## Lockey, Heather@CNRA

**From:** Owens, Julia A <Julia.A.Owens@p66.com>
**Sent:** Wednesday, March 14, 2018 4:36 PM
**To:** CEQA Guidelines@CNRA
**Cc:** Bristol, Don A; Greene, Jimmy R (LDZX)
**Subject:** Comments on proposed amendments to CEQA Guidelines
**Attachments:** Comments on proposed amendments to CEQA Guidelines.pdf

Julia A. Owens
Environmental Services

O: (+1) 510.245.4645 | F: (+1) 510.245.4512 | E: Julia.A.Owens@P66.com
SFR | 1380 San Pablo Ave. | Rodeo, CA 94572

***"In matters of principle, stand like a rock; in matters of taste, swim with the current."***

***-Thomas Jefferson***

Phillips 66
San Francisco Refinery
1380 San Pablo Avenue
Rodeo, CA 94572
phone 510.799.4411
fax 510.245.4476

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CERTIFIED MAIL – 7015 0640 0005 0673 8714

Christopher Calfee, Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Fax: 916-653-8102
Email: CEQA.Guidelines@resources.ca.gov

Re: Comments on proposed amendments to CEQA Guidelines

Dear Deputy Secretary Calfee:

Phillips 66 Company ("Phillips 66") appreciates the opportunity to provide comments on the proposed updates to Title 14 of the California Code of Regulations implementing the California Environmental Quality Act (the CEQA Guidelines). Phillips 66 owns and operates numerous manufacturing, transportation, and other industrial facilities in California and many of the projects it undertakes are subject to California Environmental Quality Act review.

## I. "Environmental Standards" as Significance Thresholds

The Office of Planning and Research ("OPR") proposes to update sections 15064 and 15064.7 to address when regulatory standards may be used as significance thresholds. We first address new proposed language in section 15064.7(d), and address section 15064 in Part II of this letter below.

Section 15064.7(d) proposes new language that allows lead agencies to adopt or use an "environmental standard" as a threshold of significance, provided that the agency explains how the requirements of the environmental standard avoid project impacts, and why the environmental standard is relevant to the project. The criteria for establishing an "environmental standard" under this new provision include the requirement that it be a rule of general application, adopted by a public agency through a public review process.

We agree that regulatory standards can be appropriate significance thresholds. We also believe that where an agency has gone through a public review process to adopt a standard that meets these criteria, an agency evaluating the project under CEQA should be able to reference the documents associated with that review process for the explanation required. Rules, policies or requirements established pursuant to the public review process are often the results of months of solicitation and consideration of public input

and written analysis. An agency evaluating a project under CEQA should be able to rely on the materials generated in connection with this public process for its explanation of how the rule works and why it is relevant, rather than have to reiterate the reasoning and analysis previously conducted at length in connection with the adoption. The Guidelines or Statement of Reasons should make clear that such an approach is an acceptable means of complying with no section 15067.4(d).

## II. An EIR's Analysis Should Be Based On Compliance With Existing Regulatory Programs.

Even where a regulatory standard does not form the basis for a significance threshold, compliance with existing environmental regulatory programs should be reflected in the environmental analyses. The Guidelines or the Statement of Reasons should state that environmental analyses and significance conclusions should assume that a proposed project will be carried out consistent with existing regulatory programs. This concept should be clearly stated in the guidelines, as it affects the analysis of every environmental topic. It also plays a role in several of our comments on the proposed amendments, as noted in the succeeding sections of this letter.

California has invested decades and substantial resources in developing sophisticated programs regulating every environmental medium. These programs are diligently enforced at the state and local levels. In some cases, these programs will altogether prevent significant adverse effects from a project, as was found in *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934 (compliance with applicable regulatory standards can provide a basis for determining that a project will not have a significant environmental impact). In other cases the existing environmental programs will reduce the severity of significant impacts that warrant additional mitigation. However, in all cases, the EIR analysis should take compliance with these programs into account in assessing a project's impacts. Indeed, it would be convoluted and misleading for an EIR to analyze impacts as if the project could operate outside the law, and then describe the theoretical "impacts" as mitigated through compliance with the law. For example, if applicable air quality rules mandate that a certain stack be equipped with a diesel particulate filter in order to obtain the necessary permit to operate, then the project's air emissions should not be analyzed without the filter in the first instance. Rather, the potential air impacts should be analyzed with the legally mandated control device in place.

