



California Council for Environmental and Economic Balance

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October 12, 2015

Christopher Calfee, Senior Counsel
Holly Roberson, Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

RE: Preliminary Discussion Draft of Amendments to the CEQA Guidelines dated
August 11, 2015

Dear Mr. Calfee and Ms. Roberson:

On behalf of the California Council for Environmental and Economic Balance ("CCEEB"), I write to thank you for the opportunity to submit comments on the Office of Planning and Research's ("OPR") August 11, 2015, Preliminary Discussion Draft of Amendments to the CEQA Guidelines ("Discussion Draft"). CCEEB works to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

As you requested in the "Tips for Providing Effective Input" portion of the Discussion Draft, CCEEB's forthcoming comments will be specific, factual, only be made on issues that are covered within the scope of the proposed changes and supported by legal authority. Overall, CCEEB finds OPR's Discussion Draft to be excellent. It is largely consistent with statutes and case law, and has achieved OPR's expressed desire to improve the efficiency and effectiveness of the CEQA process.

1. **Appendix G**

CCEEB Comment

Overall, CCEEB strongly supports OPR's extensive revisions of, and substantial improvements to, the Appendix G Checklist.

Biological Resources

However, we respectfully request you reconsider CCEEB's previous proposal to revise CEQA Guidelines Appendix G, Section IV(a) re: Biological Resource Impacts as follows (added text underlined, deleted text ~~struck-out~~):

- (a) ~~Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of~~

Fish and Game or U.S. Fish and Wildlife Service? Cause, either directly or through habitat modifications, any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service to: drop below self-sustaining levels; have a community or population eliminated; or have a substantial reduction in the species number or range?

We continue to believe that this proposed amendment comports with the appropriate standards of significance for biological resource impacts in CEQA Section 21001(c) and CEQA Guidelines Section 15065(a)(1).

Jobs/Housing Fit

The Discussion Draft adds a new question to the CEQA Guidelines Appendix G, Section XIII on Population and Housing: “Would the project: (c) Result in a substantial imbalance in regional jobs/housing fit?” While not disagreeing with the intent of this addition to capture environmental impacts that may result from such imbalance, we are concerned that the terms “substantial imbalance” and “jobs/housing fit” are not defined and that this question, as drafted, does not provide a usable standard to guide lead agencies. As the Discussion Draft acknowledges (p. 43), the imbalance in jobs and housing is a concept drawn from planning scholarship. It is not a familiar concept under CEQA or other environmental laws; nor is it readily analogous to other Appendix G standards, such as numeric standards for determining significant quantities of air pollutant emissions, or even the qualitative standard of “compatibility” used in analyzing consistency with land use plans. *See, e.g., San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678. The Discussion Draft’s explanatory text cites planning publications that discuss the issue in general terms, but do not contain, for example, regulatory standards that would qualify as significance thresholds under proposed Guidelines Section 15064.7. The existing Appendix G Section XIII checklist questions on Population and Housing are focused on the physical environmental consequences of socioeconomic effects: would the project induce substantial population growth, or displace existing housing and residents, necessitating construction of replacement housing elsewhere? *See also* CEQA Guidelines, Appendix G, § X (a): would the project physically divide an established community? These Appendix G questions are consistent with CEQA Guidelines § 15064(e), which provides that socioeconomic impacts are not themselves, but may contribute to, environmental impacts. We suggest that OPR revise the proposed checklist question to identify specific environmental consequences, such as necessitating construction of replacement housing or an increase in vehicle-miles-traveled (consistent with the SB 743 CEQA Guidelines update that OPR is also developing), that could render an imbalance in “jobs/housing fit” significant in the CEQA sense.



2. Section 15004 - Pre-Approval Agreements

CCEEB Comment

The Discussion Draft proposes new subsection (b)(4) in CEQA Guidelines Section 15004(b), incorporating the California Supreme Court's decision in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, which clarified the limits on a lead agency's ability to enter into a binding agreement to carry out a project prior to completing CEQA review. At the same time, OPR proposes to delete existing language in subsection (b)(2)(A) providing that "agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance." The explanatory text in the Discussion Draft (p. 110) states that "the last clause of subdivision (b)(2)(A) would be deleted because the circumstances it describes would be encompassed in the new subdivision (b)(4)" incorporating *Save Tara*.

