



1400 K Street, Suite 400 • Sacramento, California 95814
Phone: 916.658.8200 Fax: 916.658.8240
www.cacities.org

October 8, 2015

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 94814

Re: Comments to CEQA Guidelines Update

Dear Mr. Calfee:

Thank you for the opportunity to comment on the preliminary discussion draft of the changes to the CEQA Guidelines. Thank you for your consideration of the following comments submitted on behalf of the League of California Cities:

1. Section 15064(b)(2)

(2) Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining ~~the significance of~~ if an impact may be significant. When relying on a threshold, the lead agency should explain how compliance with the threshold ~~indicates that~~ means the project's impacts are less than significant. A lead agency shall not apply a threshold in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, a project ~~there~~ may still be have a significant environmental effect ~~from a project~~.

Comments

1. The first change is intended to reflect the CEQA inquiry process in which the lead agency determines if an impact may be significant rather than the significance of an impact.
2. The second change uses the language found in Section 15064.7: "A threshold of significance is an identifiable quantitative...level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant...and compliance with which means the effect normally will be determined to be less than significant."
3. The third change is intended to reflect the CEQA inquiry process (Section 15064(a): "Determine whether a project may have a significant effect..."

2. Section 15064.7

Comments

1. Must an environmental standard “adopted or used” as a threshold of significance be supported by substantial evidence (Section 15064.7(b))?
2. How is the requirement of subdivision (d) to “explain how the particular requirements of that environmental standard will avoid or reduce project impacts...” different than what is required when a threshold of significance is adopted?
3. I’m concerned that the phrase “designed to apply” creates a certain amount of ambiguity and requires an inquiry into the intention of the legislative body that may not be appropriate. Please see proposed changes in (d)(4).
4. We would suggest that the Guideline include the authority to adopt project-specific thresholds of significance (*Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1067-68).

(d) Any public agency may adopt or use an environmental standard as a threshold of significance. In adopting or using an environmental standard as a threshold of significance, a public agency shall explain how the particular requirements of that environmental standard will avoid or reduce project impacts, including cumulative impacts, to a less than significant level. For the purposes of this subdivision, an “environmental 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 environmental requirement of general application;
- (2) adopted for the purpose of environmental protection;
- (3) addresses the same environmental effect caused by the project; and,
- (4) ~~is designed to apply~~ applies to the type of project under review.

3. Section 15168

Comments

How does language added to 15168(c)(2) relate to the language in Section 15168(a)(1)-(4). The latter seems to define how a series of actions can be characterized as one large project. The new language (“relevant factors”) in (c)(2) seems to add new criteria for making that determination. Is this the intent? If so, then we would suggest adding the “relevant factors” to subdivision (a).

What is meant by the phrase “geographic area analyzed for environmental impacts?”

4. Section 15182

Comments

The following changes to subdivision (b) are suggested to reflect language from Section 21155.4(a) and 21099(a)(7) respectively.

(b) Projects Proximate to Transit.

(1) Eligibility. A residential or mixed-use project, or a commercial project with a floor area ratio of at least 0.75, including any ~~required~~ subdivision or zoning change approvals, is exempt if the project satisfies the following criteria:

(A) It is located within one-half mile of an existing or planned rail transit station, ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods. For the purposes of this subdivision, within the boundaries of a metropolitan planning organization, a “planned” station, terminal or stop includes a facility that is scheduled to be completed within the planning horizon included in the regional transportation plan. Outside of the boundaries of a metropolitan planning organization, a “planned” station, terminal or stop includes a facility that is scheduled to be completed within the planning horizon included in ~~the regional transportation improvement program~~ a Transportation Improvement Program adopted pursuant to Section 450.216 or 450.322 of Title 23 of the Code of Federal Regulations.

Comment

The following change to subdivision (c)(3) is suggested to remove the ambiguity created by the phrase “decision to carry out.” The date on which a lead agency decides to “carry out” a project may be the subject to differing interpretations.

