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From: Calfee, Christopher@CNRA
Sent: Thursday, March 15, 2018 4:06 PM
To: CEQA Guidelines@CNRA
Subject: Fwd: Proposed Regulatory Update to the CEQA Guidelines - Metropolitan Water District Comment Letter
Attachments: Signed CEQA Comment Letter.pdf; ATT00001.htm

Begin forwarded message:

From: "Morrison,Michelle J" <MMorrison@mwdh2o.com>
Date: March 15, 2018 at 3:56:38 PM PDT
To: "Christopher.Calfee@RESOURCES.CA.GOV" <Christopher.Calfee@RESOURCES.CA.GOV>
Subject: Proposed Regulatory Update to the CEQA Guidelines - Metropolitan Water District Comment Letter

Mr. Calfee,

Please see the attached comment letter regarding proposed updates to the CEQA Guidelines on behalf of the Metropolitan Water District of Southern California.

Thank you,

Michelle Morrison
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THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Office of the General Manager

March 15, 2018

VIA EMAIL AND FED EX

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

Dear Mr. Calfee:

Comments on the Final Proposed Update to the CEQA Guidelines

The Metropolitan Water District of Southern California (Metropolitan) reviewed the Final Proposed Updates to the CEQA Guidelines (the Proposed Update) prepared by the Governor's Office of Planning and Research (OPR), and is pleased to submit comments for consideration by OPR during the public comment period for the Proposed Update.

Background

Metropolitan is a public agency and regional water wholesaler. It is comprised of 26 member public agencies serving approximately 19 million people in portions of six counties in Southern California, including Los Angeles, Ventura, Orange, Riverside, San Bernardino, and San Diego Counties. Metropolitan's primary sources of imported water come from the California State Water Project (SWP) and from the Colorado River via the Colorado River Aqueduct (CRA). Metropolitan's mission is to provide its 5,200 square mile service area with adequate and reliable supplies of high-quality water to meet present and future needs in an environmentally and economically responsible way. Consistent with this mission, Metropolitan provides the following comments on the Proposed Update:

1. Using Regulatory Standards in CEQA (Thresholds of Significance) § 15064.7(c)

Metropolitan Comment: Metropolitan recommends adding language (double underlined)¹ to support the proposed addition by OPR.

Metropolitan Proposal

(c) When adopting or using thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public agencies or recommended by

¹ For ease of reference, Metropolitan's suggested additions and deletions are shown in double underline or double strike out font.

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experts, provided the decision of the lead agency to adopt or use such thresholds is supported by substantial evidence.

2. Baseline (Exceptions to the General Rule) § 15125(a)(2)

Metropolitan Comment: Proposed new CEQA Guidelines section 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 stating 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.

Metropolitan Proposal

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).

3. Consideration and Discussion of Mitigation Measures proposed to Minimize Significant Effects § 15126.4(a)(1)(B)

Metropolitan Comment: Proposed section 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...”. 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

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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."

Additionally, the language that the lead agency would reduce an impact to a performance standard doesn't make sense. It should refer to reducing the impact to the "resource," in accordance with the performance standards that would result in an impact of less than significant. Suggested text on this section is double underlined.

Metropolitan Proposal

Revise section 15126.4 (a)(1)(B) to the following:

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. **The specific details of a mitigation measure, however, may be deferred when it is impractical or infeasible to include those details during the environmental review and the agency (1) 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. 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 in accordance with specified performance standards.**

4. Clarifying Rules on Tiering § 15152(h)

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Metropolitan Comment: Metropolitan appreciates the revision proposed by OPR for clarity's sake on streamlining later reviews and how tiering is just one method among many. To be more comprehensive, this section should also be cross-referenced with the existing section on streamlining and tiering with respect to GHG. The addition of "methods" in the revised text allows for inclusion of GHG analysis here and not just a listing of documents or projects. Additional text on the GHG tiering section is double underlined.

