February 14, 2014

Via E-mail (CEQA.Guidelines@ceres.ca.gov)

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1400 Tenth Street
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Re: Comments on 2014 CEQA Guidelines Update and Transportation Assessment Methodologies

Dear Chris:

Thank you for the opportunity to submit comments and suggestions on the Governor’s Office of Planning and Research (OPR) List of Possible Topics to be Addressed in the 2014 CEQA Guidelines Update (List of Topics) and the Preliminary Evaluation of Alternative Methods of Transportation Analysis (VMT Proposal), both dated December 30, 2013. The VMT Proposal includes possible metrics to replace the “Level of Service” analysis with a vehicle miles travelled (VMT) metric for measuring transportation impacts under CEQA. We submit these comments on behalf of the California Building Industry Association (CBIA).

CBIA is a statewide trade association that represents thousands of member companies including developers, planners, environmental professionals, engineers, architects, lenders, homebuilders, trade contractors, suppliers, sales agents, risk managers, lawyers, and other industry professionals. CBIA and its member companies employ over 100,000 who are responsible for the production of more than 80% of all new homes in the State.

CBIA is particularly focused on efforts to: curb the abuse of CEQA litigation for non-environmental purposes; clarify the procedural and substantive requirements of CEQA, thereby making CEQA lawsuits less likely and lawsuit outcomes more predictable; and avoid introducing new uncertainties, costs or delays into the existing CEQA process. We believe these goals are also shared by Governor Brown, who views CEQA reform as “God’s work.”

Overview

OPR proposes to amend 27 sections of the CEQA Guidelines (14 Cal. Code Regs. §§ 15000-15387); amend two existing appendices; and create three new appendices. We believe it is probable that OPR will also need to create several new sections of the CEQA Guidelines to effectuate some of the concepts addressed in the List of Topics and VMT Proposal. We applaud OPR’s appetite for such an ambitious undertaking. However, we believe that a far more surgical approach would be less time-consuming and more effective in achieving the three goals OPR identified as goals for the 2014 CEQA Guidelines:
• Make the environmental review process more efficient and meaningful;

• Reflect California’s adopted policy priorities, including, among others, addressing climate change, promoting of infill development, and conserving natural and fiscal resources; and

• Reflect statutory changes to CEQA and cases interpreting CEQA.

We believe all of these goals can be successfully achieved within the overall CEQA reform framework of curbing CEQA abuse, clarifying CEQA’s procedural and substantive requirements, and avoiding the introduction of new uncertainties, costs, or delays into the existing CEQA process.

Part 1 of our comments address update topics that we support, provided that OPR follows controlling case law and does not introduce new substantive or procedural limitations to controlling judicial interpretations of existing statutes.

Part 2 of our comments address update topics that we believe are inappropriate, based on pending judicial proceedings addressing the same topics. OPR has implicitly acknowledged the impropriety of updating the CEQA Guidelines on topics under review by the Supreme Court, by declining to address any Guideline revisions addressing the environment’s impact on a project. A substantial number of CEQA cases remains pending before the Court, and a number of other issues are the subject of contradictory appellate case decisions which are likely to require resolution by the Court. OPR should await the Court’s decisions to avoid making amendments to the CEQA Guidelines that have a high probability of creating greater uncertainty, cost, and delay in the CEQA process.

Part 3 of our comments address update topics on Guideline provisions that have been stable for a period of years, are not subject to litigation uncertainty, and are well understood by CEQA stakeholders. We do not support OPR’s proposal to address these topics. While OPR staff or those lobbying OPR may have policy disagreements with these established CEQA Guidelines, statutes, and practices, changes to established CEQA policy are effectuated by statute, not by OPR.

Part 4 of our comments address update topics, including the VMT Proposal, which we oppose because they create an unwarranted expansion of CEQA, with a corresponding increase in compliance costs, processing delays, and judicial uncertainty.

We urge OPR to focus its limited resources on the topics addressed in Part 1.
Part 1. Topics Recommended for Guideline Updates

A. Section 15061 (Preliminary Review)

The List of Topics proposes to “replace the phrase ‘general rule’ with ‘common sense exemption’ to be consistent with the terminology used by the Supreme Court in *Muzzy Ranch v. Solano County ALUC* (2007) 41 Cal.4th 372.”

We support replacing the phrase “general rule” with “common sense exemption” in CEQA Guidelines Section 15061(b)(3), to be consistent with the terminology used in *Muzzy Ranch*.

Additionally, we agree with the California Chamber of Commerce that it is critical to specify that a lead agency’s determination regarding whether a project qualifies for the common sense exemption “need not necessarily be preceded by detailed or extensive factfinding.” *Muzzy Ranch, supra*, 41 Cal.4th at p. 388. We support the following additions to Section 15061, proposed by the California Chamber of Commerce in its letter to OPR dated February 13, 2014, to reflect the Court’s holding in *Muzzy Ranch*:

§ 15061. Review for Exemption.

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(d) A lead agency’s determination regarding whether a project qualifies for the common sense exemption need not be preceded by detailed or extensive fact-finding.

(ce) After determining that a project is exempt, the agency may prepare a notice of exemption as provided in Section 15062. Although the notice may be kept with the project application at this time, the notice shall not be filed with the Office of Planning and Research or the county clerk until the project has been approved.

(ef) When a non-elected official or decisionmaking body of a local lead agency decides that a project is exempt from CEQA, and the public agency approves or determines to carry out the project, the decision that the project is exempt may be appealed to the local lead agency's elected decisionmaking body, if one exists. A local lead agency may establish procedures governing such appeals.

B. Sections 15063 (Initial Study) and 15083 (Early Public Consultations)

We support efforts to revise Section 15063 to authorize lead agencies to utilize the same arrangements when preparing an Initial Study as those outlined in Section 15084(d) for purposes of preparing a Draft EIR.
As to OPR’s additional proposal to revise Sections 15063(g) and 15083, we believe that a lead agency’s obligation to consult with a project applicant to ensure that the project description and mitigation measures presented in an administrative draft of an initial study and EIR are accurate should be mandatory, not simply permissive.


C. Section 15064 (Determining the Significance of the Environmental Effects Caused by a Project) and Appendix G

There are several subtopics addressed in the List of Topics relating to Section 15064 and Appendix G.

