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From: Tomas Garza <Tomas_Garza@gualcogroup.com>
Sent: Thursday, March 15, 2018 4:02 PM
To: CEQA Guidelines@CNRA
Cc: Baugh, Heather@CNRA; Burchill, Emiko@CNRA
Subject: CCEEB Comment Letter RE: Proposed Amendments and Additions to the State CEQA Guidelines_01-26-2018
Attachments: CCEEB CEQA Guidelines Comment Letter 3.15.18.pdf; CCEEB Final Comments on Proposed CEQA Guidelines_November 21 2014.pdf

Good Afternoon Mr. Calfee,

Attached you will find a comment letter from our client, California Council for Environmental and Economic Balance ("CCEEB"), regarding proposed Amendments and Additions to the State CEQA Guidelines dated January 26, 2018.

Also attached are CCEEB's CEQA Guidelines comments dated November 21, 2014, as stated in the letter.

Please do not hesitate to contact us if you have any questions or need further information.

Thank you,

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March 15, 2018

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

Re: Comments on the Amendments and Additions to the State CEQA Guidelines dated
January 26, 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 on the California Natural Resources Agency (“Agency”) proposed Amendments and Additions to the State CEQA Guidelines (“Guidelines”) January 26, 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 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.

Overall, CCEEB believes the Guidelines to be largely consistent with statutes and case law with the exception of two proposed changes. **We believe it is critically important for the Agency to modify these two sections – CEQA Guidelines subsection 15125(a)(2) and CEQA Guidelines subsection 15126.4(a)(1)(B) - in order for them to be consistent with current case law.**

Proposed New CEQA Guidelines Subsection 15125(a)(2)

Proposed new CEQA Guidelines subsection 15125(a)(2) provides: *“A lead agency may use either a historic conditions baseline or a projected future conditions baseline as the sole baseline for analysis only if it demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public.”* Several subsections of Section 15125 are revised to incorporate case law including the California Supreme Court’s holdings in *Communities for a Better Environment v. South Coast Air Quality*

Management District (2010) 48 Cal.4th 310, allowing use of representative past conditions as the baseline when conditions fluctuate over time, and *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, allowing use of a future baseline where an existing conditions baseline would be misleading. However, the revised language states that the heightened evidentiary showing, that using an existing conditions baseline would be “misleading or without informative value”, applies when the baseline is “*either a historic conditions baseline or a projected future conditions baseline.*” That is **inconsistent** with the recent case *Association of Irrigated Residents v. Kern County* (2017) 17 Cal.App.5th 708, which holds that the heightened evidentiary standard applies *only* to a future conditions baseline, not to a historic conditions baseline. On January 31, 2018, the California Supreme Court issued an order denying a petition for review and requests for depublication of *Association of Irrigated Residents*, so the case remains binding precedent. **Consistent with *Association of Irrigated Residents*, the Natural Resources Agency should delete the phrase “either a historic conditions baseline or” from Guidelines 15125(a)(2).**

Proposed Revised CEQA Guidelines Subsection 15126.4 (a)(1)(B)

Proposed revised CEQA Guidelines subsection 15126.4 (a)(1)(B) provides 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, 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 Natural Resources Agency’s Initial Statement of Reasons accompanying the release of the proposed CEQA Guidelines amendments.

Page 42 of the Initial Statement of Reasons 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.

Consistent with the cases and the Initial Statement of Reasons, the Natural Resources Agency should revise subsection 15126.4 (a)(1)(B) to change “(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...” 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...”

Proposed New CEQA Guidelines Section 15357

CCEEB suggests that the proposed addition to Guidelines Section 15357 be simplified and track the language in Guidelines Section 15002(i). The new language states: “*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 [sic] might be raised in an environmental impact report.*” While this language is legally accurate when you assume that the EIR “concerns” are all permissible CEQA concerns, it is confusing in this context because it puts the EIR before the CEQA trigger and could be interpreted too broadly.

