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By Email and U.S. Mail

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Re: Level of Service ("LOS") Alternatives: Comments on Preliminary Evaluation of Alternative Methods of Transportation Analysis

Dear Mr. Calfee:

On behalf of California Unions for Reliable Energy ("CURE"), we respectfully submit these comments on OPR's Preliminary Evaluation of Alternative Methods of Transportation Analysis. The Preliminary Evaluation seeks early public input on new criteria for determining the significance of transportation impacts, as mandated by Senate Bill 743. The alternative criteria include vehicle miles traveled, automobile trips generated, multi-modal level of service, fuel use, and motor vehicles traveled. We appreciate the hard work that staff has put into developing the Preliminary Evaluation. In continuing this work and considering the input from all stakeholders, we recommend that OPR consider the following requirements of SB 743 and the pre-existing requirements of the California Environmental Quality Act ("CEQA"):

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.

1644-036cv

By doing so, OPR's guidelines will 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.

I. OPR Must Ensure that Alternative Criteria Promote the State's Goals and Are Independently Verifiable by Decision Makers and the Public

The Preliminary Evaluation properly discusses whether the alternative criteria are able to promote the State's goals, as required by SB 743. However, the Preliminary Evaluation also focuses on whether the alternative criteria are "easier" or "more difficult" to calculate, rather than on a statutorily-relevant factor, such as whether the criteria rely on independently verifiable data and assumptions. Instead, we recommend that OPR also focus on whether the alternative criteria are independently verifiable by decision makers and the public, as required by CEQA.

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."¹ For this reason, the CEQA Guidelines instruct that environmental impact reports follow a "clear format" and be written in "plain language."² Information on which an environmental review document relies must constitute substantial evidence.³ "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."⁴ "[U]nsupported opinion or narrative [and] evidence which is clearly inaccurate or erroneous . . . is not substantial evidence."⁵ Likewise, evidence that is speculative, imprecise, or "without any supporting, verifiable data," is not substantial evidence.⁶

¹ Pub. Resources Code, § 21003(b).

² See CEQA Guidelines, §§ 15006(q)-(r) and 15140.

³ 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.").

⁴ Pub. Resources Code, § 21082.2(c).

⁵ Pub. Resources Code, § 21082.2(c).

⁶ See *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130. 1644-036cv

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.”⁷ SB 743 requires OPR to develop proposed revisions to the CEQA Guidelines⁸ “establishing criteria for determining the significance of transportation impacts of projects within transit priority areas.”⁹ The new criteria shall “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.”¹⁰

The Legislature suggested several possible alternative measures of potential transportation impacts, including, but not limited to: “vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated.”¹¹ SB 743 states that upon certification of the new guidelines, “automobile delay, as described solely by [LOS] or similar measures of vehicle capacity or traffic congestions shall not be considered a significant impact..., except in locations specifically identified in the guidelines, if any.”¹²

The Preliminary Evaluation provides four reasons why LOS is difficult and expensive to calculate and refers to these reasons throughout its analysis of the alternative criteria. These reasons include (1) the number of vehicle trips associated with a project must be estimated, (2) an analysis requires assumptions about the path those vehicles may take, (3) traffic levels must be estimated at points along the network, and (4) microsimulation models must be used to determine traffic outcomes of volume projections. However, many of these reasons also apply to the alternative criteria. An estimate of the number of vehicle trips associated with a project is required for every alternative criteria outlined in the Preliminary Evaluation. Using “vehicle miles traveled” also requires assumptions, namely about trip length. Using “automobile trips generated” requires nothing else, but is overly simplistic, omits regional location and would not “provid[e] clean,

⁷ SB 743, Sec. 1(a)(2).

⁸ Title 14 of the California Code of Regulations.

⁹ 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).

¹⁰ SB 743, Pub. Resources Code § 21099(b)(1).

¹¹ SB 743, Pub. Resources Code § 21099(b)(1).

¹² *Id.* at §21099(b)(2).

efficient access to destinations.”¹³ “Multi-modal LOS” continues to consider LOS and also includes ratings for transit, walking and bikes, but, like automobile trips generated, omits regional location. “Fuel use” criteria would require new modeling techniques and assumptions about the area affected by project traffic. “Motor vehicle hours traveled” requires even more sophisticated modeling and the data may not be available to support the analysis, requiring even more assumptions to be made. Thus, OPR’s reasons that LOS is difficult and expensive to calculate arise to varying degrees in every alternative criteria evaluated in the Preliminary Evaluation.

