



February 13, 2014

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 Governor's Office of Planning and Research
 1400 Tenth Street
 Sacramento, CA 95814

SUBJECT: 2014 CEQA Guidelines Update

Sent Electronically to: CEQA.Guidelines@ceres.ca.gov

Dear Mr. Calfee:

The California Chamber of Commerce and the below-listed organizations thank you for the opportunity to submit comments regarding the Governor's Office of Planning and Research's ("OPR") "Possible Topics to be Addressed in the 2014 Guidelines Update," issued by OPR on December 30, 2013.

On July 1, 2013, OPR and the Natural Resources Agency distributed a Solicitation for Input on possible changes to the CEQA Guidelines. The purpose of distributing a Solicitation for Input was to seek suggestions for improvements to the CEQA Guidelines that achieve the following three goals: (1) make the environmental review process more efficient and meaningful; (2) reflect California's adopted policy priorities, including, among others, addressing climate change, promoting of infill development, and conserving natural and fiscal resources; and (3) reflect statutory changes to CEQA and cases interpreting CEQA.

According to OPR, the "Possible Topics" document "identifies the specific suggestions that appear consistent with [CEQA] and case law, as well as the goals described in the Solicitation for Input." In OPR's its request for comments on the possible topics, OPR requested input on the following three issues: (1) whether OPR's preliminary list of topics is appropriate for the CEQA Guidelines Update; (2) whether there are any additional topics that should be addressed; and (3) whether there is any specific language OPR should consider with respect to any preliminary or suggested topic.

This letter contains comments in response to OPR's request for comments. The purpose of our comments is to ensure that the topics addressed do, in fact, meet the stated goals in the Solicitation for Input. In that context, our comments identify issues that our organizations support, conditionally support,

or oppose. We provide the basis for positions and, where appropriate, we propose specific regulatory language. We do not address issues on which we take no position.

1. Appropriateness OPR's Preliminary List of Topics

Section 15060.5 (Pre-application Consultation)

OPR proposes to “recast this section to address consultation more generally,” “[a]dd provisions to address specific consultation requirements, and include suggestions on tribal consultation,” and “[a]ddress consultation with regional air districts.”

We **oppose** addressing general consultation requirements in the Update. Consultation requirements, from the pre-application stage through completion of the draft environmental document, are addressed thoroughly throughout the CEQA Guidelines. (PRC § 15060.5 [specifying consultation requirements that may occur prior to the filing of a formal application]; PRC § 15063(g) [specifying consultation requirements that must occur as soon as the lead agency has determined that an initial study will be required for the project]; PRC § 15082(c) [specifying consultation requirements that may occur to determine scope and/or contents of the information to be contained in the environmental document]; PRC § 15083 [specifying the consultation requirements that may occur prior to completing the draft EIR] PRC § 15086 [specifying consultation requirements that must occur upon completing the draft EIR].)

Notwithstanding these requirements, OPR has indicated that it may specifically address tribal consultation and consultation with regional air districts as part of its Update process. Although we appreciate and support consultation with Native American tribes and air districts as an important component of the CEQA process, we believe consultation requirements with both groups are adequately addressed in both CEQA and the Government Code.

With respect to tribal consultation, the CEQA Guidelines section 15083 already provide for “early public consultation” with any person or organization it believes will be concerned with the environmental effects of the project. This, of course, includes Native American tribes. Further, section 15083 expressly encourages early consultation with concerned groups, noting that early consultation can solve problems early in the environmental review process that could otherwise arise at a later stage. Section 15083 states, in relevant part:

“Prior to completing the draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. *Many public agencies have found that early consultation solves many potential problems that would arise in more serious forms later in the review process.*”

(CEQA Guidelines § 15083 [emphasis added].)

Tribal consultation, specifically with respect to the protection of cultural sacred places, is also addressed in the Government Code. Specifically, SB 18 (D-Burton), passed in the 2003-2004 legislative session, established meaningful ongoing government to government consultation regarding the protection of cultural sacred places by requiring local city and county governments to consult with Native American tribes about proposed local land use planning decisions, including the adoption or substantial amendment of general plans, specific plans, and the dedication of open space for the purpose of protecting cultural places. With the passage of SB 18 and subsequent legislation, the Government Code now contains consultation requirements for the “preservation of, or the mitigation of impacts to, places, features, and objects” described in in Public Resources Code section 5097.9 [Native American sanctified cemeteries, places of worship, religious or ceremonial sites, or sacred shrines located on public property] and Public Resources Code section 5097.993 [Historic or prehistoric ruins, any burial ground, any archaeological or historic site, any inscriptions made by Native Americans at such a site, any archaeological or historic Native American rock art, or any archaeological or historic feature of a Native American historic, cultural,

or sacred site].) We believe these consultation requirements—both in CEQA and the Government Code—provide adequate tribal consultation requirements with respect to the environmental review and land use process.

We also note that Assembly Bill 52 (D-Gatto), which is currently pending before the Legislature, seeks to establish a separate and distinct tribal consultation process under CEQA. As currently drafted, AB 52 would, among other things, require a lead agency to consult with affected Native American tribes prior to determining whether a negative declaration or an environmental impact report (EIR) is required for a project pursuant to CEQA. Many of our organization have come out in opposition to the consultation requirements in AB 52 in great part because CEQA and the land use process provide adequate tribal consultation requirements.

Addressing tribal consultation in the Update while AB 52 is pending before the Legislature would be problematic for two reasons. First, if OPR addresses tribal consultation in the Update and AB 52 is subsequently signed into law, AB 52 may impose conflicting and/or duplicative consultation requirements, thereby requiring OPR to begin the regulatory process anew with regard to this issue. Second, and more importantly, even if AB 52 is not signed into law, OPR, by addressing tribal consultation in the Update, will have created additional and unnecessary consultation requirements to the plethora of existing consultation requirements discussed above.

Further, while we oppose addressing tribal consultation in both the legislative and regulatory forums for the reasons discussed above, it is relatively clear that OPR has the authority under CEQA to address this issue *without the need for legislation* such as AB 52. (PRC § 21104(a) [“The state lead agency may consult with persons identified by the applicant who the applicant believes will be concerned with the environmental effects of the project and may consult with members of the public who have made a written request to be consulted on the project.”].) Accordingly, if this issue is ultimately addressed in one of the two forums, it must be addressed by way of the regulatory process, not by legislation.

With respect to consultation with regional air districts, the CEQA Guidelines currently provide adequate consultation requirements for both responsible and trustee agencies. To ensure that negative declarations and EIRs will be adequate for the responsible agency, lead agencies must consult with responsible and trustee agencies throughout the CEQA process. For example, the CEQA Guidelines section 15063, subsection (g), expressly states that “the lead agency *shall* consult informally with all responsible agencies and all trustee agencies responsible for the resources affected by the project to obtain the recommendations of those agencies as to whether an EIR or a negative declaration should be prepared.” (emphasis added.) Additional consultation with both responsible and trustee agencies is required once the draft environmental document is prepared and released for public review. (See CEQA Guidelines § 15086.) Accordingly, whether a regional air district serves as a responsible or trustee agency, the Guidelines contain a plethora of mandatory consultation requirements throughout the CEQA process. Addressing this issue in the Update, therefore, is also unnecessary.

Section 15061 (Preliminary Review)

OPR 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, subdivision (b)(3), to be consistent with the terminology used in *Muzzy Ranch*.

Additionally, we believe it is critical to specify that a lead agency’s determination regarding whether a project qualifies for the common sense exemption, as noted by the Supreme Court in *Muzzy Ranch*, “need not be preceded by detailed or extensive factfinding.” (*Id.* at 388.) Ultimately, we would like to see the following language added to section 15061:

A lead agency's determination regarding whether a project qualifies for the common sense exemption need not be preceded by detailed or extensive factfinding.

