California Council for Environmental and Economic Balance
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February 14, 2014

Mr. Christopher Calfee
Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Re: Possible Topics to be Addressed in the 2014 CEQA Guidelines Update that the Governor's Office of Planning and Research ("OPR") released on December 30, 2013

Dear Mr. Calfee:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates the opportunity to comment on the list of "Possible Topics to be Addressed" in this year's update of the Guidelines to implement the California Environmental Quality Act ("CEQA"). In response to OPR's request for input on whether the topics are appropriate for the proposed update and "specific suggested language" we are pleased to offer the following comments and specific language for amendments to the relevant sections of the CEQA Guidelines. In doing so, we were mindful of the requirement that any changes to the Guidelines must be consistent with the statute and case law, and OPR's expressed desire to improve the efficiency and effectiveness of the CEQA process.

This letter is organized in accordance with the Section numbers listed in "Possible Topics" document dated December 30, 2013.

1. Section 15060.5 (Pre-application Consultation)

OPR Topic:

"Recast this section to address consultation more generally. Add provisions to address specific consultation requirements, and include suggestions on tribal consultation."

Comment:

We do not believe it's necessary or appropriate to include suggestions for additional consultation with tribes. Additional pre-application consultation could result in the mandatory inclusion of a long list of parties which could lead to procedural delays and confusion about which groups and/or agencies should be involved.

CEQA Guidelines Section 15060.5 provides that "…the lead agency shall, upon the request of a potential applicant and prior to the filing of a formal application, provide for consultation with the potential applicant to consider the range of actions, potential alternatives, mitigation measures, and any potential significant impacts on the environment…The lead agency may include in the consultation one or more responsible agencies, trustee agencies, or other public agencies…" including tribes.

While this consultation is triggered at the request of the potential applicant, it is already common practice for project applicants to engage and consult with potentially affected tribes, either as a best management practice or because such consultation is otherwise required. For example, Section IX of the California Public Utilities Commission's ("CPUC") General Order ("GO") 131-D requires that in support of the application for a Certificate of Public Convenience and Necessity ("CPCN") and/or Permit to Construct ("PTC"), electric public utilities must provide a "listing of the governmental agencies with which proposed route [or substation location] reviews have been undertaken…Such listing shall include The Native American Heritage Commission, which shall constitute notice on the California Indian Reservation Tribal governments…"

Typically, in concert with the regulations referenced herein, the National Environmental Policy Act ("NEPA"), and based on successful consultation on past projects, most project applicants take a number of concrete steps to pre-consult with tribes to ensure that the Native American community's interests and tribal values are represented when planning projects. Project applicants are benefitted by consulting early, often, and throughout the life-cycle to avoid and/or minimize impacts to cultural resources where feasible. Project applicants may reach out to the Native American Heritage Commission ("NAHC"), request sacred lands file searches for the areas in the vicinity of the proposed project, and conduct various rounds of outreach to individuals, including federally recognized and non-federally recognized tribes, having a documented interest in a particular region as evidenced by NAHC referral lists and past participation on projects. Responses to this outreach may include the engagement of tribal monitors during construction, development of new ethnographies contributing to the Native American community's ethnohistoric framework, ongoing discussion with the tribes regarding the identification and preservation of sensitive cultural resources, and/or potential mutually agreeable mitigation measures and project modifications.

Furthermore, there are numerous provisions providing for the protection of historical and tribal resources satisfaction of which typically requires consultation with tribes as a practical matter.

Cal. Public Resources Code sect. 21084.1, *Historical Resource; Substantial Adverse Change* asserts that "[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment…" Title 14 Cal. Code of Regulations Ch. 3 (CEQA Guidelines) sect 15064.5, *Determining The Significance Of Impacts To Archeological And Historical Resources* already provides guidance to lead agencies to determine when a project may have negative impacts on Native American sites designated as historical resources, and requires appropriate mitigation if applicable. *See id*. sect. 15064.5(c) ("If a lead agency determines that the archaeological site is an historical resource, it shall refer to the provisions of Section 21084.1 of the Public Resources Code, and this section, Section 15126.4 of the Guidelines, and the limits contained in Section 21083.2 of the Public Resources Code do not apply.") In addition, Cal. Public Resources Code sections 5097.995 - 5097.996, *Native American Historic Resource Protection Act*, establishes as a misdemeanor, punishable by up to a $10,000 fine or both fine and imprisonment, the unlawful and malicious excavation, removal or destruction of Native American archeological or historic sites on public lands or on private lands.

Regarding Native American sites, CEQA Guidelines sect 15064.5(d) specifically notes that "[w]hen an initial study identifies the existence of, or the probable likelihood, of Native American human remains within the project, a lead agency shall work with the appropriate Native Americans as identified by the Native American Heritage Commission as provided in Public Resources Code Section 5097.98." Cal. Public Resources Code sect. 5097.98 requires relevant Native American tribes be notified of the discovery of Native American human remains and governs the disposition of human remains and associated grave goods.

