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From: Jain, Devyani (CPC) <devyani.jain@sfgov.org>
Sent: Thursday, March 15, 2018 12:52 PM
To: CEQA Guidelines@CNRA
Cc: Gibson, Lisa (CPC); Rahaim, John@City and County of San Francisco
Subject: San Francisco Comment Letter on the Proposed Amendments and Additions to the CEQA Guidelines
Attachments: San Francisco Comment Letter_CEQA Guidelines Update_03-15-18.pdf

Dear Deputy Secretary Calfee,

Thank you for this opportunity to provide comments on the California Natural Resources Agency Secretary's Proposed Amendments and Additions to the CEQA Guidelines, dated January 26, 2018.

Please see attached comment letter from the San Francisco Planning Department, on behalf of the City and County of San Francisco, providing input on the secretary's proposed revisions to the CEQA Guidelines. We appreciate your consideration of our comments and welcome any questions you might have. Please contact me for any follow up regarding the attached comment letter.

Sincerely,

Devyani Jain
Deputy Environmental Review Officer/
Deputy Director of Environmental Planning

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SAN FRANCISCO PLANNING DEPARTMENT

March 15, 2018

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Subject: Comments on Proposed Amendments and Additions to the State CEQA Guidelines, Dated January 26, 2018

Dear Deputy Secretary Calfee:

As the Environmental Review Officer for the City and County of San Francisco ("the City"), and on behalf of the City, I am pleased to respond to the California Natural Resources Agency secretary's request for comment regarding the proposed amendments and additions to the State CEQA Guidelines (hereinafter, "secretary's proposed draft") dated January 26, 2018. The Environmental Planning Division of the San Francisco Planning Department, acting as a Lead Agency for the City, conducts California Environmental Quality Act ("CEQA") review for a wide variety of public and private projects, in both urban and natural environments. Additionally, the San Francisco Planning Department conducts CEQA review on an unusually high volume of projects because, within the City, most building permits are considered discretionary actions that may be subject to CEQA. The San Francisco Planning Department processes approximately 5,000 CEQA determinations per year, the majority of these cases being categorical exemptions. Therefore, we have a unique Lead Agency perspective to offer and we have a vested interest in helping to improve the clarity and effectiveness of the CEQA Guidelines.

We present our comments on the secretary's proposed draft in the order of the topics included in the secretary's proposed draft and have included the subject and page number of the secretary's proposed draft for the convenience of reviewers (see <http://resources.ca.gov/ceqa/docs/update2018/proposed-regulatory-text.pdf>). We have also reviewed the accompanying document published by the Office and Planning and Research ("OPR") on November, 2017, entitled "Proposed Updates to the CEQA Guidelines" (hereinafter, "OPR's proposed updates;" see http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf). We have shown the secretary's proposed draft's text changes as follows: secretary's additions are shown in underline and secretary's deletions are shown in ~~striketrough~~, so as to highlight these amendments within the context of the overall text in our comments below. Where our comments include proposals for specific text changes, these are indicated on the secretary's proposed draft with our suggested additions shown in **bold double underline** and deletions shown in **~~bold striketrough~~**. We believe that our suggested revisions would improve the implementation of CEQA.

March 15, 2018

San Francisco Comments on Proposed Amendments and Additions to the CEQA Guidelines

§ 15064.4: Determining the Significance of Impacts from Greenhouse Gas Emissions – pages 11-12

This section of the secretary's proposed draft clarifies various aspects of CEQA Guidelines Section 15064.4: Determining the Significance of Impacts from Greenhouse Gas Emissions. The section further references CEQA Guidelines Section 15183.5: Tiering and Streamlining the Analysis of Greenhouse Gas Emissions.

San Francisco Planning Department would like to seek a specific clarification to CEQA Guidelines Section 15183.5(b)(1)(F), which is not proposed for amendment in the secretary's proposed draft. This section states that when relying on a plan for the reduction in greenhouse gas emissions, the plan should be adopted in a public process following environmental review. This section should be clarified to recognize that many jurisdictions have specific requirements that effectively mitigate the effects of greenhouse gases, and that these may have proceeded under separate public processes with varying levels of environmental review.

City proposed Edits:

The following revision is therefore suggested for Section 15183.5(b)(1)(F):

(F) Be adopted in a public process following environmental review: or, if the plan elements include regulations or requirements relied upon for streamlining the analysis of greenhouse gas emissions, those regulations or requirements must be adopted in a public process following environmental review.

Our suggested revision above is consistent with the secretary's proposed revision to CEQA Guidelines Section 15064.4(b): Determining the Significance of Impacts from Greenhouse Gas Emissions, which states, "(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions (see, e.g., Section 15183.5(b)). Such requirements must be adopted by the relevant public agency through a public review process..." [the underlined text here is the secretary's proposed draft language in section 15064.4(b)]. This section emphasizes that the plan requirements must be adopted by the relevant public agency, rather than under a specific plan.

§ 15125. Environmental Setting – pages 25-26

The proposed amendments to CEQA Guidelines Section 15125(a)(1) restate recent case law regarding baseline and existing conditions, but the first sentence of the proposed Section 15125(a)(2) appears to conflate requirements for using a future baseline with those for using a historical conditions baseline. Specifically, the *Neighbors for Smart Rail* language cited in OPR's Proposed Updates document on page 93 applies when a lead agency decides to use a future baseline, *not* a historic conditions baseline. (See *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, at page 453, asking the question "Is it ever appropriate for an EIR's significant impacts analysis to use conditions predicted to prevail in the more distant future, well beyond the date the project is expected to begin operation, to the

exclusion of an existing conditions baseline?" This question immediately precedes the *Neighbors* text quoted by OPR on page 93 of the proposed updates document.) In contrast, a long line of cases allows the use of a historic baseline if the decision is supported by substantial evidence in the record, and without the added requirement that the lead agency show that the existing conditions analysis "would be uninformative or misleading to decision makers and the public." (See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 [allowing the use of a historic conditions baseline and stating that "[n]either CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence"].) For these reasons, we propose that the words "either a historic conditions baseline" be deleted from the secretary's proposed new subsection 15125(a)(2).

Secretary draft language:

§ 15125. Environmental Setting

* * * *

(2) 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. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

City proposed edits:

* * * *

(2) 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. Use of projected future conditions as the only baseline must be supported by reliable projections based on substantial evidence in the record.

§ 15126.2. Consideration and Discussion of Significant Environmental Impacts (Energy Impacts) – pages 26-27 and 60

The proposed amendments to CEQA Guidelines Section 15126.2 appear to implement Public Resources Code Section 21100(b)(3), which requires EIRs to include "measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." However, the City would like clarification as to whether Section 21100 applies to all lead agencies, or only to state lead agencies, given the fact that it is contained within Chapter 3 of CEQA, which applies to "State Agencies, Boards and Commissions." Second, the City would like clarification as to what the status of Appendix F: Energy Conservation is after the secretary's proposed additions of energy-related questions to Appendix G: Environmental Checklist Form. Should lead agencies consider the questions in both appendices, or prioritize one? Third, the City

proposes that the caveat offered by OPR in its “Proposed Updates” document on page 67, that a full “lifecycle” analysis is not required, be added to CEQA Guidelines Section 15126.2(b), to provide clear guidance in this respect to lead agencies and interested members of the public. Finally, the City would like some guidance as to what is required under the second question in the proposed new environmental topic “Energy” in the secretary’s proposed Appendix G’s language, which asks if the project would “conflict with or obstruct a state or local plan for renewable energy or energy efficiency.” It is unclear what plans are referenced, and it is also unclear how a mere “conflict” with such a plan would, in and of itself, result in an environmental impact. The City recommends deletion of the secretary’s second Energy question, or, in the alternative, to change it to provide greater guidance to lead agencies on what physical environmental impacts are intended to be addressed by this question that are separate and distinct from those covered in the first.

§ 15126.2.

Secretary draft language:

* * * *

(b) Energy Impacts. If the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy, the EIR shall analyze and mitigate that energy use. This analysis should include the project’s energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to building code compliance, other relevant considerations may include, among others, the project’s size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project. This analysis may be included in related analyses of air quality, greenhouse gas emissions or utilities in the discretion of the lead agency.

City proposed edits:

* * * *

(b) Energy Impacts. If the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy, the EIR shall analyze and mitigate that energy use. This analysis should include the project’s energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to building code compliance, other relevant considerations may include, among others, the project’s size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project; **a full “lifecycle” analysis that would account for energy used in building materials and consumer products is not required.** This analysis may be included in related analyses of air quality, greenhouse gas emissions or utilities in the discretion of the lead agency.

Appendix G:

Secretary draft language:

VI. ENERGY. Would the project:

a) Result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation?

b) Conflict with or obstruct a state or local plan for renewable energy or energy efficiency?

City proposed edits:

VI. ENERGY. Would the project:

a) Result in potentially significant environmental impact due to wasteful, inefficient, or unnecessary consumption of energy resources, during project construction or operation?

~~b) Conflict with or obstruct a state or local plan for renewable energy or energy efficiency?~~

§ 150126.4: Deferral of Mitigation Measures – pages 27–28

The secretary's proposed draft revises CEQA Guidelines Section 15126.4(a)(1)(B) to further clarify when deferral of mitigation measure details may be permissible. Under the secretary's proposed draft text, which is reproduced and highlighted below, deferral is permissible if it is impractical or infeasible to include those details during the project's environmental review and the lead agency satisfies each of the three further listed criteria. The agency must:

- (1) commit itself to the mitigation,
- (2) adopt specific performance standards the mitigation will achieve, and
- (3) list the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure

A plain reading of these proposed additions to CEQA Guidelines Section 15126.4 suggests that a lead agency must meet all three of these criteria in order to properly defer development of the details of a mitigation measure. However, the explanation of these proposed amendments on page 99 of OPR's proposed updates suggests that a lead agency may defer development of mitigation measure details if the agency *either* provides a list of possible mitigation measures, *or* adopts specific performance standards (see second full paragraph on page 99 of OPR's proposed updates). Please clarify whether OPR's explanation of the proposed amendments accurately describes the additions to CEQA Guidelines Section 15126.4 contained in the secretary's proposed draft text and, if so, please revise the secretary's proposed amendments to CEQA Guidelines Section 15126.4(a)(1)(B) accordingly. (The "and" below in the

secretary's proposed draft should then be revised to an "or" to ensure consistency with OPR's explanation of the proposed amendments shown in the second full paragraph on page 99 of OPR's proposed updates. Additionally, an "and either" should be added after "(1) commits itself to the mitigation. This would clarify that (1) is required in all circumstances and a lead agency may elect to implement either (2) or (3).)

Secretary draft language

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures ~~should~~ shall not be deferred until some future time. ~~However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.~~ The specific details of a mitigation measure, however, may be deferred when it is impractical or infeasible to include those details during the project's environmental review and the 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. Compliance with a regulatory permit process may be identified as a future action in the proper deferral of mitigation details if compliance is mandatory and would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.

City proposed edits (for consistency with OPR's proposed updates):

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures ~~should~~ shall not be deferred until some future time. ~~However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.~~ The specific details of a mitigation measure, however, may be deferred when it is impractical or infeasible to include those details during the project's environmental review and the agency (1) commits itself to the mitigation, **and either** (2) adopts specific performance standards the mitigation will achieve, **and or** (3) lists the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure. Compliance with a regulatory permit process may be identified as a future action in the proper deferral of mitigation details if compliance is mandatory and would result in implementation of measures that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.

§ 15301 Categorical Exemption: Existing Facilities – page 41

The secretary should add language to CEQA Guidelines Section 15301 that is consistent with Public Resources Code Section 21099 (Senate Bill 743 - Steinberg, 2013), and OPR's Senate Bill 743 technical advisory.

Secretary draft language

15301. Existing Facilities

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety, and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, pedestrian crossings, and street trees, and other similar improvements that do not create additional automobile lanes).

City proposed edits

15301. Existing Facilities

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety, and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, transit improvements such as bus lanes, pedestrian crossings, street trees, removal of vehicular travel lanes, and other similar improvements alterations that do not create additional substantially induce automobile lanes travel).

Aesthetics – page 57

OPR's proposed updates document rightly points out on pages 32-33, that "[v]isual character is a particularly difficult issue to address in the context of environmental review, in large part because it calls for exceedingly subjective judgments." The proposed solution subsequently appears to be to import into CEQA a requirement that lead agencies consider a project's consistency with applicable zoning or other regulations governing scenic quality.

The City respectfully disagrees with this approach. This approach misreads *Bowman v. City of Berkeley* (2006) 122 Cal.App.4th 572, appears to conflict with long-standing case law regarding consistency with plans and policies, and runs contrary to the recent amendments pertaining to aesthetic impacts in infill areas contained in Senate Bill 743 (Steinberg, 2013), now codified in Public Resources Code Section 21099. *Bowman* concluded that "aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA" (*Bowman*, at p. 593.). It is therefore surprising then that compliance with zoning and other regulations is now proposed to be used as part of the CEQA analysis.

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Moreover, lack of compliance with zoning or other plans and policies is not, in and of itself, indicative of a potential environmental impact. What matters is whether that inconsistency results in environmental impacts. (See *Marin Mun. Water Dist. v. Kg Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1668.) And, numerous cases have held that absolute consistency with plans and policies is not required. (See *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498 [“State law does not require perfect conformity between a proposed project and the applicable general plan.... In other words, it is nearly, if not absolutely, impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan.... It is enough that the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan” [citations omitted].) The City is concerned that the proposed language calling for the identification of “conflicts” with applicable zoning or other regulations as part of the CEQA analysis could be construed to impose a heightened consistency requirement, contrary to state law.

Finally, recently adopted Public Resources Code Section 21099(d)(1) states that “aesthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment.” This provision was recently upheld in court, in a case involving the City. (See *Protect Telegraph Hill v. City and County of San Francisco* (2017) 16 Cal.App.5th 261, 272.) Infill sites and transit priority areas are, by definition, in urbanized areas. (See Section 21099(a) [definitions].)

For these reasons, the City believes the draft language regarding conflicts with applicable zoning or other regulations should be deleted. In the alternative, a caveat should be added to refer to the exemption codified in Section 21099(d).

Secretary draft text:

I. AESTHETICS. Would the project:

* * * *

c) Substantially degrade the existing visual character or quality of public views of the site and its surroundings? If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?

City proposed edits:

I. AESTHETICS. Would the project:

* * * *

c) Substantially degrade the existing visual character or quality of public views of the site and its surroundings? ~~If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?~~

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San Francisco Comments on Proposed Amendments and Additions to the CEQA Guidelines

That concludes our comments on the California Natural Resources Agency Secretary's Proposed Amendments and Additions to the State CEQA Guidelines. Thank you for this opportunity to provide input on the proposed revisions to the CEQA Guidelines. We appreciate your consideration of our comments and welcome any questions or comments you might have. Please contact Devyani Jain at (415) 575-9051 or at Devyani.Jain@sfgov.org if you would like to speak to us regarding our comment letter.

Sincerely,



Lisa Gibson

Environmental Review Officer

San Francisco Planning Department

