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

Dear Mr. Calfee:

We submit this letter to provide our comments on the Preliminary Discussion Draft of the Proposed Updates to the CEQA Guidelines. We applaud the Governor's Office of Planning and Research's (OPR) efforts to update the Guidelines to reflect the statutory and case law changes that have altered CEQA since the late 1990s. Overall, we have found the proposed updates to be accurate representations of the changes that have occurred. However, we suggest in this letter that certain changes should be made to the Guidelines in order to provide greater clarity for future users. Therefore, we offer the following specific comments:

Using Regulatory Standards in CEQA

1. In § 15064, subd. (b)(2), the following language is unclear and could lead to unnecessary litigation: "A lead agency shall not apply a threshold of significance in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant effect from a project." (p. 15.) Section 15064 is included within Article 5 of the CEQA Guidelines, Preliminary Review of Projects and Conduct of Initial Study, and we assume the intent of the revision is to clarify that the fair argument standard of review applies during preliminary project review before an EIR has been prepared. It is well-established that the fair argument standard applies to this initial determination. (See CEQA Guidelines, § 15064(f)(1); see also *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732 [appropriately applying the fair argument standard to the agency's use of a threshold to determine that no EIR was needed]; see also *Mejia v. City of Los Angeles* (2005) Cal.App.4th 322, 342 [lead agency improperly failed to prepare EIR by relying on administrative threshold regarding significance of project for traffic when there was a fair argument that the project may have a significant

effect on traffic].) However, it would be quite another matter if the Guidelines are amended such that an agency's use of a threshold when drafting an EIR is held to the fair argument standard. While OPR implies in the Background section that this expansion was made by the Court of Appeal in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 (*Amador*), that is not an accurate interpretation. In *Amador*, the petitioner alleged the lead agency failed to establish a threshold of significance that addressed the project's impact associated with the seasonal reduction of surface flow in local streams. The court concluded that it could not determine the merits of the petitioner's argument because "contrary to CEQA requirements, the EIR fails to explain the reasons why the Agency found the reduction in stream flow would not be significant." (*Id.* at p. 1111.) In other words, the court concluded there was no substantial evidence – indeed there was no evidence at all – supporting the lead agency's determination. Later, in addressing the petitioner's challenge concerning riparian habitat, the court reiterated that "the agency's conclusion that a particular effect of a project will not be significant can be challenged as an abuse of discretion on the ground the conclusion was not supported by substantial evidence in the administrative record." (*Id.* at p. 1113 (emphasis added).) Therefore, the holding in *Amador* supports the general principle that, after an EIR is prepared, a lead agency's significance threshold and associated environmental analysis must be upheld if supported by substantial evidence. Similarly, *Communities for a Better Environment v. Natural Resources Agency* (2002) 103 Cal.App.4th 98, 113 (*CBE*) does not provide support for extending the "fair argument" standard of review to a challenge to a significance threshold used in an EIR. In *CBE*, the court concluded a guideline that applied the "substantial evidence" standard of review to the initial determination of whether to draft an EIR violated CEQA; *CBE* does not address the standard of review applicable once an EIR has been prepared. (*Communities for a Better Environment v. Natural Resources Agency* (2002) 103 Cal.App.4th 98, 113 (*CBE*) ("[S]ubdivision (h) ... appears to dispense with the traditional 'fair argument' standard otherwise applicable to the decision whether to prepare a[n] . . . EIR.") (emphasis added).)

Consistent with CEQA and CEQA case law, if substantial evidence supports the conclusion in an EIR that compliance with the threshold will reduce the impact to less than significant, that should be the end of the inquiry. Therefore, we recommend that the language of subdivision (b)(2) be changed as follows: "In making its determination of whether to prepare an draft EIR, a lead agency shall not apply a threshold of significance in a way that forecloses consideration of substantial evidence showing that, despite compliance with the threshold, there may still be a significant effect from a project."

