

## Lockey, Heather@CNRA

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**From:** Calvo, Lucinda@SLC <Lucinda.Calvo@slc.ca.gov>  
**Sent:** Thursday, March 15, 2018 1:41 PM  
**To:** CEQA Guidelines@CNRA  
**Subject:** Comments on CEQA Guidelines Proposed Updates  
**Attachments:** CSLC CEQA Guidelines Cmts 03\_15\_2018.pdf

Dear Mr. Calfee:

Attached please find a comment letter from the staff of the State Lands Commission regarding the Proposed Updates to the CEQA Guidelines. We appreciate the opportunity to comment.

Please do not hesitate to contact me should you have any questions or if you have any difficulties with the attachment.

Thank you,

**Lucinda Calvo, Attorney**  
**CALIFORNIA STATE LANDS COMMISSION**  
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March 15, 2018

**VIA EMAIL (CEQA.Guidelines@resources.ca.gov)**

Christopher Calfee, Deputy Secretary and General Counsel  
California Natural Resources Agency  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

Dear Mr. Calfee:

Thank you for the opportunity to comment on the California Natural Resources Agency's Proposed Updates to the State CEQA Guidelines (Proposed Updates) (Guidelines). California State Lands Commission (CSLC) staff appreciates your agency's efforts to engage the public and stakeholders to improve the efficiency, clarity, and relevance of the Guidelines, and in this spirit of collaboration we make the following comments on the Proposed Updates. Due to the CSLC's broad jurisdiction over state lands, including sovereign tide and submerged lands, the CSLC frequently acts as a CEQA lead agency, as well as a responsible agency and a trustee agency. For example, in the Senate Environmental Quality Committee 2017 CEQA Survey Report, CSLC is listed as the fourth among state agencies for number of total CEQA projects, fourth for CEQA projects requiring an EIR, and third in number of CEQA lawsuits.<sup>1</sup> The comments are listed in the order set forth in the Proposed Regulatory Text (numerical by section number, followed by comments on Guidelines Appendix G).

*Technical note: where our letter suggests revisions to the Proposed Regulatory Text, the Natural Resources Agency's proposed revisions are generally treated as accepted and are shown in plain type. CSLC staff's suggested additions are shown in **bold underlined** type and deletions are shown in bold **strikethrough**.*

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<sup>1</sup> Senate Environmental Quality Committee, CEQA Survey FY 2011/12 to FY 2015/16, October 2017, p. 9, available at [http://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa\\_survey\\_full\\_report\\_-\\_final\\_12-5-17.pdf](http://senv.senate.ca.gov/sites/senv.senate.ca.gov/files/ceqa_survey_full_report_-_final_12-5-17.pdf).

### **Section 15064.7**

The Natural Resources Agency proposes adding new subdivision (d) to this section to incorporate CEQA case law and promote the use of environmental standards as thresholds of significance (ISOR, p. 18). The subdivision would define “Environmental standard” as:

. . . a rule of general application that is adopted by a public agency through a public review process and that is all of the following:

- (1) a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, plan or other environmental requirement;
- (2) adopted for the purpose of environmental protection;
- (3) addresses the environmental effect caused by the project; and,
- (4) applies to the project under review.

CSLC staff has observed that ordinances, resolutions, etc. can be ephemeral, and that if the requirement changes or the document containing it is no longer easily accessible between the time it is cited in an environmental document and the time of responsible agency review, it can be difficult for a responsible agency to determine what the requirement was exactly. This is particularly true if the lead agency refers to the requirement by a citation to an ordinance or resolution number rather than by including the relevant text in the lead agency’s environmental document. Therefore, CSLC staff suggests adding an additional subdivision to require that the relevant text of the requirement and the adopted document from which it is drawn be made available:

**(e) the relevant operative text relied upon from an ordinance, resolution, rule, regulation, order, plan or other environmental requirement must be included in the environmental document (rather than merely supplying a citation). Where the environmental standard is drawn from a longer document, the full ordinance, resolution, rule, regulation, order, plan or other environmental requirement from which the standard was drawn must be included either in the environmental document, or in an appendix to the environmental document.**

### **Section 15370: Mitigation**

CSLC staff supports the Natural Resources Agency’s effort to clarify that conservation easements can provide mitigation for environmental impacts and to inform the public and decisionmakers of the holding in *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238 that conservation easements

“may appropriately mitigate the direct loss of farmland.” The Natural Resources Agency proposes to revise subdivision (e) of section 15370 to state that the definition of “mitigation” includes:

(e) Compensating for the impact by replacing or providing substitute resources or environments, **including through permanent protection of such resources in the form of conservation easements.**

However, permanent or perpetual conservation easements are not allowable on the sovereign Public Trust lands that CSLC manages on behalf of the people of California (tidelands and submerged lands).<sup>2</sup> These sovereign lands are subject to the common law Public Trust Doctrine and State constitutional and statutory provisions that forbid their alienation. Additionally, under the Public Trust Doctrine, the CSLC must not place restrictions on sovereign land, such as perpetual conservation easements or permanent deed restrictions, that tie the hands of future legislatures. In a very real sense, the sovereign character of sovereign lands is its own sort of perpetual protective restriction, given that sovereign lands must always be managed consistent with Public Trust protections.

At the same time, CSLC staff recognizes that the issue of perpetuity of conservation easements on non-sovereign lands is a matter of great importance in the land trust and environmental community to ensure the enforceability of mitigation and the long-term protection of habitat, open space, and other conservation values. Therefore, we recommend the following options for revising the proposed language in a manner that recognizes the legal context and conservation needs for both sovereign and non-sovereign lands:

(e) Compensating for the impact by replacing or providing substitute resources or environments, including, **but not limited to**, through permanent protection of such resources in the form of conservation easements.

Or, alternately,

(e) Compensating for the impact by replacing or providing substitute resources or environments, including through **permanent** protection of such resources in the form of **permanent** conservation easements **or other use restrictions**.

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<sup>2</sup> A rare exception would be situations in which a conservation easement was placed on property before the CSLC took title to land, such as CSLC’s land holdings in the Ballona Wetlands Freshwater Marsh. However, most sovereign lands owned by the State were acquired at statehood under the Equal Footing Doctrine and so were not transferred subject to pre-existing easements.

## **Appendix G: Updating the Environmental Checklist**

### IV. Biological Resources

#### Nonindigenous/Invasive Species:

The CSLC is charged with preventing or minimizing the introduction of non-indigenous species to California waters by regulating marine vessel ballast water and biofouling. To assure that lead agencies and project applicants are aware of these requirements, CSLC staff suggests a specific reference to nonindigenous/invasive species prevention in Appendix G, question IV (d) (Proposed Regulatory Text, p. 59). This suggested edit would also raise awareness of potential impacts related to the introduction or increase of nonindigenous/invasive species generally:

d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, ~~or~~ impede the use of native wildlife nursery sites, **or introduce or increase nonindigenous or invasive species?**

### VIII. Greenhouse Gas Emissions

Several air quality management or air pollution control districts are beginning to establish thresholds for greenhouse gas emissions; therefore, similar to III. Air Quality, CSLC staff recommends adding the following under Greenhouse Gas Emissions:

**VIII. GREENHOUSE GAS EMISSIONS. Where available, the significance criteria established by applicable air quality management or air pollution control district may be relied upon to make the following determinations.** Would the project: . . .

Once again, thank you for the opportunity to review and comment on the Proposed Updates. Should you have any questions regarding these comments, please do not hesitate to contact us.

Most sincerely,



Lucinda Calvo  
Staff Attorney