1. Regulatory Standards. We support OPR’s proposal to update the CEQA Guidelines to conform to the substantial body of case law that authorizes reliance on regulatory standards to determine the significance of environmental impacts. This proposal is consistent with Communities for a Better Env’t v. California Resources Agency (2002) 103 Cal.App.4th 98 (CBE), which recognized that compliance with environmental standards could serve as substantial evidence that an impact was less than significant. Notably, the CBE court concluded that “a lead agency’s use of existing environmental standards in determining the significance of a project’s environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation.” CBE, supra, 103 Cal.App.4th at p. 111; 14 Cal. Code Regs. § 15064.7(c).


We caution, however, that any proposed definition of “regulatory standard” by OPR in Section 15064 should not interfere with the discretion afforded to lead agencies to utilize their own thresholds of significance, or to reject a regulatory agency assertion as to the scope of studies required to comply with CEQA’s substantial evidence standard, provided the lead agencies’ thresholds and analyses are supported by substantial evidence. See, e.g., North Coast

2. Adjusted Baseline. We also support updating the CEQA Guidelines consistent with the California Supreme Court’s decision in Neighbors for Smart Rail v. Exposition Metro Line Construction Authority (2013) 57 Cal.4th 439 (Smart Rail). Smart Rail allows the significance of project impacts to be evaluated against either the existing physical baseline conditions or, under appropriate circumstances, under an adjusted baseline. Appropriate adjustments to the baseline may take into account such conditions as historic operational levels for existing facilities and structures (Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310), already approved infrastructure improvements (Pfeiffer v. City of Sunnyvale City Council (2011) 200 Cal.App.4th 1552), and new laws and regulatory mandates scheduled to take effect (Smart Rail, supra, 57 Cal.4th at p. 453, fn. 5). OPR should confine its CEQA Guidelines Update to these court decisions, and should not impose new or modified restrictions on use of an adjusted baseline, such as those proposed in the American Planning Association’s August 30, 2013 comment letter, which pre-dated the Smart Rail decision.

3. Other Statutory and Case Law Updates Relating to Thresholds of Significance. We believe that OPR should address new case law and legislation regarding significant impacts. First, OPR should expressly incorporate the provisions from Senate Bill 743 (Steinberg) (SB 743) that prohibit a finding of a significant adverse impact based on aesthetics, parking availability, and traffic delay, for a limited class of infill projects in designated priority development areas into a new CEQA Guideline. Pub. Res. Code § 21099(d)(1) (“[a]esthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment”). We also believe that all current Appendix G provisions regarding aesthetics, as well as provisions addressing traffic congestion, should be designated as inapplicable to projects covered by this provision of SB 743. See, CEQA Guidelines Appendix G §§ I, XVI(a-b).

Finally, we believe that the combination of Taxpayers for Accountable School Bond Spending v. San Diego Unified Dist. (2013) 215 Cal.App.4th 1013 and SB 743 (see Pub. Res. Code §§ 21099(b)(3), 21099(d)(1)), require that Appendix G be updated to restore parking to Appendix G except for those projects for which parking cannot be a significant impact under SB 743.

D. Section 15082 (Notice of Preparation)

We support clarifying that NOPs must be posted at the County Clerk’s office.
E. Section 15087 (Public Review of Draft EIR)

We support this revision to specify that the notice must indicate not only where the EIR may be reviewed, but also where documents “incorporated by reference” in the EIR may be reviewed. Furthermore, for materials that are referenced in the EIR, we encourage OPR to amend Section 15087 to require only the inclusion of the cover page and cited text for copyrighted materials and websites. This clarification will eliminate the frustration of searching for difficult to access materials and disabled websites.

F. Section 15088 (Evaluation of and Response to Comments)

We support OPR’s proposal to revise Section 15088 to make clear that “comments that do not explain the basis for the comments or the relevance of evidence submitted with the comment do not require a response.” It has become common practice for many project opponents to couple their comment letters with so-called “document dumps” (i.e., the letters are filed with voluminous attachments, the relevance of which is never explained). Lead agencies should not be tasked with the responsibility of combing through hundreds or thousands of pages of non-project specific materials to identify the commenter’s concern; CEQA was never intended to be a game of find-the-needle-in-the-haystack. See, e.g., Citizens for Responsible Equitable Envt’l Dev. v. City of San Diego (2011) 196 Cal.App.4th 515, 528.

Additionally, we support amendments to the CEQA Guidelines that advise participants in the CEQA process that such comments – i.e., ones that do not explain the relevance of documentation attached thereto – do not satisfy requirement to exhaust administrative remedies. Pub. Resources Code § 21177. Section 15088 should clarify that a CEQA claim can only be litigated if the issue was raised with sufficient specificity to provide the lead agency with a meaningful opportunity to respond. Pub. Res. Code § 21177(a); see also, Sierra Club v. California Coastal Comm’n (2005) 35 Cal.4th 839, 864 fn. 20; see also, Coalition for Student Action v. City of Fullerton (1984) 153 Cal.App.3d 1194-1198 (“The essence of the exhaustion doctrine is the public agency’s opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review” (emphasis in original)).

G. Section 15124 (Project Description)

The List of Topics proposes allowing the lead agency to discuss the project's benefits in the description of the project's technical, economic, and environmental characteristics. We support this proposal so long as it is clear that it does not create a new mandatory duty to prepare studies regarding project benefits, nor require economic studies.

H. Section 15125 (Environmental Setting)

OPR’s proposal on this section includes three sub-parts.
1. Adjusted Baseline. As noted above, with regard to consideration of an adjusted baseline, we support OPR’s intent to codify the California Supreme Court's decision to uphold reliance on an adjusted baseline in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 and *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310. We would oppose Guideline revisions that attempted to limit or condition use of an adjusted baseline in any manner contrary to this case law.

§ 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.

(b) 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 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. Examples of future conditions that may appropriately be included in an adjusted baseline include, but are not limited to:

(1) planned infrastructure improvements for which funding sources have been identified, estimated completion will occur during project operations, and the future existence of such infrastructure improvements is relevant to gaining a meaningful understanding of project impacts;

(2) recent historical or reasonably foreseeable future operational or occupancy levels of existing facilities or structures on a project site, even if such facilities or structures are not fully utilized at the time environmental review of a project begins; and

(3) implementation of new laws and regulations that have already been adopted, and provide for phased implementation over time.

(c) In evaluating the significance of project impacts, and in determining the need for and nature of feasible mitigation measures to address project impacts, a lead agency may rely
solely on existing conditions as a baseline, or may rely solely on the adjusted baseline, or may use both baseline scenarios.

(d) 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.