Section 15063 (Initial Study)

OPR proposes to “[c]larify that initial studies may be prepared by contract to the lead agency, consistent with Section 15084” and to “clarify in subdivision (g) that the lead agency may share and administrative draft of the initial study with the applicant in order to ensure accuracy in the project description and mitigation measures.”

To the extent OPR is seeking to make section 15063 consistent with section 15084, subsection (a) (specifying that *EIRs* may be prepared by contract to the lead agency), we would **support** such a clarification.

We also **support** clarifying that the lead agency may provide a copy of an administrative draft initial study with the applicant in order to ensure accuracy in the project description and mitigation measures. However, we believe that section 15084, subsection (g), should specify that providing an administrative draft initial study to the project applicant is mandatory rather than permissive. Sharing a copy of the administrative draft to the applicant is essential to, among other things, ensure that the document accurately describes the project and proposes to adopt appropriate mitigation measures. Perhaps more importantly, it is critical to address any issues that may exist in the initial study at an earlier stage of the CEQA process so as to minimize potential issues that may arise at a later stage.

Although OPR suggests it may address this issue specifically as it relates to the administrative draft initial study, we believe the regulations should require the sharing of *all* types of administrative draft environmental documents with the project application in one comprehensive guideline.

In this respect, we support adding a new CEQA Guidelines §15156, Cooperation with Applicant, instead of addressing this issue in multiple guidelines:

At the applicant's request, the lead agency shall share drafts of any environmental document, or portions thereof, with the applicant and shall consider information provided by the applicant regarding such drafts. Such drafts include, but are not limited to, drafts of the initial study, proposed Negative Declaration, and draft and final EIR including responses to comments.

Addressing this issue in one guideline would provide more clarity and direction to lead agencies, project applicants, and the public regarding the ability of lead agencies to share draft environmental documents to the project applicant.

We understand that some commenters have requested that OPR specify that drafts shared with the applicant are not considered to have been released for public review for purposes of the record of proceedings. While we agree with this as a policy matter, we **oppose** addressing the issue as part of the Update, particularly if OPR is inclined to opine that the shared documents *are* in fact part of the administrative record. OPR would have no basis for doing so because the California Appellate courts are currently split on whether pre-approval communications between the lead agency and project developers may be protected from disclosure. (*California Oak Foundation v. County of Tehama* (2009) 174 Cal. App. 4th 1217 [pre-approval communications between the lead agency and project developer may be protected from disclosure by the common interest doctrine]; *but see Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 [pre-approval communications between the lead agency and project developer may be protected from disclosure by the common interest doctrine, but only after the environmental document has been approved and is challenged by a project opponent].) It is not within

OPR's authority to reconcile an appellate split by way of the regulatory process. Instead, this issue can only be resolved by the California Supreme Court or by way of the legislative process. For this reason, we request that OPR avoid opining on the issue of whether shared documents are part of the record of proceedings.

Regardless of whether OPR adds a new guideline to encompass all environmental documents or includes a separate provision in section 15063 regarding the ability of the lead agency to share the administrative draft initial study, to the extent OPR intends to clarify that providing drafts to the applicant is *permissive* instead of mandatory, we would request that OPR include language emphasizing that providing the administrative draft initial study and/or other environmental documents to the lead agency during the initial draft stage has important benefits.

Specifically, if OPR adds a new guideline making it permissive for lead agencies to share any draft environmental document with the project application, we would request that OPR add the following language to section 15063, which substantially mirrors the language in section 15083 pertaining to the benefits of early public consultation:

Many public agencies have found that providing a draft of environmental documents with the applicant solves many potential problems that would arise in more serious forms later in the review process.

In the alternative, if OPR includes a separate provision to section 15063 specifying that lead agencies may share administrative draft initial studies with the project applicant, we would request that OPR also include the following language:

Many public agencies have found that providing an administrative draft initial study with the applicant solves many potential problems that would arise in more serious forms later in the review process.

Section 15064 (Determining the Significance of the Environmental Effects Caused by a Project)

OPR proposes to “[add a definition of regulatory standard, and explain when a standard may be used appropriately in determining the significance of an impact under CEQA,” “[a]dd loss of open space as an example of potential cumulative impacts in subdivision (h)(1),” and “[a]dd explanation of baseline in this section, since 15125 technically addresses the contents of an environmental impact report.”

We **support** providing a definition of a regulatory standard and explaining when a standard may be used appropriately in determining the significance of an impact under CEQA. As a practical matter, many lead agencies already rely on compliance with regulatory agency permits and programs for CEQA purposes. Indeed, lead agencies can hardly avoid looking to expert regulatory agencies for approaches to evaluating environmental issues that are subject to regulation. “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.” (*Communities for a Better Environment v. California Resources Agency* (2001) 103 Cal.App.4th 98, 111 (CBE).)

In addition, applying significance thresholds based on clear regulatory standards, developed and found to be effective by regulatory agencies with expertise on the subject matter, can help streamline the environmental review and approval process, providing greater consistency and transparency, avoiding repetitive and unnecessary effort, and reducing costs and delays.

In *CBE*, the court struck down a previous effort to endorse regulatory standards as significance thresholds in the CEQA Guidelines. In that case, however, the court was concerned with a specific problem: the challenged Guidelines language compelled a lead agency to find that compliance with such

standards renders impacts less than significant. In some instances, the court concluded, regulatory compliance might not be enough to ensure insignificant impacts, and commenters should be able to bring evidence of such instances to the lead agency's attention, under the "fair argument" test.

But later cases such as *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 (*Amador*) clarified that CBE does not rule out all reliance on regulatory standards in all cases. Regulatory standards may be used to determine when impacts "will normally be determined to be significant" or "normally will be determined to be less than significant" – so long as the lead agency is not compelled to accept regulatory compliance as sufficient in every case. (*Amador* at 1108 [emphasis added; citing CEQA Guidelines Section 15064.7(a)]; see also *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 [a lead agency cannot apply a regulatory standard "in a way that forecloses the consideration of any other substantial evidence showing that there may be a significant effect."].)

It is also established that regulatory standards relied upon as thresholds may include local standards as well. Indeed, in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, the City of Oakland, in addressing seismic impacts caused by a mixed-use development, adopted mitigation measures which required that the buildings comply with all applicable state and local regulations. The Court agreed that reliance on such regulations was sufficient, stating that "[w]e agree with the City that compliance with the Building Code, and the other regulatory provisions, in conjunction with the detailed Geotechnical Investigation, provided substantial evidence that the mitigation measures would reduce seismic impacts to a less than significant level." (*Id.* at 904; see also *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 623-25 [upholding city's reliance on local level of service (LOS) standards in determining significance of project's traffic impacts].)

Further, standards relied upon by lead agencies need not have been adopted solely for environmental protection. (See *National Parks & Conservation Ass'n* (1999) 71 Cal.App.4th 1341, 1356-57 [rejecting petitioner's argument that thresholds "must be derived from a statute or a public agency's standard adopted for environmental protection purposes."].)

Consistent with the case law discussed above, we suggest the following language be considered for incorporation into a new subsection of CEQA Guidelines Section 15064:

In determining whether a project may have a significant effect, a lead agency may rely on federal, state and local regulatory standards as thresholds of significance. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant. In utilizing a regulatory standard as a threshold of significance, a public agency shall explain how the particular requirements of that standard will ensure that project impacts, including cumulative impacts, will not be significant. For the purposes of this subdivision, a "regulatory standard" is a rule of general application, that is adopted by a public agency through a public review process, and that is all of the following:

- (1) a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, or other standard of general application;**
- (2) one that governs the same environmental effect implicated by the project; and**
- (3) one that governs the project.**

This language is substantively based on amendments to SB 731 that OPR recommended to the Legislature in June 2013. While SB 731 did not pass, incorporating this portion of OPR's

recommendations into the CEQA process would not require legislative action. In providing that impacts “normally will be determined to be less than significant” based on compliance with regulatory standards, the language is fully consistent with case law. (See, e.g., *Amador* at 1108.)