Cal. Public Resources Code sect. 21083.2, *Archeological Resources; Determination of Effect of Project* provides, in relevant part "…the lead agency shall determine whether the project may have a significant effect on archaeological resources. If the lead agency determines that the project may have a significant effect on unique archaeological resources, the environmental impact report shall address the issue of those resources" going on to specifically reference the value of California Native American sites should be appropriately considered when determining mitigation.

In sum, existing statutes and CEQA Guidelines serve their intended purposes, that is, to preserve and protect Native American human remains and cultural resources rendering additional suggestions to the process of consulting with tribes unnecessary.

2. Section 15064 (Determining the Significance of the Environmental Effects Caused by a Project)

<u>OPR Topic:</u>

"Add a definition of regulatory standard and explain when a standard may be used appropriately in determining the significance of an impact under CEQA"

Suggested Revision:

For the purposes of this Section, a "regulatory standard" is a rule of general application, that is adopted by the public agency through a public review process, and that is all of the following:

(1) a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, or other standard of general application;

(2) one that governs the same environmental effect implicated by the project; and,

(3) one that governs the project.

In determining whether a project may have a significant effect, a lead agency may rely on federal, state and local regulatory standards as thresholds of significance. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. In utilizing a regulatory standard as a threshold of significance, a public agency shall explain how the particular requirements of that standard will ensure that project impacts, including cumulative impacts, will not be significant.

Rationale:

The language suggested above is largely based on amendments to SB 271 that OPR recommended to the Legislature in June 2013.[1] As recognized by the court in *Communities for a Better Environment v. California Resources Agency* (2001) 103 Cal.App.4th 98: "A lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation." *CBE* at 111. The above language specifically addresses the reasons why the court in CBE struck down the previous Guidelines language and comports with later cases such as *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, which held that regulatory standards may be used to determine when impacts "will *normally* be determined to be significant" or "*normally* will be determined to be less than significant." *Amador* at 1108 (emphasis added).

[1] OPR's recommended language would have required regulatory standards to be "adopted" by the lead agency to serve as significance thresholds. Our suggested language does not do so, since lead agencies may utilize significance thresholds without formally adopting them. *Oakland Heritage Alliance v. City of Oakland* (2011), 195 Cal. App. 4th 884, 896-897.

3. Section 15064.4 (Determining the Significance of Impacts from Greenhouse Gas Emissions)

OPR Topic

"Clarify that analysis of greenhouse gas emissions is required, and the role of the Scoping Plan in determining the significance of greenhouse gas emissions."

"Further clarify that 'business as usual' (or hypothetical baseline) analysis is not appropriate. Also clarify that, particularly for long range plans, lack of complete precision in projections of emissions will not make the use of models inadequate for information disclosure purposes."

Comment:

We do not believe it's appropriate for OPR to incorporate the AB 32 Scoping Plan into the CEQA process via an amendment to the Guidelines.

The current Scoping Plan and the one that is projected for future use are important but amorphous in both size and scope. Because the Scoping Plan specifies measures to reduce emissions, but lacks specific criteria for the evaluation of a project's impacts, its use to set a threshold for identifying a project's potentially significant impacts is hypothetical. As such, declarations that a proposed project's compliance with the Plan ipso facto makes the project impacts less than significant, or declarations that a proposed project does not comply with the Plan ipso facto makes the project impacts significant does not improve the transparency and effectiveness of the environmental review process.

We do not believe it is necessary or appropriate to "clarify that 'business as usual' (or hypothetical baseline) analysis is not appropriate." The "business as usual" ("BAU") methodology was specifically upheld as a proper form of significance threshold by the court of appeal in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal. App. 4th 327, 336-37 (*CREED*). Another appellate decision endorsed the BAU approach in *CREED*, though criticizing the lead agency's implementation of the approach. *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841-42 ("The problem is the City improperly applied this proper standard in concluding that the Project's environmental impacts from GHG emissions are less than significant. [*CREED*] exemplifies the model, showing us a proper way to apply the [BAU] standard"). One trial court has rejected the BAU methodology, but that case is currently pending appeal. *Center for Biological Diversity v. Dept. of Fish and Wildlife*, Los Angeles Sup. Ct., Case No. BS131347 (2012) (*CBD*). As such, it is premature at best for OPR to revise the CEQA Guidelines to be consistent with the non-precedential trial court decision in *CBD*, but inconsistent with the precedential appellate cases *CREED* and *Friends of Oroville*

4. Section 15125 (Environmental Setting)

OPR Topic:

Provide guidance on appropriateness of use of alternative baselines, including changes resulting from climate change, future baselines to address large-scale infrastructure, historic use, and unpermitted uses. Provide that the description of the environmental setting may include a description of the community within which the project is proposed in order to better analyze the specific impacts to that community. Clarify the analysis of consistency with adopted plans, both local and regional.

