

Recommendations for Updating the State CEQA Guidelines

American Planning Association, California Chapter; Association of Environmental Professionals; and Enhanced CEQA Action Team

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The American Planning Association, California Chapter (APACA), Association of Environmental Professionals (AEP), and the Enhanced CEQA Action Team (ECAT) offer the following recommendations to the Governor's Office of Planning and Research regarding revisions to the State CEQA Guidelines. First, several specific amendments are presented. Following those, additional conceptual recommendations are provided for consideration.

RECOMMENDED, SPECIFIC GUIDELINES AMENDMENTS

The following specific guidelines amendments are recommended. A brief explanation of the reasoning underlying the recommendation is presented under "Comment."

§ 15107 – Completion of Negative Declaration for Certain Private Projects.

"With private projects involving the issuance of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies, the negative declaration must be completed and approved within 180 days from the date when the lead agency accepted the application as complete. Lead agency procedures may provide that the 180-day time limit may be extended once for a period of not more than 90 days upon consent of both the lead agency and the applicant."

Comment: Guidelines Section 15108 allows the flexibility to extend the deadline for completion of an environmental impact report, and similar flexibility, with agreement between the lead agency and applicant, is appropriate for negative declarations and mitigated negative declarations.

§ 15125 – Environmental Setting.

"(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project, 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. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. Under appropriate circumstances, a baseline may take account of environmental conditions that will exist in the future when the project begins operations; the lead agency is not strictly limited to those prevailing when environmental review begins. Lead agencies have the discretion to define a baseline that is different from the environmental setting,

provided that this baseline is justified by substantial evidence in the record demonstrating that the use of existing conditions would be either misleading or without informative value to decision-makers and the public. Projected future conditions, supported by reliable projections based on substantial evidence in the record, may be used as the sole baseline for impacts analysis, when their use in place of existing conditions is justified by unusual aspects of the project or the surrounding physical conditions. However, hypothetical future conditions, such as hypothetical conditions that might be allowed under existing permits or plans, are not appropriate for use as the baseline. A lead agency may also use both an existing conditions baseline and a projected future conditions baseline, provided the future-conditions baseline is based on substantial evidence in the record and is not hypothetical. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.”

Comment: The proposed revision is intended to clarify the circumstances when a baseline different from the existing conditions is appropriate, and to note that projected future baselines can serve as the sole basis for impact analysis under certain limited circumstances. The proposed revision is based on the recent California Supreme Court decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority, et al.* (2013) 57 Cal.4th 439.

15126.4 – Mitigation Measures

“(a) Mitigation Measures in General.

(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.

(A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(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.

(C) ~~Formulation~~ Identification of and commitment to adopt of feasible mitigation measures ~~should~~ shall not be deferred until some future time. Deferral of the specific details of a mitigation measure is permissible when it is impractical or infeasible to present the details during the environmental review and the agency commits itself to the mitigation plan or approach, adopts specific performance standards, and lists the potential actions and measures to be considered, analyzed, and potentially incorporated

in the mitigation plan or approach. Once the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place. However, measures may specify Deferral of specific mitigation details is allowed only when all of the following circumstances are met:

(i) The lead agency finds, based on substantial evidence in the record, that it is not practical or feasible to define the mitigation measure details during the project's environmental review pursuant to this division.

(ii) The lead agency commits to the mitigation by identifying a mitigation measure in the environmental document and adopting that measure; or, the lead agency will make the finding pursuant to Section 15091(a)(2) that the identified mitigation measure has been or can and should be adopted by another agency.

(iii) The mitigation includes specific quantitative or qualitative performance standards which ~~that~~ would mitigate the significant effect of the project, ~~and~~

(iv) the mitigation includes a discussion of potential actions and measures that would feasibly achieve the specified performance standards. ~~and which may be accomplished in more than one specified way.~~

(D) 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 compliance would result in the adoption and implementation of mitigating actions that would be reasonably expected, based on substantial evidence in the record, to reduce the significant impact to the specified performance standards.

