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CEQA DEVELOPMENTS

Proposed CEQA Guidelines Amendments: A Critique Of OPR's "Preliminary Discussion Draft" (Part I – Proposed "Efficiency Improvements")

By Arthur F. Coon on September 18th, 2015

Posted in Baseline, CEQA-in-reverse, Climate Change/GHG, Cumulative Effects, Exemptions, Land Use, Legislation, Litigation, Mitigation, Recirculation, Reform, Remedies, Standard of Review, Subsequent Review

On August 11, 2015, the Governor's Office of Planning and Research (OPR) released a 145-page "Preliminary Discussion Draft" of "Proposed Updates to the CEQA Guidelines" (the "Discussion Draft"). The Discussion Draft "contains [OPR's] initial thoughts on possible amendments to the CEQA Guidelines" and proposes revisions to nearly thirty (30) sections that OPR classifies into three categories: (1) efficiency improvements; (2) substance improvements; and (3) technical improvements. If ultimately adopted in some form, the Discussion Draft's proposals would constitute the most comprehensive update to the Guidelines since the late 1990s. The Discussion Draft's Executive Summary describes it as "a ***balanced*** package that is intended to make the [CEQA] process easier and quicker to implement, and better protect natural and fiscal resources consistent with other state environmental policies."

A prefatory letter from OPR Director Ken Alex emphasizes that the document "is, first and foremost, a *discussion* draft" and encourages "input from all parts of California and all aspects of our economy, population, and environment." OPR thus encourages "robust engagement" from stakeholders that identifies specific issues and disagreements, suggests alternative language, and supports assertions with legal authority and factual information. The deadline for submitting comments to OPR is **October 12, 2015**.

This post will to some extent summarize and also, where appropriate (and in the spirit of OPR's invitation), offer the author's analysis of and suggestions regarding specific proposed revisions within OPR's "efficiency" category. (Due to the length of OPR's Discussion Draft, and time and space limitations inherent in this format, review and analysis of the Discussion Draft's final two categories – substance and technical improvements – will await a future post or posts.)

Part I – Proposed Efficiency Improvements

- **Proposed amendments to Guidelines §§ 15064 and 15064.7.** OPR proposes to codify case law principles through "updates" to these two sections to "expressly provide that lead agencies may use thresholds of significance, and that some regulatory standards may be appropriately used as thresholds of significance." It would add § 15064(b)(2) stating that thresholds can be used in determining the significance of an impact, that the lead agency should explain how compliance with a relied-on threshold indicates project impacts will be less than significant, and that a "lead agency shall not apply

> a threshold in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant environmental effect from a project."

OPR would also add § 15064.7(d) recognizing that an "agency may adopt or use an environmental standard as a threshold of significance[,]" stating that in so doing it "shall explain how the particular requirements of the environmental standard will avoid or reduce project impacts … to a less than significant level[,]" and defining an "environmental standard" as a "rule of general application that is adopted by a public agency through a public review process" and that meets certain other criteria.

Analysis and suggestions: The revisions to § 15064.7 could be enhanced and improved in several respects. To accurately reflect the case law, a subdivision should be added recognizing that a lead agency need not "formally adopt" thresholds of significance (as contemplated by § 15064.7(b)), but may also adopt and employ *project-specific* thresholds of significance (i.e., on a project-by-project basis), so long as they are supported by substantial evidence. (See, *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1067-1068 ["adverse hydraulic impacts" threshold of significance adopted in County's EIR to evaluate riverbed sand and gravel mining project was proper and did not need to be "formally adopted" as it was project-specific and not for general use; further, the threshold was clear and unambiguous, and properly distinct from the Appendix G factors and thresholds for hydrological impacts, which were only suggestive, not presumptive or mandatory means of evaluating impacts].)

