



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

October 12, 2015

Submitted electronically

Christopher Calfee, Senior Counsel
Holly Roberson, Land Use Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814
CEQA.Guidelines@resources.ca.gov

Governor's Office of Planning and Research
Preliminary Discussion Draft of the Proposed Updates to the CEQA Guidelines

Dear Mr. Calfee and Ms. Roberson:

On behalf of the Metropolitan Water District of Southern California (Metropolitan), I write to thank you for the opportunity to review and comment on the Preliminary Discussion Draft of the Proposed Updates to the CEQA Guidelines (the Discussion Draft) provided by the Governor's Office of Planning and Research (OPR). This process has been extremely helpful to Metropolitan and is a model of how agency rulemaking should proceed.

Background

Metropolitan is a public agency and regional water wholesaler. It is comprised of 26 member public agencies serving approximately 19 million people in portions of six counties in Southern California, including Los Angeles, Ventura, Orange, Riverside, San Bernardino, and San Diego Counties. Metropolitan's primary sources of imported water come from the California State Water Project (SWP) and from the Colorado River via the Colorado River Aqueduct (CRA). Metropolitan's mission is to provide its 5,200 square mile service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way. Consistent with this mission, Metropolitan is pleased to provide the following comments and proposed revisions for consideration by OPR to the Preliminary Discussion Draft:

1. Determining the Significance of the Environmental Effects Caused by a Project -- Proposed Addition of Subdivision (b)(2) to Section 15064

The last sentence in the proposed new subdivision suggests that where a lead agency employs a threshold of significance and determines that the impact will fall below the threshold, there remains a possibility that the impact is nevertheless significant. The last sentence is added to codify a general principle articulated in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 ("*Amador*"). However, while the court recited

general principles to the effect that an agency may not rely on established thresholds of significance from Appendix G to “automatically” determine whether a project will have a significant impact on the environment, the holding in the case was much more specific. The court held that the lead agency abused its discretion by concluding there would be no significant water resource impacts based solely on the assertion that “[t]he change in local hydrology associated with dewatering the Amador Canal and eliminating all leakage is not considered to be a significant hydrological impact per se.” (*Amador, supra*, 116 Cal.App.4th at p. 1111.) The court concluded that “[t]his assertion is not a statement of reasons, but a bare conclusion. As such, it does not satisfy CEQA requirements.” (*Ibid.*) In other words, the EIR was flawed because it lacked any analysis whatever of streamflow impacts; the court was not second guessing the agency’s reliance on a threshold relevant to streamflows. (*See also Rominger v. County of Colusa*, 229 Cal.App.4th 690, 714-718 (2014) (affirming an agency’s discretion to select the appropriate thresholds).)

Metropolitan Proposal

Revised proposed text in new subdivision (b)(2) that appears on page 15, paragraph 4 as follows (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 if the threshold in question does not address the specific physical change that requires analysis.

2. Thresholds of Significance -- Proposed Revisions to Subdivision (d) to Section 15064.7

The addition of § 15064.7(d) should be amended to expressly exclude CEQA Appendix G thresholds. CEQA Appendix G thresholds and regulatory standards are typically used as the standard for determining if an environmental effect of the project is significant. Lead agencies should be able to rely on those standards without having to explain why regulatory agencies determined that impacts less than the specified standard are not significant.

In addition, the draft language could call into question a lead agency’s use of federal environmental standards that otherwise meet the requirements for an environmental standard because the definition of “public agency” in the CEQA Guidelines expressly excludes federal agencies. (14 C.C.R. § 21063 [or CEQA Guidelines § 21063].) For instance, a public agency may rely on National Ambient Air Quality Standards or water quality standards adopted by the Environmental Protection Agency as thresholds of significance. Nothing in CEQA or the caselaw suggests this would be an abuse of discretion.

Metropolitan Proposal

Revised proposed text in new subdivision (d) that appears on page 18, paragraph 7 as follows (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 state, local, or federal public review process and that is all of the following:

3. Updating the Environmental Checklist -- Proposed Amendments to Appendix G

OPR proposes to reorganize and revise Appendix G to eliminate redundancy, reframe or delete certain questions more properly dealt with in the planning process, and add certain questions it contends are required by existing law but are often overlooked. (Discussion Draft, pages 38 -75)

Metropolitan believes most of the proposed revisions appear to be of a common sense and non-controversial nature, however, some clarification regarding the relevant information is requested.

a) Aesthetics – Proposed Revision to Appendix G § I(a)

A “designated scenic highway” is a specific term found in the Streets and Highways Code, which includes a list of all highways in the state that have been officially designated to be a scenic highway. Metropolitan recommends adding in a reference to the code to avoid any ambiguity in addressing this question.