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2. Evaluation of Plan Inconsistencies. CEQA Guidelines Section 15125(d) requires that the environmental setting portion of an EIR contain a discussion of “any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans.” CEQA Guidelines Appendix G, Section X similarly queries whether a project would “conflict with any applicable land use plan, policy or regulation . . . adopted for the purpose of avoiding or mitigating an environmental impact.” These provisions inappropriately require a discussion of consistency with broad public policies, since CEQA documents are supposed to be focused on physical environmental impacts. Some CEQA practitioners mistakenly equate even a single plan inconsistency with a significant impact for CEQA purposes.

We propose that the CEQA Guidelines delete this requirement from Appendix G, since it is duplicative of the requirement found in Section 15125(d). Furthermore, we suggest that OPR amend section 15125(d) to describe which plans are relevant to the consideration of physical impacts to the environment, specifying such plans by resource issue (i.e., compliance with Basin Plans is relevant to water quality impacts).

3. “Community” Conditions. OPR proposes to expand CEQA by requiring a new assessment of “community” conditions. This expansion is unwarranted and will increase uncertainty, cost, and delay as addressed in greater detail in Part 4, below.

I. Section 15126.4 (Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects)

OPR indicates that it will provide guidance on when an agency may appropriately defer the precise parameters of mitigation measures. Section 15126.4(a)(1)(B) already reflects the general prohibition on the improper deferral of mitigation, absent the utilization of performance standards to achieve the mitigation of significant effects. We agree that the CEQA Guidelines should be updated to reflect the substantial body of case law on this topic, including the greater flexibility for deferral of detailed mitigation measures in EIRs. See, e.g., Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 306; Sacramento Old City Ass’n v. City Council of Sacramento (1991) 229 Cal.App.3d 1011, 1028; League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland (1997) 52 Cal.App.4th 896; Communities for a Better Environment v. City of Richmond (2010) 184 Cal.App.4th 70. We suggest the following amended language:
§ 15126.4. Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects.

(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.

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(C) Formulation Identification of and commitment to adopt of specific, feasible mitigation measures should not be deferred until some future time unless:

(i) A quantitative or qualitative performance standard is identified that will mitigate the identified impact, and achievement of this performance standard is made a condition of project approval;

(ii) One or more feasible mitigation measures is identified that would achieve this performance standard; and

(iii) A date, project-related milestone, or other parameter is specified to require actual implementation of such feasible mitigation measures as are ultimately selected to meet the specified performance standard.

(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.

J. Section 15152 (Tiering)

We support clarifying that tiering is only one streamlining mechanism and that Section 15152 does not govern the other types of streamlining.

K. Section 15168 (Program EIR)

We support OPR’s proposed amendment to this Guideline to reflect the limited circumstances under which additional CEQA documentation is required after approval of a Program EIR to reflect recent case law. For example, the First Appellate District upheld a city’s determination that a proposed residential project was consistent with a 2002 specific plan and thus exempt from further CEQA review, pursuant to Government Code Section 65457. Concerned Dublin Citizens v. City of Dublin (2013) 214 Cal.App.4th 1301. It also upheld a city’s use of its 1998 Program EIR certified for its 2020 General Plan Update for a proposed 2009 Housing Element Update, and related Land Use Element and zoning code amendments.
Latinos Unidos de Napa v. City of Napa (2013) 221 Cal.App.4th 192. The court similarly concluded that reliance on a Programmatic General Plan EIR was appropriate, and no new EIR was required for actions implementing the General Plan including updates to the Housing Element, and implementing zoning ordinances. *Ibid.* Based on these and other cases, we support the following amendments:

§ 15168. Program EIR.

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(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.

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(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 for the project site or project site vicinity, and the absence of significant new adverse or significantly worse impacts that are peculiar to the project or project site.

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(5) A program EIR will be most helpful in dealing with subsequent later activities if it provides a detailed description of the potential significant adverse environmental impacts that may occur with program implementation. With a good and detailed 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.

We would oppose any Guideline Update that attempted to require the inclusion of project-level information in Program EIRs, of the type a court concluded was required for Redevelopment Plan EIRs. Requiring project-level details in a Program EIR defeats the purpose of a Program EIR, and effectively converts a Program EIR into a Project-level EIR.

L. Section 15182 (Projects Pursuant to a Specific Plan)
We support adding a description of the new statutory specific plan exemption in Public Resources Section 21155.4. This addition should make it clear that this new exemption is separate from, and in addition to, the existing Government Code Section 65457 statutory exemption for residential projects consistent with specific plans.

M. Section 15222 (Preparation of Joint Documents)

We support clarifying that CEQA lead agencies may enter into a memorandum of understanding to facilitate joint review with a federal lead agency, provided that it is clear that entering into such a memorandum of understanding does not itself trigger the need for CEQA review. It should also be clear that the memorandum of understanding expressly discloses the planned schedule for completion of a joint CEQA/NEPA process with respect to CEQA's statutory processing deadlines for EIR and Negative Declaration processing.

N. Section 15269 (Emergency Projects)

We support clarifying that the emergency exemption does not preclude projects responding to emergencies that require some long-term planning, consistent with the CalBeach Advocates v. City of Solana Beach (2002) 103 Cal.App.4th 529 decision, to the extent that that the revised CEQA Guidelines do not create new limits or pre-conditions not required by applicable case law.

O. Section 15301 (Existing Facilities)

The List of Topics includes “[r]evis[ing] [Section 15301] to incorporate the holding in Communities for a Better Environment v. South Coast Air Quality Management Dist. (2010) 48 Cal.4th 310, regarding the level of historic use, so that the exemption cannot be used to expand the use of a facility beyond its historic use (rather than use at the time of the lead agency’s determination).”

CBIA proposed this topic because this section restricts the application of the Existing Facilities exemption to facilities where there is negligible or no expansion of use “beyond that existing at the time of the lead agency’s determination.” This language effectively precludes the use of this exemption for vacant or underutilized facilities or structures. It creates an artificial construct that presumes that vacant structures and formerly developed parcels have never been occupied or put to any productive use. As a result, it is difficult to employ this exemption the way it was intended to be used. This CBIA proposal is even more compelling given the Supreme Court's endorsement of an adjusted baseline approach to CEQA compliance in Smart Rail.

The phrase “beyond that existing at the time of the lead agency’s determination” was added to this exemption in response to Bloom v. McGurk (1994) 26 Cal.App.4th 1307. In that case, the court clarified that the term “existing facility” means a facility existing as of the time of the agency’s determination, rather than a facility existing at the time CEQA was enacted. Since the Bloom court’s intent was not to limit the application of the Existing Facilities exemption, this
limiting language should be removed. The exemption should be revised to read the way it read prior to *Bloom* as follows:

§ 15301. Existing Facilities.

*Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that previously existing at the time of the lead agency’s determination.* The types of “existing facilities” itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

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P. Section 15357 (Discretionary Project)

The List of Topics proposes to augment the definition of a “discretionary project” to provide further guidance about whether a project is ministerial or discretionary. Since CEQA applies only to discretionary projects, this distinction is important. Pub. Res. Code § 21080(a); *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 187-188. We support a checklist approach to clarifying whether a project is ministerial or discretionary, which should address the following questions:

Ministerial Projects

- Does the project require only a determination of whether it conforms to the applicable statutes, regulations, or ordinances? 14 Cal. Code Regs. § 15357.

- Does the project involve little or no personal judgment by the public official as to the wisdom or manner of carrying out the project, for example by requiring only confirmation that a project meet the requirements of a previously-adopted checklist of general, program-, or project-level applicability? 14 Cal. Code Regs. § 15369; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144.

Discretionary Projects

- Is the project an enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, or the approval of tentative subdivision maps? Pub. Res. Code § 21080(a).

- Does the agency exercise judgment over whether or how the project should be carried out? 14 Cal. Code Regs. § 15357.
• Does the public agency or body approving or disapproving project exercise judgment or deliberate? 14 Cal. Code Regs. §§ 15357, 15002(i).

• Does the agency have “the power to shape the project in ways that are responsive to environmental concerns?” 

• Has environmental review been completed and no further review is anticipated?

Q. Section 15370 (Mitigation)

We do not oppose clarifying that preservation in perpetuity, provided that OPR indicates that it can be but one type of appropriate mitigation (i.e., for impacts to prime agricultural lands or significant biological resources) for consideration, so long as this clarification does not create new limits or conditions that extend beyond existing case law.

R. Section 15378 (Project)

We agree with OPR’s assessment that there is room for clarification of the definition of a “project” and “project approval” in light of recent case law. CEQA applies only when the City “approves” a project. Pub. Res. Code § 21080(a); RiverWatch v. Olivenhain Municipal Water Dist. (2009) 170 Cal.App.4th 1186. “‘Approval’ means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.” 14 Cal. Code Regs. § 15352(a). “The critical question is whether the totality of the circumstances surrounding the public agency’s action has effectively committed the agency to the project even though it has not provided all approvals or entitlements necessary to proceed.” City of Irvine v. County of Orange (2013) 221 Cal.App.4th 846, 859 (City of Irvine). “[C]ourts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project.” Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116, 139 (Save Tara).

Courts have recently applied this Save Tara test three times, finding that agency had not approved a project. For example, in Cedar Fair, L.P. v. City of Santa Clara (2011) 194 Cal.App.4th 1150 (Cedar Fair), the court concluded that the city’s approval of a term sheet with a private developer for the construction of a proposed stadium was not an approval, despite the fact that the term sheet included detailed descriptions of the project, and the city had already committed substantial resources to its negotiations with the developer. The court concluded that the term sheet did not commit the city to the project since it only required the city to continue to negotiate with the developer. The city retained complete discretion over all aspects of the CEQA review process. Id. at pp. 1170-1171.
Likewise, the Court of Appeal found that a city’s loan to a community center, a supervisor’s introduction of a special use district ordinance, and statements by the supervisor, the center, and a nonprofit organization did not constitute an approval of a project triggering CEQA. *Neighbors For Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540 (*Neighbors For Fair Planning*). Finally, the court determined that a county’s submittal of an application for state funding to expand a jail facility was not a project approval under CEQA because it did not commit the county to a definite course of action. *City of Irvine, supra*, 221 Cal.App.4th 846.

Consequently, we support the addition of language in the CEQA Guidelines to reflect the fact that a “project” has been “approved” only if the lead agency has committed to a definite course of action. We request that OPR consider the following principles, based on the suggestions by the California Chamber of Commerce, when drafting these revisions:

1. A pre-approval agreement is a project only if the lead agency has committed itself to a definite course of action regarding the project. (*Save Tara*).

2. A pre-approval agreement is not a project where it only requires the lead agency to continue to negotiate with the developer and it retains discretion over all aspects of the CEQA review process. (*Cedar Fair*).

3. A pre-approval agreement is not a project if it unambiguously states that: (1) the lead agency is not committing itself or otherwise endorsing the project by financing predevelopment activities; and (2) requires the developer to repay the predevelopment portion of the loan regardless of whether the project is approved. (*Neighbors for Fair Planning*).

4. A lead agency’s application for state funding for a future project is not a project. (*City of Irvine*)

**S. Appendix J (Examples of Tiering)**

We support amending Appendix J to provide better guidance on use of different and new streamlining tools.

**Part 2. OPR Proposals Recommended for Deferral Pending Judicial Interpretation**

**A. Section 15064.4 (Determining the Significance of Impacts from Greenhouse Gas Emissions)**

The appropriate methodology for evaluating the significance of greenhouse gas emissions under CEQA has now been reviewed by several courts. The methodology of evaluating the significance of project emissions against a “business as usual” (BAU) framework has been
expressly upheld in several trial and in all reported appellate court cases addressing this topic. It remains pending in others.

The necessity for judicial interpretations of greenhouse gas analytical methodologies that are consistent with existing CEQA statutes and Guidelines resulted directly from OPR’s decision that lead agencies should choose their own greenhouse gas significance threshold pursuant to CEQA Guidelines Section 15064.4(a)(1). This section provides that the “determination of the significance of [GHG] emissions calls for a careful judgment by the lead agency,” and that the “lead agency has discretion to select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence.” 14 Cal. Code Regs. § 15064.4(a)(1).

The absence of clear direction as to greenhouse gas significance thresholds from OPR resulted in a highly litigious “jump ball” dropped into the middle of the Great Recession, with lead agencies scrambling alongside various CEQA stakeholders to determine how greenhouse gas emissions should be evaluated under CEQA. We now have scores of pending lawsuits based on CEQA challenges to the adequacy of greenhouse gas analyses under the existing CEQA Guidelines.

OPR’s new proposal is to disallow BAU, the most commonly-used methodology in CEQA practice, notwithstanding the fact that this threshold that has been upheld by appellate courts in reported opinions (and there are no reported opinions that prohibit use of this methodology). This proposal is yet another “jump ball” of uncertainty. This time, OPR proposes (contrary to existing case law) to tell CEQA stakeholders that what they have been doing is wrong, but again avoid providing affirmative, practical direction on what should be done. OPR’s discretion to reset the clock has ended, however: this is now a matter of statutory and regulatory interpretation being adjudicated by the courts.

