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VIA EMAIL AND OVERNIGHT DELIVERY

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**Re: Comments on the Preliminary Discussion Draft for the 2015
Proposed Updates to the CEQA Guidelines**

Dear Mr. Calfee:

On behalf of the State Building and Construction Trades Council of California, an umbrella organization representing over 400,000 construction workers in California and their families, we respectfully submit these preliminary comments on OPR's Preliminary Discussion Draft for the 2015 Proposed Updates to the CEQA Guidelines. Due to the sweeping changes proposed by OPR, we recommend that OPR revise the preliminary discussion draft and recirculate another discussion draft for public review and comment.

OPR is authorized to adopt or amend a regulation only if it is consistent and not in conflict with CEQA.¹ We have reviewed OPR's proposed updates and find that while some of the changes are beneficial and consistent with current law, other changes are not. Some changes would also result in confusion, increased litigation and, importantly, weakened environmental review of potentially harmful projects contrary to the Legislature's intent in enacting CEQA. For these problematic proposals, we recommend language that more accurately reflects the Legislature's

¹ Gov. Code, § 11342.2; see also *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 108.

goals in enacting CEQA and important CEQA case holdings, most of which are cited by OPR in the Discussion Draft.

I. OPR FAILED TO DEMONSTRATE THAT ALL PROPOSED UPDATES ARE CONSISTENT WITH APPLICABLE STATUTES AND CASE LAW

A. Regulatory Standards as Thresholds of Significance

OPR proposes to amend sections 15064 and 15064.7 to expressly provide that lead agencies may use regulatory standards as thresholds of significance in determining whether the impacts of a project may be significant.

Some cases, such as *Communities for a Better Environment v. Resources Agency*² and *Oakland Heritage Alliance v. City of Oakland*,³ conclude that compliance with regulatory standards is appropriate for determining the significance of impacts *in certain situations*. However, other cases cast doubt on whether compliance with standards alone is sufficient to reduce significant impacts when there is either evidence to the contrary or when there is no assurance that compliance will occur.

In *Keep our Mountains Quiet v. County of Santa Clara*, neighbors of a wedding venue sued over the county's failure to prepare an EIR due to significant noise impacts. The court concluded that "a fair argument [exists] that the Project may have a significant environmental noise impact."⁴ The court reasoned that although the noise levels would likely comply with local noise standards, "compliance with the ordinance does not foreclose the possibility of significant noise impacts."⁵ The court ordered the county to prepare an EIR. In *Leonoff v. Monterey County Bd. of Supervisors*, the court held that conditions requiring compliance with

² *Communities for a Better Environment v. Resources Agency* (2002) 126 Cal.Rptr.2d 441 ("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").

³ *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal. App. 4th 884, 904 ("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").

⁴ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

⁵ *Keep our Mountains Quiet v. County of Santa Clara* (2015) Case No. H039707, p. 21.

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regulations are proper “where the public agency had meaningful information reasonably justifying an expectation of mitigation of environmental effects.”⁶

Furthermore, in the case cited by OPR, *Communities for a Better Env't v. California Res. Agency*, the court struck down a CEQA Guideline because it “impermissibly allow[ed] an agency to find a cumulative effect insignificant based on a project's compliance with some generalized plan rather than on the project's actual environmental impacts.”⁷ The court concluded that “[i]f there is substantial evidence that the *possible* effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.”⁸ Thus, the ruling supports the notion that compliance with a regulatory standard does not automatically obviate a lead agency’s obligation to prepare an EIR when presented with a fair argument supported by substantial evidence that a project may result in potentially significant impacts.

The proposed changes to section 15064 attempt to address the holding in *Communities for a Better Env't v. California Res. Agency* and other cases, requiring that a lead agency must evaluate any substantial evidence showing that, despite compliance with a threshold, a project’s impacts are nevertheless significant. OPR proposes the following changes to section 15064 (general threshold provision):

Thresholds of significance, as defined in Section 15064.7(a), may assist lead agencies in determining the significance of an impact. When relying on a threshold, the lead agency should explain how compliance with the threshold indicates that the project's impacts are less than significant. A lead agency shall not apply a threshold in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant environmental effect from a project.

However, the provision should use the “fair argument language”, which is clearly established in the statute and case law. We recommend adding: “**A lead agency must evaluate any substantial evidence supporting a fair argument that, despite compliance with the threshold, there may still be a significant environmental effect from a project.**”

⁶ *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1355.

⁷ *Communities for a Better Env't v. California Res. Agency* (2002) 126 Cal.Rptr.2d 441, 453.

⁸ *Id.* (emphasis added).

