

## COMMENTS ON PROPOSED CEQA GUIDELINES REVISIONS

October 4, 2015

1. USE OF REGULATORY STANDARDS AS THRESHOLDS – The proposed changes merely allow the use of regulatory standards as thresholds and specifically require lead agencies to justify their use and, also, respond to any substantial evidence that they are inappropriate. This seems reasonable to me and probably is already allowed. The revisions also allow lead agencies to adopt standards as thresholds on an ongoing basis but include criteria for determining an adequate standard and, also, require that the adoption be justified.

Again, I think the proposals are reasonable and a lead agency would be upheld if they adopted a standard as a threshold now and met the criteria.

2. WITHIN THE SCOPE OF A PROGRAM EIR – There are a couple of problematic changes proposed here. However, the basic approach seems reasonable. The revisions propose clarifying language for when a later project is found to be within the scope of a program EIR. This finding needs to be based on facts and a number of examples are included.

One of the problems concerns the situation where a later project is found to not be within the scope of the program EIR. A new Initial Study is required but the following sentence is added to the current requirement: **That later analysis may be tiered from the program EIR as provided in Section 15152.** . This is confusing because it doesn't clarify that tiering can only be used for those significant impacts of the project that are within the scope. As written, the language seems to contradict the previous sentence. It should be deleted.

The second problem concerns the contents of a program EIR related to future projects. It states: A program EIR will be most helpful in dealing with **subsequent later** activities if it **provides a detailed description of planned activities**

**that would implement the program and** deals with the effects of the program as specifically and comprehensively as possible. However, often a later project is not known at the time the Program EIR is prepared but may still be consistent with it. The Depot Park Master Plan in the City of Santa Cruz is an example of this. It tiered off the Program EIR for the Beach/South of Laurel Area Plan but was not contemplated when that plan was approved. I think the proposed language could lead to challenges to tiered documents because they were not mentioned in the Program EIR, which will undercut the intention of the tiering process. It should be deleted.

3. NOT JUST TIERING – The change here seeks to clarify that tiering isn't the only method for streamlining the CEQA process. However, the proposed language seems to require that when other methods are used, tiering can't be. Are the various streamlining methods intended to be mutually exclusive? This seems to potentially limit the effectiveness of tiering.
4. TRANSIT ORIENTED DEVELOPMENT – The revisions here strengthen the role of specific plans. Transit oriented developments are exempted from CEQA if they meet certain pretty generous criteria and a specific plan has been approved. In addition, residential developments are exempted if consistent with a specific plan, which I think is the current rule. The revisions clarify that there is a 30 day statute of limitation. The revisions simply seem to codify current law.
5. EXISTING FACILITIES EXEMPTION - One of the proposed revisions deals with the issue of whether an exemption is allowable for an expansion of use. The current language prohibits such an exemption if the expansion is beyond what is in existence at the time of the determination. The proposed revision would substitute "historic" as follows: no expansion of **historic** use ~~beyond that existing at the time of the lead agency's determination.~~ This is justified on the basis of encouraging infill but seems overly broad. For example, the Davenport cement plant closed in 2010. It has been empty since that time. This revision

would allow an exemption no matter what reuse was proposed for the facility as long as it didn't expand on its historic cement plant activities. The intention here to recognize previous uses seems reasonable in certain circumstances but not always, which the proposed language would allow.

Also, the proposed revision is contradicted in the last sentence of the section which still refers to no expansion of existing uses. There should at least be time and scale limits imposed on the change.

The second proposed revision allows the addition of bike facilities on a street as an acceptable part of the exemption. This seems to respond to what happened to bicycle planning in San Francisco and seems reasonable.

## 6. UPDATING THE ENVIRONMENTAL CHECKLIST:

- a. SECTION I.b) – AESTHETICS – There are a number of problems with the proposed change in this section. It ties the degradation of visual character to existing regulations as follows: “Substantially degrade the existing visual character or quality of public views of the site and its surroundings in conflict with applicable zoning and other regulations.” The rationale for the requirement tying impact to existing regulations is that it is difficult to determine the significance of visual impacts and that most jurisdictions have design guidelines that deal with this issue. While it is probably true that many cities and counties have design guidelines, often they are so general as to provide little or no guidance.

In addition, to the extent that the jurisdiction doesn't want to deal with this issue through CEQA, their design guidelines can be eliminated. Also, under the current Guidelines, nothing prevents a jurisdiction from using its design guidelines as part of the CEQA process.

Finally, and probably most important, CEQA doesn't just apply to cities and counties. State agencies and special districts often do not have design guidelines. The proposed change would theoretically allow their projects to significantly degrade the existing visual character or quality of the site or area without it being considered a significant impact. This seems to run counter to CEQA objectives.

While determining significant visual impacts is difficult, it is not impossible and not necessarily arbitrary. This proposed change should be deleted.

