Five Years in the Making: California is One Step Closer to a Comprehensive Update to the CEQA Guidelines

Jeffrey W. Forrest
Whitney Hodges
Lauren K. Chang

Sheppard, Mullin, Richter & Hampton LLP

Monday, January 7, 2019

The Governor's Office of Planning and Research ("OPR") has spent five years drafting a comprehensive update to 30 sections of the California Environmental Quality Act ("CEQA") Guidelines.[1] The updated text[2] ("Final Text") ensures the Guidelines are consistent with recent court decisions, implements legislative changes, clarifies rules governing the CEQA process, and eliminates duplicative analysis. Several changes to the Guidelines address two hot button topics: global climate change and statewide affordable housing shortages. During the deliberative process, the Agency also released its "Final Statement of Reasons for the Regulatory Action Amendment to the State Guidelines" to give more history and context to each change to the Final Text.[3]

While a number of the amendments to the Guidelines simply codify the implementation of CEQA as currently required by case law, many of the changes will significantly alter the application of CEQA to future projects. The revised Guidelines will certainly cause lead agencies to be more proactive in their analysis of wildfire

impacts. Such programs and thresholds will likely dovetail with state and local efforts to meet GHG reduction targets set by the state or in local climate action plans. This comprehensive update, five years in the making, will undoubtedly improve the defensibility of CEQA documents moving forward.

The Office of Administrative Law ("OAL") completed its review of the Final Text on December 28, 2018. Once OAL files the Final Text with the Secretary of State (likely, the next few days), any CEQA documents not circulated for the statutory public review and comment period prior to January 1, 2019 must comply with the new content requirements. Any new procedural requirements will take effect 120 days after the new Guidelines are filed with the Secretary of State. The new VMT methodology will not be mandatory until July 1, 2020, unless implemented early by a lead agency, as has been done by the City of San Francisco. However, lead agencies should start planning now for their VMT-based thresholds, or start creating VMT mitigation banks to allow for new development to achieve some of VMT reductions off-site through contributions to regional transit projects that more efficiently reduce VMT.

A more detailed analysis of these changes follows.

Efficiency Improvements

A New and Improved Environmental Checklist – The Final Text updates and reorganizes the environmental checklist (Appendix G) most agencies use to format and guide their environmental review.[4] The modifications to the checklist:

- Eliminate redundant questions so lead agencies are not required to repeat analysis in subparts of the same impact category;
- Add new transportation questions that focus lead agencies on evaluating impacts on VMT,[5]pursuant to requirements, however, that will not be in effect in most places until July 1, 2020
- Add new wildfire questions, reminding lead agencies that, while CEQA does not require analysis of the impact of the environment on a project (a.k.a. "reverse CEQA"), CEQA does require an analysis when a project exacerbates an environmental impact, e.g., wildfire risk;
- Add energy as an impact category for MNDs (and not just EIRs) with new questions requiring analysis of a project's energy consumption and compliance with state or local energy laws;
- Clarifies that both state and federal wetland impacts must be evaluated;
- Clarifies that public, not private, view impacts are relevant to a CEQA analysis; and
- Moves paleontological resource impacts out of cultural and into the geologic resource section, in accordance with AB 52.

Use of Existing Regulatory Standards – The Final Text promotes use of existing regulatory standards as "thresholds of significance" in the CEQA process, even on an informal, case-by-case basis.[6] This change codifies case law[7] allowing agencies to rely on the expertise of another regulatory body, without foreclosing consideration of possible project-specific effects.

Program EIR Tiering – Among the most efficient, but underutilized, methods for expediting subsequent CEQA review and avoiding duplicative analysis, is the "within the scope" method for analyzing a project covered by a Program EIR.[8] Recognizing that recent case law showed that the existing Guidelines lacked clarity regarding "within the scope" analysis, the Final Text identified factors (consistency with the Program EIR's land use, overall density and intensity, geographic area, and covered infrastructure) courts have used to uphold a lead agency's "within the scope" environmental checklist.[9]

Emergency Project Exemption – The Final Text clarifies that projects requiring a "reasonable amount" of planning can qualify under CEQA's current exemption for emergency repairs.[10] The exemption is also

Existing Facilities Exemption – In order to promote redevelopment of vacant buildings, the Final Text clarifies that a project's prior use history can be considered when determining whether it would result in an expansion of an existing use. The Final Text also clarifies that this exemption includes improvements to the public right-of-way that enable use by multiple modes of transportation.[11]These clarifications are intended to encourage infill and transit-oriented development.

