

# Attachment E



June 16, 2020

To: Jordan Flanders, City Attorney, City of Oakland  
Edward Manasse, Deputy Director, Bureau of Planning, City of Oakland  
Daniel Hamilton, Sustainability Program Manager, City of Oakland  
Jenn Hyman, PE, LEED AP, Director of Engineering, EKI Environment & Water

From: Curtis E. Alling, AICP, Principal, Ascent Environmental, Inc.

**Subject: Recommendations for California Environmental Quality Act Compliance for the Proposed City of Oakland Equitable Climate Action Plan - Class 8 Categorical Exemption, Actions by Regulatory Agencies for Protection of the Environment.**

## Purpose of this Memorandum

The City of Oakland is preparing the proposed Equitable Climate Action Plan (ECAP) as an update and revision of the 2012 Energy and Climate Action Plan. The overall purpose of the proposed ECAP is expressed in the City's webpage introduction:

*"Oakland is developing a new Equitable Climate Action Plan (ECAP)! The 2030 ECAP will establish actions that the City and its partners will take to equitably reduce Oakland's climate emissions and adapt to a changing climate."*

*"The new 2030 ECAP will be rooted in equity and a deep community engagement process: it will identify ambitious actions we can take to combat climate change while also ensuring that frontline communities – those that have been harmed by environmental injustice and who are likely to be hurt first and worst by the impacts of climate change – will benefit first and foremost from climate action."*

A draft ECAP was completed in December 2019 for community review and feedback. City staff is in the process of revising and finalizing the draft based on public feedback.

City staff requested a review of action items in the draft ECAP and an assessment of the California Environmental Quality Act (CEQA) process that would be most appropriate for the City's adoption of the proposed ECAP. The 2030 ECAP Draft Final Actions List was reviewed for this assessment. Parameters guiding this assessment were: (1) defining an appropriate CEQA review process for the proposed decision at hand, i.e., adoption of the ECAP and (2) considering the CEQA compliance approach intended for projects implementing the ECAP.

## Previous CEQA Documents for City-wide or Large Area Plans

Previous City of Oakland-adopted plans include policy definitions, public improvements, and private development standards that describe a wide spectrum of actions precedent to and consistent with the actions proposed in the ECAP. A preliminary review of existing City of Oakland CEQA documents was conducted to identify prior documents that may relate to the policies of the proposed ECAP. The focus of the review was on environmental documents that addressed city-wide plans and policies or large plan areas that influence environmental conditions broadly in the Oakland community. The following CEQA documents provide a background of environmental review approaches of city-wide or large area plans.

1. 1996 Open Space Conservation and Recreation (OSCAR) Element ND
2. 1998 Land Use and Transportation Element of the Oakland General Plan EIR
3. 1998 Historic Preservation Element EIR
4. 1999 Estuary Policy Plan EIR
5. 2002 Pedestrian Master Plan MND
6. 2004 Safety Element ND
7. 2005 Noise Element ND
8. 2007 Bicycle Master Plan EIR
9. 2010 City of Oakland Housing Element 2007 – 2014 EIR
10. 2012 Energy and Climate Action Plan Addendum
11. 2014 Housing Element 2015 – 2023 Addendum to 2010 EIR
12. 2014 West Oakland Specific Plan EIR
13. 2015 Coliseum Area Specific Plan EIR
14. 2016 Oakland Local Hazard Mitigation Plan 2016-2021 Adopted as an Amendment to the Safety Element of the Oakland General Plan, CEQA exempt (exempt per CEQA Guidelines sections 15183 [projects consistent with a community plan, general plan, or zoning]; 15262 [feasibility and planning studies]; 15306 [information collection], and 15061[b][3] [general rule])
15. 2017 Oakland Walks! Pedestrian Master Plan Update Addendum
16. 2019 Downtown Oakland Specific Plan EIR (underway, public draft released)
17. 2020 Oakland Vegetation Management Plan EIR (underway, scoping completed)

As additional considerations, the proposed ECAP would employ greenhouse gas (GHG) emission reduction analysis conducted in support of the proposed actions, including the 2018 Greenhouse Gas Inventory Report and GHG analysis in the draft ECAP. Also, the Port of Oakland approved its Seaport Air Quality 2020 and Beyond Plan, which establishes planning guidance for achieving zero emissions in the port's marine operations. In June 2019, the port accepted the plan using CEQA's statutory exemption for a planning study that does not commit an agency to actions, pursuant to CEQA section 21102 ("planning studies for possible future actions which the agency, board, or commission has not approved, adopted or funded") and CEQA Guidelines section 15262.