CCEEB urges OPR to reconsider and retain the existing language in Section 15004(b)(2)(A). We do not believe that the intent is to alter lead agencies' authority under existing statutory and case law – including *Save Tara* – to designate sites or enter into land acquisition agreements such as option agreements, appropriately conditioned on CEQA compliance. We agree that there is some overlap with new subsection (b)(4). Had this language not previously appeared in subsection (b)(2)(A), it might not now be necessary to add it; but that is not the situation here. When existing Guidelines language is deleted, the change can be seized on by commenters and litigants to argue that whatever was authorized by prior language is no longer permissible. Thus, deletions that are not needed to reflect changes in law should be approached with caution, to avoid calling settled law into question and triggering unnecessary litigation. In particular, project opponents could assert that the deletion reflects OPR's determination that preferred site designations or land acquisition agreements are *never* permitted prior to CEQA compliance, because such designations and agreements inherently commit the agency to the project or restrict the agency's consideration of alternatives including the no project alternative. *Save Tara* did not go that far. Moreover, subsequent to *Save Tara*, *Golden Gate Land Holdings LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353 upheld the appropriateness of pre-CEQA land acquisition agreements and even initiation (but not completion) of condemnation without CEQA review, so long as CEQA review is completed before undertaking any physical changes in the environment. In doing so, the *Golden Gate* court expressly relied on the language that OPR now proposes to delete from CEQA Guidelines 15004(b)(2)(A), without finding it problematic under *Save Tara*. Indeed, had the language on which the court relied been deleted, the case might have gone the other way. Accordingly, in our view, it is preferable to retain the positive statement of agency authority for pre-CEQA site designation and land acquisition agreements.



3. **Section 15051 - Agreement Among Agencies to Designate the Lead Agency**

CCEEB Comment

CCEEB supports OPR's proposal to clarify that when two or more public agencies meet the criteria for the lead agency, the first agency to act will normally be the lead agency, but the agencies may agree to designate one of them to act as the lead agency.

4. **Section 15063 - Clarifying Options for Preparing an Initial Study**

CCEEB Comment

OPR's proposal that the "lead agency may use any of the arrangements or combination of arrangements described in Section 15084(d) to prepare an initial study" is excellent and has CCEEB's full support.

5. **Sections 15064 and 15064.7 - Use of Regulatory Standards as Thresholds of Significance**

CCEEB Comment

OPR's Discussion Draft provides that a lead agency may rely on "environmental standards" of regulatory agencies as significance thresholds under CEQA, provided that the lead agency explains how the standard will avoid or reduce project impacts to insignificance. CCEEB strongly supports this proposal. As recognized in *Communities for a Better Environment v. California Resources Agency* (2001) 103 Cal.App.4th 98: "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." 103 Cal.App.4th at 111; *see also Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906. Moreover, as the Discussion Draft explains, the proposed language is consistent with the leading case, *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099. In that case, the court concluded that an impact "normally will be determined to be less than significant" if in compliance with an applicable regulatory standard, but the lead agency must also consider any substantial evidence to the contrary. *Id.* at 1108; *see also Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344. However, in order to ensure that OPR's proposal strikes the right balance between the appropriate presumption of reliance on regulatory standards and the opportunity for commenters to rebut the presumption, we suggest the following additional language to clarify the role of the presumption when supported by substantial evidence. *See Rominger v. County of Colusa*, 229 Cal.App.4th 690, 717-718.



Section 15064 (b)(2) (added text underlined)

“(2) Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining the significance of an impact and, when supported with substantial evidence, are entitled to a presumption of sufficiency. When relying on a threshold, the lead agency should explain how compliance with the threshold indicates that 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, there may still be a significant environmental effect from a project.”

Section 15064.7(d) (added text underlined)

“(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. When supported by substantial evidence, there is a presumption of sufficiency when a public agency relies on an environmental standard as a threshold of significance. For the purposes of this subdivision, an ‘environmental standard’ is a rule of general application that is adopted by a public review process and that is all of the following:”

We also support the proposed language in Guidelines Section 15064.7(d) stating that a public agency may either “adopt or use” environmental standards as significance thresholds. In many cases, lead agencies do not formally adopt significance thresholds in ordinances or regulations, but rather informally utilize thresholds drawn from regulatory standards or other sources such as guidance documents or previous CEQA documents. As provided in the Discussion Draft, the lead agency should be entitled to use regulatory standards for this purpose, where supported by substantial evidence, without requiring formal adoption.

6. Sections 15087 and 15088 - Data Dumping

CCEEB Comment

CCEEB believes that OPR’s proposal is a significant step forward in alleviating the burden on lead agencies from the practice of “data dumping” comments electronically. Oftentimes, massive documents that include links to other documents that may not be readily available are attached to comments. As such, CCEEB supports this proposed amendment to the Guidelines.

7. Section 15125 - Future Baseline

CCEEB Comment

Incorporating Neighbors for Smart Rail

As proposed in the Discussion Draft, under appropriate circumstances, a lead agency may utilize projected future conditions as the environmental setting or baseline for CEQA impact analysis. CCEEB endorses this change, which codifies the California Supreme Court's holding in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439. However, the proposed language is unclear in distinguishing circumstances in which a future conditions baseline may be utilized *in addition to* an existing conditions baseline (Section 15125(a)(1)) or *instead of* an existing conditions baseline (Section 15125(a)(2)).