We prefer other language consistent with *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App.3d 259 and included in Guidelines 15369, which provides: “A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.” This captures the two necessary prongs that distinguish ministerial and discretionary actions: 1) the ability to approve or disapprove a project, and 2) the ability to shape or change the project (e.g., revising its size, purpose, design, conditions or construction) using subjective judgment. **Consistent with Guidelines 15369, the Natural Resources Agency should strike the new language and replace it with the following:** “The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project.”

Proposed New CEQA Guidelines Section 15064.3

Finally, CCEEB continues to be concerned with the scope of proposed new Guidelines Section 15064.3 that goes beyond the statutory language in SB 743, by mandating statewide application of the new Vehicle-Miles-Traveled (VMT) methodology in lieu of traditional Level of Service (LOS) analysis. SB 743 directs the Office of Planning Research (OPR) to develop, and the Agency to certify and adopt, Guidelines revisions establishing significance criteria for transportation impacts only for “*projects within transit priority areas*”, that is, within one-half mile of an existing or planned rail transit station, ferry terminal served by bus or rail transit, or the intersection of two more major bus routes. (Pub. Res. Code §21099(b)(1))

SB 743 also provides that OPR “*may adopt* guidelines... establishing alternative metrics... for transportation impacts outside transit priority areas” which “may include the retention of traffic levels of service, where appropriate” as determined by OPR. (Pub. Res. Code § 21099(c)). Thus, this provision authorizes only informal, advisory OPR guidance for analysis outside transit priority areas, not revisions to CEQA Guidelines formally adopted by the Agency making the VMT metric mandatory throughout the state.

Moreover, as discussed in detail in CCEEB’s November 21, 2014 comment letter (copy attached), we believe that VMT has not been sufficiently studied to require its use statewide. By applying the VMT metric within transit priority areas as required by Pub. Res. Code §21099(b)(1), its effectiveness and implementation issues can be further evaluated before considering its broader application -- or possible retention of the LOS metric authorized by Pub. Res. Code § 21099(c) – beyond transit priority areas.

In particular, SB 743 preserves the authority of local agencies to apply the LOS metric through their general plans, zoning codes, conditions of approval, thresholds or other planning requirements, based on their police power or any other authority. (Pub. Res. Code § 21099(b)(4)) To the extent that local agencies retain LOS in planning requirements, mandating the VMT metric creates another layer of analysis for transportation impacts, rather than simply replacing LOS. Since consistency with local land use plans and policies is typically an environmental topic addressed in CEQA documents, this additional layer of analysis may result in significant land use impacts although no impact is reported in the transportation section using the VMT methodology. The Agency’s Initial Statement of Reasons (p. 16) refers to confusion and litigation risk from the uncertainty of requiring two different types of analysis, but does not address the consequences of local agencies using LOS in land use analysis. **The scope of proposed Guideline Section 15064.3 should remain limited to “transit priority areas” as directed by SB 743, until such implementation issues may be evaluated and considered.**

CCEEB appreciates the opportunity to comment on the Guidelines. We believe that our recommendations regarding Section 15125(a)(2), Section 15126.4(a)(1)(B), and Section 15357 accurately reflect current case law and should be incorporated into the final document, and that the VMT-based significance threshold should apply only within transit priority areas consistent with the language of SB 743. 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: Ms. Heather Baugh
Ms. Emiko Burchill
Mr. William J. Quinn
Ms. Janet Whittick
Mr. Devin Richards
The Gualco Group, Inc.



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November 21, 2014

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

Re: Preliminary Discussion Draft of Updates to CEQA Guidelines to Implement
SB 743 -- Proposed Section 15064.3 and Proposed Amendments to
Appendices F and G

Dear Mr. Calfee:

The California Council for Environmental and Economic Balance ("CCEEB") is a coalition of business, labor, and public leaders that works together to advance strategies to achieve a sound economy and a healthy environment. Founded in 1973, CCEEB is a non-profit and non-partisan organization.

