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Thematic Responses to Comments

The Public Resources Code created a two-step process for updates to the CEQA Guidelines. (Pub. Resources Code, § 21083.) In the first step, the Governor's Office of Planning and Research reviews the existing Guidelines and develops proposed updates. In the second step, the Natural Resources Agency conducts a formal administrative rulemaking process, and ultimately adopts the proposed updates as final changes.

OPR's process of developing proposed changes to the Guidelines typically involves robust stakeholder input. This update is no exception. In addition to conducting its own review of the Guidelines, in 2013, OPR invited stakeholders to suggest improvements to streamline the environmental review process and encourage better environmental outcomes. OPR also requested suggestions for updates reflecting recent changes in the Public Resources Code and in published decisions interpreting CEQA. Once it developed a list of possible changes, OPR requested further input on the scope of the update. When it developed the text of the proposed changes in 2015, OPR invited still more public review.

In addition to the regular updates required by Section 21083 of the Public Resources Code, OPR also developed a number of updates responding to new legislation and recent appellate court decisions. Senate Bill 743 (Steinberg 2013), for example, required an update to address the analysis of transportation impacts. Due to the complexity of the subject matter, and intense public interest, OPR invited public input in three separate phases of the proposal's development. OPR also developed changes to the Guidelines responding to the California Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369 (*CBIA v. BAAQMD*), for which it sought additional public review. Pursuant to the Court's decision in that case, OPR developed changes related to the evaluation of hazards.

Since it began the update in 2013, OPR has received hundreds of comments on the CEQA Guidelines. Many of those comments provided helpful suggestions for improvement, and this package is stronger as a result. As an informal, pre-regulatory input process, OPR's development of the Guidelines does not include individual responses to each comment. However, the following sets forth some of the major themes in the comments that OPR received on the proposed package, as well as thematic responses to those concerns.

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Regulatory Standards and Thresholds of Significance

Some stakeholders suggested that existing regulatory standards should play a greater role in streamlining the CEQA process. In response, OPR proposes to clarify that agencies may rely on standards adopted for environmental protection as thresholds of significance. Thresholds of significance assist lead agencies in determining whether a project may have a significant impact on the environment. Under OPR's proposal, in many cases, compliance with relevant standards may be a basis for determining that the project's impacts are less than significant.

Despite general support for the proposal, some observers questioned the proposal's description of the nature of thresholds of significance. In particular, some object to the clarification that agencies must consider evidence that a project may have a significant impact, even when it complies with a threshold of significance. That clarification is important for several reasons. First, it is an accurate statement of the law. (See *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 717; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-1109; *Communities for a Better Environment v. Resources Agency* (2002) 103 Cal.App.4th 98, 112-113.) Second, clarification of what the law requires in the Guidelines will help agencies to comply and thereby avoid litigation and disruption to project implementation.

OPR agrees, however, that its proposal could be more precise to avoid confusion about applicable standards of review. Therefore, OPR revised the proposal to state clearly in the background explanation that the changes do not alter the applicable standard of review. It also revised the text of the proposal itself to more plainly state the rule that lead agencies must consider evidence of potential impacts.

Existing Facilities Exemption

The CEQA Guidelines currently include a categorical exemption for changes to existing facilities. (CEQA Guidelines, § 15301.) That exemption should be a useful tool for streamlining infill development and neighborhood revitalization. Stakeholders noted, however, that as currently written the exemption does not allow any expansion of use beyond that existing *at the time of project application*. As a result, the exemption would not cover reuse of vacant buildings, even where the project would not alter the existing environmental footprint. To remedy that anomalous result, OPR proposed to clarify that the exemption can be used where the project does not expand the "historic" use of the building.

Observers noted that the word "historic" is itself a term of art, and also is not precise. Some suggested limiting how many years prior a lead agency could look to determine whether the new use would be an expansion. OPR agrees that, as a term of art, the word historic is not appropriate in this context, and so replaced that word with "existing or former." OPR recognizes that "former" is also not precise; however, the relevant question is not whether a building has been vacant for any particular number of years. The relevant question is whether reuse of the facility will cause adverse environmental impacts beyond the former use. Exceptions to the application of categorical exemptions for unusual circumstances and cumulative impacts should provide adequate safeguards to prevent use of the exemption in circumstances that would result in adverse impacts.