OPR also proposes the following changes to section 15064.7:

Any public agency may adopt or use an environmental standard as a threshold of significance. In adopting or using an environmental standard as a threshold of significance, a public agency shall explain how the particular requirements of that environmental standard will avoid or reduce project impacts, including cumulative impacts, to a less than significant level. For the purposes of this subdivision, an “environmental 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 environmental requirement of general application;
- (2) adopted for the purpose of environmental protection;
- (3) addresses the same environmental effect caused by the project; and,
- (4) is designed to apply to the type of project under review.

OPR’s proposed language does not address the reasonable expectation of compliance requirement set forth in *Leonoff*. In addition, the provision could be made more clear by specifying that “a public agency shall explain in an **EIR** or **MND** how the particular requirements . . .” This would address any ambiguity as to whether the agency must explain how the application of the standard reduces impacts in each individual CEQA document.

In sum, we recommend that OPR incorporate the “fair argument” language into section 15064. Furthermore, we recommend that OPR clarify in section 15064.7 that the public agency must provide “meaningful information reasonably justifying an expectation of mitigation of environmental effects” when relying on an environmental standard as a threshold of significance. Finally, we recommend that OPR clarify that the agency must explain in the environmental review document for a project how the use of an environmental standard mitigates the particular impact.

B. Program Review

OPR proposes changes to the provisions regarding programmatic environmental review. These changes cover the determination of whether a later activity falls within the scope of a program EIR; factors relating to that determination; proceeding with analysis when an activity is not within the scope of a program EIR; and inclusion of a description of later activities in a program EIR's project description.

OPR proposes the following changes to section 15168:

(c) Use With Later Activities. ~~Subsequent~~ Later activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared.

(1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration. That later analysis may be tiered from the program EIR as provided in Section 15152.

(2) If the agency finds that pursuant to Section 15162, no new significant effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required. Determining that a later activity is within the scope of a program covered in the program EIR is a factual question that the lead agency determines based on substantial evidence in the record. Relevant factors that an agency may consider include, but are not limited to, consistency of the later activity with the type of allowable land use, overall planned density and building intensity, geographic area analyzed for environmental impacts, and description of covered infrastructure, as presented in the project description or elsewhere in the program EIR.

There are two problems with the proposed language. First, the addition of "significant" alone to subdivision (2) is inconsistent with Public Resources Code section 21166 and CEQA Guidelines section 15162. Section 15162 includes other

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language in addition to new significant impacts, including a “substantial increase in the severity of previously identified significant effects.”

Second, the list of “relevant factors” should be deleted for several reasons: it is inconsistent with case law; OPR should not add factual findings to the CEQA guidelines base on facts in limited case law; each factor is not dispositive of whether a project was sufficiently analyzed in a prior program EIR; and there is no exception that requires an agency to consider substantial evidence, as required by CEQA.

OPR relies on *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency*⁹ (“CREED”) and *Sierra Club* to support the notion that the determination of whether an activity falls within the scope of a program EIR is a factual question based on substantial evidence. OPR’s list of relevant factors, however, goes beyond the case holdings. For example, “consistency of the later activity with the type of allowable land use” is too broad. OPR cites to *Sierra Club*, which indicates that a project that is *not* consistent with land use shows it could *not* be within the scope of a program EIR. However, the case does not hold that because a project *is* consistent with land use, the project *is* within the scope of a program EIR. OPR’s proposed language goes beyond the holding.

“[G]eographic area analyzed for environmental impacts” is also too broad. OPR cites to *Santa Teresa Citizen Action Group v. City of San Jose*;¹⁰ however, in that case the court considered whether a previously approved project had changed enough to trigger subsequent environmental review. The court found that the project did not trigger new environmental review not only because of the geographical location but because it “used recycled water in the same way” and was basically the same project that was previously analyzed and approved.¹¹ By including this factor here, a City could argue that a previously planned residential project in the suburbs covers a later proposed industrial project in the same geographical area merely because the same geographical area was already analyzed for an entirely different project. This would violate the plain language and intent of CEQA.

⁹ *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal. App. 4th 598, 610 (“The fair argument standard does not apply to judicial review of an agency’s determination that a project is within the scope of a previously completed EIR”).

¹⁰ *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689.

¹¹ *Id.*, at 703 – 704.

OPR should not rely on facts from limited case law in this area to add relevant factual findings to the guidelines, when there are many other factors that are relevant to an agency's determination in this regard, many of which have not been litigated. Furthermore, each factor on its own is not dispositive of whether a project was considered in a program EIR, although OPR's proposed language incorrectly presumes so.

