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October 12, 2015

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

via email to: CEQA.Guidelines@resources.ca.gov

Subject: Comments on OPR's *Proposed Updates to the CEQA Guidelines – Preliminary Discussion Draft,* August 11, 2015

Dear Mr. Alex:

As the Environmental Review Officer for the City and County of San Francisco ("the City"), and on behalf of the San Francisco Planning Department, I am pleased to respond to the Governor's Office of Planning and Research ("OPR") request for comment regarding the *Proposed Updates to the CEQA Guidelines – Preliminary Discussion Draft* ("Preliminary Discussion Draft") dated August 11, 2015. The Environmental Planning Division of the San Francisco Planning Department, acting as a Lead Agency for the City, conducts California Environmental Quality Act ("CEQA") review for a wide variety of public and private projects, in both urban and natural environments. Additionally, the San Francisco Planning Department conducts CEQA review on an unusually high volume of projects because, within the City, most building permits are considered discretionary actions that may be subject to CEQA. The San Francisco Planning Department processes approximately 5,000 CEQA determinations per year, the majority of these cases being categorical exemptions. Therefore, we have a unique Lead Agency perspective to offer and we have a vested interest in helping to improve the clarity and effectiveness of the CEQA Guidelines.

We present our comments on the proposed revisions to the CEQA Guidelines in the order of the topics included in the Preliminary Discussion Draft and have included the subject and page number of the OPR draft for the convenience of reviewers. Where our comments include proposals for specific text changes, these are indicated on the "clean" version of the OPR-proposed changes with additions shown in **bold double underline** and deletions shown in ~~**bold strikethrough**~~. We believe that the recommended revisions would improve the implementation of CEQA. Our comments cover a wide range of topics, each with merit. Yet, we would like to emphasize that our comments on Air Quality, and Population/Housing, and Energy are ones that are of particular import to us.

Using Regulatory Standards in CEQA

Please add text explaining that the regulatory standards may be of a public health and safety nature, in addition to purely "environmental" protection. Also add relevant case law.

OPR Proposed Text (pp. 18-19):

§ 15064.7. Thresholds of Significance

****

(d) 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 or to protect public health and safety;
(3) addresses the same environmental effect caused by the project; and,
(4) is designed to apply to the type of project under review.

AUTHORITY:
Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21000, 21082 and 21083, Public Resources Code; ***Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98; Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099***.

Clarifying Rules on Tiering – Proposed Amendments to Section 15152

Please add a reference to CEQA Section 21094.5 streamlining.

OPR Proposed Text (p. 28):

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Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21003, 21061, **21083.3,** 21093, 21094, 21100~~, and~~ 21151, **21157, and 21158** Public Resources Code; Stanislaus Natural Heritage Project, Sierra Club v. County of Stanislaus (1996) 48 Cal.App.4th 182; Al

Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App. 4th 729; and Sierra Club v. County of Sonoma (1992) 6 Cal.App. 4th 1307.

San Francisco Planning Department Proposed Text:

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Note: Authority cited: Section 21083, Public Resources Code. Reference: Sections 21003, 21061, 21083.3, 21093, 21094, **21094.5,** 21100**,** 21151, 21157, and 21158 Public Resources Code; Stanislaus Natural Heritage Project, Sierra Club v. County of Stanislaus (1996) 48 Cal.App.4th 182; Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App. 4th 729; and Sierra Club v. County of Sonoma (1992) 6 Cal.App. 4th 1307.

Using the Existing Facilities Exemption – Proposed Amendments to Section 15301

The City strongly supports the changes proposed by OPR to the examples of projects covered under Section 15031(c), the Existing Facilities Exemption. The Board of Supervisors of the City and County of San Francisco adopted a "Vision Zero" policy in 2014 to eliminate all traffic deaths in San Francisco by 2024. A key aspect of this policy is to prioritize the implementation of transportation facilities to reduce the potential for conflicts between automobiles and vulnerable roadway uses (cyclists and pedestrians). Clearly delineating that a variety of types of bicycle facilities, along with pedestrian crossings, are categorically exempt directly supports the rapid implementation of San Francisco's Vision Zero.

Additionally, these changes to the CEQA guidelines incorporate the legislative intent of SB 743 to "more appropriate balance the needs of congestion management with statewide goals related to…promotion of public health through active transportation, and reduction of greenhouse gas emissions."1 This change promotes the streamlining of the environmental review processes for projects that do not trigger any potential significant impacts.