- b. SECTION III – AIR QUALITY – The proposed revisions here seem reasonable but the lack of any definition of “substantial,” used three times in revised subsection e), concerning odors, dust and haze, could cause confusion – substantial emissions, duration, and number of people affected.
- c. SECTION V.b) – ENERGY – This subsection seems to make the incorporation of renewable energy or energy efficiency measures into a project a significant impact. Shouldn't the lack of such measures be considered a significant impact?
- d. SECTION IX.b) – LAND USE AND PLANNING – This subsection revises the provision whereby a conflict with a land use plan, policy, or regulation would be considered a significant impact. On the one hand, the change, which reads “Cause a significant environmental impact due to a conflict” with any plan, etc., seems meaningless. Wouldn't the fact that the project would cause a significant environmental impact be dealt with elsewhere in the Checklist?

On the other hand, the current language limits the concern to agencies with jurisdiction over the project. The proposed revision expands the provision to any agency that adopted a

plan to avoid or mitigate an environmental effect, which seems overly broad.

Identifying conflicts with environmentally related plans and policies is a worthwhile function CEQA plays. I would suggest the following revision: “Cause a significant conflict with any land use plan, policy or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating an environmental effect.”

- e. SECTION XIII.c) – POPULATION AND HOUSING – Adding consideration of the jobs housing balance to the Checklist is a positive and important change. While discussion of this issue currently occurs in many environmental documents, it should be included in the Checklist.
  - f. SECTION XVI – TRANSPORTATION – The proposed revisions seem reasonable.
7. REMEDIES – The proposed revisions seem to simply incorporate case law. In part, they make clear to the courts and lead agencies what options exist when an environmental document is found inadequate.
8. ENERGY IMPACTS – The proposed revisions add a section to the guidelines requiring analysis of the energy impacts of the full project – i.e. to include traffic generation impacts. However, it is not meant to include lifecycle impacts. The question is asked as to whether the Guidelines should include a definition of “wasteful, inefficient or unnecessary consumption of energy,” and, if so, what should it be. It might be reasonable to tie the definition to the adoption by the lead agency of a climate action plan that contains specific programs and projects for reducing energy use and assuring energy efficiency.

9. WATER SUPPLY ANALYSIS – The proposed revisions incorporate into the Guidelines the requirements from the Vineyards decision. In my view, the Guidelines should make clear that a feasible mitigation measure for a project where sufficient water is unavailable in the short or the long term, is not to implement the project.
10. TECHNICAL AMENDMENTS – BASELINE – The proposed revisions simply incorporate the determinations from recent Supreme Court decisions on when historic and future conditions can be used in determining baseline conditions.
11. DEFERRAL OF MITIGATIONS – The proposed revisions clarify that lead agencies “shall” not defer mitigations, instead of the current “should.” The revisions then list the circumstances under which “details” of mitigation may be deferred. One of the requirements is that the lead agency “commits to mitigation.” (15126.4(B)2.) Unfortunately, it isn’t clear what this means. Since CEQA generally requires a commitment to mitigation, this is redundant.

The problem is compounded by another requirement (15126.4(B)4.) which requires that the lead agency “**adopts specific performance standards that will be achieved by the mitigation measure.**” What isn’t clear is what will happen if the project will not achieve the performance standards. It’s implied by the requirement to commit to mitigation that the project would not go forward if the performance standards aren’t achieved, but this isn’t clearly stated. It should be made explicit.

Without this clarification, the revisions create a significant loophole and a stimulus for court challenges. Perhaps the following language could be added to (B)4.: “**adopts specific performance standards that will be achieved by the mitigation measure in order for the project to go forward.**”

12. RESPONSES TO COMMENTS – The revisions deal with lead agency responsibility in the world of the Internet and social media.

The proposed revisions implement recent court decisions and seem reasonable.

13. MINOR TECHNICAL AMENDMENTS – PRE-APPROVAL

AGREEMENTS – The revisions here respond to the Tara decision and specify circumstances where a lead agency can act on a project prior to CEQA review. Specific limitations on these actions are included in order to prevent the lead agency from committing to a project prior to CEQA review. The limitations seem reasonable to me (no vested rights, a commitment to CEQA review, no binding of any party on the project prior to CEQA compliance, no restriction on mitigations or alternatives).

14. LEAD AGENCY BY AGREEMENT – This revision is really minor.

15. COMMON SENSE EXEMPTION – The proposed revisions substitute “common sense exception” for “general rule” in Section 15061(b)3. While I don’t think either term means much, the substance of the provision hasn’t been changed.

16. PREPARING AN INITIAL STUDY – The proposed revision simply clarifies that the preparation of initial studies can follow the same procedure as that for preparing an EIR. As I understand, the revision makes clear that a lead agency can prepare an initial study either directly or under contract.