Further, we **oppose** adding loss of open space as an example of potential cumulative impacts in subdivision (h)(1). While the CEQA Guidelines currently treat certain types of open spaces such as agricultural resources and forest resources as potential environmental impacts under CEQA, no case has ever held that loss of open space, in and of itself, constitutes a potential environmental impact under CEQA. For this reason, we are perplexed as to how this suggestion would “appear consistent with [CEQA] and case law” as that phrase is used in OPR’s “Possible Topics.” Adding open space as an example of a potential cumulative impact in the CEQA Guidelines would create an entirely new substantive requirement under CEQA with no basis in case law. For this reason, we oppose adding open space an example of a cumulative impact.

To the extent OPR wishes to add an explanation of “baseline” in section 15064, we **support** such an explanation so long as it is limited to and consistent with the recent Supreme Court decision in *Neighbors for Smart Rail v. Exposition Metro Line Authority* (2013) 57 Cal.4th 439, which held that while an agency has discretion to omit an analysis of the project’s significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value.

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

OPR proposes to “[c]larify that analysis of greenhouse gas (GHG) emissions is required, and the role of the Scoping Plan in determining the significance of greenhouse gas emissions.” OPR also proposes to “[f]urther clarify that ‘business as usual’ (or hypothetical baseline) analysis is not appropriate.”

Addressing each issue in turn, we **oppose** clarifying that GHG analyses are required as part of CEQA. March 2010, the CEQA Guidelines were amended to, among other things, require that lead agencies consider the extent to which proposed projects may increase or reduce GHG emissions. Currently, the CEQA Guidelines provide guidance to lead agencies with respect to determining the significance of impacts from GHG emissions (CEQA Guidelines § 15064.4) and formulating mitigation measures related to GHG emissions (CEQA Guidelines § 15126.4(c).) For this reason alone, there is no need to clarify that analysis of GHG emissions is required as part of CEQA.

With respect to the role of the Scoping Plan, we **oppose** incorporating the AB 32 Scoping Plan into the CEQA process.

We understand that some stakeholders have suggested treating consistency with the Scoping Plan as a significance threshold for GHG impacts, similar to the way that consistency with a General Plan provides a significance threshold for land use impacts in CEQA Guidelines Appendix G, Section X(b). The Scoping Plan is an aspirational document spanning 40 years of air quality planning and containing numerous specific emission reduction measures which do not apply to the greenhouse gas (GHG) impact analysis undertaken in CEQA documents. Such a plan is not suitable to serve as a threshold for identifying the potentially significant impacts of an individual project. Unlike a General Plan or other land use plan, the Scoping Plan does not define a specific set of criteria that may be applied to evaluate project impacts.

More fundamentally, the Scoping Plan anticipates reducing statewide GHG emissions from existing levels over time. By contrast, though CEQA requires projects to avoid or reduce environmental impacts where feasible, existing environmental conditions constitute the setting or baseline in CEQA analysis and not impacts of the project. (PRC § 15125.) As such, improving pre-existing environmental problems may be required by other law (such as AB 32), but it is not required by CEQA. (See, e.g., *In re Bay-Delta*

Programmatic Environmental Impact Report Coordinated Proceedings (2008) 43 Cal. 4th 1143, 1167-68 [“The Court of Appeal erred also in failing to sufficiently distinguish between preexisting environmental problems in the Bay–Delta, on the one hand, and adverse environmental effects of the proposed [project]. . . . [T]hose problems would continue to exist even if there were no [project], and thus under CEQA they are part of the baseline conditions rather than [project]-generated environmental impacts.”.]

The Scoping Plan is also subject to updating by the California Air Resources Board (CARB) every five years with new GHG reduction strategies and recommendations – far more often than General Plans are updated. One such update is in progress and proposes to address continued GHG emissions reductions beyond the 2020 scope of the current Scoping Plan, in light of the 2050 GHG emissions goal established by Executive Order. However, the effect of the Executive Order goal in CEQA analysis is the subject of pending litigation and its incorporation by means of the Guidelines update would be premature at best. (*Cleveland National Forest Foundation v. San Diego Ass’n of Governments*, 4th Appellate Dist., Case No. D063288.)

In sum, the Scoping Plan is too much of an amorphous and moving target to serve as the basis for a significance threshold defined by consistency with the plan, in the manner of a General Plan or other land use plan. For these reasons, OPR should leave the determination of appropriate GHG significance thresholds to the discretion of the lead agency and not modify the Guidelines to establish a role for the AB 32 Scoping Plan.

With respect to the business as usual (BAU) scenario for purposes of GHG emissions, disposing of the BAU scenario would reject the use of an accepted GHG significance threshold that has been endorsed by two precedential appellate courts, widely utilized by lead agencies, and formally adopted by at least one air district.¹

Consistent with the Guidelines’ general deference to lead agencies, lead agencies are afforded considerable discretion in determining the appropriate method to evaluate a project’s estimated GHG emissions. One method is to evaluate a project’s estimated GHG emissions is under what is referred to as the BAU scenario. Under the BAU scenario, a lead agency compares a project’s reductions to GHG emission reductions required by AB 32 (the California Global Warming Solutions Act of 2006). Specifically, AB 32 requires California to reduce its GHG emission to 1990 levels by 2020, and CARB’s Scoping Plan, in turn, estimates that GHG emissions in the state must to be reduced by approximately 29 percent (as compared to BAU) in order to meet this GHG emissions reduction requirement. Under the BAU method for evaluating a project’s GHG emissions impacts, if a project meets or exceeds a 29 percent reduction in GHG emissions, therefore, the impacts from such emissions will be less than significant for CEQA purposes.

California appellate courts, in published decisions, have twice upheld the use of the BAU scenario since the Guidelines were amended in 2010. In *Citizens for Responsible Equitable Environmental Development (CREED) v. City of Chula Vista* (2011) 197 Cal.App.4th 327, reliance on the BAU significance threshold was specifically upheld as a proper exercise of agency discretion. In evaluating a remodel and expansion of an operating retail store that would demolish a 1970s-era building and build a modern, energy-efficient building, the City of Chula Vista used AB 32’s reduction goals to determine whether the project would reduce “business as usual” emissions – emissions assuming no reduction from measures required by AB 32 – by the percentage required to be consistent with AB 32’s statewide emission goals. *CREED* had argued various other thresholds were more stringent and therefore should have been the relevant threshold. The court, citing to CEQA Guidelines section 15064.4, upheld the City’s decision to use an AB 32 percentage reduction based on the “business as usual” methodology and found that *CREED*’s arguments regarding potential alternative thresholds were unavailing.

¹ San Joaquin Valley Air Pollution Control District, “District Policy Addressing GHG Emission Impacts for Stationary Source Projects Under CEQA When Serving as Lead Agency” (2009), pp.7-8.

Three subsequent cases concurred with the approach in *CREED*. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 841-42; *Friends of Northern San Jacinto Valley v. County of Riverside*, Riverside County Sup. Ct., Case No. RIC10007572 (2012); and *Center for Biological Diversity v. City of Fullerton*, Orange County Sup. Ct., Case No. 30-2011-00499466-CU-WM-CXC (2012).)