Please include our recommend minor text addition in the examples of existing facilities improvements covered under this class.

OPR Proposed Text (pp. 36-37):

****

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety**, and other alterations**

[1] Senate Bill 743, 2012-2013, Reg. Sess., ch. 386, 2013 Cal. Stat. http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB743

such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, pedestrian crossings, and street trees, and other similar improvements that do not create additional automobile lanes).
*****
(l) Demolition and removal of individual small structures listed in this subdivision;
(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.
(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.
(3) A store, motel, office, restaurant, and similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.
(4) Accessory (appurtenant) structures including garages, carports, patios, swimming pools and fences.

San Francisco Planning Department Proposed Text:
****
(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety, and other alterations such as the addition of bicycle facilities, including but not limited to bicycle parking, bicycle-share facilities and bicycle lanes, pedestrian crossings, and **addition or replacement of** street trees, and other similar improvements that do not create additional automobile lanes).
****
(l) Demolition and removal of individual small structures listed in this subdivision;
(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.
(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.
(3) A store, motel, office, restaurant, and similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.
(4) Accessory (appurtenant) structures **and exterior areas,** including garages, carports, patios, swimming pools, **yards,** and fences

Updating the Environmental Checklist

I. AESTHETICS

A review of cited case law supports the conclusion that only public views of scenic vistas and substantial degradation of the visual character of environmentally sensitive areas are subject to CEQA scrutiny. Public views of scenic vistas are addressed in Aesthetics question a) and need not be re-addressed in Aesthetics part b). As written, rather than resulting in a less subjective analysis of "visual character" in urban areas, the revisions would impose greater CEQA review of aesthetic issues; any project requesting a change in zoning or that arguably "conflicts" with any design regulations would potentially raise a "fair argument" of a significant CEQA impact. Instead, the question, if left in at all, should focus on the visual character of environmentally sensitive areas, and not arguable conflicts with zoning and other design regulations in a built environment.

OPR Proposed Text (pp. 50-51):

I. AESTHETICS -- Would the project
a) Have a substantial adverse effect on **either** a scenic vista **or scenic resources within a designated scenic highway**?

b) ~~**Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?**~~

~~**c) 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**?

San Francisco Planning Department Proposed Text:

I. AESTHETICS -- Would the project

a) Have a substantial adverse effect on either a scenic vista or scenic resources, **including, but not limited to, trees, rock outcroppings, and historic buildings,** within a designated scenic highway?

b) Substantially degrade the existing visual character **of an environmentally sensitive area** ~~**or quality of public views of the site and its surroundings area in conflict with applicable zoning and other regulations**~~?

III. AIR QUALITY

Air Quality and all subsequent checklist topics should be renumbered, given the deletion of the preceding topic II, Agriculture and Forest Resources.

Regarding checklist question III. Air Quality a), the language has not been updated to reflect OPR's statement on page 43, which is made regarding land use plans: "OPR proposes to clarify that the focus should not be on the 'conflict' with the plan, but instead, on any environmental impact that might result from a conflict." This approach is applicable to all environmental topics, including Air Quality.

The City disagrees with the language added to question III. Air Quality a). While air quality management and air pollution control districts are considered experts regarding air quality issues, CEQA Guidelines Section 15064.7 recognizes a lead agency's authority to develop, adopt, and apply its own thresholds of significance or those developed by other agencies or experts. Some lead agencies, including San Francisco, may have additional expertise in identifying significance criteria. Further, some air pollution control districts may not have established significance criteria. Therefore, while lead agencies may use significance criteria put forward by air districts, the question should not be phrased in a manner that elevates the importance of significance thresholds of an air quality regulatory agency above those of the lead agency. Most lead agencies utilize Appendix G verbatim and thus the proposed narrow wording would effectively compel lead agencies to evaluate project impacts against significance criteria that may not be those of the lead agency.

Regarding checklist question III. Air Quality b), it is not clear how this is distinguished from checklist question III. Air Quality a). Air quality plans, at the air basin level, are prepared to comply with federal and state laws regarding criteria air pollutant *standards*, which are inherently *cumulative*. Violation of an air quality standard would conflict with an air quality plan. Therefore, we suggest that the two questions be combined into one and address the comments in the previous paragraph.

