

October 12, 2015

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

Re: Comments on Proposed Updates to the CEQA Guidelines
Preliminary Discussion Draft, August 11, 2015

Dear Mr. Calfee,

The California State University ("CSU") has reviewed the *Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft* dated August 11, 2015 ("Proposed Updates"). We appreciate the opportunity to provide input and offer the comments included below.

Guidelines Section 15004, subsection (b)(2)(A) (pages 110-111)

The proposed amendment to the Section 15004, subsection (b)(2)(A) of the CEQA Guidelines in the Proposed Updates is intended to reflect the *Save Tara* Supreme Court decision, which addresses the issue of when CEQA applies to pre-approval activities. The proposed amendment would delete a portion of Section 15004, subsection (b)(2)(A), which indicates that public agencies may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance. Furthermore, Section 15004, subsection (b)(4) is proposed to be added which would allow a public agency to enter into a "preliminary agreement" provided it meets the criteria identified in this subsection. However, this subsection does not specifically address the issue of land acquisition agreements.

By deleting the portion of Section 15004, subsection (b)(2)(A), it would imply that under no circumstances would land acquisition agreements be considered a preliminary agreement not subject to CEQA. This is contrary to the *Standing Tall* decision, which recognized that as a practical matter in a competitive real estate market, an agreement to purchase property may need to be initiated before completing CEQA analysis.

On that basis, the following revision to Section 15004(b)(2)(A) is recommended as shown in red text:

- (A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, **except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance consistent with the requirements of subsection (b)(4).** ~~except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance.~~

Guidelines Section 15234 (pages 73-74)

The proposed amendments would add new Guidelines Section 15234 addressing remand within the context of CEQA litigation. While CSU generally supports the addition of the section, additional revisions are recommended.

It is requested that proposed Section 15234 subsection (a) be revised to add a new subpart that provides: "(2) decertify the project environmental impact report, in whole or in part." This revision is consistent with proposed amendment Section 15234, subsection (d), which provides in relevant part: "As to those portions of the environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with principles of res judicata."

On that basis, the following revisions, as shown in red text, are recommended:

New Section 15234. Remand

- (a) **Not every violation of CEQA is prejudicial requiring rescission of project approvals. Courts may fashion equitable remedies in CEQA litigation. If a court determines that a public agency has not complied with CEQA, and that noncompliance was a prejudicial abuse of discretion, the court shall issue a peremptory writ of mandate requiring the agency to:**
- (1) **void the project approval, in whole or in part;**
 - (2) **decertify the project environmental impact report, in whole or in part;**
 - (3) **suspend any project activities that preclude consideration and implementation of mitigation measures and alternative necessary to comply with CEQA; or**

(4) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA.

Guidelines Section 15126.4, subsection (a)(1)(B) (pages 98-99)

The proposed amendments, which address mitigation deferral, are inconsistent with the "Explanation of Proposed Amendments" that is provided in the Proposed Update. As support for the revisions, the Explanation states: "OPR proposes to clarify that when deferring the specifics of mitigation, the lead agency should either provide a list of possible mitigation measures, *or* adopt specific performance standards." (Proposed Updates, p. 97.) However, the proposed amendments provide that deferral of the specific details of mitigation measures may be permissible provided the lead agency provides *both* a list of possible mitigation measures and specific performance standards, not one or the other. (Proposed Updates, page 98.)

It is recommended that the Proposed Updates be revised such that the lead agency should either provide a list of possible mitigation measures *or* adopt specific performance standards in proposed Guidelines Section 15126.4, subsection (a)(1)(B) (pages 98-99).

Environmental Checklist, Section XVI. Transportation/Traffic (pages 67-68)

The proposed amendments include revisions to Environmental Checklist Section XVI, Transportation/Traffic. As background, changes related to CEQA-related transportation analysis, required by SB 743, were released for public review in August 2014. OPR is still revising that proposal in response to stakeholder comments; and the revised proposal will be released separately. (Proposed Updates, p. 9.) Thus, as OPR explains, the changes contained in the Proposed Updates "are placeholders while OPR continues outreach on its proposal implementing SB 743." (Proposed Updates, p. 44.)