We understand that lead agencies may choose to include language requiring compliance with the law, which is permissible but not required under CEQA. As the court explained in *Oakland Heritage Alliance v City of Oakland* (2011) 195 Cal.App.4th 884, 906, "a condition requiring compliance with regulations is a common and reasonable mitigation measure and may be proper where it is reasonable to expect compliance." However, CEQA does not require a lead agency to ignore existing regulatory requirements that limit or avoid project impacts. To do so would have the effect of undermining the informational value of the EIR by unnecessarily evaluating impacts that will not be significant due to existing regulatory programs, thus failing to follow the mandate in Guidelines section 15126.2 to concentrate the EIR on potentially significant impacts. As such, compliance should be assumed in the environmental analysis.

## III. Proposed Baseline Amendments Should be Revised to Reflect Recent Controlling Caselaw.

Proposed revisions to section 15125 purport to bring it in line with recent caselaw, but the changes misstate the Supreme Court authorities. The correct reading was articulated most recently in *Association of Irritated Residents v. Kern County Board of Supervisors,* 17 Cal.App.5th 708 (2017) (*"AIR"*). The *AIR* opinion may have been overlooked because it was filed only days before the proposed Guidelines were published, but the Agency should take the opportunity now to revise the proposed language to reflect this important recent holding, which is consistent with the Supreme Court authorities already cited by the proposal.

OPR explained that it is revising section 15125 to make it consistent with the baseline holdings of two cases: *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439 (*"Neighbors"*) and *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (*"CBE"*). But the proposed Guidelines language would mistakenly apply the standard for a hypothetical, future conditions baseline to an agency's decision about how to measure an existing conditions baseline when the activity creating these conditions has fluctuated over time.

The correct approach is reflected in *AIR*, where the court of appeal directly answered the question of whether the *Neighbors* standard for a hypothetical, future conditions baseline also applied to agency's decision about how to measure an existing conditions baseline based on actual operations: It does not. Yet, as currently drafted, the proposed changes would import that onerous requirement even for an existing conditions baseline based on actual historical operations: *"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."* (Emphasis added.) But neither *Neighbors* nor *CBE* provides authority for adding a new standard for a historic conditions baseline.

The *Neighbors* holding took great pains to articulate the limited application of the extra burden when using a hypothetical, future baseline. The court explained: "The need for justification arises when an agency chooses to evaluate *only* the impacts on future conditions, foregoing the existing conditions analysis called for under the CEQA Guidelines." (*Id.* at 454) (italics in original). There, the court addressed the circumstances under which an agency could employ a hypothetical future conditions baseline in place of a baseline that was based on existing physical conditions. The court held that an analysis based *only* on *hypothetical, future* conditions baseline was subject to a more rigorous judicial standard than the scrutiny applied to the choice of measurement for an existing conditions baseline. (*Neighbors, supra,* 57 Cal.4th at 451-452.)

Similarly, in *CBE*, the court had invalidated the environmental review for a project at an oil refinery because the air district analyzing the project's air quality impacts used a hypothetical baseline based on permit limits that did not reflect the level of actual and historical operations at the refinery.

In *AIR,* the lead agency had selected a baseline for a refinery that was experiencing a lull in operations at the time environmental review was commenced, and so the baseline activity levels were based on historical activity levels which were representative of the operating refinery during the period prior to the lull. In this context, the court upheld the selected baseline after considering the standards articulated in *Neighbors* and *CBE*. The *AIR* court, in a lengthy and well-reasoned opinion, provided further clarification of

the factors that should be considered when determining a baseline for a project that builds on an existing facility that has a long history of operations, including some lulls, as well as prior CEQA review.

The use of an existing conditions baseline is fundamentally different from the use of a hypothetical set of physical conditions that might exist in the future. (*AIR, supra,* 17 Cal.App.5th at 730.) Existing physical conditions are referred to in CEQA's statutory text. (Pub. Resources Code §§ 21060.5, 21100, subd. (d), 21151, subd. (b).) In contrast, a comparison based on hypothetical future conditions is not referenced in CEQA. Thus, the principles set forth in *Neighbors* relating to hypothetical future conditions baselines are not needed when a baseline using actual conditions at a time other than the NOP date is used to address "the problem of defining an existing conditions baseline in circumstances where the existing conditions themselves change of fluctuate over time." (*Neighbors*, *supra*, 57 Cal. 4th at 449.)