Regarding checklist question III. Air Quality d), the environmental effects of odors are not clear, nor is the definition of haze. The question is also phrased in a manner that is repetitive with questions a), b) and c). The term "such as" implies that other types of frequent and substantial emissions could adversely affect a substantial number of people. However, dust is typically considered a criteria air pollutant that would be addressed in questions a) and b) or localized issues related to c), and toxic air contaminants would be addressed in question c). The "such as" leaves the door open for other types of emissions that are not defined. Therefore, we suggest that this question be deleted. If it is not deleted, it should relabeled d) and rephrased to state "i.e." instead of "such as," and odor and haze should be defined.

In summary, the edits suggested are intended to address the two air quality impacts that occur from projects: criteria air pollutants (regional) and toxic air contaminants (local).

OPR Proposed Text (p. 53):

a) Conflict with or obstruct implementation of the applicable air quality plan o**r exceed significance criteria established by the applicable air quality management or air pollution control district**?

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?

c) ~~**Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions which exceed quantitative thresholds for ozone precursors)?**~~

~~**d)**~~ Expose sensitive receptors to substantial pollutant concentrations?

e) ~~**Create objectionable**~~ **Result in frequent and substantial emissions (such as** odors**, dust or haze) for a substantial duration that adversely** affect~~**ing**~~ a substantial number of people?

San Francisco Planning Department Proposed Text:

a) Conflict with ~~or obstruct implementation of~~ the applicable air quality plan ~~**or exceed significance criteria established by the applicable air quality management or air pollution control district**~~ **due to a cumulatively considerable net increase of any criteria air pollutant for which the project air basin is non-attainment under an applicable federal or state ambient air quality standard or disruption or hindrance of any air quality plan control measure?**

~~b) Violate any air quality standard or result in a cumulatively considerable net increase in an existing or projected air quality violation?~~

c) Expose sensitive receptors to substantial pollutant concentrations?

~~e) Result in frequent and substantial emissions (such as odors, dust or haze) for a substantial duration that adversely affect a substantial number of people?~~

V. CULTURAL RESOURCES

The following changes are proposed to more closely reflect the statutory language.

OPR Proposed Text (p. 55):

V. CULTURAL RESOURCES -- Would the project:
a) Cause a substantial adverse change in the significance of a historical resource **or of a unique archeological resource pursuant to** ~~**as defined in**~~ § 15064.5?

b) ~~**Cause a substantial adverse change in the significance of an archaeological resource pursuant to § 15064.5?**~~

~~**c)**~~ **Cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code § 21074?**~~**Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?**~~

~~**d)**~~ **c)** Disturb any human remains, including those interred outside of formal cemeteries?

San Francisco Planning Department Proposed Text:

V. CULTURAL RESOURCES -- Would the project:
a) Cause a substantial adverse change in the significance of a historical resource **as defined in § 15064.5** or of a unique archeological resource ~~**pursuant to § 15064.5**~~ **as defined in Public Resources Code § 21083.2**?

V. ENERGY

Public Resources Code Section 21100(b)(3) applies only to state agencies, boards, and commissions, not to local agencies. Thus, it does not seem appropriate to rely upon this section as the basis for adding the proposed Energy questions to Appendix G, which should generally apply to all types of lead agencies. OPR does not seem to otherwise cite sufficient legal support for requiring all projects to undertake an Appendix F energy analysis as part of the CEQA review process.

Moreover, it is not clear how incorporation of "renewable energy or energy efficiency measures into building design, equipment use, transportation or other project features" is an indicator of the environmental impacts of a project. While these measures may improve environmental performance, the phrasing of the question implies that projects that don't include these features would result in an environmental impact. Appendix G already asks about the air quality and greenhouse gas emissions of a project, which are the underlying concerns related to energy usage, as indicated in the excerpt of the Environmental Goals and Policy Report cited on page 76 of the Preliminary Discussion Draft.

Further, with the exception of Energy, all questions in the checklist ask questions to which a "yes" answer would suggest the possibility of a significant environmental impact. By contrast, the proposed checklist question b) for Energy poses a question to which a "yes" answer would indicate a project that would have less of an energy impact. At a minimum, its basic construction should be reversed.

For the above reasons, we request that the energy section be deleted.