Especially because the proposed new subdivision (d) of § 15064.7 relies heavily on the rationale of the appellate decision in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 ("*CBE*"), it would be helpful to add the following language from that case at its beginning: "[A] lead agency's use of existing environmental standards in determining the significance of a project's environmental effects is an effective means of promoting consistency in significance determinations and integrating CEQA's environmental review activities with other environmental program planning and regulation." (*Id.*, at 111, citing Maureen F. Gorsen, *The New and Improved CEQA Guidelines Revisions: Important Guidance for Controversial Issues* (Oct. 1998).) OPR should also consider amending the definition of "threshold of significance" set forth in subdivision (a) to more closely align with the following one given at pages 110-111 of the *CBE* decision: "A 'threshold of significance' for a given environmental effect is simply that level at which the agency finds the effects of the project to be significant. The term may be defined as a quantitative or qualitative standard, or set of criteria, pursuant to which the significance of a given environmental effect may be determined."

Further, if efficiency is truly the goal, then perhaps the proposed addition should only require the public agency to "briefly" explain how meeting a standard's requirements will reduce the project's impact to insignificance.

Finally, the definition of "environmental standard" seems too narrow in limiting the term to rules of general application "adopted by a public agency through a public review process[.]" For example, CEQA narrowly defines "public agency" to *exclude* "agencies of the federal government" (Guidelines § 15379), yet it is certainly conceivable that substantial evidence could support a public agency's adoption of a federal agency's environmental standard as its own threshold of significance for a particular type of impact for purposes of the CEQA process.

- **Proposed amendments to Guidelines § 15168.** OPR proposes to amend § 15168 to provide guidance regarding whether later activities are within the scope of a program EIR. Apart from what appear to be intended as non-substantive and technical changes (e.g., substituting "later authorities" for "subsequent actions"), the primary substantive change appears to be the addition of the following language to subdivision (b)(2): "Determining that a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Relevant factors that an agency may consider include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic

area analyzed for environmental impacts, and description of covered infrastructure, as presented in the project description or elsewhere in the program EIR."

Analysis and suggestions: While the first sentence of the foregoing proposed addition is helpful, the second sentence (and the rest of the proposed revisions to the section, for that matter) are unnecessary, premature, carry the potential for confusion and conflict with forthcoming California Supreme Court precedent on the subject, and should therefore probably be eliminated. This is an area where OPR should "tread with caution" because it carries the potential for great confusion, rather than "efficient" clarification. The California Supreme Court currently has under review a case that is expected to provide definitive guidance on the relevant factors and standard of review applicable to an agency's determination regarding whether changes to a large project for which a program EIR has been prepared constitute a project *modification* (subject to subsequent CEQA review as limited by Public Resources Code § 21166 and Guidelines § 15162) or a *new project altogether* (subject to essentially "de novo" review under the "fair argument" standard.) (*Friends of the College of San Mateo Gardens v. San Mateo Community College Dist.*, rev. gtd. 1/15/14, Case No. 5214061; *see also*, e.g., *Mani Bros. Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1391, 1400-1401 [major changes to approved missed-use development project as a result of changed real estate market conditions – including increase from 2.7 to more than 3.2 million total square feet, reduction of office/retail space, addition of residential component, and elimination of cultural component – did *not* transform it into "new project" requiring new EIR; court expressed that "changes in the size, ownership, nature, character, etc., of a project are of no consequence in and of themselves [and] ... are meaningful *only* to the extent they affect the [project's] environmental impacts ...."].)

The above (and similar) cases counsel that OPR should stay its hand in amending § 15168 at the present time. This is further underscored by the Discussion Draft's own reasoning at page 21; OPR there states the amendment "follows the analysis" of *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320-1321, and it characterizes that case as holding "because the project was not within the scope of the program EIR, "section 21166 was inapplicable, and the [agency] was obligated by section 21094, subdivision (c), to consider whether [the] site-specific new project might cause significant effects on the environment that were not examined in the prior program EIR". Since OPR intends for some of its proposed revisions to address substantive areas of law that the Supreme Court will soon illuminate, it should hold off for now with respect to those. In this same vein, OPR has omitted from its Discussion Draft issues related to GHG analysis and the "CEQA-in-reverse" issue *precisely because* those issues are currently pending in the Supreme Court. (Discussion Draft, at 9 ["The California Supreme Court, however, is now considering those issues in several cases. OPR does not propose to address those topics while they are under consideration at the Supreme Court."].) Consistent with this seemingly sound reasoning, OPR should follow the same prudent course with respect to § 15168.