Furthermore, the *AIR* court held that a baseline based on historical operations was consistent with the principles in *Neighbors* and *CBE*, as well as the more recent case of *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94 (*"North County"*). In *North County,* in connection with a project to renovate an existing shopping center, the lead agency had adopted a traffic baseline that treated a department store space as being fully occupied, even though it had been largely vacated. The court upheld the lead agency's determination of the traffic baseline, concluding substantial evidence supported the determination because "it was based on recent historical use and was consistent with [project applicant's] right to fully occupy the [retail] space without further discretionary approvals." (*North County, supra,* 241 Cal.App.4th at 97; see also *AIR, supra,* 17 Cal.App.5th at 729.)

Given the expansive discussions in the recent caselaw, it is clear that a baseline based on achieved, historical conditions is not subject to the "misleading and without informational value" standard applicable solely to hypothetical, future baselines. The proposed Guidelines language can easily be revised to comport with these principles by deleting the reference to the historical conditions baseline as follows:

> *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.*

Additionally, the Guidelines or the Statement of Reasons should make clear that these revisions to the baseline doctrine do not undermine the equally important principles applicable to subsequent CEQA review set forth in Public Resources Code section 21166. That section provides that where a project has gone through a prior CEQA review and been evaluated in an EIR or negative declaration, subsequent review can only be triggered if certain standards are met. In other words, where a prior environmental review has analyzed activities, operations and equipment, new projects that employ the same activities or equipment, in the way designed and analyzed in the prior review, do not trigger new review. This is consistent with the principles espoused in *North County* and *AIR*, where the historical activity levels were reasonable baselines because the facilities could operate at that same level of activity without any new discretionary approvals.

## IV. The Proposed GHG Provisions Should Be Revised for Clarity.

### a. Compliance with Law

As described in Part II of this letter, above, an environmental document should evaluate the proposed project as it will be required to operate in compliance with existing environmental regulatory programs. This is particularly true with respect to analysis of climate change, in light of the comprehensive regulation of GHG emissions from many sectors, and the declining cap that will prevent many projects from resulting in a net increase in GHG emissions.

Guidance is particularly warranted for projects where some or all of the GHG emissions are generated by Cap-and-Trade regulated facilities or activities. Currently, there is a great deal of confusion and inconsistency in how to reflect regulatory compliance, with many EIRs incorrectly showing emissions increases that cannot lawfully occur, and treating regulatory compliance as mitigation, or requiring mitigation and offsets even for GHG emissions sources subject to Cap-and-Trade. Cap-and-Trade is a critical part of reducing statewide GHG emissions and achieving the reductions set forth in AB 32. The Guidelines should explain that GHG emissions from a project should be analyzed in a way that best characterizes the potential project impacts, i.e., within the context of applicable laws, including Cap-and-Trade.

For the vast majority of projects, climate change is analyzed as a potential cumulative impact because any single project is highly unlikely to cause a significant impact on an individual basis. For regulated entities, compliance with Cap-and-Trade is not optional – it is mandatory – and compliance with the mandatory program prevents a net increase in cumulative emissions. While project-specific GHG emissions should be quantified where feasible, the EIR should explain that compliance with Cap-and-Trade will avoid a net increase in GHG emissions from project sources subject to the cap.

The Cap-and-Trade program was promulgated by the California Air Resources Board ("CARB") for the "express regulatory purpose" of reducing GHG emissions associated with certain entities and accomplished this by establishing an annually declining limit on aggregated emissions from these facilities. (See, e.g., *AIR,* supra, 17 Cal.App.4th at 734-735.) The companies subject to the program, and the declining "cap," likewise are allocated a certain amount of annual GHG emissions that decline over time. They must each reduce their annual emissions to remain within their declining allocation, or obtain allocations from other companies who have reduced their emissions by more than necessary (the trade). In this way, overall emissions from the industrial sectors included in the program are reduced over time.

Critically, the effect is that individual facilities complying with the program *cannot cause a net increase* in overall statewide GHG emissions. If a facility project will, at an individual level, result in GHG emissions, the emissions must be counterbalanced by reductions of GHG emissions from elsewhere, as verified by the requirements of the compliance instruments the facility must trade or surrender. CARB considers the Cap-and-Trade program a linchpin in the implementation of its Scoping Plan, designed to implement the goals of AB 32, and concluded that implementation of the program would reduce statewide GHG emissions by 75 million metric tons per year by 2020.

Therefore, where and to the extent that a project's GHG emissions are attributable to a Cap-and-Trade regulated entity or activity, their potentially significant cumulative impact must be considered in the context of compliance with Cap-and-Trade, which precludes their contribution to statewide GHG emissions increases.

