



**MWD**

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Executive Office

February 10, 2014

**Via Electronic and Regular Mail**

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

Dear Mr. Calfee:

**Possible Topics to be Addressed in the 2014 CEQA Guidelines Update**

Public Resources Code Section 21083 requires that the California Environmental Quality Act (CEQA) Guidelines be updated periodically. The Office of Planning and Research (OPR) and the Natural Resources Agency are conducting a comprehensive review of the CEQA Guidelines. In the summer of 2013, OPR and the Natural Resources Agency released a solicitation for input on possible changes to the CEQA Guidelines. In response to that solicitation, Metropolitan submitted a letter on August 29, 2013. On December 30, 2013, OPR and the Natural Resources Agency released a publication with a list of possible topics to be addressed in the 2014 CEQA Guidelines Update and requested input regarding the following:

- Are these topics appropriate for the CEQA Guidelines Update?
- Are there any important topics that we missed and that should be addressed?
- If you have not already provided specific suggested language, do you have any that we should consider?

Metropolitan appreciates the opportunity to remain engaged in this 2014 CEQA Guidelines Update process and offers the following comments in response to the December 30, 2013 document and the three questions listed above.

**Question #1: Appropriate Topics for CEQA Guidelines Update**

Metropolitan has reviewed the possible topics listed in the publication and does not disagree with their consideration in the CEQA Guidelines Update. We note that some of the topics, depending on how they are addressed, could have substantial ramifications to our agency's operational activities, facilities, and planning efforts. Accordingly, we will be closely following proposed revisions for these topics. Metropolitan requests that OPR consider the following comments when developing possible revisions to the CEQA Guidelines.

**Section 15082 (Notice of Preparation).** This possible topic indicates that Notices of Preparation (NOPs) would be required to be posted at the County Clerk's office. As stated in our previous letter (see Enclosure), Metropolitan is supportive of CEQA streamlining provisions. Internally, Metropolitan staff discussed the concept of a centralized repository for all CEQA documents regardless if the lead agency is a state or a local entity, with OPR serving as that repository. Currently, no single, centralized location is identified where all CEQA documents are filed or posted. This often results in reviewers having to research information on a project in OPR's database as well as in multiple counties. Confusion also may be created by multiple posting dates as those dates pertain to comment periods and statutes of limitations. A central repository where all CEQA documents are filed would provide reviewers one centralized location where CEQA documents for all projects would be retained, would clarify statute of limitations dates and comment period durations, and would eliminate redundant costs to agencies who are filing documents with multiple counties. Metropolitan requests that any proposed revisions to the CEQA Guidelines, such as the one identified for Section 15082, not conflict with any potential streamlining actions such as centralized postings.

**Section 15046 (Determining Significance of the Environmental Effects Caused by a Project).** This possible topic addresses the concept of using regulatory standards to determine significance of environmental effects and the concept of baseline. These two concepts are critical to the CEQA evaluation process for every lead agency. Metropolitan requests that any proposed revisions to the CEQA Guidelines to establish regulatory-based significance thresholds consider and preserve the lead agency's ability to exercise independent judgment in determining the potential significance of project- and programmatic-level impacts. Metropolitan also requests that any proposed revisions pertaining to baseline be consistent with recent court cases, most notably, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4<sup>th</sup> 439.

**Section 15301 (Existing Facilities).** This possible topic suggests revisions to the Class 1 categorical exemption. As a public utility, Metropolitan relies heavily on this exemption for many of its routine, but critical, operations and maintenance activities. We request that any proposed changes to this exemption consider the essential work performed and services provided by public utilities and ensure our ability to utilize this exemption is not compromised. If possible, it would be helpful if OPR could provide additional examples of projects that would fall under this categorical exemption.

**New Appendix (Supplement Review Checklist).** Suggested revisions include the addition of a checklist to guide supplemental review and guidance on the fair argument standard. As stated in our previous letter to OPR, Metropolitan agrees this is an appropriate topic for consideration; however, the OPR publication does not indicate what the guidance on fair argument would

include. Metropolitan requests that any guidance or clarifications proposed in this new appendix would be consistent with existing case law.