"Common Sense" Exemption – Under the Final Text, the "general rule" that an activity is exempt from CEQA if there is no possibility that activity may have a significant effect on the environment is now referred to as the "common sense" exemption to match the language used by the California Supreme Court.[12]

<*Judicial Remedies* – Relying on several CEQA cases,[13] the Final Text emphasizes that courts have the equitable discretion to void only parts of a project approval and to suspend only certain project activities that preclude consideration of mitigation measures and alternatives; or to require the lead agency to take specific actions to bring the project into CEQA compliance.[14] It also affirms that CEQA-compliant portions of the EIR need not be reevaluated if consistent with the principles of *res judicata*. In other words, when the proposed project is not changed, there is no "second bite at the apple" on issues that were not raised or that were successfully defended. Changing the project can open up new issues, of course, but the agency generally need not expand its analysis beyond what a court specified needed to be fixed.

Substantive Improvements

Energy Impacts – The Final Text provides new guidance for analyzing a project's impacts due to "wasteful, inefficient, or unnecessary consumption of energy."[15] An EIR's energy analysis must now address not only building design and Title 24 green building code compliance, but also transportation, equipment use, location, renewable energy features that could be incorporated into the project, and other relevant factors.

Water Supply Impacts – The Final Text clarifies the standards for an adequate water supply assessment, including an analysis of possible sources of water supply over the life of a project and the environmental impacts of supplying that water to that project. The analysis must also consider any uncertainties in supply, as well as potential alternatives and other environmental impacts of using these alternatives.[16] Following on the heels of one of the worst water crises in California history, these requirements will assume additional importance in many jurisdictions.

Transportation Impacts and New VMT Methodology – In perhaps the most significant substantive change to the Guidelines, the Final Text adopts an alternative methodology for analyzing the significance of transportation impacts.[17] The Agency determined that the current level of service ("LOS") methodology, which analyzes traffic congestion, tends to promote increased vehicle use, jeopardizing the ability to realize GHG emissions reduction goals. Guidelines section 15064.3 therefore adopts a new methodology focusing on a project's effect on VMT. While the Agency believes VMT methodology will promote project designs that reduce reliance on automobile travel, this section still permits lead agencies to use discretion when selecting alternative methodologies for determining transportation impacts, including LOS, for projects intended to increase roadway capacity.

The Agency noted that the second greatest category of household expenditures after housing itself is a family's transportation costs. The Agency believes the shift to VMT analysis will save households approximately $2,000 a year by reducing VMT and spurring more infill and transit-oriented development. The updated Guidelines will also help streamline the development process for housing projects in low-VMT and transit-oriented locations, thereby helping increase the supply of housing options in areas with low transportation costs.

Greenhouse Gas Emissions – The Final Text revises the CEQA Guideline addressing GHG emissions to clarify the appropriate methodology for a GHG analysis consistent with recent case law.[18] The revisions recognize that GHG-related climate change is a global problem and that no individual project is likely to have a significant direct impact on climate change Accordingly, the lead agency should focus its analysis on whether a project's incremental contribution to GHG emissions would have a *cumulatively considerable*[19] effect on climate change. Moreover, the Final Text emphasizes the importance of: (a) analyzing long-term GHG impacts when the project has a long time-horizon for implementation; and (b) accounting for evolving scientific knowledge and regulatory schemes. The changes also clarify that, if relying on consistency with state goals and policies to determine significance, the lead agency should explain how the project's emissions are consistent with those goals and support this position with substantial evidence.

Technical Improvements

Exacerbating Existing Environmental Hazards/Reverse CEQA Prohibition – The Final Text provides guidance for when agencies must consider the effects of locating projects in hazardous or vulnerable locations.[20] A lead agency is not required to perform "reverse CEQA analysis" (analyzing the impacts of the existing environment on the project and its future users) unless the project has a reasonably foreseeable risk of exacerbating existing environmental hazards. This includes any cumulative effect the project would have on a hazardous condition. This means that a lead agency should consider a project's potential for increasing the severity of hazards over time, including hazards that are expected to be more severe in the future due to climate change. However, a lead agency need not conclude any indirect impacts from environmental hazards are significant or engage in speculative analysis of such impacts.

Baseline – The Final Text eliminates any limitation of the baseline to those conditions existing at the time the Notice of Preparation ("NOP") is published. It may be appropriate to use projected future conditions or representative past conditions as the environmental baseline when use of existing conditions would be either misleading or without informative value to decision-makers and the public.[21] In such instances, the Final Text requires the lead agency to expressly justify its decision not to use existing conditions, and support that justification with substantial evidence in the record. This change also allows a lead agency to describe both existing and future conditions. These changes facilitate the ability of the lead agency to present a more accurate picture of a project's actual impacts.

Deferred Mitigation – Another change addresses when agencies may defer specific details of mitigation measures until after project approval.[22] Specifically, the Final Text permits "deferred mitigation" when the lead agency: "(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will [be] considered, analyzed, and potentially incorporated in the mitigation measure." Notably, while commitment to the performance standard is required, this change does not require the lead agency to commit to an approved menu of measures from which the implemented mitigation ***must*** be selected. Rather, the menu may be a non-exclusive list of examples.

