Lockey, Heather@CNRA

From: Sara L. Breckenridge <breckenridge@smwlaw.com>
Sent: Thursday, March 15, 2018 4:02 PM
To: CEQA Guidelines@CNRA
Cc: Ellison Folk
Subject: CEQA Guidelines Amendments
Attachments: SMW Comment Letter to California Natural Resources Agency re CEQA Guidelines Amendments (March 2018).PDF

Mr. Calfee,

Shute, Mihaly & Weinberger submits the attached comments on the Natural Resources Agency's proposed amendments to the CEQA Guidelines. Please contact Ellison Folk with any questions. Thank you.

Sara L. Breckenridge
Legal Secretary
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Tel: (415) 552-7272
Fax: (415) 552-5816

SHUTE, MIHALY & WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

ELLISON FOLK
Attorney
folk@smwlaw.com

March 15, 2018

Via Electronic Mail Only

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

Re: CEQA Guidelines Amendments

Dear Mr. Calfee:

Shute, Mihaly & Weinberger submits the following comments on the Natural Resources Agency's proposed amendments to the CEQA Guidelines. Because Shute, Mihaly & Weinberger represents both public agencies and environmental and community groups, we have a unique perspective on the CEQA process. We appreciate the level of work that went into this update and its comprehensive attempt to reflect the evolving case law and statutory changes that have occurred since the last major update. Although there are many proposed amendments to the Guidelines, these comments focus only on those amendments that are of particular importance or concern.

Section 15182.

We understand this amendment is designed to implement the provisions of Public Resources Code section 21155.4. We suggest that the reference to a "planned" transit stop include a reference to Public Resources Code section 21099 (a)(7), which identifies specific criteria for "planned" transit stops.

Section 15301.

The existing facilities exemption is designed to allow a narrow exemption for existing projects or minor expansions to such projects. For this reason, we agree that the change to allow for bicycle lanes and pedestrian improvements within existing roadways is consistent with the purpose of the exemption. As a general rule, these changes would

not have significant impacts and are an improvement to the existing roadways which are often focused on vehicle traffic rather than pedestrian and bicycle safety.

However, we believe the deletion of the language "beyond that existing at the time of the lead agency's determination" and the addition of the word "former" would fundamentally change the existing facilities exemption and expand it beyond that which is supported by the statute. First, there is not support for the claim that these terms interfere with infill development. Existing facilities, by their nature, exist throughout the state and could include any number of operations, whether infill or not, including hazardous waste facilities, oil refineries, or oil and gas wells. Being "infill" does not make a use innocuous nor is there any state policy to encourage the use of such projects in populated areas.

Moreover, it is not appropriate to conflate baseline case law with exemptions from CEQA, where no environmental review is conducted at all. Exemptions from CEQA should be narrowly construed. *Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 125. The baseline case law discussed in the comments all involved cases for which environmental review was conducted and assessed how to establish a particular level of activity in an area. It did not sanction the use of an exemption for projects simply because they may have existed in the past. Yet, the amendments could exempt substantial projects with significant effects on public health—such as an oil refinery in a low income community—from any review at all. If the Resources Agency is concerned with efficiency of environmental review, former facilities—for which environmental review had been conducted in the past—may be able to rely on the provisions of Public Resources Code section 21166. However, they should not be exempt from CEQA altogether.

Modifications to CEQA Checklist.

The changes to the checklist to reflect the decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369 ("*CBIA v. BAAQMD"*) do a good job of interpreting the decision and incorporating it into specific language. That decision specifically acknowledges that agencies are required to analyze the impacts of exposing people to hazardous conditions where the project will exacerbate these conditions. The proposed amendments appropriately reflect this holding.

We have concerns about the elimination of the noise threshold providing that substantial increases in ambient noise levels may be potentially significant impacts. First, not every jurisdiction has quantifiable noise standards. Moreover, compliance with a specific noise threshold may not be adequate to demonstrate a project will not have a

significant environmental impact. *Berkeley Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344.

Also, it's unclear why the amendments would delete provisions addressing impacts to projects located in the vicinity of an airport. Notwithstanding the decision in *CBIA v. BAAQMD*, CEQA specifically requires an analysis of locating development in close proximity to airports. Pub. Res. Code § 21096.

Section 15125.

