

Consideration of Significant Effects and Hazards in the CEQA Guidelines

Proposed Amendments to CEQA Guidelines Section 15126.2(a)

Background

The California Environmental Quality Act, also known as CEQA, requires analysis of the potential effects of a project on the environment. CEQA defines “environment” to mean “the physical conditions which exist within the area which will be affected *by a proposed project*, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance.” (Pub. Resources Code § 21060.5 (emphasis added).)

The CEQA Guidelines are administrative regulations that implement CEQA. They clarify the types of environmental effects that an environmental impact report must analyze. Section 15126.2(a) states the general rule that an “EIR shall identify and focus on the significant environmental effects of the proposed project.” Among the potential effects that must be analyzed are “any significant environmental effects the project might cause by *bringing development and people into the area affected*.” (State CEQA Guidelines § 15126.2(a) (emphasis added).) To illustrate, that Guideline section currently provides the following example¹:

[A]n EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.

Other examples include: “any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans, addressing such hazards areas.”²

The California Supreme Court addressed these provisions in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal. 4th 369. In that case, an industry association challenged an air district’s suggested thresholds for the analysis of impacts of toxic air contaminants on future project residents. The Court accepted review to address: “[u]nder what circumstances, if any, does [CEQA] require an analysis of how existing environmental conditions will impact future residents or users of a proposed project?” (*Id.* at 377.) The Court held that “agencies subject to CEQA *generally* are not required to analyze the impact of existing environmental conditions on a project’s future users or

¹ The Natural Resources Agency added this example to the CEQA Guidelines in 1983.

² The Natural Resources Agency added these examples to the CEQA Guidelines in 2009. For a full explanation of that addition, see the Agency’s Final Statement of Reasons (December 2009), available online at http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf.

residents.” (*Ibid* (emphasis added).) The Court further explained, however, that the general rule does not apply to effects the project might risk exacerbating. Specifically, it held:

[W]hen 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. In those specific instances, it is the *project’s* impact on the environment — and not the *environment’s* impact on the project — that compels an evaluation of how future residents or users could be affected by exacerbated conditions.

(*Id.* at 377-378 (emphasis in original).)³ In reaching this conclusion, the Court found that two sentences in CEQA Guidelines 15126.2(a) (using development on a fault line as an example of exposing development to a hazard in a manner that would not risk exacerbating it) exceeded CEQA’s scope and so were invalid. The Court found the remainder of that section to be consistent with CEQA, and therefore valid.

In reaching its conclusion, the Court looked to both the plain words of the statute as well as express legislative policy underlying CEQA. For example, the Court began its analysis by restating the well-known principle guiding interpretation of CEQA: “afford the most thorough possible protection to the environment that fits reasonably within the scope of its text.” (*Id.* at 381.) The Court also repeatedly noted CEQA’s concern for public health and safety. (*See, e.g.*, *id.* at 386 (“the Legislature has made clear—in declarations accompanying CEQA’s enactment—that public health and safety are of great importance in the statutory scheme. (E.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d) [emphasizing the need to provide for the public’s welfare, health, safety, enjoyment, and living environment]”).) At the same time, the Court also recognized CEQA’s technical complexity and the costs that its analysis requirements impose on project development. (*Id.* at pp. 387 (noting “the sometimes costly nature of the analysis required under CEQA”), 390 (noting “the often technical and complex waters of CEQA”).) These same policy considerations guide the Office of Planning and Research in developing revisions to Section 15126.2(a) to be consistent with the Court’s holding.

The Office of Planning and Research seeks your views on these proposed changes. Input may be submitted electronically to CEQA.Guidelines@resources.ca.gov. While electronic submission is preferred, suggestions may also be mailed or hand delivered to:

Christopher Calfee, Senior Counsel
Governor’s Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Please submit all suggestions before **November 21, 2016 at 5:00 p.m.** Once the comment period closes, OPR will review all written input and revise the proposal as appropriate. These changes will ultimately

³ In reaching this conclusion, the Court declined to characterize the issue as “reverse CEQA”: “We find this term misleading and inapt. Because CEQA does sometimes require analysis of the effect of existing conditions on a project’s future residents or users, such analysis is not the ‘reverse’ of what CEQA mandates.” (*Id.* at p. 386, fn 11.)

be included a larger package of updates to the CEQA Guidelines and be submitted to the Natural Resources Agency, which will commence a formal rulemaking process. Once the Natural Resources Agency adopts the changes, they undergo review by the Office of Administrative Law.

Proposed Amendments to Section 15126.2(a)

Changes are proposed in the fifth through the eighth sentences in existing Section 15126.2(a). (The text, including all proposed revisions, is provided below at page 5.)

