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To the Office of Planning and Research:

As an attorney with over three decades of experience in enforcing the California Environmental Quality Act (CEQA), I ask that these brief comments on the draft of the Office of Planning and Research's (OPR) proposed new CEQA Guideline interpreting and giving effect to SB 743 be entered into the regulation's administrative record.

### **Necessity for Adequate Air Quality Analysis**

OPR has done a very thorough and very thoughtful job of reconsidering how the significance of transportation impacts of projects can best be determined; it is long past time to eliminate use of Level of Service as the most used criterion for significance. However, I am concerned that the proposed Guideline must not, and should explicitly state that it does not, obviate, implicitly or explicitly, the requirement that a fully adequate analysis of air quality impacts of any project that may cause air quality impacts due to increased or differently distributed traffic, be performed. In many cases, this will require a full transportation analysis, since the air quality analysis of projects involving increased or differently distributed VMT or traffic usually base their projections of vehicle-produced air pollutant emissions upon calculations that are themselves based upon the results of the transportation analysis. In such cases, if a full and adequate transportation analysis is not done, a full and adequate air quality analysis cannot be done.

Although California has worked extremely hard to reduce air pollution, it remains a public health problem of huge proportions. California violates federal and state standards for ozone and fine particulate matter in some of the most heavily populated areas of the state, with resultant public health damage. In addition, recent research suggests that the current persistent drought from which the state is suffering threatens the state's hard-won gains in reducing public exposure to health-damaging air pollution. Persistent high heat has worsened air inversions, holding pollutants close to the ground, especially in the Central Valley. ("Heat, drought worsen smog in California, stalling decades of progress": <http://www.latimes.com/science/la-me-air-pollution-20141110-story.html>.) With no end to this drought in sight, CEQA must continue to require stringent analysis, robust and supported by substantial supporting evidence, of the air quality impacts of projects that may worsen the existing air. The proposed Guideline may interfere with agencies' and applicants' ability to perform such an analysis, and to support it with substantial evidence.

The discussion draft at 15064.3(a) states that the primary consideration in a transportation analysis is the amount and distance a project might cause people to drive. While this is correct, it is insufficient. At the risk of stating the obvious, it is also crucial to consider the geographic areas in which such driving may be increased, whether proximate to or distant from the project itself, since increased driving and its attendant pollutant emissions might make an already severe local or regional air quality problem even worse. It is a long established principle of CEQA that the significance of impacts varies with the existing conditions, and that even a small increase in air pollutants may be significant where the existing air quality problem is already critical. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.) Without a full transportation analysis, conclusions about the significance of air quality impacts of a project proposed in an area of severe existing air quality problems may be impossible to reach, or to support with substantial evidence. The Guideline should make clear that a transportation analysis should be performed where it is necessary to support an adequate and robust air quality analysis, whether or not it is necessary to determine impacts on transportation per se. It is impossible to believe that OPR intended anything else, but the intention should be made explicit.

The draft Guideline does specify that noise and air pollution analysis “may still be relevant.” However, such analysis may not be possible, or at least a full and adequate analysis supported by substantial evidence, may not be possible, without a full transportation impacts analysis. At the very least, the Guideline should make clear that noise and air quality analyses may not merely be “relevant”, but may be at the heart of the CEQA analysis for some projects. Even if the VMT impacts are not significant from an energy-consumption or greenhouse gas perspective, they may be significant from an air quality perspective, and impossible or highly difficult to analyze without a supporting transportation analysis. In the FAQs section of the discussion draft, FAQ number 7 states that the methods for addressing noise and air quality under CEQA remain unchanged by the proposed regulation. While I have profound respect for OPR's expertise, I cannot agree. Having spent over 30 years doing CEQA work in government and private practice<sup>1</sup>, and having read hundreds of EIRs and negative declarations, it has been my experience that in many, if not most, cases, the air quality analysis of vehicle-related air pollution emissions for any project of significant size is based on the outputs of the modeling done in and for the transportation analysis. It is from the transportation analysis that the increases in vehicular pollutants, both in quantity and location, are derived. Change, truncate, or eliminate the transportation modeling and analysis, and you perforce change the air quality analysis. Far fewer data may be generated, more estimates or generalized assumptions from reference sources, rather than from project-specific calculations, may be used, and these estimates and assumptions may or may not be backed by substantial evidence. Ultimately, CEQA documents may be more subject to challenge for lack of substantial evidence than they were before. No one wishes to impose useless or unproductive costs and analyses on an agency or a project applicant, but the Guideline should be clear that, where there may be significant air quality impacts, a full analysis must be done, even if it requires a transportation analysis where one might not be done for other VMT impacts.

