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November 21, 2014

By Email and U.S. Mail

Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814
Email: CEQA.Guidelines@ceres.ca.gov

Re: Updating Transportation Impacts Analysis in the CEQA Guidelines

Dear Mr. Calfee:

On behalf of California Unions for Reliable Energy ("CURE"), we respectfully submit these comments on OPR's Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (Steinberg, 2013). In SB 743, the legislature stated that "[n]ew methodologies under [CEQA] are needed for evaluating transportation impacts that are better able to promote the state's goals of reducing greenhouse gas emissions and traffic-related air pollution, promoting the development of a multimodal transportation system, and providing clean, efficient access to destinations."¹ SB 743 requires OPR to develop proposed revisions to the CEQA Guidelines² "establishing criteria for determining the significance of transportation impacts of projects within transit priority areas."³ The new criteria shall "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses."⁴

In February, we recommended that OPR consider the following requirements of SB 743 and the pre-existing requirements of CEQA:

¹ SB 743, Sec. 1(a)(2).

² Title 14 of the California Code of Regulations.

³ SB 743, Pub. Resources Code § 21099(b)(1). OPR may also adopt guidelines to establish alternative criteria for evaluating transportation impacts outside transit priority areas. (SB 743, Pub. Resources Code § 21099(c).

⁴ SB 743, Pub. Resources Code § 21099(b)(1).

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1. Ensure that any new, alternative metric promotes the State's goals and is independently verifiable by the decision makers and the public;
2. Ensure projects mitigate their impacts, rather than rely on state and/or local governments to implement mitigation; and
3. Ensure that new guidelines do not create a presumption of less than significant transportation impacts based on location.

We commented that these recommendations would result in guidelines that more accurately promote the Legislature's goals in SB 743 to reduce greenhouse gas emissions, create multimodal transportation networks and promote a mix of land uses, while meeting the Legislature's goals in CEQA to inform decision makers and the public about project impacts and to avoid or reduce impacts by requiring projects to implement mitigation measures.

OPR's Preliminary Discussion Draft makes good progress towards achieving these goals and consistency with SB 743 and CEQA. OPR proposes a new section 15064.3 of the CEQA Guidelines, which contains several provisions that properly implement SB 743. First, it replaces level of service ("LOS") with vehicle miles traveled ("VMT") as the method for analyzing transportation impacts. By doing so, it captures auto trips generated and trip distance, which are important factors in reducing greenhouse gas emissions. Second, it correctly identifies impacts to transit and safety as relevant factors in an environmental analysis, consistent with SB 743's goal to create multimodal transportation networks and as required by CEQA. OPR also expands Appendix F (Energy Impacts) to provide examples of possible mitigation measures and alternatives to reduce VMT for projects. Finally, OPR proposes changes to Appendix G, which properly conform to the proposed new Section 15064.3.

In continuing this important work, we recommended that OPR consider the following changes to section 15064.3 in order to meet the requirements of SB 743 and the pre-existing requirements of CEQA:

1. Eliminate the presumption that projects in transit areas may result in less than significant impacts;
2. Unbundle assessment of impacts on traffic with assessment of impacts on transit and safety;
3. Ensure that agencies analyze impacts to safety; and

4. Ensure that alternative criteria are independently verifiable and consistent with CEQA.

I. SB 743 DOES NOT AUTHORIZE OPR TO CREATE A PRESUMPTION OF LESS THAN SIGNIFICANT TRANSPORTATION IMPACTS BASED ON LOCATION AND SUBDIVISION (B)(1) OF SECTION 15064.3 IS OVERBROAD

Subdivision (b)(1) of 15064.3 states that “projects that locate within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor generally may be considered to have a less than significant transportation impact.” This presumption is not authorized by SB 743 and is otherwise overbroad.⁵

A. SB 743 Does Not Authorize Subdivision (b)(1)’s Presumption of Less Than Significant Transportation Impacts for Projects in Transit Priority Areas

In SB 743, the Legislature referred to its commitment in SB 375, the Sustainable Communities and Climate Protection Act of 2008, to encouraging land use and transportation planning decisions and investments that reduce vehicle miles traveled and contribute to reductions in greenhouse gas emissions required by the Global Warming Solutions Act of 2006. The Legislature also referred to its passage of the California Complete Streets Act of 2008, which requires local governments to plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads and highways for safe and convenient travel. Thus, in SB 743, the Legislature states that “new methodologies under [CEQA] are needed for evaluating transportation impacts that are better able to promote the state’s goals of reducing greenhouse gas emissions and traffic-related air pollution, promoting the development of a multimodal transportation system, and providing clean, efficient access to destinations.”⁶

The Legislature clearly declared its intent in enacting SB 743 to “(1) [e]nsure that the environmental impacts of traffic, such as noise, air pollution, and safety concerns, continue to be properly addressed and mitigated through [CEQA]” and

⁵ *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338 (the plain language of a statute controls unless it is found to be ambiguous).