Metropolitan Proposal

Revised proposed text in the Aesthetics question of Appendix G § 1(a) that appears on page 50, paragraph 3 (added text underlined):

- (a) Have a substantial adverse effect on either a scenic vista or scenic resources within a designated scenic highway listed in Article 2.5 of Chapter 2 of Division 1 of the Streets and Highways Code?

Also, understanding that CEQA is primarily concerned with public (as opposed to private) views, it is not clear in the new question (b) that all aesthetic issues will always be covered adequately by the local design review process. This amended question suggests that a project’s

Preliminary Discussion Draft to the Proposed Updates to the CEQA Guidelines
Page 4
October 12, 2015

substantial degradation of existing public views of scenic resources that may exist in the vicinity of the project site is not significant unless the project is “in conflict with applicable zoning and other regulations.” Metropolitan requests some clarification of this question.

b) Biological Resources - Proposed Revision to Appendix G § IV(a)

Regarding the proposed language addition of state or federally protected wetlands, the term “protected” is not defined. Previously this section referenced Section 404 of the Clean Water Act, a federal regulation which “protects” and regulates impacts to wetlands. When using the term “protected” it is helpful to have a reference to which regulation specifically protects and regulates the resource.

Metropolitan Proposal

Revised proposed text in the Biological Resources question of Appendix G § 1V (a) that appears on page 53, paragraph 6 (added text underlined, deleted text struck out):

- (a) Have a substantial adverse effect on ~~state or federally protected~~ wetlands protected under state or federal regulation, including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

c) Energy Impacts – Proposed Revisions to Subdivision (b)(2) to Section 15064 & Appendix G § V (a) & (b)

The proposed inclusion of Appendix F regarding energy impacts into Appendix G § V raises many questions. First, it is not clear what is meant by the term wasteful, inefficient, or an unnecessary consumption of energy located in question (a). At a minimum, the threshold should be whether a project imposes “significant” energy impacts. See *Tracy First v. City of Tracy*, 177 Cal. App. 4th 912, 933 (Cal. App. 3d Dist. 2009) (holding that the city satisfied its Appendix F requirements to analyze energy impacts where the city found that a project would not have a significant energy impacts).

Additionally, question (b) is problematic. Whether the project incorporates energy efficiency measures calls for a yes or no answer. Question (b) is written like a compulsory mitigation measure, seemingly applicable regardless of the significance of attendant environmental impacts resulting from the project. It is not clear that incorporation of energy efficiency measures would always be appropriate or automatically result in lessened potential impacts, for example, in routine operations and maintenance projects that do not involve the construction of any new structures or facilities. At a minimum, this should only apply where feasible and where energy savings could be achieved. However, Metropolitan questions whether this section belongs in Appendix G at all and asks OPR to consider striking it entirely.

Preliminary Discussion Draft to the Proposed Updates to the CEQA Guidelines

Page 5

October 12, 2015

Metropolitan Proposal

Revised proposed text in the Energy questions of Appendix G § V (a) & (b) that starts on page 55, paragraph 7 and continues on page 56 (added text underlined):

(a) Result in a significant wasteful or inefficient use of energy, or an unnecessary consumption of energy, during project construction or operation?

(b) Where feasible and energy savings would be achieved, incorporate renewable energy or energy efficiency measures into building design, equipment use, transportation or other project features?

d) Open Space, Managed Resources and Working Landscapes -- Revisions to Appendix G § XI (a) and (a)(iii)

The Discussion Draft proposes to add a new consolidation section to the CEQA Guidelines Appendix G, Section XI Open Space, Managed Resources and Working Landscapes.

Metropolitan appreciates that the newly coupled subcategories roughly correspond to the categories of open space that must be inventoried in a city or county's open space element; however, regarding the project's ability to adversely impact open space for the preservation of natural resources located in question (a), Metropolitan believes that this question does not address when or how the open space was designated for preservation of natural resources. Anyone could make an argument that open space should be preserved (at some point) in the future for the benefit of natural resources. The sentence is generic, and open to broad interpretation.