CSU has submitted comments on the previously released proposed SB 743 Guidelines revisions (dated November 20 2014). CSU restates those comments with respect to the revisions contained in the Proposed Updates, and reserves the right to provide additional comments when the next draft of proposed SB 743 revisions is released for public comment.

Environmental Checklist, Section XI. Open Space, Managed Resources and Working Landscapes, Subpart b)(i) (page 63)

The proposed amendments would expand the scope of farmland covered by the Environmental Checklist from "Prime Farmland, Unique Farmland, or Farmland of Statewide Importance" (as determined by the California Resources Agency Farmland Mapping and Monitoring Program) to *all* farmland without regard for the quality of the resource. By substantially broadening the scope of the term "farmland," the proposed amendments also would result in a substantial increase in the identification of significant impacts, even though the subject "farmland" may have little actual agricultural value.

It is thus recommended that the proposed amendments be revised to retain the “Prime Farmland, Unique Farmland, or Farmland of Statewide Importance” modifiers presently contained in Environmental Checklist Section II., Agriculture and Forest Resources, subpart (a).

On that basis, the following revisions are recommended, as shown in **red** text:

Would the project adversely affect open spaces containing natural resources and working landscapes? Considerations may include, among others, whether the project would:

- b) Adversely impact open space used for production of **agricultural** resources by, among other things:
 - (i) **converting Prime Farmland, Unique Farmland, or Farmland of Statewide Importance (Farmland) as shown on the maps prepared pursuant to the Farmland Mapping and Monitoring Program of the California Resources Agency farmland** to non-agricultural use;

Environmental Checklist, Section XVII. Utilities and Service Systems, subpart d) (page 69)

The proposed amendments ask if “the Project” would have sufficient water supplies available to serve the project “and reasonably foreseeable future development during normal, dry and multiple dry years?” While it is appropriate to inquire as to the availability of sufficient water supplies for reasonably foreseeable future development as part of a cumulative analysis, “the Project” is not responsible to make available such supplies to reasonably foreseeable other future development.

It is thus requested that the proposed amendments be revised to reflect that it is not “the Project’s” responsibility to make available sufficient water supplies to serve “reasonably foreseeable future development.” On that basis, CSU recommends the following revisions, as shown in **red** text:

XVII. UTILITIES AND SERVICE SYSTEMS – Would the project:

- d) **Be served by Have** sufficient water supplies ~~available to serve the project and reasonably foreseeable future development~~ during normal, dry and multiple dry years ~~from existing entitlements and resources, or are new or expanded entitlements needed?~~

Environmental Checklist, Section X, Land Use and Planning, Subpart b) (page 61)

The proposed amendment would delete text which currently limits analysis to conflicts of “applicable” plans of an agency “with jurisdiction over the project.” There are several concerns on this proposed amendment. First, the proposed deletion is inconsistent with Guidelines section 15125(d), which, as OPR notes, limits the required discussion of plan inconsistencies to “*applicable*” plans. Second, requiring agencies to analyze consistency with plans that are not applicable would be inefficient and result in a needless expenditure of resources. Third, the intent of the proposed deletion is to “clarify that the focus of the analysis should not be on the ‘conflict’ with the plan, but instead, on any adverse environmental impact that might result from a conflict.” (Proposed Updates, pp. 42-43.) However, deletion of the modifier “applicable” does not further that intent. Similarly, deletion of the phrase “with jurisdiction over the project” also does not further the intent because any plans of an agency without jurisdiction over the project are not applicable to analysis of the subject project’s environmental impacts in the first instance.

On this basis, the following revision is recommended, as shown in red text:

IX. LAND USE AND PLANNING – Would the project:

- b) ~~Conflict~~ Cause a significant environmental impact due to a conflict with any applicable **applicable** land use plan, policy, or regulation **of an agency with jurisdiction over the project** ~~of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance)~~ adopted for the purpose of avoiding or mitigating an environmental effect?

The CSU appreciates the opportunity to provide comments on the Proposed Updates. We look forward to OPR’s response in the form of additional revisions to the amendments as presently proposed.

Sincerely,



Elvyra F. San Juan
Assistant Vice Chancellor

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Distribution:

Wess Larson, Senior Legislative Director, CSU Office of the Chancellor
Christopher Fowler, University Counsel, CSU Office of the Chancellor
Steven Lohr, Chief of Land Use Planning and Environmental Review,
CSU Office of the Chancellor