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CEQA DEVELOPMENTS

Proposed CEQA Guidelines Amendments: A Critique of OPR's "Preliminary Discussion Draft" (Part II – Proposed "Substance" and Major "Technical Improvements")

By Arthur F. Coon on October 5th, 2015

Posted in Baseline, Climate Change/GHG, Cumulative Effects, Legislation, Litigation, Mitigation, Reform, Responses to Comments, Subsequent Review, Water Supply

On September 18, 2015, I posted a "Part I" piece on the "efficiency improvements" category of OPR's Preliminary Discussion Draft of its "Proposed Updates to the CEQA Guidelines" (the "Discussion Draft"). That post can be found *here*. This follow up post (Part II) covers OPR's most significant proposals contained in the Discussion Draft's remaining two categories, i.e., its two proposed "Substance" improvements and its first three proposed "Technical" improvements, but excludes the remaining dozen proposals that OPR classifies as only "minor technical improvements."

Part II – Proposed Substance Improvements

- **Proposed amendments to Guidelines § 15126.2.** This proposal would add a new subdivision (b) to § 15126.2 to implement Public Resources Code § 21100(b)(3), which OPR characterizes as "requiring [EIRs] to include "measures to reduce the wasteful, inefficient, and unnecessary consumption of energy."" (Discussion Draft, at 76.) OPR notes "Appendix F was revised in 2009 to clarify that analysis of energy impacts is mandatory" and explains the purpose of its currently proposed action as "to further elevate the issue, and remove any question about whether such an analysis is required." (*Id.* at 77.) The new subdivision would read:

(b) Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include the project's energy use for all project phases and components, including transportation-related energy, during construction and operation. In addition to project design, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project.

(Discussion Draft, at 78-79.)

***Analysis and Suggestions*:** As stated in Part I, in connection with the related proposed Appendix G amendments, I believe that OPR has failed to cite sufficient legal support for mandating *all* projects to

conduct an Appendix F energy analysis as part of required CEQA review. The only statutory authority OPR cites to support its action is a non-CEQA statute (the Warren-Alquist State Energy Resources Conservation and Development Act, at Pub. Resources Code, § 25000 et. seq.) (Discussion Draft, at 76), and a CEQA statute that on its face appears to apply only to state agencies and state projects (Pub. Resources Code § 21100(b)(3)). While Public Resources Code § 21061 – a general definitional statute *not* cited by OPR in support of its proposal – defines an EIR as "a detailed statement setting forth the matters specified in Sections 21100 and 21100.1[,]" this general reference is of unclear import and per CEQA's own terms governs "[u]nless the context otherwise requires." (Pub. Resources Code, § 21060.)

Context matters here, and OPR should clear up any confusion by setting forth a more comprehensive legal analysis supporting its position that this proposal is merely the implementation of existing law OPR claims it is. To play "devil's advocate" for a moment, while it certainly makes sense for state agencies to determine as a matter of policy (and, perhaps, environmental impact) whether their projects' use of energy is "wasteful, inefficient, and unnecessary," it is less clear that it makes sense to extend such an amorphous and undefined standard to all private projects that require governmental approvals. For example, could an amusement park, auto racing venue, movie theater, live music amphitheater, or sports stadium, no matter how energy "efficient," ever truly be found *not* to be "wasteful" or "unnecessary" in *some* sense in its use of energy? Whose subjective judgment controls? And if such uses *are* inherently "wasteful" or "unnecessary" in their use of energy, what are the adverse impacts on physical conditions in the area affected by the project for CEQA purposes, and what would constitute appropriate mitigation? Will projects be required to incorporate on-site energy generation components (e.g., solar panels) to mitigate their "unnecessary" energy consumption? And, if such uses employ the most energy efficient technology that is feasible, will they still need to recognize significant unavoidable energy supply impacts (i.e., because *any* energy use for such purposes is judged to be "wasteful" and "unnecessary") and require a statement of overriding considerations for approval?

It is clear from OPR's explanation of the proposal that "the analysis of energy impacts may need to extend beyond building code compliance." (Discussion Draft, at 77; *see id.* ["while building code compliance is a relevant factor, the generalized rules in the building code will not necessarily indicate whether a particular project's energy use could be improved….. That the Legislature added the energy analysis requirement in CEQA [in 1974] at the same time that it created an Energy Commission authorized to impose building energy standards indicates that compliance with the building code is a necessary but not exclusive means of satisfying CEQA's independent requirement to analyze energy impacts broadly."].) Readers must forgive my skepticism, but there seems to be a lot of "bootstrapping" in OPR's reasoning here; it appears to rely heavily on 40-plus-year-old legislation enacted in CEQA's infancy and in the wake of an "energy crisis" spurred by the 1973 oil embargo and its resulting sky-high gasoline prices, fuel shortages, and long queues at gas stations. It is quite possible that the energy analysis requirement was never intended to apply to projects other than those of state agencies, as is supported by the statute's position within CEQA's organizational structure and framework.

Neither of the cases cited by OPR as legal authority for its proposal – *People v. County of Kern* (1976) 62 Cal.App.3d 761 and *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173 – confronted the fundamental legal issue whether Public Resources Code § 21100(b)(3)'s energy analysis/mitigation requirement applies only to state agency EIRs, and cases are not authority for propositions not considered therein. Given OPR's implicit concession that the "requirement" has often been overlooked in actual practice, its proposal would appear to considerably expand the application of CEQA (at least as a practical matter) without demonstrating a sound legal basis for doing so. This problematic issue is further highlighted in OPR's position (discussed above) that "CEQA's independent requirement to analyze energy impacts broadly" will likely require considerably more "mitigation" than simply complying with energy-efficient building code regulations (Discussion Draft, at 77), and its recognition that the "rule of reason" is needed to place "reasonable limits on the analysis" such that, for example, "a full "lifecycle" analysis that would account for energy used in building materials and consumer products will ***generally*** not

be required." (*Id.* at 77-78, emph. added.) Once released from its bottle, any new CEQA "genie" of this ilk will clearly be difficult to restrain.

Further counseling against creating any amorphous new law in this area is OPR's own recognition (as indicated above) that "[n]either the statute nor the Guidelines currently define the phrase "wasteful, inefficient, and unnecessary consumption of energy."" (*Id.* at 78.) Before asking stakeholders whether and how this phrase should be defined, however, it seems to me that OPR should first thoroughly analyze CEQA's legislative history to determine whether the Legislature ever intended it to broadly apply to non-state agency projects in the first place. I do not purport to have researched this topic or to pre-judge whether or not OPR will be able to make such a showing (although, as noted above, I am skeptical); I simply raise the issue as one I view to be significant and deserving of a showing of more substantial legal support for OPR's proposed action than it has yet provided.

- **Proposed amendments to Guidelines § 15155.** OPR proposes to add a new subdivision (f) to this section to codify the water supply analysis rules set forth in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 (*"Vineyard"*). (Discussion Draft, p. 82.) The proposed subdivision would provide:

(f) The degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan. An analysis of water supply in an environmental document shall include the following:

(1) Sufficient information regarding the project's proposed water demand and proposed water supplies to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.

(2) An analysis of the long-term environmental impacts of supplying water throughout the life of all phases of the project.

(3) An analysis of circumstances affecting the likelihood of the water's availability, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, saltwater intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.

(4) If the lead agency cannot confidently predict the availability of a particular water supply, it shall conduct an analysis of alternative sources, including at least in general terms the environmental consequences of using those alternative sources, or alternatives to the project that could be served with available water.

(Discussion Draft, at 87-88.)

OPR also asks stakeholders if this proposed new section is appropriately located within the Guidelines, or should be added to another section or made the subject of a new separate section. (*Id.* at 84.)

Analysis and suggestions: The proposed new § 15155(f) appears to be a reasonably accurate codification of some key legal principles from the *Vineyard* case, but it could be enhanced. It could add that reliance on "paper water" (i.e., unrealistic allocations) or other "speculative sources" is impermissible, and that the future water supplies identified, analyzed and relied on by the EIR "must bear a likelihood of actually proving available[.]" (*Vineyard, supra*; 40 Cal.4th at 432.) In subdivision (f)(4), OPR should replace the phrase "predict the availability of a particular water source" with the phrase "determine that anticipated future water sources will be available" to more closely track *Vineyard*'s actual language. (*Vineyard, supra*, at 432.) It should also add language to capture the following important concepts from the *Vineyard* case:

"[CEQA's] informational demands may not be met, in this context, simply by providing that future development will not proceed if the anticipated water supply fails to materialize. But when an EIR makes a

sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis." (*Id.* at 432, citing *Napa Citizens For Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 374.)

To answer OPR's questions, the contents of this new subdivision appear to me to warrant creation of a completely separate Guidelines section entitled "Water Supply Impacts" located adjacent to § 15126.2 and among the sections discussing contents of EIRs. Finally, in the note on "authority" following the new section, in addition to the *Vineyard* case, the Guidelines should also cite the following foundational cases relied on by *Vineyard* for its key water supply analysis principles: *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818; *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182; *Santa Clarita Organization For Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715; and *Napa Citizens For Honest Government, supra,* 91 Cal.App.4th 342.

Major Technical Improvements

The Discussion Draft's first three proposed "technical improvements" – concerning baseline, deferral of mitigation details, and responses to comments (Discussion Draft at 89-107) – are discussed below. The remaining 12 proposals, which OPR describes as "minor technical improvements" (Discussion Draft, at 108-145), are not discussed in this post.

- **Proposed amendments to Guidelines § 15125.** OPR proposes to amend § 15125(a), regarding the EIR's required description of the "environmental setting" (which will normally constitute the "baseline" physical conditions against which a project's impacts are measured) in several respects. It would shorten the subsection's first sentence to simply read "An EIR must include a description of the physical environmental conditions in the vicinity of the project" by deleting the language ", 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." It would, among other changes, relocate the deleted "general rule" to the first of three new subdivisions – to subdivision (a) (discussed further below) – and would add a statement of purpose: "The purpose of this requirement is to give the public and decision-makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts."

In new subdivision (a)(1), OPR would also add (after the relocated general rule) the following text: "Where existing conditions change or fluctuate over time, a lead agency may define existing conditions by referencing historic conditions that are supported with substantial evidence. In addition, to existing conditions, a lead agency may also use a second baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record."

OPR would add a proposed new subdivision (a)(2) stating: "If a lead agency demonstrates with substantial evidence that the use of existing conditions would be either misleading or without informative value to decision-makers and the public, it may use a different baseline. Use of projected future conditions must be supported by reliable projections based on substantial evidence in the record."

Finally, OPR would add a new subdivision (a)(3) stating: "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."

Analysis and suggestions: The proposed revisions are generally a good summary of the "baseline" rules announced in two recent cases: *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 and *Communities For a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 ("*CBE*").

I have two recommendations to enhance the proposal's accuracy and usefulness as new guidance. First, in the last sentence of proposed subdivision (a)(1), OPR should replace "a second baseline" with "an additional baseline or baselines" to accurately reflect the lead agency's *discretion* to utilize *one or more* future baselines *in addition to* the normally required "existing conditions" baseline. (*Neighbors for Smart Rail, supra*, 57 Cal.4th at 462 [holding "the use of multiple baselines for direct impact analysis does not violate CEQA"]).

Second, OPR should add the following introductory clause at the beginning of proposed new subdivision (a)(3): "Except as required by the subsequent review rules described in Section 15162, …." This clarifying qualification is needed to avoid confusion by recognizing CEQA's well established *exceptions* to *CBE's* "no hypothetical conditions baseline" rule in the *subsequent review* context, where CEQA's normal "existing conditions" baseline does not apply. (*See* Pub. Resources Code, § 21166, Guidelines, § 15162; *see Remy, et al.*, Guide to CEQA (11th Ed. 2001), p. 207 ["if the project under review merely constitutes a modification of a previously approved project previously subjected to environmental analysis, then the "baseline" … is adjusted such that the originally approved project is assumed to exist."].) Particularly because this is a frequently litigated area of CEQA, OPR should be careful not to state absolute rules that, when taken out of context, are inaccurate and likely to be productive of confusion rather than helpful clarification.

Proposed amendments to Guidelines § 15126.4. OPR proposes to amend § 15126.4(a)(1)(B) to include OPR's distillation of the substantial body of case law concerning when it is permissible under CEQA to defer the details of binding mitigation until a time after project approval and certification or adoption of the CEQA document. As I have previously observed, deferral of mitigation under CEQA is a complex area of the law. (*See **"'Deferral' Under CEQA: It's Complicated!"*** by Arthur F. Coon, posted November 15, 2011.) For this reason, and because this area is an important and heavily litigated one, it is particularly important that OPR both "do no harm" and "get it right" when amending this Guidelines section.

After a 2-page discussion of the case law (Discussion Draft at 96-97) concluding, in part, that deferral of specifics of mitigation is permitted where the lead agency either "provide[s] a list of possible mitigation measures, *or* adopt[s] specific performance standards" (*id.* at 97, emph. added), OPR goes on to propose the following changes in § 15126.4(a)(1)(B): (1) clarify that formulation of mitigation measures "shall" (rather than "should") not be deferred; (2) *delete* the current sentence: "However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one way"; and (3) add the following:

Deferral of the specific details of mitigation measures may be permissible when it is impractical or infeasible to fully formulate the details of such measures at the time of project approval, or where a regulatory agency other than the lead agency will issue a permit for a project that will impose mitigation requirements, provided that the lead agency has:

1. fully evaluated the significance of the environmental impact and explained why it is not feasible or practical to formulate specific mitigation at the time of project approval;
2. commits to mitigation;
3. lists the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan; and
4. adopts specific performance standards that will be achieved by the mitigation measure.

(Discussion Draft, at 98.)

Analysis and suggestions: First, the proposed amendment should state that deferral of specific details "is," not "may be," permissible when it is impractical or infeasible, etc. Second, the words "and either" should be added after proposed new subdivision (a)(1)(B) 2; and the word "and" should be replaced with "or"

following proposed new subdivision (a)(1)(B) 3. This is because OPR clearly describes the concepts expressed in (a)(1)(B) 3. and 4. as *alternative options,* not conjunctive requirements, in its explanation, and the proposed amendment as written substantially departs from what OPR states is the law in a manner that would be more burdensome to the lead agency. (Discussion Draft, at 98.)

Third, OPR should pay more attention to the deferral principles enunciated in the First District's well-reasoned opinion in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906 (deriving relevant deferral principles from the case law), and include that important decision among the cases listed in the "authority cited" note at the end of § 15126.4. (*Oakland Heritage's* distillation of the relevant case law principles can be found in my 2011 blog post on deferral cited above.)

Fourth, while it would no doubt be good practice, OPR should remove the requirement stated in subdivision (a)(1)(B) 1. that the lead agency "explain[ ] why it is not feasible or practical to formulate specific mitigation at the time of project approval[.]" The requirement that such conditions exist is stated in an earlier part of the amendment and substantial evidence anywhere in the record supporting their existence should suffice to permit deferral of mitigation details so long as the agency follows the other requirements. I see no need to impose any additional "explanation" requirement on the lead agency, which may unnecessarily paint yet another litigation target on its back.

Finally, OPR should add a provision acknowledging that mitigation measures requiring compliance with generally applicable environmental regulations may also be entirely proper mitigation measures, as has now been established by a substantial body of case law. (*See, e.g., North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 647-648 [commitment to consult with NOAA and avoid take under CWA and ESA permitting processes]; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1070 [compliance with SMARA required by mitigation measure for river bed sand/gravel mining project]; *Oakland Heritage Alliance v. City of Oakland, supra*, 195 Cal.App.4th at 898-912 [mitigation for material seismic impacts properly required future compliance with Seismic Hazards Mapping Act and State and City Building Codes to protect public safety]; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 932-934 [required compliance with applicable Title 24 energy standards proper].)

Proposed amendments to Guidelines §§ 15087 and 15088. Citing recent case law involving what I would characterize as project opponent "document dumps" and general comments that would require agencies to undertake considerable effort to "search out" relevant information in order to be able to respond to the "comment," OPR proposes amendments to accomplish the following: (1) "clarify that responses to general comments may be general"; (2) "clarify that general responses may be appropriate when a comment does not explain the relevance of information submitted with the comment, and when a comment refers to information that is not included or is not readily available to the agency"; (3) "clarify . . . that a lead agency may provide proposed responses to public agency comments in electronic form"; and (4) "clarify . . . that a lead agency may specify the manner in which it will receive written comments[,]" i.e., while it may wish to publicize a draft EIR on social media, it need not respond to chatroom, Facebook or Twitter comments. (Discussion Draft, at 102-104.)

Analysis and suggestions: The proposed revisions to § 15087(b)(2) and § 15088(b) and (c), which I will not set forth verbatim, appear to accomplish OPR's above-recited goals and also appear to be helpful and non-controversial clarifications. I think OPR's proposal could be enhanced by adding certain language to § 15088(a) that would clarify two other important concepts that apply to responses to comments.

First, I would amend that subdivision's second sentence by adding underlined language as follows: "The lead agency shall respond to comments <u>raising significant environmental issues</u> received during the noticed comment period and any extension and may respond to late comments." This addition would incorporate a concept contained in a quote from a case cited at page 102 of the Discussion Draft. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 878 [". . . lead agency need not respond to

each comment made during the review process, however, it must specifically respond to the most significant environmental questions presented . . . ."].)

Second, OPR should add another sentence at the end of § 15088(a) to reflect other relevant case law as follows: "However, because the lead agency need not respond to late comments, any inadequacy in responses to late comments shall not provide a basis for rendering a project approval ineffective, invalid or contrary to law." The case supporting this suggested addition is *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1111 ("because the Board never had a legal duty to respond to late comments, the inadequacy of the Board's responses to the late comments is not sufficient to render approval of the CEQA project ineffective or contrary to law.").

* * *

This concludes Part II of my critique of OPR's Discussion Draft. I will take this opportunity to again remind interested stakeholders to submit any comments they may wish to submit on the Discussion Draft to OPR at ceqa.guidelines@resources.ca.gov by the **October 12, 2015 deadline**, which is just one week from today.

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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