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February 14, 2014

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

Re: Orange County Transportation Authority's Comments on "Possible Topics to be Addressed in the 2014 California Environmental Quality Act (CEQA) Guidelines Update"

Dear Mr. Calfee:

The Orange County Transportation Authority (OCTA) appreciates the opportunity to comment on the Office of Planning and Research's (OPR) document entitled, "Possible Topics to be Addressed in the 2014 (CEQA) Guidelines Update." As OPR embarks on the effort to comprehensively update the CEQA Guidelines, a measured approach must be taken to ensure that any proposals do not inadvertently create unnecessary barriers to project delivery, while also ensuring the appropriate measures and analysis are undertaken to measure, and potentially mitigate, a project's impacts to the environment. As part of this undertaking, specific attention should be granted to exploring ways to modernize CEQA to remove outdated and unnecessary steps to environmental impact analysis, and improve the focus of the analysis to the information needed to make informed environmental decisions.

OCTA specifically commends OPR for steps it is taking to provide updates to the CEQA guidelines which will allow for additional use of program level documents, encouraging tiering, and thereby preventing duplicative analysis. Furthermore, the use of the regulatory documents to help determine the significance of projects may help to allow for consistency in these findings, and provide greater context for how a project helps meet statewide goals, especially as they relate to reducing greenhouse gas emissions. While the actual language to implement these ideas will be crucial to determine their impact, as proposed, these features have potential to help modernize the CEQA process.

However, there are several recommendations included in the proposed topics to be addressed, which if interpreted in certain ways, have the ability to prevent accurate environmental analysis, and create unnecessary project delays. Therefore, OCTA recommends the following edits:

Section 15061 (Preliminary Review)

OPR currently recommends that Section 15061(b)(3) be amended to replace the phrase “general rule” with “common sense exemption” to be consistent with the terminology used in *Muzzy Ranch v. Solano County ALUC* (41 Cal.4<sup>th</sup> 372) (2007). While these terms have admittedly been used interchangeably in various court decisions, it is unclear why a change in existing language is necessitated. Indeed, using the term “exemption” is not consistent with the language used in the rest of the section, and may not accurately describe the ultimate finding of Section 15061(b)(3) that an activity is not actually a “project” under CEQA. Deeming a project as “exempt” from CEQA is different than saying an activity is not a project under CEQA as is provided in (b)(3). Absent a more compelling reason for changing the language included in Section 15061(b)(3), OCTA recommends maintaining the existing language.

Section 15063 (Initial Study)

The proposal is to add clarifying language to Section 15063(g) that a lead agency may share an administrative draft of an initial study with an applicant to ensure accuracy in the project description and mitigation measures. While there is nothing objectionable in the intent behind this clarification, it is unclear why it is necessary. Existing law already allows a public agency to share a draft initial study for comment with a person or group. Specifically calling out parties with whom a lead agency “may” share these documents could be interpreted as limiting the type of parties with whom these documents can be shared.

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

Within Section 15064(h)(1), OPR suggests adding loss of open space as an example of potential cumulative impacts. If added, this would be the only example listed in that section. By including a singular example, this will further limit the applicability of the section, while also creating an assumption that in all cases where there is a loss of open space, cumulative impacts exist. It is preferable that this section remain as is, to allow each situation to be judged on its own merits. If examples are included in the section, language should also be included which makes clear that the examples are not to be interpreted as per se cumulative impacts under CEQA, and must be accompanied by other evidence.

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

As currently proposed, OPR seems to suggest that a hypothetical baseline in analyzing impacts related to greenhouse gas emissions is never appropriate.

Such an amendment will likely be controversial in light of the recent decisions related to baseline analysis included in *West Neighborhood Association v. City of Sunnyvale* (190 Cal.App.4th 1351) and *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (57 Cal.4th 439). In the latter case, the court ruled that hypothetical baselines may be used, where appropriate, such as when a project will not be operational for several years, if supported by substantial evidence. Any analysis that is done to examine future conditions that may exist when a project is built will rely on hypothetical events to some extent. Such hypotheticals can provide useful information to decision-makers, if based on substantial evidence, in deciding the project's more immediate and long-term potential environmental impacts. This is especially true for transportation projects, which often include lengthy lag times between initial project approval and actual implementation. Therefore, in order to maintain the most accurate environmental analysis, OCTA suggests that the existing Section 15064.4 be maintained in regards to referencing hypothetical baselines.

#### Section 15065 (Mandatory Findings of Significance)

Section 15065(a)(2) currently does not provide any examples of projects which achieve short-term environmental goals to the disadvantage of long-term environmental goals. By singling out roadway widening projects and excess parking, the section could potentially create a non-evidence based presumption that roadway widening projects and excess parking per se disadvantage some unnamed long-term environmental goal, and that an environmental impact report will always be required. This may also lead to the converse implication that allowing congestion to increase will somehow further some unnamed long-term environmental goals. No specific citations or evidence are provided to support singling out roadway widening projects and excess parking. Rather than create the potential for these hypothetical presumptions, the existing language in the guidelines should remain the same, allowing each project to be analyzed on its own merits. In many cases roadway widening projects provide benefits beyond just relieving congestion, which has been shown to further both short and long-term goals, including increased safety, drainage, and alternative transportation opportunities.

Beyond the revisions referenced above, OCTA also recommends that the OPR take into consideration the following recommended revisions:

#### Document Dumping

OPR should review and clarify the CEQA guidelines to mitigate the ongoing practice of "document dumping." The submission of last-minute voluminous

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comments, has in many cases, become a tactic of project opponents to delay projects and/or create a record to which future litigants can point to and argue the agency did not respond or produce any evidence to rebut. Often times, this practice will delay the approval of projects, costing taxpayer funds, and undermine the formal notice and comment process provided under CEQA. It is unfair to the public agency, the public and to project sponsors.

Specifically to address this issue, in referencing California Public Records Code 21177(a), the CEQA guidelines should state the following clarification: "The alleged grounds for noncompliance shall be presented fairly and timely to afford the public agency and interested parties a reasonable opportunity to respond. Public agencies may adopt reasonable rules for the submission of oral and written evidence." Public agencies are already permitted to adopt reasonable rules for oral evidence under the Brown Act. This should be extended, in the CEQA context, to written evidence to ensure a fairer process.

Streamlined CEQA Review for Specific Transportation Projects

OPR should consider revisions which will allow for streamlined CEQA review for transportation projects that reduce greenhouse gas emissions, through either an exemption or more explicit tiering authority. This exemption would apply specifically to those projects which can demonstrate that they are consistent with an approved sustainable communities' strategy that meets the relevant regional greenhouse gas emission reduction targets, and which has been included in a regional transportation plan for which an environmental impact report has been certified.

OCTA looks forward to continued collaboration with the OPR to create CEQA guidelines which continue to provide strong protections for the environment and the public's right to weigh in on projects, while also preventing misuse and improper project delays. If you have any questions please contact Kristin Essner, Principal Government Relations Representative, at (714) 560-5754.

Sincerely,



Darrell Johnson  
Chief Executive Officer

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c: Sloat Higgins Jensen & Associates