- **Proposed amendment to § 15152**. OPR would revise this section addressing "tiering" by amending § 15152(h) to read: "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. These other methods include, but are not limited to, the following: ... [listing various types of EIRs and projects]."

Analysis and suggestions: The proposed revision appears unobjectionable as far as it goes, but OPR should consider additional revisions to update the guideline in other respects by codifying more recent and relevant case law. For example, cases decided subsequent to the early-to-mid-1990s decisions which the guideline continues to rely on as authority have held that even where some project level analysis on a "second-tier" project has occurred *before* a program-level EIR is certified, the program EIR may still properly focus on the broader issues, and is not required to include the project level analysis as part of the "reasonably foreseeable" impacts of the project. (*In re Bay Delta, etc.* (2008) 43 Cal.4th 1143, 1170-1177; *Town of Atherton v. California High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 343-347.) These cases reason that a contrary rule would defeat the purpose of tiering by injecting issues not yet ripe for review into the

first-tier analysis, and could also result in "endless rounds of revision and recirculation of EIRs that the Legislature did not intend." (*Town of Atherton, supra*, 213 Cal.App.4th at 346-347, citing *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1132.) In the interest of efficiency, completeness, and a balanced approach, these principles should be added to the guideline.

- **Proposed amendments to Guidelines § 15182.** This section would be amended to reflect the new statutory exemption for qualifying transit-oriented residential, mixed use and commercial projects codified at Public Resources Code § 21155.4, enacted by SB 743 in 2013, and would include related and clarifying changes that appear uncontroversial.
- **Proposed amendments to Guidelines § 15301.** These uncontroversial amendments, intended to facilitate infill projects and multi-mode transportation projects on existing streets, would align the section with recent case law on the "baseline" issue by clarifying that in applying the "existing facilities" exemption, the key inquiry is whether the proposed activity involves "negligible or no expansion of *historic* use." This change would allow an agency to apply the exemption to a project involving, for example, re-use or re-tenanting of an existing, currently unoccupied building that has a history of productive use. The amendments would also expressly exempt "alterations [to existing streets and similar facilities] such as the addition of bicycle [and related] facilities ... pedestrian crossings, and street trees, and similar improvements that do not create additional automobile lanes."
- **Proposed amendments to Appendix G.** OPR would 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 often overlooked. (Discussion Draft, at pp. 38-75.) It claims the revisions would shorten Appendix G by approximately 30%. It states it "sees the[] proposed changes in Appendix G as a conversation starter" and invites reviewers to consider, inter alia, whether they pose any "conflict with CEQA or cases interpreting CEQA." While I will not attempt to cover all of the proposed revisions, most of which appear to be of a common sense and non-controversial nature, I will – again, in the spirit of OPR's invitation – cover some highlights and potentially problematic areas in detail.

Analysis and suggestions: The Aesthetics section would be reframed to consolidate sub-questions **I a)** and **b)**, but would (in my estimation) *substantively* alter sub-question **c)** into a new **b)** that asks whether the project would "[s]ubstantially degrade the existing visual character or quality of public views of the site and its surroundings in conflict with existing zoning and other regulations?" (Proposed additions underlined.) The first underlined addition helpfully clarifies and reinforces case law indicating that CEQA is primarily concerned with the environment of persons in general, not particular persons, and thus public (as opposed to private) views. To the extent the *second* underlined addition suggests that a project's substantial degradation of existing public views of scenic resources that may exist in the vicinity of the project site is not significant *unless* the project is "in conflict with applicable zoning and other regulations," it seems to go beyond the case law and, indeed, to conflict with CEQA's "fair argument" test and the treatment OPR gives that issue in its discussion of thresholds of significance (discussed above in connection with proposed amendments to §§ 15064 and 15064.7). It is not clear to me that all aesthetic issues (e.g., a zoning compliant project's blocking of scenic public views of a nearby mountain range) will *always* be covered adequately by the local design review process.

