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MEMORANDUM

To: Los Angeles County Board of Supervisors/Department of Regional Planning
From: Fiber First Los Angeles County
Re: **Legal Issues Under CEQA, NEPA, and NHPA Presented by Proposed Amendments to Title 16 and 22 Ordinances**
Date: September 23, 2022

The following is an analysis of various legal issues under the California Environmental Quality Act (CEQA), the National Historic Preservation Act (NHPA) and related California state laws, and the National Environmental Policy Act (NEPA) arising from proposed wireless facilities ordinances (amending County Code Titles 16 and 22) now before the Los Angeles Board of Supervisors (BOS) as a result of recommendations by the Department of Regional Planning (LACDRP).

Fiber First Los Angeles (FFLA) contests the Proposed Environmental Determination, which states:

PROPOSED ENVIRONMENTAL DETERMINATION

DETERMINATION DATE:	*March 23, 2022*
PROJECT NUMBER:	*2021-002931*
PERMIT NUMBER(S):	*RPPL2021007939 Permit Number*
SUPERVISORIAL DISTRICT:	*1-5*
PROJECT LOCATION:	*Countywide*
OWNER:	*N/A*
APPLICANT:	*Los Angeles County*
CASE PLANNER:	*Alyson Stewart, Senior Regional Planner, ordinance@planning.lacounty.gov*

Los Angeles County ("County") completed an initial review for the above-mentioned project. Based on examination of the project proposal and the supporting information included for the project, the County proposes that an Exemption is the appropriate environmental documentation under the California Environmental Quality Act (CEQA). This project (Ordinance) qualifies for a Categorical Exemption, (Class 1 – Existing Facilities, and Class 3 – New Construction or Conversion of Small Structures) under the California Environmental Quality Act (CEQA) and County environmental guidelines. The project includes authorization for modifications to existing facilities as well as for *minor alterations to land with the construction or conversion of small structures. Both actions will not have a significant effect on the environment.*

I. Executive Summary

The county staff recommends that the Board find that the action on wireless-related provisions through Amendments to County Codes Titles 16 and 22 is exempt from any environmental or historical evaluation based on a purported Categorical Exemption, (Class 1 – Existing Facilities, and Class 3 – New Construction or Conversion of Small Structures) under the California Environmental Quality Act (CEQA) and County environmental guidelines. We disagree.

1. There will be massive and irreversible adverse environmental consequences if the staff-recommended amendments are adopted.
2. The claimed Categorical Exemptions do not apply for any purpose.
3. Even if the Categorical Exemptions do apply generally, the BOS action will fall within specific Exceptions to the Exemptions, specifically, [CEQA Guidelines Section 15300.2](https://casetext.com/regulation/california-code-of-regulations/title-14-natural-resources/division-6-resources-agency/chapter-3-guidelines-for-implementation-of-the-california-environmental-quality-act/article-19-categorical-exemptions/section-153002-exceptions)[1]:
   - (a) Location. Classes 3, 4, 5, 6, and 11 involving significant impacts on particularly sensitive environments
   - (b) Cumulative Impacts.
   - (c) Significant Effects. Arising from unusual circumstances
   - (f) Historical Resources. Substantial adverse change to a historic resource.
4. The extensive federal involvement in Los Angeles Country triggers NEPA's "small handle doctrine," which will necessitate a separate NEPA compliant Environmental Impact Statement (EIS). The BOS is the "co-lead agency," as this term is interpreted under NEPA, in close consultation and collaboration with several federal agencies that are most engaged in providing funding to Los Angeles County.
5. There are a substantial number of registered and otherwise recognized historical sites and places located in Los Angeles County that are specially protected, and subject to Section 15300.2 Exceptions as well as provisions of NHPA and court decisions.
6. To the extent staff claims CEQA is preempted in whole or in part by the Communications Act (47 U.S.C.) Title III they are incorrect. Nothing in that statute or any FCC rule promulgated thereunder preempts the Board's duty to perform a compliant programmatic Environmental Impact Report (EIR) for both proposed ordinances and the individual projects they countenance.
7. The FCC's shot clock rules have no relevance to the ordinance drafting process for Titles 16 and 22. They apply only to decisions involving individual applications. The shot clock rules do not pre-empt state or local due process notice and hearing requirements, although they do compress the available time for final disposition.

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[1] https://casetext.com/regulation/california-code-of-regulations/title-14-natural-resources/division-6-resources-agency/chapter-3-guidelines-for-implementation-of-the-california-environmental-quality-act/article-19-categorical-exemptions/section-153002-exceptions.

8. The BOS cannot avoid its heavy environmental responsibilities under CEQA, NEPA, and NHPA by pushing the process into Ministerial Site Review. All permits must remain subject to traditional Conditional Use Permit review.

II. Legal Analysis

The LACDRP's proposed Environmental Determination recommendation is fatally defective as a matter of CEQA law in two fundamental respects. First, the staff asserts that the proposed Code Amendments to Titles 16 and 22 are Categorically Exempt, which in CEQA language means that their environmental impacts are so negligible as not to justify even preparing an Initial Environmental Review, much less a Negative Declaration. The staff ignores, however, that categorical exemptions are construed narrowly. Aptos Residents Ass'n v. Cty. of Santa Cruz, (2018) 20 Cal. App. 5th 1039, 1046, 229 Cal. Rptr. 3d 605, 612. The county must determine the cumulative impact of all reasonably expected wireless facilities that will be authorized pursuant to the ordinances. Id. The extensive evidence of serious environmental impacts presented below belies any notion the operation of the contemplated ordinances could not possibly have a significant effect on the environment.

Union of Med. Marijuana Patients, Inc. v. City of San Diego, (2019) 7 Cal. 5th 1171, 1184-87, 250 Cal. Rptr. 3d 818, 825-27, 446 P.3d 317, 323-25 (quotation marks, citations and footnotes omitted) provides a good overview of the statutory regime:

2. CEQA generally

> CEQA was enacted to advance four related purposes: to (1) inform the government and public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid, environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation measures when feasible; and (4) disclose to the public the rationale for governmental approval of a project that may significantly impact the environment. CEQA embodies a central state policy to require state and local governmental entities to perform their duties so that major consideration is given to preventing environmental damage. CEQA prescribes how governmental decisions will be made when public entities, including the state itself, are charged with approving, funding – or themselves undertaking – a project with significant effects on the environment.
>
> CEQA review is undertaken by a lead agency, defined as the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment. A putative lead agency's implementation of CEQA proceeds by way of a multistep decision tree, which has been characterized as having three tiers. First, the agency must determine whether the proposed activity is subject to CEQA at all. Second, assuming CEQA is found to apply, the agency must decide whether the activity qualifies for one of the many exemptions that excuse otherwise covered activities from CEQA's environmental review. Finally, assuming no applicable exemption, the agency must undertake environmental review of the activity, the third tier. We examine the three-tier process in more detail below.