(c)(3) Statute of Limitations. A court action challenging the approval of a project under this subdivision for failure to prepare a supplemental EIR shall be commenced within 30 days after the lead agency's decision to ~~carry out or~~ approve the project in accordance with the specific plan.

5. Appendix G

Comments

A. I. Aesthetics: Will the change to subdivision (c) require an “applicable zoning and other regulation” before a local lead agency can determine that a project will substantially degrade the existing visual character or quality of public views? In other words, if there is no “applicable zoning and other regulation,” does this mean that there is no impact?

B. V. Energy: Under what circumstances would incorporating renewable energy or energy efficiency measures into a project create a potentially significant impact or less than significant impact with mitigation incorporated?

C. X. Land Use and Planning: How will a lead agency determine whether a conflict with a land use plan will cause a significant environmental impact prior to undertaking environmental analysis?

D. XIII. Population and Housing:

- We suggest adding “unplanned” before “numbers” in (b) to be consistent with the change proposed in (a).
- We would like to express our strong concerns and opposition to the change to subdivision (c). The language imposes a consideration that is not reflected in the State’s Planning Law. We think it inappropriate to do so through CEQA. A local agency is not currently under any statutory obligation (other than Government Code 65853.6 relating to a growth control ordinance) to “balance” regional jobs and housing. As we discussed in our phone call, Section 65863 simply requires a local agency to make provision for its share of the regional housing need as allocated by its council of governments (Section 65584). Because a city/county’s housing element requires planning for its RHNA, and because its RHNA does not require maintaining a substantial balance in regional jobs and housing, it is possible that this new requirement of CEQA will make it much more difficult for a city or county to implement its housing element by pushing more projects into the requirements for an EIR.

E. XVI. Transportation

- We would like to express our strong concerns and opposition to the change in subdivision (b) which substitutes VMT for the existing language. We note that the phrase “appropriate measures” is also included. However, the change in the language inclines the analysis towards VMT. We would like to suggest that OPR complete its work pursuant to SB 743 (Steinberg) before introducing VMT into other areas. We think introducing VMT into the CEQA Guidelines moves Appendix G beyond (and makes Appendix G inconsistent with) the statutory scheme.
- Similarly, we would like to express our strong concerns and opposition to the change in subdivision (c) which seems to implement the foundational premise of the change from LOS to VMT. Although we support the analysis of “induced additional automobile” and don’t wish to necessarily increase physical roadway capacity, we think it very important to be mindful of the fact that public transit is simply not available throughout California.

Therefore, the automobile is the only efficient means of travel to housing and jobs. We are very wary of adding standards to Appendix G which will require an EIR for a project that under existing standards would not require an EIR.

6. Section 15234

Comments

A. Section 15234(a) requires a court to issue a writ of mandate “requiring the agency to” take the actions identified in (1) through (3). The actions identified in (1) through (3) might conflict with each other. For example, paragraph (1) requires the court to “**void** the project approval, in whole or in part;” and paragraph (2) requires the court to “**suspend** any project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA.” Finally, paragraph (3) requires the court to “take specific action necessary to bring the agency’s consideration of the project into compliance with CEQA.” Only the agency can take “specific action” to bring the project into compliance with CEQA. The doctrine of separation of powers precludes a court from taking such action.

Therefore, we suggest the following changes:

(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 and may require requiring the agency to take one or more of the following actions:

(1) void the project approval, in whole or in part; or

(2) suspend any project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or

~~(3) take specific action necessary to bring the agency’s consideration of the project into compliance with CEQA.~~

B. Section 15234(b) allows an agency to proceed with those portions of the challenged determinations, findings, or decisions that the court finds meet certain criteria. In our opinion, this proposed Guideline constitutes an unnecessary interference with the discretion of the court. Therefore we suggest the following changes:

(b) Following a determination described in subdivision (a), the court may determine that an agency may proceed with those portions of the challenged determinations, findings, or decisions for the project or those project activities that the court finds:

~~(1) are severable;~~
~~(2) will not prejudice the agency's compliance with CEQA as described in the court's peremptory writ of mandate; and~~
~~(3) complied with CEQA.~~

C. Section 15234(c): Similar to subdivision (b), in our opinion, this proposed Guideline constitutes an unnecessary interference with the discretion of the court. Therefore we suggest the following changes:

~~(c) An agency may also proceed with a project, or individual project activities, during~~ Following a determination described in subdivision (a), a court may determine during the remand period ~~where the court has exercised its equitable discretion~~ to leave project approvals in place or in practical effect during that period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

D. Under existing law, a court has broad discretion to create an appropriate remedy for a CEQA violation. However, each case is different. In addition, we think it important to preserve a lead agency's discretion to determine how to achieve compliance. Therefore, we suggest the following changes:

~~(d) As to those portions of an 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. In general, where a court has required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in section 15088.5. In general, where a court has not required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in Section 15162.~~

7. Section 15126.2

Comments

A. We do not support including a definition of "wasteful, inefficient, or unnecessary consumption of energy" and prefer to allow the lead agency to establish a threshold of significance or environmental standard as it does with other environmental impacts.

B. Section 21100(b)(3) requires an EIR to include mitigation measures to reduce the wasteful, inefficient, or unnecessary consumption of energy. The third sentence of proposed 15126.2(b) seems to require consideration of a re-design of a project even if the project does not include the "wasteful, inefficient, or unnecessary consumption of energy."

C. The fourth sentence explains that the analysis is subject to the “rule of reason.” Since the “rule of reason” is generally applicable to an analysis undertaken pursuant to CEQA, we do not think it’s necessary to make this statement in this section and have some concerns about its negative implication. Further, we suggest (below) deleting the phrase “...shall focus on energy demand that is caused by the project” since a requirement for “causation” is an invitation to litigation, in our opinion.

Therefore we suggest the following changes to the draft:

(b) Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include the project’s energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to project design, other relevant considerations when determining whether a project may include wasteful, inefficient, or unnecessary consumption of energy, may include, among others, the project’s size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) ~~This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project.~~

8. Section 15155

Comments

A. In response to the “Question for stakeholders,” we suggest creating a separate section for this material and also suggest coordinating the language in the new section with Appendix G as it relates to water resources. In our experience, the local lead agency community has had some difficulty integrating the “water-demand project” statute and CEQA Guideline into the requirements for the contents of an EIR. Therefore, we think it best to make a clean separation between Section 15155 which requires a very particular type of consultation with water agencies from the contents of an EIR relating to a project’s impact on water supply.

B. We acknowledge and appreciate the effort to incorporate the court’s principles articulated in *Vineyard Area Citizens for Responsible Growth*. In the draft changes below, we are suggesting that one additional principle be included in the language.

C. We are suggesting below an a change to paragraph (4) which would delete the reference to “alternatives to the project” since the requirement to discuss “alternatives to the project” is discussed elsewhere.

Therefore we suggest the following changes to the draft:

(f) The degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan. An analysis of water supply in an environmental document shall include the following:

(1) Sufficient information regarding the project's proposed water demand and proposed water supplies to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.

(2) An analysis of the long-term environmental impacts of supplying water throughout the life of all phases of the project.

(3) An analysis of circumstances affecting the likelihood of the water's availability, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, salt- water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.

(4) ~~If~~ Where despite a full discussion the lead agency cannot ~~it is impossible to~~ confidently predict the availability of a ~~particular~~ an anticipated water supply, it shall conduct an analysis of alternative sources, including at least in general terms the environmental consequences of using those alternative sources, ~~or alternatives to the project that could be served with available water.~~

(5) When an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure curtailing development if the intended sources fail to materialize may play a role in the impact analysis.ⁱ

9. Section 15125

Comments

A. Although we note that the proposed Guideline stays close to the language in *Neighbors for Smart Rail*, we would like to suggest that the Guideline also include one other statement made by the Court: "Projected future conditions may be used as the sole baseline for impacts analysis if their use in place of measured existing conditions – a departure from the norm stated in Guidelines section 15125(a) – is justified by unusual aspects of the project or the surrounding conditions" (emphasis added at page 451).