2. In § 15064.7, subd. (d), the requirement that an agency adopting a threshold of significance should "explain how the particular requirements of that environmental standard will avoid or reduce project impacts, including

cumulative impacts, to a less than significant level” (p. 18) seems to imply that use of the threshold will must reduce the impact below a level of significant. This is at odds with the current § 15064, subd. (a)(2), which allows agencies to prepare a statement of overriding consideration for impacts that cannot be reduced to a level of less than significant. We suggest modifying the language as follows: “(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 achieving the particular requirements of that environmental standard, if feasible, ~~will~~ would avoid or reduce project impacts, including cumulative impacts, to a less than significant level. . . .”

3. In § 15064.7, subd. (d)(1), an “environmental standard” is defined as “a rule of general application that is adopted by a public agency through a public review process and that is all of the following: a quantitative, qualitative or performance requirement found in an ordinance, resolution, rule, regulation, order, or other environmental requirement of general application.” (P. 19.) This list should also include “plan” to clearly allow for thresholds derived from specific and general plans. It should also be clarified what kind of “orders” this language refers to. If the goal of this new language is to integrate executive orders as possible sources of environmental standards, that should be clearly stated. However, OPR may wish to wait until a decision from the Supreme Court in *Cleveland National Forest Foundation v. SANDAG* (S223603) before including executive orders as a possible source.

Clarifying the Rules on Tiering

4. We suggest that § 15152, subd. (e) be deleted from the Guidelines in order to provide more flexibility for local governments to use tiering. (P. 26.) For example, a project may require a general plan amendment for a limited reason but may be consistent with a sustainable communities strategy. In that situation, the project should still be allowed use tiering.

Transit Oriented Development Exemption

5. In § 15182, subd. (b)(1), to make this language consistent with the existing language in § 15162, we suggest that the words “but not limited to” be added to this section. We also recommend that the word “required” be deleted as it is unclear what is meant by “required subdivision or zoning approvals.” Therefore, we recommend that this section read as follows: “A residential or mixed-use project, or a commercial project with a floor area ratio of at least 0.75, including but not limited to any ~~required~~ subdivision or zoning approvals, is exempt if the project satisfies the following criteria.” (P. 31.)
6. In § 15182, subd. (b)(1)(A), the following language is unclear: “intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.” (P. 31.) This

language makes it seem as if two major bus routes must each provide 15 minute service to the stop. That interpretation conflicts with our understanding of the legislative intent behind the “major transit stop” definition, which requires that the stop be served by one or more buses every 15 minutes. We suggest the following changes: “a transit stop served by two or more major bus routes at which a bus arrives at a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.”

7. In § 15182, subd. (b)(2), the following language is unclear: “Additional environmental review may be required for a project described in this subdivision if one of the events in section 15162 occurs with respect to the project.” (P. 32.) The legislative history supports the conclusion that SB 743’s exemption was meant to track Government Code § 65457’s exemption from environmental review for a residential development consistent with a specific plan for which an EIR was previously certified. If that is the case, then pursuant to § 65457 and the decision in *Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, the subsequent review should relate to the specific plan and not the project itself. If this Guidelines section is not meant to track § 65457 and the *Dublin* decision, then additional guidance should be provided about how § 15162 considerations should be undertaken. Without such guidance, interpretation of this section will lead to substantial litigation.

Updating the Environmental Checklist

8. In Air Quality section III(a), the language “or exceed significance criteria established by the applicable air quality management or air pollution control district,” takes away the ability of a lead agency to establish its own criteria. (P. 53.) This is contrary to other Guidelines sections, for instance § 15064.4.
9. In Air Quality section III(e), language should be added to make it clear that the effects last longer than the construction of the project. (P. 53.) We suggest: “result in frequent and substantial emissions (such as odors, dust or haze) for a substantial duration of time beyond the end of construction that adversely affect a substantial number of people.”
10. In the new Energy section V(a), the language “Would the project result in wasteful, inefficient, or unnecessary consumption of energy, during project construction or operation” (p. 56) should be revised to say “result in significant environmental effects due to wasteful . . .” This will make the language consistent with § 15126.2. (See p. 78.)
11. In the new Energy section V(b), the language “[Would the project] incorporate renewable energy or energy efficiency measures into building design, equipment use, transportation, or other project features” (p. 57) is oddly phrased such that a “yes” answer would be environmentally beneficial but would seem to require a

“potentially significant finding” on the checklist. The other questions are focused on potentially negative effects of the project.