> *CEQA's applicability*: When a public agency is asked to grant regulatory approval of a private activity or proposes to fund or undertake an activity on its own, the agency must first decide whether the proposed activity is subject to CEQA. In practice, this requires the agency to conduct a preliminary review to determine whether the proposed activity constitutes a "project" for purposes of CEQA. If the proposed activity is found not to be a project, the agency may proceed without further regard to CEQA.
>
> *Exemption from environmental review*: If the lead agency concludes it is faced with a project, it must then decide whether the project is exempt from the CEQA review process under either a statutory exemption or a categorical exemption set forth in the CEQA Guidelines. The statutory exemptions, created by the Legislature, are found in section 21080, subdivision (b). Among the most important exemptions is the first, for "[m]inisterial" projects, which are defined generally as projects whose approval does not require an agency to exercise discretion. The categorical exemptions in Guidelines sections 15300 through 15333 were promulgated by the Secretary for the Natural Resources Agency in response to the Legislature's directive to develop "a list of classes of projects that have been determined not to have a significant effect on the environment." If the lead agency concludes a project is exempt from review, it must issue a notice of exemption citing the evidence on which it relied in reaching that conclusion. The agency may thereafter proceed without further consideration of CEQA.
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> *Environmental review*: Environmental review is required under CEQA only if a public agency concludes that a proposed activity is a project and does not qualify for an exemption. In that case, the agency must first undertake an initial study to determine whether the project may have a significant effect on the environment." If the initial study finds no substantial evidence that the project may have a significant environmental effect, the lead agency must prepare a negative declaration, and environmental review ends. If the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes, the agency must prepare a *mitigated* negative declaration. This too ends CEQA review. Finally, if the initial study finds substantial evidence that the project may have a significant environmental impact and a mitigated negative declaration is inappropriate, the lead agency must prepare and certify a full and complete EIR before approving or proceeding with the project.

In <u>Farmland Protection Alliance v. County of Yolo,</u> 71 Cal. App 5th 300 (2021) the Appellate Court held that if **any** aspect of a project entails a significant environmental impact, a Negative Declaration, or Mitigated Negative Declaration cannot cure this fundamental deficiency and a full EIR is thereby required. As explained below, in addition to qualifying for a Cumulative Impacts Exception, proposed Titles 16 and 22 also effectively meet the requirements of the Historic Resource Exception, which like Cumulative Impacts does not require the analysis of the "unusual circumstances" test of the Supreme Court in <u>Berkeley</u>. Historic Resources are considered so important that if a single historic resource is seriously threatened the entire asserted Exemption collapses.

A. Ministerial Exemption

Proposed Titles 16 and 22 contemplate a comprehensive Ministerial Site Review that is inappropriate as a general matter. This Ministerial Site Review does not comply with CEQA. It allows unfettered discretion by the LACRPD and fails to apply strict criteria for each permit application. Further, it presumes there will always be an insignificant environmental impact, when it is highly likely many individual wireless facilities subject to the process will, in fact, have a significant impact.

CEQA Guidelines 14 CCR § 15369 defines “Ministerial”:

> "Ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.

CEQA Guidelines 14 CCR §15002(i) states:

> (i) Discretionary Action. CEQA applies in situations where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project. A project subject to such judgmental controls is called a "discretionary project." See Section 15357.
>
> (1) Where the law requires a governmental agency to act on a project in a set way without allowing the agency to use its own judgment, the project is called "ministerial," and CEQA does not apply. See Section15369.
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> (2) Whether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity. Similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another. See Section 15268.

CEQA Guidelines 14 CCR § 15300.1 provides:

> § 15300.1. Relation to Ministerial Projects.
>
> Section 21080 of the Public Resources Code exempts from the application of CEQA those projects over which public agencies exercise only ministerial authority. Since ministerial projects are already exempt, Categorical Exemptions should be applied only where a project is not ministerial under a public agency's statutes and ordinances. The inclusion of activities which may be ministerial within the classes and examples contained in this article shall not be construed as a finding by the Secretary for resources that such an activity is discretionary.

The draft ordinances' contemplated "Ministerial" review process does not meet the applicable definitions and treatment that are required before a project is exempt from CEQA review.

B. The claimed Categorical Exemptions do not apply

The LACDRP proposed Environmental Determination implicitly accepts that the ordinance drafting process here is a "project" for purposes of CEQA (step 1) because it undertakes step 2. We expressly agree that this ordinance exercise is a CEQA project. Staff, however, manifestly errs at step 2.

We first note that the draft Environmental Determination is defective because it does not "cit[e] the evidence on which [the lead agency, here presumably the County] relie[s] in reaching that Conclusion." Union of Med. Marijuana Patients, supra, 7 Cal. 5th at 1186, *citing* Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2007) 41 Cal.4th 372, 380, 386-387, 60 Cal. Rptr. 3d 247, 160 P.3d 116. "The exemption can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies… whether a particular activity qualifies for the commonsense exemption presents an issue of fact, and [] the agency invoking the exemption has the burden of demonstrating it applies." Muzzy, 41 Cal. 4th at 386. An agency's duty to provide such factual support "is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts." Id. This alone is fatal to the proposed Environmental Determination. But there are additional issues.

Exemption Class 1 pertains to "existing facilities" when the project involves negligible or no expansion of an existing use. Every type of wireless facility (other than exempt facilities covered by Section 6409 of the federal Spectrum Act, 47 U.S.C. Section 1455 and its implementing regulations at 47 C.F.R. Section 1.6100) that will be authorized under the proposed ordinance will either involve a new facility or a new use on an existing facility.

The Title 22 changes address, for example, new towers on public property other than highways or on private property. *See, e.g.*, proposed 22.140.E.b.i,[2] d. The Title 16 amendments contemplate the leasing of public infrastructure and allow for new or replacement poles to which new facilities will be attached. *E.g.*, proposed 16.25.030.E.3.d., 16.25.050.E. New poles or structures are not existing facilities.[3] Even when existing county infrastructure is used the wireless facility will be a non-negligible "new use."

Exemption Class 3 consists of construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. This exemption does not apply because the ordinances will allow for construction and location of thousands of facilities. It is foreseeable that there may be many more applications than the 700 "small cabinets" involved in S.F.

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[2] This provision addresses potential towers on the grounds of historical properties, a matter clearly not within any categorical exemption.

[3] The staff does not rely on Class 2 for an exemption, but this also does not apply because the replacement structure will not have the same purpose or capacity.

Beautiful v. City & Cty. of S.F., (2014) 226 Cal. App. 4th 1012, 172 Cal. Rptr. 3d 134[4] or the "transformer boxes" in McCann v. City of San Diego, (2021) 70 Cal. App. 5th 51, 89, 285 Cal. Rptr. 3d 175.[5] More than minor modifications will be required. The draft ordinances provide for ministerial approval of thousands of wireless projects, so the scope is much greater than the 13 microcell sites addressed in Aptos. The ordinances expressly contemplate that facilities will be placed in scenic rural areas – not just neighborhoods or the urban core. They also expressly allow facilities on, in or near to historical resources. Los Angeles County General Plan Goal C/NR 14[6] requires mitigation of impacts to historic resources, inter-jurisdictional collaboration, preservation of historic resources and it mandates that "proper notification and recovery processes are carried out for development on or near historic … resources." Exemption Class 3 does not apply.

C. Applicable California Judicial Standards

Even if the exemptions apply this is an unusual circumstance, and there is a reasonable possibility of a significant effect due to this circumstance. The significant effect is so substantial that the effect itself is an unusual circumstance. There are therefore applicable exceptions to the exemptions.

CEQA Guidelines Section 15300.2[7] provides explicit exceptions to the exemptions section upon which the staff relies. The most relevant sections are:

> (a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located -a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant.
>
> (b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.
>
> (c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances…

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[4] These projects will involve more obtrusive antennas, wiring and associated equipment on various structures more than 10 feet above the ground and sometimes equipment on the ground.

[5] McCann involved a "mitigated negative declaration" not a claimed categorical exemption. Notably, the McCann court found that San Diego did not adequately address whether the project would have a significant impact due to greenhouse gas emissions. 70 Cal. App. 5th 51, 91. The staff recommendation here suffers the same defect. As explained below, the projects contemplated by the ordinances will lead to more electric utility consumption that will, in turn, generate additional greenhouse gas emissions.