OPR proposes addition of a new question **V a)** asking whether the project would "[r]esult in wasteful, inefficient, or unnecessary consumption of energy, during project construction or operations?" It seems this revision is based on a 1974 statute (Public Resources Code § 21100(b)(3)) that was intended to apply only to *state* lead agencies, and a recent appellate decision that is questionable in this regard as it involves a *city*, i.e., a local agency. (Discussion Draft, at 41-42, citing the statute and *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 ("*CCEC*"); *see* West's Ann. Cal. Codes, Pub. Resources Code, Div. 13, Ch. 3 (entitled "State Agencies, Boards and Commissions") & § 21100 (entitled "Environmental impact report on proposed state projects," etc.), emph. added; Guidelines §§ 15368 (defining "local agency") and 15383 (defining "state agency").) Our Supreme Court has held that statutory chapter and section headings are given considerable weight in determining legislative intent (e.g., *People v. Hall* (1991) 1

Cal.4th 266, 272), and Appendix F itself states that: "Potentially significant energy implications of a project shall be considered in an EIR *to the extent relevant and applicable to the project*." (Emph. added.) It is far from clear – notwithstanding the *CCEC* case and the 1976 appellate case involving a county defendant that it relies on – that energy efficiency analysis was ever intended by the Legislature to be a mandatory EIR topic for *all* lead agency (as opposed to *state* agency) projects, and OPR cites no statute or case law in the Discussion Draft expressly addressing this issue.

Notably, this "efficiency" change is related to another proposed Guidelines revision that OPR characterizes as one of "substance" – the addition of a new subdivision (b) to § 15126.2 to address analysis of energy impacts to better implement the "stand alone" Appendix F Guidance. (Discussion Draft, at 76-80.) I will defer substantive analysis of the proposed § 15126.2(b) "substance" revision to a later time, but flag the issue here as it relates to this proposed Appendix G revision and draws into question OPR's legal support for its position that Appendix F energy analysis has *universal* application to all (i.e., including non-state agency) projects covered by CEQA. Indeed, perhaps there is good reason for Appendix F to "stand alone." At the very least, OPR should be certain of its legal footing before even arguably expanding the reach of CEQA in this area through Guidelines amendments.

Aspects of the proposed Appendix G revisions also continue to raise problematic "CEQA-in-reverse" issues despite the fact that this topic is currently under review in a case to be argued on October 7 in the California Supreme Court (meaning that the high court will provide its definitive and binding legal guidance in this area not later than January 2016). (*California Building Industry Association v. Bay Area Air Quality Management District,* Supreme Court Case No. 5213478.) Problem areas of the proposed Guidelines revisions in this respect include: **X h)** (exposing people and structures to "flooding or inundation, unstable soils and other potential hazards"); **XII a)** (exposing people to *or* generating substantial temporary or permanent increases in ambient noise levels in project vicinity); **XVIII b)** (exposing project occupants to wildfire risks), and **d)** (exposing people or structures to various pre-existing risks). OPR should be alert to the potential need to significantly further revise these, and perhaps other, portions of Appendix G following the high court's "CEQA-in-reverse" decision.

While ostensibly well intended, OPR's proposed revision of Land Use and Planning question **X b)** to remove the adjective "applicable" which currently precedes the phrase "land use plan, policy, or regulation" is problematic, for reasons explained below. The proposed revision to focus the question on whether the project would "[c]ause a significant environmental impact due to a conflict" with a plan, however, appears helpful and consistent with CEQA. The word "applicable" should be retained to ensure that CEQA is not expanded to require analysis of "impacts" due to conflicts with provisions of plans that *no longer exist* or are otherwise *inapplicable* to the project under review. For example, if a local lead agency as part of a project approval expressly amends its general plan and zoning ordinance to accommodate the project (as is not infrequently the case), it should not have to contend in litigation challenging the project with arguments that CEQA review should have analyzed the project's alleged "conflicts" with *former* planning and zoning provisions that are no longer applicable to it. (This concern is not hypothetical, as I have personally been involved in litigation where this argument has been made *despite* the existence of the adjective "applicable," and removal of that term would certainly and unwisely draw an additional CEQA litigation "target" on the "backs" of lead agencies, which I am equally certain is not OPR's intent.)

