

February 14, 2014

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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

Dear Mr. Calfee,

Thank you for the opportunity to comment on the list of "Possible Topics to be Addressed in the 2014 CEQA Guidelines Update" issued by the Office of Planning and Research (OPR) on December 30, 2013. In its request for comments, OPR asks for input on whether the topics are appropriate for the proposed update to the California Environmental Quality Act (CEQA) Guidelines; whether any important topics have been omitted; and suggested language for Guidelines amendments. This letter contains the comments of the many organizations and companies signed below in response to OPR's request.

In its July 1, 2013 Solicitation for Input that initiated this update of the CEQA Guidelines, OPR sought suggestions for process and substantive improvements to make the environmental review process more efficient and meaningful, reflect the state's policy priorities and reflect statutory and case law developments. Our comments on the "Possible Topics" list are intended to help maintain the focus on improvements to efficiency of review. In that context, we are concerned that some of the proposed changes may have adverse consequences, adding new hurdles to the CEQA process. In particular, some items – such as relying on the AB 32 Scoping Plan as a significance threshold, or incorporating vague and overbroad "community descriptions" into the environmental setting – could actually make the review process less efficient and meaningful. Other items, such as rejecting the "business as usual" methodology for GHG analysis, would eliminate existing opportunities for efficient review. While our comments below address specific issues, we also urge OPR to keep in mind the overall goal of an improved, more streamlined and effective CEQA process.

Reliance on Regulatory Standards (CEQA Guidelines Section 15064). OPR proposes to "[a]dd a definition of regulatory standard, and explain when a standard may be used appropriately in determining the significance of an impact under CEQA." This issue has generated considerable interest in recent years and is an appropriate topic for inclusion in the Guidelines update.

As a practical matter, many lead agencies already rely on compliance with regulatory agency permits and programs for CEQA purposes. Indeed, lead agencies can hardly avoid looking to expert regulatory agencies for approaches to evaluating environmental issues that are subject to regulation. "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." *Communities for a Better Environment v. California Resources Agency* (2001) 103 Cal.App.4<sup>th</sup> 98, 111 (CBE). In addition, applying significance thresholds based on clear regulatory standards, developed and found to be effective by regulatory agencies with expertise on the subject matter, can help streamline the

environmental review and approval process, providing greater consistency and transparency, avoiding repetitive and unnecessary effort, and reducing costs and delays.

In *CBE*, the court struck down a previous effort to endorse regulatory standards as significance thresholds in the CEQA Guidelines. In that case, however, the court was concerned with a specific problem: the challenged Guidelines language *compelled* a lead agency to find that compliance with such standards renders impacts less than significant. In some instances, the court concluded, regulatory compliance might not be enough to ensure insignificant impacts, and commenters should be able to bring evidence of such instances to the lead agency's attention, under the "fair argument" test. But later cases such as *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4<sup>th</sup> 1099 (*Amador*) clarified that *CBE* does not rule out all reliance on regulatory standards in all cases. 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" – so long as the lead agency is not compelled to accept regulatory compliance as sufficient in every case. *Amador* at 1108 (emphasis added; citing CEQA Guidelines Section 15064.7(a)); *see also Mejia v. City of Los Angeles* (2005) 130 Cal.App.4<sup>th</sup> 322, 342 (same).

We suggest the following language be considered for incorporation into a new subsection of CEQA Guidelines Section 15064:

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. For the purposes of this subdivision, a "regulatory standard" is a rule of general application, that is adopted by a 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.

This language is largely based on amendments to SB 271 that OPR recommended to the Legislature in June 2013.<sup>1</sup> While SB 271 did not pass, incorporating this portion of OPR's recommendations into the CEQA process would not require legislative action. In providing that

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<sup>1</sup> 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.

impacts “normally will be determined to be less than significant” based on compliance with regulatory standards, the language is fully consistent with case law; *see Amador* at 1108.

Role of the AB32 Scoping Plan in Determining Significance (CEQA Guidelines Section 15064.4). OPR proposes to clarify “the role of the Scoping Plan in determining the significance of greenhouse gas emissions.” We do not believe it is appropriate to incorporate the AB 32 Scoping Plan into the CEQA process by means of the Guidelines update.

We understand that some stakeholders have suggested treating consistency with the Scoping Plan as a significance threshold for greenhouse gas (GHG) impacts, similar to the way that consistency with a General Plan provides a significance threshold for land use impacts in CEQA Guidelines Appendix G, Section X(b). The Scoping Plan is an aspirational document spanning 40 years of air quality planning and containing numerous specific emission reduction measures which do not apply to the greenhouse gas (GHG) impact analysis undertaken in CEQA documents. Such a plan is not suitable to serve as a threshold for identifying the potentially significant impacts of an individual project. Unlike a General Plan or other land use plan, the Scoping Plan does not define a specific set of criteria that may be applied to evaluate project impacts.