### **Question #2: Important Topics Missed**

As previously stated, Metropolitan submitted a letter to OPR on August 29, 2013 in response to OPR's original solicitation for ideas to consider in updating the CEQA Guidelines. We appreciate the consideration given to our letter and thank OPR for including several of our suggested topics. However, some of the topics proposed in our letter were not included in the December 30, 2013 publication. We still believe these are important topics and request again that they be considered. As stated in our previous letter:

#### **Section 15096 (Process for a Responsible Agency)**

Section 15096 addresses the process for an agency to comply with CEQA as a responsible agency. Specifically, subsection (d) recommends that a responsible agency review and comment on draft environmental impact reports (EIRs) and negative declarations (NDs) for projects that the responsible agency would later be asked to approve. Metropolitan recommends changing the first sentence of subsection (d) to "A responsible agency shall review and, if it determines it is appropriate to do so, comment on...", so that responsible agencies would be required to provide comments during the public review period of the draft EIR or negative declaration rather than making comments and raising new issues during a subsequent permitting process. Metropolitan has experienced situations where permitting agencies do not comment on a project during the CEQA process, but rather, provide comments during the permitting process, after the CEQA document has been certified and/or adopted. This can result in the lead agency having to revise the project design and/or implementation, which ultimately can result in increased costs and schedule delays. Making review of and comment on the CEQA document during the public review period mandatory by responsible agencies, if they deem it appropriate, would help lead agencies to (1) obtain important information early in the project, rather than later in the process, (2) incorporate that information into project planning and design, and (3) minimize cost and schedule impacts in later phases of the project.

#### **Section 15169 (Master Environmental Assessment)**

Metropolitan recommends revisions to the Guidelines that would better define the preparation and use of a Master Environmental Assessment (EA). As subsection (a) acknowledges, "Neither the content, the format, nor the procedures to be used to develop a master environmental assessment are prescribed by these guidelines." As described, it seems a Master EA could greatly benefit Metropolitan (and other public agencies) and would streamline preparation of CEQA documents for its service area; however, without any more specific guidance regarding

preparation and implementation of the Master EA, Metropolitan would be hesitant to use such a document. OPR should consider preparation of a technical memorandum addressing how a Master EA can further advance analysis, full public disclosure, and efficiency.

**Section 15300.2 (Exceptions to Categorical Exemptions)**

Metropolitan recommends that Section 15300.2(c) regarding exceptions to categorical exemptions be clarified to better define “unusual circumstances.” Given recent and somewhat contradictory court decisions pertaining to this topic, clarification is recommended to give agencies a higher confidence in using categorical exemptions. We understand that the Supreme Court is currently reviewing a case they may provide clarification of this issue (*Berkeley Hillside Preservation, et al., v. City of Berkeley, et al.*). Metropolitan recommends that the Guidelines be updated to include any clarifications based on the decision in that case in the future.

**Section 15328 (Categorical Exemption for Small Hydroelectric Projects at Existing Facilities)**

Section 15328 (i) states, “Construction will not occur in the vicinity of any endangered, rare, or threatened species.” The phrase “in the vicinity of” is somewhat vague and limits the use of this exemption. OPR should revise subsection (i) to better define “in the vicinity of.”

**New Categorical Exemption Section 15334 (Hydroelectric Projects at Existing Man-made Water Conveyance Facilities)**

Metropolitan recommends adding a new categorical exemption for hydroelectric projects at existing man-made water conveyance facilities. Metropolitan suggests that this new categorical exemption would be similar to the language for Class 28 (Section 15328) and would align the CEQA exemption for hydroelectric projects with existing state and federal licensing exemptions as follows:

**15334. Hydroelectric Projects at Existing Man-Made Water Conveyance Facilities**

Class 34 consists of the installation of hydroelectric generating facilities that are operated as part of a man-made water supply or conveyance system where:

- (a) The capacity of the generating facilities is 40 megawatts or less similar to the capacity allowed in PUC Section 399.12(e)(1)(A);
- (b) Operation of the generating facilities will not change the flow regime in the affected man-made water supply or conveyance system including but not limited to:
  - (1) Rate and volume of flow,

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- (2) Temperature,
  - (3) Amounts of dissolved oxygen to a degree that could adversely affect aquatic life, and
  - (4) Timing of release.
- (c) New power lines to connect the generating facilities to existing power lines will not exceed one mile in length if located on a new right of way and will not be located adjacent to a wild or scenic river.
- (d) Repair or reconstruction of the diversion structure will not raise the normal maximum surface elevation of the impoundment.
- (e) There will be no significant upstream or downstream passage of fish affected by the project.
- (1) The discharge from the power house will not be located more than 300 feet from the toe of the diversion structure.
- (g) The project will not cause violations of applicable state or federal water quality standards.
- (h) The project will not entail any construction on or alteration of a site included in or eligible for inclusion in the National Register of Historic Places.
- (i) Construction will not occur in the vicinity of endangered, rare, or threatened species.
- (j) The hydroelectric facility will be owned and operated by the owner of the water conveyance facilities.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

**Question #3: Suggested Specific Language**

At this time, Metropolitan does not have suggestions for specific language for any of these possible topics; however, prior to entering into the formal review and comment period, Metropolitan requests that OPR release proposed draft language or a summary of proposed changes as a preliminary review document. Such a preliminary review would provide Metropolitan, other agencies, and stakeholders an opportunity to provide meaningful comments on topics after they have been more developed, but before it becomes more difficult for comment to affect meaningful change.