⁶ SB 743, Sec. 1(a)(2).

“(2) [m]ore appropriately balance the needs of congestion management with statewide goals related to infill development, promotion of public health through active transportation, and reduction of greenhouse gas emissions.”⁷

SB 743 is a “*modernization* of transportation analysis for transit-oriented infill projects,”⁸ *not an elimination* of transportation analysis. Within “transit priority areas,” OPR shall establish criteria for determining the significance of transportation impacts of projects. “In developing the criteria, the office shall recommend potential metrics to measure transportation impacts that may include “vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated.”⁹ SB 743 states that “[t]he methodology established by these guidelines shall not create a presumption that a project will not result in significant impacts related to air quality, noise, safety, or any other impact associated with transportation.”¹⁰ The adequacy of parking is the *only* factor that shall not support a finding of significance in a transit priority area.¹¹ Outside of transit priority areas, OPR may establish alternative metrics for analyzing transportation impacts that may include retaining LOS.¹²

Therefore, the presumption in subdivision (b)(1) that projects located within certain transit priority areas may be considered to result in less than significant transportation impacts is inconsistent with the Legislature’s directive to modernize, not eliminate transportation analyses.

B. Subdivision (b)(1)’s Presumption of Less Than Significant Transportation Impacts for Projects in Transit Priority Areas is Overbroad Because it Includes Impacts on Transit and Safety

The presumption in subdivision (b)(1) is overbroad because it may apply to any “transportation impact.” Subdivision (a) of section 15064.3 explains that transportation impacts include impacts associated with automobile travel, transit, non-motorized travel and the safety of all travelers:

⁷ SB 743, Sec. 1(b)(1)-(2).

⁸ SB 743, Sec. 5 (**emphasis added**).

⁹ SB 743, Sec. 5, Pub. Resources Code §21099(b)(1).

¹⁰ SB 743, Sec. 5, Pub. Resources Code § 21099(b)(3).

¹¹ *Id.*

¹² SB 743, Sec. 5, Pub. Resources Code § 21099(c).

When analyzing a project's potential environmental impacts *related to transportation*, primary considerations include the amount and distance of automobile travel associated with the project. Other relevant *considerations include the effects of the project on transit and non-motorized travel and the safety of all travelers.*

This language is consistent with the Legislature's intent in enacting CEQA that government agencies are required to assess a project's impacts on safety:

"The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached."¹³

CEQA requires a significance finding if "a project will cause substantial adverse effects on human beings, either directly or indirectly".¹⁴ SB 743 "requires the new guidelines to promote 'multimodal transportation' and *to provide for analysis of safety impacts.*"¹⁵ Accordingly, subsection (a) of section 15064.3 properly identifies impacts to transit and the safety of other roadway users as relevant factors in an analysis of "impacts related to transportation."

OPR correctly explains that "impacts to human safety are clearly impacts under CEQA."¹⁶ OPR also correctly recognizes that SB 743 "requires the new guidelines to promote 'multimodal transportation' and to provide for analysis of safety impacts."¹⁷ Thus, section 15064.3(a) properly identifies impacts to transit and the safety of other roadway users as relevant factors in an analysis of "impacts related to transportation."

¹³ Pub. Resources Code § 21000(d).

¹⁴ Pub. Resources Code § 21083(b)(3).

¹⁵ *Id.*

¹⁶ Updating Transportation Impacts Analysis in the CEQA Guidelines, *Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (Steinberg, 2013)*, Governor's Office of Planning and Research 8/6/2014, p. 7 citing Pub. Resources Code § 21083(b)(3) (a significance finding is required if "a project will cause substantial adverse effects on human beings, either directly or indirectly").

¹⁷ *Id.*

However, subdivision (b)(1) improperly presumes that development projects in transit priority areas may be considered to have a less than significant “transportation impact,” generally. While this presumption may be applicable in a transit priority area when considering a project’s VMT, it would not be applicable for “the effects of the project on transit and non-motorized travel and the safety of all travelers,” which are also transportation impacts requiring analysis in subdivision (a) and as required by CEQA and SB 743. Indeed, the very nature of projects in transit priority areas is to rely on, and thus impact, transit and non-motorized travel. Lead agencies must consider impacts on different modes of transportation and substantially unsafe conditions for various roadway, non-roadway and transit users.