OPR Proposed Text (p. 57):

V. ENERGY – Would the project:

a) Result in wasteful, inefficient, or unnecessary consumption of energy, during project construction or operation?

b) Incorporate renewable energy or energy efficiency measures into building design, equipment use, transportation or other project features?

San Francisco Planning Department Proposed Text:

~~**V. ENERGY – Would the project:**~~

~~**a) Result in wasteful, inefficient, or unnecessary consumption of energy, during project construction or operation?**~~

~~**b) Incorporate renewable energy or energy efficiency measures into building design, equipment use, transportation or other project features?**~~

VIII. HAZARDS AND HAZARDOUS MATERIALS

See our comment under XI. Open Space, Managed Resources and Working Landscapes below. We recommend combining questions VIII(h) and XI(d).

OPR Proposed Text (p. 58):

VIII. HAZARDS AND HAZARDOUS MATERIALS -- Would the project:
*****
h) Expose people or structures to a significant risk of loss, injury or death involving wildland fires, **flooding or other inundation, unstable soils and other potential hazards** ~~**including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands**~~?

San Francisco Planning Department Proposed Text:

h) Expose people or structures to a significant risk of loss, injury or death involving wildland fires, flooding or other inundation, unstable soils and other potential hazards? **Considerations may include, among others, whether the project would place new structures in or otherwise adversely affect areas requiring special management due to hazards, including, but not limited to:**

(i) areas subject to periodic inundation, including coasts, wetlands, and riparian areas and flood zones;

(ii) wildfire hazard areas;

(iii) unstable soil areas, including fault zones, liquefaction zones, areas subject to landslides and expansive soil areas; or

(iv) areas required for the protection of water quality and water supply?

IX. LAND USE AND PLANNING

When a local government develops a project on land it owns in another jurisdiction, the land use policies of the other jurisdiction do not apply under the principle of intergovernmental immunity and there would therefore be no conflict. OPR's proposed deletion of language in checklist question IX. Land Use and Planning b), could imply that these legally inapplicable policies must be considered, which would conflict with the intergovernmental immunity principles. Therefore, we request that some of this language be added back in.

OPR Proposed Text (p. 61):

IX. LAND USE AND PLANNING - Would the project:
*****
b) ~~**Conflict**~~ **Cause a significant environmental impact due to a conflict** with any ~~**applicable**~~ land use plan, policy, or regulation ~~**of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance)**~~ adopted for the purpose of avoiding or mitigating an environmental effect?

San Francisco Planning Department Proposed Text:

IX. LAND USE AND PLANNING - Would the project:
*****
b) Cause a significant environmental impact due to a conflict with any **applicable** land use plan, policy, or regulation **of an agency with jurisdiction over the project** adopted for the purpose of avoiding or mitigating an environmental effect?

XI. OPEN SPACE, MANAGED RESOURCES AND WORKING LANDSCAPES

Limiting open space areas to be considered to those that are in a "natural resource" state or contain working landscapes (which appears to mean agricultural or timberlands) would potentially exclude built landscapes, such a public parks and recreation spaces that may have non-native trees, plants, and other vegetation but are nevertheless treasured open space areas as far as the public is concerned and would seem to qualify as part of the "physical environment" under CEQA.

"Open Space, Managed Resources and Working Landscapes" is a cumbersome title for a resource topic. We understand the intention for this topic to correspond with the open space element categories of Government Code Section 65560(b)(4); however, question d) concerns hazards that are similar to VIII. Hazards and Hazardous Materials question (h). We recommend that these questions be combined as one topic under VIII. Hazards and Hazardous Materials. Because

questions a) through c) in topic XI all concern open space, the resource topic can be shortened to just "Open Space."

A final parenthetical comma has been added to question (c) for clarification.

OPR Proposed Text (pp. 62-66):

XI. OPEN SPACE, MANAGED RESOURCES AND WORKING LANDSCAPES – Would the project adversely affect open spaces containing natural resources and working landscapes? Considerations may include, among others, whether the project would:
****

c) Adversely affect open spaces used for outdoor recreation, including parks, trails and similar resources through conversion to non-recreation uses or by increasing demand to a degree that substantial physical deterioration would occur?

d) Place new structures in or otherwise adversely affect areas requiring special management due to hazards, including, but not limited to:

(i) areas subject to periodic inundation, including coasts, wetlands, and riparian areas and flood zones;

(ii) wildfire hazard areas;

(iii) unstable soil areas, including fault zones, liquefaction zones, areas subject to landslides and expansive soil areas; or

(iv) areas required for the protection of water quality and water supply?