Though *Friends of Oroville* and *Friends of Northern San Jacinto* criticized the *analysis* of the BAU-based threshold in their respective cases, both courts stated that the lead agencies should have followed the same analysis utilized in *CREED*. In particular, in *Friends of Northern San Jacinto*, the trial court rejected the comparison to a “hypothetical” worst-case BAU scenario that was highly unrealistic (disregarding local zoning restrictions, assuming the project site was stripped of vegetation and fully developed even in steeply sloping areas) – but distinguished that unrealistic hypothetical BAU scenario from the reasonable BAU analysis in *CREED*.

More recently, in *Friends of Oroville*, an EIR for a Wal-Mart replacement project used the BAU scenario for GHG as the threshold of significance, an approach favorably reviewed in *CREED*. Although the court found that the City of Oroville operated from an appropriate legal foundation with regard to its adopted threshold, the court found that the *analysis* was faulty. Specifically, the lead agency focused on the relative percentage of project emissions against the statewide numbers for 2004, determining that the project would contribute a mere .003% of California’s 2004 emissions. Such a calculation, as noted by the court, would always pale when compared to the “world’s eighth largest economy.”

The appellate court stated that the correct analysis, as reflected in *CREED*, would have involved an evaluation of the project as compared to a business-as-usual reference point. According to the court, *CREED* “exemplifies the model, showing us a proper way to apply the Assembly Bill 32 threshold-of-significance standard.” (*Id.* at 841.) The second error involved the failure to analyze GHG generation from the existing Wal-Mart and failure to include a quantitative or qualitative analysis of air mitigation measures 8a through 8e, a step called for in Guidelines section 15064.4. The flaws in the evidence in support of the conclusion that the impacts would be less than significant was also compounded by the fact that a majority of the project generated impacts came from transportation sources, and those were subject to state implementation. In the absence of evaluation (quantitative or qualitative), the court concluded that the less-than-significant impact was not adequately supported by substantial evidence.

Thus, these courts did not find that a BAU-based significance threshold is fundamentally flawed for reliance on an inappropriate “hypothetical baseline” as OPR suggests. Rather, like other methodologies used in CEQA analysis, the BAU scenario must be realistic and supported by substantial evidence.

One trial court has found that the BAU methodology improperly relied on a hypothetical baseline. (*Center for Biological Diversity v. Dept. of Fish and Wildlife*, Los Angeles Sup. Ct., Case No. BS131347 (2012) (*CBD*). However, that case is currently pending appeal. Prior to the court of appeal’s decision (which may well be appealed in turn), it is premature to revise the CEQA Guidelines to take the position that the trial court in *CBD* was correct and the precedential appellate cases *CREED* and *Friends of Oroville* were wrong.

At a more basic level, the reasoning in *CBD* is flawed by conflating two very different CEQA concepts, the baseline and the significance threshold. Relying on cases that rejected use of purely hypothetical conditions (such as planned or permitted facility capacity, never actually achieved) as the baseline, the court interpreted the BAU scenario as a form of “hypothetical baseline.” But the BAU scenario is not a baseline. The baseline remains actual, existing GHG emissions prior to the project. As with any other type of impact, project emissions are compared to the existing emissions baseline.

If the difference between baseline and project emissions exceeds the significance threshold, the impact is significant. The BAU emissions scenario is simply an intermediate step in determining the significance threshold (29% below BAU). As such, it is incorrect to equate the BAU-based significance threshold with an improper hypothetical baseline. The BAU methodology considers whether the difference between

baseline and project emissions exceeds the significance threshold of 29% below BAU, not whether the difference exceeds 29% below the baseline. This objection is akin to complaining that it is “hypothetical” to estimate emissions from reasonably foreseeable future projects, as an intermediate step in cumulative impact analysis. Many aspects of CEQA review involve future estimates and projections which inevitably are “hypothetical” to some extent, since they do not yet exist. Only the existing conditions baseline must not be “hypothetical.”²

With the above comments in mind, should OPR address this issue, any additional guidance should keep the BAU scenario intact consistent with case law and should instead be limited to proper GHG analyses, so as to avoid the type of faulty analysis in *City of Oroville*, and to encourage the type of adequate analysis in *CREED*.

Section 16065 (Mandatory Findings of Significance)

OPR proposes to “[a]dd 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 **oppose** including roadway widening and excess parking as examples of conditions requiring the preparation of an EIR. Although we understand and acknowledge that such conditions may, in certain circumstances, achieve short-term environmental goals (congestion relief) to the disadvantage of long-term environmental goals (reducing GHG emissions), we believe that lead agencies should maintain the discretion—consistent with CEQA’s status as a home-rule statute—to make such determinations.

Further, and perhaps more significantly, requiring an EIR for a project involving roadway widening or excess parking is based on the flawed presumption that roadway widening or excess parking will *always* result in increased long-term GHG emissions. Put another way, adding this provision would imply that it is OPR’s position that any project requiring the widening of even one road would necessarily lead to increased long-term GHG emission and, in turn, would require preparation of an EIR. This position, if it is indeed the one OPR adopts, is unsupportable. For example, providing “excess” parking within walking distance of a transit station can provide commuters with greater certainty that, if and when they drive to the station in the morning peak commute hour, they will be able to find parking. This, in turn, would attract more transit riders, achieving long-term environmental benefits of congestion relief and vehicle emission reductions.

With this example in mind, OPR has not provided any evidence or authority to support its rigid and conclusive position. Without such evidence or authority, these types of determinations must be left to the discretion of the lead agency. Should OPR be inclined to address this issue as part of its Update, however, we believe it will be critical to (1) provide evidence or authority that road widening or “excess” parking per se leads to long term GHG emissions impacts, thus necessitating the preparation of an EIR, and (2) determine what constitutes “excess parking,” as such a definition invariably differs depending on the jurisdiction, its location, and the existing development and available parking infrastructure within it.

Section 15083 (Early Public Consultation)

² In *CBD*, the lead agency raised a different argument, that a realistic future baseline is appropriate for long-term projects, citing the *Neighbors for Smart Rail* case which was then pending appeal in the California Supreme Court. The CBD court was not persuaded, noting that *Neighbors* was de-published and uncitable, and that evidentiary support for BAU was lacking. *CBD*, p. 27, n. 46. However, the subsequent Supreme Court decision upheld future baselines, in appropriate circumstances and supported by substantial evidence. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439. Thus, even if the BAU methodology were interpreted as applying a form of future baseline, it should remain available to lead agencies that, with the benefit of the guidance in *Neighbors for Smart Rail*, incorporate the requisite evidentiary support into the record.

OPR proposes to “[c]larify that the lead agency may share an administrative draft of the EIR, or portions thereof, with the applicant in order to ensure accuracy in the project description and mitigation measures.”

Consistent with our recommendations regarding section 15063, subsection (g), we believe that clarifying that the lead agency may share the administrative draft EIR with the project applicant is an appropriate issue to address as part of the Update. However, we believe this issue would be better addressed in section 15084, entitled “Preparing the Draft EIR.” Section 15083, entitled “Early Public Consultation,” pertains to scoping, which is a process that may occur “with any person or organization” the lead agency believes will be concerned with the environmental effects of the project. Because this proposed change would relate specifically to sharing the administrative draft EIR with the *project applicant*, we believe section 15084 is a more appropriate guideline to address the issue to avoid confusion.

Similar to our suggestion regarding section 15063, subsection (g), we believe sharing an administrative draft EIR with the project applicant should be mandatory rather than permissive. Sharing a copy of the administrative draft EIR to the project applicant is essential to ensure that, among other things, the document accurately describes the project and proposes to adopt appropriate mitigation measures. Perhaps more importantly, it is critical to address any issues that may exist in the EIR at an earlier stage of the CEQA process so as to minimize potential issues that may arise as a later stage.