[6] https://planning.lacounty.gov/assets/upl/project/gp_final-general-plan.pdf#page=163.

[7] https://casetext.com/regulation/california-code-of-regulations/title-14-natural-resources/division-6-resources-agency/chapter-3-guidelines-for-implementation-of-the-california-environmental-quality-act/article-19-categorical-exemptions/section-153002-exceptions.

> (f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.[8]

As explained above and in more detail below, the proposed action falls well within exceptions (a), (b) and (f) and easily meets the "unusual circumstances" test in (c), as established by the California Supreme Court. Historical resources are involved so (f) applies as well.

In Berkeley Hillside Pres. v. City of Berkeley, (2015) 60 Cal. 4th 1086, 184 Cal. Rptr. 3d 643, 343 P.3d 834 the California Supreme Court addressed the scope of exceptions under the "unusual circumstances test" under Exception (c):

> A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need **only** show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, … a party may establish an unusual circumstance with evidence that the project will have a significant environmental impact. That evidence, if convincing, necessarily also establishes "a reasonable possibility that the activity will have a significant effect … due to unusual circumstances.

60 Cal. 4th at 1105.[9]

Berkeley applies only to Exception (c). The other listed Exceptions are more liberally interpreted and applied. As explained below, the cumulative impacts even in a single location, which could be a neighborhood where permitted towers under Title 22 are densified will be significant. This distinguishes the present situation from prior situations where the environmental risks were clearly limited. The proposed Titles 16 and 22 propose to use Ministerial Site Review for a huge number of specific sites under comprehensive plans written by the telecom providers.[10] As explained below, FFLA will be able to present overwhelming evidence that there is more than a reasonable probability, indeed an almost certain likelihood, that there will be a massive environmental impact.

D. Proper Application CEQA Exemptions and Exceptions

Statutory interpretation requires harmonization of different statutes and multiple parts of the same statute to reconcile potential conflicts and give optimal effect to legislative intent. In the present instance, the staff is asking the Board to ignore the framework California courts have developed to constrain arbitrary overuse of claimed Categorical Exemptions and Negative

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[8] *See* Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles (2008) 161 Cal.App.4th 1168, 1186 ["a categorical exemption is not applied to projects that may cause a substantial adverse change in the significance of a historic resource."]

[9] The majority deemed the above analysis consistent with the concurring opinion's "central proposition" that the exception applies where there is evidence that a project *will* have a significant effect." 60 Cal. 4th at 1106.

[10] There are already thousands of sites in the incorporated and unincorporated parts of Los Angeles County, and one provider alone wants to install more than 1,300 new facilities. *See* https://pw.lacounty.gov/tnl/streetlights/?action=small-cell; https://data.lacity.org/City-Infrastructure-Service-Requests/Small-Cell-Locations/3nrm-mq6k; https://www.crowncastle.com/communities/los-angeles-ca.

Declarations. Here, staff does not even get to the point of a Negative Declaration analysis – which makes the error even more egregious.

The Third District Court of Appeal (in a unanimous opinion authored by Justice Robie) recently reaffirmed that Cal. Pub. Res. Code § 21151 requires a "full EIR" whenever a project may have any significant environmental effect; it thus reversed the trial court's judgment that had allowed a deficient revised Mitigated Negative Declaration (MND) and its mitigation measures to remain intact while ordering Yolo County to also prepare an EIR limited to addressing only the project's impacts on three species of concern (tricolored blackbird, valley elderberry longhorn beetle, and golden eagle). The court reversed and remanded with instructions to issue a peremptory writ directing the County to set aside its MND approval and to prepare a full EIR. Farmland Protection Alliance v. County of Yolo, (2021) 71 Cal. App. 5th 300, 286 Cal. Rptr. 3d 227.

Boiled down to the essentials, the Court of Appeal held that neither CEQA nor its interpretive case law authorize a "limited EIR" at the "third tier" of the CEQA review process, nor do they provide any authority for "an order splitting the analysis of a project's environmental impacts across two types of environmental review documents," such as the deficient MND and the "limited EIR" ordered by the trial court in that case. Rather, once substantial evidence is presented that a project might have a significant environmental impact in any area, a negative declaration is inappropriate and a "full EIR" is required. While the CEQA remedies statute (Public Resources Code, §21168.9[11]) is intended to provide flexibility in facilitating compliance with CEQA, judicial remedies cannot avoid "the heart of the Act – the preparation of an environmental impact report for the project." Yolo involved an MDR but the principles articulated in that case still directly and forcefully guide the unusual circumstances test to the proposed "Project" – here the two ordinances at hand.

The Court held that "if *any* aspect of the project triggers preparation of an environmental impact report, a full environmental impact report must be prepared in accordance with the definition of [an EIR in Public Resources Code] section 21061." (*Citing* San Bernardino Valley Audubon Society v. Metropolitan Water Dist. *(*1999) 71 Cal.App.4th 382, 402 & fn. 11; Muzzy, supra at 381.

E. Unassessed Environmental Impacts

The proposed amendments to Code Titles 16 and 22 (henceforth, "Project") and the associated Facility Design Guidelines raise a wide range of unaddressed but substantiated grave environmental risks that meet the unusual circumstances test. Further, since there are historical resources in issue there can be no exemption. These risks are:

- Human Health;
- Wildlife—fauna and plants;
- Historic sites;
- Wildfires, earthquakes, floods leading to lack of resilience;
- Plastic faux trees (including monopines) and other plastic faux products;
- Energy use and wasteful consumption;
- Especially sensitive environmental areas.

[11] https://codes.findlaw.com/ca/public-resources-code/prc-sect-21168-9/.

The Project, if approved, represents a massive, unprecedented assault on human populations and the environment which distinguishes it from individual applications or locations covered by the CEQA Exceptions.

1. **Human Health Effects**

There is already an extensive and mounting body of peer reviewed studies from many countries on the health effects of exposing densified human populations from continuous cumulative RF/EMF radiation exposure from small cell and macro towers in addition to other RF radiation emitting devices. The present regulatory environment, especially as it relates to "microwave illness" or Electromagnetic Hypersensitivity (EHS), is uncertain. The bottom line is that harm to humans from radiofrequency radiation exposure is clearly foreseeable and the BOS has a high duty to proceed with precaution and heightened vigilance—the very opposite of the position taken by relying on a Category 3 Exemption and the attempt to blanket the unincorporated portions of the county using a Ministerial Exemption. A compendium of abstracts of the published scientific papers on radiofrequency and other non-ionizing magnetic fields is available at https://bit.ly/EMF08102022. The great majority of those published by independent (non-telecom funded) researchers shows significant risk.

2. **Wildlife—Fauna and Plants**

The effects of RF/EMF radiation exposure of fauna and plants is at present a regulatory no-man's land. The FCC's maximum radiation exposure rules do not address wildlife or plants. Bats and bees and other airborne species occupy air space in close proximity to transmitting cell tower antennas. Wireless network densification increases RFR levels (El-Hajj & Naous, 2020[12]) and with over 800,000 new cell sites[13] projected for the 5G buildout nationwide, environmental effects need to be properly examined, because ambient RFR is increasing in wildlife habitat.

A landmark three-part research review on effects to wildlife was published in R*eviews on Environmental Health in 2021* by U.S. experts, including former U.S. Fish and Wildlife senior biologist Albert Manville. The authors reviewed and cited more than 1,200 scientific references. These experts concluded that the evidence was adequate to trigger urgent regulatory action. The review found adverse biological effects to wildlife from even very low intensity non-ionizing radiation emissions at multiple orders of magnitude below current FCC-allowed levels (Levitt et al., 2021a[14], Levitt et al., 2021b[15], Levitt et al., 2021c[16]).

