March 14, 2018

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

RE: The Proposed “Comprehensive” Update to the Guidelines Implementing the California Environmental Quality Act Is Unconstitutional and Unlawful, and Must Be Withdrawn

Mr. Calfee:

Introduction and Summary.

The Two Hundred is a group of community civil rights leaders advocating for home ownership for California’s minority families. We are committed to increasing the supply of housing, to reducing the cost of housing to levels that are affordable to California’s hard working families, and to restoring and enhancing home ownership by minorities so that our communities can also benefit from the family stability, enhanced educational attainment over multiple generations, and improved family and individual health outcomes, that white homeowners have long taken for granted. Our leadership group includes civil rights advocates who each have four or more decades of experience in protecting the civil rights of our communities against unlawful conduct by government agencies as well as businesses.

We also support the quality of the California environment, and the need to protect and improve public health in our communities.

We have for many decades watched with dismay decisions by government bureaucrats that discriminate against and disproportionately harm minority communities. We have battled against this discrimination for our entire careers, which for some of us means working to combat discrimination for more than 50 years. In litigation and political action, we have worked to force
government bureaucrats to reform policies and programs that included blatant racial discrimination – by for example denying minority veterans college and home loans and benefits that were available to white veterans, and by promoting housing segregation as well as preferentially demolishing homes in minority communities. We sued and legislated to force federal and state agencies to end redlining practices that denied loans and insurance to aspiring minority home buyers and small businesses. We sued and lobbied to force regulators and private companies to recognize their own civil rights violations, and end discriminatory services and practices, in the banking, telecommunication, electricity, and insurance industries.

We have learned, the hard way, that California’s purportedly liberal, progressive environmental regulators and environmental advocacy group lobbyists are as oblivious to the needs of minority communities, and are as supportive of ongoing racial discrimination in their policies and practices, as many of their banking, utility and insurance bureaucratic peers. Several years ago, we waged a three year battle in Sacramento to successfully overcome state environmental agency and environmental advocacy group opposition to establishing clear rules for the cleanup of the polluted properties in our communities, and experienced first-hand the harm caused to our communities by the cozy crony relationships between regulators and environmentalists who financially benefited from cleanup delays and disputes instead of creating the clear, understandable, financeable, insurable, and equitable rules for the cleanup and redevelopment of the polluted properties that blighted our communities.

Having successfully fought for decades to overcome government and business discrimination against minority working families, we were deeply saddened – but not surprised – that the predatory lending practices and discriminatory regulatory oversight deficiencies that led to the Great Recession disproportionately harmed minority homeowners, who lost homes to foreclosures at a far greater rate than white families. Just as the civil rights promises of laws enacted in the 1960s and 1970s had reached their stride, and the racial homeownership racial gap was starting to close, the Great Recession wiped out generations of home ownership progress in our communities.

We were not surprised, but were likewise deeply saddened, when the regulatory climate change passions of California’s environmental leaders – including the overlapping leadership at the Office of Planning and Research (“OPR”) and Strategic Growth Council - were quickly distorted into a series of proposed changes to the CEQA Guidelines that add compliance costs, add regressive new consumer costs for basic living necessities like housing, transportation and utilities, and increase litigation risk to the housing and housing-related transportation and infrastructure projects.

In fact, OPR’s 2017 Proposals will actually worsen our current housing, poverty and homeless crises – while intentionally increasing traffic congestion for those already forced to drive the longest distances to housing they can afford to own or rent.

OPR does not even acknowledge California’s housing, homelessness and poverty crisis – all of which require the prompt construction of millions of new housing units that California’s hard-working residents can afford, and infrastructure that California’s burdened taxpayers can afford. Nowhere does OPR acknowledge the fact that housing is the top target of CEQA lawsuits statewide. Nowhere does OPR acknowledge that CEQA’s vague and ambiguous
provisions – which the Legislature directed OPR to clarify in the CEQA Guidelines, and which OPR is also independently required to make clear under the California Administrative Procedure Act – has resulted in a pattern of CEQA litigation outcomes that are hugely and disproportionately highly biased in favor of CEQA lawsuit challengers when compared to litigation under other federal and state environmental and administrative laws.¹

Instead, OPR’s failure to propose clear and consistent regulations in this purportedly “comprehensive” update to the CEQA Guidelines actually adds more uncertainty and ambiguity to CEQA (which in some cases even directly contradicts existing and controlling judicial interpretations of CEQA), and actually increases the power of those seeking to leverage CEQA lawsuits and lawsuit threats against the housing and infrastructure needed by our communities.

CEQA protect the status quo: home ownership is increasingly a privilege reserved for older, whiter elites in California, and CEQA gives a powerful litigation leverage tool to even anonymous parties seeking to stop construction of the estimated 3.5 million shortfall in California housing units. No meaningful legislative reforms have been enacted (with the exception of some “buddy bills” for politically favored sports stadiums, the Legislature’s own office remodel, and similar projects). In fact, the two successive studies of statewide CEQA lawsuits (2010-2012, and 2013-2015) showed that percentage of CEQA lawsuits filed against housing actually increased, even while ineffective “reforms” to CEQA promoted by OPR were enacted by the Legislature.

Governor Brown has personally acknowledged that because certain unions like using CEQA litigation threats to leverage project labor agreements, political reform of CEQA in the Legislature is impossible politically – quipping that CEQA reform is “the Lord’s work” but “the Lord’s work isn’t always done.”

