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January 31, 2014

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

Re: 2014 CEQA Guideline Update

Dear Mr. Calfee:

We are writing in response to the notice of Possible Topics to be Addressed in the 2014 CEQA Guideline Update, released on December 30, 2013.

Section 15061 (Review for Exemption) and Appendix E: Notice of Exemption

We agree that the phrase "general rule" in subsection 15061(b)(3) should be replaced with "commonsense exemption," to be consistent with the Supreme Court's *Muzzy Ranch* opinion, but we also suggest that subsection (b)(3) should be further amended, as follows:

The activity project is covered by the general rule commonsense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question project may have a significant effect on the environment, the activity project is not subject to exempt from CEQA.

As counsel for the Solano County Airport Land Use Commission in the *Muzzy Ranch* litigation, we are very familiar with how the Supreme Court interpreted subsection (b)(3) in its opinion. In its current form, subsection (b)(3) is inconsistent with subsection (a) of that section and with the three-tier analysis described by the Supreme Court in *Muzzy Ranch*.

Although it is not cited in the Supreme Court's *Muzzy Ranch* opinion, the CEQA Process Flow Chart presented in Appendix A of the CEQA Guidelines was an important reference both

in the briefs and during oral argument of that case. The three-tier analysis described by the Supreme Court in its opinion directly reflects the first three boxes of the Flow Chart. As shown in the Flow Chart and described in subsection 15061(a), the lead agency moves on the second tier of the analysis and reviews for exemption only after it has first determined that the activity is a project subject to CEQA. Therefore, the current use in subsection (b)(3) of the term “activity” rather than “project,” and of the phrase “not subject to” rather than “exempt from,” is incorrect.

Because review for the commonsense exemption is to be conducted as part of the second tier rather than the first tier of the lead agency’s CEQA analysis, we also request that the sample Notice of Exemption form in Appendix E of the Guidelines be revised to include a checkbox for the commonsense exemption.

Sections 15063, 10572, 15083, 15088, and 15060.5 (Administrative Drafts)

The preliminary list of topics indicates some sections of the Guidelines may be updated to clarify that a lead agency may share an administrative draft of an initial study or an EIR with the project applicant in order to ensure the accuracy of the project description and mitigation measures. We believe that a lead agency’s authority to share an administrative draft with the project applicant is well-recognized and requires no clarification.

What does require clarification, however, is whether the lead agency’s action of sharing an administrative draft with the project applicant makes that document a draft “that [has] been released for public review” for purposes of section 21167.6, subdivision (e)(10), of the Public Resources Code. It is our view that an administrative draft of an environmental document has not been released for public review if it has been shared with the project applicant for purposes of ensuring the accuracy of the document. Sometimes concerns for accuracy go beyond project description and mitigation measure, and extend to other matters such as the feasibility of project alternatives.

Rather than adding separate but parallel provisions to sections 15063 (Initial Study) and 15083 (Early Public Consultation on DEIR), and possibly to sections 15072 (Negative Declaration or Mitigated Negative Declaration) and 15088 (Response to Comments), we would prefer a single provision clarifying that the sharing of an administrative draft of any type of environmental document with the project applicant for purposes of ensuring the accuracy of that document does not constitute a release of that draft document for public review. We note that the term “environmental document” is already defined in section 15361.

Because updates to section 15060.5 (Pre-application Consultation) are already being considered, we suggest that the title of that section be amended to encompass both pre-application and post-application consultation, and that a new subsection (c) be added to that section, as follows:

(c) Prior to releasing an environmental document for public review, the lead agency may share an administrative draft of such document, or portion of such document, with the project applicant for the purpose of ensuring the accuracy of the document. If an administrative draft document shared with the project applicant is not released for public review, the lead agency is not required to retain a copy of such administrative draft in its files on the project.

Sections 15064 and 15125 (Baseline)

As described in subsection 15125(a), the “baseline” is the set of physical environmental conditions against which a lead agency shall determine the significance of a project’s impacts. A lead agency is required to assess the significance of a project’s impacts at two separate points in the CEQA process: at the initial study phase, when determining whether to prepare a negative declaration or an EIR, and possibly a second time during preparation of an EIR.

Based on the definition of “environment” provided in section 21060.5 of the Public Resources Code and the use of that term in subsections 21100(a) and 21151(b) to describe when preparation of an EIR is required, we believe it would be inappropriate for a lead agency to use an alternative baseline analysis when assessing the significance of a project’s impacts at the initial study phase. We therefore request that section 15064 either be left as is or be amended to expressly exclude the use of an alternative baseline at the initial study phase of the CEQA process.

In *Neighbors for Smart Rail* (2013) 57 Cal.4th 439, 457, the Supreme Court held that a lead agency could “omit an analysis of the project’s significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future,” only when the agency could “justify its decision by showing an existing conditions analysis would be misleading or without informational value.” To reflect this Supreme Court holding in the Guidelines, we recommend that subsection 15125(a) be amended, as follows:

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 EIR may utilize an alternative baseline consisting of environmental conditions projected to exist in the future if the lead agency determines, based on substantial evidence provided in the EIR, that an existing conditions analysis would be misleading or

without informational value. The description of the existing environmental setting and any alternative baseline utilized in the EIR shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

Given the Supreme Court's holding in *Neighbors for Smart Rail* that a lead agency may, in appropriate circumstances, use an alternative baseline in place of an existing conditions baseline, subsection 15125(e) of section is inconsistent with that holding. We therefore request that subsection (e) be deleted.

