



SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT

300 Lakeside Drive, P.O. Box 12688
Oakland, CA 94604-2688
(510) 464-6000

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VIA EMAIL and U.S. MAIL

Thomas M. Blalock, P.E.
PRESIDENT

Tom Radulovich
VICE PRESIDENT

Grace Crunican
GENERAL MANAGER

Mr. Christopher Calfee, Senior Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

DIRECTORS

Gail Murray
1ST DISTRICT

Joel Keller
2ND DISTRICT

Rebecca Saltzman
3RD DISTRICT

Robert Raburn, Ph.D.
4TH DISTRICT

John McPartland
5TH DISTRICT

Thomas M. Blalock, P.E.
6TH DISTRICT

Zakhary Mallett, MCP
7TH DISTRICT

Nicholas Josefowitz
8TH DISTRICT

Tom Radulovich
9TH DISTRICT

Re: BART Comments on *Preliminary Discussion Draft of Proposed Updates to the CEQA Guidelines*

Dear Mr. Calfee:

On behalf of the San Francisco Bay Area Rapid Transit District (BART), we welcome this opportunity to comment on the Office of Planning and Research's Proposed Updates to the CEQA Guidelines. Our comments are focused on clarifying certain proposed changes which we strongly support.

With 45 transit stations, BART currently provides 100 percent electric rail transit service to San Francisco, Alameda, Contra Costa, and San Mateo counties and expects to open four new stations in the next few years (two will be in Santa Clara County).

We play an important role in enhancing the region's air quality, land use, and transportation networks. BART carries, on average, 420,000 riders on weekdays and expects to see ridership grow to 659,000 by 2035. One rider using BART each weekday saves an average of 315 gallons of gas per year and reduces CO2 emissions by an average of 6,277 pounds a year.¹

While transit growth reduces highway congestion and improves regional air quality, such growth also places greater demands on BART's existing core station facilities, some of which are at near-capacity levels of crowding during peak hours.

For these reasons, we applaud and strongly support many of the proposed updates in the CEQA Guidelines that recognize public transit systems as a public resource to be valued and public transit agencies as experts with whom consultation is critical.

¹ BART Green Factsheet. <http://www.bart.gov/guide/bluesky/greenfacts>

Our attached comments propose changes to clarify the proposed amendments in order to (1) ensure that transit agencies are consulted when a project may impact transit, (2) encourage lead agencies to use transit agency expertise in assessing transportation impacts, (3) provide certainty for minor alteration projects that modernize transit, (4) ensure that transit-adjacent development is transit-oriented, and (5) promote integration of other public projects with transit uses.

We thank you for your consideration and look forward to participating in the CEQA Guidelines process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Val Menotti". The signature is fluid and cursive, with a long horizontal stroke at the end.

Val Menotti,
Chief Planning and Development Officer

cc: A. Tang
D. Dean
M. Wu-Morri
N. Carlin
B. Powers

ATTACHMENT A

August 11, 2015 Preliminary Discussion Draft of Proposed Updates to the CEQA Guidelines *Changes Proposed by BART*

A) Consultation with Transit Agencies, Sections 15072(e), 15086(a), and 15082(c)(2)(e)

Rationale for Proposed Clarifications

In its August Preliminary Discussion Draft, OPR proposed a provision stating that lead agencies should consult public transit agencies with facilities within one-half mile of the proposed project. BART strongly supports such a clarification. Additionally, BART suggests changes to clarify the scope of such consultation.

The first change would clarify that this additional consultation applies specifically to “projects that are not of statewide, regional, or areawide significance.” The existing Guidelines already require transit agency consultation for projects that are of statewide, regional, or areawide significance.

The second change would limit the consultation provision to projects near a smaller subcategory of transit facilities, transit stops or stations. The August 11th language states that lead agencies should consult transit agencies for a project that is proximate to any transportation facility. As defined in Guidelines Section 15072(e), “transportation facilities” could include transit maintenance yards or operations centers. In addition, the definition of transportation facilities includes rail transit service within 10 miles of the project site, which is inconsistent with the proposed added language referring to facilities within one-half mile of the proposed project. However, consultation is critical for projects near major transit stops (including transit stations), whose capacity may be adversely affected by increased development and population growth near that stop. Section 21064.3 of the Public Resources Code already provides a clear definition of major transit stop, and we propose using that definition here.

The third change would add such consultation to the scoping provision, Section 15082(c), to ensure that public transit agencies are apprised of proposed projects from the outset and have the opportunity to participate in the scoping process. This is consistent with CEQA, Pub. Res. Code Section 21083.9(b)(4), which requires notice of scoping meetings to public agencies with transportation facilities consulted pursuant to Pub. Res. Code Section 21092.4. As noted above, noticing is critical for projects near major transit stops that may be affected by nearby projects.