CCEEB appreciates the opportunity to submit the following comments on the Governor's Office of Planning and Research's Preliminary Discussion Draft of Updates to CEQA Guidelines to Implement SB 743.

Senate Bill 743

SB 743 requires OPR to prepare revisions to the CEQA guidelines regarding "criteria for determined the significance of transportation impacts of projects within transit priority areas." The criteria "shall promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses." Also, in developing the criteria, OPR shall recommend potential metrics to evaluate the transportation impacts, which may include "vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates or automobile trips generated." With the certification of the guidelines, "automobile delay" as traditionally described "shall not be considered a significant impact on the environment . . ." with potential exceptions to be noted in the guidelines.

SB 743 recognizes a local agency’s police power and states that it “does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements” Also, any air quality, noise, safety or other impacts associated with transportation will still need to be analyzed. OPR has the option of establishing “alternative metrics to the metrics used for traffic levels of service for transportation impacts outside of transit priority areas.”

Summary of Proposed Section 15064.3

Proposed Section 15064.3 includes in its “Purpose” the following: “When analyzing a project’s potential environmental impacts related to transportation, primary considerations include the amount and distance of automobile travel associated with the project. Other relevant considerations include the effects of the project on transit and non-motorized travel and the safety of all travelers.” This section also reiterates SB 743’s admonition – automobile delay does not constitute a significant environmental impact – and notes that any indirect effects of transportation on air quality and noise may be analyzed in other portions of the environmental document.

This proposed Section 15064.3 also describes criteria for analyzing transportation impacts in subsection (b), including VMT and Land Use Projects, Induced Vehicle Travel and Transportation Projects, Local Safety and Methodology. Subsection (c) relates to Alternatives and Mitigation to reduce VMT, and subsection (d) explains the timing of application of this Section to projects with “transit priority areas” and other areas.

1. Any Proposed Changes to the CEQA Guidelines Should be Restricted to “Transportation Impacts of Projects Within Transit Priority Areas”

As currently drafted, proposed Section 15064.3 and the proposed amendments to Appendices F and G are intended to address transportation impacts for all projects, and based on its phased approach, it would apply “statewide” on January 1, 2016. For example, Section 15064.3(a), Purpose, discusses a “project’s potential environmental impacts related to transportation,” and does not mention SB 743’s mandate with respect to “transit priority areas.” Subsection (b) states: “Generally, transportation impacts of a project can be best measured using vehicle miles traveled.” Again, this statement is not qualified by referring to “transit priority areas.” Similarly, proposed amendments to Appendices F and G would apply to all projects, not only projects in “transit priority areas.”

While SB 743 provides the option to OPR of establishing “alternative metrics” for areas outside of “transit priority areas,” OPR should decline to do so at this juncture. While “vehicle miles traveled” (“VMT”) is a metric that has been utilized for transit-served areas through the implementation of SB 375, as OPR has acknowledged, VMT has not been sufficiently evaluated or studied to be established as the CEQA metric for projects outside of “transit priority areas.” (See Preliminary Discussion, p. 11.) Further, the use of VMT for purposes of evaluating transportation impacts under CEQA is a new approach even for “transit priority areas” and OPR should consider the success or failure of using VMT in “transit priority areas” first before imposing it on all projects in the State of California.

2. Any Proposed Changes Not Mandated by SB 743 Should be Eliminated

Although SB 743 does not direct OPR to prepare revisions to the CEQA Guidelines to address “Induced Vehicle Travel and Transportation Projects” or “Local Safety,” proposed Section 15064.3 includes two substantial provisions devoted to these topics. Subsection (b)(2) requires an analysis of whether certain transportation projects could create “additional automobile travel” but fails to identify how such an analysis would be performed, particularly in the context of a local agency’s general plan and required circulation element. While there may be benefits from a better understanding of how new roadways affect growth, such an analysis should be performed on a policy and planning level, not on a project by project basis under CEQA.

