**SUPPORTING MATERIALS TO AEPI CEQA REFORM PAPER October 2016**

**OPR DRAFT CEQA GUIDELINES CHANGES – AUGUST 2015**

The Governor’s Office of Planning and Research (ORP) had been working on proposed changes to the State CEQA Guidelines since 2014. Unfortunately, they independently chose to release a preliminary discussion draft of the changes only a few weeks after the AEP Institute Event. OPR proposed a series of changes to CEQA including efficiency measures, substantive improvements, and technical changes, as outlined below.

**1. Proposed Efficiency Improvements**

OPR proposed several changes to improve the efficiency of CEQA implementation, including:

1. Use of thresholds of significance and regulatory standards in determining the significance of project impacts in the CEQA process;
2. Clarification to rules related to tiering and determining when a later project is "within the scope" of a program environmental impact report;
3. Expanding the new exemption for transit oriented development from residential projects to commercial and mixed-use projects as well;
4. Clarification on establishing baseline for using the existing facilities exemption;
5. Updating to the CEQA checklist in Appendix G; and
6. Proposing a new section 15234 in CEQA Guidelines regarding remand and remedies of CEQA litigation.

The major efficiency improvements related to updating the CEQA checklist in Appendix G. The amendments consolidated the Agriculture and Forest Resources, Geology and Soils, Mineral Resources, and Recreation sections of the CEQA checklist into a new section called “Open Space, Managed Resources and Working Landscapes.” OPR also proposed updates to the CEQA checklist regarding the following topics: Aesthetics, Air Quality, Biological Resources and State Wetlands, Tribal Cultural Resources, Impervious Surfaces, Groundwater, Land Use, Population Growth, Job/ Housing Fit, Transportation, and Wildfire.

**2. Proposed Substantive Improvements**

The OPR proposes substantive improvements for analyzing energy and water supply impacts. This includes adding a new Energy section to the CEQA checklist and providing more guidance related to the energy impacts analysis in Appendix F. These changes would require the project's energy impact analysis to include energy impacts from transportation, equipment use, location, and other relevant factors, and not just building design. The OPR also proposes to provide guidance on water supply impacts by requiring a proposed project to analyze its possible water supply sources, any uncertainties in supply, possible supply alternatives over the life of the project, and the environmental impacts of supplying that water to the project.

**3. Proposed Technical Improvements**

OPR’s proposed technical improvements included:

1. clarifications on when it is appropriate to use projected future conditions as the environmental baseline;

2. when agencies may defer specific details of mitigation measures until after project approval; and

3. a set of changes related to the duty of lead agencies to provide responses to comments on a project.

The Preliminary Discussion Draft noted that it did not include changes related to transportation analysis regarding vehicle miles traveled, which were going to be analyzed separately to comply with Senate Bill 743. It also did not include changes related to greenhouse gas emissions analysis or a clarification of whether CEQA requires an agency to analyze the impacts of the environment on a project because cases are pending before the California Supreme Court on these issues (see BIA v. BAAQMD below issued in 2015).

**RECENT COURT CASES**

The following court case summaries are based on more detailed evaluations prepared by Devon Muto, the San Diego Branch Leader of ICF International issued last year. In 2015 Mr. Muto was the State AEP Executive Vice President and Chair of the AEP Legislative Action Committee. In 2016 Mr. Muto became the State AEP President.

**1. CBIA v. BAAQMD Case (Environment’s Impact on a Project)**

The original title of this article was *“Cal Supreme Court Decides CEQA Does Not Require Evaluation of Environment's Impact to Project”* and the article was originally issued by ICF International on December 17, 2015.

On December 17, 2015, the California Supreme Court issued their decision on *Cal. Building Industry Assn. v. Bay Area Air Quality Mgmt Dist.* 218 Cal.App.4th 1171  (Supreme Ct., Opinion No. S213478). The reader should follow this link to the decision:  <http://www.courts.ca.gov/opinions/documents/S213478.PDF>

The case focused on whether CEQA requires an analysis of how existing environmental conditions will impact future residents or users of a proposed project (this has been referred to by some as the "CEQA in reverse" topic). The origin of the case was a set of air quality significance thresholds adopted by the BAAQMD. The CBIA challenged the thresholds on a number of fronts. Ultimately, the Supreme Court focused in on one of them which was a challenge to a threshold based on the number of new receptors (residents and workers) a project would introduce into an area. Yet, the Court approached it a bit more broadly and asked: "Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

The Court's conclusion was that CEQA generally does not require an agency to analyze the impact of existing environmental conditions on a project's future users or residents. However, they point out that when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. Additionally, they indicate that special CEQA requirements require that certain airport, school, and housing construction projects evaluate a project site's environmental conditions (such as noise, hazardous waste, or wildland fire hazard) regardless of whether the project risks exacerbating existing conditions.