San Francisco Planning Department Proposed Text:

OPEN SPACE~~, MANAGED RESOURCES AND WORKING LANDSCAPES~~ – Would the project adversely affect open spaces containing natural resources**, public parks and recreation areas,** and working landscapes? Considerations may include, among others, whether the project would:
****

c) Adversely affect open spaces used for outdoor recreation, including parks, trails and similar resources**,** through conversion to non-recreation uses or by increasing demand to a degree that substantial physical deterioration would occur?

~~**d) Place new structures in or otherwise adversely affect areas requiring special management due to hazards, including, but not limited to:**~~

~~**(i) areas subject to periodic inundation, including coasts, wetlands, and riparian areas and flood zones;**~~

~~**(ii) wildfire hazard areas;**~~

> ~~**(iii) unstable soil areas, including fault zones, liquefaction zones, areas subject to landslides and expansive soil areas; or**~~
> ~~**(iv) areas required for the protection of water quality and water supply?**~~

XIII. POPULATION AND HOUSING

The proposed "jobs / housing fit" language in question c) could be interpreted as requiring expensive, complex analyses that is not required under CEQA. The discussion on page 42 cites mostly to academic and planning documents and not to the law. The one case cited, Defend the Bay v. City of Irvine (2004) 119 Cal. App. 4th 1261, does not really stand for the proposition that lead agencies have to, or should, do this analysis. In that case, the court upheld an EIR's conclusion that a large-scale development project would not adversely impact housing or employment growth under the substantial evidence standard; it did not hold that every case has to undertake a jobs / housing analysis.

The need to look at the jobs / housing fit comes from Section 21100(b)(5) of the Public Resources Code (requiring analysis of "the growth producing impact of the proposed project") and Section 15126(d) of the Guidelines (same). Interestingly, Section 21100 is in the section of CEQA that applies to state agencies – so there could be an argument that these requirements do not apply to local agencies. But even if we put that issue aside, it is by no means clear that local agencies are mandated to do an exhaustive jobs / housing analysis.

Section 15126.2(d) of the Guidelines provides some guidance as to what to look for when analyzing growth-inducing impacts:

> Growth-Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

Under this guidance, projects can be growth inducing if they provide infrastructure to remove capacity constraints, or if they increase population in a way that leads to further development and new construction. Note that under either scenario, the CEQA Guidelines require that an EIR

discuss "the ways in which" the project would foster growth. Cases have consistently held that this analysis need not be detailed or exhaustive. For example, in Napa Citizens For Honest Government v. Napa Co. Board of Supervisors ((2001) 91 Cal.App.4th 342, 369), the Court of Appeal explained that:

> [A]n agency cannot avoid the EIR process simply because a project does not itself call for the construction of housing or other facilities that will be needed to support the growth contemplated by the project. *It does not follow, however, that an EIR is required to make a detailed analysis of the impacts of a project on housing and growth. Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth*. The detail required in any particular case necessarily depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment. In addition, it is relevant, although by no means determinative, that future effects will themselves require analysis under CEQA.

Defend the Bay cited this language from Napa Citizens, and so do other, more recent cases, including the Supreme Court, in Muzzy Ranch Co. v.Solano Co. Airport Land Use Commission, (2007) 41 Cal. 4th 372, 388.

In sum, as proposed by OPR, the language could be interpreted as requiring expensive, complex analyses that is not supported by law. We request that ORP delete its currently proposed question c) in the Population and Housing section of Appendix G.

> *OPR Proposed Text (p. 65):*
>
> XIII. POPULATION AND HOUSING -- Would the project:
>
> *****
>
> c) **Result in a substantial imbalance in regional jobs / housing fit?** ~~**Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?**~~
>
> *San Francisco Planning Department Proposed Text:*
>
> XIII. POPULATION AND HOUSING -- Would the project:
> *****
>
> ~~**c) Result in a substantial imbalance in regional jobs / housing fit?**~~

XIV. TRANSPORTATION

Proposed checklist question XIV. Transportation b) is too vague and unbounded, and it can be construed to imply that additional VMT per se will constitute an impact. This would be detrimental to the environment and contrary to State policies to promote growth in infill areas. Our recommended changes would make it clear that additional VMT may be an impact only when substantially over the regional average.