17. CONSULTATION WITH TRANSIT AGENCIES – The Guidelines currently require that for projects with statewide, regional, or areawide significance, lead agencies must consult with “**transportation planning agencies and public agencies which have transportation facilities within their jurisdictions.**” The proposed revision adds a sentence to also require consultation with “**public transit agencies with facilities within one-half mile of the proposed project.**” Since public transit agencies would also be “public agencies which have transportation facilities,” the only change

here would be where a public transit agency is within half a mile of the project but outside of the jurisdiction.

Why just limit consultation to public transit agencies within half a mile of the project? I think it would be preferable to add at the end of the existing language “or within one-half mile of the proposed project.

18. CITATIONS IN ENVIRONMENTAL DOCUMENTS – The revisions clarify that that the lead agency needs to include the addresses only for documents incorporated by reference in a CEQA document, not also for those simply cited. This seems reasonable to me.

19. POSTING NOTICES WITH THE COUNTY CLERK – This revision requires that Notice of Preparation be filed with the County Clerk. Does this create a new cause of action if the lead agency fails to do this?

I’m surprised that no public notice is required, as I know that many lead agencies also provide this. This change seems to better conform to the law’s requirements but, since one of the objectives of CEQA is to encourage public participation, I think it would be reasonable to require publication of the NOP.

20. TIME LIMITS FOR NEGATIVE DECLARATIONS – The revision proposes to allow for a 90 day extension to the 180 time limit for Negative Declarations with the approval of the lead agency and the applicant. This permits the same time extension as is already allowed for EIRs and seems reasonable.

21. PROJECT BENEFITS – While this revision seems minimal, it may not be. The proposal would add the discussion of project benefits to the project objectives section of the project description as follows: “The statement of objectives should include the underlying purpose of the project **and may discuss the project benefits.**” Since project objectives are the basis for determining feasible alternatives, won’t this addition allow lead

agencies to find alternatives to the project infeasible if they don't provide the same or similar benefits? The change seems to allow for a significant reduction in feasible alternatives. Since the current language is already used to include project benefits, I don't think this revision is either necessary or desirable.

22. JOINT CEQA/NEPA DOCUMENTS – This revision simply encourages the use of a Memorandum of Understanding when preparing joint documents.
23. USING THE EMERGENCY EXEMPTION – The proposed revisions make it easier to justify an emergency exemption by allowing for a “reasonable amount of planning” for the emergency repairs, if the time for environmental review would create a public health risk, and **“if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility.”** I think these proposals create a significant loophole for lead agencies to use to avoid CEQA review.

As a minimum, there should be a definition for a reasonable amount of planning. Is it two months? Two years? Can grants to fund the project be applied for during this period?

In terms of determining the public health risk, the lead agency should be required to provide substantial evidence documenting the risk.

Finally, I don't see why CEQA review should be avoided when a project is undertaken at an existing facility where there is no emergency simply because a project was done at a “similar” facility where there was an emergency. The facility and the project may be similar but the environmental impacts may be significantly different. This revision should be dropped or better justified.

24. WHEN IS A PROJECT DISCRETIONARY? – The revisions propose two changes to Section 15357. First, the current section states that a project isn't discretionary if the lead agency “merely” determines

whether the project conforms to statutes, ordinances, or regulations. The proposed revision would add “fixed standards” to this list. It isn’t clear what this addition applies to and, therefore, I think it creates confusion. How are fixed standards different from regulations? As a minimum the term should be defined and distinguished from “regulations.”

The second change adds the following: “The key question is whether the approval process involved allows the public agency to shape the project in any way that could materially respond to any of the concerns which might be raised in an environmental impact report.” The current language defines a discretionary project as one where the lead agency must “exercise judgment or deliberation.” It seems to me that the key question is whether the lead agency must exercise judgment or deliberation. It isn’t clear what it means to “shape” the project based on the environmental document. How does this alter the current requirement? If it doesn’t, why add language that could just cause confusion and lawsuits?

25. CONSERVATION EASEMENTS AS MITIGATION – The proposed language incorporates the court case that allowed conservation easements as mitigation for the loss of agricultural land. However, the revision would allow it for all “resources.” In my view, this change has three problems.

First, it expands the acceptable use of conservation easements beyond what the court allows.

Second, it applies a controversial policy statewide before the Supreme Court has determined its validity. While there are circumstances where conservation easements to preserve resources would provide meaningful mitigation, there are other situations where this is not the case. For example, placing a conservation easement on farmland with poor quality soil far from urban development and not threatened by it as a mitigation for the loss of high quality farmland, does not seem like an adequate mitigation.

Third, it isn’t clear whether a conservation easement for project’s significant impact on one resource, say prime agricultural land, could be mitigated by protecting another resource, say a wetland. Are the resources interchangeable?

The proposed revision is too broad and should not be included until there are more court cases that clarify the situations where conservation easements as mitigation are acceptable.