Comprehensive documentation of the biological effects of non-ionizing electromagnetic radiation to flora and fauna has never before been undertaken to this degree in any previous publication. These three experts divide their science and findings with urgent warnings into three parts: Part 1 identifies ambient EMF adverse effects on wildlife and notes a particular urgency regarding millimeter wave emissions and the pulsation/modulation used in 5G technologies. Part 2 explores natural and man-made fields, animal magnetoreception mechanisms, and pertinent studies to all wildlife kingdoms. Part 3 examines current exposure standards, applicable laws, and future directions. Their conclusions after this expansive review of the science are neither

[12] https://ieeexplore.ieee.org/document/9221314.

[13] https://docs.fcc.gov/public/attachments/DOC-354323A1.pdf.

[14] https://pubmed.ncbi.nlm.nih.gov/34047144/.

[15] https://pubmed.ncbi.nlm.nih.gov/34243228/.

[16] https://doi.org/10.1515/reveh-2021-0083.

equivocal nor speculative. This environmental research review is a clarion call to develop regulations that ensure wildlife and its habitat are protected. The abstract summarizes the findings:

- Numerous studies across all frequencies and taxa indicate that low-level EMF exposures have numerous adverse effects, including on orientation, migration, food finding, reproduction, mating, nest and den building, territorial maintenance, defense, vitality, longevity, and survivorship. Cyto-toxic and geno-toxic effects have long been observed. It is time to recognize ambient EMF as a novel form of pollution and develop rules at regulatory agencies that designate air as 'habitat' so EMF can be regulated like other pollutants. Wildlife loss is often unseen and undocumented until tipping points are reached. A robust dialog regarding technology's high-impact role in the nascent field of electroecology needs to commence. Long-term chronic low-level EMF exposure standards should be set accordingly for wildlife, including, but not limited to, the redesign of wireless devices, as well as infrastructure, in order to reduce the rising ambient levels.
- Numerous individual studies on impacts to flora and fauna have been published over the last two years, notably several on pollinators and insects.
- Two studies used scientific simulations to quantify the amount of power absorbed into the bodies of various insects for different RFR frequencies. In January 2020 researchers published "Radio-frequency electromagnetic field exposure of Western Honey Bees" in Scientific Reports on the absorption of RFR into honey bees at different developmental stages with phantoms simulating worker bees, a drone, a larva, and a queen (Thielens et al., 2020). The simulations were combined with measurements of environmental RF-EMF exposure near beehives in Belgium in order to estimate realistic exposures. They found absorbed RF-EMF power increases by factors of up to 16 to 121 when the frequency is increased from 0.6 GHz to 6 GHz for a fixed incident electric field strength. The implications of the impacts to bees – an ecologically and economically important insect species – are widespread and consequential.
- In October 2021 a second simulation study with far-reaching implications "Radio-frequency exposure of the yellow fever mosquito (A. aegypti) from 2 to 240 GHz" published in PLOS Computational Biology simulated the far field exposure of a mosquito between 2 and 240 GHz and found the power absorption into the mosquito is 16 times higher at 60 GHz than at 6 GHz at the same incident field strength. This increase is even larger (by a factor of 21.8) for 120 GHz when compared to 6 GHz. The authors conclude "higher absorption of EMF by yellow fever mosquitoes, which can cause dielectric heating and have an impact on behaviour, development and possibly spread of the insect."
- In 2020, a report by Alain Hill of the biological effects of non-ionizing radiation on insects found that mobile communications was a critical factor in weakening the insect world along with pesticides and habitat loss. (Khan et al., 2021) found the Apis Cerana bee becomes very passive at a certain level of frequencies and power.

- In May 2021, Spanish biologist Alfonso Balmori published “Electromagnetic radiation as an emerging driver factor for the decline of insects” in Science of The Total Environment. Balmori found that electromagnetic radiation threatens insect biodiversity worldwide. He documents the sufficient evidence of effects of non-thermal, non-ionizing radiation on insects, at well below the limits allowed by FCC guidelines, and warns that action must be taken now before significant new deployment of new technologies (like with 5G) is undertaken. He cautions that the loss of insect diversity and abundance will likely provoke cascading effects on food webs and ecosystem services.
- A November 2021 review of the effects of millimeter waves, ultraviolet, and gamma rays on plants found many non-thermal effects specifically from millimeter waves (Zhong et al. 2021). (The paper examined the millimeter range 30 to 300 GHz which overlaps with FCC’s limits 300 kHz to 100 GHz.) Millimeter-wave irradiation stimulated cell division, enzyme synthesis, growth rate, and biomass. The review highlights how different doses and durations provoked dynamic morphophysiological effects in plants. Seed pretreatment with weak microwaves or millimeter wave irradiation altered root physiology. Different effects were observed in different plants and the authors state that, “the discordance of proteomic changes in different plants is reasonable, since different plants have a distinct tolerance to stress. Moreover, the cell tissues from soybeans and chickpeas used for proteomic analysis were different, which implies that tissue-specific or organ-specific responses of plants under millimeter-wave irradiation might exist and require further investigation.” This review adds to the published analysis confirming non thermal effects from RFR. While these frequencies may have beneficial uses in agriculture, the adverse impact to trees and plants in close vicinity to transmitting antennas must be addressed.

There are massive risks to the environment from the heedless deployment of wireless radiation. The proposed ordinances will facilitate even more, without acknowledgement of the science on the subject. These environmental effects within Los Angeles County must be acknowledged and addressed in any Environmental Determination. They cannot be ignored or brushed off in any potential Categorical Exemptions, Negative or Modified Negative Declaration. As a matter of law an Environmental Impact Report is required.

3. Wildfires, earthquakes, floods lead to lack of resilience

a. Wildfire

Four major wildfires have been initiated, in whole or in part, by telecommunications equipment in Southern California in the last 15 years. Cumulatively, these fires have caused over $6 billion in damages, destroyed over 2000 homes, cost 5 lives, severely burned firefighters and civilians and triggered the largest mass evacuation in California history. These fires are:

1) Guejito Fire (2007)[17] in San Diego which became part of the Witch Creek Fire, the worst fire in San Diego history,[18] causing the largest mass evacuation in California's history of nearly 1,000,000 people.[19]
2) The Malibu Canyon Fire (2007)[20]: Three utility poles overloaded with equipment from Sprint (now T-Mobile), AT&T, Verizon and NextG (now owned by Crown Castle) snapped in the wind and ignited the grass below. All four carriers as well as Southern California Edison,[21] the utility that services Los Angeles County, were accused by the CPUC of attempting to mislead fire investigators.
3) Woolsey Fire (2018)[22]: A telecommunications lashing wire came loose igniting at least one of the two ignition points for the $6 billion fire.[23] Southern California Edison (SCE) was cited for 28 violations by the CPUC. One critical violation involved the failure by SCE to mark as a priority the repair of a broken communication line and broken telecommunications lashing wire. The broken equipment was found during a May 2018 telecommunications inspection. Without priority designation for repair, this known electrical hazard remained in disrepair. In November 2018, the broken Edison telecommunications equipment was involved as part of the ignition of the month-long fire.
4) Silverado Fire in Irvine (2020)[24] involved SCE and a T-Mobile lashing wire.[25] Silverado merged with a second fire causing the evacuation of 130,000 people.

