

## Lockey, Heather@CNRA

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**From:** Josy Payan <jpayan@portofsandiego.org>  
**Sent:** Thursday, March 15, 2018 9:47 AM  
**To:** CEQA Guidelines@CNRA  
**Cc:** Lucchesi, Jennifer@SLC; Tim Schott (tschott@schottassocs.com); Randa Coniglio; Jason Giffen  
**Subject:** Revised Comment Letter for Notice of Proposed Rulemaking - Amendments and Additions to the State CEQA Guidelines  
**Attachments:** 03-15-18 REVISED Ltr emailed to Christopher Calfee-Ca Natural Resources Agency re NOP Rulemaking for Amendments & Additions to CEQA Guidelines.pdf

Please note the highlighted “or” between the words “easements” and “other”.

Thank you,

### Josy Payan on behalf of Jason H. Giffen

Assistant to Vice President, Executive Offices

3165 Pacific Highway, San Diego, CA 92101  
(o) (619) 686.6533 • (c)



connect: 

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March 15, 2018

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

Dear Deputy Secretary Calfee:

RE: Amended Letter from the San Diego Unified Port District regarding the Notice of Proposed Rulemaking for Amendments and Additions to State California Environmental Quality Act (CEQA) Guidelines

Dear Deputy Secretary Calfee:

Please accept this letter as an amendment to the comment letter submitted by the San Diego Unified Port District (District) dated March 13, 2018 on the above referenced subject.

The District would like to clarify the suggested revisions requested in paragraph three of page three with the following replacement language:

(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 on private lands or conservation easements or other use restrictions on public trust lands.**"

Thank you for your consideration of the District's comments on the Notice of Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines. Please contact Jason Giffen at (619) 686-6473 or [jgiffen@portofsandiego.org](mailto:jgiffen@portofsandiego.org) if you have any questions or need additional information.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lesley M. Nishihira".

Lesley M. Nishihira on behalf of  
Jason H. Giffen  
Assistant Vice President  
Planning & Green Port

Attachment: San Diego Unified Port District Comment Letter, dated March 13, 2018

cc: Jennifer Lucchesi, Executive Officer, State Lands Commission  
Tim Schott, Executive Director, California Association of Port Authorities  
Randa Coniglio, President/Chief Executive Officer, Port of San Diego

March 13, 2018

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

RE: Notice of Proposed Rulemaking for Amendments and Additions to State  
California Environmental Quality Act (CEQA) Guidelines

Dear Deputy Secretary Calfee:

The mission of the San Diego Unified Port District (District) is to protect the Tidelands Trust resources by providing economic vitality and community benefit through a balanced approach to maritime industry, tourism, water and land recreation, environmental stewardship, and public safety. The District was created by the San Diego Unified Port District Act (Port Act) adopted by the California State Legislature in 1962, as amended, and holds the tidelands and certain submerged waters of San Diego Bay in public trust for all Californians. Accordingly, the Port Act recognizes the Public Trust Doctrine, and states that tidelands and submerged lands are only to be used for statewide purposes. To this end, the District is charged with management of the tidelands and diverse waterfront uses along San Diego Bay that promote commerce, navigation, fisheries, and recreation on granted lands. When issuing discretionary permits and/or project approvals for projects and activities located within tidelands, the District often serves as the lead agency under CEQA.

The District has been coordinating with the California Governor's Office of Planning and Research (OPR) over the past four years and recently, the California Natural Resources Agency, and is supportive of the vast majority of the proposed changes reflected in the Notice of Proposed Rulemaking. However, the District respectfully requests clarifications to proposed Section 15370. Mitigation (e), which proposes to add language as follows:

(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.**"

The District understands that the proposed addition of the language above is based on case law, *Masonite Corporation v. County of Mendocino* (2013) 218 Cal. App. 4<sup>th</sup> 230 which discusses the use of agricultural conservation easements as an appropriate and feasible way to reduce or lessen environmental impacts to agricultural resources. The District also acknowledges that offsite preservation of habitats for endangered species is an acceptable means of mitigating impacts on biological resources. However, the new language proposed for Section 15370(e) is unintentionally narrow and limits the application of feasible mitigation options for trustee agencies or agencies responsible for managing certain lands in trust and on behalf of the State of California.

March 13, 2018  
Mr. Christopher Calfee

RE: Notice of Proposed Rulemaking for Amendments and Additions to State California  
Environmental Quality Act (CEQA) Guidelines

As noted above, the District was created by the Port Act, *Chapter 67, Statutes of 1962*, to manage in trust certain tidelands and submerged lands within the San Diego Bay. Lands within and around the Bay that had been previously granted to the cities of San Diego, Chula Vista, Coronado, and National City were transferred to the District. In addition land originally granted to the city of Imperial Beach along the Pacific Ocean was transferred to the District. For over 50 years the District has managed these lands for a balance of benefits using leases and other time-limited mechanisms to allow a variety of uses on District managed tidelands and submerged lands, including industrial, commercial, visitor-serving, and environmental conservation uses. The lands are subject to the Public Trust doctrine and cannot be alienated. In fact, the Port Act restricts the District's ability to enter into agreements, franchises, leases or easements for more than sixty-six (66) years. Consequently, the District legally cannot approve or grant a permanent conservation easement within its jurisdiction as proposed under Section 15370 (e). Additionally, one constant feature associated with all uses on the lands the District manages is that they are non-permanent. The District agrees that permanent mitigation for permanent impacts is appropriate, but a regulatory provision requiring a permanent conservation easement as mitigation on public land held in trust is per se infeasible and would require, at least for the District, permanent mitigation for non-permanent uses and developments. Hence, as currently proposed, Section 15370 (e) artificially reduces options for providing feasible mitigation for the District and may in fact limit the use of these lands for the benefit of the State of California.

The District has a responsibility to manage development and conservation of the public trust lands and waters within its jurisdiction for the benefit of the State of California. In alignment with this responsibility and as discussed above, there are no leases or other uses in perpetuity on the lands the District manages. However, the District often conserves biological resources to feasibly mitigate for impacts from development on lands the District manages and that conservation typically runs co-terminus with the duration of the lease for the proposed development. Under this structure, it often allows for biological resources of an in-kind or greater value to be maintained within or around San Diego Bay for the duration of the development's impact. Resources may be conserved through restrictive use easements or other means, such as a conservation use designation, to ensure habitats of equal or greater value are set aside for the duration of the development, since most leases require the development to return the lands to pre-development conditions (i.e., with habitat restoration, if applicable) at the termination of a lease.

A similar situation also may occur for other time-limited projects on private property, such as those subject to fixed-term use permits. For example, large scale solar energy projects are often proposed on fallow agricultural land. Such projects usually must obtain conditional use permits, with a limited duration, and are required to restore the project site to pre-project conditions at the end of the permit term in order to make the site available again for agricultural uses. In such cases, there is only a temporary loss of agricultural land which requires only temporary, not permanent, mitigation.

March 13, 2018

Mr. Christopher Calfee

RE: Notice of Proposed Rulemaking for Amendments and Additions to State California Environmental Quality Act (CEQA) Guidelines

Therefore, the District requests the proposed language be broadened to allow for feasible, time-limited measures in situations where permanent mitigation, like a permanent conservation easement, is legally infeasible, as would be the case on public trust or granted lands.

These lands are considerably dissimilar from private lands where permanent conservation easements can be established. Suggested revisions to accommodate this request may include:

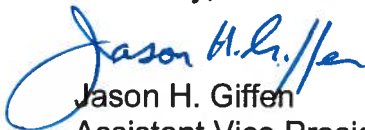
(e) "Compensating for the impact by replacing or providing substitute resources or environments, **including through permanent protection of such resources in the form of permanent conservation easements on private lands or conservation easements other use restrictions on public trust lands.**"

Or

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

Thank you for the opportunity to comment on the Notice of Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines. Please contact me at (619) 686-6473 or at [jgiffen@portofsandiego.org](mailto:jgiffen@portofsandiego.org) if you have any questions or need any further information.

Sincerely,



Jason H. Giffen  
Assistant Vice President  
Planning & Green Port

cc: Jennifer Lucchesi, Executive Officer, State Lands Commission  
Tim Schott, Executive Director, California Association of Port Authorities  
Randa Coniglio, President/Chief Executive Officer, Port of San Diego