There are a number of judicial opinions discussing how a lead agency should address existing illegal or unpermitted activity when conducting CEQA analysis. See *Communities for a Better Environment* (2011) 48 Cal.4th 310, 321 at fn. 7, and *Citizens for East Shore Parks* (2011) 202 Cal.App.4th 549. These judicial opinions hold that existing illegal or unpermitted activity constitutes part of the existing baseline conditions, which means that existing activity is a past project rather than a component of the current project. Therefore, we believe a lead agency already has sufficient authority to address the environmental impacts of existing illegal or unpermitted activity as part of its cumulative impacts analysis for a proposed project. To clarify that a lead agency does in fact have such authority, we request that subsection 15064(h)(1) be amended, as follows:

When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. "Cumulatively considerable" means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects. The incremental effect of a proposed project may be presumed to be cumulatively considerable if existing illegal or unpermitted activity is occurring on the project site, such existing activity is contributing the cumulative impact, and such existing activity will be permitted or authorized to continue as part of the project approval action.

Section 15125 (Consistency with Adopted Plans)

Subsection (d) of section 15125 implies that adopted plans are part of the environmental setting and that any inconsistency with an adopted plan is an environmental impact. As stated by the Supreme Court, a long line of judicial decisions hold "that the impacts of a proposed project

are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by an [adopted] plan or regulatory framework.” See *Communities for a Better Environment*, 48 Cal.4th at pp. 320-321, fn. 6, see also *Environmental Planning & Information Council* (1982) 131 Cal.App.3d 350, 354 [“CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan; it concerns itself with the impacts of the project on the environment, defined as the existing physical conditions in the affected area.”]. We therefore suggest that subsection 15125(d) be amended, as follows:

The In addition to a description of the environmental setting, the EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans, regional blueprint plans, plans for the reduction of greenhouse gas emissions, habitat conservation plans, natural community conservation plans and regional land use plans for the protection of the Coastal Zone, Lake Tahoe Basin, San Francisco Bay, and Santa Monica Mountains. Any inconsistency between a proposed project and an adopted plan is not itself an environmental impact, but adopted plans may identify applicable thresholds of significance and should be considered by the lead agency when evaluating whether a direct or indirect impact of a proposed project on the physical environment would be significant.

Section 15141 (Page Limits for an EIR)

The page limits for an EIR recommended in this section parallel the Council on Environmental Quality’s recommendations for an EIR prepared pursuant to NEPA. See 40 C.F.R. § 1502.7. A leading treatise on CEQA notes that these page limits are frequently ignored, and that lead agencies often prepare “lengthy, detailed, and complex EIR[s] that decision-makers will not read and members of the public will not understand.” The treatise further notes that “The legal adequacy of an EIR depends on whether it addresses significant environmental issues and the quality of its analysis of those issues, not the quantity of information that is provided.” 1 *Practice Under the California Environmental Quality Act* (Cont.Ed.Bar. 2013) § 11.19, p. 545.

Section 15140 requires EIRs to be written in a format “that decision makers and the public can rapidly understand,” while section 15151 requires EIRs to provide “a sufficient degree of analysis” to enable decision makers to intelligently take account of environmental consequences. We believe the page limits recommended in section 15141 strike an appropriate balance between these two requirements. We request that section 15141 be amended to

emphasize that the existing recommended page limits have significance and are not to be ignored, as follows:

The text of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300 pages. If a draft EIR exceeds these pages limits, the lead agency shall provide an explanation in the summary required by Section 15123.

Section 15300.2 (Exceptions to Categorical Exemptions)

Because the opening clause of subsection 15300.2(b) does not parallel the opening clauses in subsections 15300.2(c)-(f), it is potentially unclear whether the phrase “these classes” in subsection 15300.2(b) refers only to the classes listed in subsection 15300.2(a) or to all classes of categorical exemptions. We suggest that subsection 15300.2(b) be clarified, as follows:

Cumulative Impact. ~~All exemptions for these classes are inapplicable~~ A Class 3, 4, 5, 6, or 11 categorical exemption shall not be used when the cumulative impact of successive projects of the same type in the same place, over time is significant.

Section 15301 (Existing Facilities)

We support the proposal to clarify that the Class 1 categorical exemption includes alterations to existing roadways for bike lanes, pedestrian crossings, street trees, and implementation of other complete streets features. Our only suggestion is that subdivision (h) of section 15304 be deleted in order to clarify that the addition of a bike lane to an existing roadway or right-of-way is a minor alteration of an existing public facility, covered by the Class 1 categorical exemption, rather than a minor alteration to the condition of land, covered by the Class 4 categorical exemption.

Section 15305 (Minor Alterations in Land Use Limitations)

Subsection (a) of section 15305 provides that minor lot line adjustments qualify for the Class 5 categorical exemption. The distinction between “minor” and “major” lot line adjustments was never codified in statute, although some local ordinances defined minor lot line adjustments as involving four or fewer lots. See *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748. The Legislature amended section 66412 of the Government Code in 2001 (SB 497) to limit all lot line adjustments to four or fewer lots, thereby prohibiting “major” lot line adjustments.

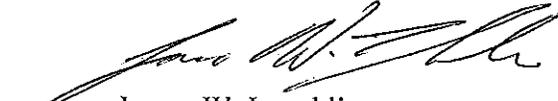
In *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162, the Court of Appeal held that a local agency’s approval of a lot line adjustment is a ministerial action rather than a discretionary one, and therefore not an action subject to CEQA. In light of the

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Court of Appeal's opinion and consistent with section 15300.1, we request that the phrase "minor lot line adjustments" be deleted from section 15305.

Thank you for your attention to our comments.

Very truly yours,



James W. Laughlin