Lockey, Heather@CNRA

From: Maggie Chui <MChui@rcrcnet.org>
Sent: Thursday, March 15, 2018 12:35 PM
To: CEQA Guidelines@CNRA
Cc: Mary Pitto
Subject: RCRC Letter - Notice of Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines
Attachments: CEQA_Guidelines_Ltr_to_CNRA_03152018_FULL.pdf

Good Afternoon:

Attached please find RCRC's letter regarding the Notice of Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines.

If you have any questions or concerns, please contact Mary Pitto at mpitto@rcrcnet.org.

Thank you,

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March 15, 2018

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

Transmit Via E-mail: CEQA.Guidelines@resources.ca.gov

RE: Notice of Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines

Dear Mr. Calfee:

The Rural County Representatives of California (RCRC) appreciate this opportunity to comment on the Proposed Rulemaking for Amendments an Additions to the State California Environmental Quality Act (CEQA) Guidelines. RCRC is an association of thirty-five rural California counties, and the RCRC Board of Directors is comprised of an elected supervisor from each of those member counties.

The RCRC Board of Directors understands the need to promote sustainable growth, sustainable resources, and sustainable economic conditions in rural California. RCRC member counties are tasked with a variety of decision-making responsibilities related to development and land use in rural California communities and are challenged with environmental stewardship, economic vitality, and social equity at the local level. RCRC member counties are also committed to achieving realistic greenhouse gas (GHG) emission reductions through sustainable land use planning policies, facilitating infrastructure development, and services to provide alternative transportation modes and healthier behavior options. From this perspective, we would like to offer the following comments on the proposed CEQA Guidelines.

First, we would like to commend the Governor's Office of Planning and Research (OPR) for the overall thorough and thoughtful work on updating the CEQA Guidelines and find the amendments mostly positive. Other than a few technical comments that we would like considered, we are still concerned with the new section 15064.3, Determining the Significance of Transportation Impacts.

The long-practiced use of level of service (LOS), or automobile delay, as a criterion for determining the significance of transportation impacts of a project is often a barrier to infill development and can contribute to discouraging other transportation modes. Senate Bill 743 required OPR to prepare proposed revisions to the CEQA Guidelines establishing alternative criteria for determining the significance of transportation impacts of projects *within transit priority areas within Metropolitan Planning Organizations (MPOs)*. SB 743 further *allows* OPR to establish alternative metrics for transportation impacts outside transit priority areas. SB 743 tacitly implies there may be a different implication for rural areas by not mandating a statewide application.

Our primary concern with the proposed addition is the mandated application of the proposed alternative metric, vehicle miles traveled (VMT), effective January 1, 2019. SB 743 clearly states "it is the intent of the Legislature to balance the need for level of service standards for traffic with the need to build infill housing and mixed use commercial developments within walking distance of mass transit facilities, downtowns, and town centers and to provide greater flexibility to local governments to balance these sometimes-competing needs." RCRC does not believe the intent was to mandate a change in metrics statewide in every application of transportation projects.

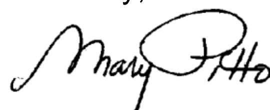
We reiterate from our previous comments to OPR that RCRC believes that choosing any alternative metric at this point is likely to cause unintended consequences, such as a new onslaught of litigation due to new uncertainties and speculation. Even the relationship between the VMT metric for CEQA evaluation and the LOS metric for those counties that still may use LOS in their general plans or fee programs will add to the uncertainties. It will be important to ferret out the difficulties with implementation of the proposed VMT before extending into other areas of the State, especially in rural areas where transit priority areas do not exist and where transit options are limited.

RCRC believes the VMT metric should apply strictly *within transit priority areas within MPOs*. However, if it is to be applied statewide, we urge the Agency to allow more time for rural areas to address the challenges of implementation and transition to a new implementation process. It seems it would be valuable to test the VMT metric in the select areas of the State prior to its application in the more suburban and rural areas of the State where we know implementation may not make the most sense to achieve the State's goals and comes with significant costs and challenges.

RCRC also has a few technical suggestions we would like considered (see attached). There are several areas where proposed amendments either (1) convert *non-exclusive examples* of a permissible practice found in caselaw into the *exclusive* circumstances in which that practice is permissible, or (2) adapt the language from caselaw in a manner that could be (mis)interpreted more stringently than the courts intended (or would decide under existing law).

Thank you for this opportunity to provide input into this important process. If you have any questions or wish to have further discussions, please do not hesitate to contact me at (916) 447-4806.

