



October 12, 2015

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814
CEQA.Guidelines@resources.ca.gov

Re: Proposed Updates to the CEQA Guidelines – Preliminary Discussion Draft

Dear Mr. Calfee:

Thank you for the opportunity to comment on the Proposed Updates to the CEQA Guidelines – Preliminary Discussion Draft, dated August 11, 2015. These comments are submitted by the Environmental Defense Center (“EDC”), a public interest environmental law firm servicing the Counties of Santa Barbara, Ventura and San Luis Obispo. The EDC protects and enhances the environment through education, advocacy and legal action. Since 1977, we have represented more than 100 organizations dedicated to the protection of coast and ocean resources, open spaces and wildlife, and human and environmental health. Much of our work focuses on informed public participation and decisionmaking, with particular emphasis on compliance with the strict mandates of the California Environmental Quality Act (“CEQA,” Pub. Res. Code section 21000 et seq.).

As a preliminary matter, we want to applaud the Office of Planning and Research (“OPR”) for the proposal to update the Guidelines to implement recent legislative enactments and judicial decisions. For example, we support the updated treatment of water supply analysis requirements and deferral of mitigation. We also support the recommended use of internet links and electronic access.

We are, however, concerned with many of the proposed amendments which would effectively reduce the scope of environmental and public review that are at the core of CEQA. First, we note that some of the updates identified as “Technical Improvements” actually have very substantive ramifications, such as the sections addressing Baseline, Deferral of Mitigation, Pre-Approval Agreements, Common Sense Exemption, Emergency Exemption, and Conservation Easements as Mitigation. Depending upon how these issues are addressed, they

could dramatically affect the environmental analysis of a proposed project as well as consideration of mitigation measures and alternatives.

In addition, many of the updates are inconsistent with the spirit and intent of CEQA. This letter will focus on the following issues addressed in the Preliminary Discussion Draft: (1) Using Regulatory Standards in CEQA; (2) Remedies and Remand; (3) Baseline; (4) Conservation Easements; and (5) Posting Notices. We also support the comments and recommendations submitted by the California Planning and Conservation League, Center for Food Safety, and Center for Biological Diversity.

Using Regulatory Standards in CEQA – Guidelines sections 15064, 15064.7

While EDC prefers a project-specific analysis, we agree that an agency could use a regulatory standard to determine the potential significance of an impact if compliance with the standard would clearly result in an impact that is less than significant. ***The Guidelines must be clear, therefore, that the lead agency must demonstrate that adherence to the regulatory standard will in fact result in an impact that is less than significant.***

In addition, we agree that ***such a determination cannot be made if, under the fair argument standard of review, substantial evidence is submitted indicating that the proposed project may result in a potentially significant impact, notwithstanding compliance with a regulatory standard.***

These two points are critical because (1) many regulatory standards are adopted for purposes other than ensuring less-than-significant impacts on the environment and, in many cases, are designed to balance environmental impacts with other non-environmental policy objectives; and (2) in a particular situation and context, a project could result in a significant impact despite compliance with a regulatory standard.

Remedies and Remand – Guidelines section 15234

EDC is extremely troubled by the proposal to allow a project to proceed despite noncompliance with the informational requirements of CEQA. According to the state legislature, “noncompliance with the information disclosure provisions of [CEQA] which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of [CEQA], may constitute a prejudicial abuse of discretion...regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.” Pub. Res. Code section 21005(a).

If an environmental review document is inadequate, it makes no sense to allow a project, or even part of a project, to proceed. Such advancement of a project will not only deprive the public and decision makers of all relevant and necessary information prior to decision making, but it could also limit the range of mitigation measures and alternatives available to address potentially significant impacts that have not been adequately or completely evaluated. ***OPR should revise this proposal to require that project approvals be vacated whenever there is a violation of CEQA.***

The only possible exception to this requirement would be in the case of extraordinary circumstances when it would be more beneficial to the environment to retain the agency's action pending further environmental review. (See, e.g., *POET, LLC. V. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 761-763: a court should only leave an approval in tact in the event of “extraordinary circumstances” and only if such action does not prejudice the ability of an agency to consider or require mitigation measures or alternatives, or does not result in adverse change or alteration to the physical environment; in the case at hand the court found that leaving the challenged regulation in place would provide greater protection to the environment.)

Baseline – Guidelines section 15125

EDC submitted comments on the proposed 2014 CEQA Guidelines Update, pointing out the critical need to require environmental review of prior unpermitted and/or illegal activities that affect the environment. In our region, we are witnessing increasing abuse of the CEQA process, wherein landowners undertake development or other physical activities on their property that cause significant impacts and then subsequently apply for permits and attempt to avoid review of the impacts on the grounds by maintaining that the prior actions and impacts are now part of the baseline condition of the site. Landowners and project applicants are thus incentivized to conduct activities and then seek project approval so that they can avoid requirements to mitigate impacts or pursue less destructive alternatives.

Accordingly, *in the case of a project where the current physical conditions on the site include unpermitted, illegal activities and/or structures, the baseline from which to analyze impacts must be set prior to such illegal uses.* An understanding of the impacts of such illegal uses on a project site will help the public and decision-makers more fully understand the environmental conditions that existed prior to such illegal uses. This is a realistic and accurate baseline on which to base an understanding of the impacts of a proposed project, mitigation measures and project alternatives, all necessary to adequate CEQA review. Moreover, often such illegal uses on a site would have been “projects” within the meaning of CEQA if they had been done legally, and would have therefore been subject to environmental review in the first place.

EDC therefore requests that OPR develop guidance that ensures that illegal or unpermitted actions, for example, habitat clearing, tree removal, grading and development, do not go unaddressed. The Guidelines should clarify that the impacts of such actions must be addressed in the environmental review process through an appropriate baseline. OPR's clarification in this regard will not only ensure adequate environmental review of projects and activities, but will also provide a fair and level playing field for those property owners and applicants who go through the proper process.

Conservation Easements – Guidelines section 15370

While EDC understands that in some situations conservation easements may provide the only feasible means to achieve mitigation of adverse impacts, we believe that such mitigation

should be a matter of last resort. It is far better to avoid or substantially lessen the impacts on-site, rather than destroy an important resource and then conserve a similar resource that already exists elsewhere. In many instances, a conservation easement still results in a net negative impact on the environment. Accordingly, ***the CEQA Guidelines should point out that compensation is not necessarily the same as mitigation, and that avoidance or substantial lessening of impacts to a resource is the first priority.***

Posting Notices

It is important that CEQA notices be readily accessible to the public. In this day and age, we believe that notices should be available electronically in order to assure adequate public access. It can be extremely burdensome for some community members to travel to County offices to view posted notices. ***We therefore request that the Guidelines be updated to require electronic posting of all CEQA notices by lead agencies on their public websites as well as on the OPR website.***

Conclusion

Thank you for this opportunity to comment on the proposed updates to the CEQA Guidelines. While many of the proposed changes are necessary to implement recent statutory changes and case law, several proposals detract from CEQA's substantive and procedural (e.g., informative) mandates. We urge your serious consideration of these comments and we look forward to commenting on the next iteration of the proposed Guideline updates.

Sincerely,



Linda Krop
Chief Counsel