

LEGISLATION & GOVERNMENTAL ORGANIZATION COMMITTEE

Committee Chair: Councilmember Julie Pierce—City of Clayton

Committee Vice Chair: Supervisor David Rabbit—Sonoma County

Staff: Patricia Jones – Assistant Executive Director 510/ 464-7933; FAX 510/464-7970; PatJ@abag.ca.gov

Kathleen Cha – Senior Communications Officer 510/ 464-7922; KathleenC@abag.ca.gov

Thursday, September 20, 2012 – 3:30 p.m. to 5:00 p.m.
ABAG Large Conference Room B, MetroCenter, 101 Eighth Street, Oakland

AGENDA*

1.	OPEN AGENDA Committee members may raise issues for consideration; members of the public may speak.	Information/ Action
2.	APPROVAL OF MINUTES Committee will review and approve the minutes of the July 19, 2012, L&GO meeting.	Information/ Action
3.	STATUS OF 2012 STATE LEGISLATION CONSIDERED ** Summary report of bills previously considered by the Committee as the Legislature begins its final recess of the 2012 Legislative Session.	Information/ Action
4.	CEQA GUIDELINES ANALYSIS—BALLONA WETLANDS TRUST Presentation by Zack Wasserman, Partner, Wendel Rosen Black & Dean, LLP	Information/ Action
5.	OVERVIEW OF PENSION REFORM LEGISLATION Briefing by Herbert Pike, ABAG Finance Director	Information/ Action
6.	DISCUSSION OF SEA LEVEL RISE SCOPE Briefing by Ezra Rapport, ABAG Executive Director	Information/ Action
7.	REVIEW OF NOVEMBER BALLOT PROPOSITIONS IMPACTING LOCAL GOVERNMENT Proposition 30: Schools and Local Public Safety Protection Act Proposition 31: Government Performance and Accountability Act Proposition 39: Tax Treatment for Multistate Businesses	Information/ Action
8.	ADJOURNMENT Next meeting is scheduled for November 15, 2012.	Action
	Agenda and other written materials are available at ABAG/Front Desk, 101 8th Street, Oakland, or at http://www.abag.ca.gov/meetings --	

* The Committee may take any action on any item on the agenda

** Full California Bill Texts and actions can be read and printed out from state website: www.leginfo.ca.gov.



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August 16, 2012

VIA EMAIL

Mr. Ezra Rapport
Executive Director
Association of Bay Area Governments
Joseph P. Bort MetroCenter
101 Eighth Street
Oakland, CA 94607

Re: Proposal to Prepare Legal Analysis – Effect of *Ballona Wetlands* and Related CEQA Cases on CEQA Guidelines §15126.2

Dear Ezra:

This letter is a response to the request for a proposed scope of work and cost proposal for Wendel, Rosen, Black & Dean LLP (“Wendel Rosen”) to prepare a legal analysis regarding the impacts and implications of *Ballona Wetlands Land Trust et al. v. City of Los Angeles* (2011) 201 Cal.App.4th 455 (“*Ballona Wetlands*”) and related cases under California Environmental Quality Act (“CEQA”) on the validity of statewide CEQA Guidelines §15126.2. The legal analysis would be prepared on behalf of Association of Bay Area Governments (“ABAG”), with the intent that the analysis could be used by ABAG to assist in advocacy efforts related to the affects of CEQA Guidelines on development and the environment in the Bay Area. As further described below, we propose to prepare the requested legal analysis for a fixed fee of \$15,000.

Guidelines §15126.2, and related State materials, including Appendix G, as currently adopted requires EIRs to “analyze any significant environmental effects the project might cause by bringing development and people into the area affected.” By way of example, this Guideline’s section states that “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.” Essentially, this means that EIRs must analyze the impacts of the environment on the project, in addition to the impact of the project on the environment. *Ballona Wetlands* is one of a series of cases that has called this language and approach into question, stating that “identifying the effects on the project and its users of locating the project in a particular environmental setting is neither consistent with CEQA’s legislative purpose nor required by the CEQA statutes.”