OPR should either delete the language or revise the language to specify that, at a minimum, all of the factors must be met and that an agency is still required to consider substantial evidence that a project was not analyzed in a program EIR despite consistency with the listed factors.

In sum, we recommend in section 15168(c)(2) that OPR either delete the word significant, or include both standards from section 15162 (significant and more severe). Furthermore, we recommend that OPR either delete the list of possible factors for determining whether a later project is within the scope of a program EIR, or add language requiring that, at a minimum, all of the relevant factors be met and that an agency is still required to consider substantial evidence that a project was not analyzed in a program EIR despite consistency with the listed factors.

C. Transit Oriented Development Exemption

OPR proposes to add language to section 15182 that reflects the new transit oriented development exemption codified in Public Resources Code section 21155.4. The proposed section 15182 violates section 21155.4 in several ways. For example, the language states that additional review *may* be required if the project triggers one of the requirements for further review described in section 15162, whereas section 21155.4 states that additional review *shall* be conducted.

In addition, section 15182 currently states that no further environmental impact report or negative declaration is required for residential projects that are consistent with a specific plan. California Government Code section 65457 states that such projects are exempt from CEQA requirements and OPR's proposed language to allegedly clarify this point. However, OPR's proposal omits additional language in section 65457 that specifies a project is only exempt under the section if no event specified in Public Resources Code section 21166 occurs.

Furthermore, 15182(b)(1) purports to incorporate the definition of “employment center project” from Public Resources Code section 21155.4 and 21099(a)(1). However, it does not incorporate the full definition. The definition is not a “commercial project with a floor area ratio of at least 0.75,” as OPR proposes in subsection (b)(1). Rather, the definition under 21099(a)(1) is “a project located on property zoned for commercial uses with a floor area ratio of no less than 0.75 ...”¹² The difference between the statutory definition and OPR’s proposed language is not trivial; the Legislature clearly stated in the statute that, in order to qualify for an exemption, the property must have already been zoned commercial. By removing the language regarding zoning and enabling zoning changes to be exempt under section 15182, OPR’s proposed language would not only violate the statute, but it could lead to a property being zoned from open space to commercial with no environmental review.

We recommend that OPR address the inconsistencies in the language of section 15182, as described above. For section 15182(b)(1), we recommend that OPR directly refer to an “employment center project, as defined in paragraph (1) of subdivision (a) of Section 21099.”

D. Exemptions

OPR’s proposed changes to the existing facilities exemption, section 15301, is inconsistent with the plain language of CEQA, the Legislature’s intent in enacting the statute and case law. The changes are as follows:

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

¹² Pub. Res. Code 21099(a)(1). We note that the statutory definition also requires that an “employment center project” be located within a transit priority area, which OPR proposes to include in section 15182.

Regarding the removal of the phrase “beyond that existing at the time of the lead agency's determination,” OPR states that “[s]takeholders have noted that this phrase could be interpreted to preclude use of this exemption if a facility were vacant ‘at the time of the lead agency’s determination,’ even if it had a history of productive use, because compared to an empty building any use would be an expansion of use.”¹³ OPR also argues that the change would reflect the decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.*,¹⁴ which it says “found that a lead agency may look back to historic conditions to establish a baseline where existing conditions fluctuate, again provided that it can document such historic conditions with substantial evidence.”¹⁵ Finally, OPR argues that the deleted phrase was added to the Guidelines in response to *Bloom v. McGurk*,¹⁶ but that “[n]othing in that decision indicates, however, that a lead agency could not consider actual historic use in deciding whether the project would expand beyond that use.”¹⁷

OPR’s justification for the expansion of this exemption is flawed for three reasons. First, *Bloom* clearly states that “[f]or purposes of the exception to the categorical exemptions, ‘significant effect on the environment’ would mean a change in the environment existing *at the time of the agency's determination* . . .”¹⁸ OPR acknowledges this statement but then completely ignores it by arguing that historic use could be considered instead of use at the time of the agency’s determination. OPR’s argument is nonsensical and contrary to judicial interpretations of CEQA under current case law.

Second, OPR’s concern that use of a vacant building would always be considered an expansion of use is inapposite because CEQA requires agencies to determine whether *any* direct or indirect physical change in the environment from current conditions is significant.¹⁹ A change from a vacant building to any other

¹³ OPR Draft, p. 34.

¹⁴ *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-328.

¹⁵ OPR Draft, p. 34.

¹⁶ *Bloom v. McGurk* (1994) 26 Cal. App. 4th 1307.

¹⁷ OPR Draft, p. 35.

¹⁸ *Id.*

¹⁹ A project is defined as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...” (Pub. Res. Code §21065); a project’s effects are defined as “...all the direct or indirect environmental effects of a

kind of use is a direct physical change and OPR's proposal could lead to unanalyzed and unmitigated impacts. For example, if a vacant building was used for one kind of production 20 years ago, and contamination from that production is no longer present in the soil and air emissions have ceased, would a development project today for a different, or even the same, production be exempt from review even though the production could result in the same hazards and air emissions? No; CEQA requires an agency to assess the physical changes in the environment at the time a project is proposed.

Third, OPR misapplies the *CBE* case, which held that the project baseline cannot be determined by a hypothetical maximum permitted capacity rather than existing physical conditions at the time of commencement of the environmental review. In that case, the Supreme Court also discussed the potential variability of certain environmental conditions at a facility over time, but did not decide whether a use or environmental condition that may have existed in years prior could be considered the baseline *over* the current non-use of a site.

OPR's proposal further suffers from a lack of guidance on determining historic use. For example, in determining a baseline with variability over time, EIRs have used minimum or average values, such as the minimum or average amount of NO_x that is emitted from a facility over the last five years (as compared to the maximum amount of NO_x that would be emitted by a project). However, this approach would not necessarily apply to something like the presence of hazardous waste on the project site during a previous use because it is not the same kind of variability as NO_x emissions. OPR is not merely acknowledging that historic use or conditions may be considered *in addition to* consideration of current use or conditions, as *CBE*'s holding would suggest, but OPR is improperly *replacing* consideration of impacts as compared to current use with impacts as compared to historic use.

Therefore, we recommend that OPR not amend section 15301.

project..." (Pub. Res. Code §21065.3); and a significant effect is defined as a "...substantial, or potentially substantial, adverse change in the environment" (Pub. Res. Code §21068).

E. Checklist

OPR proposes to “update, consolidate and streamline” the Appendix G environmental checklist by consolidating certain categories of questions; reframing or deleting certain questions; adding questions; and revising the questions related to tribal cultural resources, transportation impacts, and wildfire risk. Below are comments on substantive changes to the checklist.

- **Aesthetics**

OPR proposes the following changes:

a) Have a substantial adverse effect on either a scenic vista or scenic resources within a designated scenic highway?

b) ~~“Substantially degrade the existing~~ Substantially degrade the existing visual character or quality of public views of the site and its surroundings in conflict with applicable zoning and other regulations?”

First, subdivision (a) incorrectly reads as though a “scenic vista” must also be within a “designated scenic highway.” Second, the “public views” addition is consistent with current case law; however, the latter addition regarding conflicts with zoning and other regulations is a substantive change that alters the focus of the analysis. In the same vein as OPR’s proposal regarding regulatory standards as thresholds, the Aesthetics analysis now turns solely on whether the project is in conflict with zoning and other regulations, not whether it degrades public views as compared to the current baseline. This goes beyond case law and fails to reflect that the fair argument standard still applies to a determination of impacts regardless of compliance with local zoning and regulations.

In sum, in section I of Appendix G, we recommend that OPR move “scenic resources within a designated scenic highway” after the word “either,” so the provision appropriately separates “scenic vista” from a “designated scenic highway.” In addition, we recommend that OPR remove the phrase “in conflict with applicable zoning and other regulations.”

- **Air quality**

OPR proposes the following changes:

- b) Violate any air quality standard or ~~contribute substantially to result in a cumulatively considerable net increase in~~ an existing or projected air quality violation?
- e) — ~~Create objectionable~~ Result in frequent and substantial emissions (such as odors, dust or haze) for a substantial duration that adversely affecting a substantial number of people?

For the first change in subsection (b), OPR should not delete the words “contribute substantially” for three reasons. First, CEQA requires agencies to analyze a project’s contribution to an existing or projected air quality violation, not just cumulatively, but individually. Second, given the poor air quality and existing violations of air quality standards in many parts of the State, agencies must continue to assess and identify mitigation for projects that propose to continue to emit air pollutants in an otherwise degraded air basin. Finally, OPR provided no justification for deleting the phrase “contribute substantially”, which agencies are required to analyze under CEQA.

For the second change, OPR states that the previous term “objectionable” is “subjective” and that the provision should focus on “the project’s potential to cause adverse impacts to substantial numbers of people.”²⁰ OPR cites to *Mira Mar Mobile Community v. City of Oceanside*²¹ to support its position. This aspect of OPR’s argument appears consistent with the case law; however, OPR does not provide any justification for adding the phrases “frequent and substantial emissions” and “substantial duration.” OPR is improperly turning the sample questions that agencies should ask when evaluating projects into thresholds of significance, which are much higher and for which there is no authority in the statute.

²⁰ *Id.*, at 41.

²¹ *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492–493 (“Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons”).

In sum, in section III of Appendix G, we recommend that OPR not delete “contribute substantially” in subsection (b) and delete “frequent and substantial” and “substantial duration” in subsection (e).

- **Noise**

OPR proposes the following changes:

a) Exposure of persons to or generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?

~~e) — A substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project?~~

~~d) — A substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the project?~~

In combining the subdivisions, OPR proposes to only use regulatory standards as a threshold rather than requiring consideration of an increase in noise above levels existing without the project. Although applicable standards can be relevant, environmental standards are not the only measure of a significant impact, as discussed above and acknowledged by OPR.

Therefore, we recommend that OPR not amend section XII of Appendix G regarding noise.

- **Transportation**

OPR proposes to revise the transportation analysis to focus on vehicle miles traveled rather than level of service, in accordance with current legislative changes. The changes are as follows:

(a) Conflict with ~~an applicable plan, ordinance or policy establishing measures of effectiveness for the~~ addressing the safety or performance of the circulation system, including transit, roadways, bicycle lanes and pedestrian paths? ~~, taking into account all modes of transportation including mass~~

~~transit and non-motorized travel and relevant components of the circulation system, including but not limited to intersections, streets, highways and freeways, pedestrian and bicycle paths, and mass transit?~~

~~(b) Conflict with an applicable congestion management program, including, but not limited to level of service standards and travel demand measures, or other standards established by the county congestion management agency for designated roads or highways? Cause substantial additional vehicle miles traveled (per capita, per service population, or other appropriate measure)?~~

~~(c) Result in a change in air traffic patterns, including either an increase in traffic levels or a change in location that results in substantial safety risks?~~

~~Substantially induce additional automobile travel by increasing physical roadway capacity in congested areas (i.e., by adding new mixed-flow lanes) or by adding new roadways to the network? increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?~~

~~(d) Result in inadequate emergency access?~~

~~(f) Conflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or safety of such facilities?~~

OPR states that “these changes in Appendix G are placeholders while OPR continues outreach on its proposal implementing SB 743.”²² It is unclear why OPR is even proposing placeholders at this stage, and it is difficult to assess the provision’s impact because it is subject to change.

Furthermore, we recommend that OPR keep the current phrase “increase hazards due to a design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)” in subdivision (c). While new language in subdivision (a) could eventually address this potential impact, most agency plans,

²² *Id.*, at 44.

ordinances, and policies are far behind in incorporating guidance on safety of transit, bicycle lanes, and pedestrian paths.

- **Water Supply**

OPR proposes to revise the water supply question to address the holding in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*,²³ as well as the water supply assessment and verification statutes. (Wat. Code § 10910; Govt. Code § 66473.7). The changes are as follows:

- d) [Would the project] Have sufficient water supplies available to serve the project and reasonably foreseeable future development during normal, dry and multiple dry years ~~from existing entitlements and resources, or are new or expanded entitlements needed?~~

The *Vineyard* case also emphasized the need to analyze any environmental impacts resulting from using a water supply, which is not mentioned in this provision. Furthermore, the phrase “from existing entitlements and resources, or are new or expanded entitlements needed” is a relevant question regarding whether the water supply is available or must be developed. Although the paper water analysis is useful, it is complex for the public to understand and comment upon. The public is better able to understand whether there is or is not an existing entitlement, which is clearly indicative of an available water supply. Therefore, we recommend that OPR not delete “from existing entitlements and resources, or are new or expanded entitlements needed.”

- **Mandatory Findings of Significance**

OPR proposes to make the following changes to this section:

- a) Does the project have the potential to substantially degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, substantially reduce the number or restrict the range of a rare or endangered plant or animal or

²³ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412.

eliminate important examples of the major periods of California history or prehistory?

OPR's attempt to make the checklist questions "thresholds of significance" violates CEQA, which requires that thresholds of significance be supported by substantial evidence. Instead, the checklist questions are meant to be environmental issues that are potentially affected, triggering further analysis and application of an agency's threshold of significance. Therefore, we recommend that OPR not amend section XVIII (a) of Appendix G.

F. Remedies and Remand

OPR proposes changes to "assist agencies in complying with CEQA in response to a court's remand, and help the public and project proponents understand the effect of the remand on project implementation."²⁴ The proposed new CEQA Guidelines section 15234 is intended to reflect Public Resources Code section 21168.9 and case law. However, OPR omits several important words and phrases, rendering the proposed revision inconsistent with the statute. We recommend that OPR add the following bolded language in order to ensure consistency with CEQA:

(a) Not every violation of CEQA is prejudicial requiring rescission of project approvals. Courts may fashion equitable remedies in CEQA litigation. If a court determines that a public agency has not complied with CEQA, and that noncompliance was a prejudicial abuse of discretion, the court shall issue a peremptory writ of mandate requiring the agency to:

(1) void the project approval, in whole or in part;

(2) suspend any **or all** project activities **that could result in an adverse change or alteration to the physical environment that preclude consideration **and** or implementation of mitigation measures **and** or alternatives necessary to comply with CEQA;** or

²⁴ OPR Draft, p. 72.

(3) take specific action necessary to bring the agency's determinations, findings, or decisions ~~consideration of the project~~ into compliance with CEQA.

(b) Following a determination described in subdivision (a), an agency may proceed with those portions of the challenged determinations, findings, or decisions for the project or those project activities ~~if that~~ the court finds:

(1) that the portion or specific project activity or activities are severable;

(2) severance will not prejudice the agency's compliance with CEQA ~~as described in the court's peremptory writ of mandate~~; and

(3) the remainder of the project complied with CEQA.

The word "all" from the statute must be included in the guideline in order to inform a court that it is appropriate to suspend all project activities in some cases. The phrase "that could result in an adverse change or alteration to the physical environment" must be added to provide the standard for what project activities must be suspended. The word "and" must be changed to "or", not only because "or" is used in the statute and has a different meaning, but because by requiring the court to find that an activity must preclude consideration *and* implementation of mitigation measures *and* alternatives necessary to comply with CEQA, OPR's proposal improperly changes the finding required by the statute.

The words "determinations, findings, or decisions" must be included in subdivision (a)(3) for consistency with the statute and for consistency with subdivision (b). Subdivision (b)(1)-(3) must be included, as required by the statute. In addition, the phrase "as described in the court's peremptory writ of mandate" in subdivision (b)(2) should be deleted because the standard is whether severance will not prejudice the agency's compliance with CEQA. Adding reliance on a peremptory writ of mandate is unnecessary and confusing, because there is no case in which the agency may not comply with CEQA.

In sum, we recommend that OPR either make no changes or make the changes consistent with the statute, as set forth above.

G. Water Impacts Analysis

OPR proposes the following changes regarding water impacts:

Section 15155. Water Supply Analysis; City or County Consultation with Water Agencies.

(f) The degree of certainty regarding the availability of water supplies will vary depending on the stage of project approval. A lead agency should have greater confidence in the availability of water supplies for a specific project than might be required for a conceptual plan. An analysis of water supply in an environmental document shall include the following:

(1) Sufficient information regarding the project's proposed water demand and proposed water supplies to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.

(2) An analysis of the long-term environmental impacts of supplying water throughout the life of all phases of the project.

(3) An analysis of circumstances affecting the likelihood of the water's availability, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, salt-water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.

(4) If the lead agency cannot confidently predict the availability of a particular water supply, it shall conduct an analysis of alternative sources, including at least in general terms the environmental consequences of using those alternative sources, or alternatives to the project that could be served with available water.

These changes are intended to reflect the *Vineyard* holding which requires analysis of a project's possible sources of water supply over the life of the project

and the environmental impacts of supplying that water to the project. Furthermore, the analysis must consider any uncertainties in supply, as well as potential alternatives. However, subsection (f)(4) is inconsistent with CEQA. If an agency cannot predict what the water supply for a project will be, then the project description is incomplete. If the project description is incomplete, CEQA requires the agency to analyze the possible alternative water sources with enough detail that enables the lead agency to identify mitigation for each one. Therefore, we recommend that OPR revise the language in section 15155(f)(4) to require more detailed analysis of alternative water supplies if the particular water supply is unknown.

H. Baseline

OPR proposes to make the following changes to section 15125, Environmental Setting:

(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project. ~~, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective.~~ This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives. The purpose of this requirement is to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts.

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. Where existing conditions change or fluctuate over time, a lead agency may define existing conditions by referencing historic conditions that are supported with substantial evidence. In addition to existing conditions, a lead agency may also use a second

baseline consisting of projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) If a lead agency demonstrates with substantial evidence that use of existing conditions would be either misleading or without informative value to decision-makers and the public, it may use a different baseline. Use of projected future conditions must be supported by reliable projections based on substantial evidence in the record.

(3) A lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline.

OPR's proposal to leave it to agencies to "choose the baseline that most meaningfully informs decision-makers and the public of the project's possible impacts,"²⁵ is inconsistent with the statute, and will lead to abuse, increased litigation and subversion of the public process.

OPR misapplies the *CBE* case, which discussed refinery operations and the potential variability of certain environmental conditions at such a facility over time. Contrary to OPR's suggestion, *CBE* did not decide the issue of whether an environmental condition that may have existed in years prior could be considered the baseline instead of the current conditions. In addition, OPR does not provide guidance on use of minimum or average conditions when considering historic conditions.

Any proposal that enables lead agencies to use historic or future conditions as the "environmental setting" that may be affected by a project must be *in addition to* the requirement to set forth the existing environmental setting at the time that environmental review begins. Otherwise, an agency will lack any evidence that use of the actual existing environmental setting would allegedly lead to misleading results. Requiring agencies to continue to analyze the actual existing environmental setting is also critical because the burden is on the applicant and the agency to provide the public with information on the environmental setting. CEQA

²⁵ OPR Draft, p. 90.

does not place the burden on the public to gain access to project sites and other information in order to describe the setting.

Furthermore, OPR's proposal to leave it to the agencies to decide the appropriate baseline is subject to abuse due to an agency's typical reliance on modeling and underlying data and consistent failure to provide the public with that same modeling and underlying data. Agencies are increasingly arguing that they relied on a "report" for which they did not review the underlying data. Thus, agencies do not disclose to the public the information necessary to enable the public to make a meaningful, if any, analysis of whether any agency has substantial evidence to support a particular description of the environmental setting, or baseline. Even OPR acknowledges that there are major drawbacks to using future conditions.²⁶

In sum, we recommend that OPR delete the reference to historic conditions in subdivision (a)(1) or clarify that they may be considered *in addition to* existing conditions. We further recommend that subdivision (a)(2) be deleted. Finally, we recommend that OPR add requirements to make all underlying data and assumptions available to the public during the entire comment period.

I. Mitigation

OPR proposes to make the following changes to section 15126.4:

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures ~~should~~ shall not be deferred until some future time. ~~However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way. Deferral of the specific details of mitigation measures may be permissible when it is impractical or infeasible to fully formulate the details of such measures at the time of project approval, or where a regulatory agency other than the lead agency will issue a permit for a project that will impose mitigation requirements, provided that the lead agency has:~~

²⁶ *Id.*, at 92.

1. fully evaluated the significance of the environmental impact and explained why it is not feasible or practical to formulate specific mitigation at the time of project approval;
2. commits to mitigation,
3. lists the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan; and
4. adopts specific performance standards that will be achieved by the mitigation measure.

This provision codifies several case holdings on the issue of deferral such as *Sacramento Old City Assn. v. City Council*,²⁷ *Preserve Wild Santee v. City of Santee*,²⁸ *Rialto Citizens for Responsible Growth v. City of Rialto*,²⁹ *Clover Valley Foundation v. City of Rocklin*,³⁰ and more.

We note that in its discussion of these changes, OPR states that it “proposes to clarify that when deferring the specifics of mitigation, the lead agency should either provide a list of possible mitigation measures, or adopt specific performance standards.”³¹ However, this is an incorrect characterization of the added language, because the provision as written would require *both* a list of possible mitigation measures *and* the adoption of specific performance standards. Therefore, we recommend that OPR require both.

J. Minor Technical Improvements

OPR proposes several technical changes to the following areas. We provide comments on the following changes.

- **Common Sense Exception**

OPR proposes to make the following change:

²⁷ *Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011.

²⁸ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260.

²⁹ *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899.

³⁰ *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200.

³¹ OPR Draft, p. 97.

(b) A project is exempt from CEQA if . . .

(3) The activity is covered by the ~~general rule~~ common sense exception that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

The phrase “common sense exception” is misplaced. OPR includes the phrase in the first sentence, which is the general rule of CEQA; whereas it is the second sentence that is the exception. We recommend that OPR revise its proposed language to address this discrepancy.

- **Citations in Environmental Documents**

OPR proposes to make the following changes to two different sections regarding citations in CEQA documents:

Section 15072 (4) The address or addresses where copies of the proposed negative declaration or mitigated negative declaration including the revisions developed under Section 15070(b) and all documents incorporated by reference ~~referenced~~ in the proposed negative declaration or mitigated negative declaration are available for review. This location or locations shall be readily accessible to the public during the lead agency's normal working hours.

Section 15087 (5) The address where copies of the EIR and all documents incorporated by reference ~~referenced~~ in the EIR will be available for public review. This location shall be readily accessible to the public during the lead agency's normal working hours.

This proposal violates CEQA. Public Resources Code section 21092(b)(1) requires that documents referenced in an environmental document be made available to the public. Public Resources Code section 21061 requires documents that are cited in an EIR be made available to the public. OPR provides no authority

for violating the statute and only requiring that documents “incorporated by reference” be made available for review.