RF stimulates combustible terpene production in conifers. In currently ongoing litigation in the Federal Court (Eastern District) Eisenstecken et al. v Tahoe Regional Planning Agency[26], plaintiffs cite several studies confirming that RF radiation stimulates terpene production in conifers. Terpenes are a combustible and flammable compound. They represent a significant fire hazard.

FFLA has already provided evidence of the high but unassessed wildfire risks that would be allowed by the adoption of Titles 16 and 22 amended ordinances. Others have produced evidence

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[17] https://www.supremecourt.gov/DocketPDF/18/18-1368/98044/20190430151930791_18-petitionforawritofcertiorari.pdf.

[18] https://www.sandiego.gov/fire/about/majorfires/2007witchcreek.

[19] https://www.kpbs.org/news/midday-edition/2017/10/16/2007-firestorms-ravaged-san-diego-county.

[20] https://www.dwt.com/-/media/files/blogs/broadband-advisor/2022/01/jan-20/cpuc-decision-21-10-019.pdfhttps://www.dwt.com/-/media/files/blogs/broadband-advisor/2022/01/jan-20/cpuc-decision-21-10-019.pdf.

[21] https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K126/77126214.PDF.

[22] https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/safety-and-enforcement-division/investigations-wildfires/sed-investigation-report---woolsey-fire---redacted.pdf.

[23] https://timesofsandiego.com/business/2018/11/28/6-billion-is-estimated-damage-from-woolsey-fire-in-la-and-ventura-counties/.

[24] https://www.theepochtimes.com/law-firm-seeks-clients-to-sue-socal-edison-over-silverado-fire_3639317.html.

[25] https://www.wxii12.com/article/power-company-equipment-woolsey-fire-california/34540269#.

[26] https://casetext.com/case/eisenstecken-v-tahoe-regl-planning-agency/.

that the proposed wireless "Resilience Hubs" are the very worst, least resilient technology to be relying upon during power outages or earthquakes.[27]

By relying on the proposed exemption, the staff is basically asserting these concerns are not even worthy of consideration, but there is no evidence that the LACDRP even examined them.[28]

F. Energy use and wasteful consumption

Mobile service is energy intensive. The transition to 5G, whether 5G NR (non-standalone) or 5G Standalone NR, will exacerbate this situation until newer and far more efficient equipment can be designed and deployed, and 5G networks can fully implement use of their emerging "sleep mode" capability.[29] But even with "sleep mode" the energy consumption profile will still be high.

Environmental Heath Trust provides an extensive summary of this and much more evidence on the topic, with citation to recent sources on its website.[30] All this energy consumption will translate into far more greenhouse gas output, thereby contributing to existing climate issues. An EIR is required to assess the additional greenhouse load that will flow from the operation of thousands of wireless facilities these ordinances will permit.

G. Plastic faux trees (including monopines) and other plastic faux products

Monopines and other toxic faux products designed to camouflage macro cell towers produce microplastic waste that is being scattered, and will increasingly be scattered, all over Los Angeles County. The mechanism is straightforward. The faux plastic falls off the towers via weather, wind, etc. onto the ground, then gets washed away into the storm drain system and other discharge channels. It is standard industry practice to replace faux plastic on macro towers every

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[27] In April 2022, the BOS voted in favor of a "Safety Upgrade" to the General Plan and included Wireless Resilience Hubs (WRH) as an important component of this Safety Upgrade. The stated purpose of a WRH is to help LA County address more effectively power outages, wildfires, floods, and other public emergencies. However, there is evidence that WRH will actually make Los Angeles County less safe during these emergencies, because intensive use of cell phones and other wireless devices during emergencies will actually further compromise the power grid. The proposed proliferation of cell towers authorized and encouraged by the amendments to Titles 16 and 22 under Ministerial Site Review will "hard wire" the problem, because local ordinances by California law must be "consistent" with the General Plan. An immediately available alternative proposed by Fiber Free Los Angeles and other concerned organizations is to accelerate the deployment of Resilience Hubs based on Optical Fiber to the home and workplace, supported by funding under the BEAD and other federal and state programs. *See* Tim Schoechle, "Reinventing Wires: https://gettingsmarteraboutthesmartgrid.org/pdf/Wires.pdf; https://www.nytimes.com/2019/10/28/business/energy-environment/california-cellular-blackout.html.

[28] The proposed Environmental Determination does not mention any matters of concern. It just baldly states there are two applicable Categorical Exemptions without providing any evidence in support. *But see* Union of Med. Marijuana Patients at 1186; Muzzy, 41 Cal.4th at 380. In addition, faux plastic trees may present an additional fire risk in this respect. https://www.firehouse.com/rescue/article/10544313/plastics-polymerization-what-firefighters-need-to-know.

[29] The 5G Dilemma: More Base Stations, More Antennas—Less Energy? 5G networks will likely consume more energy than 4G, but one expert says the problem may not be as bad as it seems, Dexter Johnson, IEEE Spectrum (Oct. 3, 2018), available at https://spectrum.ieee.org/will-increased-energy-consumption-be-the-achilles-heel-of-5g-networks. For "sleep mode" background see Ericsson, A technical look at 5G energy consumption and performance, Frenger and Tano (Sept. 19, 2019), available at https://www.ericsson.com/en/blog/2019/9/energy-consumption-5g-nr.

[30] https://ehtrust.org/science/reports-on-power-consumption-and-increasing-energy-use-of-wireless-systems-and-digital-ecosystem/.

five years, up to 10,000 pounds per tower. Microplastics on these faux macro towers contain lead and other carcinogenic materials proscribed under Proposition 65. Scientific studies[31] confirm evidence of microplastics in human and animal lungs and blood. There is no evidence that the LACDRP is even familiar with the problem, much less seriously addressed it. The issue is currently being litigated in *Eisenstecken et al. v Tahoe Regional Planning Agency*.[32]

H. Cumulative Impacts

Section 15300.2 of the CEQA Guidelines clearly provides for an Exception to the Exemption for cumulative impacts. It states:

> All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant. Moreover, a strong line of judicial decisions in California[33] recognizes that a valid EIR must include a careful analysis of cumulative impacts. Massive cumulative impacts is another unusually dangerous condition of the proposed Project.

For purposes of 15300.2 in this matter "projects of the same type" means any of the many "wireless facilities" that will be covered by Title 16 or 22. "The same place" means all of Los Angeles County. *See* Aptos, supra (the "same type" was DAS and "same place" was "Day Valley). The Board must assess the cumulative impact of all the individual wireless facility projects the proposed ordinances will authorize. As noted above, these wireless facilities are not being proposed willy-nilly. They are part and parcel of a wireless plan developed by the telecom providers and their installers with a single purpose to blanket all of Los Angeles County without *any* consideration of the cumulative impact of each component segment of this larger plan. This is precisely the kind of "project" that CEQA and its Cumulative Effects Exception intend an agency to carefully scrutinize with heightened environmental awareness and sensitivity of an EIR process.

I. Piecemealing and Segmentation

CEQA Guidelines explicitly prohibit piecemealing[34] as a strategy to circumvent CEQA's EIR requirements. Section 21159.27. PROHIBITION AGAINST PIECEMEALING TO QUALIFY FOR EXEMPTIONS states: "A project may not be divided into smaller projects to qualify for one or more exemptions pursuant to this article." The specific intention of the Project is to encourage piecemealing under an accelerated Ministerial Site Review. The staff's asserted Exemption cannot stand.

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[31] https://drive.google.com/file/d/127Ud8b5nTZuT3meINAFj0ngbj2NQyPa0/view?usp=sharing.