A number of legal firms and other parties interested in CEQA-related matters have issued statements, blog postings and other materials suggesting that the specific language in Guidelines §15126.2 cited above should be disregarded, while others have issued statements to the effect

Mr. Ezra Rapport
August 16, 2012
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WENDEL, ROSEN, BLACK & DEAN LLP

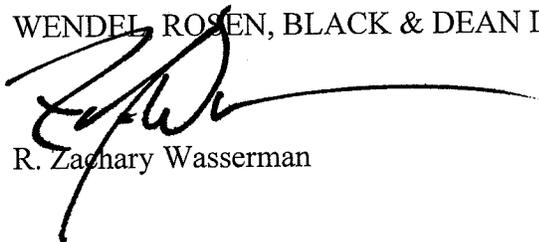
that jurisdictions preparing EIRs must rely on the current Guidelines, and include the analysis required by §15126.2 despite the courts' questioning in *Ballona Wetlands* and other cases. Additionally, as part of the process of amending the Guidelines pursuant to SB 226 (CEQA Streamlining for Infill Projects), some parties have submitted comments requesting that the Guidelines be amended to conform to the *Ballona Wetlands* decision. To date, however, the responses from the Governor's Office of Planning and Research ("OPR") have not addressed this issue, and the matter remains muddled.

Although CEQA itself only requires that the Guidelines be reviewed (and amended, if necessary) by OPR and the Secretary for Resources every two years, in practice the amendment process can occur continually, to account for statutory changes and evolving case law. We believe it is appropriate for ABAG to submit, with the assistance of Wendel Rosen, a specific request to OPR that the Guidelines be amended to account for the *Ballona Wetlands* decision and related cases. In particular, Wendel Rosen's work would consist of a careful review of the case law and commentary, and preparation of a detailed analysis explaining why §15126.2 should be amended – including a specific proposal for the required amendment. The analysis would be prepared by Wendel Rosen's experienced Land Use attorneys, with Patricia E. Curtin and Zack Wasserman assuming the lead roles. We propose to prepare the requested legal analysis for a fixed fee of \$15,000. We would also be available to make a presentation at an ABAG Board meeting, if requested.

We would be very pleased to assist ABAG in this important effort. If you have any questions on this proposal, feel free to contact me by phone or email. I look forward to discussing this with you.

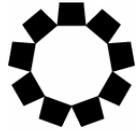
Very truly yours,

WENDEL ROSEN, BLACK & DEAN LLP



R. Zachary Wasserman

RZW/nap



Date: September 5, 2012

To: Legislation and Governmental Organization Committee

From: Ezra Rapport
Executive Director

Subject: **CEQA Guidelines Analysis**

Recent studies have made the point, including those conducted by the Bay Area Air Quality Management District (BAAQMD), that future development in areas proximate to freeways or busy arterials should consider the health impact of ambient freeway particulate matter on future residents of the project. The issue before local governments is whether or not these findings are required to be integrated into the CEQA process, or whether such findings constitute a land use policy matter that local governments can manage through conditions of approval.

Presently, there is a lack of clarity on whether the study of the impact of freeway ambient air quality is a CEQA matter or a local government policy matter. This lack of clarity has a serious impact on the ability of local governments to manage the entitlement process within PDAs and attract private and public investment to these areas. ABAG, as one of the key sponsors of the PDA strategy, has an obligation, in my opinion, to assist its members in understanding the type and level of analysis that is required by CEQA with respect to PDAs.

Recently published appellate court cases have examined the underlying CEQA statute regarding the principle of whether CEQA requires an examination of how the existing, ambient environment impacts the project or its users. In each case, the court ruled it did not. The CEQA statute contains provisions to study how the impact of the proposed project on the environment needs to be studied, not the reverse.

In the 2012 appellate case, *Ballona Wetlands Trust*, the Court struck Appendix G, the Environmental Checklist form, which contains the guideline requiring the examination of the existing environment on the project and its users. The Court did not address the guidelines directly. However, given the holding of the opinion, and the striking of Appendix G, it is logical that the Court intended that the offending guideline be struck by

the Department of Natural Resources. The Supreme Court declined to hear the case, leaving the opinion intact.

To help resolve this matter, the Executive Director would like to approach State government (Governor's Office, Attorney General's Office, Office of Planning and Research, Department of Natural Resources) to seek clarification regarding its published CEQA guidelines. The plan to do so includes obtaining a legal opinion from a strategically chosen law firm with known access to the Governor's Office, as well as contacts among other stakeholders with an interest in clarifying the intent of this guideline.