Specifically, numerous court decisions have now explicitly endorsed the “business as usual” method as a legally sound threshold. In a 2011 case, the City of Chula Vista analyzed whether the project at issue would “[c]onflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006 (AB 32) or its governing regulation.” Citizens For Responsible Equitable Environmental Development v. City of Chula Vista (2011) 197 Cal.App.4th 327, 335 (CREED). The Fourth District Court of Appeal held that the city properly exercised its discretion under Section 15064.4 to use compliance with AB 32 as the threshold to determine greenhouse gas impacts. Id. at p. 336. Similarly, just a few months ago, the Third District Court of Appeal found that a city “properly adopted Assembly Bill 32’s reduction targets for GHG emissions as the threshold-of-significance standard in determining whether the Project’s GHG emissions constituted a significant environmental impact.” Friends of Oroville v. City of Oroville (2013) 219 Cal.App.4th 832, 841 (Friends of Oroville); see also, North Coast Rivers Alliance et al. v. Marin Municipal Water District Board of Directors (2013) 216 Cal.App.4th 614 (upholding agency’s threshold of reducing GHG emissions to 15 percent below the 1990 levels by 2020 in accordance with a locally adopted plan to reduce GHGs as supported
by substantial evidence). While a few trial courts have rejected the BAU approach, these
decisions have not survived on appeal (although several remain pending).

BAU has been formally adopted by one regional expert air quality agency and informally
recognized as appropriate by others. OPR now proposes to further exacerbate the litigation
uncertainty and risks it created with Section 15064.4(a)(1) by attempting to disallow BAU.
These risks are further compounded by the fact that OPR has failed to identify a clear, practical
alternative methodology.

OPR does not have the legal authority to adopt CEQA Guidelines aimed at invalidating
appellate court decisions interpreting existing law. Government Code Section 11342.2 states that
“[w]henever by the express or implied terms of any statute a state agency has authority to adopt
regulations to implement, interpret, make specific or otherwise carry out the provisions of the
statute, no regulation adopted is valid or effective unless consistent and not in conflict with the
statute and reasonably necessary to effectuate the purpose of the statute.” The key legal question
to be addressed is “whether the regulation alters or amends the governing statute or case law” or
“[i]n short, the question is whether the regulation is within the scope of authority conferred.”
CBE, supra, 103 Cal.App.4th at p. 108 [invalidating provision of the CEQA Guidelines as
inconsistent with controlling CEQA law]. Indeed, an “agency has no authority to promulgate a
regulation that is inconsistent with controlling law” and “[i]n the end, ‘[t]he court, not the
agency, ‘has final responsibility for the interpretation of the law’ under which the regulation was
issued.’” Id. at pp. 109-110 (citations omitted). An OPR attempt to preclude the use of the
“business as usual” methodology would contradict appellate courts’ explicit approval of that
approach in CREED and Friends of Oroville. Any Guideline changes reflecting the greenhouse
gas methodology policy preferences of OPR must now come from amendments to the statutes or
further case law.

Furthermore, in a practical sense, there are no widely-accepted alternative methods by
which to analyze greenhouse gas emissions. One alternative approach endorsed by a single air
district, the Bay Area Air Quality Management District (BAAQMD), addresses only a fraction of
the types of projects requiring evaluation under CEQA. Additionally, challenges to BAAQMD’s
CEQA Guidelines are currently pending before the California Supreme Court, and BAAQMD
advises on its website that it is “no longer recommending that the [BAAQMD air quality and
greenhouse gas] Thresholds be used as a generally applicable measure of a project’s significant
air quality impacts. Lead agencies will need to determine appropriate air quality thresholds of
significance based on substantial evidence in the record.”

As further background for our strong opposition to OPR’s proposal to disallow the BAU
methodology, OPR appears to conflate two distinct concepts in its critique of BAU as a
comparison of project impacts to a “hypothetical” project. The first concept relates to the

1 See http://www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx, retrieved on February
6, 2014.
baseline. The BAU methodology does not change CEQA’s requirement to assess baseline conditions.

OPR equates BAU with a “hypothetical baseline,” when BAU is an analytical methodology for assessing the significance of project impacts and not a baseline. BAU is grounded by substantial evidence presented in CARB’s adopted Scoping Plan regarding the level of greenhouse gas emission reductions required to achieve the AB 32 statutory goal of reducing California’s 2020 emissions to 1990 levels. Under this methodology, projects are reviewed based on laws and regulations that were in effect as of the enactment date of AB 32, and then modified to achieve the CARB-compliant reduction target. Consequently, BAU, which is based on compliance with CARB’s adopted Scoping Plan, is supported by substantial evidence and is an appropriate use of a lead agency’s discretion under CEQA.

In contrast to BAU, “baseline” under CEQA is “normally” the level of existing GHG emissions from the project site. § 15125(a). Should a lead agency employ BAU to determine the significance of a project’s GHG projected emissions, it must still separately calculate the existing GHG emissions on the site. Moreover, all of this information must be disclosed as part of the EIR. Finally, under Smart Rail, baseline adjustments are appropriate under some circumstances; however, the BAU methodology does not rely on an adjusted baseline.

Because BAU is not a baseline but, rather, a valid and appropriate methodology for assessing the significance of greenhouse gas emissions, the possible prohibition of the use of this methodology undermines the fundamental discretion afforded to lead agencies by CEQA under Section 15064.4.

If OPR chooses to recommend an amendment to Section 15064.4, the amendment should reflect recent case law:

§ 15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions.

(a) The determination of the significance of greenhouse gas emissions is required. This analysis calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:

(1) Use a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use. The lead agency has discretion to select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence. One acceptable methodology for evaluating the significance of
project’s greenhouse gas emissions is whether the project would significantly hinder or delay California’s ability to meet the reduction targets contained in California Global Warming Solutions Act of 2006 (Health & Safety Code § 38500 et seq., enacted by Assembly Bill No. 32 (2005-2006 Reg. Sess.). The lead agency should explain the limitations of the particular model or methodology selected for use; and/or

(2) Rely on a qualitative analysis or performance based standards.

(b) A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment:

(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;

(2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project.