## CEQA Review Options for CAPs in Other Jurisdictions

Climate Action Plans (CAPs) approved by cities and counties have been adopted with a variety of CEQA compliance strategies. Some CAPs have been accepted as planning studies, exempt from CEQA review, if they provide general guidance for future actions, but do not commit to those actions through approval, adoption, or funding. Because CAPs are intended to protect the environment from adverse climate change impacts, another exemption available for CAP approval has been the Class 8 Categorical Exemption (CEQA Guidelines section 15308), which applies to regulatory actions by a public agency to protect the environment. Other CAPs have been integrated into the policies and implementation actions of a General Plan update, where the CEQA compliance is a part of the general plan's environmental document, most commonly, but not always, a Program EIR (CEQA Guidelines section 15168). Master EIRs (CEQA Guidelines section 15175), incorporation of the EIR into the General Plan itself (CEQA Guidelines section 15166), or addenda or supplements to an EIR (CEQA Guidelines sections 15163 and 15164) have all been used when a CAP becomes integrated into a General Plan update.

## Past City Approaches to Streamlining CEQA Review

In 2012, the City of Oakland approved its Energy and Climate Action Plan using a CEQA addendum that supplemented a group of prior EIRs, MNDs, and NDs, together called in the addendum, "Previous CEQA Documents." It also relied on the Standard Conditions of Approval/Uniformly Applied Development Standards, originally adopted in 2008, to document substantially reduced or eliminated significant impacts of development. The addendum described how the environmental effects of most actions adopted as a part of the Energy and Climate Action Plan were covered by the Previous CEQA Documents. Documentation involved a detailed presentation of how proposed actions could be crosswalked to previously approved policies or actions in a specific, earlier CEQA document. The proposed actions that were not covered by the Previous CEQA Documents were shown to either clearly not cause significant environmental effects or were too speculative to evaluate at this time and would rely on future CEQA reviews when the later projects were proposed for consideration.

The 2012 addendum indicated that the ECAP adoption could also occur using CEQA's general or community plan consistency exemption, authorized by CEQA section 21083.3 and addressed in CEQA Guidelines section 15183. Use of this exemption recognized the proposed plan was consistent with the City's EIR for the Land Use and Transportation Element of the General Plan.

Since 2012, the City has employed a CEQA review approach that includes assessing whether a proposed project would qualify for use of one or more streamlining opportunities, such as the General Plan consistency exemption or coverage by a program environmental impact reports (EIR) or other environmental documents from previous plans and projects. This approach would not be appropriate at this time for a current city-wide policy plan, like the proposed ECAP, because environmental conditions have changed substantially since the 1998 General Plan Land Use and Transportation Element EIR and environmental documents covering other plans and projects either are not city-wide in context or address a limited range of environmental effects relevant only to the proposed project under review.

## Potential for Environmental Effects from Adoption and Implementation of the ECAP

The draft ECAP includes a list of actions addressing Transportation and Land Use (TLU), Buildings (B), Material Consumption and Waste (MCW), City Leadership (CL), Adaptation (A), Carbon Removal (CR), and Port Leadership (PL), 40 actions in all. Many of the actions constitute policy directions or types of activity that would have no possibility of a discernable effect on the environment (e.g., training). For these actions, the “common sense” exemption in CEQA Guidelines section 15061(b)(3) could apply.

Approximately 15 of the listed actions include guidance related to land use, facilities, infrastructure, or operations that may result in a change in the physical environment at the time when later implementation actions are proposed. The types of physical changes would be typical actions occurring in an urban community (e.g., building upgrades, landscape management operations, equipment replacement), which would not constitute anything unusual or extraordinary for facilities and operations of a city. As described in the actions, they are designed to protect the environment and avoid significant effects. For instance, the proposed ECAP makes it clear that strategies affecting land use are designed to avoid the unintended outcomes of displacement of existing housing and residents. The ECAP action items involving future projects that may have reasonably foreseeable physical changes are presented in the following list. Actions noted in this assessment are:

- TLU1: Align All Planning Policies & Regulations with ECAP Goals & Priorities
- TLU5: Create a Zero Emission Vehicle (ZEV) Action Plan
- TLU10: Establish Temporary and Permanent Car-Free Areas
- MCW1: Eliminate Disposal of Compostable Organic Materials to Landfills
- MCW2: Establish a Deconstruction Requirement
- MCW5: Strengthen Infrastructure and Partnerships for Edible Food Recovery
- A1: Fund Creation and Operation of Resilience Hubs
- A2: Fund and Implement Citywide Vulnerability Assessment and Comprehensive Adaptation Plan
- A3: Wildfire Risk Reduction
- A4: Expand and Protect Green Infrastructure & Biodiversity
- A6: Enhance Community Energy Resilience
- CR1: Develop Local Carbon Investment Program
- CR3: Explore Carbon Farming
- CR4: Rehabilitate Riparian Areas and Open Space

Adoption of the proposed ECAP would not, by itself, fund or authorize implementation of any specific projects, including those reviewed in the actions listed above. Rather, it would set in place environmentally protective policies to achieve equitable sustainability goals. Therefore, the proposed City action currently at hand, adoption of the ECAP, would not cause effects to the environment. Each implementation project would be reviewed and approved later as it is proposed, over time, when funding is available and with a separate City approval action. For these actions, CEQA review for implementation projects would be performed by the City or another public agency as appropriate to the facts of each project. In some cases, a project may be categorically exempt or consistent with a previous plan or project approval, which may

allow a streamlining approach using the exemption or relying on a prior CEQA document. Where a proposed project is not exempt and not covered by a prior CEQA document, an initial study could be prepared to assess the potential for physical changes affecting the environment and determine the appropriate CEQA documentation.