Suggested Revision: Add the following to the end of Section 15125(a):

Under appropriate circumstances, a baseline may take account of environmental conditions that will exist in the future when the project begins operations; the lead agency is not strictly limited to those prevailing when environmental review begins. Lead agencies have the discretion to define a baseline that is different from the environmental setting, provided that this baseline is justified by substantial evidence in the record. Projected future conditions, supported by reliable projections based on substantial evidence in the record may be used as the sole baseline for impacts analysis, when their use in place of existing conditions is justified by unusual aspects of the project or the surrounding physical conditions that make the use of existing conditions either misleading or without informative value to decision-makers and the public. A lead agency may also use both an existing conditions baseline and a projected future conditions baseline, provided the future conditions baseline is based on substantial evidence in the record.

Rationale:

Current CEQA Guidelines Section 15125(a) provides that existing conditions normally constitute the baseline for evaluating environmental impacts. In *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, the California Supreme Court endorsed the use of future conditions as the baseline. Changes to the environmental setting that are anticipated to occur before project implementation can be incorporated into the analysis, either together with or in lieu of an existing conditions baseline. If the lead agency chooses to utilize future conditions as the sole baseline, however, the choice must be justified by demonstrating that inclusion of an existing conditions baseline would be uninformative or misleading to decision-makers and the public. The above suggested revision is intended to incorporate the holding of this case.[2]

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[2] Our suggested language derives from the recommendations of the American Planning Association and Association of Environmental Professionals, submitted to OPR in response to its initial solicitation for the CEQA Guidelines update. However, we suggest a minor adjustment to APA's proposal. The Supreme Court held that:

> an agency may forego analysis of a project's impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public. Parenthetically, we stress that the burden of justification articulated above applies when an agency substitutes a futures conditions analysis for one based on both existing and future conditions…But, nothing in CEQA law precludes an

In addition, we do not believe it is necessary or appropriate to incorporate a new form of "description of the community" into the environmental setting, beyond the scope of current CEQA practice. It is well-established that the CEQA analysis of specific impacts of a project must take into account its surroundings, including the specific receptors and neighborhoods adjacent to the project site, or (for impacts not limited to the immediate vicinity) within range of the project's effects. However, the appropriate "description of the community" for such purposes is defined by the scope of the potential impact. For example, a map of noise receptors beyond the reach of project noise would not be particularly useful for analyzing the community's exposure to noise impacts. Moreover, since economic and social issues are not environmental impacts in the CEQA sense (CEQA Guidelines Section 15064(e)), adding broader discussion of such factors, beyond the scope related to specific impacts, may detract from the clarity of the impact analysis. Accordingly, we believe that current CEQA practice in this regard is sufficient.

5. Section 15301 (Existing Facilities)

OPR Topic:

"Revise to incorporate holding in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, regarding the level of historic use, so that the exemption cannot be used to expand the use of a facility beyond its historic use (rather than use at the time of the lead agency's determination)."

"Clarify that this exemption includes alterations for bike lanes, pedestrian crossings, street trees and implementation of other complete streets features."

Comment

In our August 30, 2013 response to OPR's Solicitation for Input, we proposed a new subsection (f) to CEQA Guidelines Section 15125 to read as follows:

"For renewals and extensions of authorizations for an existing facility, structure or activity, the existing facility, structure or activity is considered part of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time the environmental analysis is commenced. The continued presence and effects of such existing facilities, structures or activities without change, shall not be considered to cause any potentially significant environmental impact or contribute to any potentially significant cumulative impact."

> agency, as well, from considering both types of baselines—existing and future conditions—in its primary analysis of the project's significant adverse effects…The need for justification arises when an agency chooses to evaluate only the impacts on future conditions, foregoing the existing conditions analysis called for under the CEQA Guidelines…"

Neighbors for Smart Rail at 453-454. Therefore we have revised APA's proposed language to relate the "uninformative or misleading" justification specifically to use of future conditions as the sole baseline.

This language codifies the holding of *Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal.App.4th 549.

The topic refers to revising the categorical exemption for existing facilities to incorporate holding in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310. It's very important to note that the CBE v. South Coast case excluded a facility's permitted but unused capacity from the baseline, but did not cast any doubt on including "the use at the time of the lead agency's determination" in the baseline. Accordingly, the current presence and effects of an existing facility are properly considered as part of the baseline. *Citizens for East Shore Parks v. California State Lands Commission* (2011) 202 Cal. App.4th 549.

In conclusion, CCEEB supports OPR's intent to improve the CEQA Guidelines and provide an environmental review process that is more efficient, effective and meaningful for agencies, applicants and the public. We appreciate the time and efforts required to develop revisions to the CEQA Guidelines and are pleased to have the opportunity to work with OPR on these issues. If you have any comments or questions concerning the suggested revisions detailed above, please contact me or Jackson R. Gualco or Mark Theisen of The Gualco Group, Inc. at (916) 441-1392.

Thank you for your consideration of our comments.

Sincerely,

GERALD D. SECUNDY
President

cc: Honorable Edmund G. Brown, Jr.
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