(3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions, including but not limited to the California Global Warming Solutions Act of 2006 (Health & Safety Code § 38500 et seq., enacted by Assembly Bill No. 32 (2005-2006 Reg. Sess.). Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project’s incremental contribution of greenhouse gas emissions. If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project.

B. Appendix G - Fire Hazards

SB 1241 (Kehoe) requires that OPR, “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 . . . . for the inclusion of questions related to fire hazard impacts for projects located on lands classified as state responsibility areas . . . . and on lands classified as very high fire hazard severity zones . . . .” Pub. Res. Code § 21083.01(a).

We request that OPR refrain proposing any proposed revisions to the initial study checklist relating to assessing the potential fire hazard impacts to a project based on existing environmental conditions pending resolution by the California Supreme Court of the issue of

If OPR decides to go forward with a proposed amendment of the Guidelines on this point, the amendment should focus on whether there are aspects of the proposed project that create a significant fire hazard risk, if the project is located within a state responsibility area or on lands classified as very high fire hazards severity zones within such state responsibility areas.

**Part 3. OPR Proposals That Would Disrupt Established CEQA Law and Practice**

**A. Section 15060.5 (Pre-application Consultation)**

Section 15060.5 of the CEQA Guidelines currently provides for consultation, prior to the filing of a formal application, between lead agencies and potential applicants, and lead agencies and one or more responsible agencies, trustee agencies, or other public agencies that may have an interest in the potential project. OPR’s List of Topics indicates that this section will be revised to “address consultation more generally,” and to include new provisions expanding consultation requirements for tribes and regional air districts.

Tribal consultation is also already required pursuant to the federal National Historic Preservation Act, including Section 106 and its implementing regulations, and California’s tribal resource protection statutes (i.e., Pub. Res. Code § 5097.9). OPR should not use this CEQA Guidelines Update to add new CEQA consultation mandates for tribes absent new Legislative authority.

For projects requiring discretionary approvals from air districts, CEQA’s existing scoping, notice and comment processes likewise already provide for comment and consultation opportunities. The Legislature has established other exceptions to CEQA’s general rule that responsible and expert agencies and stakeholders participate in the CEQA process as part of the generally applicable scoping and comment periods provided for in CEQA, including, for example, consultation with Caltrans. See, e.g., Pub. Res. Code § 21083.9. OPR should not destabilize CEQA’s well-established scoping, notice, and comment process with a new or expanded “consultation” process. Any new “pre-application” mandate would increase existing CEQA compliance costs and schedules beyond those currently required.
We are aware that some agencies have reported budget or staffing constraints that create practical limitations on their participation in the CEQA process. Adding another mandatory “pre-application” consultation requirement does not address this resource limitation. Instead, it creates an ambiguous new expectation for lead agencies and applicants before the CEQA review process even begins. This unknown set of new consultation meetings and processes further waste resources.

In lieu of expanding the CEQA process, we fully support OPR’s efforts to educate responsible and trustee agencies about participating in CEQA’s existing scoping, notice, and comment processes.

B. Section 15051 (Criteria for Identifying the Lead Agency)

The List of Topics proposes to “[c]larify when the determination of lead agency may be made by agreement” and “provide that the agency that acts first shall “normally” be the lead agency, which leaves open the possibility of designating another by agreement.” We believe that this practice is already well-settled and does not require clarification.

C. Section 15091 (Findings) and Section 15126.6 (Consideration and Discussion of Alternatives to the Proposed Project)

The List of Possible Topics includes two CEQA Guidelines sections that address the feasibility of alternatives. We believe that the law on the requirements of potentially feasible alternatives is already clear and that no additional amendments to clarify this point are necessary. CEQA defines the term “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Pub. Res. Code § 21061.1. The CEQA Guidelines add legal factors to this analysis. 14 Cal. Code Regs. § 15364.

As noted in a leading CEQA practice guide, a lead agency considers the feasibility of alternatives at two different stages in the CEQA process. When selecting alternatives for analysis in an EIR, the lead agency identifies a range of alternatives that will satisfy the project objectives and reduce impacts. A lead agency may exclude alternatives from an EIR that it concludes are not potentially feasible. 14 Cal. Code Regs. § 15126.6(a); see, Save San Francisco Bay Ass’n v. San Francisco Bay Conserv. & Dev. Comm’n (1992) 10 Cal.App.4th 908, 922 (finding that an EIR need not examine “alternatives that are so speculative, contrary to law, or economically catastrophic as to exceed realm of feasibility”).

Conversely, when approving a project, the agency’s decision-makers weigh the relative advantages and disadvantages of the project and the alternatives. The decision-makers can reject the alternatives in favor of the project, determining that the alternatives are infeasible. Pub. Res. Code § 21081(a)(3); 14 Cal. Code Regs. § 15091; see also, California Native Plant Soc’y v. City of Santa Cruz (2009) 177 Cal.App.4th 957, 981.
We believe that CEQA, the CEQA Guidelines, and related case law are clear on these issues and Guideline revisions are not warranted.

D. Section 15107 (Completion of a Negative Declaration)

The List of Topics proposes to provide that a lead agency may request an extension of time (under the Permit Streamlining Act) to be consistent with Section 15108. We believe that this existing practice is well-established and does not require clarification.

E. Proposed New Appendix (Mitigation Monitoring and Reporting Program)

The List of Topics suggests that OPR is considering adding a new appendix that would provide a sample Mitigation Monitoring and Reporting Program. We believe that the creation of this appendix is unnecessary and invites legal challenges and litigation. Courts have endorsed a wide variety of Mitigation Monitoring and Reporting Programs. See, e.g., Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412, 444; Leonoff v. Monterey County Bd. of Supervisors (1990) 222 Cal.App.3d 1337, 1356; Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal.App.4th 351, 380. Creating a sample program would necessarily limit these options.

Moreover, the Legislature declined to create a new enforcement regime for mitigation measures by rejecting Senate Bill 741. OPR should not attempt to do in the CEQA Guidelines what the Legislature has declined to do, if as seems possible, a policy goal inherent in OPR’s proposal is to add or amend existing statutory mitigation monitoring and implementation requirements or to create a new mitigation enforcement duty intended to support new causes of action by third parties.

F. Proposed New Appendix (Supplemental Review Checklist)

The List of Topics proposes to provide a checklist to guide supplemental review, including guidance on the fair argument standard, in a new appendix. We oppose this amendment because Public Resources Section 21166 already establishes the triggers for supplemental review. See also, 14 Cal. Code Regs. §§ 15162-15164. Furthermore, as discussed above, we believe it is untimely to add or amend CEQA Guidelines provisions relating to CEQA’s applicability to the environment’s impacts on projects, until the California Supreme Court renders its opinion in California Building Industry Association v. Bay Area Air Quality Management District, California Supreme Court Case No. S213478.