Finally, BART requests that “should” be changed to “shall.” Absent the imperative, lead agencies would remain free to not consult with transit agencies. Appendix G, Section XVI, already identifies conflict with applicable transit and other transportation plans, ordinances and policies as a significant environmental impact under CEQA. Courts have supported such requirements as consistent with existing statute. See, for example, *City of San Diego v. Bd. of Trustees of Cal. State Univ.* (2011) Cal. App. 4th 1134, invalidating the EIR certification for failure to adequately consider impacts on the local transit system (appeal decided on other grounds, *City of San Diego v. Bd. Of Trustees of Cal.State Univ.* (2015) 61 Cal.4th 945).

Consultation with transit agencies is necessary to identify such inconsistencies and ensure avoidance or mitigation of significant impacts.

Text of the Proposed Clarifications

BART's proposed changes are shown in **bold type and underlined**; OPR's August 11th discussion draft changes are shown in **bold only**.

Section 15072(e) and 15086(a)(5): "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 jurisdiction 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. **For projects that are not of statewide, regional, or areawide significance, the lead agency should shall also consult with public transit agencies with facilities major transit stops, as defined in Section 21064.3 of the Public Resources Code, within one-half mile of the proposed project.**"

Section 15082(c):

"(1) For projects of statewide, regional, or areawide significance pursuant to Section 15206, the lead agency shall conduct at least one scoping meeting. A scoping meeting held pursuant to the National Environmental Policy Act, 42 USC 4321 et seq. (NEPA) in the city or county within which the project is located satisfies this requirement if the lead agency meets the notice requirements of subsection (c)(2) below.

(2) The lead agency shall provide notice of the scoping meeting to all of the following:

- (A) any county or city that borders on a county or city within which the project is located, unless otherwise designated annually by agreement between the lead agency and the county or city;
- (B) any responsible agency;
- (C) any public agency that has jurisdiction by law with respect to the project;
- (D) any organization or individual who has filed a written request for the notice;
- (E) **any public transit agency with a major transit stop, as defined in Section 21064.3 of the Public Resources Code, within one-half mile of the proposed project.**"

B) Using Regulatory Standards in CEQA, Section 15064.7(d)

Rationale for Proposed Clarifications

In BART's prior comments, we requested that OPR develop broader criteria so as to not preclude use of regulatory standards developed by transit agencies. We support the direction of OPR's proposed changes as they move towards that goal. We suggest certain, additional clarifications.

BART and other transit agencies may choose to develop thresholds of significance for transit-related transportation impacts. Such thresholds would assist lead agencies in assessing when projects may avoid or minimize significant adverse impacts on transit. However, we are concerned that the proposed criteria (2) and (3) may engender uncertainty as to whether transit agency standards qualify as being adopted "for the purpose of environmental protection." More generally, the proposed language may create unintended confusion and potential for litigation over the meaning of phrases not defined by CEQA, such as whether a standard is for the purpose

of “environmental protection.” Instead, we propose substituting “purpose of minimizing or avoiding the environmental effect at issue.” This definition is consistent with CEQA’s definition of mitigation found at Section 15370 of the CEQA Guidelines. Similarly, criterion 3 appears to serve the same purpose as criteria 2 and 4; so, we submit that it should be eliminated to avoid additional ambiguities on the distinctions between the criteria.

Finally, we are concerned that criterion 4, as drafted, may preclude a lead agency from applying a regulatory standard because the drafters failed to list the “types” of projects that the standard covers, at the time the standard was designed. We are also concerned by the risk of confusion and litigation over the meaning of the words “designed to apply” and “type of project.” We suggest either deleting criterion 4 (because criterion 2 already addresses the issue) or substituting with the simpler and more direct wording: “applicable to the project impacts under review.” Such a substitution would clarify the intent while continuing to require that the lead agency demonstrate how and why the criterion is applicable to the specific project impacts under review, as cautioned by the court in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004), 116 Cal.App.4th 1099 (thresholds cannot be automatically used) and *Berkeley Keep Jets Over the Bay v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1382 (where the agency failed to adequately justify its dismissal of the single event noise standard in favor of the cumulative noise standard for jet noise).

Text of the Proposed Clarifications

BART’s proposed changes are shown in **bold type and underlined**; OPR’s August 11th discussion draft changes are shown in **bold only**.

Section 15064.7(d) “Any public agency may adopt or use an environmental standard as a threshold of significance.... 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~~ minimizing or avoiding the environmental effect at issue;**
- ~~(3) addresses the same environmental effect caused by the project; and,~~**
- (4) is applicable to the ~~designed to apply to the type of project~~ impacts under review.”**

C) Existing Facilities Exemption, Section 15301

Rationale for Proposed Clarifications

OPR’s August 11th changes add additional examples of projects qualifying for the existing facilities categorical exemption, which BART fully supports and applauds. In addition, we suggest the following additional clarifications. In the existing Guidelines section 15301(a), “interior or exterior alterations” are already included as eligible for an exemption, but examples of exterior alterations are not provided. Similar to “interior alterations,” examples of qualifying exterior alterations should be provided.