~~(C)~~(E) Energy conservation measures, as well as other appropriate mitigation measures, shall be discussed when relevant. Examples of energy conservation measures are provided in Appendix F.

~~(D)~~(F) If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.)

(2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design.

Comment: The intent of the recommended amendments is to bring the mitigation guidelines up to date with applicable court decisions related to the proper approach to defer the details of mitigation measures, when it is not reasonable or feasible to present those details in an EIR or MND. Concepts

have been drawn from the *Rialto Citizens, Save Panoche, Defend the Bay*, and other relevant court decisions.

§15168(c) – Program EIR (Later Activities Within the Scope of a Program EIR)

“(c) Use with Later Activities. Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

(1) If a later activity would have effects that were not examined in the program EIR, a new Initial Study would need to be prepared leading to either an EIR or a Negative Declaration.

(2) If the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required. Finding that a later activity is within the scope of a program covered in the program EIR shall be based on substantial evidence in the record. Criteria that may be used in making the finding include, but are not limited to, consistency of the later activity with the type of allowable land use, planned density and building intensity, geographic area analyzed for environmental impacts, and description of covered infrastructure, as presented in the project description of the program EIR.

(3) An agency shall incorporate feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program.

(4) Where the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR.

(5) A program EIR will be most helpful in dealing with ~~subsequent~~ later activities if it provides a detailed description of planned activities that would implement the program and deals with the effects of the program as specifically and comprehensively as possible. With a good and detailed project description and analysis of the program, many ~~subsequent~~ later activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required.

Comment: Section 15168(c) of the Guidelines describes procedures for use of a Program EIR with “later activities.” In subparts (c)(2) and (c)(5), the Guidelines offer an important avenue for avoidance of redundant environmental documents when a later activity is found to be “within the scope” of the program covered by the Program EIR. Two types of revisions would be very helpful for this provision: (1) explicit statement about the standard of review for finding a project to be “within the scope” and (2) guidance regarding factors to consider in making the finding, based on relevant court decisions, particularly *CREED v. San Diego* (2005). Also, conforming terminology to be “later” activities would help

avoid confusion with “subsequent projects,” which are relevant to Master EIRs. Finally, adding the guidance to prepare a detailed project description is also useful in providing the evidence to support a “within the scope” finding.

§15370 - Mitigation

In §15370(e), amend as follows:

“(e) Compensating for the impact by replacing or providing substitute resources or environments, including preservation in perpetuity of existing, offsite resources that would help avoid further losses of the affected resource.

Comment: Court decisions (e.g., *Masonite Corporation v. County of Mendocino*) have allowed the use of conservation easements and dedications of land for preservation, under certain conditions. This amendment would update the definition of mitigation in the guidelines to take the decisions into account.

§15332 – Infill Development Projects

“Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

(a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.

(b) The proposed development occurs ~~within city limits~~ on a project site of no more than five acres substantially surrounded by urban uses.

Comment: The existing exemption is limited to incorporated cities, which appears to be based on a policy question about the location of development, rather than land use and environmental factors. From a land use and environmental perspective, a project would be urban infill if it is surrounded by urban uses, regardless of whether it is jurisdictionally within a city or county. If the “within city limits” restriction were removed, this exemption would be more flexible and useful, yet it would not lead to a higher risk of environmental impacts.

Appendix G – Fire Hazard Questions

VIII. HAZARDS AND HAZARDOUS MATERIALS. Would the project:

(i) increase the risk of wildfire in an area of state responsibility for fire response or on land classified as a very high fire hazard severity zone?

(j) in an area of state responsibility for fire response or on land classified as a very high fire hazard zone,

(i) expose people to a substantial risk of injury or death from wildfire hazards because of their location, accessibility for response and evacuation, vulnerability to fire, or other factors?

(ii) expose buildings and appurtenant structures to a substantial risk of loss or damage from wildfire hazards because of their location, type of use, vulnerability to fire damage, or other factors?

(iii) expose transmission lines, public utilities, water supply, or other critical infrastructure to a substantial risk of loss or damage from wildfire, or cause a substantial increase in wildfire risk for these facilities?