Part 4. Topics That Would Expand CEQA, Including Increases to Uncertainty, Cost, and Delay
A. Section 15064 (Determining the Significance of the Environmental Effects Caused by a Project) and Appendix G

There were several subtopics addressed under Section 15064 and Appendix G. As noted in Part 1, above, we support clarifications regarding with environmental standards and comparisons to an adjusted baseline, and we support clarifications relating to SB 743’s prohibition on finding the existence of certain types of significant impacts for a limited class of projects located in infill opportunity areas.

We do not support OPR’s policy proposal to expand CEQA by adding new significant adverse impacts absent express statutory authority or case law. For example, the loss of open space is not a significant impact under CEQA, absent a correlation between the loss of that open space and impacts to an identified Appendix G environmental resource topical area (i.e., agricultural lands, forestry lands, lands with significant biological or cultural resources, recreational resources, etc.). We oppose any expansion of the CEQA Guidelines to include loss of open space as a new impact. Similarly, we oppose adding a question regarding “conversion of open space generally” in Appendix G.

B. Section 15065 (Mandatory Findings of Significance)

The List of Topics proposes adding “roadway widening and the provision of excess parking as examples of projects that may achieve short-term environmental goals (congestion relief) to the disadvantage of long-term environmental goals (reducing greenhouse gas emissions).” We believe that this amendment is unnecessary and would only result in confusion and increased litigation risks.

Both CEQA and the CEQA Guidelines require preparation of an EIR when a proposed project may result in certain impacts. Pub. Res. Code § 21083(b); 14 Cal. Code Regs. §15065(a). If a lead agency finds that the conditions in these sections exist, the proposed project’s impacts are assumed to be “significant” as a matter of law, requiring preparation of an EIR. Section 15065 identifies conditions that trigger an EIR. This proposed amendment implies that an ambiguous “excess” level of parking, or “roadway widening” which may actually be a mandate under applicable General Plan or Congestion Management Plan law, would trigger the preparation of an EIR, which is not currently the case. We do not support any expansion of triggers to prepare an EIR, or the introduction of any new ambiguities or legal contradictions, into CEQA.

C. Section 15125 (Environmental Setting)

OPR’s proposal on this section includes three subparts, two of which we support as described above but one of which we oppose. Specifically, with regard to OPR’s suggestions that the “environmental setting may including a description of the community within which the project is proposed,” we do not believe that the CEQA Guidelines need to be amended to include this language.
The CEQA Guidelines already require that an EIR describe “the physical environmental conditions in the vicinity of the project” viewed from “a local and regional perspective.” 14 Cal. Code Regs. § 15125(a), (c). Additionally, the description must include details regarding specific characteristics of the setting where it is necessary to determine the significance of an impact. See, e.g., Cadiz Land Co. v. Rail Cycle (2000) 83 Cal.App.4th 74, 94 (rejecting the description of a landfill project that did not quantify the volume of water in the aquifer below the site); Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist. (1997) 60 Cal.App.4th 1109, 1122 (rejecting a description that included only a general reference to adjacent vineyards that could be affected by the project). Appendix G queries whether the project would “[e]xpose sensitive receptors to substantial pollutant concentrations?” (CEQA Guidelines Appendix G, § III(d)) or “[e]mit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?” (CEQA Guidelines Appendix G, § VIII(c)). Thus, under existing CEQA Guidelines and case law, the setting discussion is already required to identify sensitive receptors and other facts about the project vicinity that could be affected by the proposed project.

Furthermore, the term “community” is ambiguous (at best). Without a stable definition for this term, projects will be subjected to time-consuming and costly litigation to resolve the level of detail required to fulfill this requirement. To the extent this term is a surrogate for environmental justice, the Legislature has consistently declined to expand CEQA to address environmental justice or economic impacts more broadly.

D. Section 15126.4 (Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects)

The List of Topics also indicates that OPR will provide “additional guidance on mitigation of energy impacts,” a topic already addressed in Appendix F (Energy Conservation) of the CEQA Guidelines and a topic subject to comprehensive federal and state regulatory oversight. Absent further clarification, we do not believe further guidance on this subject is needed.

E. Section 15155 (City or County Consultation with Water Agencies)

OPR proposes to provide “further guidance on the adequacy of water supply analysis” including “account[ing] for increasing variability in water supply.” We believe it is not a good use of OPR’s resources to attempt to clarify and unravel this complicated area of law.

There is already a robust statutory scheme addressing water supply issues, including Senate Bill 610 (Water Code §§ 10910-10915) and Senate Bill 221 (Gov. Code § 66473.7). These provisions require preparation of water supply assessment and water supply verifications. There is also a vast body of case law, including a lengthy California Supreme Court opinion, which defines the parameters for the required analysis of water supply under CEQA. See, e.g., Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova (2007) 40 Cal.4th 412; Western Placer Citizens for an Agric. & Rural Env’t v. County of Placer (2006) 144

Finally, water is a highly valuable resource with region-specific challenges in California. Indeed, Governor Brown proclaimed a state of emergency on January 17, 2014 due to a water shortage and drought conditions. As such, there are many specialized agencies, such as the State Water Resources Control Board, Department of Water Resources, and local water districts, have jurisdiction over water issues and expertise in complex water-related issues. These agencies deal with issues such as droughts. OPR should continue to defer to the expertise of these agencies.

F. VMT Proposal/Proposed New Appendix (Transportation Analysis)

OPR’s proposal to amend the CEQA Guidelines to consider vehicle miles traveled (VMT) as a replacement for the level of service (LOS) metric for evaluating transportation impacts in response to Senate Bill 743 (Steinberg) is premature, and will increase compliance uncertainty, costs and delay. As noted by many transportation experts, OPR’s proposal overstates the cost and complexity of LOS thresholds while severely understating the challenges of developing and implementing a new VMT threshold. We urge OPR to engage in a series of workshops with a range of stakeholders regarding the many practical and legal problems associated with implementing this concept, and to develop clear and cost-effective solutions to these programs prior to proposing any VMT-related changes to the CEQA Guidelines. Just a few of the most daunting and costly problems associated with using VMT in lieu of LOS follow:

- SB 743 expressly preserved CEQA’s requirement to study air quality impacts associated with traffic. Traffic delay, and LOS levels, are required to evaluate carbon monoxide emissions and other pollutant levels. Pollution loads are higher on congested streets with cars waiting for multiple light cycles. In its present form, CEQA requires an evaluation of LOS for air quality impacts, hence requiring VMT as a transportation metric expands rather than streamlines CEQA.