12. In Hazards section VIII(h), the question now asks whether the project will “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.” (P. 58.) However, the language defining what a flood risk is was removed from the former hydrology section. Is there a benchmark now for what constitutes a flood risk or is it subjective?
13. In Noise section XII(a), the word “temporary” should be removed. (P. 62.) Construction impacts must be allowed temporarily in order to promote infill development.
14. In new Landscapes section XI, it is not clear what is meant by a “working landscape.” (P. 63.) Would that include a mill, a refinery, grazing land, etc.? A definition should be added in order to avoid litigation.
15. In new Landscapes section XI(c), it is not clear if there would still be a significant impact if a recreation trail was closed because of species impacts. (P. 64.) Is that considered a “conversion to non-recreation uses”?
16. In Transportation section XVI, subdivisions (a) and (b) could be in conflict. (P. 67.) If the general plan uses a LOS standard but the threshold uses VMT, there could be a less than significant impact under (b). However, if the LOS goes to an unacceptable level under (a), there could be a significant impact due to conflict with the general plan’s requirements.
17. Thomas Law Group also notes that OPR should not adopt the following sections from the Environmental Checklist as they may soon be invalidated by the upcoming Supreme Court decision in *California Building Industry Association v. Bay Area Air Quality Management District* (S213478): Hazards VIII(h), Landscapes XI(d), Wildfire XVII(a) and (d).

Remedies and Remand

18. In § 15234, it should be made clear that a court cannot order eviction of tenants or homeowners on remand even if a project is found to not be in compliance with CEQA. (P. 73.)

Water Supply Analysis in CEQA

19. In § 15155, subd. (f), the language in the first two sentences establishes that the level of certainty that there are sufficient water supplies for a project will vary depending on whether there is a conceptual plan or a specific project. Then, the last sentence refers to the requirements for “an analysis of water supply in an

environmental document” but does not state whether this analysis is required for both conceptual plans and a specific project. (P. 87.) That should be clarified.

Baseline

20. In § 15125, subd. (a), we suggest that the language of the last sentence be modified as follows: “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 as compared to the existing conditions.” (P. 94.)

Response to Comments

21. In § 15087, subd. (c)(2), a lead agency is now required to state in the notice “the manner in which the lead agency will receive” comments. (P. 105.) We are concerned that this will open the door for petitioners to try to expand the world of comments that should have been considered by a lead agency that fails to expressly state the types of comments that will be accepted. We suggest the language be changed to state: “unless otherwise provided by the lead agency, written comments must be submitted to the lead agency via email or mail prior to the close of the comment period.” This will still provide agencies with the discretion to accept comments using new media formats like Facebook and Twitter but will prevent any potential abuse of this subdivision by petitioners.
22. In § 15088, subd. (c), the language should be changed to be more firm: “A general response, for example, is ~~may be~~ appropriate when a comment does not contain or specifically refer to readily available information, or does not explain the relevance of evidence submitted with comment.” (P. 107.)

Pre-Approval Agreements

23. In § 15004, subd. (b)(2)(a), we believe that it is important to retain the following language: “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.” (P. 111.) This language has been cited often by courts and removing the language from the Guidelines could create confusion. Rather than deleting the language entirely, we recommend that this language be added into the new subdivision (b)(4), as follows: “For example, it shall not grant any vested rights prior to compliance with CEQA but may designate a preferred site for CEQA review and may enter into preliminary agreements such as land acquisition agreements. Any preliminary agreements, including land acquisition agreements, Further, any such agreement should . . .”

Consultation with Transit Agencies

24. In § 15072, subd. (e) and § 15086, subd. (a)(5), it is not clear what is required of the lead agency during the required consultation with public transit agencies with facilities within one-half mile of the proposed project. (Pp. 121, 123.) It is also not clear if a consultation with a COG would suffice. Finally, the reference to

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“facilities” in the last sentence should be changed to “transportation facilities” for greater clarity.

25. If possible, it would be useful for consultation to be defined generally to address not only this section, but other sections requiring consultation.

Thank you for your consideration of these comments.

Sincerely,



Tina A. Thomas