Comment: In SB 1241, §21083.01 was added to CEQA, as noted below:

“(a) On or after January 1, 2013, at the time of the next review of the guidelines prepared and developed to implement this division pursuant to subdivision (f) of Section 21083, the Office of Planning and Research, in cooperation with the Department of Forestry and Fire Protection, shall prepare, develop, and transmit to the Secretary of the Natural Resources Agency recommended proposed changes or amendments to the initial study checklist of the guidelines implementing this division for the inclusion of questions related to fire hazard impacts for projects located on lands classified as state responsibility areas, as defined in Section 4102, and on lands classified as very high fire hazard severity zones, as defined in subdivision (i) of Section 51177 of the Government Code.

(b) Upon receipt and review, the Secretary of the Natural Resources Agency shall certify and adopt the recommended proposed changes or amendments prepared and developed by the Office of Planning and Research pursuant to subdivision (a).”

The questions suggested above would capture the range of potential fire hazards being encountered in state responsibility areas and very high fire hazard zones. They could be added to the existing list of question in Part VIII of the Appendix G checklist.

Appendix G, Section V, Cultural Resources

Move question (c) in Section V, regarding paleontological resources/unique geological features, to Part VI, Geology and Soils.

“(c) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?”

Comment: Paleontological resources/unique geological features are more appropriately considered a component of the natural, geologic characteristics of an area, rather than a cultural resource.

Appendix G, Section XVIII(a) – Mandatory Findings of Significance

Revise Appendix G, Section XVIII(a):

Does the project have the potential to *substantially* degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, *substantially* reduce the number or restrict the range of an ~~endangered~~, rare or ~~endangered~~ ~~threatened species plant or animal~~ or eliminate important examples of the major periods of California history or prehistory?

Comment: This change is intended to achieve internal consistency between Appendix G and Guidelines §15065(a)(1), both of which specify Mandatory Findings of Significance. §15065(a)(1) was previously updated, but the checklist was not.

OTHER CONCEPTUAL RECOMMENDATIONS WITHOUT SPECIFIC AMENDMENTS

1. Provide guidance to explain application of fair argument and substantial evidence standards

Case law has defined when fair argument and substantial evidence standards should be applied in circumstances where subsequent activities that are covered by a prior EIR, program EIR, master EIR, or ND/MND are subject to supplemental review. Lead agency CEQA staff often need to either consult with counsel or comb through court decisions to discern the application of these standards. Please prepare revisions that describe whether the fair argument standard or substantial evidence standard is to be applied to the decisions related to the choice of environmental review approach, type of document, and the proper supplemental and subsequent environmental reviews of projects covered by or consistent with previous EIRs.

2. Update criteria for determining alternatives feasibility

Court decisions have expanded and elaborated on the factors to be considered when assessing the feasibility of alternatives, including in *CNPS v. City of Santa Cruz* (decided in 2009). Please elaborate the discussion of factors to be reviewed in considering the feasibility of alternatives in Section 15126.6 to update the section so it is current regarding court decisions. Topics could include:

- evidence needed to support a conclusion of actual infeasibility of an alternative based on cost or economics,
- role of policy inconsistency in the feasibility determination,
- evidence needed to determine feasibility of an alternative location, and

- the difference between “potential feasibility” sufficient for deciding to include an alternative for detailed analysis in an EIR and “actual feasibility” when making findings regarding alternatives under Public Resource Code §21083(a)(3).

3. Checklists for Supplemental Reviews - §§15162 through 15164, §15168, and §15183

An environmental checklist should be developed with content tailored to help answer questions required for determining the type of CEQA document necessary for supplemental reviews after earlier EIRs. This would help facilitate the proper selection of CEQA review approach and efficient and effective use of prior documentation and application of prior mitigation measures to protect the environment.

A candidate, draft checklist is attached as Appendix A to these comments for potential use in complying with §§15162 through 15164, where the same project addressed in a certified EIR is being considered for later approvals. Other checklists could be developed for use with §15168, later activities within the scope of Program EIRs, and §15183, projects consistent with a Community Plan or Zoning