If OPR continues to provide a presumption for projects near existing major transit stops or high quality transit corridors, then the presumption should be with respect to VMT only.

II. OPR SHOULD REVISE THE GUIDELINE TO ENSURE THAT AGENCIES ANALYZE AND REQUIRE MITIGATION FOR IMPACTS TO PUBLIC SAFETY

The preliminary draft guideline must be revised to ensure that project impacts to safety will be analyzed and mitigated. Subdivision (a) of section 15064.3 states:

When analyzing a project’s potential environmental impacts related to transportation, primary considerations include the amount and distance of automobile travel associated with the project. Other relevant considerations include the effects of the project on transit and non-motorized travel and the safety of all travelers.

However, subdivision (b)(3) states that a lead agency “may” consider “localized effects of project-related transportation on safety.” This discretionary language fails to ensure that agencies will analyze and mitigate project impacts on safety, as required by CEQA and SB 743 (and explained above).

Lead agencies must also identify mitigation measures to ensure that impacts on transit and the safety of all travelers is avoided or reduced. In enacting CEQA, the Legislature declared that it is “the policy of the state that public agencies should

not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”¹⁸ An environmental impact report must include “a detailed statement setting forth . . . mitigation measures proposed to minimize [the project’s] significant effects on the environment.”¹⁹ CEQA requires lead agencies to incorporate all feasible mitigation measures into a project to reduce the project’s potentially significant impacts to a level of insignificance.²⁰ Finally, CEQA requires the lead agency to find “that the mitigation measures are required in or incorporated into the project; or that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency.”²¹ Nothing in SB 743 changed these requirements.

The thrust of CEQA is that projects mitigate their impacts. “The reporting or monitoring program shall be designed to ensure compliance *during project implementation*.”²² Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”²³ The lead agency may not defer the formulation of mitigation measures until a future time, unless the lead agency also specifies the specific performance standards capable of mitigating the project’s impacts to a less than significant level.²⁴ Furthermore, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.²⁵ Mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.²⁶ “*The purpose of these requirements is to ensure that feasible mitigation measures will actually be*

¹⁸ See Pub. Resources Code, § 21002.

¹⁹ See Pub. Resources Code, § 21100(b)(3); see also CEQA Guidelines, § 15126(e).

²⁰ See Pub. Resources Code, § 21081(a)(1)-(3); CEQA Guidelines, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

²¹ See Pub. Resources Code, § 21081; see *Trisha Lee Lotus v. Caltrans* (January 30, 2014) (1st District) (Humboldt County Super. Ct. No. CV110002) (slip opin. at 18); *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260, internal quotations omitted.

²² Pub. Resources Code § 21081.6(a)(1).

²³ Pub. Resources Code, § 21081.6(b); CEQA Guidelines, § 15126.4(a)(2).

²⁴ See CEQA Guidelines, § 15126.4(a)(1)(B); see also *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 793-94; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.

²⁵ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).

²⁶ *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79.

*implemented as a condition of development, and not merely adopted and then neglected or disregarded.*²⁷ Again, nothing in SB 743 changed these requirements.

In SB 743, the legislature stated that “[n]ew methodologies under [CEQA] are needed for evaluating transportation impacts that are better able to promote the state’s goals of reducing greenhouse gas emissions and traffic-related air pollution, promoting the development of a multimodal transportation system, and providing clean, efficient access to destinations.”

In evaluating the appropriate criteria, it is vital that OPR not shift the burden of mitigating impacts from developers to State and local government. The Legislature did not shift that burden in SB 743. SB 743 requires that the new criteria “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses,” but does not eliminate the requirement that projects implement mitigation. While the state’s planning priorities are intended to, among other things, strengthen the economy,²⁸ this cannot be at the expense of the public and the environment. CEQA’s goals and requirements have not changed. Instead, the Legislature added goals consistent with the State’s priorities and found that new methodologies for evaluating transportation impacts are needed to promote those goals. State and local agencies must still analyze impacts and identify adequate mitigation, except now the mitigation is directed at achieving the goals of SB 743.

As the Preliminary Evaluation notes, our State and local governments have limited fiscal resources. In evaluating alternative criteria, we agree that OPR should seek criteria that will lead to efficient use of limited fiscal resources. This means that OPR must not shift the burden of mitigating impacts from developers to State and local government. Instead, OPR must ensure that projects continue to mitigate their impacts, as required by CEQA.

²⁷ See *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1258, citing Pub. Resources Code, § 21002.1(b) (emphasis in original).