The *AIR* decision addressed an important issue of first impression concerning a CEQA GHG emissions analysis under Cap-and-Trade, and is illustrative of how lead agencies can analyze projects where GHG emissions are generated by Cap-and-Trade regulated entities (e.g., the project facility itself and/or the power plant supplying power to the project). There, the court upheld the lead agency's determination that the refinery project's GHG emissions were not cumulatively considerable because its compliance with Cap-and-Trade meant that any GHG emissions it emitted must be counterbalanced by emissions reductions elsewhere.

In *AIR*, the court first addressed the question of whether the Cap-and-Trade program constitutes a "regulation[s] [or] requirement[] adopted to implement a statewide…plan for the reduction or mitigation" of GHGs under 15064.4(b)(3), and concluded that because the program consisted of regulations, it did. (*AIR*, supra, 17 Cal.App.5th at 741-742.) Therefore, the lead agency for the refinery project was obligated to consider it under section 15064.4(b).

The court then asked whether consideration of the project's compliance with Cap-and-Trade allowed the lead agency to determine that impacts were less than significant. The court found that compliance with Cap-and-Trade did adequately address potential GHG emissions impacts. Highlighting this Court's decision in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, the Opinion stated:

> The importance of the overall effect of a statewide plan, rather than the plan's specific effect on the particular project's emissions was illustrated in *Center for Biological Diversity*. There, our Supreme Court stated the significance of the environmental impact of greenhouse gases does not depend on where they are emitted because of the global scope of the climate change impact. (*Center for Biological Diversity*, supra, 62 Cal.4th at pp. 219–220.) Thus, examining the amount and location of the refinery's emissions is too narrow of an inquiry when the ultimate question is global climate change.
>
> (*AIR*, supra, 17 Cal.App.5th at 742.)

The court concluded that, in the case of Cap-and-Trade and its "industry-wide perspective,…it is appropriate for a lead agency to conclude a project compliance with the cap-and-trade program provides a sufficient basis for determining the impact of the project's greenhouse gas emissions will be less than significant." (*AIR*, supra, 17 Cal.App.5th at 743.)

The court's holding is entirely consistent with, and indeed furthers, the recent holding in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 519 that as climate science advances, EIRs must "stay[] in step with evolving scientific knowledge and regulatory schemes." The Agency and OPR should further these important developments in GHG analysis under CEQA by emphasizing the importance of presuming compliance with these laws. In doing so, the public and the decision-makers gain a better understanding of the project's impacts within the context of the state's efforts to combat climate change as mandated by AB 32. This should be made clear in the Statement of Reasons.

b. "Appropriate Timeframe"

The proposed new language in section 15064.4(b) discussing the determination of GHG emissions impacts adds the following sentence: "*The agency's analysis should consider a timeframe that is appropriate for the project.*" The text that purports to explain the rationale for this addition cites to provisions of CEQA and the Guidelines that already require consideration, in a broader context, of "short-term and long-term" consideration of a project's potential impacts on the environment." (Explanation, p. 82.) Since CEQA reviews are already required to consider reasonably foreseeable potential impacts, the addition of an "appropriate timeframe" language is redundant and would only serve to increase ambiguity and potential for protracted litigation over what particular timeframes are "appropriate" in addition to what is reasonably foreseeable.

Moreover, it does not make sense to apply this additional "timeframe" layer to GHG emissions, specifically. Mitigation and monitoring must already "be designed to ensure compliance during project implementation." (Pub. Resources §21081.6.) Lead agencies may already amortize construction emissions of GHGs.

We request that the agency **delete** the sentence referring to the timeframe, so that the new language in subdivision (b) reads as follows:

> *In determining the significance of a project's greenhouse gas emissions, the lead agency should focus its analysis on the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change.* ~~*The agency's analysis should consider a timeframe that is appropriate for the project.*~~ *The agency's analysis also must reasonably reflect evolving scientific knowledge and state regulatory schemes.*

## V. Deferred Mitigation Amendments Warrant Clarification.

### a. Lead and Responsible Agency Purviews

Proposed section 15126.4, subdivision (a)(1)(B), appears to conflate the concept of mitigation and compliance with the law by stating that the lead agency may "defer mitigation" where another agency will apply a regulatory permit process (and related performance standards). This change risks confusing the roles of the lead and responsible agencies, making lead agencies responsible for performance standards for later actions within the purview of a responsible agency (i.e. a later permit that would rely on the original CEQA review). The responsible agency permit process should not be confused with – or conflated with – mitigation. To do so would create new CEQA requirements that the lead agency must meet with respect to permit programs and compliance details that are – and should remain – under the jurisdiction of the responsible agencies. We suggest clarifying this issue in the Statement of Reasons.