The first proposed change would add the words “or risks exacerbating” to the fifth sentence regarding impacts a project may cause by bringing people or development to the affected area. This addition clarifies that an EIR must analyze not just impacts that a project might cause, but also existing hazards that the project might make worse. This clarification implements the Supreme Court’s holding in the *CBIA* case. (62 Cal. 4th at 377 (“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”).) In this context, an effect that a project “risks exacerbating” is similar to an “indirect” effect. Describing “indirect effects,” the CEQA Guidelines state: “If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment.” (State CEQA Guidelines § 15064(d)(2).) Just as with indirect effects, a lead agency should confine its analysis of exacerbating effects to those that are reasonably foreseeable. (*Id.* at subd. (d)(3).)

Notably, by stating that EIRs should analyze effects that a project might “cause or risk exacerbating,” this clarification also makes clear that EIRs need not analyze effects that the project does not cause directly or indirectly.

The second change deletes the sentences that the Supreme Court specifically held exceeded CEQA’s scope. This change is necessary to implement the Court’s holding regarding the scope of analysis that CEQA requires. Notably, however, other laws require analysis of seismic hazards. Public Resources Code Section 2697, for example, requires cities and counties to prepare a site-specific geologic report prior to approval of most projects in a seismic hazard zone. Regulations further clarify that such “project shall be approved only when the nature and severity of the seismic hazards at the site have been evaluated in a geotechnical report and appropriate mitigation measures have been proposed.” (Cal. Code Regs, tit. 14, § 3724.) Further, the California Building Code contains provisions requiring all buildings to be designed to withstand some seismic activity. (See, e.g., tit. 24, § 1613.1.)

The safety elements of local general plans will also describe potential hazards, including: “any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence; liquefaction; and other seismic hazards ..., and other geologic hazards known to the legislative body; flooding; and wildland and urban fires.” (Gov. Code § 65302(g)(1).) Hazards associated with flooding, wildfire and climate change require special consideration. (*Id.* at subd. (g)(2)-(g)(4).) Lead agencies must “discuss any inconsistencies between the proposed project and applicable general plans”

related to a project's potential environmental impacts in a project's environmental review. (State CEQA Guidelines § 15125(d).) Local governments may regulate land use to protect public health and welfare pursuant to their police power. (Cal. Const., art. XI, § 7; *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 455 ("so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible").)

The third change clarifies that a project's direct and indirect and cumulative effects may affect the hazardous condition, and therefore, must still be evaluated in CEQA. In fact, such effects are particularly important when a project locates in a hazardous location. For example, a project proposed on a coastline may not itself cause pre-existing erosive forces. However, according to the Court in the *CBIA* case, a lead agency would need to include any relevant hazards in the environmental document's description of the environmental setting. Further, in the case of coastal development, if sea walls or other shoreline structures are necessary to protect the project from erosion, the sea wall may contribute to cumulative erosion impacts nearby on the coast. Such a development might also lead to indirect effects such as dispersion of pollutants from inundation, increased maintenance and repair-related construction, impedance of evacuation routes, increased demand on emergency services, etc. Thus, harm to the project would not mandate a finding of a significant effect; however, any environmental effects that might result from the harm to the project, and predictable responses to that harm, are properly evaluated in a CEQA evaluation.

The final addition clarifies that a lead agency should consider not just existing hazards, but the potential for increasing severity of hazards over time. This change is necessary because certain types of hazards are expected to be more severe in the future due to our changing climate. Examples include increased flooding (resulting from more precipitation falling as rain instead of snow as well as from rising sea levels) and more intense wildfires. These types of climate change impacts may worsen a proposed project's direct, indirect, or cumulative environmental effects in the future. A lead agency need not engage in speculation regarding such effects. Rather, hazard zones may be clearly identified in authoritative maps, such as those found on the [Cal-Adapt](#) website, or in locally adopted general plan safety elements and local hazard mitigation plans. Notably, pursuant to new requirements in Government Code section 65302(g)(4), added by Senate Bill 379, general plans will identify "geographic areas at risk from climate change impacts[.]" Focus on both short-term and long-term effects is also necessary to implement express legislative policy. (Pub. Resources Code §§ 21001(d), (g); 21083(b)(1).) Notably, this addition is consistent with the Council on Environmental Quality's interpretation of existing requirements under the National Environmental Policy Act. (Council on Environmental Quality, "[Final Guidance on the Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews](#)," August 1, 2016.)

Consideration of future conditions in determining whether a project's impacts may be significant is consistent with CEQA's rules regarding baseline. "[N]othing in CEQA law precludes an agency ... from considering both types of baseline—existing and future conditions—in its primary analysis of the project's significant adverse effects." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 454.) "The key ... is the EIR's role as an informational document." (*Id.* at 453.)

Text of Proposed Amendments

Changes to the text of the existing section are shown in **bold** type, with additions underlined and deletions shown in ~~strikeout~~.

§ 15126.2. Consideration and Discussion of Significant Environmental Impacts

The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services. The EIR shall also analyze any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected. For example, ~~an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly,~~ the EIR should evaluate any potentially significant direct, indirect or cumulative environmental impacts of locating development in ~~other~~ **other** areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), including both short-term and long-term conditions, as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.