Metropolitan Proposal

Revised proposed text in the Open Space, Managed Resources and Working Landscapes question of Appendix G § VI (a) that appears on page 63, paragraph 2 (added text underlined):

(a) Adversely impact open space that has been designated in a general plan, conservation easement, or state or federal law for the preservation of natural resources, including, but not limited to:

Also, the evaluation of unique paleontological resource needs proposed in the new sub-question (iii) needs clarification. Unlike "unique archaeological resources," "unique paleontological resources" is undefined in CEQA and the Public Resources Code. Professional paleontologists analyze impacts to fossil resources based on the Society of Vertebrate Paleontology's standards of "scientific significance", which is not a requirement of CEQA. Metropolitan recommends

Preliminary Discussion Draft to the Proposed Updates to the CEQA Guidelines

Page 6

October 12, 2015

using the definition provided in the Society for Vertebrate Paleontology's white paper on assessing impacts to paleontological resources under CEQA with slight modification. The proposed definition is as follows: "Unique Paleontological Resources are fossils and fossiliferous deposits, consisting of identifiable vertebrate fossils, uncommon invertebrate, plant, and trace fossils, and other data that provide taphonomic, taxonomic, phylogenetic, paleoecologic, stratigraphic, and/or biochronologic information. Paleontological resources are considered to be older than recorded human history and/or older than middle Holocene (i.e., older than about 5,000 radiocarbon years)."

Metropolitan Proposal

Revised proposed text in the Open Space, Managed Resources and Working Landscapes question of Appendix G § VI (a) (iii) that appears on page 63, paragraph 2 (added text underlined):

(iii) unique paleontological resource, as defined by the Society for Vertebrate Paleontology, or site or unique geologic feature? For purposes of his question, "unique paleontological resources" means fossils and fossiliferous deposits, consisting of identifiable vertebrate fossils, uncommon invertebrate, plant, and trace fossils, and other data that provide taphonomic, taxonomic, phylogenetic, paleoecologic, stratigraphic, and/or biochronologic information; considered to be older than recorded human history and/or older than middle Holocene (i.e., older than about 5,000 radiocarbon years).

e) Transportation -- Revisions to Appendix G § XVI (b)

Understand that OPR proposes to revise the question that currently refers to "level of service" to focus instead on a project's vehicle miles traveled, it is not clear whether question XVI(b) applies to temporary (e.g. construction) or permanent (e.g. operations) impacts, or both.

Metropolitan Proposal

Revised proposed text in the Transportation question of Appendix G § XVI (b) that appears on page 67, paragraph 2 (added text underlined):

a) Cause substantial temporary or permanent increase in additional vehicle miles traveled (per capita, per service population, or other appropriate measure)?

4. Remedies and Remand -- Proposed Revisions to New Subdivision (b)(3) to Section 15234

The last subdivision of this new section requires the court to find that the project activities “complied with CEQA” in order to proceed during pending litigation. If read broadly, opponents could object to an agency proceeding with any portion of a project on a theory that the whole project does not comply with CEQA where a court has ordered the lead agency to de-certify an EIR.

Metropolitan Proposal

Revised proposed text in new subdivision (b)(3) that appears on page 74, paragraph 1 as follows (added text underlined):

(b)(3) complied with CEQA as to the severable portions of the project.

5. Pre-Approval Agreements -- Proposed Deletion of a Portion of Subdivision (b)(2)(A) to Section 15004

Metropolitan reviewed the comments submitted by the California Council for Environmental and Economic Balance (CCEEB), and while we support their overall comments on the proposed update, we also think it is important to echo the comment regarding Pre-Approval Agreements in Section 15004 because the proposed deletion could be interpreted as a change in the law and the change would likely lead to unnecessary litigation. We agree that OPR’s explanatory text in the Discussion Draft (page 110) demonstrates some overlap between the existing language in subdivision (b)(2)(A) and the newly proposed subdivision (b)(4); however, we come to the same CCEEB understanding that when existing CEQA Guideline language is deleted, the change can be seized by commenters and potential litigants that whatever was authorized by prior language is no longer permissible.

We agree with CCEEB that it is preferable to retain the positive statement of agency authority for pre-CEQA site designation and land acquisition agreements located in unaltered Section 15004 (b)(2)(A).

Metropolitan Proposal

In agreement with CCEEB, retained existing text in subdivision (b)(2)(A) that appears on page 111, paragraph 2 as follows (re-added existing text underlined):

(A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities, except that agencies may designate a preferred site for CEQA

Preliminary Discussion Draft to the Proposed Updates to the CEQA Guidelines
Page 8
October 12, 2015

review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance.

In conclusion, Metropolitan 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 opportunity to work with OPR on these changes and are grateful for the due diligence and outreach provided by you both. If you have any comments or questions concerning the suggested revisions detailed above, please call Vikki Dee Bradshaw at (213) 217-6028.

Thank you for your consideration of our comments.

Very truly yours,



Deirdre West
Manager, Environmental Planning Team

VDB/vdb

(J:Environmental Planning&Compliance/COMPLETEDJOBS/October2015/Job No. 20151012EXT)

bcc: Catherine M. Stites
Robert Horton
John Schlotterbeck
Delaine Shane
Deborah Drezner
Vikki Dee Bradshaw
Thomas Napoli
Wendy Picht
Sean Carlson
Alexander Marks
Michelle Morrison
Malinda Stalvey