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Updating the Environmental Checklist

The CEQA Guidelines include a sample environmental checklist that many agencies use to develop an initial study. The sample initial study checklist in Appendix G has grown over time and includes many redundant questions. Therefore, OPR originally proposed a significant reorganization of the checklist that consolidated several topics into a category addressing open space resources. Not only would such a consolidation reduce the number of questions in the checklist, but also would align with local government general plan open space elements.

Many stakeholders objected to the reorganization, however, noting that agencies commonly retain different consultants to develop specific sections of the initial study checklist, following the categories in Appendix G. They feared that the reorganization could create confusion for the public and lead agencies. Separately, other stakeholders suggested that many of the questions in the checklist focused improperly on the effects of the environment on a project, contrary to the Supreme Court's guidance in *CBIA v. BAAQMD*.

OPR continues to see value in rethinking Appendix G, and notes that Appendix G is just a sample format, not a binding mandate. Nevertheless, one of the purposes of this update is to make the process simpler for lead agencies, not more difficult. Therefore, OPR will not recommend a major reorganization of Appendix G at this time.

Regarding the wording of individual questions in Appendix G, OPR continues to recommend changes to be consistent with new case law, including the Supreme Court's decision in *CBIA v. BAAQMD*. Additionally, OPR modified the questions related to the analysis of transportation impacts to be consistent with the proposed amendment to Guideline section 15064.3.

Energy Impacts

CEQA has required analysis of a project's energy since the 1970s, and the Natural Resources Agency reiterated that requirement in changes to Appendix F in 2010. However, lead agencies have not consistently complied. As result, the failure to adequately analyze a project's energy impacts has become a more frequent allegation in litigation. OPR therefore proposes to provide more specific direction regarding energy impacts in the CEQA Guidelines.

Nevertheless, some stakeholders suggest that these clarifications expand CEQA. Not so. As recently as 1997, the Appendix G initial study checklist contained questions regarding energy impacts. OPR's proposal would simply reinstate those prior questions in a slightly updated form.

Other stakeholders raised valid questions about the focus of the analysis, however. In response, OPR has clarified in this proposal that the focus of the analysis is on environmental impacts associated with a project's energy use, and not the mere fact that a project may use energy. The proposal has also been updated to clarify that the analysis of such environmental impacts may appear in an environmental document's air quality section, or analysis of greenhouse gas emissions, or wherever the lead agency determines is most appropriate.

Energy use, both in buildings and the transportation sector, contributes significantly to California's greenhouse gas emissions. Therefore, to achieve this State's ambitious climate goals, and continue to build our green economy, all agencies must consider carefully the energy implications of the projects that they propose.

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Transportation Impacts

The changes mandated by Senate Bill 743 attracted more attention than any other proposed change in this update. Notably, OPR developed not just proposed changes to the CEQA Guidelines (including proposed changes to Appendix G) addressing transportation impacts, but also a non-binding Technical Advisory with methodological recommendations. The following describes some of the major issues that stakeholders raised in the last round of public input, as well as OPR's resolution of those issues.

Geographic Application

Some stakeholders noted that SB 743 only mandated new transportation methodologies within transit priority areas. OPR has conducted extensive outreach since 2013 to craft the proposal. During that outreach OPR asked stakeholders in various regions of the state whether the status quo would do a better job promoting the purposes of the statute. No evidence demonstrated that the status quo, which focuses on traffic congestion, provides a more accurate analysis of the environmental effects of transportation than a methodology that focuses on vehicle miles traveled.

Conversely, outreach with the Institute for Transportation Engineers, transportation professionals, transportation agencies, local governments, and metropolitan planning organizations demonstrated that studying vehicle miles traveled is possible and mitigation is feasible when needed. The evidence further shows that studying vehicle miles traveled is cheaper and quicker than studies of traffic congestion. Projects with lower vehicle miles traveled promote significantly improved health and safety outcomes, as well as air quality benefits.