In addition, the draft Guideline may not place sufficient emphasis on the obvious fact that not all VMT-produced pollutant emissions are equal. Projects, even projects in transit-dense areas, e.g., shopping malls, may attract diesel truck traffic and the carcinogenic diesel particulates such trucks emit. While new diesel trucks are being held to tougher emissions standards and old diesels are being required to retrofit with particulate control devices and use cleaner fuel, diesel trucks still emit carcinogenic diesel particulate matter, old diesel trucks may remain on the road for several decades, and individual projects may still require an analysis of the impacts of increased emissions of diesel particulates. In this

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<sup>1</sup> I can provide a copy of my resume if OPR desires documentation of my CEQA experience.

respect, OPR may wish to reconsider its restriction of the definition of “VMT” solely to miles driven by automobiles, and not trucks. In any case, an adequate analysis of carcinogenic and asthma-inducing air pollutant emissions may be necessary, and may require an underlying transportation analysis, even where energy and greenhouse gas impacts of VMT cause by a project may not be significant.

### **Modeling and Post Processing**

In the section discussing methodologies, the requirement that post-processing of transportation modeling results be made publicly available and transparent is both long overdue and essential to fulfilling CEQA's full environmental disclosure requirement. The professional judgement used in such post-processing should be supported by substantial evidence. However, such transparency is of questionable value unless the underlying transportation modeling itself is also available for public scrutiny, and not hidden in a proprietary “black box,” or available only upon execution of non-disclosure agreements. While there are areas of CEQA analysis that must remain secret because of sound public policy reasons or for the protection of the resource itself, e.g., the location of Native American sacred sites or of archeological sites that might be vandalized or plundered if their location or exact nature were revealed, the basic science of transportation modeling analysis does not fall into such a category. Both transportation modeling and post-processing should be public and transparent.

### **SCS Consistency and Use of Regional VMT Averages**

Proposed section (b)(1) makes the general assumption that a project located close to a “major transit stop” will have less than significant transportation impacts. It should be made fully explicit that this is a rebuttable presumption, one that may be overcome by presentation of substantial evidence to the contrary, such as evidence that the transit system is already overloaded or otherwise not obviously capable of servicing the increased transportation needs that the project is expected to cause. Similarly, the subsection presumes that a land use plan showing VMT decreases that are consistent with the decreases provided for in an applicable Sustainable Communities Strategy (SCS) will not have significant impacts. This should also be clearly stated to be a rebuttable presumption. For example, consider the timing of VMT decreases. If a multi-year land use plan would cause VMT *increases* at an early phase of development, and only show appropriate VMT *decreases* many years later at the end of development, such a project might not be consistent with the applicable SCS if that SCS prescribed a steady VMT decrease over time, rather than a sort of “balloon payment” at the end of the multi-year plan. Residents in the project area might be subject to increased air pollution and its attendant health damage for months or years before the promised project VMT decreases materialized. While a public agency might be willing to make such a trade-off, and might be able to support it in a Statement of Overriding Considerations, the public should still be able to know and understand the choices that the agency is making on the public's behalf. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376 (an EIR is a document of public and political accountability.)

Finally, the proposal to presume that a decrease in VMT over “regional” VMT averages equates directly to a lack of significant impacts is very troubling, unless a sound and supportable method for defining “regional” is worked out. While the presumption might be true in some areas of California, it is difficult to imagine it being borne out in many areas that include both rural and urban areas. In a place like the San Bernardino Association of Governments' (SANBAG) jurisdiction, for example, which contains both fairly large cities and vast rural areas, a regional VMT “average” that is based on driving patterns in both urban areas with transit and rural areas that largely lack it, cannot reasonably be presumed, without substantial supporting evidence and analysis, to accurately reflect VMT in either

urban or rural areas. The definition of “regional average” must be carefully worked out, perhaps using sub-regional averages, to ensure that the achievements of jurisdictions that have already greatly lowered their VMT are not used to justify allowing increased VMT in other areas. In addition, the quality of the VMT inventory being used should be vetted carefully, to ensure that substantial evidence supports the calculation of the “regional average.”

## **Conclusion**

The bulk of the discussion draft, and in particular its substitution of VMT for Levels of Service as the appropriate criterion for significance of transportation impacts, are well done and commendable. However, the current draft does not explicitly ensure that adequate air quality analyses will be performed where a full transportation impact analysis is not required for non-air quality impacts. The public and the environment would be better served if the final regulation provides that assurance.

Thank you for the opportunity to comment on the draft Guideline.

Sincerely yours,

Susan L. Durbin, Esq.