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Metropolitan appreciates this opportunity to provide input to your process and will continue to engage in this process. If you have any questions on the comments contained in this letter, please contact Ms. Jennifer Harriger at (213) 217-7658.

Very truly yours,



Deirdre West

Manager, Environmental Planning Team

JH/jh

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Enclosure: August 29, 2013 Letter to OPR



THE METROPOLITAN WATER DISTRICT  
OF SOUTHERN CALIFORNIA

August 29, 2013

**Via Electronic and Regular Mail**

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

Dear Mr. Calfee:

Solicitation for Input on Revisions to the California Environmental Quality Act Guidelines

Public Resources Code Section 21083 requires that the California Environmental Quality Act (CEQA) Guidelines be updated periodically. The Office of Planning and Research (OPR) and the Natural Resources Agency are conducting a comprehensive review of the CEQA Guidelines. As part of the update process, OPR and the Natural Resources Agency are seeking suggestions from public agencies on revisions to the CEQA Guidelines that accomplish the following goals:

- Make the environmental review process more efficient and meaningful;
- Reflect California's adopted policy priorities, including, among others, addressing climate change, promoting of infill development, and conserving natural and fiscal resources; and
- Reflect statutory changes to CEQA and cases interpreting CEQA.

In response to OPR's solicitation for input on potential revisions to the CEQA Guidelines, The Metropolitan Water District of Southern California (Metropolitan) requests OPR and the Natural Resources Agency to consider the following suggestions.

**Section 15096 (Process for a Responsible Agency)**

Section 15096 addresses the process for an agency to comply with CEQA as a responsible agency. Specifically, subsection (d) recommends that a responsible agency review and comment on draft environmental impact reports (EIRs) and negative declarations (NDs) for projects that the responsible agency would later be asked to approve. Metropolitan recommends changing the first sentence of subsection (d) to "A responsible agency shall review and, if it determines it is

appropriate to do so, comment on...”, so that responsible agencies would be required to provide comments during the public review period of the draft EIR or negative declaration rather than making comments and raising new issues during a subsequent permitting process. Metropolitan has experienced situations where permitting agencies do not comment on a project during the CEQA process, but rather, provide comments during the permitting process, after the CEQA document has been certified and/or adopted. This can result in the lead agency having to revise the project design and/or implementation, which ultimately can result in increased costs and schedule delays. Making review of and comment on the CEQA document during the public review period mandatory by responsible agencies, if they deem it appropriate, would help lead agencies to (1) obtain important information early in the project, rather than later in the process, (2) incorporate that information into project planning and design, and (3) minimize cost and schedule impacts in later phases of the project.

#### **Section 15125 and 15126.2 (Baseline)**

In the Supreme Court decision, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013), the court described new principles regarding the timeframe of baseline conditions to use as the point of comparison for determinations of significance. The principles included allowance for a future baseline under certain conditions. Prior to this decision, the conclusions of appellate decisions had become conflicting. It would be very helpful to add provisions to Guidelines Section 15125(a) and 15126.2(a) that describe, based on *Neighbors for Smart Rail*, the factors to consider when defining the proper baseline for environmental impact analysis.

#### **Section 15126.4 (Mitigation Measures)**

A long series of court decisions have described the case law principles regarding the proper approach to follow in situations where defining the necessary details of mitigation measures is not feasible in an EIR. Guidelines Section 15126.4(a)(1)(B) is out of date. It is very important to expand the explanation in this subsection to describe the approach to properly defer the description of mitigation details, because this topic has been repeatedly raised in litigation and is very common in CEQA documents for long range development plans, program EIRs, and major long-term infrastructure plans.

#### **Section 15126.6 (Alternatives to the Proposed Project)**

Guidelines Section 15126.6(f)(1) introduces factors to consider when assessing the feasibility of alternatives. While the factors are very useful, court decisions have expanded and elaborated on

the considerations of feasibility of alternatives, such as in *CNPS v. City of Santa Cruz* (2009). Please expand the discussion of considerations of feasibility to update the section so it is current regarding court decisions. Topics could include: evidence needed to support an infeasibility of an alternative based on cost or economics, role of policy inconsistency in the feasibility determination, and evidence needed to determine feasibility of an alternative location.

