



California Council for Environmental and Economic Balance

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Submitted Via Email: CEQA.Guidelines@resources.ca.gov

July 20, 2018

Mr. Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 9th Street, Suite 1311
Sacramento, CA 95814

Re: Comments on Modifications to the Proposed State CEQA Guidelines dated
July 2, 2018

Dear Mr. Calfee:

On behalf of the California Council for Environmental and Economic Balance (CCEEB), I write to thank you for the opportunity to submit comments to the Natural Resources Agency (Agency) on the proposed Modifications to Text of Proposed Regulation for the State CEQA Guidelines (Guidelines) Update, as provided in the 15-day notice issued July 2, 2018.

Founded in 1973, CCEEB is a non-profit and non-partisan organization that works to advance strategies to achieve a sound economy and a healthy environment. Since the Office of Planning and Research (OPR) launched its effort to update the Guidelines back in 2011, CCEEB has been an active stakeholder participating in workshops and providing comments on the numerous drafts and public comment opportunities.

We have one comment regarding the new modifications to the proposed CEQA Guidelines text and another regarding a recent case adding support to a prior comment.

CEQA Guidelines Section 15126.4 (a)(1)(B)

As originally proposed, revised CEQA Guidelines subsection 15126.4 (a)(1)(B) provided that mitigation may be deferred when the lead agency: “(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, **and** (3) lists the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure.” (emphasis added). However, as CCEEB previously commented, requiring both criteria (2) and (3) to be met in each case is inconsistent with case law which provides that either performance standards (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899) or a menu of mitigation options (*Defend the Bay v. City of Irvine* (2004) 119 Cal. App.4th 1261), can separately suffice to justify deferred mitigation. That these are alternative options is also correctly stated in the Agency’s Initial Statement of Reasons (ISOR).

Page 42 of the ISOR reads:

these changes 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.” (*Defend the Bay, supra*, at p. 1275; *see also Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376; *Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th 899; ...) **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*. There, the court ruled that where mitigation measures incorporated specific performance criteria and were not so open-ended that they allowed potential impacts to remain significant, deferral was proper. (Emphases added.)

The current modifications revise subsection 15126.4 (a)(1)(B) to provide that mitigation may be deferred when the lead agency: “(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.” In effect, in place of the requirement to commit to a menu of candidate measures from which the ultimate mitigation must be selected, the modified language requires a demonstration that at least some types of feasible mitigation exist. This is an improvement, and we appreciate the attempt at a creative solution to this provision. Unfortunately, however, the new modification is not supported by case law, because it has another effect: it eliminates the *first option* described in the ISOR, to commit to a menu of candidate measures which is itself sufficient, *without* adopting performance standards. The menu-only option must be retained as provided in *Defend the Bay* and similar cases.

Accordingly, consistent with case law and the ISOR, CCEEB reiterates its prior comment that the Agency should revise subsection 15126.4 (a)(1)(B) to read “commits itself to the mitigation and (1) adopts specific performance standards the mitigation will achieve, or (2) lists the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure.”

CEQA Guidelines Section 15125

Proposed CEQA Guidelines subsection 15125 updates the guidance on the types and use of baseline conditions for purposes of comparison to potential impacts of a project. The latest modifications reflect the recent case *Association of Irrigated Residents v. Kern County* (2017) 17 Cal.App.5th 708, by clarifying that only a projected future conditions baseline requires a special showing that an existing conditions baseline would be “misleading or without informative value.” However, another recent case, *World Business Academy v. State Lands Commission* (2018) 24 Cal.App.5th 476, is also relevant to the application of CEQA baselines. This case was decided on June 13, 2018, subsequent to the last comment opportunity for the Agency’s proposed Guidelines update.

World Business Academy upheld the State Lands Commission’s reliance on a CEQA exemption when renewing leases for the Diablo Canyon nuclear power plant. In that case, the petitioners urged that numerous potentially significant impacts to public health and the environment from continued



operation of the plant necessitated CEQA review. On the contrary, the court of appeal found, all of the claimed “impacts” were in fact existing baseline conditions not attributable to the lease renewal. In addition, the court of appeal rejected the petitioner’s arguments against applying a similar case, *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549.

In CCEEB’s previous comments, we proposed adding a new subsection (f) to CEQA Guidelines Section 15125 to incorporate the holding of *Citizens for East Shore Parks*, 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.

OPR and the Agency did not address this issue in their revisions to CEQA Guidelines Section 15125, possibly concerned that the then-pending *World Business Academy* case might have a different outcome. As it turned out, the *World Business Academy* decision strongly endorsed *Citizens for East Shore Parks*.

Accordingly, CCEEB reiterates its recommendation for a new CEQA Guidelines Section 15125(f) as stated above. If the Agency declines to address this issue in the current rulemaking, we request that OPR and the Agency consider doing so in a later rulemaking.

CCEEB appreciates the opportunity to comment on the Guidelines. If you have any comments or questions concerning our suggested revisions, please contact me or Jackson R. Gualco, Kendra Daijogo or Cliff Moriyama, CCEEB’s governmental relations representatives at The Gualco Group, Inc. at (916) 441-1392.

Sincerely,



GERALD D. SECUNDY
President

cc: Mr. William J. Quinn
Ms. Janet Whittick
Mr. Devin Richards
The Gualco Group, Inc.