Regarding question c), our proposed changes are meant to clarify that adding new roadways per se is not an impact, except where those changes would lead to a substantial increase in automobile travel. As written the question could be interpreted to mean that new roadways per se would lead to an impact when, in fact, there are circumstances where new roadways could constitute a safety improvement and not lead to new trips.

OPR Proposed Text (pp. 67-68)

XIV. TRANSPORTATION – Would the project:
*****
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)**?~~

San Francisco Planning Department Proposed Text:

XIV. TRANSPORTATION – Would the project:
*****
b) Cause substantial additional vehicle miles traveled (per capita, per service population, or other appropriate measure)**, when compared to the regional average**?
c) Substantially induce additional automobile travel **(e.g., by increasing physical roadway capacity through the addition of new mixed-flow lanes on an existing roadway, or adding new limited access roadways within urban areas)** ~~**by increasing physical roadway capacity in congested areas (i.e., by adding new mixed-flow lanes) or by adding new roadways to the network**~~**?**

Remedies and Remand – Proposed New Section 15234

For clarification, we recommend deletion of the reference to Section 15088. Section 15088 arguably imposes a more expansive standard, applicable before an EIR is final and subject to court review, than Section 15162, which is the more appropriate standard. This is because the court will have upheld the non-remanded portions of the CEQA document and those portions should be considered final.

OPR Proposed Text (pp. 73-74) (all new text):

Section 15234. Remand

(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 project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or

(3) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA. August 11, 2015.

(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 that the court finds:

(1) are severable;

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

(3) complied with CEQA.

(c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during that period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

(d) As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with principles of res judicata. In general, where a court has required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in section 15088.5. In general, where a court has not required an agency to void its approval of

the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in Section 15162.

San Francisco Planning Department Proposed Text:

(a) Not every violation of CEQA is prejudicial requiring rescission of project approvals **or suspension of project activities**. Courts may fashion equitable remedies in CEQA litigation. If a court determines that a public agency **determination, finding or decision or a specific project activity or activities** 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 **do one or more of the following**:

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

(2) suspend any project activities that preclude consideration and implementation of mitigation measures and alternatives necessary to comply with CEQA; or

(3) take specific action necessary to bring the agency's consideration of the project into compliance with CEQA.

(b) Following ~~a determination~~ **an order** 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 that the court finds:

(1) are severable;

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

(3) ~~complied~~ **comply** with CEQA.

(c) An agency may also proceed with a project, or individual project activities, during the remand period**,** where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during ~~that~~ **the remand** period because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period.

(d) As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall only be required as required by the court consistent with principles of res judicata. In general, where a court has required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court~~, except under the circumstances described in section 15088.5~~. In general, where a court has not required an agency to void its approval of the project, the agency need not expand the scope of analysis on remand beyond that specified by the court, except under the circumstances described in Section 15162.

Analysis of Energy Impacts – Proposed Amendments to Section 15126.2

The City requests that OPR please provide examples of wasteful, inefficient, or unnecessary consumption of energy. Examples of projects that result in wasteful, inefficient, or unnecessary consumption of energy are projects that result in significant vehicle miles traveled impacts, as outlined in OPR's *Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743*, August 6, 2014; projects that utilize a low percentage of energy input into usable electricity (e.g., inefficient power plants); and projects that have a high ratio of total facility energy use to information technology equipment power draw (e.g., data centers with a high power usage effectiveness).

Section 15126.2(b) should clarify that the analysis can be quantitative and/or qualitative or performance-based standards, consistent with greenhouse gas analyses (Section 15064.4) and the rule of reason statement already included in the paragraph.

OPR Proposed Text (pp. 78-79):

(b) Energy Impacts. The EIR shall include an analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include the project s energy use f or all project phases and components, including transportation-related energy, during construction and operation. In addition to project design, other relevant considerations may include, among others, the project's size, location, orientation, equipment use and any renewable energy features that could be incorporated into the project. (Guidance on information that may be included in such an analysis is presented in Appendix F.) This analysis is subject to the rule of reason and shall focus on energy demand that is caused by the project.

San Francisco Planning Department Proposed Text

(b) Energy Impacts. The EIR shall include a~~n~~ **quantitative and/or qualitative or performance standard** analysis of whether the project will result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy. This analysis should include…

Water Supply Analysis in CEQA – Proposed Amendments to Section 15155

The City concurs with OPR that the discussion of water supply analysis requirements should be in Section 15155 and not in Section 15064, Section 15126.2, or a new separate section.