- CEQA practice already requires an analysis of greenhouse gases, which for vehicular-related emissions requires an assessment of a project’s VMT. The VMT modeling tools that are readily available (e.g., CalEEMod) were not intended, and do not, address transportation impacts. While VMT models have been developed, these remain proprietary, costly, and under the control of just a handful of private companies. OPR should not promote, let alone require, use of a new CEQA methodology that is not readily available for public use at no or nominal costs. OPR should first assure that accurate and no- or low-cost VMT models are fully available, and conduct further workshops regarding the value and challenges of such models to stakeholders, before proposing to expand CEQA.
• LOS is well-established, and is currently used in major bodies of land use law independent of CEQA. For instance, pursuant to Congestion Management Program (CMP) law (Gov. Code §§ 65088-65089.10), LOS is a threshold that defines a deficiency on the congestion management program highway and roadway system which requires the preparation of a deficiency plan. Gov. Code § 65088.1(g); see also, Gov. Code § 65089(b)(1)(A) (requiring traffic level of service standards established for a system of highways and roadways designated by the agency as a required element of a congestion management program). Likewise, California General Plan law (Gov. Code §§ 65300-65404) requires a circulation element. Gov. Code § 65302(b)(1). OPR’s General Plan Guidelines includes discussion of LOS and even includes “[LOS] standards for transportation routes, intersections, and transit” and “[s]eparate level-of-service standards for bicycle and pedestrian traffic or integrated level-of-service standards that consider multiple modes” as ideas for development policies. See, e.g., State of California General Plan Guidelines (2003) at p. 60. While SB 743 precludes application of CMP traffic delay standards to certain kinds of projects in certain limited locations, CMP laws - and General Plans - remain legally binding throughout California. Since these other laws independently require compliance with LOS standards, and CEQA itself requires an assessment of compliance with General Plan and CMP standards, OPR’s VMT proposal simply adds a costly and uncertain new layer of transportation analytical mandates to these LOS mandates. If OPR’s goal is really to substitute VMT for LOS, rather than simply expand CEQA and add to CEQA’s compliance costs and litigation risks, then OPR should first complete ongoing efforts to update its General Plan Guidance.

• Cities and counties also use LOS in their traffic impact studies to satisfy the Mitigation Fee Act (Gov. Code §§ 66000-66011) and to create the constitutionally-required nexus they need to charge traffic impact fees. As a leading practice guide notes:

“A sufficient traffic fee study, for example, will anticipate development that is designated in the city’s general plan, and estimate future traffic based upon that level of development. A strong study also will use established trip generation rates, or explain the rationale for deviating from those rates. A typical study then will project needed facilities based upon acceptable traffic levels and public transportation criteria set forth in the general plan, estimate the cost and schedule for building those facilities, and then allocate the cost of constructing those facilities to new and existing development on a proportional basis.”

Barclay and Gray, Curtin’s California Land Use & Planning Law (Solano Press Books 2013) at pp. 330-331. Thus, the importance of a well-established, reliable traffic metric is important for cities as well to fund their circulation elements.
Caltrans, as well as local lead agencies, have long required LOS-based traffic studies to develop mitigation fee programs, and to develop project-level traffic mitigation fee mandates (e.g., “fair share” contributions toward larger roadway improvement projects). Virtually none of these agencies is ready to abandon their LOS-based transportation fee programs. As with the problems noted above for CMP and General Plan law compliance, attempting to substitute VMT for LOS in CEQA is premature given these LOS-based transportation mitigation programs.

- Another deficiency in OPR’s VMT Proposal is the absence of VMT significance thresholds adopted by the Legislature. The absence of such a threshold for greenhouse gas emissions, discussed above, prompted scores of costly greenhouse gas studies and lawsuit claims which, many years (and one extremely deep recession) later has yielded three appellate court decisions upholding a BAU approach that OPR’s proposal now attempts to reject. It would not be wise to launch yet another “jump ball” into CEQA by requiring a VMT analysis without confronting the core legal question of what level of VMT is “significant,” and what types of “feasible” mitigation measures would be acceptable to appropriately mitigate such impacts. SB 375 created dramatic new land use planning and transportation mandates, and SB 375 Sustainable Communities Strategies have now been enacted in all but one of California’s major regions. The SCS identifies land use and transportation improvements required to achieve SB 375 greenhouse gas reduction compliance targets for 2020 and 2035, and CARB has agreed that each plan submitted to date meets these targets. Well-known opponents of economic development continue to argue that these approved plans do not go far enough, and only transit and multi-family infill housing should be allowed to be constructed. These same opponents have been the champions of adding VMT to CEQA, to create a new legal “hook” to challenge even those projects and plans that comply with an approved SCS. OPR’s VMT proposal seems to embrace this philosophy, but the CEQA Guidelines implement - and do not undermine - policies set by statute. SB 375 is the state’s policy on addressing greenhouse gas from the land use and transportation sector, and CEQA should not be expanded to undermine the hundreds of millions of dollars spent on developing SCS plans, or the billions of dollars in federal transportation (inclusive of transit) funding at issue for these regional transportation plans.

While we believe that a swift transition to VMT is inappropriate, we do believe that OPR can take clear steps in the CEQA Guidelines to allow lead agencies to consider moving away from an LOS-based transportation planning, impact and mitigation framework. For example:

- OPR can encourage Caltrans, and local lead agencies, to consider VMT goals as part of their transportation planning process, and can update the General Plan Guidelines to expressly authorize local agencies to adopt LOS alternatives in their circulation elements. Some cities have already done so, and more follow if their authority to do so is made clear.
• OPR can encourage regional planning entities responsible for SCS plans to make their VMT models available for use by the public at a low or nominal cost, so this information can be more readily obtained and help inform planning decisions - without creating new CEQA litigation risks.

• OPR can sponsor workshops to help study alternatives to funding transportation-related improvements in lieu of current LOS-based mitigation fees.

• Lessons learned from these initial, measured steps relating to VMT can then inform a frank discussion about VMT significance levels and mitigation measures, and the possibility of including VMT in the CEQA Guidelines.

Thank you again for the opportunity to comment on these documents. We look forward to discussing these topics with you further.

Sincerely,

Nick Cammarota
General Counsel