As a legal matter, the definition of "transit priority areas" is not clear in the statute. For example, the boundaries of a transit priority area may shift as bus routes and service frequencies change, and as plans for future transit investments change. Those changes may be made by multiple agencies, and no one agency is charged with maintaining current and accurate delineations of transit priority areas. As a result, applying one set of rules within transit priority areas and another outside would impose a significant burden on lead agencies to determine on a project by project basis which rules apply. Such uncertainty could also encourage litigation.

Thus, due to the substantial benefits of measuring vehicle miles traveled instead of level of service, and the serious potential for confusion and litigation risk of having two different measures of transportation impact, OPR has determined that the new methodology should apply statewide.

OPR recognizes that access to transit makes it easier to find that a project's vehicle miles traveled are low. However, mixing uses, designing projects so that customers only need to park once, enhancing bicycle and pedestrian networks, and many other strategies also exist to reduce vehicle miles traveled. Further, OPR's recommendations in its Technical Advisory recognize that rural areas are different, and so there, thresholds may be applied on a case by case basis that reflect local conditions.

Application to Transportation Projects

Some observers expressed concern about the potential impact of the proposal to analyze vehicle miles traveled on the delivery of transportation projects, and roadway-capacity projects in particular. On April 28, 2017, the Governor signed Senate Bill 1, a landmark transportation funding package designed to protect our existing transportation assets and to make the system run more efficiently. OPR's proposal will assist in that effort. The transportation funding package emphasizes maintenance and safety projects. It also includes funding for transit. Those types of activities would be found less than

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significant under OPR's proposal. OPR's proposal further provides that lead agencies have discretion in which measure to use to evaluate roadway, including highway, capacity projects using the appropriate measure consistent with CEQA and other applicable requirements.

Presumptions that Certain Projects Will Cause a Less-than-Significant Impact

Evidence shows that projects located in areas with access to transit tend to have lower vehicle miles traveled. Therefore, OPR's proposal presumes that land use projects located within one-half mile of transit will have a less-than-significant transportation impact.

Some observers questioned that presumption, indicating that some projects located near transit may still have high vehicle miles traveled. That possibility does not, in OPR's view, justify the elimination of the presumption. As noted above, the evidence shows that transit proximity usually lowers vehicle miles traveled. As a matter of environmental policy, we want to encourage more development in transit-rich areas. In fact, several observers suggested that the presumption should be even more strongly stated. OPR agrees. Instead of stating that lead agencies "may" presume that development near transit would have a less-than-significant impact, OPR has revised the proposed Guideline to state that lead agencies "should" presume that the impacts are less than significant. Notably, because it is a presumption, lead agencies must still consider whether any features of the project or its location would tend to negate the presumption. OPR's Technical Advisory describes several such circumstances. Because the presumption is rebuttable, the proposal does not risk streamlining projects with high vehicle miles traveled.

Proposed Thresholds

Public Resources Code section 21099 directs OPR to provide guidance on determining the significance of transportation impacts. To that end, OPR's Technical Advisory recommends, absent any more project-specific information to the contrary, that per capita or per employee VMT fifteen percent below that of existing development may be a reasonable threshold.

Some observers suggested that the threshold for land use projects is too stringent, while others thought it would be too lenient and not allow local governments to require appropriate mitigation. Notably, OPR's Technical Advisory describes recommended thresholds and the technical basis for those recommendations. Consistent with CEQA, however, lead agencies have discretion in the selection of thresholds. Agencies may have other, more specific information that would justify a different threshold. Moreover, Public Resources Code section 21099 explicitly allows lead agencies to apply more stringent thresholds.

Some observers, particularly metropolitan planning organizations, expressed concern about the methodology OPR recommended in its Technical Advisory proposed for setting the transportation project threshold. OPR agrees that further work can be done to develop a numeric threshold in conjunction with the Air Resources Board and metropolitan planning organizations. Therefore, the Technical Advisory has been revised to remove the numeric threshold for transportation projects and instead include a placeholder stating that the determination of significance must include consideration of the project's impact on the attainment of California's long term climate goals. Additionally, OPR's proposed Guideline clarifies that lead agencies for roadway, including highway, capacity projects have discretion to use either existing metrics or VMT, consistent with CEQA and applicable planning requirements.