OPR should, instead, focus on whether the alternative criteria are independently verifiable by decision makers and the public, as required by CEQA. In SB 743, the Legislature did not determine that the State should move away from solely using LOS due to the fact that LOS is difficult and expensive to calculate. Instead, the Legislature determined that the State should move away from LOS due to its focus on congestion impacts and capacity mitigation, rather than on transportation impacts and mitigation to achieve multimodal transportation, mixed land uses and reduction of greenhouse gas emissions. Therefore, in evaluating the new criteria, OPR should focus on the goals, i.e. what criteria would result in a link between the impact and either greenhouse gas emissions, multimodal transportation or a diversity of land uses, thereby justifying the imposition of mitigation measures addressing these issues. OPR should also focus on ensuring that the link is independently verifiable by the decision makers and the public, as required by CEQA.

II. OPR Must Ensure That Projects Continue To Mitigate Their Impacts

OPR’s statement in the Preliminary Evaluation that using a “multi-modal level of service” approach would “assign the burden” of mitigation to development and, thus, have the potential to raise infill costs and thereby reduce infill development fails to address both the goals of SB 743 and the existing goals and requirements of CEQA. Instead, OPR must ensure that projects continue to mitigate their impacts, rather than rely on state and/or local governments to implement mitigation.

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

¹³ SB 743.

alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.”¹⁴ An environmental impact report must include “a detailed statement setting forth . . . mitigation measures proposed to minimize [the project’s] significant effects on the environment.”¹⁵ 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.¹⁶ 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.”¹⁷ 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*.”¹⁸ Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments.”¹⁹ 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.²⁰ Furthermore, a public agency may not rely on mitigation measures of uncertain efficacy or feasibility.²¹ Mitigation measures that are vague or so undefined that it is impossible to evaluate their effectiveness are legally inadequate.²² “*The purpose of these requirements is to ensure that feasible mitigation measures will actually be*

¹⁴ See Pub. Resources Code, § 21002.

¹⁵ See Pub. Resources Code, § 21100(b)(3); see also CEQA Guidelines, § 15126(e).

¹⁶ See Pub. Resources Code, § 21081(a)(1)-(3); CEQA Guidelines, §§ 15002(a)(3), 15021(a)(2), 15091(a)(1).

¹⁷ 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.

¹⁸ Pub. Resources Code § 21081.6(a)(1).

¹⁹ Pub. Resources Code, § 21081.6(b); CEQA Guidelines, § 15126.4(a)(2).

²⁰ 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.

²¹ *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).

²² *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.*²³ 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.” Further, subdivision (b) of the new Public Resources Code section 21099 requires that the new criteria “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.” SB 743 did not change CEQA’s requirements regarding the adequacy of mitigation measures.

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,²⁴ 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 State law.

²³ 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).

²⁴ Gov. Code, § 65041.1.

III. SB 743 Does Not Authorize OPR to Create a Presumption of Less Than Significant Transportation Impacts Based on Location

OPR suggests that “project location could serve as predetermined ‘transportation beneficial development’ areas” and that “[s]uch areas might be presumed to cause less than significant regional transportation impacts.” This is not authorized by SB 743.²⁵

In SB 743, the Legislature referred to its commitment in 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.”²⁶

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 “(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.”²⁷

SB 743 is a “*modernization* of transportation analysis for transit-oriented infill projects,”²⁸ *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

²⁵ *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).

²⁶ SB 743, Sec. 1(a)(2).

²⁷ SB 743, Sec. 1(b)(1)-(2).

²⁸ SB 743, Sec. 5 (emphasis added).

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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.”²⁹ 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.”³⁰ The adequacy of parking is the only factor that shall not support a finding of significance in a transit priority area.³¹ Outside of transit priority areas, OPR may establish alternative metrics for analyzing transportation impacts that may include the retention of LOS.³² Therefore, contrary to OPR’s suggestion in the Preliminary Evaluation, the Legislature directed OPR to modernize, not eliminate transportation analyses.

IV. Summary of Recommendation

We recommend that OPR ensure that any new, alternative metric promotes the State’s goals and is independently verifiable by the decision makers and the public, and that projects mitigate their impacts, rather than rely on state and/or local governments to implement mitigation, and not create a presumption regarding traffic impacts based on location where none is authorized by law.

Sincerely,



Tanya A. Gulesserian

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²⁹ SB 743, Sec. 5, Pub. Resources Code §21099(b)(1).

³⁰ SB 743, Sec. 5, Pub. Resources Code § 21099(b)(3).

³¹ *Id.*

³² SB 743, Sec. 5, Pub. Resources Code § 21099(c).