Subsection (b)(3) on Local Safety is also not mandated by SB 743, and while safety is certainly an important topic, the “objective factors” listed seem to be incomplete or unclear, and again, it does not provide any direction as to how this potential impact should be determined. The discussion paper states: “Further, impacts to human safety are clearly impacts under CEQA. [Citation to CEQA Section 21083(b)(3).] . . . Finally, SB 743 requires the new guidelines to promote “multimodal transportation” and to provide for analysis of safety impacts.” (Preliminary Discussion, p. 7.) To the contrary, however, SB 743 states that it does not relieve a public agency from evaluating impacts to air quality, noise and safety related to transportation and that it does not create a presumption that those impacts would not occur. Thus, the discussion paper seems to overstate SB 743, and the other two areas listed along with safety in SB 743 – noise and air quality – are not included as new subsections in the proposed Section 15064.3.

Instead of attempting to tackle subjects not mandated by SB 743, particularly subjects that would benefit from further study and analysis, we would suggest that OPR focus on preparing updates to the CEQA Guidelines that address the primary mandate of SB 743 -- “transportation impacts of projects in transit priority areas.”

3. The Discussion of Alternatives in Section E of Appendix F Should be Eliminated

The proposed amendments to Appendix F include a list of potential alternatives to reduce vehicle miles traveled under Section E. Section E currently states: “Alternatives should be compared in terms of overall energy consumption and in terms of reducing wasteful, inefficient and unnecessary consumption of energy.” Section E does not, and should not, be used to list specific alternatives to be considered for individual projects. CEQA already provides numerous requirements for how alternatives are to be considered and discussed in a CEQA document. (See CEQA Guidelines, Section 15126.6.) Further, the selection and evaluation of alternatives is to be performed with respect to the project as a whole, not any one specific environmental topic. Finally, these examples of project alternatives seem to relate solely to projects within “transit priority areas” and not all projects to be evaluated under CEQA. Thus, to the extent feasible, these concepts may be incorporated elsewhere in any proposed guidelines, but should be eliminated from Section E of Appendix F.

4. Amendments to Appendix G Should Be Limited to Transit Priority Areas

The proposed amendments to Appendix G are intended to conform to proposed Section 15064.3, and given our concerns raised regarding proposed Section 15064.3, we believe any amendments to Appendix G should only be modified to the minimum degree required by law for transit priority areas.

5. Proposed Section 15064.3 Creates More CEQA Work, Not Less, and Thus, Its Scope Should be Limited to “Transit Priority Areas”

While SB 743 and proposed Section 15064.3 purport to eliminate a significant impact under CEQA for automobile delay, SB 743 acknowledges that local agencies have the authority to include such levels of service in their general plans (based on their police power). Thus, to the extent that local agencies retain level of service requirements in their planning documents, this proposed Section 15064.3 creates another layer of analysis for transportation impacts and does not serve to replace the level of service analysis. Further, land use is typically an environmental topic in CEQA documents, and thus, a project’s consistency with any level of service requirements in a local agency’s planning requirements would be evaluated in the CEQA document, although in a different section – land use, not transportation. For this reason, OPR should limit the scope of proposed Section 15064.3 to “transit priority areas” until this new CEQA metric of “vehicle miles traveled” may be evaluated and considered.

6. Additional Review

Should the comments received by OPR result in the introduction of any new issues to the Preliminary Discussion Draft, or should the document be amended substantively, we respectfully request that additional time be allocated for further review and submittal of written comments on those items.

We appreciate the time and effort required to develop revisions to the CEQA Guidelines and are pleased to have the opportunity to work with OPR on these issues. If you have any comments or questions concerning the suggested revisions detailed above, please contact me or Jackson R. Gualco 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

cc: Honorable Edmund G. Brown, Jr.
Honorable Ken Alex
Ms. Nancy McFadden
Mr. Cliff Rechtschaffen
Ms. Martha Guzman-Aceves
CCEEB Board of Directors
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