In this respect, we support adding a new CEQA Guidelines §15156, Cooperation with Applicant, instead of addressing this issue in multiple guidelines:

At the applicant’s request, the lead agency shall share drafts of any environmental document, or portions thereof, with the applicant and shall consider information provided by the applicant regarding such drafts. Such drafts include, but are not limited to, drafts of the initial study, proposed Negative Declaration, and draft and final EIR including responses to comments.

Addressing this issue in one guideline would provide more clarity and direction to lead agencies, project applicants, and the public regarding the ability of lead agencies to share draft environmental documents to the project applicant.

We understand that some commenters have requested that OPR specify that drafts shared with the applicant are not considered to have been released for public review for purposes of the record of proceedings. While we agree with this as a policy matter, we **oppose** addressing the issue as part of the Update, particularly if OPR is inclined to opine that the shared documents *are* in fact part of the administrative record. OPR would have no basis for doing so because the California Appellate courts are currently split on whether pre-approval communications between the lead agency and project developers may be protected from disclosure. (*California Oak Foundation v. County of Tehama* (2009) 174 Cal. App. 4th 1217 [pre-approval communications between the lead agency and project developer may be protected from disclosure by the common interest doctrine]; *but see Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 [pre-approval communications between the lead agency and project developer may be protected from disclosure by the common interest doctrine, but only after the environmental document has been approved and is challenged by a project opponent].) It is not within OPR’s authority to reconcile an appellate split by way of the regulatory process. Instead, this issue can only be resolved by the California Supreme Court or by way of the legislative process. For this reason, we request that OPR avoid opining on the issue of whether shared documents are part of the record of proceedings.

Regardless of whether OPR adds a new guideline to encompass all environmental documents or includes a separate provision in section 15083 regarding the ability of the lead agency to share the administrative draft EIR, to the extent OPR intends to clarify that providing drafts to the applicant is *permissive* instead of mandatory, we would request that OPR include language emphasizing that providing the administrative

draft initial study and/or other environmental documents to the lead agency during the initial draft stage has important benefits.

Specifically, if OPR adds a new guideline making it permissive for lead agencies to share any draft environmental document with the project application, we would request that OPR add the following language, which substantially mirrors the language currently section 15083 pertaining to the benefits of early public consultation more generally:

Many public agencies have found that providing a draft of environmental documents with the applicant solves many potential problems that would arise in more serious forms later in the review process.

In the alternative, if OPR includes a separate provision to section 15084 specifying that lead agencies may share administrative draft EIRs with the project applicant, we would request that OPR also include the following language:

Many public agencies have found that providing an administrative draft EIR with the applicant solves many potential problems that would arise in more serious forms later in the review process.

Section 15087 (Public Review of Draft EIR)

OPR proposes to “[r]evis[e] section 15087 to require that all documents ‘incorporated by reference’ into the environmental impact report be made available for public inspection, but not necessarily every document cited in the EIR.”

We **support** revising section 15087 to require that all documents “incorporated by reference” into the EIR be made available for public inspection, but not necessarily every document cited in the EIR. We further **support** clarifying that copies provided to the public and to libraries may be provided electronically.

Section 15088 (Evaluation of and Response to Comments)

OPR also proposes to “[c]larify that responses may correspond to the level of detail contained in the comment, and specifically that responses to general comments may be general” and to “[p]rovide further that comments that do explain the basis for the comments or the relevance of the evidence submitted with the comment do not require a response. *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal. App. 4th; *Gilroy Citizens for Responsible Planning v. City of Gilroy*, 140 Cal. App. 4th 911.”

We **support** providing clarification to section 15088 to ensure that it accurately reflects and is consistent with the holding in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515. In accordance with *City of San Diego*, we submit the following language:

Responses to comments may correspond to the level of detail contained in the comment. A lead agency may, but is not required to, respond to general, unelaborated objections which, within the discretion of the lead agency, do not explain the basis for the objections, do not provide evidence in support of the objections, or do not explain the relevance of the evidence provided in support of the objections such that the lead agency would not have an opportunity to adequately evaluate or respond to such objections.

Section 15091 (Findings)

OPR proposes to “[c]larify requirements regarding the need for finding on alternative, as well as the difference between feasibility for the purpose of analysis in the environmental impact report versus actual feasibility for the purpose of making findings.”

Although we believe that the CEQA Guidelines provide an adequate distinction between feasibility analysis in the EIR phase versus feasibility analysis during the project approval stage, we **support** making such a clarification so long as the clarification is consistent with *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957. In that case, a petitioner argued that the same feasibility standards apply both to the EIR and to project approval. According to the petitioner, “[t]he City cannot in a public process (the EIR) tell the public that there are feasible alternatives, and then at the end of the process (project approval) make a contrary conclusion.” (*Id.* at 998.) The Court rejected petitioner’s contention, noting that “different considerations and even different participants may come into play at each of the two phases” (*Id.* at 999.)

In the EIR phase, the question is whether the alternative is potentially feasible. This question is governed by section 15126.6, subsection (f)(1), which permits the lead agency to take into account a number of factors when determining the feasibility of alternatives in the EIR, including site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent).

In the project approval phase, however, the lead agency must evaluate whether the alternatives are actually feasible. This question is governed by section 15091, subsection (a)(3), which allows lead agency to consider “[s]pecific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers” in making an infeasibility determination during the project approval phase.

Consistent with the holding in *City of Santa Cruz*, we believe it would be helpful to clarify the following:

1. the lead agency, in evaluating the feasibility of alternatives during the environmental review phase, must determine whether the alternative is potentially feasible;
2. the lead agency, in evaluating the feasibility of alternatives during the project approval phase, must determine whether the alternative is actually feasible; and
3. alternatives may be included in the EIR as potentially feasible pursuant to section 15126.6, subsection (f)(1), even if those alternatives are ultimately rejected as infeasible pursuant to section 15091, subsection (a)(3).

Section 15124 (Project Description)

OPR proposes to allow the lead agency to discuss the project benefits “[i]n the description of the project’s technical, economic, and environmental characteristics.”

We **support** allowing the lead agency to discuss the project’s benefits in the project description. We believe the benefits should include both environmental benefits (e.g., the project will reduce GHG emissions) and economic/other project-related benefits (e.g., the project will provide low cost aggregate materials for much needed public infrastructure projects). Although environmental documents appear to provide this information in current practice, providing clarification on this issue may be useful.

Section 15125 (Environmental Setting)

OPR proposes to “[p]rovide guidance on appropriateness of use of alternative baselines, including changes resulting from climate change, future baselines to address large-scale infrastructure, historic use, and unpermitted uses.”

Similar to our position with respect to section 15064, to the extent OPR wishes to add an explanation of “baseline” in section 15125, we would **support** such an explanation so long as it is limited to and consistent with the recent Supreme Court decision in *Neighbors for Smart Rail v. Exposition Metro Line Authority* (2013) 57 Cal.4th 439, which held that while an agency has discretion to omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value.

We also believe it is important to specify that use of maximum operational levels allowed under a previous permit, rather than existing physical conditions, is the appropriate baseline when the project at issue is a modification of a previously analyzed project. This rule is well established. (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 326, citing *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 242–243 [application for a permit to increase mine production treated as the continued operation of an existing facility and modification of the project authorized in a prior permit issued after CEQA analysis]; *Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 437–438 [modified pipeline design and route for water supply project that had already undergone CEQA review]; *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477–1484 [modified location of winery construction project on which CEQA review was already complete].)

Turning to OPR’s suggestion that it may provide that the description of the environmental setting in section 15125 may include a description of the community within which the project is proposed in order to better analyze specific impacts to that community, the intent of this proposal is unclear. The type of “description” is unspecified, and “community” may be defined in many ways. To the extent that this is intended as a restatement of existing law, it may be unnecessary to address this topic in the Update.