Sincerely,



MARY PITTO
Regulatory Affairs Advocate

cc: Ms. Maura Twomey, Chair, California Rural Counties Task Force

Attachment: RCRC Suggested Amendments

RCRC Suggested Amendments to the Proposed Rulemaking for Amendments and Additions to State CEQA Guidelines
March 15, 2018

§ 15004. Time of Preparation

(b) **(4) While mere interest in, or inclination to support, a project does not constitute approval, a public agency entering into preliminary agreements regarding a project prior to approval shall not, as a practical matter, commit the agency to the project. For example, an agency shall not grant any vested development entitlements prior to compliance with CEQA. Further, although not determinative, any such pre-approval agreement should:**

- **(A) Condition the agreement on compliance with CEQA;**
- **(B) Not bind any party, or commit to any definite course of action, prior to CEQA compliance; and**
- **(C) Not restrict the lead agency from considering any feasible mitigation measures and alternatives, including the "no project" alternative.**

This change is intended to clarify that each of these elements is recommended, but that not all elements are necessarily mandatory for every agreement.

§ 15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions

(a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency **~~should~~** **shall** make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the **significance** ~~amount~~ of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

(1) **….**

(2) …

The word "amount" necessarily implies that some *quantitative* determination is required, which is contrary to the remainder of the section. (This was less problematic when this section was a "should," but becomes very important with the transition to "shall.")

(b) **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~~ be in step with evolving scientific knowledge and state regulatory schemes.** A lead agency should consider the following factors, among others, when **assessing** **determining** the significance of impacts from greenhouse gas emissions on the environment:

(1) …

(2) …

"In step with" is the exact language from *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal. App. 5th 413, 422, and carries a less prescriptive connotation than "must *reflect*."

§ 15125. Environmental Setting

(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. The lead agency has discretion to decide how the existing physical conditions can most realistically be measured. Where existing conditions change or fluctuate over time, ~~and~~ recent or recurring historical conditions may constitute a realistic measure of existing conditions. ~~w~~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, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(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 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.

The proposed regulations conflate *historic conditions* with *projected future conditions*, which the caselaw specifically cautions against. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 450.) Historic conditions are actually a means of measuring existing conditions, when those conditions fluctuate. The lead agency has substantial discretion to use historical conditions, subject to simple review for substantial evidence. (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-328; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99.) By contrast, project future conditions are an alternative metric "use[d] in place" of existing conditions, only under the narrow circumstances set forth in the proposed regulations. (*Neighbors, supra,* 57 Cal.4th at pp. 451-452.) The limitations applicable to projected future conditions are inapplicable to the use of historic conditions as a realistic measure of the existing conditions on the ground. The proposed regulations consequently miss-state the applicable law. The suggested language here is taken from the foregoing caselaw in order to correctly state the legal rule.

§ 15126.4. Consideration and Discussion of Mitigation Measures proposed to Minimize Significant Effects.

(B) 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. ~~**However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.**~~ **The specific details of a mitigation measure, however, may be deferred when ~~it is impractical or infeasible to include those details during the project's environmental review~~ for practical reasons, mitigation measures cannot be fully formulated at the time of project approval, and the**

agency (1) commits itself to the mitigation, and (2) adopts specific performance standards the mitigation will achieve~~, and (3) lists the potential actions to be considered, analyzed, and potentially incorporated in the imitation 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 reasonable expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.~~ A condition requiring compliance with regulations may be identified as a future action in the proper deferral of mitigation if (1) it is reasonable to expect compliance and (2) the regulations provide adequate assurance that the impact will be mitigated.

The broad references to "practical reasons" and "practical considerations" are virtually universal in the caselaw (see, e.g., *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 241; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94) and do not require the lead agency to demonstrate that *each omitted detail* is infeasible to articulate at the time of project approval.

The deleted provision goes beyond the requirements of caselaw. Although formulation of the performance criteria required under the caselaw will *often* entail such a listing of potential actions, the contents of such performance standards will ultimately depend upon the circumstances of the project. Such a listing of specific actions may itself be infeasible (or uselessly vague or speculative) for a high-level programmatic environmental document. The proposed verbiage would inappropriately remove lead agencies' flexibility to address the full range of projects where this issue may arise.

This formulation is taken directly from the caselaw (see, e.g., *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884; *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036), and more accurately describes the correct legal standard. (For example, the caselaw does not require that the regulatory standards in question involve a "permit process.")

Article 20. Definitions

§ 15357.Discretionary Project

"Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, **or** regulations**, or other fixed standards**. **The key question is whether the approval process involved allows the public agency to shape the project in a~~ny~~ way that ~~could materially respond to any of the concerns~~ would mitigate any environmental impact which might be ~~raised~~ identified in an environmental impact report.** A timber harvesting plan submitted to the State Forester for approval under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code Sections 4511 et seq.) constitutes a discretionary project within the meaning of the California Environmental Quality Act. Section 21065(c).

The vast majority of cases on this precise point use the definitive "would" rather than the speculative "could." (See, e.g., *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.)

This language is taken directly from the most recent caselaw (e.g., *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 22-23), and reflects the correct legal standard more accurately than "respond to any of the concerns".