Metropolitan Proposal

(h) There are various types of EIRs that may be used in a tiering situation. The rules in this section govern tiering generally. Several other methods to streamline the environmental review process exist, which are governed by the more specific rules of those provisions. Where other methods have more specific provisions, those provisions shall apply, rather than the provisions in this section. Where multiple methods may apply, lead agencies have discretion regarding which to use. These other methods include, but are not limited to, the following:

- (1) General plan EIR (Section 15166).
- (2) Staged EIR (Section 15167).
- (3) Program EIR (Section 15168).
- (4) Master EIR (Section 15175).
- (5) Multiple-family residential development/residential and commercial or retail mixed-use development (Section 15179.5).
- (6) Redevelopment project (Section 15180).
- (7) Projects consistent with community plan, general plan, or zoning (Section 15183).
- (8) **Infill projects (Section 15183.3).**
- (9) **Tiering and streamlining the analysis of greenhouse gas emissions (Section 15183.5).**

5. Remedies and Remand §15234(b)(3)

Metropolitan Comment: The last subdivision of this new section requires the court to find that the project activities "complied with CEQA" in order to proceed during pending litigation. If read broadly, opponents could object to an agency proceeding with any portion of a project on the theory that the whole project does not comply with CEQA where a court has ordered the lead agency to decertify an EIR. Suggested text is double underlined.

Metropolitan Proposal

Revise proposed text in new section 15234(b)(3) to the following:

(b)(3) complied with CEQA as to the severable portions of the project.

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6. Conservation Easements as Mitigation § 15370(e)

Metropolitan Comment: The proposed revision is to permit the use of conservation easements for mitigation purposes. The text (background and explanation on page 154) indicates that offsite easements are allowed per recent court case cited, however; it is not explicit in the new language. Suggested text is double underlined.

Metropolitan Proposal

(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 (either onsite or offsite, depending on the circumstances, availability, and goals of the mitigation).**

7. Updating the Environmental Checklist – Proposed Amendments to Appendix G

OPR proposes to reorganize and revise Appendix G to eliminate redundancy, reframe or delete certain questions more properly dealt with in the planning process, and add certain questions it contends are required by existing law but are often overlooked. Metropolitan believes most of the proposed revisions appear to be of a common sense and non-controversial nature however, some clarification regarding the relevant information is requested.

Aesthetics - Proposed Revision to Appendix G § I(c)

Metropolitan Comment: Regarding Aesthetics Item c), the statement addresses whether a project conflicts with zoning rather than physical environmental impacts. Also, the term “scenic quality” is subjective and ambiguous as it is not clear what it means to mitigate scenic quality, and Metropolitan suggests using “scenic resources,” which is already in the regulations. Suggested text on this section is double underlined.

Metropolitan Proposal

Revise proposed text in the Aesthetics question of Appendix G § I(c):

c) Substantially degrade the existing character or quality of **public views of** the site and its surroundings? **If the project is in an urbanized area, would the project cause a significant impact due to conflict with applicable zoning and other regulations governing relating to scenic quality resources?**

Biological Resources – Proposed Revision to Appendix G § IV(c)

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Metropolitan Comment: Regarding the proposed language addition of state or federally protected wetlands, the term “protected” is not defined. Previously this section referenced Section 404 of the Clean Water Act, a federal regulation which “protects” and regulates impacts to wetlands. When using the term “protected” it is helpful to have a reference to which regulation specifically protects and regulates the resource. Suggested text on this section is double underlined.

Metropolitan Proposal

Revise proposed text in the Biological Resources question of Appendix G§ IV(c):

c) Have a substantial adverse effect on ~~state or federally protected~~ wetlands as defined by Section 404 of the Clean Water Act protected under state or federal regulations, (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

Energy Impacts – Proposed Revisions to § 15064(b)(2) & Appendix G § VI (a) & (b)

Metropolitan Comment: The proposed inclusion of Appendix F regarding energy impacts into Appendix G § VI raises many questions. First, it is not clear what is meant by the term wasteful, inefficient, or an unnecessary consumption of energy located in question (a), and a definition or metrics should be provided for clarification. At a minimum, the threshold should be whether a project would cause “significant” energy impacts. See *Tracy First v. City of Tracy*, 177 Cal. App. 4th 912, 933 (2009) (holding that the city satisfied its Appendix F requirements to analyze energy impacts where the city found that a project would not have significant energy impacts).

Question (b) is also problematic. Whether the project conflicts with or obstructs a state or local plan for renewable energy or energy efficiency calls for a yes or no answer. A conflict between a project and a particular plan (even for renewable energy) may not necessarily lead to a significant environmental impact. The analysis should be whether such a conflict will result in significant effects. The suggested wording for item b) is double underlined.

Metropolitan Proposal

b) Would the project cause a significant environmental impact due to conflict with or obstruction of a state or local plan adopted for the purpose of avoiding or mitigating energy impacts through renewable energy or energy efficiency?