More fundamentally, the Scoping Plan anticipates ratcheting down statewide GHG emissions from existing levels over time. By contrast, though CEQA requires projects to avoid or reduce environmental impacts where feasible, existing environmental conditions constitute the setting or baseline in CEQA analysis and not impacts of the project. CEQA Guidelines Section 15125. As such, improving pre-existing environmental problems may be required by other law (such as AB 32), but it is not required by CEQA.<sup>2</sup> The Scoping Plan is also subject to updating by the California Air Resources Board (CARB) every five years with new GHG reduction strategies and recommendations – far more often than General Plans are updated. One such update is in progress and proposes to address continued GHG emissions reductions beyond the 2020 scope of the current Scoping Plan, in light of the 2050 GHG emissions goal established by Executive Order. However, the effect of the Executive Order goal in CEQA analysis is the subject of pending litigation and its incorporation by means of the Guidelines update would be premature at best. *Cleveland National Forest Foundation v. San Diego Ass’n of Governments*, 4<sup>th</sup> Appellate Dist., Case No. D063288.

In sum, the Scoping Plan is too much of an amorphous and moving target to serve as the basis for a significance threshold defined by consistency with the plan, in the manner of a General Plan or other land use plan. For these reasons, OPR should leave the determination of appropriate GHG significance thresholds to the discretion of the lead agency and not modify the Guidelines to establish a role for the AB 32 Scoping Plan.

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<sup>2</sup> See, e.g., *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal. 4<sup>th</sup> 1143, 1167-68 (“The Court of Appeal erred also in failing to sufficiently distinguish between preexisting environmental problems in the Bay–Delta, on the one hand, and adverse environmental effects of the proposed [project]. . . . [T]hose problems would continue to exist even if there were no [project], and thus under CEQA they are part of the baseline conditions rather than [project]-generated environmental impacts”).

Rejection of “Business As Usual” Analysis (CEQA Guidelines Section 15064.4). OPR proposes to “clarify that ‘business as usual’ (or hypothetical baseline) analysis is not appropriate.” This appears to reject a form of GHG significance analysis that has been endorsed by two precedential appellate decisions, widely utilized by lead agencies, and formally adopted by at least one air district.<sup>3</sup> We do not believe it is appropriate to include this change in the Guidelines update.

In the “business as usual” (BAU) methodology, GHG emissions from a project are considered to have an insignificant impact if they are more than 29% below modeled emissions under a “business as usual” scenario. Reliance on the BAU-based significance threshold was specifically upheld as a proper exercise of agency discretion in *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal. App. 4th 327, 336-37 (*CREED*). Three subsequent cases concurred with the approach in *CREED*. *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841-42; *Friends of Northern San Jacinto Valley v. County of Riverside*, Riverside County Sup. Ct., Case No. RIC10007572 (2012); and *Center for Biological Diversity v. City of Fullerton*, Orange County Sup. Ct., Case No. 30-2011-00499466-CU-WM-CXC (2012). Though *Friends of Oroville* and *Friends of Northern San Jacinto* criticized the application of the BAU-based threshold in their respective cases, both courts stated that the lead agencies should have followed the methodology in *CREED*. In particular, in *Friends of Northern San Jacinto*, the trial court rejected the comparison to a “hypothetical” worst-case BAU scenario that was highly unrealistic (disregarding local zoning restrictions, assuming the project site was stripped of vegetation and fully developed even in steeply sloping areas) – but distinguished that unrealistic hypothetical BAU scenario from the reasonable BAU analysis in *CREED*.<sup>4</sup> Thus, these courts did *not* find that a BAU-based significance threshold is fundamentally flawed for reliance on an inappropriate “hypothetical baseline” as OPR suggests. Rather, like other methodologies used in CEQA analysis, the BAU scenario must be realistic and supported by substantial evidence.

One trial court did find that the BAU methodology improperly relied on a hypothetical baseline. *Center for Biological Diversity v. Dept. of Fish and Wildlife*, Los Angeles Sup. Ct., Case No. BS131347 (2012) (*CBD*). However, that case is currently pending appeal. Prior to the court of appeal’s decision (which may well be appealed in turn), it is premature to revise the CEQA Guidelines to take the position that the trial court in *CBD* was correct and the precedential appellate cases *CREED* and *Friends of Oroville* were wrong.

At a more basic level, the reasoning in *CBD* is flawed by conflating two very different CEQA concepts, the baseline and the significance threshold. Relying on cases that rejected use of purely hypothetical conditions (such as planned or permitted facility capacity, never actually achieved) as the baseline, the court interpreted the BAU scenario as a form of “hypothetical baseline.” *But the BAU scenario is not a baseline*. The baseline remains actual, existing GHG

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<sup>3</sup> San Joaquin Valley Air Pollution Control District, “District Policy Addressing GHG Emission Impacts for Stationary Source Projects Under CEQA When Serving as the Lead Agency” (2009), pp. 7-8.