The last sentence of Section 15125(a)(1) incorporates one key conclusion in *Neighbors*: “*In addition to* existing conditions, a lead agency may also use a second baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record” (emphasis added). However, in some situations, presenting both an existing conditions and a second baseline of projected future conditions may be uninformative and misleading. In *Neighbors*, an existing conditions baseline in the EIR for a major transit infrastructure project would have been misleading since the project will take years to fully fund and construct, by which time existing conditions will have long since changed; instead, the better baseline consisted of anticipated future conditions at the time transit service will commence. Accordingly, the Court concluded, in such cases it is appropriate to use a future conditions baseline as the *sole* baseline. To OPR's credit, it appears to us that the Discussion Draft intends to capture this distinction in Section 15125(a)(2), which reads: “If a lead agency demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public, *it may use a different baseline*” (emphasis added). However, we are concerned that the reference to “a different baseline”, without more, is unclear and may lead to confusion. Some may read (a)(2) to endorse the use of *any* other baseline, if existing conditions would be misleading or uninformative; while others may read (a)(1) and (a)(2) together as requiring “a different baseline” to be presented “in addition to” the existing conditions baseline. We believe it is preferable to expressly and unambiguously incorporate the holding of *Neighbors*, by revising 15125(a)(2) to read: “If a lead agency demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public, *it may use a future conditions baseline in lieu of an existing conditions baseline.*”



Incorporating Citizens for East Shore Parks

While the Discussion Draft proposes revisions to reflect the *Neighbors for Smart Rail* decision, it does not address another important baseline issue under recent CEQA case law. In CCEEB's August 30, 2013, response to OPR's solicitation of suggested revisions to the CEQA Guidelines, CCEEB proposed adding a new subsection (f) to CEQA Guidelines Section 15125 to read as follows:

For renewals and extensions of authorizations for an existing facility, structure or activity, the existing facility, structure or activity is considered part 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 the environmental analysis is commenced. The continued presence and effects of such existing facilities, structures or activities without change, shall not be considered to cause any potentially significant environmental impact or contribute to any potentially significant cumulative impact.

Our view is this provision would incorporate the holding in *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, which concluded that the current presence and continuing effects of an existing facility are properly considered as baseline conditions for purposes of CEQA analysis. *See also Fat v. Sacramento* (2002) 97 Cal.App.4th 1270, 1280 and *Riverwatch v. San Diego* (1999) 76 Cal.App.4th 1428, 1452–1453, which determined that even unpermitted or otherwise illegal existing conditions constitute part of the baseline, since “any illegal activities affecting the baseline environmental condition are best addressed by enforcement agencies” rather than through the CEQA process. *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233.

As the Discussion Draft notes (p. 93), advocates continue to urge that the baseline should exclude the effects of past illegal activities, notwithstanding cases such as *Fat*, *Riverwatch* and *Banning* that reached the opposite conclusion. Similarly, there are continued disputes over the inclusion of ongoing existing activity in the baseline, as reflected in recent cases such as *North Coast Rivers Alliance v. Westlands Water District* (2014) 227 Cal.App.4th 832, 872–873 (“Where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline.... This baseline principle means that a proposal to continue existing operations without change would generally have no cognizable impact under CEQA”) and *Center For Biological Diversity v. Department of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 248 (“CEQA and case authority hold the baseline for a continuing project is the current environmental condition including the project, even if the project has not undergone prior environmental review”).

Accordingly, to confirm and clarify the appropriate baseline standards established in case law, we suggest that the proposed Guidelines incorporate the holding of *Citizens for East Shore Parks* as well as that of *Neighbors for Smart Rail*.



8. Section 15126.4 – Deferred Mitigation

CCEEB Comment

The Discussion Draft proposes amendments to Guidelines Section 15126.4 clarifying circumstances in which deferral of specific details in mitigation measures may be permissible. While CCEEB generally agrees with the proposed revisions, we are concerned that the language proposed is more restrictive than case law suggests, and will unnecessarily complicate the analysis of mitigation measures required by CEQA. In particular, Section 15126.4(a)(1)(B)(3) and (4) provide that, to justify deferral of mitigation details, a lead agency must *both* list mitigation options to be considered *and* adopt specific performance standards. This language is inconsistent with OPR’s explanatory text (p. 97, emphases added):

Further, OPR proposes to clarify that when deferring the specifics of mitigation, the lead agency should *either* provide a list of possible mitigation measures, *or* adopt specific performance standards. The first *option* is summarized in *Defend the Bay v. City of Irvine, supra*. In that case, the court stated that deferral may be appropriate where the lead agency “lists the alternatives to be considered, analyzed and possibly incorporated into the mitigation plan.” . . . *Alternatively*, the lead agency may adopt performance standards in the environmental document, as described by the court in *Rialto Citizens for Responsible Growth v. City of Rialto, supra*.