²⁸ Gov. Code, § 65041.1.

III. OPR MUST ENSURE THAT AGENCIES CONTINUE TO EVALUATE IMPACTS BEYOND THEIR JURISDICTION

CEQA requires lead agencies to evaluate a project's direct and indirect impacts, even if those impacts occur beyond the jurisdiction of the lead agency.²⁹ CEQA defines the environmental setting as the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, from both a local and regional perspective.³⁰ CEQA is clear that “[k]nowledge of the regional setting is critical to the assessment of environmental impacts.”³¹ Evaluating a project's impacts without regard to political boundaries is necessary to “permit the significant effects of the Project to be considered in the full environmental context.”³²

Subdivision (b)(4) of section 15064.3 states that “a lead agency generally should not confine its evaluation to its own political boundary.” Although the use of the word “generally” is inconsistent with CEQA, we agree that a lead agency should not confine its evaluation to its own jurisdictional boundaries. Therefore, the word “generally” should be removed to ensure that the new guideline is consistent with CEQA.

IV. OPR MUST ENSURE THAT ALTERNATIVE CRITERIA ARE INDEPENDENTLY VERIFIABLE BY DECISION MAKERS AND THE PUBLIC

CEQA requires an environmental review document to be “organized and written in a manner that will be meaningful and useful to decision makers and to the public.”³³ For this reason, the CEQA Guidelines instruct that environmental impact reports follow a “clear format” and be written in “plain language.”³⁴ Information on which an environmental review document relies must constitute

²⁹ Pub. Resources Code §§ 21065, 21065.3, 21083(b)(3); CEQA Guidelines §15064(d), 15065(a)(4).

³⁰ CEQA Guidelines §15125(a) (emphasis added); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1453 (“*Riverwatch*”).

³¹ CEQA Guidelines § 15125(d).

³² *Id.*

³³ Pub. Resources Code, § 21003(b).

³⁴ See CEQA Guidelines, §§ 15006(q)-(r) and 15140.

substantial evidence.³⁵ “Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”³⁶ “[U]nsupported opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence.”³⁷ Likewise, evidence that is speculative, imprecise, or “without any supporting, verifiable data,” is not substantial evidence.³⁸ CEQA also requires that this substantial evidence be available for review and readable accessible during the entire comment period.³⁹

Subdivision (b)(1) should be clarified to ensure that the threshold of significance for evaluating the significance of transportation impacts will be independently verifiable. Subdivision (b)(1) states that a project which results in VMT greater than the “regional average” for the land use type may indicate a significant impact. It also states that “regional average should be measured per capita, per employee, per trip, per person-trip or other appropriate measure.” This definition of the threshold of significance leaves substantial discretion for a lead agency to decide the regional average.

Subdivision (b)(4) properly explains that assumptions used to estimate transportation impacts, namely VMT, must be independently verifiable. Subdivision (b)(4) states,

[a] lead agency may use models to estimate a project’s [VMT], and may revise those estimates to reflect professional judgment based on substantial evidence. Any assumptions used to estimate [VMT] and any revisions to model outputs should be documented and explained in the environmental document prepared for the project.

We agree that an agency’s models must be based on substantial evidence, which is required to be readily available to the public during the entire comment period on an environmental review document.⁴⁰ OPR should similarly revise (b)(1) to ensure

³⁵ Pub. Resources Code, § 21080; see CEQA Guidelines, §15063(a)(3) (“An initial study may rely upon expert opinion supported by facts, technical studies or other substantial evidence to document its findings.”).

³⁶ Pub. Resources Code, § 21082.2(c).

³⁷ Pub. Resources Code, § 21082.2(c).

³⁸ See *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130.

³⁹ Pub. Resources Code § 21092(b)(1); CEQA Guidelines §§ 15072(g)(4) and 15087(c)(5).

⁴⁰ Pub. Resources Code § 21092(b)(1); CEQA Guidelines §§ 15072(g)(4) and 15087(c)(5).

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that a lead agency's measurement of the regional average as the threshold of significance is independently verifiable, as required by CEQA.

V. SUMMARY OF RECOMMENDATION

We recommend that OPR eliminate the presumption that projects in certain transit areas may result in less than significant impacts, unbundle assessment of impacts on traffic with assessment of impacts on transit and safety, ensure that agencies analyze impacts to safety, ensure that agencies continue to analyze impacts beyond their jurisdiction and ensure that any assumptions made in measuring thresholds of significance and VMT are independently verifiable.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tanya A. Gulesserian".

Tanya A. Gulesserian

TAG:clv