CEQA Guideline section 15150 is, by its plain language, different and applicable to documents that are readily available to the public, such as regulations, ordinances, general plans, or other documents that are, for example, posted on agency websites or otherwise easily accessible. Sections 15087 and 15072 address *other* types of documents that are clearly described in the statute – those referenced in or cited in an environmental review document.

- **Project Benefits**

OPR proposes to make the following change:

§ 15124. Project Description

(b) A statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project and may discuss the project benefits.

OPR’s authority is *County of Inyo v. City of Los Angeles*;³² however, the language is taken out of context. The court in *County of Inyo* stated that an adequate project description enables a full discussion of benefits, costs, mitigation, and other issues related to project review. “Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the ‘no project’ alternative) and weigh other alternatives in the balance.”³³ Thus, the costs are just as relevant as the benefits.

Therefore, we recommend that OPR make no changes to section 15124.

³² *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185.

³³ *Id.*, at 192 – 193.

- **Using the Emergency Exemption**

OPR proposes to make the following changes to 15269, Emergency Projects:

(b) Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare. Emergency repairs include those that require a reasonable amount of planning.

(c) Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term, but this exclusion does not apply (i) if the anticipated period of time to conduct an environmental review of such a long-term project would create a risk to public health, safety or welfare, or (ii) if activities (such as fire or catastrophic risk mitigation or modifications to improve facility integrity) are proposed for existing facilities in response to an emergency at a similar existing facility.

OPR relies on *CalBeach Advocates v. City of Solana Beach* as support for the proposed changes.³⁴ The court in *CalBeach* held that the CEQA exemption did not require that emergencies be “unexpected” and “in order to design a project to prevent an emergency, the designer must anticipate the emergency.”³⁵

However, OPR’s phrase “reasonable amount of planning” is vague and uncertain, and *CalBeach* does not provide further guidance on that language. In addition, the proposed language for subdivision (c) unnecessarily expands the exemption by adding that long-term projects could be covered if the project meets the additional criteria. There is no further guidance regarding the criteria and no evidence that the change is consistent with the statute.

Therefore, we recommend that OPR provide further explanation of the language added to section 15269(b) and delete the proposed changes to 15269(c).

³⁴ *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal. App. 4th 529.

³⁵ *Id.*, at 537.

- **When is a Project Discretionary?**

OPR proposes the following changes to section 15357, Discretionary Project:

“Discretionary project” means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, ~~or~~ regulations, or other fixed standards. The key question is whether the approval process involved allows the public agency to shape the project in any way that could materially respond to any of the concerns which might be raised in an environmental impact report. A timber harvesting plan submitted to the State Forester for approval under the requirements of the Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code Sections 4511 et seq.)

OPR’s added language is inconsistent with CEQA and Supreme Court case law because OPR misstates the “key question.” The definition has already been determined by the Supreme Court in *Johnson v. State of California*,³⁶ and has been approved in numerous court decisions since that time. OPR provides no authority for adding the words and phrases “shape the project in any way,” “materially respond,” “concerns,” and “environmental impact report.” OPR must delete the phrase “[t]he key question is whether the approval process involved allows the public agency to shape the project in any way that could materially respond to any of the concerns which might be raised in an environmental impact report.” These words add requirements that do not exist in CEQA and case law.

In sum, OPR must not change the definition of “discretionary project” in section 15357.

II. CONCLUSION

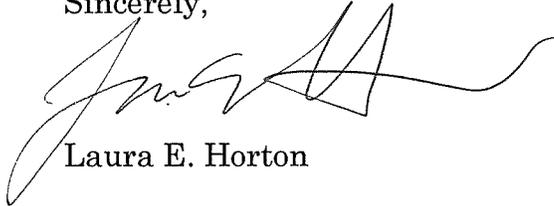
OPR proposes updates to various provisions of the CEQA Guidelines, from minor technical changes to substantive changes requiring new or different analysis. Some of these changes are properly based on case law that has developed over the years or new legislation. However, in many instances, OPR misinterprets case law,

³⁶ *Johnson v. State of California* (1968) 69 Cal. 2d 782.

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goes beyond case holdings, or proposes changes that are inconsistent with the statute. Therefore, we urge OPR to incorporate our suggested changes and recirculate another discussion draft. Should OPR fail to do so, the new CEQA Guidelines would be inconsistent with CEQA and court holdings and would not be upheld in court.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura E. Horton', with a long, sweeping horizontal flourish extending to the right.

Laura E. Horton

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