We believe that the explanatory text is correct and the proposed language should be modified accordingly. That these are alternative options, rather than both being required, is consistent with case law. The leading case on deferred mitigation, *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 418, approved a performance standard for noise mitigation (without a list) and a list of possible mitigation measures for traffic (without a performance standard). 47 Cal.3d at 418. In *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1030, the court cited *Laurel Heights* in finding sufficient commitment to parking mitigation through a list of mitigation options. *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, cited in the Discussion Draft, relied in turn on *Sacramento Old City Assn.* in finding sufficient to commitment to mitigation by requiring the developer to consult with regulatory agencies, obtain permits and adopt seven itemized avoidance measures. Other courts have similarly found that either approach is sufficient; *e.g., Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793-794, approved a mitigation measure that included multiple alternatives but not a specific performance standard; *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1118-19 approved a mitigation measure committing to a performance standard, without a list of alternatives; and *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 411 approved a mitigation measure with specific criteria, without a list of options. *San Joaquin Raptor Rescue Center v. County of Merced*, (2007) 149 Cal.App.4th 645, 670, discusses performance standards and lists of mitigation measures as alternative options: “Although a generalized goal of maintaining the integrity of vernal pool habitats is stated (see mitigation measure 3.6-3b), no specific criteria or standard of performance is committed to in the EIR. Nor does the EIR present several alternative mitigation



measures, in which a selection of one or more of the described options is to be made after further study.” See also *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236 quoting *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 915-916 (“Impermissible deferral of mitigation measures occurs when an EIR puts off analysis or orders a report without *either* setting standards *or* demonstrating how the impact can be mitigated in the manner described in the EIR”) (emphasis added);

The only case that required both a list of measures and a performance standard is *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70. In that case, the court stated that an EIR can defer mitigation where the EIR gives the lead agency “a choice of which measure to adopt, so long as the measures are coupled with specific and mandatory performance standards to ensure that the measures, as implemented, will be effective.” *Id.* at 94. However, to the extent it suggests that both are always required, this formulation is inconsistent with other case law discussed above. Moreover, the *CBE* case has limited precedential value in this specific context. As the court emphasized, the EIR at issue had difficulty addressing the then-novel problem of greenhouse gas (GHG) mitigation with sufficient certainty. Under the circumstances, the court found that the requirement to mitigate to a net-zero increase in GHG emissions was a generalized goal rather than a specific performance standard. Moreover, the court was unsure that a net-zero goal could be achieved, concluding that the list of mitigation options must be “coupled with” demonstrably achievable performance standards. *Id.* at 94 (“the perfunctory listing of possible mitigation measures set out in Mitigation Measure 4.3-5e are nonexclusive, undefined, untested and of unknown efficacy. The only criteria for ‘success’ of the ultimate mitigation plan adopted is the subjective judgment of the City Council”). For these reasons, this case does not stand for the broad proposition that both a list and performance standards must always be required, where there is no reason to doubt the efficacy of commonly used mitigation measures on the list.

Accordingly, CCEEB recommends that the text of proposed amended Guidelines § 15126.4 be revised to state that either a mitigation menu or performance standard is sufficient.

9. Section 15222 - Memorandum of Understanding for Joint CEQA/NEPA Documents

CCEEB Comment

CCEEB supports OPR’s proposal to add a provision authorizing the CEQA lead agency to enter into a Memorandum of Understanding with the NEPA lead agency for all joint CEQA/NEPA documents.



10. Section 15301 - Use of the Existing Facilities Categorical Exemption

CCEEB Comment

CCEEB supports OPR's proposed amendment to the Guidelines. We believe it incorporates the holding in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, regarding the level of historic use, so the the exemption cannot be used to expand the use of a facility beyond its historic use (rather than use at the time of the lead agency's determination).

In conclusion, CCEEB supports OPR's intent to improve the CEQA Guidelines and provide an environmental review process that is more efficient, effective and meaningful for agencies, applicants and the public. We appreciate the time and efforts required to develop revisions to the CEQA Guidelines and are pleased to have the opportunity to work with OPR on these issues. The level of due diligence and outreach you both continue to sustain is admirable and greatly appreciated. If you have any comments or questions concerning the suggested revisions detailed above, please contact me or Jackson R. Gualco, Kendra Daijogo or Mark Theisen of The Gualco Group, Inc. at (916) 441-1392.

Thank you for your consideration of our comments.

Sincerely,



GERALD D. SECUNDY
President

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