It is well-established that the CEQA analysis of specific impacts of a project must take into account its surroundings, including the specific receptors and neighborhoods adjacent to the project site, or (for impacts not limited to the immediate vicinity) within range of the project’s effects. (See, e.g., Guidelines Appendix G, Section I(c) [would the project “[s]ubstantially degrade the existing visual character or quality of the site and its surroundings?”]; Section III(e) [would the project “[c]reate objectionable odors affecting a substantial number of people?”]; Section X(a) [would the project “[p]hysically divide an established community?"]; CEQA analysis also takes into account special sensitivities of persons or uses affected by a project. (See, e.g., Guidelines Appendix G, Section III(d) [would the project “[e]xpose sensitive receptors to substantial pollutant concentrations?"]; Section VIII(c) [would the project “[e]mit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?"].) As another example, evaluation of noise impacts is typically based on standards specified in a noise ordinance or General Plan noise element, with lower noise exposures identified as significant impacts for projects near sensitive receptors such as residences, schools and hospitals.

Descriptions of community characteristics also appear in the Population and Housing sections of CEQA documents, as a basis for evaluating impacts such as inducing substantial population growth, or displacing substantial numbers of people or housing. Moreover, although “[e]conomic and social changes resulting from a project shall not be treated as significant effects on the environment” in themselves (CEQA Guidelines Section 15064(e)), economic or social factors may contribute to determining the significance of physical impacts, such as dividing an existing community.

As such, it is already true that environmental setting descriptions in CEQA documents may include descriptions of the surrounding communities, supporting the analysis of specific impacts. However, as

shown in the above examples, the description of the community is defined by the scope of the potential impact. For example, a map of noise receptors beyond the reach of project noise would not be particularly useful for analyzing the community's exposure to noise impacts. Moreover, since economic and social issues are not environmental impacts in the CEQA sense, adding broader discussion of such factors, beyond the scope related to specific impacts, may detract from the clarity of the impact analysis. We urge OPR to address this topic with caution, if at all, to preserve the focus and utility of CEQA documents to support environmentally informed decision-making.

To the extent OPR addresses this issue, we note that OPR's guidance must not be at odds with the recent decision in *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768. In that case, the court addressed whether a project would have a significant effect on the environment as a result of the potential health risks to people. The court concluded that it would not, noting the following:

[I]t is far from clear that adverse effects confined only to the people who build or reside in a project can ever suffice to render significant the effects of a physical change. In general, CEQA does not regulate environmental changes that do not affect the public at large: 'the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons.'

(*Id.* at 782, citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492.)

The *Parker Shattuck* court also cited to *Topanga Beach Renters Assn. v. Department of General Services* (1976) 58 Cal.App.3d 188, where the plaintiff argued that the demolition of structures on a beach would adversely affect humans, and thus constitute a significant effect on the environment requiring an EIR, because "the planned demolition [would] evict people from their homes (with consequent adverse effect on those people)." (*Id.* at 191.) The court held that the "[a]dverse effect on persons evicted from Topanga Beach cannot alone invoke the requirements of CEQA, for all government activity has some direct or indirect adverse effect on some persons." (*Id.* at 195.) "The issue [was] not whether demolition of structures [would] adversely affect particular persons but whether demolition of structures [would] adversely affect the environment of persons in general." In short, the court concluded that there was no significant effect on the environment because the identified impact affected only a particular group of people.

Accordingly, should OPR include this modification as part of its Update, we ask that the modification be limited by and consistent with the holdings in *Parker Shattuck* and *Topanga*.

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

OPR proposes to "[p]rovide guidance on when an agency may appropriately defer mitigation details" and "[m]ention vectors as an example of potential impacts that result from mitigation measures."

Addressing each issue in turn, we believe case law is well developed regarding deferred mitigation. However, should OPR elect to provide guidance on this issue, we request that OPR incorporate the following established principles into its regulation:

1. Deferral is permitted if, in addition to demonstrating some need for deferral, the agency (1) commits itself to mitigation; and (2) spells out, in its environmental impact report, the possible mitigation options that meet "specific performance criteria" contained in the report. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011)

2. An agency may commit itself to mitigation by conditioning the issuance of a land use permit on compliance with the deferred mitigation measure. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1070.)
3. A deferred mitigation measure should set forth specific and mandatory performance standards to ensure that the measure, as implemented, will be effective. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94.)
4. The details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906, citing *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011; see also *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 619 [city did not improperly defer mitigation measures when it determined that the project would have a habitat loss impact and identified the preservation or creation of replacement off-site habitat, in a specific ratio, as the specific measure to mitigate that impact, and city merely deferred as to the details of exactly how mitigation would be achieved pending completion of a future study].)

With regard to vectors, we **oppose** mentioning vectors as an example of potential impacts that result from mitigation measures. Currently, according to the CEQA Guidelines, if a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. (CEQA Guidelines § 15126.4(A)(1)(D).)

Including vectors as an example of a potential impact resulting from mitigation measures would be the first such example in the CEQA Guidelines. To be clear, the CEQA Guidelines do not currently include, nor have they ever included, a specific example of a potential impact that may result from mitigation measures. Including vectors as the first example would be a slippery slope whereby interest groups will begin requesting that OPR include specific examples of potential impacts caused by mitigation measures in the CEQA Guidelines. Evaluating what types of impacts may occur as a result of implementing mitigation measures is a responsibility traditionally left to the discretion of the lead agency, and, absent any case law or statutory authority to the contrary, we oppose any attempt to usurp that discretion.

Second, and more significantly, including such a provision regarding vectors has no basis in existing case law. Specifically, no case has ever held that a lead agency must evaluate vectors when evaluating the impacts as a result of mitigation measures. For this reason, we are perplexed as to how this suggestion would “appear consistent with [CEQA] and case law” as that phrase is used in OPR’s “Possible Topics.” Notwithstanding the lack of case law on this issue, absent a specific legislative mandate, we also question whether OPR has authority or discretion to amend the regulations this way.³

Third, from a policy perspective, including vectors as a potential impact that may result from mitigation measures would undoubtedly discourage the creation of wetland habitat and/or water reservoirs as mitigation measures. The creation of wetland habitat is an often used and commonly upheld mitigation measure to mitigate impacts to biological communities. (See, e.g., *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 [creation of vernal pool and seasonal wetland habitat sites to ensure no net loss in wetland habitat acreage, values and functions, was an adequate mitigation measure under CEQA].) Indeed, discouraging the creation of wetland habitat as mitigation under CEQA would have a profound impact, both economically and practically, on lead agencies’ ability to reduce potential impacts to a level of insignificance.

³ It is worth noting that AB 896 (D-Eggman), currently pending before the California Legislature, would re-enact expired provisions requiring best management practices (BMPs) for mosquito control in wildlife management areas. It would appear, therefore, that requiring a government entity to implement BMPs for mosquito control would necessitate legislative authority.

Finally, we note that our opposition to addressing this issue as part of the Update should not be mistaken as an attempt to understate the seriousness of the spread of the West Nile virus (WNV) in the State of California. It is our position, however, that doing so through the Update process would be unprecedented, legally unsupportable, and flawed from a policy perspective. In this respect, to the extent a particular interest group would like to see lead agencies adopting Best Management Practices guidance developed by the California Department of Public Health to reduce the spread of WNV, we believe that effort would be better utilized as the local level through the adoption and implementation of local ordinances and policies.

Section 15152 (Tiering)

OPR proposes to “[c]larify that tiering is the only one streamlining mechanism, and this section does not govern the other types of streamlining.”

We **support** clarifying that tiering under section 15152 is only one streamlining mechanism to simplify the environmental review process and avoid redundant analysis. Appendix J includes a variety of streamlining documents, not all of which involve tiering. Accordingly, we agree that section 15152 subsection (h) should be revised to specify that Appendix J provides an overview of the various streamlining methods that may be used, not all of which involve tiering.

Section 15155 (City or County Consultation with Water Agencies)

OPR proposes to “[p]rovide further guidance on the adequacy of water supply analysis under CEQA” and to “account for increasing variability in water supply.”

We **support** providing further guidance on the adequacy of water supply analysis under CEQA. In 2007, the California Supreme Court addressed this very issue in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412. In that case, the Supreme Court clarified a number of issues with respect to the adequacy of water supply assessments, each of which should be incorporated into the guideline:

1. An EIR for a land use plan need not demonstrate that the project is definitely assured water through signed, enforceable agreements with a provider and already built or approved treatment and delivery facilities. (*Id.* at 432.)
2. Water supplies must be identified with more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases. (*Id.* 433-434.)
3. If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it (1) acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and (2) discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact. In approving a project based on an EIR that takes this approach, however, the agency would also have to make, as appropriate to the circumstances, any findings CEQA requires regarding incorporated mitigation measures, infeasibility of mitigation, and overriding benefits of the project as to each alternative prong of the analysis. (*Id.* at 434)
4. When an individual land use project requires CEQA evaluation, the urban water management plan's information and analysis may be incorporated in the water supply and demand assessment

if the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan. (*Id.* at 434.)

Section 15168 (Program EIR)

OPR proposes to “[p]rovide further guidance on determining whether a later project is “within the scope” of a program EIR.”

We **support** providing further guidance regarding whether a later project is “within the scope” of a program EIR. We request that OPR incorporate the following three clarifications into the guidelines.

First, it is well established that once a program EIR is prepared and certified, a decision not to prepare a subsequent or supplemental EIR for a later project is reviewed under the substantial evidence standard. (*Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2005) 134 Cal.App.4th 598, 610; [*CREED*] *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 195.)

Second, *Santa Teresa Citizen Action Group* clarified that an activity is “within the scope” of a program EIR if the activity’s impacts are not substantially different from or greater than the impacts covered in the program EIR. (*Santa Teresa Citizen Action Group*, 114 Cal.App.4th at 705 [“In sum, the record contains substantial evidence supporting the conclusion that the environmental impact of the Silver Creek alignment upon the groundwater in North Coyote Valley was not substantially different from or greater than the impacts considered in the previous studies.”].)

Third, building on the proposition in *Santa Teresa Citizen Action Group*, the court in *CREED* further clarified that an activity is “within the scope” of a program EIR if the activity’s impacts were adequately analyzed in the program EIR. (*CREED*, 134 Cal.App.4th at 611-12 [“[i]n view of respondents’ determination that the project’s potential environmental impacts were adequately analyzed in the MEIR and the SEIR, we reject *CREED*’s argument that the fair argument standard requires that respondents prepare an EIR for the hotel project.”])

Accordingly, with these basic legal propositions in mind, we believe section 15168, subsection (c)(2), should be amended to read follows:

*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 by the program EIR, and no new environmental document would be required. **An activity is within the scope of the project by the program EIR if the agency determines that the activity’s potential environmental impacts (1) were adequately considered in the program EIR; and (2) are not substantially different from or greater than the impacts considered in the program EIR. An agency’s determination not to prepare a new environmental document under this section shall be upheld if the determination is supported by substantial evidence as that term is defined in Section 15384.***

Section 15301 (Existing Facilities)

OPR proposes to “[r]evis[e] to incorporate 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 explain the use of facility beyond its historic use (rather than use at the time of the lead agency’s determination).”

For purposes of the existing facilities exemption under section 15301, we **support** clarifying that maximum historic operational levels allowed under a previous permit, rather than existing physical

conditions, is the appropriate CEQA baseline for determining whether a project is exempt under section 15301, so long as the project would involve no or negligible expansion.

Although *Communities for Better Environment v. South Coast Air Quality Management District* (2010) recognizes this general proposition of law (*Id.* at 326), the holding in that case was that a refinery project proposing to add a new refining process to an existing facility, require the installation of new equipment, and increase operation of other equipment, could *not* utilize a historic baseline based on maximum historic operation levels. Accordingly, because the project involved more than a negligible increase in operations, the Court concluded that existing levels of emissions from the boilers, as opposed to the maximum capacity levels set in prior boiler permits, was the appropriate baseline under CEQA. (*Id.* at 326-327)

With the holding in *Communities for a Better Environment* in mind, we would like to clarify that the purpose of OPR's proposed changes to section 15301 would be to codify the holdings in cases cited to by the Supreme Court in *Communities for a Better Environment* to distinguish the project in that case from other projects where the exemption was appropriately applied, such as *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307 [previous permitted capacity was appropriate baseline for determining that renewal of a medical waste treatment facility was exempt under section 15301] and *Committee for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) [previous permitted capacity was appropriate baseline for determining that restoration of a sewage treatment plant was exempt under section 15301].)

If OPR's intent is to codify *Bloom* and *Committee for a Progressive Gilroy* to establish that the appropriate baseline for purposes of applying the existing facilities exemption is maximum historic operational levels allowed under a previous permit, so long as the project involves little to negligible expansion, we would support this effort.

Section 15357 (Discretionary Project)

OPR proposes to "[a]ugment the definition of a 'discretionary project' to provide further guidance about whether a project is ministerial or discretionary."

Although we believe the CEQA Guidelines adequately address what constitutes a discretionary versus ministerial project under CEQA, one issue that has arisen frequently is how to classify approvals granted consistent with and subsequent to a previously approved detailed plan which underwent full environmental review. That very question was addressed recently in *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 139. In that case, the court considered whether the approval of a design application for a warehouse distribution facility, which required the lead agency to answer a 125 question "yes-or-no" checklist to determine whether the project was consistent with a previously approved specific plan for a business center, was a discretionary or ministerial decision. The specific plan had undergone comprehensive environmental review in the form of a focused EIR, and contemplated the proposed warehouse facility.

The court, in citing to a number of previous cases, held that the warehouse facility was a "separate step" in implementing the larger specific plan for the business center. (*Id.* at 1144.) That step involved merely determining whether the application was consistent with the requirements, fixed standards, and proposed mitigation of the specific plan and the focused EIR. The lead agency accomplished this review by completing a checklist of 125 yes or no questions, and in doing so "exercised no discretion and instead acted ministerially." (*Id.*)

The court also rejected the petitioner's contention that the warehouse presented substantial changes or new information that would affect the specific plan. Specifically, the court held that there was no justification for such a claim because the warehouse "is smaller in size than the area already approved for industrial use by the Specific Plan. It has fewer environmental impacts and no special or additional impacts not analyzed in the Focused EIR." (*Id.* at 1145.)

Finally, the court rejected petitioner's argument that the implementation of the specific plan's mitigation measures as part of the design plan for the warehouse facility was discretionary because the measures were not specifically incorporated as part of the design plan approval. The record contradicted this assertion, however, because it was relatively clear that the mitigation measures adopted in the specific plan, unless they had been deleted, continued to apply to the warehouse facility. (*Id.*)

Because the *Health First* holding provided more direction with respect to the definition of a "ministerial" approval, we believe codifying the *Health First* holding would be better served in section 15369, which defines the term "ministerial." Specifically, we would **support** that the following language be added to section 15369:

*"Ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. **Another common example of a ministerial permit includes an approval granted subsequent to a detailed land use plan, so long as the following conditions are met: (1) the detailed land use plan underwent comprehensive environmental review which contemplated the development of the subsequent approval as eventually implemented; and (2) the subsequent approval is contingent solely upon a determination, requiring no subjective judgment, of whether the approval is consistent with the requirements, fixed standards, and proposed mitigation of the previously approved detailed land use plan and its associated environmental review.** A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.*

Section 15370 (Mitigation)

OPR proposes to "[c]larify that preservation in perpetuity can be appropriate mitigation." Section 15370 currently contemplates preservation in perpetuity as appropriate compensatory mitigation. (§ 15370(e) [compensating for the impact by replacing or providing substitute resources or environments].) Accordingly, amending the guideline in this way is unnecessary and we **oppose** it for that reason.

If OPR intends to clarify that preservation in perpetuity is a form of mitigation under CEQA, we would request that OPR also clarify that adopting preservation in perpetuity as a mitigation measure, like other forms of mitigation, is contingent upon and subject to feasibility findings in sections 15091, subsection (a)(3) and 15126.6, subsection (f)(1). Indeed, while *Masonite Corporation v. County of Mendocino* (2013) 218 Cal. App. 4th 230 confirmed that agricultural conservation easements (ACEs) are an appropriate form of mitigation under section 15370, this was not the focal point in that case because the lead agency expressly recognized that ACEs were indeed appropriate forms of mitigation, but that other cases have upheld lead agencies' determination that ACEs, while appropriate mitigation, were economically infeasible. (See, e.g., *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261.)

Section 15378 (Project)

OPR proposes to "[r]evise the definition of "project" to more clearly address pre-approval agreements."

We support revising the definition of “project” to more clearly address pre-approval agreements, so long as the revisions are consistent with case law on the issue. Three cases in particular have provided considerable guidance on the issue.

First, in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the Supreme Court held that a predevelopment loan for an affordable housing development constituted an unlawful “preapproval.” While the Court in *Save Tara* did not provide a bright line test regarding what types of actions constitute unlawful preapprovals, it did hold that if the factual circumstances surrounding the project indicate that the agency has committed itself to a definite course of action regarding the project, then CEQA analysis must be performed at that time. The Court explained:

A CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.

(*Id.* at 132.)

Among other reasons, the Supreme Court based its holding in part on the fact that the developer was not required to repay the predevelopment portion of the loan unless the project was approved. By making an unrecoverable financial commitment, according to the Court, the lead agency had committed itself to a definite course of action regarding the project.

More recently, in *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, an appellate court ruled that a lead agency’s predevelopment loan to a project applicant prior to the certification of an EIR did not constitute an unlawful “preapproval” of a project. The decision centered on the San Francisco Mayor’s Office of Housing (“MOH”) decision to execute a loan of \$788,484 to the Booker T. Washington Community Service Center (“Center”) for predevelopment activities relating to the Center’s proposal to replace an existing community center and housing project. The loan agreement expressly stated that the City was not committing itself to the project, and that the City had the discretion to disapprove the project upon consideration. The Planning Commission certified the EIR and approved the project six months after MOH executed the loan.

A citizens’ group sued, arguing that the predevelopment loan constituted an unlawful “preapproval” of the project. This preapproval, according to the plaintiff, violated the well-established rule that project approval must occur after, not prior to, the certification of an EIR. The group relied on *Save Tara*. The Appellate Court rejected these contentions, holding that, unlike the loan agreement in *Save Tara*, the loan agreement between MOH and the Center unambiguously stated the City did not commit itself or otherwise endorse the project by financing predevelopment activities. Further, the court noted that it was significant that the developer in *Save Tara* was not required to repay the predevelopment portion of the loan unless the project was approved. The court distinguished the facts in *Neighbors for Fair Planning*, however, noting that MOH would be reimbursed whether or not the project was approved, and thus did not commit to the project.

In another recent case, *City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, a county applying for state funding for a county jail expansion project was not required to comply with CEQA prior to submitting an application. State funding regulations called for the interested local agencies to submit applications. No CEQA clearances were required as part of the application, nor was CEQA required in order to for the State to conditionally fund the projects. In affirming the county’s application submittal for funding without CEQA review, the court relied in part on the state regulations which specified that the funding commitment was conditional, required the county to ultimately undergo CEQA review, and did not commit the county to a definite course of action. On this basis, the Court was able to distinguish *Save Tara*.

In sum, we request that OPR consider the following principles 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 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*)
3. A lead agency's application for state funding for a future project is not a project. (*City of Irvine*)

Appendix G: Environmental Study Checklist

We **oppose** adding a question about conversion of open space generally in Appendix G for the same reasons we oppose adding loss of open space as an example of potential cumulative impacts in section 15064, subdivision (h)(1), as discussed above.

We also **oppose** adding a question about providing excess parking in Appendix G for the same reasons we oppose including excess parking an example of a condition requiring the preparation of an EIR in section 15065, as discussed above.

Appendix J (Examples of Tiering)

We **support** revising Appendix J to provide better guidance on the use of streamlining tools.

New Appendix (Supplemental Review Checklist)

We **support** providing a checklist to guide supplemental review, including guidance on the fair argument standard. Such guidance will assist lead agencies in determining whether a proposed project is a new project or a modification of an existing project. This distinction is important because if the agency determines that the project is a new project, section 21151 applies and the environmental document will be reviewed by a court under the fair argument test. On the other hand, if the agency determines that the project is a modification of a previously studies project, section 21166 applies and the court will review the agency's environmental review under the substantial evidence standard.

As OPR develops this new appendix, we recommend that it keep in mind the holding in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, where the court treated a winery as a modification of an existing approval, even though the lead agency required a new use permit for the project. The court made its determination not based on the type of land use approval granted, but on the way in which the lead agency *treated* the project throughout the course of the land use and environmental process. (*Id.* at 1476 ["the administrative record demonstrates that the commission and board consistently treated the new application as if it were a request for modification of the already-permitted project."].)

2. Additional Topics that Should be Addressed / Specific Language

In addition to the discussion and proposed language above, we propose that OPR address the following topic as part of its Update.

Section 15302 (Replacement or Reconstruction)

We request that the Update clarify, consistent with the holding in *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, that the scope of the exemption for replacement or reconstruction of an existing

facility is not limited by the size of the proposed project. (*Id.* [in rejecting petitioner's argument that the magnitude of a cement replacement project was too large to qualify for the exemption, the court stated that "[we] believe it inappropriate for a court to determine when, if ever, a particular project should be deemed too large to qualify for this categorical exemption."].)

Consistent with the holding in *Dehne*, we submit the following language:

*Class 2 consists of replacement or reconstruction of existing structures and facilities, **regardless of the size of the project**, where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to:*

(a) Replacement or reconstruction of existing schools and hospitals to provide earthquake resistant structures which do not increase capacity more than 50 percent;

(b) Replacement of a commercial structure with a new structure of substantially the same size, purpose, and capacity.

(c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no expansion of capacity.

(d) Conversion of overhead electric utility distribution system facilities to underground including connection to existing overhead electric utility distribution lines where the surface is restored to the condition existing prior to the undergrounding.

CONCLUSION

Again, thank you for the opportunity to comment on OPR's 2014 CEQA Guidelines Update Process. We hope you will take our comments into considerations when drafting the updated language. We look forward to the opportunity for further comment on OPR's specific language when it is proposed.

Sincerely,

Anthony Samson



Policy Advocate
The California Chamber of Commerce

On behalf of the following organizations:

The California Association of Realtors
The California Business Property Association
The California Construction and Industrial Materials Association
The California Independent Petroleum Association
The California Grocers Association
The California League of Food Processors
The California Manufacturers and Technology Association
The California Retailers Association
The National Federation of Independent Business
The West Coast Lumber and Building Materials Association
The Western Mining Alliance
The Western States Petroleum Association