The Court's decision is a substantial change in how CEQA has been applied over the past decades. Many CEQA issues have often contained elements of how the environment could affect new residents, visitors, or workers introduced by a project. These include noise, contaminated sites, wildfire risk, faults and earthquakes, flooding, sea level rise, and air emissions (heath risk). However, this is not to say that these issues should be overlooked. Many agencies have General Plan policies, ordinances, required findings, or other regulations that still cover these topics and may require their review and consideration. It just may be outside of the CEQA document.

**2. Newhall Case (Guidance on Greenhouse Gas Emission Studies)**

The original title of this article was *“Cal Supreme Court Decides on CEQA Newhall Case”* and the article was originally issued by ICF International on December 1, 2015.

[On November 30, 2015] the California Supreme Court issued their decision on *Center for Biological Diversity, et al. v. Department of Fish and Game (Newhall Land Farming Company)* (2d Dist. 2014) 224 Cal.App.4h 1105 (Supreme Ct., Case No. S217763). Follow this link to the decision:  <http://www.courts.ca.gov/opinions/documents/S217763.PDF>

The case involved challenges to the California Department of Fish and Wildlife's (Department) environmental impact report (EIR) and approval of the Newhall Ranch project in Los Angeles County.  The Supreme Court reviewed three issues: (1) whether the California Environmental Quality Act (CEQA) allowed the Department to adopt a GHG threshold of significance based on the "Business as Usual" (BAU) methodology adopted by the California Air Resources Board (CARB) in its A.B. 32 Scoping Plan,  (2) whether the Department's measures requiring the collection and transplantation of a fully protected fish (the unarmored threespine stickleback) to avoid project impacts is "take" in violation of the state law prohibition on take of a fully protected species, and (3) whether the CEQA restricts judicial review to issues raised prior to the close of comments on a draft EIR.  The Court of Appeal ruled in favor of the Department. The Supreme Court overturned this decision.

The case was being closely watched by many CEQA professionals with hopes for some guidance on GHG analyses for CEQA documents. Unfortunately, the decision provides limited clarity and seems to raise more questions than answers. The GHG threshold of significance used in the EIR was consistency with the AB 32 Scoping Plan. The Court found this to be acceptable (although they did note that this threshold focused on emissions in 2020 which at the time of EIR preparation was okay but for new CEQA documents the threshold may need to address future years). In order to demonstrate consistency with the Scoping Plan, the GHG analysis provided a BAU calculation for emissions from the project (emissions without consideration of reduction measures) and compared it to emissions from the project after reductions measures were incorporated. This comparison showed a 31% reduction in GHG emissions with proposed measures compared to the BAU scenario. The Scoping Plan called for a 29% reduction and therefore the EIR concluded that the project was consistent since it would exceed this reduction. As result, GHG emissions were determined to be a less than significant impact.

The Court found that the EIR lacked substantial evidence to make the less than significant determination. They questioned the direct comparison of the Scoping Plan's reduction (which is a statewide goal that covers many sectors) to a project specific reduction. They indicated that there was evidence lacking to support this comparison. From a baseline perspective, the Court was okay with the comparison between BAU to the project to determine significance. And from a threshold perspective, the Court agreed that a percent decrease in emissions (which relates to the efficiency of a project) made more sense than a single quantity. It appears that their main issue with the threshold was that there was insufficient evidence provided that the 29% reduction was appropriate amount.

By the way, the Court also ruled that the proposed project would result in a "take" of the unarmored threespine stickleback, which is prohibited by state law. And of some additional interest to CEQA folks, the Court held that comments submitted during the FEIS review period where this EIR/EIS is concerned are live comments for purposes of CEQA. The issues raised in those comments can be raised in the CEQA litigation. The Court’s reasoning is based in part on the fact that the Department assisted in the FEIS responses to comments. This will require some close reading to determine whether they’re creating a new burden for California agencies undertaking joint CEQA/NEPA documents.

**PENDING LEGISLATION**

The following bills were approved or largely acted upon during 2015 and would have substantial effects on CEQA. For current information on California legislation, go to: http://www.leginfo.ca.gov/bilinfo.html and search by the number of the bill.

**1. Senate Bill 32 (Pavley) Post-2020 GHG Reduction Targets**

The original title of this article was “Amended, But Is It Enough to Address CEQA Concerns?” and the article was originally issued by ICF International on September 5, 2015 (article text in italic).

**NOTE:** Although this bill failed an assembly floor vote in late 2015, it is possible some portions of it could arise in 2016 regarding looking beyond 2020 GHG targets to 2050 GHG targets. AEP will provide updated information during the 2016 legislative session. Although not approved, the following information on SB 32 may be useful to CEQA practitioners regarding where the state legislature may be heading.