[32] On September 7, 2022 the Lahontan Regional Water Quality Control Board (LRWQCB) officially opened an investigation of hazardous waste discharges of microplastic and other toxics emitted from monopine cell towers. The LRWQCB issued Requests for Information on six faux plastic macro cell tower sites operated by Verizon and other telecom companies. Currently, there is a Zero Discharge Standard under the Clean Water Act and California Porter-Cologne Act. Discharges of hazardous waste from monopines into Lake Tahoe have been ignored for many years, and at last the LRWQCB is seriously investigating the past practice and proposals for new developments referenced in *Eisenstecken et al. v. TRPA*. Although Lake Tahoe represents a unique national treasure, there are many historic sites and environmentally sensitive areas in Los Angeles County that must be protected from microplastic hazardous waste discharges into the air, land, and water from faux plastic macro cell towers. *See e.g.* https://drive.google.com/file/d/1GycVZ8Uhv8reweII64dnQ4VHIKNiMlcS/view?usp=sharing.

[33] https://www.co.shasta.ca.us/docs/libraries/resource-management-docs/eir/hatchet-ridge/ch_4_otheranalyses.pdf.

[34] https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2014_CEQA_Statutes_and_Guidelines.pdf.

J. Especially sensitive environmental areas

Los Angeles County is replete with environmentally sensitive areas, including parts of the Coastal Zone and the Santa Monica Mountains, all of which are identified in the General Plan. Several are expressly mentioned in, for example, proposed 22.26.E.1.b. The Significant Ecological Area (SEA) Program is a component of the Los Angeles County Conservation/Open Space Element.[35] The imposition of Ministerial Site Review will create an unnecessary conflict with these other important State and County policies and programs, which would otherwise be harmonized and balanced under the established Conditional Use Permit framework. One major purpose of the move to "ministerial" is to avoid dealing with such things. But this you cannot do, unless and until the Board addresses the environmental impact as part of the ordinance drafting process. Even then environmental analysis of certain projects will still be required.

K. Unexamined Alternatives

CEQA: CEQA Guidelines § 15126.6 explicitly states: "An EIR need not consider every conceivable alternative to a project. Rather, it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation." (*See* https://planning.lacity.org/eir/SwanHall/DEIR/Chapters/7_Alternatives.pdf).

Environmentally safe, energy efficient, resilient, climate change friendly optical fiber to the home and workplace is an alternative solution to the Digital Divide. The Board should express the same policy decision as the current federal administration: wireless solutions are a less preferred alternative. Wireless should be deployed only where it is necessary, not everywhere in heedless fashion. CEQA requires that each potentially feasible alternative be examined, but the proposed Environmental Determination completely avoids any such effort.

L. Federal and State Policy

Local government agencies like the Board are constrained by and must respect directly applicable federal statutes.[36]

1. **NEPA "Small Handle Doctrine"**

There is quite likely more federal funding and engagement in Los Angeles County than any other California county or quite possibly in the U.S. Specifically, the American Rescue Plan Act provides $1.9 billion in federal funding to assist economic recovery. Substantial funding is also forthcoming under the NTIA policy announced in May 2022. Federal funding under the 2021 Infrastructure Investment and Jobs Act is also being directed to support efforts such as a Community Wireless Network in Los Angeles County. Other federal statutes are possibly applicable as well. This extensive federal involvement triggers NEPA's "small handle" application which necessitates a NEPA review in addition to a CEQA review on the revisions of Titles 16 and 22 which will alter forever the health and well-being of Los Angeles County residents and its environment. Moreover, the Council on Environmental Quality strongly encourages close coordination between NEPA and CEQA environmental reviews[37]. This is

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[35] https://planning.lacounty.gov/sea/faqs.

[36] The telecoms repeatedly claim the federal laws they like must be obeyed. But other federal laws preclude the permit review process and substance that they and staff champion.

[37] https://opr.ca.gov/docs/NEPA_CEQA_Handbook_Feb2014.pdf.

another unique circumstance of the present Project which precludes BOS' reliance on the Exemption.

References:

- https://ceo.lacounty.gov/recovery/arp/
- https://www.jstor.org/stable/24115016
- https://sprlaw.com/wp-content/uploads/2020/10/CEQ-New-NEPA-Regulations.pdf
- https://opr.ca.gov/docs/NEPA_CEQA_Handbook_Feb2014.pdf

M. Climate Change Impact Assessment

CEQA Guidelines explicitly require climate change impact analyses.[38] As the presumable lead agency, the county must analyze the greenhouse gas emissions of this project. This "project" relates to two ordinances that will govern how wireless facilities are permitted so any environmental inquiry must assess not only the quantity of emissions and how that quantity of emissions compares to statewide or global emissions but also the project's effect on climate change.

The precedent that the staff is recommending encourages the Board to allow massive deployment of wireless macro towers and other RF radiation emitting devices under Ministerial Site Review. This reckless policy will have massive negative environmental repercussions in Los Angeles County. Moreover, other counties in California and possibly in other states will cite this precedent to justify similar actions. The collective adverse impacts of hundreds of such projects throughout the U.S. could very well contribute to an adverse climate change impact. CEQA Guidelines 15064.4, subd (a)-(c) require a full inquiry and conclusion that uses appropriate modeling and reflects evolving scientific knowledge and the state's regulatory regime. A flat assertion of a Categorical Exemption, without any evidentiary support, simply does not suffice.

N. Cost/Benefit Analysis

California courts sometimes look to NEPA and federal decisions for guidance. Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 260–261; Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572, 591 (CEQA is patterned on NEPA; NEPA cases can be persuasive authority for interpreting CEQA). It is therefore noteworthy that NEPA regulations require cost/benefit analyses in assessment of alternatives. 40 C.F.R. § 1502.22 Cost-benefit analysis[39] states:

> If the agency is considering a cost-benefit analysis for the proposed action relevant to the choice among alternatives with different environmental effects, the agency shall incorporate the cost-benefit analysis by reference or append it to the statement.

The present situation of the proposed amendments to Titles 16 and 22 presents an excellent opportunity to coordinate CEQA and NEPA practices. NEPA cases can be persuasive in interpreting CEQA when CEQA is unclear (Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 202-203). CEQA amplifies NEPA practice but does not rely on it. There are provisions for coordinating CEQA review with NEPA and other types of review (CEQA Guidelines section 15004 (c)) Although CEQA does not explicitly require cost-benefit analysis as does NEPA, the

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[38] https://opr.ca.gov/ceqa/ceqa-climate-change.html.

[39] https://www.law.cornell.edu/cfr/text/40/1502.22.

County of Los Angeles can benefit from and rely upon a NEPA cost benefit analysis in reaching an informed decision as part of fulfilling its CEQA obligations.

Moreover, the staff's claimed Exemption blindly relies on a plethora of unchallenged false claims advanced by the telecom providers. These false claims include:

- The environmental impacts are trivial;
- Radiation exposure levels of children in schools, disabled persons, elderly, and pregnant women are safe;
- Blanketing Los Angeles County, especially underserved communities with macro towers and other radiative emitting devices will close the Digital Divide;
- Wireless devices are energy saving;
- Wireless hubs will promote community network resilience during power outages.

Each such claim is incorrect. At least one federal court has rejected a NEPA EIS on the grounds that the EIS included false statements.[40]

O. Other Applicable Federal Laws

The staff's abuse of claimed Exemptions will place the BOS in direct violation of other important federal statutes. Here are two examples.

1. **National Historic Preservation Act (NHPA).**

The proposed Wireless Facility Design Guidelines address the incursion of small cell and macro towers on historic sites and related properties. For example:

Historic resources and landmarks.