#### **Section 15168(c)(2) (Program EIR)**

Guidelines Section 15168(c) describes consideration of “later activities” after certification of a Program EIR. This section of the Guidelines provides an important tool to avoid redundant environmental documents when a later activity is “within the scope” of the program covered by the Program EIR. It would be helpful to clarify how to reach this finding, such as criteria to evaluate, need for support by evidence, and role of the project description. In 2005, the appellate decision in *CREED v. San Diego* provided guiding principles that could be the foundation for Guidelines clarifications.

#### **Section 15169 (Master Environmental Assessment)**

Metropolitan recommends revisions to the Guidelines that would better define the preparation and use of a Master Environmental Assessment (EA). As subsection (a) acknowledges, “Neither the content, the format, nor the procedures to be used to develop a master environmental assessment are prescribed by these guidelines.” As described, it seems a Master EA could greatly benefit Metropolitan (and other public agencies) and would streamline preparation of CEQA documents for its service area; however, without any more specific guidance regarding preparation and implementation of the Master EA, Metropolitan would be hesitant to use such a document. OPR should consider preparation of a technical memorandum addressing how a Master EA can further advance analysis, full public disclosure, and efficiency.

#### **Section 15221 (NEPA Document Ready Before CEQA Document) and Section 15222 (Preparation of Joint Documents)**

Metropolitan recommends revisions to these sections to provide better guidance on preparation of environmental documents where both CEQA and NEPA apply. Recently, Metropolitan has seen joint NEPA-CEQA documents that are thousands of pages long. These voluminous documents are too cumbersome and difficult for the public to interpret in the allotted review periods. In addition, joint documents pose potential conflicts in state and federal policies and processing times can be slow due to multiple lead agencies. Section 15221 allows a NEPA document to be used for the purposes of CEQA with a few stipulations; however, these

stipulations (primarily subsection (a)(2)) make it difficult for agencies to utilize this section. Perhaps a revision to Section 15221 could enable state and local agencies to utilize this section to rely on the federal agencies' NEPA document for CEQA compliance more often.

#### **Section 15300.2 (Exceptions to Categorical Exemptions)**

Metropolitan recommends that Section 15300.2(c) regarding exceptions to categorical exemptions be clarified to better define "unusual circumstances." Given recent and somewhat contradictory court decisions pertaining to this topic, clarification is recommended to give agencies a higher confidence in using categorical exemptions. We understand that the Supreme Court is currently reviewing a case they may provide clarification of this issue (*Berkeley Hillside Preservation, et al., v. City of Berkeley, et al.*). Metropolitan recommends that the Guidelines be updated to include any clarifications based on the decision in that case in the future.

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- (j) The hydroelectric facility will be owned and operated by the owner of the water conveyance facilities.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

### **General Comments**

#### **Clarifying the Application of Fair Argument and Substantial Evidence Standards**

The Guidelines provide information to help determine the proper CEQA document to prepare or additional environmental analysis needed for subsequent activities that are covered by a prior EIR, program EIR, master EIR, or ND. Case law has defined when fair argument and substantial evidence standards should be applied in these circumstances; however, application of these standards can be unclear except for the standard of review for EIRs and NDs. Please prepare

Mr. Christopher Calfee, Senior Counsel  
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revisions that explicitly state, consistent with controlling case law, whether the fair argument standard and substantial evidence standard is applied to the various decisions related to the choice of environmental review approach, type of document, and the proper supplemental and subsequent environmental reviews of projects covered by or consistent with previous EIRs.

### **Streamlining**

CEQA already contains many effective provisions to streamline, including: “partial exemption” (PRC Section 21083.3 and Guidelines Section 15183), use of a Program EIR (Guidelines Section 15168), the subsequent review of a project for which a prior CEQA document has been approved (PRC Section 21166 and Guidelines Section 15162), yet they are not all well recognized. Metropolitan suggests that OPR provide technical guidance with the goal of educating lead agencies and facilitating use of existing streamlining opportunities.

Metropolitan appreciates this opportunity to provide input to your process. If you have any questions or need any additional information on these recommended revisions, please contact Dr. Debbie Drezner at (213) 217-5687.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Deirdre West', with a stylized flourish at the end.

Deirdre West  
Manager, Environmental Planning Team

DD/rd

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