### **Recommendation for Environmental Review of the Proposed ECAP**

Several important factors influence the determination of the appropriate CEQA compliance approach for adoption of the proposed ECAP.

First, the proposed ECAP is fundamentally a plan to protect the environment by achieving climate sustainability in an equitable manner for all members of the Oakland community. Adoption of the ECAP by the City Council would establish environmentally protective policies that seek to resolve existing environmental injustices and inequalities, thus improving conditions within the parts of the community that have disproportionately experienced adverse environmental consequences, as well as generally for the City as a whole.

Second, ECAP approval would not, by itself, commit the City to authorization of funding for or approval of the implementation of specific projects that may change the physical environment. Review and approval of funding for and/or development of specific implementation projects would occur later as separate City actions. Approval of a project that may result in construction would require its own CEQA compliance. Therefore, the potential for significant environmental impacts would be addressed at the appropriate time when an implementation project is proposed for City review.

Finally, while the concepts of some infrastructure, facility, operations, and land use changes are narratively mentioned in the proposed ECAP, it would not be feasible to evaluate reasonably foreseeable environmental effects at the time of ECAP approval, because the planning and design of implementation projects are yet to occur. Insufficient information is available to feasibly perform environmental analysis without substantial speculation, which is inconsistent with CEQA practice. When a specific implementation project is proposed later, it would include sufficient planning and design to understand project characteristics, evaluate their reasonably foreseeable environmental impacts, and, if significant, mitigate significant impacts to the extent feasible.

**Recognizing relevant factors, it is recommended that the approval of the proposed ECAP would qualify for use of a Class 8 Categorical Exemption for actions by a public agency for the protection of the environment, CEQA Guidelines section 15308.**

The full text of the Class 8 exemption is provided verbatim below:

15308. ACTIONS BY REGULATORY AGENCIES FOR PROTECTION OF THE ENVIRONMENT Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

The City of Oakland possesses the regulatory powers through state laws and City ordinances to adopt policies regarding land use, authorize spending for implementation of projects, and approve the development of new infrastructure and facilities or operational changes of City departments, functions, and facilities. The proposed ECAP contains policies establishing an equitable process that “involves procedures for the protection of the environment.” Construction, which is excluded from the Class 8 exemption, would not be authorized by adoption of the proposed ECAP. Any proposed construction intended to implement the ECAP would be subject to separate CEQA review at the time of project review when adequate planning, design, and project details are known to feasibly evaluate environmental impacts.

No exceptions to categorical exemptions, as described in CEQA Guidelines section 15300.2, would apply to disqualify use of a Class 8 exemption for approval of the proposed ECAP. Because the ECAP approval would not authorize funding or implement projects that cause direct consequences of construction, the exceptions related to cumulative impact, scenic highways, hazardous waste sites, or historic resources would not apply; they all involve the potential for physical consequences from construction. No unusual circumstances exist, recognizing that the proposed ECAP would be a continuation of ongoing planning efforts in Oakland, i.e., amendment of a previous climate action plan, and the proposed ECAP takes into account the already adopted policies in the City’s general plan.

### **Value of a Future General Plan Update with Program EIR for Equitable Climate Adaptation and Sustainability Projects**

In addition to recommending the use of a Class 8 categorical exemption for the currently proposed ECAP adoption, to set the stage for readily streamlining future implementation projects, consideration is suggested to incorporate the policies and actions of the proposed ECAP into a General Plan update accompanied by a program EIR covering a comprehensive range of specific projects the City of Oakland would seek to implement for equitable climate adaptation and sustainability. Environmental and community conditions of the City have changed since certification of the EIR for the Land Use and Transportation Elements of the city’s General Plan. If a General Plan update were developed to include the actions to implement the ECAP, climate adaptation, and other sustainability projects, a program EIR could be prepared to address their environmental impacts and identify feasible mitigation measures, if needed. Use of a program EIR with streamlining of later consistent activities is a best practice employed for a wide variety of local and state government plans and programs. Multiple court decisions have validated the use of a program EIR as a streamlining tool for consistent later activities covered in an EIR.

A comprehensive General Plan update and program EIR would consolidate and coordinate relevant climate and sustainability policies and actions together and bring environmental resource information and impact analysis up to date. This document could then become a unified and efficient source of streamlining for future projects consistent with an overall City program. While the cost of the program EIR would require initial investment in planning of projects and conducting a broad environmental review, it would have utility for many years to come for future CEQA review and streamlining of many projects.

---

**Advisory:** This assessment does not provide legal advice; rather, it is prepared to share practitioner’s recommendations based on the author’s extensive experience as a professional environmental planner and CEQA process leader. Please continue to consult with the City Attorney’s office for legal guidance.