Such a clarification would provide greater certainty for BART and other transit agencies that small, minor alteration projects to modernize aging transit stops may be undertaken without

extensive CEQA review. Such improvements include installing LED, energy-efficient lighting in our stations and parking lots, reconfiguring vehicle circulation patterns to permit more non-motorized travel (bicycle paths, safety bollards that convert vehicle ingress/egress areas into protected pedestrian paths), energy-efficient travel (EV-vehicle charging stations) in our parking lots, and the installation of security cameras systemwide to ensure the personal safety and security of our passengers. Clarifying that such projects are indeed categorically exempt from CEQA review will enable BART to keep pace with the times and quickly deliver small modernization improvements incrementally, as technology evolves.

We also propose additional examples to interior alterations. As BART's ridership grows rapidly, internal circulation changes within a station, such as more escalators and elevators, count among the few minor alterations that can significantly improve station capacity and BART's ability to circulate more riders through its stations, more quickly, safely, and comfortably.

Text of the Proposed Clarifications

15301(a) : Interior and exterior alterations involving such things as interior partitions, plumbing, **escalators, elevators,** and electrical conveyances; **and exterior alterations including such things as window replacement, landscaping, lighting, signage, and pedestrian amenities.**"

15301(c): "Existing highways and streets, sidewalks, gutters, **existing parking facilities,** 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 amenities, street trees, safety improvements such as bollards, planters, sensors, cameras and gates,** and other similar improvements that do not create additional automobile lanes)."

D) Promoting Transit Oriented Development, Section 15182

Rationale for Proposed Clarifications

In an effort to reduce the environmental review requirements for transit-oriented development (TOD), OPR proposes changes to Section 15182 exempting several types of development near existing or planned major transit stops from further CEQA review. BART points out that just because a development is near transit does not necessarily make it transit-oriented. In particular, developments with significant amounts of parking are not transit-oriented or consistent with the goals of SB743. Large parking lots near transit stations disincentivize dense and efficient transit-oriented development near transit; large parking lots also deter rider use and local investment in multimodal transportation, such as pedestrian and bus infrastructure.

Text of the Proposed Clarifications

15182(b)(1)(A): "**It is located within one-half mile of an existing or planned rail transit station.... Outside of the boundaries of a metropolitan planning organization, a "planned" station, terminal or stop includes a facility that is scheduled to be completed within the planning horizon included in the regional transportation improvement program. If the development has more parking than the greater of a) the minimum required by the local jurisdiction or lead agency, or b) one space per residential unit or two spaces per 1,000 square feet for other projects, then the development will no longer benefit from this exemption.**"

E) Sharing of Administrative Drafts with Public Agencies

Rationale for Proposed Clarifications

BART requests language clarifying that administrative drafts may be shared between responsible agencies and lead agencies without concern that such sharing would become part of the administrative record.

In BART's prior comments, we suggested that OPR include in the CEQA Guidelines update a clarification that administrative draft EIRs and Negative Declarations are not part of the record for CEQA litigation purposes and may be shared among agencies. BART often undertakes its projects with other public agencies, including host municipalities or other transit agencies. Such projects include mixed use transit-oriented development projects (residential, retail, commercial) developed on property formerly used as surface parking lots for BART stations. Other projects include multimodal transit projects, with another transit agency as lead, where BART trains represent only one mode in the project.

To ensure that other public projects are integrated with transit uses or with BART, BART has needed to comment on other lead agencies' administrative draft EIRs or Negative Declarations, where BART is acting as a responsible agency. Where possible, BART has executed joint defense agreements with agencies which provide that shared administrative drafts remain confidential. However, following *Citizens for Ceres v. Superior Court of Stanislaus County* (2013) 217 Cal. App. 4th 889, some have questioned the enforceability of such agreements. As a result, some lead agencies have been reluctant to share administrative drafts with BART and other transit agencies, effectively excluding transit agency design, engineering, and operating expertise from a project's preliminary engineering and design.

A clarification on administrative draft sharing would not be inconsistent with statute or case law. The *Ceres* case did not address agreements between two agencies; rather, the case concerned communications between a lead agency and a private developer, which the court found were not privileged. Moreover, as the *Ceres* decision noted, under CEQA, only "drafts of any environmental document, or portions thereof, that have been *released for public review*" are part of the litigation record (Pub. Res. Code § 21167.6(e)(10) (emphasis added)). Also, see *Consolidated Irrigation District v. Superior Court of Fresno County* (2012) 205 Cal. App. 4th 697, 728 n.19 (had draft documents been made available for public review, they would have properly qualified for inclusion in the administrative record); *San Francisco Tomorrow v. City & County of San Francisco* (2014) 228 Cal. App. 4th 1239, 1257 (documents made available for public review were required to be included in the record). Because the statute expressly provides that inclusion in the record turns on the release of the draft EIR or Negative Declaration to the public for review, BART believes that it is appropriate to exclude administrative drafts exchanged between agencies from the record. Nevertheless, *Ceres* created ambiguity in this area, and such ambiguity has often precluded BART from early and cost-effective opportunities to design projects in a transit-oriented manner.

Text of the Proposed Clarifications

15234: "If a lawsuit is filed challenging an EIR or negative declaration for noncompliance with CEQA, the record of proceedings shall not include any drafts of the EIR or negative declaration, or portions thereof, that have been shared between the lead agency and responsible agencies, but have not been released for public review."