- No new facilities shall be permitted on or within historic resources or structures listed or eligible for listing on the national, state, or county historic registers.
- Existing facilities located on or within historic resources or structures listed or eligible for listing in any historic registers shall be located and designed to eliminate impacts on the historic resource.
- A Historic Resource Assessment, prepared to the satisfaction of the Director, may be required for a facility to be located on a site containing an eligible resource to identify impacts to historic resources, and identify mitigation to minimize impacts.[41]

The Title 22 Wireless Ordinance Summary states:

Development Standards for All Facilities (except small cell facilities).

[40] *See Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811–13 (9th Cir. 2005) (finding that the agency's use of inflated, inaccurate, and misleading data violated NEPA).

[41] Proposed Section 22.140.700.E.1.b.v allows the Director to use individual judgment on whether to require more information and/or impose mitigation measures as a condition of the permit. Despite the staff's desire to move to a "ministerial" review, this is a discretionary act for CEQA purposes. *See* Protecting Our Water & Envtl. Res. v. Cty. of Stanislaus, (2020) 10 Cal. 5th 479, 489, 268 Cal. Rptr. 3d 148, 153, 472 P.3d 459, 464.

> Facilities may not be placed on historically significant buildings or structures. They may be placed elsewhere on the property containing historic buildings or structures, provided a Historic Resource Assessment is prepared and submitted.

The Project, however, sets up an accelerated process under Ministerial Site Review that still does not fully implement federal and state law regarding historical resources.

2. **Identification of Historic Sites in Los Angeles County**

The recognized historic sites in Los Angeles County can be found at:

https://ohp.parks.ca.gov/?page_id=21427 and https://hlrc.lacounty.gov/.

Existing County Code Ch. 22.124 recognizes and protects some "historic districts." The proposed Tit. 22 revisions do provide mitigating measures for those districts, but there are several state and nationally recognized historic districts that have not gone through the county 22.124 process. The View Park site in Angela Sherick-Bright v. Los Angeles County[42] is one of these. To be consistent with how the current and proposed amended Titles 16 and 22 apply, we must recognize that some nationally or state recognized places (landmarks or districts) are not accepted for full protection under Chapter 22.124 (Historic Preservation), but are still protected (by way of an exception to any exemption) under state and federal law. There are "historic resources (as defined in current 22.14) that are not, for example, an "historic district" as defined in 22.14 because they have not been recognized by the Board under 22.124, and thus covered by Ch. 22.82.

It appears the drafters of the proposed wireless ordinances are aware of this. *See* proposed Section 22.140.E.1.b.v. which uses "historic resources," the broader term. But what the draft ordinance fails to deal with is existing Section 22.82.030.B:

> Notwithstanding Section 22.300.020 (Application of Community Standards Districts to Property), where an ordinance establishing or amending a historic district imposes development standards, limitations, conditions or regulations which are inconsistent with those otherwise imposed by this Title 22, the development standards, limitations, conditions, and regulations set forth in the ordinance establishing or amending the historic district shall supersede any inconsistent provisions in this Title 22.

A specific provision on development for a particular county 22.124/22.82 district ordinance and preservation plan should prevail over the proposed new provisions. That may or may not be the drafter's intent, however. The proposed language is ambiguous. If the intent is to preserve the specific provisions for existing 22.124/22.82 districts, then it is true there will no impact as to these districts. However, there are many other historic resources not yet recognized in 22.124/22.82, and there will certainly be a significant environmental impact on them. CEQA Guidelines §15300.2(f) provides that any claimed Categorical Exemption does not apply because of the historical resources exception.

More important, the drafters clearly recognize there will be an impact on historical resources, whether part of the 22.124/22.82 regime or not. There are specific draft terms addressing historical resources. It appears the drafters attempted to provide some mitigating provisions, but

[42] https://drive.google.com/file/d/1pfnYIhHB2IbhmYh59nJUTR8y9PbhRlnZ/view?usp=sharing.

staff has not provided any facts in support of the proposition there will still be no significant impact on any historical resource. This could, in theory, form the basis of a Modified Negative Declaration, if the mitigating steps are sufficient. But staff did not go that far; it just incorrectly asserts the Categorical Exemption, implying thereby no historic analysis is required.

3. **Federal Clean Water Act/California Porter Cologne Acts.**

As noted, the Project will permit unregulated wide diffusion of toxic faux plastic and micro plastic and related plastic waste, lead, and other toxic and carcinogenic materials listed under Proposition 65. The toxic wastes are being carried by strong winds and deposited on land, in or near lakes, streams, and coastal waters. They will penetrate ground water aquifers used for drinking water. They will expose animals and plants in environmentally sensitive areas. They will enter food chains. The widespread discharge of such toxic materials is subject to a Zero Discharge Standard as implemented in California through State, Regional, and Local Water Quality Boards, which are governed by California's Porter Cologne Act. The BOS Project completely ignores this unique and imminent environmental hazard.

P. Federal and State Shot Clock Regulations.

An unstated but obvious reason for the staff's effort to "streamline" the process through ministerial treatment instead of the currently-required Conditional Use process is that the FCC and state legislatively imposed "shot clock" rules require strict deadlines for a final decision. If the deadline is not met, the status for many wireless facility categories will be "deemed approved." FFLA acknowledges this practical problem.

It is important to understand that **the "shot clock" rules *do not apply* to the ordinance drafting process.** They pertain only to individual (or bundled) permit applications seeking land use approval.

The environmental rules FCC establishes when it is complying with NEPA are qualitatively different than the rules FCC promulgates under its Title III authority. The "preemption" in 47 U.S.C. 332(c)(7)(B)(iv) is in Title III. It provides that a state or local government may not "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." This provision speaks only to "radio frequency emissions" and does not in any way inhibit inquiry into the other environmental effects of the facilities – visual effects, greenhouse gas emissions, camouflage shedding of microplastics, lead and other carcinogenic materials. The FCC's NEPA rules are in 47 C.F.R. Part 1, Subpart I and do not derive from Title III. Instead these rules are mandated by NEPA, which is an entirely different statute. That is why the FCC has directly held that its NEPA related rules do not preempt state law equivalents like CEQA. *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd 3102, 3132 ¶77 (March 30, 2018), *rev'd other grnds United Keetoowah Band of Cherokee Indians in Oklahoma*, 933 F.3d 728, 744 (D.C. Cir. 2019):

> …Finally, nothing we do in this order precludes any review conducted by other authorities—such as state and local authorities—insofar as they have review processes encompassing small wireless facility deployments.[152] The existence of state and local review procedures, adopted and implemented by regulators with more intimate knowledge of local geography and history, reduces the

likelihood that small wireless facilities will be deployed in ways that will have adverse environmental and historic preservation effects.[153]

n.152 The record refers to a range of such requirements that exist under state or local law. See, e.g., City of Boston et al. Ex Parte Letter at 8 (stating appreciation that this order "does not intend to preempt state and local environmental and historical review, and thus leaves open the possibility that states and localities may be able to provide protections that had been provided through the Section 106 and NEPA processes" and noting that "many states have their own versions of NEPA and Section 106"); Letter from Scott K. Bergmann, CTIA, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 3 (filed Mar. 16, 2018) (the actions taken here do not "mean that small wireless facilities can be deployed by private parties without environmental and historic protections; state and local zoning, environmental, and historic preservation requirements will continue to apply"); Letter from Kenneth S. Fellman, counsel for Colorado Communications and Utility Alliance et al., to Marlene H. Dortch, FCC, WT Docket No. 17-79, Attach. At 5 (filed Oct. 19, 2017) (discussing Colorado state rights-of-way and Denver zoning requirements for wireless facilities); National League of Cities Comments, Attach. At 4 (discussing examples of factors that local authorities consider in connection with right-of-way access, including environmental and aesthetic considerations); National League of Cities et al. Request for Extension of Time at 3 (filed July 7, 2017) (observing that several states have enacted small wireless facility siting laws); see also, e.g., 2017 Pole Replacement Order, 32 FCC Rcd 9760, 9769-70, para. 23 (noting state law requirements for the handling of human or burial remains). Although this order does not preclude otherwise-existing review by other authorities, it also does not eliminate otherwise-existing limitations on that review, see, e.g., City of Boston et al. Ex Parte Letter at 8 (discussing limits under 47 U.S.C. § 1455), but instead leaves the preexisting status quo in place at this time.

n.153 We recognize that state and local procedures do not mirror the review required under Section 1.1312 of the Commission's rules in all respects. But these procedures nevertheless act as an independent check and show that our action today will not have the effect of authorizing indiscriminate deployment. To the extent that review provided for under state and local law differs, those differences presumably reflect the judgment of state and local lawmakers as to the type of review required for a particular geographic area. We thus find no basis to ignore the role of state and local procedures based on differences in their scope or application cited by commenters. See, e.g., Missouri SHPO Comments at 4; Texas Historical Commission Comments at 3; City of Boston et al. Mar. 14, 2018 Ex Parte Letter at 8-9.

There is no evidence NEPA or 47 U.S.C. Title III was intended to preempt CEQA. In fact, Congress intended NEPA and CEQA to be closely coordinated and integrated within a larger federal/state environmental framework. So any analysis required by CEQA for this project, or any of the hundreds of wireless facility application projects the draft ordinances contemplate, must still be obtained.

It is true a local jurisdiction cannot "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions." That is the result of a federal statute (47 USC §332(c)(7), which, again is in Title III), not an agency rule. Even so, that does not mean the local jurisdiction is federally preempted from informing itself of the environmental impact from emissions that will flow from the permits it issues. Information gathering to produce required knowledge is not "regulation." Even if the county cannot "regulate" RF emissions, nothing in any federal or state law prevents the Board from informing itself, and thus also the public, about the emissions that will occur because of the permits the County will grant pursuant to the contemplated ordinances.

CEQA compliance is not "regulation on the basis of environmental effects." While CEQA has a substantive mandate (Public Resources Code section 21081), it is mainly procedural in nature, not substantive like the specifics of a zoning ordinance or design guidelines. A fully compliant CEQA analysis of the substantive ordinance and guideline outcomes is still fully required, and the Board must take a meaningful look at the true environmental impact of the proposed action. This means that any Initial Study must look at the impact of additional RF emissions on humans and the rest of the environment. It must also consider the extent to which the operation of thousands of additional wireless facilities will further increase greenhouse gas emissions and result in other toxins like lead or microplastics going into the environment.

4. **California Shot Clock Rules as Applied to CEQA Exception Analysis**

There are cases that stand for the premise that there must be a CEQA decision prior to commencing the Permit Streamlining Act's (PSA) time limits for acting on a "complete application." Eller Media Co. v. City of Los Angeles (2001) 87 Cal.App.4th 1217, 1221 [noting the Permit Streamlining Act measures all time limits for final approval or disapproval of an application in terms of the environmental review process established by CEQA]; *see also* § 65950, subd. (a); Riverwatch v. County of San Diego (1999) 76 Cal.App.4th 1428, 1440–1441 [discussing exceptions to PSA time limits, stating "CEQA itself contains no automatic approval provisions and its time limits are directory rather than mandatory."] However, unfortunately, AB 57 enacted shot clocks that do not have the same provisions that allow CEQA review to be completed as the Permit Streamlining Act does.[43] Therefore, the new rules might- and likely do- override the directory nature of CEQA-based time limits. Even so, as the article at this link indicates it is unclear what happens when a permit is deemed approved in this context. Nonetheless any CEQA-required process must be completed, even if under a compressed schedule.

In sum, the federal and state shock clock rules raise complex legal questions, but they will only arise in individual permit applications. The FCC rules defer to the state; some California cases recognize that a CEQA analysis must precede the initiation of the shot clock, but the PSA appears to supersede these cases. At the same time, NEPA is the superior federal statute and CEQA was enacted to extend Congress' intention to foster "little NEPAs." The Board cannot frustrate or undermine the federal and state policies that check against the abuse of Exemptions.

[43] *See* https://www.westerncity.com/article/brave-new-world-cell-antennas-california-what-you-need-know-about-ab-57.

To be sure, the ordinance provisions must be constructed to allow, indeed assure, any applicable shot clock is met because there are negative consequences when they are not. But nothing in federal law or any state law allows or requires that fundamental procedural due process or property rights and the environment be sacrificed at the shot clock altar. Notice and an opportunity for hearing must be provided, so ministerial treatment is not allowed.

III. Conclusion

The proposed amendments to Titles 16 and 22 will inevitably result in the blanketing of Los Angeles County with small cell and macro towers installed in high densified residential communities, rural areas and many environmentally sensitive and vulnerable historic sites. This ill-conceived, wireless industry promoted project will have massive human health and environmental consequences and threaten over 1,000 historic sites and resources in Los Angeles County. The staff failed even to consider, much less evaluate, any of these risks and wrongly contends that it has no legal obligation to do so. There is not a shred of evidence the Planning Division has consulted with the California state authorities that are responsible for the protection and stewardship of historical resources. Rather, by a flick of the administrative finger, the entire wireless enterprise – or at least that which is most urgent for humans and the environment – is careless and wrongly gifted over to "ministerial" treatment and thus exempted from meaningful evaluation.

The staff also asserts a Category 3 Exemption under the CEQA Guidelines. This memo explains why that Exemption does not contemplate or allow the wholescale environmental destruction that will result from the amended Titles 16 and 22. The staff's reliance on this section is refuted by the extremely unusual circumstances that attend the project, which will disqualify any reliance on this Exemption.

Any potentially applicable Exemption is overridden as this memorandum documents by two Exceptions to the Exemption: the Exception for Historic Resources, and Cumulative Effects. Because the documented environmental and health risks are so grave, a Negative Declaration or Mitigated Negative Declaration will not suffice. The BOS must prepare a Comprehensive Programmatic Environmental Impact Report as required by CEQA. This EIR should also require ongoing monitoring and mitigation of identified impacts.

The BOS must also recognize that the proposed Project is not a small and insignificant County initiative. Because of the extensive federal involvement, including significant funding and services in Los Angeles County like airports, roads, crime prevention, weather forecasting and other basic functions, various federal laws are immediately applicable. The most directly relevant of these is NEPA. The BOS is legally required as the co-lead agency to consult and collaborate closely with a lead federal agency (or agencies), most prominently in this instance the Department of Transportation, FAA, and/or other concerned federal agencies in preparing a Comprehensive Environmental Impact Assessment.

The rigorous environmental review required for the Project is not preempted by federal law, in particular the 1996 Telecommunications Act ("Communications Act") for several reasons. First, nothing in that statute indicates that states are preempted from informing themselves of the environmental and health effects, even if they are preempted from regulating the facilities causing these harms. Second, the Communications Act does not preempt or supersede other federal statutes, including most relevant here NEPA, NHPA, Americans with Disabilities Act and the Clean Water Act, all of which are triggered by the extensive federal presence. Third, it is a core principle of American jurisprudence that whenever possible, any statutes in apparent conflict must be “harmonized.” If CEQA, NEPA and Communications Act mandates are effectively harmonized, the result will be a fair and effective solution for balancing broadband infrastructural development, addressing the needs of internet-underserved communities, and protecting Los Angeles County’s living environment.