Attached is a proposal from Wendell Rosen, authored by attorney Zach Wasserman, to provide ABAG with such an opinion within the Executive Director's contracting authority (proposal is for a fixed fee of \$15,000), to be funded by the Planning Budget. If the opinion is useful in providing clarity for the state of CEQA law for this purpose, the Executive Director will request meetings with appropriate State agencies and report back to the L&GO Committee. It is expected that this process could take as long as 12 months.

Recommendation

Staff recommends the Committee approve the process to achieve clarification of this CEQA guideline. Mr. Wasserman will be available to answer any questions.

Attachment:
Wendell Rosen proposal dated August 16, 2012



ASSOCIATION OF BAY AREA GOVERNMENTS
 Representing City and County Governments of the San Francisco Bay Area

LEGISLATION
2012 State Legislative Session
Legislation & Governmental Organization Committee
September 6, 2012

	2012 Legislative Session: Bills Enrolled and Sent to Governor	Status	L&GO Position
AB 693 (Huffman)	Local Government: Sonoma County Regional Climate Protection Authority		Support
AB 441 Monning	State Planning		Oppose
AB 1532 John A. Perez	California Global Warming Solutions Act of 2006: Greenhouse Gas Reduction Account		Support (with suggested amendment)
AB 1585 Perez, Atkins, Dickinson, Hill, Mitchell, Perea, and Torres	Community Development		Support
AB 1656 Fong	San Francisco Bay Restoration Authority		Support
AB 1672 Torres	Housing-Related Parks Program		Support
AB 1951 Atkins	Housing Bonds		Support
SB 878 DeSaulnier	Office of the Transportation Inspector General		Watch
SB 1156 Steinberg	Sustainable Communities Investment Authority		Support
SB 1366 DeSaulnier	Firearms: Lost or Stolen— Reports		Support
AB 57 Beall	Metropolitan Transportation Commission	Chapter 88, 2012 Statutes	Support
	Bills that failed passage/died in Committee	Last status	
AB 484 Alejo	Enterprise Zones: Expiration of Designation	SEN Governance and Finance	Support
AB 1555 Norby	Redevelopment: Debt Forgiveness Agreements	ASM Inactive File	Watch
AB 1627 Dickinson	Energy: Vehicle Miles Traveled	ASM Business, Professions, Consumer Protection	Oppose
AB 2231	Sidewalks: Repairs	SEN Appropria-	Oppose

Fuentes		tions Com	
AB 2447 Skinner & Perez	California Neighborhood Revitalization Partnership Act of 2012	SEN Appropriations Com	Watch
SB 654 Steinberg	Redevelopment	ASM Housing and Community Develop- ment	Watch
SB 986 Dutton	Redevelopment: Bond Proceeds	SEN Read third time. Urgency clause refused adoption	Support
SB 1130 (De Leon)	Energy: Energy Assessment— Nonresidential Buildings— Financing	ASM Appropriations Com; held under submission	Support
SB 1149 DeSaulnier	Bay Area Regional Commission (BARC)	SEN Appropriations Com	Oppose and Withdraw
SB 1151 Steinberg	Sustainable Economic Development and Housing Trust Fund: Long-range Asset Management Plan	ASM Housing and Community Develop- ment	Support
SB 1220 Steinberg and DeSaulnier	Housing Opportunity and Market Stabilization (HOMeS) Trust Fund Act of 2012	SEN Read Third time; refused passage	Watch
SB 1335 Pavley	Redevelopment: Brownfield Sites	SEN Appropriations Com. Held under submission	Watch
SB 1545 DeSaulnier —CoAuthor Hancock	Bay Area Toll Bridges	ASM Transportation--Failed passage out of Com.	Watch
SB 1572 (Pavley)	California Global Warming Solutions Act of 2006: <u>AB 32 Investment Fund</u>	ASM Ordered to Second Reading. Rule 63 Suspended	Support
	FEDERAL LEGISLATION		
S.97 Feinstein	San Francisco Bay Restoration Act	SEN Legislative Calendar under General Orders	Support
H.R. 3034 Speier	San Francisco Bay Restoration Act of 2011	Subcom. On Water Resources and Environment	Support