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Mitigation

Some observers questioned whether certain suburban or rural projects could be feasibly mitigated. As explained in earlier versions of the proposal, many mitigation options exist; however, the determination of whether any particular measure is feasible in connection with a specific project is to be made by the lead agency.¹

In discussions with stakeholders following the release of the latest draft, it became apparent that the proposal would benefit from additional clarity around the regional nature of impacts on vehicle miles traveled. Specifically, because such impacts are largely regional in nature, mitigation may also be regional in scope. Further, mitigation programs to reduce vehicle miles traveled may be an effective way to reduce such impacts. The Technical Advisory has been updated to reflect these clarifications.

Grace period

Throughout the process, observers have commented that local lead agencies need time to update their own procedures to incorporate the new rules. OPR agrees. The last draft of the proposal stated that agencies would have a two year grace period from adoption of the rules before they became mandatory.

OPR's current proposal states that the new rules will become mandatory beginning on January 1, 2020. OPR believes a two-year opt-in period is sufficient to allow agencies to make the transition. First, OPR notes that typically, agencies must update their procedures within 120 days of revisions to the CEQA Guidelines. (See CEQA Guidelines, § 15007(d).) Second, these proposed changes have been circulating in substantially similar form since 2014. Thus, the concepts have been circulating for several years already. Third, OPR, together with the Association of Environmental Professionals and transportation experts, has conducted extensive training and outreach to educate lead agencies on the proposed requirements. Finally, several cities have already updated their own procedures to analyze vehicle miles traveled, and so many examples already exist.

Hazards

In 2015, the California Supreme Court ruled that CEQA generally does not require agencies to consider the environment's impacts on a project in *CBIA v. BAAQMD, supra*, 62 Cal.4th 369. In so holding, the Court found that a sentence in the CEQA Guidelines requiring analysis of seismic hazards to a project located on a fault line was not valid. However, it also held that the interactions between a project and its environment must be analyzed where the project "risks exacerbating" environmental harms. OPR, therefore, proposes to revise the Guidelines to remove the sentence the Court found to be invalid and to clarify the requirement to analyze hazards that a project risks exacerbating.

Some stakeholders suggested that OPR's proposal did not clearly enough state the rule that CEQA focuses on impacts of the project on its surrounding environment. Some specifically requested that the proposed changes state the Court's general rule that CEQA focuses on the effects of a project on the

¹ OPR additionally notes that recent appellate case law held that an EIR's alternatives analysis for a regional transportation plan was deficient because it failed to discuss an alternative which could significantly reduce vehicle miles traveled. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (Nov. 16, 2017, D063288) __Cal.App.5th__) OPR makes note of this recent decision to emphasize a lead agency's duty to analyze feasible methods to reducing the significance of environmental impacts.

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environment. OPR agrees that the first sentence in the Guideline section should be revised to focus on the project's impacts on the environment. OPR disagrees that further changes are needed, however. As a practical matter, and as the State agency with specialized expertise in land use planning, OPR observes that many environmental hazards may be made worse by new land development. Thus, the rule that CEQA does not require analysis of environmental hazards on a project may not be as general as some stakeholders suggest. The proposed revisions to the first sentence in Section 15126.2(a) adequately capture that rule, and the following sentences appropriately describe the nuances in the Supreme Court's holding in *CBIA v. BAAQMD*.

Analysis of Greenhouse Gas Emissions

Early in the development of this Guidelines update, OPR indicated that it would consider updates to the Guideline addressing greenhouse gas emissions, but that it would not do so while relevant cases were pending before the California Supreme Court. Since that time, the California Supreme Court published decisions addressing the role of state climate policy in a CEQA analysis in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 and *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204. Therefore, OPR proposes clarifying edits to Section 15064.4 to reflect the holdings of those cases. Those proposed amendments have been included in this proposed Guidelines update and will be subject to public review during the Natural Resources Agency's rulemaking process.