### b. Either/Or Options for Mitigation

Proposed section 15126.4, subdivision (a)(1)(B), adds new text purportedly to clarify obligations of a lead agency when they defer mitigation. Based on OPR's explanatory text, the intent of this section is to provide lead agencies with a menu of three independent choices for properly deferring mitigation. However, the proposed language conflicts with OPR's explanatory text by stating the three options for compliance must <u>all</u> be followed by the agency:

*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, (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.*

As written, this does not agree with the authorities cited in the explanatory text (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261 [allowing a lead agency to defer specifics of mitigation by providing a list of possible mitigation measures] and *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899 [allowing a lead agency to adopt performance standards in the environmental document.].)

We suggest correcting this issue as follows:

*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 either (1)** ~~(2)~~ adopts specific performance standards the mitigation will achieve, ~~and~~ **or (2)** ~~(3)~~ lists the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure.*

## VI. The NOP Posting Location(s) Should be Clarified to Avoid Unintended Consequences.

Section 15082 proposes to add new language regarding the posting of the Notice of Preparation ("NOP"). Specifically, new language would mandate that the NOP be filed "with the county clerk of each county in which the project will be located." The stated rationale for this change is that it is needed to reflect the procedural requirement in PRC § 21092.3, which states, "The notices ... for an environmental impact report shall be posted in the office of the county clerk of each county in which the project will be located..."

It would assist in the orderly evaluation of projects and preparation of EIRs, as provided in Public Resources Section 21083, if OPR would add language to Section 15082 or to the Final Statement of Reasons clarifying that the location of the project is not synonymous with the geographic scope of analysis of environmental impacts. We have observed that agencies occasionally confuse the location of the project with the location of the impacts. The two may be coterminous or overlapping, but are not necessarily the same. The confusion can arise with respect to any of the environmental topics in an EIR, but the potential unintended consequences are illustrated most vividly with the topic of climate change: taken to an extreme, treating the location of the impacts as the location of the project could lead an agency to require posting of the NOP throughout the state. While we have not yet seen such a case, there have been instances in which agencies have viewed indirect impacts as part of the project description. In such a case, the new language in section 15082, without further clarification, could result in a misunderstanding that publication of the NOP is required far from the location of the project itself.

## VII. Transportation Impact Analysis Language Should be Narrowed.

Proposed new section 15064.3 would declare vehicle miles traveled ("VMT") as the most appropriate measure of transportation impacts. This change is prompted by SB 743, but goes far beyond that bill's focus on infill projects and direction to OPR to develop criteria for evaluating vehicle impacts "within transit priority areas." (Pub. Resources Code §21099(b)(1).) Notwithstanding OPR's rationale that uniform standards are less burdensome, OPR should not adopt a guideline that overrides the discretion that CEQA places in lead agencies to determine the appropriate significance thresholds outside of the areas addressed in SB 743.

In addition, by extending the SB 743 concepts beyond infill and transit priority projects, proposed section 15064.3 creates confusion. Depending upon the project, transportation impacts may not be restricted to issues of motor vehicle circulation and transportation. For some projects, the transportation issues may involve other modes of transportation such as rail, air, or marine vessel. Vehicle miles travelled is ***not*** "the most appropriate measure of transportation impacts" for these projects.

In sum, proposed section 15064.3 should be narrowed to simply satisfy the specific directive in SB 743.

## VIII. Energy

New proposed subsection 15126.2(b) seeks to provide further guidance to lead agencies with respect to the energy use analysis of a project. A few minor changes in to the language would improve this section.

First, the new language states that where a project's energy use is considered a significant environmental effect, "the EIR shall analyze and mitigate that energy use." To be consistent with CEQA, this should be revised to read: "*the EIR shall analyze and* ~~***mitigate***~~ ***discuss feasible mitigation of*** *that energy use.*"

Second, proposed section 15126.2(b) acknowledges that the energy analysis need not be a standalone chapter of the EIR, but may be included in related analyses. But the lead agency should not be limited to including an energy discussion in one of the three resource areas enumerated by the Guideline ("*air quality, greenhouse gas emissions, or utilities*"). The lead agency should have the discretion to decide where a discussion of project energy use makes the most sense for a given project. For example, for a project whose dominant energy consumption is related to transportation, the lead agency may determine that energy use should be discussed in conjunction with transportation issues.

## IX. Conclusion

Thank you for your time and consideration of our comments.

Sincerely,

Don Bristol

Director, Environmental Services