We suggest revising Guidelines section 15125(a)(2) to clarify that agencies must consider the entire administrative record when selecting a future or historic conditions baseline in lieu of an existing conditions baseline. As currently drafted, subsection (a)(2) would allow lead agencies to exclude an existing conditions baseline only where the agency finds such a baseline would be misleading or uninformative. This is result is inconsistent with the standard established in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448 ("*Smart Rail*"). There, the court found that the relevant question is "whether the administrative record here contains substantial evidence" to justify excluding an existing conditions baseline. Proposed Guidelines section 15125(a)(1) also recognizes that a future conditions baseline must be supported "reliable projections based on substantial evidence in the record". By focusing only on whether the lead agency demonstrates that the existing conditions baseline would be misleading or uninformative, the revision suggests that the lead agency could ignore all available evidence when making its baseline determination, including evidence submitted by another agency or the public. Ultimately, requiring agencies to consider the full suite of evidence before them furthers the underlying policy of providing decisionmakers and the public information that most accurately reflects a project's potential impacts on the environment. *Smart Rail*, 57 Cal.4th at 453.

Additionally, as drafted, Guidelines section 15125(a)(3) creates uncertainty about when it is appropriate to use a future conditions baseline. By definition, future conditions are conditions that have never actually occurred. The Guidelines should be revised to clarify that projected conditions may be used to establish a future conditions baseline but not an existing conditions baseline. We recommend moving the proposed text from subsection (a)(3) to subsection (a)(1), and distinguishing hypothetical conditions from "conditions expected when the project becomes operation," which might otherwise be confused with hypothetical conditions. With that revision, it would be clear that subsection (a)(1) addresses standards for establishing existing conditions while subsection (a)(2) addresses departures from the existing conditions baseline.

In sum, we suggest the following revisions to Guidelines section 15125(a):

> (1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, that are supported with substantial evidence. In addition to existing conditions, a lead agency may also use baselines consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record. However, a lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.
>
> (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 in the record shows 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.
>
> ~~*(3) A lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.*~~

Proposed Section 15064.3.

In general, we support the use of VMT to address transportation impacts. This metric is consistent with SB 743 and it provides a more complete picture of both the increased transportation and potential air quality implications of a project. However, it is not appropriate to exempt transportation projects—particularly roadway capacity projects—from the obligation to determine if the induced traffic from the project will

result in a significant increase in VMT. If the Guidelines intend to set a consistent standard for evaluating transportation impacts, highway projects that increase VMT should be subject to the same standards as other projects. Moreover, it is important not to lose sight of the fact that even projects in urban areas close to public transit can have significant transportation impacts if not appropriately designed or mitigated. Rather than assume that projects located near transit will not result in increased VMT, the environmental documents should conduct the VMT analysis and conclude based on evidence whether the impact will be significant.

Proposed Section 15064.4.

We appreciate the effort to update this Guideline to reflect more recent case law. The statement of reasons accompanying the proposed changes correctly notes that the analysis of greenhouse gas emissions should not diminish a project's impacts on climate change by comparing the quantity of a single project's emissions to statewide or global emissions. However, we do not believe that the amendment to section 15064.4 (b)—providing that an agency should focus on the incremental contribution of the project's emissions to the effects of climate change—effectively captures this goal. Because no single project is likely to have a significant effect on climate change, we are concerned that agencies could still dismiss project impacts if they focus on that project's contribution to the effects of climate change. We propose that the Guideline be modified to include the following language, which would more clearly state the intent of the amendment.

> 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 emission to the effects of climate change; however, the agency should not dismiss a project's contribution to climate change because it appears relatively small when compared to national or statewide emissions.

In addition, the language in section 15064.4 (b)(3) regarding consistency with the State's long-term climate goals does not capture the court's holding in *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204.

We believe the language in section 15064.4(b)(3) should be more tightly worded to reflect the court's holding and suggest the following revision:

> In determining the significance of impacts, the lead agency may consider a project's consistency with the State's long-term climate goals or strategies, provided that substantial evidence supports the agency's analysis of how those goals or strategies address the project's incremental contribution to climate change and its conclusion that the project's incremental contribution to climate change is consistent with these plans.

Section 15357:

Although we understand the purpose of the addition to this section is to reflect *Friends of Westwood v. City of Los Angeles* (1987) 191 Cal. App. 3d 259, the language should not be limited to changes that could be effected by an environmental impact report because an EIR is only one form of environmental review that could result from the application of CEQA. Therefore we suggest amending the language to state:

> The key ~~*question*~~ is whether the approval process allows the public agency to shape the project in any way that could materially respond to any of the concerns which might be raised in an environmental document.

Section 15370.

We support the addition to subsection (e), which reflects the court's decision in *Masonite Corporation v. County of Mendocino* (2013) 218 Cal. App. 4th 230 and the practice of many agencies with respect to mitigation of impacts to agricultural and environmentally sensitive land.

Thank you for your consideration of these comments.

Very truly yours,
SHUTE, MIHALY & WEINBERGER LLP

Ellison Folk