B. We think that it would be helpful if the Guideline made a sharper distinction between when an "alternative baseline" is used in conjunction with the "normal" baseline; and when an "alternative baseline" is used in place of the "normal baseline.

Therefore we suggest the following changes to the draft:

§ 15125. Environmental Setting

(a) An EIR must include a description 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 environmental analysis is commenced, from both a local and regional perspective.~~ This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives. The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, a lead agency may define existing conditions by referencing historic conditions that are supported with substantial evidence. In addition to **an existing conditions baseline**, a lead agency may also use **a future conditions baseline** as a second baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) If a lead agency demonstrates with substantial evidence that **use of existing conditions a description of the physical environmental conditions in the vicinity of the project** would be either misleading or without informative value to decision-makers and the public, it may use a different baseline. **Use of a different baseline, including projected future conditions, must be supported by reliable projections based on substantial evidence in the record.**

(3) A lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.

10. Section 15126.4

Comments

A. We suggest that slightly different language more accurately reflects the case law that is the foundation of these draft changes.

B. The court in *City of Rialto* held that when mitigation measures cannot be fully formulated at the time of project approval, the lead agency may commit itself to devising them at a later date....(page 943).

C. The court in *City of Oakland* (citing *Sacramento Old City Association v. City Council*) held that “the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval” (page 906).

D. Since it is “impractical or infeasible” to determine the specific details of mitigation, we think it’s likely that a lead agency will have difficulty listing “the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan.” Without “specific details” we are concerned that this list will be a very general statement that will be challenged by project opponents for failure to be sufficiently specific. In addition, we are not sure what is intended by the phrase “mitigation plan.”

Therefore, we suggest the following changes to the draft:

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should shall not be deferred until some future time. ~~However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way. Deferral of the specific details of mitigation measures may be permissible when it is impractical or infeasible to fully formulate the details of such measures at the time of project approval, or where a regulatory agency other than the lead agency will issue a permit for a project that will impose mitigation requirements, provided that the lead agency has:~~

1. fully evaluated the significance of the environmental impact and explained why it is not feasible or practical to formulate specific mitigation at the time of project approval;

2. commits to **devising mitigation measures at a later date.**

~~3. lists the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan; and~~

4. adopts specific performance ~~standards criteria~~ that will be achieved by the mitigation measure.

11. Section 15357

Comments

We recognize the difficulty that the practitioner experiences in distinguishing between a ministerial and discretionary project for purposes of CEQA. Respectfully, we do not think the language proposed to be added to Section 15357 clarifies the distinction because (1) “shape the project” is not a phrase that is

commonly used to describe the actions of a local lead agency; and (2) use of the word “materially” adds a standard that may or may not apply to a discretionary project. In other words, a project might be “discretionary” even though a local agency is not able to respond “materially” to any of the concerns which might be raised in an environmental impact report. Finally, a negative declaration (as well as an EIR) is a document that raises concerns which a lead agency may be able to “materially respond” to.

Therefore, we suggest the following changes to the draft:

§ 15357. Discretionary Project

“Discretionary project” means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, ~~or~~ regulations, or other fixed standards. The key question is whether the approval process involved allows the public agency to **determine whether or not to require compliance with regulations or standards shape the project in any way** that could **materially** respond to any of the concerns which might be raised in an environmental **document impact report**. A timber harvesting plan submitted to the State Forester for approval under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code Sections 4511 et seq.) constitutes a discretionary project within the meaning of the California Environmental Quality Act. Section 21065(c).

If you have any questions regarding the League’s comments, please contact me at (916) 658-8264.

Sincerely,



Jason Rhine
Legislative Representative

ⁱ *Vineyard Area Citizens for Responsible Growth, Inc.* at page 432.