The City also believes that Section 15126.2(b) should clarify that the analysis can be quantitative and/or qualitative or performance based standards, consistent with greenhouse gas analyses (Section 15064.4) and the rule of reason statement already included in the paragraph.

The City also believes that Section 15126.6(f)(1) should address water supply, and we propose revisions to that section as follows:

> "Feasibility. Among the factors that may be taken into account when addressing the feasibility of alternatives are site suitability, economic viability, availability of infrastructure, availability of adequate water supplies, especially in cases where there may not be sufficient water supplies for the proposed project, 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)."

Edits to (f) below are added to take into account typical water supply analyses for infill projects, where a source of water may exist already and impacts associated with obtaining that water were examined when those sources of water were secured.

> *OPR Proposed Text (pp. 87-88) (all new text):*
>
> **(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.**

San Francisco Planning Department Proposed Text:

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

(1) **If new sources of supply are needed,** ~~S~~**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 **any new sources of** 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.

Baseline – Proposed Amendments to Section 15125

The first paragraph of Section 15125(a) seems too open ended and may leave the establishment of Environmental Setting open to interpretation, so please consider adding "as described below." The added language is from *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 445, 453.

OPR Proposed Text (p. 94):

(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.

San Francisco Planning Department Proposed Text:

(a) An EIR must include a description of the physical environmental conditions in the vicinity of the project**, as described below**. 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 **either** ~~**both**~~ a local ~~**and**~~ **or a** regional perspective**, or both, as applicable**. 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**. Where existing conditions may change before the project would go into operation, the lead agency may adjust the existing conditions baseline to reflect conditions at the time operation of the project commences, in which case the lead agency should explain and provide evidentiary support for that decision.** 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, **such as a future baseline condition that can be expected following years of project operation**. Use of projected future conditions **in lieu of existing 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 **or under construction**, under existing permits or plans, as the baseline.

Deferral of Mitigation Details – Proposed Amendments to Section 15126.4

Formulating performance standards with identified alternative ways of achieving mitigation is different from "deferral" of mitigation and does not require justification as to why flexibility is built into the measure. We proposed revisions that reflect this point.

OPR Proposed Text (p. 98):

(a) Mitigation Measures in General.

(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.

(A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(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 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:**

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.

San Francisco Planning Department Proposed Text:

(a) Mitigation Measures in General.

(1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy.

(A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(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 shall not be deferred until some future time. **However, measures may specify performance standards that would mitigate the significant effect of the project and which identify more than one way that the performance standard can be achieved. In addition,** ~~**D**~~**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:

1. fully evaluated the significance of the environmental impact and explained why it is not feasible or practical to formulate specific **details of the** mitigation **measure** at the time of project approval;

2. commit**ed**~~**s**~~ to mitigation,

3. list**ed**~~**s**~~ the mitigation options to be considered, analyzed and possibly incorporated in the mitigation plan~~**; and**~~ **or**
~~**4.**~~ adopt**ed**~~**s**~~ specific performance standards that will be achieved by the mitigation measure.

Pre-Approval Agreements – Proposed Amendments to Section 15004

We propose clarification to specify that various binding commitments that do not involve physical changes to the environment are permissible prior to completing CEQA analyses. Such agreements may involve, for example, paying for preparation of design documents, permit applications, and various other "pre-approval" documents. In subsection (4), we recommend deletion of OPR's proposed introductory clause of what is not an approval (mere inclination of support), and the example of what is an approval (granting vested rights), as neither captures the full range of actions that fall into either category and thus do not provide useful guidance.

The deletion of "For example, it shall not grant any vested rights prior to compliance with CEQA" and the addition of "that would change the physical environment" are proposed to more closely reflect statutory language.

OPR Proposed Text (p. 110-111):

* * * * *

(b) Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.

(1) With public projects, at the earliest feasible time, project sponsors shall incorporate environmental considerations into project conceptualization, design, and planning. CEQA compliance should be completed prior to acquisition of a site for a public project.