General Responses to Data Dumping –The Final Text also includes changes related to the duty of lead agencies to provide detailed responses to comments on a project.[23] The changes clarify that a general response may be appropriate when a comment is general in nature, or when a commenter submits voluminous data and information without explaining its relevance to the project ("data dumping"). A lead agency may also now provide proposed responses to public agency comments in electronic form.

Pre-Commitment Activities – The Final Text acknowledges that certain activities will occur prior to CEQA

surrounding the activity are relevant to the determination of whether an agency has, as a practical matter, committed to a project.[24] The Final Text permits approval of agreements that (a) do not foreclose any mitigation measures or project alternatives; and (b) are conditioned on completion of CEQA review. As such, it provides a useful roadmap for how to draft a pre-commitment agreement so it does not preclude mitigation measures and alternatives.

Noticing to County Clerk – The Final Text corrects an inconsistency with the Public Resources Code, and now requires posting of the NOP in the office of the County Clerk of each county in which the project will be located as well as a transmittal of the NOP to OPR.[25]

Discretionary versus Ministerial – The Final Text clarifies the definition of "discretionary" to reflect various cases distinguishing this term from "ministerial."[26] Specifically, the Final Text states a discretionary project is one in which a public agency can shape the project in any way to respond to concerns raised in an environmental impact report. This clarification is necessary to maintain consistency in determining "discretionary" projects and to improve practitioners' ability to identify when a project is required to undertake environmental review under CEQA. For example, the Agency clarified that review of projects in areas zoning specifies uses "by right" pursuant to Government Code sections 65583(a)(4) and 65583.2(b) cannot be discretionary

Lead Agency Determination – The Final Text increases the flexibility for determining the lead agency for a project by changing the word "shall" to "will normally" to clarify that where more than one public agency meets the criteria for being "lead agency," the agencies may agree to designate one entity as the lead.[27]

---

[1] 14 C.C.R. § 15000 *et seq.*

[2] http://resources.ca.gov/ceqa/docs/2018_CEQA_FINAL_TEXT_122818.pdf

[3] http://resources.ca.gov/ceqa/docs/2018_CEQA_Final_Statement_of%20Reasons_111218.pdf.

[4] A lead agencies is always permitted to use its own checklist(s).

[5] See Senate Bill 743 (Steinberg, 2013).

[6] 14 C.C.R. §§ 15064,15064.7.

[7] *Communities for a Better Envt. v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099.

[8] 14 C.C.R §§ 15152, 15168.

[9] *Citizens for Responsible Equitable Envt'l Dev. v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598;*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307.

[10] 14 C.C.R § 15269; *City of Solana Beach* (2002) 103 Cal.App.4th 529.

[11] 14 C.C.R § 15301.

[12] 14 C.C.R. § 15061; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372.

[13] *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

[14] 14 C.C.R. § 15234.

[16] 14 C.C.R. § 15155(f); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

[17] 14 C.C.R. § 15064.3.

[18] 14 C.C.R. § 15064.4; *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 3 Cal.5th 497; *Ctr for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204.

[19] "Cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past, current, and probable future projects.

[20] 14 C.C.R. § 15126.2(a); *Cal. Building Indus. Ass'n v. Bay Area Air Quality Mgmt Dist.* (2015) 62 Cal.4th 369

[21] 14 C.C.R. § 15125; *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439; *Ass'n of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708.

[22] 14 C.C.R. § 15126.4.

[23] 14 C.C.R. § 15008.

[24] 14 C.C.R. § 15004; *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116.

[25] 14 C.C.R. § 15082.

[26] 14 C.C.R. § 15357; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259; *Mountain Lion Found. v. Fish & Game Comm.* (1997) 16 Cal.4th 105; *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924; *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286.

[27] 14 C.C.R. § 15051.

PRINTER-FRIENDLY

EMAIL THIS ARTICLE

DOWNLOAD PDF

REPRINTS & PERMISSIONS

RELATED ARTICLES

Massachusetts: A Municipal Ordinance Requiring Registration and Maintenance of Vacant or Foreclosed Properties Preempted under Chapter 21E

Fourteen Years Later And Still No Third Round Regulations for New Jersey Council on Affordable Housing

Unique Opportunities in Property Assessed Clean Energy (PACE) Financing

TRENDING LEGAL ANALYSIS

Privacy Tip #189 – Online Dating
By Robinson & Cole LLP

Third Circuit Resuscitates Claims Against University 403(b) Plan Fiduciaries

By Carlton Fields

Drone Delivers Human Kidney for Transplant

By Robinson & Cole LLP