<sup>4</sup> See also *Friends of Oroville*, 219 Cal. App. 4th at 841: “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 Assembly Bill 32 threshold-of-significance standard.”

emissions prior to the project. As with any other type of impact, project emissions are compared to the existing emissions baseline. If the difference between baseline and project emissions exceeds the significance threshold, the impact is significant. The BAU emissions scenario is simply an intermediate step in determining the significance threshold (29% below BAU). As such, it is incorrect to equate the BAU-based *significance threshold* with an improper hypothetical *baseline*. The BAU methodology considers whether the difference between baseline and project emissions exceeds the *significance threshold* of 29% below BAU, not whether the difference exceeds 29% below the *baseline*. This objection is akin to complaining that it is “hypothetical” to estimate emissions from reasonably foreseeable future projects, as an intermediate step in cumulative impact analysis. Many aspects of CEQA review involve future estimates and projections which inevitably are “hypothetical” to some extent, since they do not yet exist. Only the existing conditions baseline must not be “hypothetical.”<sup>5</sup>

CEQA Guidelines Section 15064.4(b)(2) expressly provides the lead agency with discretion to determine the appropriate significance threshold for impacts from GHG emissions. Section 15064.4(a)(1) also leaves to the lead agency’s discretion the choice of methodology “it considers most appropriate” for GHG analysis, so long as the decision is supported by substantial evidence. Consistent with the existing CEQA Guidelines and caselaw, we do not believe it is appropriate to reject the BAU methodology in the Guidelines update.

Community Description in Environmental Setting (CEQA Guidelines 15125). OPR proposes to 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.” The intent of this proposal is unclear. The type of “description” is unspecified, and “community” may be defined in many ways. To the extent that this is intended as a restatement of existing law, it may be unnecessary to address this topic in the Guidelines update.

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. *See, e.g.*, Guidelines Appendix G, Section I(c) (would the project “[s]ubstantially degrade the existing visual character or quality of the site and its surroundings?”), Section III(e) (would the project “[c]reate objectionable odors affecting a substantial number of people?”), Section X(a) (would the project “[p]hysically divide an established community?”). CEQA analysis also takes into account special sensitivities of persons or uses affected by a project. *See, e.g.*, Guidelines Appendix G, Section III(d) (would the project “[e]xpose sensitive receptors to substantial pollutant concentrations?”), Section VIII(c) (would the project “[e]mit hazardous

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<sup>5</sup> In *CBD*, the lead agency raised a different argument, that a realistic future baseline is appropriate for long-term projects, citing the *Neighbors for Smart Rail* case which was then pending appeal in the California Supreme Court. The *CBD* court was not persuaded, noting that *Neighbors* was de-published and uncitable, and that evidentiary support for BAU was lacking. *CBD*, p. 27, n. 46. However, the subsequent Supreme Court decision upheld future baselines, in appropriate circumstances and supported by substantial evidence. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4<sup>th</sup> 439. Thus, even if the BAU methodology were interpreted as applying a form of future baseline, it should remain available to lead agencies that, with the benefit of the guidance in *Neighbors for Smart Rail*, incorporate the requisite evidentiary support into the record.

emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?”). As another example, evaluation of noise impacts is typically based on standards specified in a noise ordinance or General Plan noise element, with lower noise exposures identified as significant impacts for projects near sensitive receptors such as residences, schools and hospitals.

Descriptions of community characteristics also appear in the Population and Housing sections of CEQA documents, as a basis for evaluating impacts such as inducing substantial population growth, or displacing substantial numbers of people or housing. Moreover, although “[e]conomic and social changes resulting from a project shall not be treated as significant effects on the environment” in themselves (CEQA Guidelines Section 15064(e)), economic or social factors may contribute to determining the significance of physical impacts, such as dividing an existing community.

As such, it is already true that environmental setting descriptions in CEQA documents may include descriptions of the surrounding communities, supporting the analysis of specific impacts. However, as shown in the above examples make clear, the description of the community 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, adding broader discussion of such factors, beyond the scope related to specific impacts, may detract from the clarity of the impact analysis. We urge OPR to address this topic with caution, if at all, to preserve the focus and utility of CEQA documents to support environmentally informed decision-making.

Thank you for considering our comments. We look forward to the opportunity for further comment on specific CEQA Guidelines amendment language when it is proposed.

If you have questions, please contact Dorothy Rothrock, V.P. Government Relations, California Manufacturers Association, at 916-498-3319 or [DRothrock@cmta.net](mailto:DRothrock@cmta.net).

Sincerely,

California Manufacturers & Technology Association  
Wine Institute  
Chemical Industry Council of California  
Engineering Contractors’ Association  
Marin Builders Association  
California Fence Contractors’ Association  
California Chapter of American Fence Association  
Flasher Barricade Association  
Golden State Builders’ Exchanges  
Western States Petroleum Association  
California Business Roundtable