Finally, stakeholders' eyes should be kept on OPR's SB 742 implementation "placeholders" which would eliminate the existing inquiry in **XVI b)** (Transportation) regarding LOS standards, and substitute questions whether the project would cause increased VMT or induce travel by increasing physical roadway capacity. (Discussion Draft, at 67-68.) It is, perhaps, premature for OPR to insert such "placeholders" in Appendix G in advance of the adoption of the Guidelines implementing SB 742, but the issue bears watching in any event.

- **Proposed new Guidelines § 15234.** OPR's final proposed "efficiency" improvement is a proposed new § 15234 addressing CEQA compliance in the context of litigation where a court has found an

> agency has not complied with CEQA and has remanded the matter for compliance. The new section would reflect recent case law and the CEQA statute in clarifying that not every CEQA violation compels a court to set aside project approvals, that courts may fashion equitable remedies, and that courts may allow a project or project activities to proceed during remand "where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during that period because the environment will be given a greater level of protection if the project is allowed to remain operative ... during that period." (Discussion Draft, at 73, proposing to codify *Poet, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681.)

Analysis and suggestions: The provisions of proposed § 15234 subdivisions (a) through (c), described above, appear to be consistent with the law (see Pub. Resources Code § 21) and uncontroversial. Portions of proposed subdivision (d), however, are problematic. That proposed subdivision states:

> "As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with res judicata. In general, where a court has required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in Section 15088.5. In general, where a court has not required an agency to void its approval of the project, the agency need not expand the scope of analysis beyond that specified by the court, except under the circumstances described in Section 15162."

In my view, OPR should delete the second and third sentences of the above paragraph, and keep only the first, in order to avoid unnecessary and unhelpful confusion and misstatements of existing law. Every case is different, courts have great flexibility in fashioning remedies for CEQA violations (as underscored by OPR's uncontroversial proposed amendments), and much of what happens on remand will depend on the specific terms of the remedial order issued by the court. Additionally, where numerous options exist to remedy the defects found by the court (which is often the case), the lead agency retains lawful discretion as to exactly how it achieves compliance, and a court is not authorized to direct it to exercise its discretion in any particular way. (Pub. Resources Code, § 21168.9(c); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287.)

In addition to these well-established principles counseling against setting forth any "general" rules about "exceptions" requiring agencies to conduct expanded analysis beyond a court's order on remand, the legal advice OPR proposes to give appears highly questionable. Guidelines § 15088.5 appears to be inapposite to remand since it applies when significant new information is added to an EIR after circulation of the draft and before certification of the final EIR, whereas remand invariably concerns agency action following judicial invalidation of all or part of an *already certified* final EIR or *adopted* negative declaration. Moreover, where only portions of an EIR are declared deficient, the agency should be entitled to avoid undue expansion of the scope of CEQA analysis on remand by relying on its right to revise and recirculate only those portions found deficient, consistent with § 15088.5; thus, in such circumstances, the scope of environmental review on remand would *not* need to expand beyond that specifically mandated by the court even if the court voided the project approvals based on the EIR's inadequacies. In the same vein, if the court did *not* void the project approvals, it is unclear that § 15162 could operate to expand the analysis specifically required by the court on remand since that section only applies where a *further* discretionary approval is granted. (Guidelines § 15162(c).) If the approvals are not set aside, and the court is merely requiring the CEQA document to be fixed, no further "discretionary" approval would appear to be necessary.

As should be clear from these examples, the various possible factual and legal permutations that could be involved in determining the proper scope of CEQA analysis on remand, and whether that scope could exceed what is specifically ordered by the trial court, are complex and not susceptible to simple generalizations. In my view, the terse "general" guidance OPR proposes to offer here is thus unhelpful and, in fact, likely to do

more harm than good by suggesting expansion of the scope of analysis may be required by provisions of CEQA that are or may be inapplicable in this context.

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In sum, OPR has "started the conversation." The above concludes my initial thoughts on the Discussion Draft's proposed "efficiency improvements" to the CEQA Guidelines. The proposed "substance" and "technical" improvements remain topics for another day.

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 3d, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.

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