Hydrology and Water Quality - Proposed Revision to Appendix G § X(b)

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Metropolitan Comment: “sustainable groundwater management” of the basin is undefined in this context. Is this term specifically in reference to the definition in the Sustainable Groundwater Management Act, which defines it thusly: “Sustainable groundwater management means the management and use of groundwater in a manner that can be maintained during the planning and implementation horizon without causing undesirable results.”

Metropolitan Proposal

Revise proposed text in the Hydrology and Water Quality question of Appendix G§ X (b) so that it references the legal definition of sustainable groundwater management.

Hydrology and Water Quality - Proposed Revision to Appendix G § X(d)

Metropolitan Comment: The phrase “risk release of pollutants” during an extreme flooding event is vague when using as a criterion for significance. Suggested text on this section is double underlined.

Metropolitan Proposal

Revise proposed text in the Hydrology and Water Quality question of Appendix G§ X(d):

d) In flood hazard, tsunami, or seiche zones, risk release of pollutants due to project inundation that could create a significant effect to the public or the environment?

Hydrology and Water Quality -Proposed Revision to Appendix G § X(e)

Metropolitan Comment: Conflicts with a plan (even for a water quality control plan or sustainable groundwater management plan) may not necessarily lead to a significant impact. The analysis should be whether such a conflict will result in significant effects. Suggested text on this section is double underlined.

Metropolitan Proposal

Revise proposed text in the Hydrology and Water Quality question of Appendix G§ X(e):

e) Would the project cause a significant environmental impact due to conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan?

Population and Housing - Revisions to Appendix G § XI(a)

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Metropolitan Comment: The question is whether a project would induce substantial unplanned population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure). This question is odd because the lead agency/applicant is writing a *planning document*. The example provided is ill-suited because while new homes are a direct impact and roads/infrastructure are an indirect impact, they are not unplanned. However, they can potentially lead to further development and urbanization. What is an example of unplanned growth? Metropolitan suggests adding a definition or alternative example. Suggested text is double underlined.

Metropolitan Proposal

Revise proposed text in the Population and Housing question of Appendix G§ XI (a):

a) Induce substantial **unplanned** population growth in an area, either directly (~~for example, by proposing new homes and businesses~~) or indirectly (~~for example, through extension of roads or other infrastructure~~)? **Planned population growth is defined as projections analyzed in connection with an approved land use plan (e.g., general or specific plan), regional plan (e.g., Council of Governments regional transportation plan), or certified state projections from the California Department of Finance.**

Transportation – Revisions to Appendix G§ XVII

Metropolitan Comment: Metropolitan suggests rewording of items a, b, and c for clarity and consistency. Suggested text on this section is double underlined

Metropolitan Proposal

Revise proposed text in the Population and Housing question of Appendix G§ XVII (a, b, c):

a) **Cause a significant environmental impact due to conflict with an adopted plan, ordinance or policy addressing the circulation system, including transit, roadways, bicycle lanes and pedestrian paths?**

b) **For a land use project, would the project cause a significant environmental impact due to conflict or inconsistency with CEQA Guidelines section 15064.3, subdivision (b)(1)?**

c) **For a transportation project, would the project cause a significant environmental impact due to conflict with or inconsistency with CEQA Guidelines section 15064.3, subdivision (b)(2)?**

Wildfire – Revisions to Appendix G§ XX

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Metropolitan Comment: This question does not aid in actually determining the significant environmental impact.

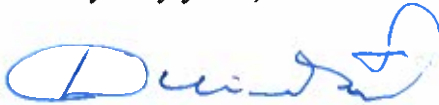
Metropolitan Proposal

Revise proposed text in the Wildfire question of Appendix G§ XX(a). Suggested text on this section is double underlined.

a) Cause a significant environmental impact due to interference with an adopted **emergency response plan or emergency evacuation plan?**

In conclusion, Metropolitan supports OPR's intent to improve the CEQA guidelines and provide an environmental review process that is more efficient, effective, and meaningful for agencies, applicants, and the public. We appreciate the opportunity to work with OPR on these changes and are grateful for the due diligence and outreach provided. If you have any comments or questions concerning the suggested revisions above, please do not hesitate to contact Michelle Morrison at 213-217-7906.

Very truly yours,



Deirdre West
Section Manager, Environmental Planning Section

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