However, even within the framework of the existing CEQA statutes, it is unconscionable for any state agency – including OPR – to make CEQA more ambiguous and more expansive, and thereby worsen our housing, poverty and homeless crisis – and disproportionately harm California’s minorities.

Adopting expansions, constraints, and ambiguities in the CEQA Guidelines – and thereby arming the politically-favored group of stakeholders that benefits from the non-environmental use of CEQA litigation and litigation threats to advance economic or other non-environmental objectives - crisis is not a color blind decision by OPR, it is a decision that has a disparate unconstitutional and unlawful impact on our minority communities. California’s majority minority population is far more likely to be homeless, far less likely to own homes and be able to attain the economic security and wealth that comes from home ownership, far more likely to suffer from multi-hour daily commutes to work, and far more likely to live below the poverty line even in households with two or more full-time workers.

Expanding CEQA, and increasing CEQA litigation risks, imposes stunningly regressive new costs and burdens on California lower and middle income families in the form of higher

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costs for basic necessities like utilities, transportation, fees and other CEQA “mitigation” costs that are imposed solely on those needing the new housing and infrastructure. OPR’s decision to impose new bundles of regressive cost burdens – like the vehicle mile travelled threshold (“VMT”) and “all feasible” mitigation mandates for “significant” VMT quantities that universally occur in the inland areas of California that provide the only home ownership opportunities available to median or below median income families – makes home ownership even less affordable and accessible to our communities.

No one in the Legislature voted to impose regressive new cost burdens that disproportionately harm California’s minority communities. No one in the Legislature voted to authorize OPR to expand CEQA, or increase CEQA uncertainty and litigation risks. OPR is not empowered, in pursuit of climate or environmental goals, to worsen the housing, poverty and homelessness crisis.

In conclusion, we write to voice our unwavering opposition to OPR’s 2017 Proposals to expand CEQA and increase CEQA litigation risk, and to demand that this proposal be withdrawn and replaced by a revised set of proposed revisions to the CEQA Guidelines. Our detailed comments follow:

Objections and Suggested Revisions to OPR’s 2017 Proposals to Expand CEQA and Increase CEQA Litigation Risks

We support the policy objective of the Office of Planning & Research to “comprehensively” update the CEQA Guidelines. Our organization supports strong environmental and public health laws, and California’s climate leadership. We also believe that our housing crisis, transportation gridlock, expanding homeless population, and the poverty and economic hardship that United Way of California\(^2\) has documented affects 40% of Californians, warrants urgent attention and creative solutions that must be implemented by all state agencies, including OPR.

Abuse of CEQA for non-environmental purposes by business competitors, NIMBY’s opposed to change, certain construction trade unions, and “bounty hunter” lawyers seeking quick cash settlements on behalf of sham “clients,” has been well documented, and includes both threatened and filed CEQA lawsuits.\(^3\) CEQA fundamentally is biased in favor of stopping changes to the status quo:

- Projects and plans to provide desperately needed housing in existing communities is the top litigation target of CEQA lawsuits statewide, and the unavailability and unaffordability of housing has been well documented by numerous studies\(^4\) including

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\(^3\) Jennifer Hernandez, David Friedman, Stephanie DeHerrera, In the Name of the Environment: Litigation Abuse Under CEQA, (Aug. 2015), Holland & Knight, https://perma.cc/SV3V-F5L2, (as of March 13, 2018);

several reports from the non-partisan Legislative Analyst's Office. Virtually all CEQA lawsuits targeting housing in California's major job centers are aimed at stopping infill, multi-family, transit-oriented housing: 100% of anti-housing CEQA lawsuits in the Bay Area region targeted infill housing, as did 98% of these lawsuits in the SCAG region. In the SCAG region, more than 70% of such lawsuits targeted multi-family housing near transit, nearly 80% of these lawsuits targeted housing in whiter, wealthier and healthier parts of California. The Legislature, and voters, have authorized significant bond funds and other measures to fund homeless and affordable housing, and to streamline housing approvals and production. The CEQA Guidelines update must recognize and be aligned with these housing and poverty priorities, and include clear and practical regulatory revisions that are consistent with existing statutes and judicial precedent to expedite completion of new housing that complies with California's stringent environmental, public safety, and climate statutes.

- Transportation infrastructure is another top target of CEQA lawsuits: nearly half of all Caltrans EIRs are challenged based on a 2017 California Senate Committee study, and more transit system projects were targeted by CEQA lawsuits than highways and roadways combined in a statewide study examining all CEQA lawsuits filed between 2010-2012. Commuter gridlock has worsened, and people have been forced to drive ever longer distances to afford housing they can rent or buy, resulting in recent increases in vehicle miles travelled with corresponding increases in transportation emissions even as traditional pollutants from cars have fallen 99% below 1960's fleet averages, and the deployment of fuel efficient, hybrid, and electric cars has increased. Bus ridership is down nationally, and transit ridership is down in California's largest metro areas - even while new transportation technologies and services have created new transit solutions for more Californians. Major

transportation projects area must be in regional plans for which EIRs have already been prepared, the California Air Resources Board reviews and approves such plans for compliance with SB 375 climate requirements, and voters have approved bond funding in numerous jurisdictions to expedite completion of these transportation projects. The CEQA Guidelines update must recognize and be aligned with these housing and poverty priorities, and include clear and practical regulatory revisions that are consistent with existing statutes and judicial precedent to expedite completion of new transportation projects and other critical infrastructure that complies with California’s stringent environmental, public safety, and climate statutes.

- Local voters have agreed to increase taxes, fees and debt to help solve homelessness, subsidize low-income housing, and build critical transportation infrastructure. The CEQA Guidelines update must recognize and be aligned with the completion of taxpayer funded projects, which are already required to comply with California’s stringent environmental, public safety, and climate statutes. Specifically, the CEQA Guidelines update must include clear and practical direction, consistent with CEQA’s statutes and judicial precedent, to assure that taxpayer funds are not diverted into lengthy and repetitive environmental studies, and approved projects are not then mired down by multi-year CEQA lawsuits based on uncertain or vague CEQA compliance mandates. Duplicative studies and CEQA lawsuits by those who oppose voter-approved projects increase taxpayer costs, delay critical projects, and continue to erode public confidence in the capability and willingness of government agencies to actually implement solutions approved by voters.

We believe OPR has a legal, political, and moral obligation to assure that this comprehensive update to the CEQA Guidelines will actually help expedite housing, transportation and related critical infrastructure and other projects by reducing duplicative CEQA processes, and reducing CEQA litigation risks. However, many of OPR’s 2017 Proposals perpetuate and even introduce new ambiguous and conflicting CEQA Guidelines which will expand CEQA’s compliance costs and litigation risks.

OPR’s expansion of CEQA also undermines the validity of previously-certified, and even previously judicially upheld, CEQA documents. Specifically, the application of the mandatory new transportation threshold for land use projects – 15% below “regional” VMT must be achieved to be less than significant under this new threshold approach, notwithstanding the fact that VMT has recently been increasing in response to increasing population and employment levels in major California regions. OPR’s defense of this as a “climate” measure also fails: neither OPR nor CARB have quantified how this is “required” to achieve the statutory GHG reductions required under SB 329 (40% below 1990 GHG levels by 2030) or the regional land use and transportation planning targets established pursuant to the statutory requirements of SB 375. In the only available quantitative study10 of the effects of an “infill-only” approach to solving the state’s desperate housing shortage by building all new housing within existing

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communities – and then assuming that residents of such new housing would reverse national and statewide transportation trends and actually ride buses rather than use alternative vehicular transit modes that most studies conclude would increase VMT, a team of UC Berkeley researchers found that this radical densification would reduce 1.79 million metric tons of GHG (MMTCO2e) annually – which is less than 1% of the 181 MMTCO2e that CARB has concluded must be eliminated from California’s GHG emissions to achieve the SB 32 target (which takes into account reductions from the land use and transportation sector from SB 375 as well as more than a dozen other major California climate laws). Even the least costly housing units constructed under this new land use vision of densification of existing communities – townhomes and small unit subdivisions in single structures like triplexes - would cost far more in rent that average middle income workers actually earn. Finally, the UC study concluded that implementing this vision would require the demolition of “tens, if not hundreds of thousands, of single family homes” – and excluded entirely the social, equity, and even GHG emissions attributed to such a massive demolition and displacement program.\footnote{Id. at 25.}

OPR also fails to acknowledge the massive adverse environmental impacts caused by changing CEQA in an effort to require this radical change in land use to achieve less than one percent of the California GHG reductions required by the Legislature.\footnote{Sen. Bill No. 32 (2015-2016 Reg. Sess.); Sen. Bill No. 375 (2007-2008 Reg. Sess.);} California’s largest region is all of Southern California (except San Diego), and the regional land use and transportation agency (the Southern California Association of Governments, “SCAG”) concluded that requiring even half of all new housing to occur exclusively in higher density, transit-served, previously-developed locations would cause significant unavoidable adverse impacts in 17 topical CEQA areas, and for many of these topical areas would cause multiple adverse impacts in each topical area, including: aesthetics, agriculture and forestry resources, air quality, biological resources, cultural resources, energy, geology and soils, greenhouse gas emissions and climate change, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population/employment/housing, recreation, transportation/traffic/safety, and utilities and service systems. SCAG further concluded that it was entirely infeasible to cram all required new housing units into these high density transit locations, and that this would cause even worse significant unavoidable impacts than the CARB-approved SCAG Sustainable Communities Strategy.\footnote{Sapphos Environmental, Inc. Findings of Fact and a Statement of Overriding Considerations for the 2016 Regional Transportation Plan/Sustainable Communities Strategy, (March, 2016), SCAG, \url{http://scagtrpocs.net/Documents/2016_peir_final/2016fPEIR_ExhibitA_FOFSOC.pdf}, (as of March 13, 2018)}

CEQA delays and obstructs change, even change that is fully compliant with every single environmental, climate, health and safety, worker protection, and anti-discrimination law and regulation applicable to California projects. OPR’s untested theory that expanding CEQA is necessary to achieve California’s climate leadership goals is not supported by substantial evidence, and will in fact cause further delay, cost, and litigation risks that obstruct timely implementation of solutions to California’s housing, homelessness, poverty and transportation crises. Amending the CEQA Guidelines to intentionally do what the Legislature has repeatedly declined to authorize – put California on a “road diet” of ever-worsening congestion and directing new housing to transit-served locations in high density unit types that are entirely unaffordable to the “missing middle” of hard working Californians – is a cruel travesty to inflict
on the 40% of Californians that the United Way has concluded cannot routinely meet monthly housing, transportation, utility, food, and medical expenses\(^\text{14}\). Plunging still more Californians into poverty to achieve “Less Than One Percent” of the SB 32 and SB 375 GHG reduction mandates is unconscionable.

Apart from the fundamental flaw that the high density development vision OPR is attempting to coerce with its 2017 Proposals will cause “significant unavoidable harm” under CEQA to scores of environmental and health thresholds, will plunge more people into poverty and homelessness, will continue to drive working Californians to much higher per capita GHG states where they can afford housing, and will achieve less than one percent (\(<1\%\)) of the state’s SB 32 and SB 375 GHG reduction mandates, OPR’s 2017 Proposals are also fatally flawed as regulations. Specifically, many of OPR’s 2017 Proposals also fail to comply with the mandatory legal requirements applicable to the CEQA Guidelines under the Administrative Procedures Act (APA). Revisions to OPR’s 2017 Proposals that are legally required to comply with the APA, and to CEQA’s statutory requirements for the CEQA Guidelines, and include revisions that are necessary to:

- Avoid ambiguous or vague Guideline provisions that create or exacerbate CEQA litigation risks
- Avoid conflicts, and eliminate duplication, with other federal, state and local legal requirements
- Avoid duplicative CEQA reviews, delays, and lawsuits that would exacerbate California’s housing, homelessness, poverty and transportation crises
- Avoid duplicative CEQA reviews, delays and lawsuits targeting: (A) transportation, water and other public infrastructure projects required to serve population and land uses included in regional Sustainable Communities Plans that the California Air Resources Board (CARB) has already approved, and (B) housing, transportation, water and other public facilities eligible for voter-approved funding.

OPR’s economic impact assessment includes zero acknowledgement of evaluation of how OPR’s 2017 Proposals will actually affect CEQA compliance costs and litigation risks affecting housing, transportation, and other urgent priorities to address our poverty and homelessness crises, and is accordingly fundamentally flawed. OPR’s unlawful economic impact assessment is based on flawed, false, and biased estimates of revisions to one impact issue (traffic-related transportation impacts). Accordingly, OPR’s Proposal lacks the required analysis of the economic, equity and economic consequences of the 2017 Proposals.

OPR’s 2017 Proposals also have a disparate effect on minority communities, as well as younger Californians such as Millennials, who are most urgently in need of more housing – and the transportation, infrastructure, and public services needed to accommodate new housing. The 2017 Proposals continue a tradition of intentionally introducing ambiguous, contradictory and litigious regulatory text that benefit the strong special interests who have a vested financial

interest in continuing the non-environmental abuse of CEQA litigation to gain economic advantages.

Finally, OPR’s 2017 Proposals are also unconstitutional and unlawful in perpetuating CEQA’s bias against change – which favors wealthier, whiter, older Californians - even when such change is urgently needed to address climate, housing, poverty, equity and transportation priorities. OPR’s 2017 Proposals constitute de jure discrimination in violation of federal and state law.

To remedy these deficiencies, OPR must revise and re-issue modified proposed amendments to the CEQA Guidelines, correct its economic assessment, fully disclose the effects of its proposal to the environment and to the disparate impacts that CEQA’s status quo bias has on minority and low income communities, and prioritize drafting clear, unambiguous, and practical regulations to minimize CEQA’s compliance costs and substantially reduce or eliminate litigation risks for projects not relying on “fair argument” negative declarations. These modifications to the OPR 2017 Proposals are necessary to comply with law, and to address the housing and poverty crisis, and expedite completion of transportation and other critical infrastructure projects that have already had at least one completed round of CEQA compliance as well as voter and initial agency approvals. No state agency should hide within a silo of vague legalese to promote increased litigation risks and delays, and do further harm to hard working minority and millennial families suffering from California’s housing, homelessness, poverty and transportation crises.

Specific comments, and revisions required to correct the fatal and discriminatory legal flaws in OPR’s 2017 Proposal, are described in Attachment A to this letter. A comprehensive revision to OPR’s economic analysis, which specifically discloses all adverse and disparate impacts of OPR’s 2017 Proposal on housing, homelessness, transportation, public infrastructure, and global climate change – including inducing even more population and job relocation to other states and countries, to the detriment of pension funds and tax revenues dependent on maintenance of a robust and equitable California economy – is also required, as described in Attachment B to this letter.

Signed,

John Gamboa
Vice-Chair
Attachment A

OPR Must Revise its 2017 Proposed Amendments to the CEQA Guidelines to Correct Substantial Legal, Equity, and Environmental Flaws

Courts have long held that CEQA should be broadly construed to protect the environment consistent with CEQA’s objectives, and have repeatedly upheld the “fair argument” standard of judicial review that applies to Negative Declarations.

Neither of these broad principles excuses or exempts OPR from its legal obligation to comply with the California Administrative Procedure Act (“APA”)¹, which is designed to assure that all regulations be written in “plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. The agency shall draft the regulation in plain English.” (Cal. Gov. Code § 11346.2, emphasis added). For a Governor to have repeatedly emphasized the urgent need for CEQA reform as the “Lord’s work” to promote regulatory amendments to CEQA that increase compliance cost and litigation risks, and worsen the state’s housing, poverty and transportation crisis and actually increase rather than decrease global greenhouse gas emissions (GHG), is simply unconscionable. OPR should revise its 2017 Proposals to draft the CEQA Guidelines with the same level of clarity and plain English text that is required of other California regulations. OPR’s policy choice to maintain and expand ambiguity in the Guidelines to benefit the well-documented special interest abuse of CEQA lawsuits and lawsuit threats at the expense of hard working California families is simply unconscionable.

Expressly applicable requirements of the APA to the CEQA Guidelines also demand an assessment of this proposal on housing supplies and housing costs, both of which will be harmed by OPR’s 2017 Proposals². Housing has for the past seven years been the top target of CEQA lawsuits statewide, and the vast majority of these housing CEQA lawsuits are located in infill areas (e.g., 100% of Bay Area CEQA lawsuits targeted infill housing locations, and 98% of the SCAG region’s housing projects were located in infill locations)³. Within the SCAG region, the vast majority of the 14,000 challenged housing units were higher density, multi-family projects – and 70% of those were within one-half mile of high quality transit stations or corridors⁴. CEQA lawsuits against housing are also yet another tactic used by whiter, wealthier, healthier communities to keep out “those people” – 78% of the challenged housing units in the SCAG region happened outside the environmentally disadvantaged areas designed by the California Environmental Protection Agency⁵.

OPR has no statutory impediment to updating the Guidelines to avoid duplicative Environmental Impact Reports (EIRs), or to clarify the required contents of EIRs. As explained below, numerous provisions of the proposed CEQA Guidelines fail to comply with this APA legal mandate for clear and practical regulations. Other provisions of OPR’s 2017 Proposals are internally inconsistent, or are inconsistent with other applicable legal requirements, and are thus unlawful and require revision independent of APA violations.

¹ Gov. Code section 11340 et seq.
² See http://opr.ca.gov/ceqa/updates/guidelines/
Independent of the APA, CEQA itself requires OPR to approve clear Guidelines: “The [G]uidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a ‘significant effect on the environment.’” (PRC § 21083(b), emphasis added) OPR’s 2017 Proposals also repeatedly violate this express CEQA statutory requirement.

A. Appendix G Environmental Checklist for Evaluating the Significance of Project Impacts Under CEQA.

Appendix G of the CEQA Guidelines has been used for decades as a legally-defensible presumptive list of thresholds for assessing the extent to which a project could have an adverse CEQA impact. This Appendix plays a critical role in allowing agencies to screen projects between those that qualify for categorical exemptions based on the absence of an “unusual circumstance” of a significant adverse Appendix G impact, as well as the decision as to whether to prepare a Negative Declaration or EIR – or to prepare a subsequent or supplemental Negative Declaration or EIR for later project implementation activities. Although CEQA petitioners are entitled to make a “fair argument” that an impact not in Appendix G is nevertheless significant under CEQA, and agencies are allowed to adopt or amend CEQA thresholds that differ from the Appendix G checklist, the fact is that Appendix G provides the most critical practical tool for the actual implementation of CEQA by hundreds of state, regional, and local agencies. Avoiding ambiguous and vague Appendix G questions is of paramount importance in compliance with the APA and CEQA mandates applicable to the Guidelines. OPR’s “comprehensive” update of the CEQA Guidelines fails to eliminate, and in fact expands, the vague, ambiguous and unlawful provisions in Appendix G.

I. Aesthetics. This set of thresholds suffers from five legal defects.

First, although OPR’s explanatory text states that CEQA is not intended to apply to “private” views, OPR’s Appendix G checklist continues to identify impacts to a “public” view as presumptively adverse. However, OPR offers no definition of what constitutes a “public” view. Is the view from a sidewalk to an empty lot a “public” view that is adversely impacted if a duplex is built on that lot? If not, why not – and if so, why?

Second, changes to the “character of a community” are among the most frequently alleged “significant adverse aesthetic impacts” of increasing the density and intensity of housing in existing communities, and OPR’s “comprehensive” update has failed to acknowledge this highly charged and litigious issue, or provide the required “clear” and “plain language” for assessing the significance of this issue.

Third, OPR also proposes to add a “zoning” conformance test to the same undefined “public” modified aesthetics impact threshold, but only within an “urbanized” area. Does this mean that building farmworker housing, even on a previously-developed location, that is visible from a public roadway is an adverse “aesthetic” impact? And does OPR’s 2017 Proposals sweep in all zoning requirements, but ignore General Plan requirements, about preservation of the aesthetic “character” of existing communities? Again this threshold fails to provide the clear and plain language required by the APA and CEQA.

Fourth, whether or what extent “aesthetics” is itself an “impact” is inherently subjective – and OPR provides no clear, unambiguous, or plain language description of what constitutes a significant adverse aesthetic impact under CEQA. Aesthetics is referenced but not defined in CEQA itself, so this is an excellent example of a gap that the CEQA Guidelines is supposed to fill for practitioners and the public.

Fifth, there are numerous examples of NIMBY reliance on CEQA’s aesthetics threshold by blocking projects such as multi-family housing that they allege will change the “character of the community.” Some NIMBYs are more blunt, and explain that the “character” they want to preserve excludes racial minorities, and

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6 Pub. Resources Code, § 21083(b)
7 Cal. Code Regs., §§ 15000–15387

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renters. There is no place in California law or policy for racial discrimination: it is unconstitutional, and barred by statute, at both the federal and state level. Given that multi-family housing is the top target of CEQA lawsuits statewide, OPR has a legal and moral duty to bluntly and unambiguously explain that CEQA can never be lawfully used to promote or defend racial or economic segregation under the code word “aesthetics” or phrase “character of community”.

To address these legal deficiencies, OPR should rely on the specific legal direction set by the Legislature in CEQA and explicitly pull back from expansive, abstract, and litigious ambiguity about aesthetics and CEQA. The Legislature directed that CEQA recognize impacts to scenic highways, and case law on aesthetics – like much of CEQA case law – is a contradictory muddle. OPR should revise Appendix G and the accompanying explanatory text to plainly state that blocking public views from scenic roadways and of scenic vistas which have been designated as scenic by state or local governments can be appropriately considered an adverse aesthetic impact under CEQA.

Similarly, revised Appendix G should make clear that projects that comply with applicable land use requirements regarding the visual character of a project or project site, such as height, setbacks and design standards, etc. do not have a significant aesthetic impact under CEQA. Projects relying on a Negative Declaration or Mitigated Negative Declaration will also be subject to a broader range of legal challenges on this as well as other impacts topics, given the “fair argument” standard, but using CEQA’s “aesthetics” impact as a threshold for preserving “the character of a community” is a prescription for continuing to use CEQA as a “redlining” tool to unlawfully protect and promote racial and economic segregation, in violation of the federal and state constitution and civil rights statutes.

OPR should also definitively explain, in its “comprehensive” revision to the Guidelines, that “aesthetics” – whether the view from or of a kitchen window, or the shade cast by a tree or building on a neighboring property for some portion of some days, - all fall outside the scope of CEQA, and can never be a significant adverse CEQA impact. As noted above, NIMBY disputes about this CEQA aesthetic in court can continue in the context of “fair argument” disputes over Negative Declarations, but these disputes would be minimized with the required clear and plain language aesthetics test, and would be virtually eliminated in EIR lawsuits.

II. Agriculture and Forestry Resources. This topic is one of many Appendix G question sets that confute compliance – or lack thereof – with zoning requirements, and other land use contracts and laws, with an “adverse” physical impact under CEQA. CEQA requires consideration of adverse impacts to the physical environment, as well as adverse impacts to public health and safety. The existence of a Williamson Act contract on land proposed for solar energy does not equate to a physical impact on the environment (Threshold II.b), just as the construction of a farmhouse on a 100-acre family farm does not equate to the “conversion” of the home site to non-agricultural use of the farm (Threshold II.a).

To address this deficiency, these thresholds should be revised, and re-aligned to ask the question of whether the project would result in a significant loss of productive agricultural or forestry lands.

OPR also has an affirmative duty to clarify the scope of CEQA requirements in this “comprehensive update” to the Guidelines. In recognition of, and to provide clear and plain language explanation of, ongoing and unsuccessful litigation claims filed by CEQA petitioners, OPR should also clarify in its explanatory text that open rangeland used for grazing but not crop production, and land that is mapped as suitable for agriculture but has no baseline agricultural uses due to water supply or other constraints, is not appropriately identified as agricultural land for purposes of assessing project impacts on agricultural lands.

Finally, the introductory text for this set of AF thresholds includes methodological recommendations for assessing impacts that precede the thresholds, which is inconsistent with the remainder of Appendix G. OPR should adopt a consistent approach in either recommending methodologies and
assessment tools, or not; as discussed below regarding reliance on non-CEQA legal standards in CEQA, OPR should provide this type of recommendation for all CEQA topics for which there are other applicable legal standards.

III. Air Quality. OPR’s revisions to these Appendix G questions violate both the APA and the Supreme Court’s rejection of petitioners’ (and OPR’s amicus) arguments in the BAAQMD decision that CEQA does not apply to the impacts of the environment on a project, absent express statutory authority to do so in relation to specific types of impacts or projects – unless the project “exacerbates” the existing environmental condition and thus creates a new or worse impact. OPR’s revisions track its unsuccessful effort to avoid the Court’s holding in BAAQMD, instead of recognizing and respecting this Supreme Court interpretation of CEQA. OPR’s blatant disregard for Supreme Court precedent, and “magic thinking” that what the Court really meant was that existing environmental conditions be evaluated as “indirect impacts” under CEQA, also ignores several years of Legislative history since the Legislature declined to reverse BAAQMD (and the Ballona case that preceded BAAQMD). It is also noteworthy that OPR clearly knows, and accepts, the BAAQMD Supreme Court’s “exacerbation” holding with respect to one topical impact area (see Threshold XX.b, Wildfire). OPR’s refusal to accept the Supreme Court’s directive for all other topical impacts in the OPR 2017 Proposals is itself unlawful, and this deficiency alone renders numerous provisions of the OPR 2017 Proposals unlawful under CEQA.

First, Threshold III.b revisions replace the threshold of whether a project would “contribute substantially” to an air quality violation with the alternate test of whether a project would “result in a cumulatively considerable net increase” in an existing or projected air quality violation. Neither the original nor the revised formulation of this threshold provides the clear, comprehensible, or plain language required by the APA. If a project does not exceed or violate an air quality standard (which is the first test in Threshold III.b, what levels of project emissions does OPR believe would result in a “cumulatively considerable” increase? California’s most populated areas are not in attainment with federal or state standards for one or more air pollutants – so does approving new housing in these locations result in a “cumulatively considerable” increase in air emissions, even though the likely consequence of refusing to approve housing is to force people to drive even longer distances between homes and jobs? Is building a new carpool lane in these regions a “cumulatively considerable” increase in air emissions, even though the consequence of not building the carpool lane is more pollution from longer gridlocked commutes? This text change is also internationally inconsistent with other portions of the Guidelines, which use the term “cumulatively considerable” to assess cumulative rather than project-level impacts. Is OPR’s addition of the term “net increase” suggestive of the need for a project to mitigate or avoid every molecule of emissions (from construction as well as occupancy) unless such mitigation is “infeasible” – and if not “net increase”, is more than one molecule of a non-attainment pollutant, or rather how many molecules (or pounds per day, or tons per year) are allowed before project emissions become “cumulatively considerable”? One noted CEQA law professor at UC Davis, who was formerly the head of the environmental division of lawyers for the California Attorney General’s Office, has quipped that CEQA has become “Talmudic” in its complexity, ambiguity, and conflicting interpretations – but OPR’s legal obligation under the APA is to create clarity and predictable compliance obligations, not promote full employment opportunities for the agency staff, lawyers and consultants who argue and litigate over OPR’s impossibly ambiguous terminology choices.

Second, OPR representatives have long argued against the plain language conclusion of the Supreme Court in the BAAQMD case that CEQA does not apply to the effects of the environment on a project, even though the Legislature has been repeatedly asked and has declined to reverse this Supreme Court decision. Specifically, OPR’s refusal to modify Threshold III.b continues this blatant noncompliance pattern because it asks whether the project will “expose sensitive receptors to substantial pollutant concentrations” even if those pollutant

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9 Ballona Wetlands Land Trust v City of Los Angeles, (2011) 201 Cal.App.4th 455
10 supra note 8
concentrations come from existing ambient environmental conditions (e.g., building transit-oriented housing close to higher volume roads with frequent bus services or in downtown locations close to freeways, but worse ambient air quality). The Supreme Court said that this type of circumstance can only be considered if the project "exacerbates" an existing environmental condition, leaving practitioners with the need to understand what constitutes "exacerbation" and when this "exacerbation" is a significant impact under CEQA. OPR has simply declined to update the Guidelines to provide the necessary regulatory clarity from this important Supreme Court decision – because OPR has made clear that it does not like or agree with the Supreme Court. This lawless conduct is unacceptable, and is another example of OPR's APA and CEQA noncompliance.

IV. Biological Resources. Under Threshold IV.c, OPR proposes to replace the clear existing threshold of whether a project would adversely affect wetlands that are federally protected under Section 404 of the Clean Water Act, with a far more ambiguous reference to whether the project would affect a "state or federally protected" wetlands. There is significant ongoing controversy regarding what constitutes a "state" wetland, with different criteria established in the Coastal Zone, no current regulatory definition for what constitutes a state wetland outside the Coastal Zone, and various interpretative memoranda and regional or local plans that have conflicting – and both advisory as well as mandatory provisions – regarding wetlands. The existing threshold includes an express statutory reference to applicable federal law; at minimum, to avoid ambiguity and the unlawful elevation through CEQA of "state protections" that have not completed the rulemaking process. This threshold must be revised to clarify that CEQA applies to "wetlands" as defined by applicable federal or state laws and regulations.

More generally, OPR is obligated to step into and resolve conflicts that are continuously litigated given the absence of clarity in the existing Guidelines. For example, Threshold IV.d states that a project could have an adverse biological impact if it would "interfere substantially with the movement of any native resident or migratory fish or wildlife species." This threshold has resulted in repeated assertions that a project that would interfere with the localized movement of common urban wildlife that have no protected status under any federal or state law, like ground squirrels and raccoons, and removal of unoccupied nests of robins or crows as part of tree trimming fire prevention activities, would have a significant adverse environmental impact under CEQA. There is no case law or Legislative directive that would result in such a massive expansion of CEQA, and OPR should clarify this disputed issue in its "comprehensive" update.

Finally, as discussed in greater detail below in relation to the integration of CEQA with other non-CEQA legal mandates, the Biological Resources thresholds appropriately refer to a project's consistency with regional natural resource regulatory plans approved by state and federal species protection agencies. However, compliance with these regulatory plans should also serve as evidence that the project avoids significant adverse project-level or cumulative impacts to the species and habitat types covered by the approved regulatory plan(s). Accordingly, Threshold IV.a and b (impacts to federal and state protected species, and habitat types) should be combined with Threshold II.f (compliance with federal and state approved habitat and species regulatory plans).

V. Cultural Resources. Two of the three thresholds in this section refer to other sections of the Guidelines, rather than restating the relevant threshold set forth in the cited section of the Guidelines. The purpose of Appendix G is to provide a clear, plain language checklist summary of relevant thresholds; the APA demands that technical language be presumptively avoided. These cross references should be replaced with text, consistent with the other sections of the Guidelines.

VI. Energy. OPR's 2017 Proposals add two brand new thresholds to Appendix G, both of which fail to comply with the APA.

First, Threshold VI.a asks whether construction or operation of a project would result in the "wasteful, inefficient, or unnecessary consumption of energy." OPR provides no criteria for either of these three new, separate thresholds – when
is energy use wasteful, efficient, or unnecessary? Is installation of windows on the west-facing wall of an apartment project "wasteful" because this design would require more air conditioning during summer months? Is it "unnecessary" to install natural gas for heating and cooking, since – at much higher consumer costs – electric heaters and stoves can be used instead? The Legislature has expressly directed the Building Standards Commission to adopt building standards that consider both efficiency and cost-effectiveness, and the Legislature has on several occasions been asked to consider and has expressly rejected enacting a ban on natural gas appliances in homes. If a project complies with California’s stringent energy efficiency and building code standards, it should not be open to being challenged in a CEQA lawsuit for its "wasteful, inefficient, or unnecessary" consumption of energy – and OPR should revise the OPR 2017 Proposals make this crystal clear to avoid endless CEQA lawsuits against the state’s top litigation target, infill housing.

Second, Threshold VI.b asks whether a project will "conflict with or obstruct" a state or local plan for energy efficiency. While the term "conflict" is clear, what does it mean for a project to "obstruct" a plan? To address today’s urgent housing crisis, how will this "obstruct" standard be applied to a state or local climate action plan calling for a per capita greenhouse gas emission threshold of 2 metric tons of carbon dioxide equivalent (MtCO2e) by 2050 – where today’s residents produce among the lowest per capita GHG emissions in the United States (at 11 MtCO2e), and the new housing will in part be served by electricity produced from natural gas "peaker" plants for evening peak loads (since storage of solar and wind daytime energy is not yet feasible), and that is occupied in part by people who must drive cars or take buses to work that are fueled in part by petroleum.

Testing these and all other thresholds against the most common targets of CEQA lawsuits – like housing, transportation and other infrastructure, and public services like schools and fire prevention – quickly devolves into a "Talmudic" vortex of uncertainty and conflicting views. This is precisely what both the APA, and the express CEQA statute directing OPR to prepare CEQA Guidelines, prohibits.

VII. Geology/Soils. This is another attempt by OPR to avoid the BAAQMD Supreme Court decision, which prohibits the application of CEQA to impacts from the environment – inclusive of geological and soils issues like earthquakes and liquefaction – on a project. OPR makes the strained case that the environment’s impacts on a project continue to fall within CEQA as an "indirect" rather than "direct" impact is flatly at odds with the Supreme Court’s holding, which limited consideration of the environment’s impacts to a project to those impacts and projects subject to express legislation, and to existing adverse environmental conditions that are "exacerbated" by the project. Attempting to infiltrate stormwater into clay soils that will cause surface flooding, or pumping stormwater into soils that are already prone to liquefaction, are examples of project impacts that would exacerbate a potentially hazardous condition that already existed in the environment. OPR’s "indirect" sleight of hand is unlawful under CEQA as decided by the Supreme Court in the BAAQMD decision, and accordingly exceeds the scope of OPR’s authorizing statute and is an unlawful regulation under the APA. Threshold VII.a must be either deleted, or rewritten to conform to the exacerbation and express authorization exceptions to the Court’s holding that CEQA does not apply to the environment’s impact on a project.

Threshold VII.f adds a new threshold addressing project impacts to a "unique" paleological or geologic features. This threshold likewise fails the APA criteria for clarity: is the feature "unique" in the world, in the state, in the region, in the city, or on the project site? Or is "unique" for paleontology simply a previously undiscovered fossil species? What is even a potentially "unique" geologic feature? These ambiguous references promote litigious jousts among experts, and do not satisfy regulatory clarity requirements.

11 Cal. Code Regs., Title 24
12 supra note 8
13 supra note 8
VIII. Greenhouse Gas. This topic remains the most legally uncertain of all impacts, notwithstanding the Legislature’s express direction that OPR and CARB collaborate to develop Guidelines that explain how CEQA applies to greenhouse gas emissions and climate change (collectively referred to in these comments as “GHG”). The majority of the Supreme Court’s decisions in recent years have addressed GHG, but not even the Supreme Court has been able to parse the existing GHG Appendix G thresholds to ascertain how and to what extent GHG emissions should be analyzed, when such impacts are significant, and how these impacts should be appropriately mitigated. In the Newhall case14, the Supreme Court identified several potential compliance “pathways” for addressing GHG under CEQA, which the Court opined “may” be sufficient – or may not. In the SANDAG case15, the Supreme Court upheld a regional plan that met near-term GHG reduction targets, while cautioning that its decision was not dispositive of longer-term planning horizons. A Supreme Court Justice, speaking at the 2017 Yosemite Conference, declined to answer a question asking for direction as to what agencies should do with GHG under CEQA, but observed that this was a topic that warranted further clarification by appropriate agencies. OPR itself explains that the existing GHG thresholds should more properly be applied to assessing a project’s “incremental” GHG emissions rather than focused on the GHG emissions of each particular project – although OPR does not provide any clear or practical explanation as to what agencies are doing wrong now, or what they should do instead based on this “incremental” criticism. OPR’s 2017 Proposal also fails to acknowledge, explain, or provide any direction as to how agencies should use and/or rely on the new CEQA GHG thresholds adopted by CARB in the CARB 2017 Scoping Plan, or to the GHG thresholds adopted by several regional air quality control agencies – including a regional agency approach that was cited with approval in one of the Supreme Court’s GHG CEQA decisions. Finally, OPR’s 2017 Proposals include revisions to the CEQA Guideline that do address GHG emissions, but these revisions have not been integrated into Appendix G to provide the required plain language regarding significance; further comments on the GHG Guideline revision itself are provided below.

In sum, OPR’s 2017 Proposals fail to comply with OPR’s statutory obligation to reconcile these and other relevant authorities to update the CEQA Guidelines to include clear and practical direction as to how to address GHG under CEQA. Given the multitude of overlapping judicial and expert agency precedents, OPR’s decision to avoid any modification to clarify the Appendix G GHG Thresholds is itself ample evidence of OPR’s failure to comply with APA and CEQA’s statutory mandates.

IX. