Lockey, Heather@CNRA

From: Linda Krop <lkrop@environmentaldefensecenter.org>
Sent: Thursday, March 15, 2018 4:07 PM
To: CEQA Guidelines@CNRA
Cc: Alicia Roessler; Tara Messing
Subject: EDC letter re CEQA Guidelines Amendments
Attachments: EDC letter re CEQA Guidelines Update_2018_03_15.pdf

Thank you for the opportunity to comment on the proposed CEQA Guidelines Amendments. I have attached our comments for your consideration.
Please confirm receipt.
Thank you,
LK

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environmental
DEFENSE CENTER

March 15, 2018

Christopher Calfee, Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Submitted by email to: CEQA.Guidelines@resources.ca.gov

Re: Notice of Proposed Rulemaking: Amendments and Additions to the State CEQA Guidelines

Dear Mr. Calfee:

Thank you for this opportunity to submit comments regarding the proposed amendments and additions to the CEQA Guidelines. The following comments are submitted on behalf of the Environmental Defense Center ("EDC"). EDC is a public interest law firm that protects and enhances the environment through education, advocacy, and legal action. EDC was founded in 1977 to represent organizations dedicated to environmental protection. In our more than forty years of operation, we have worked on many cases involving the enforcement of the California Environmental Quality Act ("CEQA"). We have also worked on legislative and regulatory proposals pertaining to CEQA.

Our comments focus on the Environmental Setting, Project Description, Mitigation Measures, and Exemptions.

I. Section 15125 Should be Amended to Exclude Illegal and Unpermitted Uses in the Environmental Setting.

Our foremost concern relates to the need to exclude illegal and unpermitted uses from the Environmental Setting for purposes of environmental review. The purpose of the Environmental Setting is to establish the baseline from which a project's environmental impacts will be evaluated. (See CEQA Guidelines § 15126.2(a).) Therefore, it is critical that the Environmental Setting provide a meaningful basis from which to ascertain a project's impacts. We have encountered several instances in which a landowner or applicant undertakes illegal or unpermitted activities and then, when required to apply for a permit, asks the lead agency to

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evaluate impacts in comparison to the modified setting – or simply points out that no environmental review is warranted because there is no physical change to the baseline conditions. As such, the illegal or unpermitted activities completely avoid environmental review, and there is no opportunity to consider impacts, mitigation measures, or alternatives. In fact, this practice *encourages* landowners and applicants to undertake activities without permits so that they can avoid environmental review altogether.

Therefore, Section 15125(a)(4) should be amended as follows: **"A lead agency shall not use a conditions baseline that resulted from illegal or unpermitted activities."**

II. Section 15124(b) Should be Limited to a Description of the Project's Characteristics, Location, and Objectives, and Not Include Alleged Benefits.

The proposed amendment to Section 15124(b) would allow a discussion of project benefits within the Project Description. Benefits are subjective and, if proposed by an applicant, may be incomplete or misleading. In addition, this discussion could impede the consideration of a reasonable range of alternatives, in the same way a narrow project objective might. The purpose of the Project Description should be to provide factual information necessary to enable the lead agency to accurately and completely evaluate the potential impacts of a proposed project. Expanding the scope of the Project Description to include benefits will not enhance the analysis of impacts and may unnecessarily and inappropriately constrain the scope of alternatives.

In any event, an applicant has ample opportunity to assert project benefits during review of a proposed Statement of Overriding Considerations. This phase of CEQA review is more appropriate for weighing potential project benefits.

Finally, this amendment is not responsive to any recent legislative or judicial directive. Therefore, **the amendment to add project benefits to Section 15124(b) should be deleted**.

III. Section 15126.4 Should Only Allow Deferral of Mitigation Measures if it is Infeasible to Formulate Measures in the EIR.

The proposed amendment to Section 15126.4 allows the lead agency to defer formulation of mitigation measures when it is "impractical or infeasible" to include details during the project's environmental review. It is important that mitigation measures be specified during the environmental review process so the lead and responsible agencies can make accurate findings as to whether project impacts will be avoided or substantially lessened. CEQA requires that mitigation measures be implemented and enforceable when feasible. *Federation of Hillside and Canyon Assns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, relying on Pub. Res. Code §§ 21002.1(b), 21081.6(b). To satisfy these requirements, the formulation of mitigation measures should only be deferred if it is "infeasible" to include details during the project's environmental review. Feasibility is a known term in CEQA practice, whereas "impracticality" is

vague and open to abuse. Therefore, **Section 15126.4 should be amended to delete the phrase "impractical or".**

IV. Section 15269 Should be Revised to Ensure that the Expansion of the Emergency Exemption does not Exceed the Definition of Emergency.

CEQA defines "emergency" as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property, or essential public services. []" CEQA Guidelines § 15359. The proposed amendment to the Guidelines would expand the exemption for emergencies to include "emergency repairs…that require a reasonable amount of planning." This expansion is vague and overbroad, and appears inconsistent with the definition of emergency. In fact, this expanded exemption could easily swallow the rule. **The proposed amendment should be eliminated, or at least clarified to ensure that it is consistent with the definition of "sudden, unexpected occurrence."**

V. Section 15301 Should be Revised to Exclude Former Uses from the Exemption for Existing Facilities.

The proposed amendment to Guidelines Section 15301 would add "former" use of an existing facility. This change conflates the Environmental Setting with the allowance of an exemption. If the Environmental Setting is changed (e.g., a use is increased or expanded), that may result in new or increased impacts on the environment. Allowing an exemption to be based on a *prior* condition ignores this important requirement of CEQA and circumvents necessary environmental review. Therefore, **the reference to "former" use should be eliminated from this proposed amendment.**

Conclusion

Most of the proposed CEQA Guidelines amendments appropriately implement new statutory requirements or judicial interpretations. Some, however, go beyond this direction and allow lead agencies and applicants to avoid environmental review, especially by expanding exemptions and changing the Environmental Setting. These proposals will deprive the public and decision makers of the information necessary to make informed determinations, and to comply with the essential goal of CEQA to prevent environmental damage. Pub. Res. Code § 21000; Guidelines § 15002(a). We therefore urge the Office of Planning and Research to modify its proposal consistent with the recommendations set forth in this letter.

Thank you for your consideration.

Sincerely,

Linda Krop, Chief Counsel