(2) To implement the above principles, public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not:

(A) Formally make a decision to proceed with the use of a site for facilities which would require CEQA review, regardless of whether the agency has made any final purchase of the site for these facilities~~**, except that agencies may designate a preferred site for CEQA review and may enter into land acquisition agreements when the agency has conditioned the agency's future use of the site on CEQA compliance**~~.

(B) Otherwise take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.

(3) With private projects, the Lead Agency shall encourage the project proponent to incorporate environmental considerations into project conceptualization, design, and planning at the earliest feasible time.

(4) While mere interest in, or inclination to support, a project does not constitute approval, a public agency entering into preliminary agreements regarding a project prior to approval shall not, as a practical matter, commit the agency to the project. For example, it shall not grant any vested rights prior to compliance with CEQA. Further, any such agreement should:

(A) Condition the agreement on compliance with CEQA;

(B) Not bind any party, or commit to any definite course of action, prior to CEQA compliance; and

(C) Not restrict the lead agency from considering any feasible mitigation measures and alternatives, including the "no project" alternative.

San Francisco Planning Department Proposed Text to (b)(4):

(4) ~~**While mere interest in, or inclination to support, a project does not constitute approval, a**~~ **A** public agency entering into preliminary agreements regarding a project prior to approval shall not, as a practical matter, commit the agency to the project. ~~**For example, it shall not grant any vested rights prior to compliance with CEQA.**~~ Further, any such agreement should:

(A) Condition the agreement on compliance with CEQA;

(B) Not bind any party, or commit to any definite course of action **that would change the physical environment**, prior to CEQA compliance; and

(C) Not restrict the lead agency from considering any feasible mitigation measures and alternatives, including the "no project" alternative.

Consultation with Transit Agencies – Proposed Amendments to Section 15072

The City supports the changes proposed by OPR in the discussion draft CEQA Guidelines (p. 120) to encourage consultation with a lead agency undertaking an environmental review of a project and a public transit agency with facilities within one-half mile of the proposed projects. The City operates a multi-modal municipal transportation system (MUNI) through the San Francisco Municipal Transportation Authority (SFMTA). As an agency of the City and County of San Francisco, SFMTA enjoys a strong connection with the SF Planning Department. This relationship already ensures that consultation occurs prior to the preparation of an environmental review document. Amendments to Sections 15027 and 1086 would facilitate and strengthen the existing relationships and level of consultation that already occurs. San Francisco is served by numerous regional and local transit providers, several of which are operated by Special Governmental Districts without a direct connection to a local jurisdiction. The City understands that many of the smaller transit agencies are not always contacted or contacted in a timely fashion to review development projects and provide their comments during environmental review scoping and/or

comment period. For this reason, the City supports this provision to encourage consultation between a CEQA lead agency and transit agencies operating within one-half mile of the proposed project.

Notwithstanding this support, we propose to revise Guidelines Section 15072 to be similar to CEQA Guidelines Section 15082, Notice of Preparation and Determination of Scope of EIR, paragraph (b).

OPR Proposed Text (p. 121):

(e) For a project of statewide, regional, or areawide significance, the lead agency shall also provide notice to transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project as specified in Section 21092.4(a) of the Public Resources Code. "Transportation facilities" includes: major local arterials and public transit within five miles of the project site and freeways, highways and rail transit service within 10 miles of the project site. **The lead agency should also consult with public transit agencies with facilities within one-half mile of the proposed project.**

San Francisco Planning Department Proposed Text:

(e) For a project of statewide, regional, or areawide significance, the lead agency shall also provide notice to transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project as specified in Section 21092.4(a) of the Public Resources Code. "Transportation facilities" includes: major local arterials and public transit within five miles of the project site and freeways, highways and rail transit service within 10 miles of the project site. The lead agency should also consult with public transit agencies with facilities within one-half mile of the proposed project. **If a transit agency fails to provide the lead agency a response in 30 days or a well-justified request for additional time, the lead agency may presume that none of those agencies have a response to make and that the consulted transit agencies concur with the proposal.**

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That concludes our comments on the Preliminary Discussion Draft. Thank you for this opportunity to provide input on what revisions should be made to the CEQA Guidelines. We appreciate your consideration of our comments and welcome any questions or comments you

might have. Please contact Lisa Gibson at (415) 575-9032 or at Lisa.Gibson@sfgov.org if you would like to speak to us regarding our comment letter.

Sincerely,

Sarah B. Jones
Environmental Review Officer
San Francisco Planning Department