*As this year's legislative session nears its end, the California Association of Environmental Professionals (AEP) is keeping a close eye on SB 32. Authored by Senator Pavely, SB 32 is considered the successor to AB 32, California's Global Warming Solutions Act. Compared to AB 32 which set Greenhouse Gas (GHG) emissions reductions targets for 2020 (it requires reductions to 1990 levels), SB 32 goes all the way to 2050 (it requires reductions to 80% below 1990 levels). AEP is supportive of California continuing to lead in the fight against climate change but as the front-line implementers of the California Environmental Quality Act (CEQA), we cannot ignore the challenge that this long term goal poses to CEQA analyses.*

*The challenge with post-2020 targets was described in depth by the AEP Climate Change committee in a recent white paper. At this time, sufficient policy and technology does not exist for an agency to describe with any certainty how the 2050 emissions target will be achieved. While general projections and speculation may be appropriate for long term planning, it is not appropriate for a CEQA analysis. To be fair, SB 32 does not mandate that the 2050 target be used as to threshold for determining significant impacts under CEQA. However, it is difficult to overlook that within a couple years after AB 32 was adopted, the 2020 target became the standard for evaluating whether a project's GHG emissions would be significant.*

*What does this mean to the basic CEQA practitioner? In CEQA terms, the 2050 target presents a significant cumulative impact that essentially any project that increases GHG emissions is contributing to. This may not be that big of an issue to those projects that are already having to prepare environmental impact reports (EIRs) but the thousands of other projects that we process annually under exemptions and negative declarations will be at risk, especially when a challenger simply has to raise a "fair argument" that the project will have a significant impact for force the preparation of an EIR.*

*CEQA lead agencies have strategies for reducing this risk such as adopting different standards of significance. Additionally, AEP and our lobbyist have been raising these concerns to the legislature and are coordinating with the California Office of Planning and Research (OPR) on strategies for assisting lead agencies with the efficient application of CEQA. Yesterday (September 4), we saw some progress. SB 32 was amended to add the following language that recognizes the difficulty that the target may pose to CEQA lead agencies:*

*Section 38566 is added to the Health and Safety Code, to read:*

*(a) For purposes of this section, “appropriate public entities” includes metropolitan planning organizations, districts, as defined in Section 39025, the League of California Cities, the California State Association of Counties, local transportation agencies, and members of the public, including homebuilders, environmental organizations, including environmental justice organizations, planning organizations, affordable housing organizations, and others.*

*(b) The state board, in consultation with appropriate public entities, shall ensure that the 2050 greenhouse gas emissions limit required pursuant to clause (ii) of subparagraph (A) of paragraph (1) of subdivision (b) of Section 38550 is achieved without imposing disproportionate greenhouse gas emissions reduction requirements on land use and permitting decisions made by lead agencies, as defined in Section 21067 of the Public Resources Code.*

Obviously, this addition does not entirely address the concern stated above and given the battleground that this piece of legislation has become, its difficult to predict how much more it might (or might not) change.  In any event, assuming it is signed into law, OPR has pledged to work with AEP to provide advice and other information to CEQA lead agencies so that the 2050 target can be integrated into their reviews without forcing additional projects into lengthier processes.

*The AEP Legislative Review Committee is actively discussing SB 32, AEP's position, and next steps to take regarding it. We will also be meeting with OPR in the coming weeks to discuss developing the agency guidance mentioned above. We welcome comments and participation from our members.*

**2. SB 350 (De Leon)**

This information is summarized from a presentation made by Matt Klopfenstein with Gonzalez, Quintana, Hunter, & Cruz, the AEP Lobbyist, to the AEP Inland Empire Chapter in November of 2015. This bill achieved two of Governor Brown’s three “50’s” inaugural address goals; an increase in the state renewable portfolio standard to 50%, and a doubling of existing building efficiencies, both by 2030. The one provision that failed to pass was a 50% reduction in petroleum use against which the auto and petroleum industries lobbied heavily. It is possible this provision may return in 2016 in some other bill.

**3. SB 88 (Chapter 27, Statutes of 2015)**

This discussion was originally part of an article entitled “CEQA Bill Update – 4 signed 2 with Governor” issued by ICF International on July 31, 2015. All statutory references are to the Public Resources Code (PRC), unless otherwise noted.

*This bill establishes statutory exemptions for the following activities related to the drought. All would expire on January 1, 2017. SB 88 takes effect immediately.*

* *Public agency construction or expansion of recycled water pipeline and directly related infrastructure within existing rights of way, and directly related groundwater replenishment, if the project is intended to respond to the declared drought emergency, does not affect wetlands or sensitive habitat, and where the construction impacts are fully mitigated consistent with applicable law.*
* *Building standards by state agencies for recycled water systems.*
* *Adoption of an ordinance by a city or county to limit or prohibit the drilling of new or deeper groundwater wells, or to limit or prohibit increased extractions from existing groundwater wells, through stricter conditions on the issuance of well permits or changes in the intensity of land use that would increase demand on groundwater.*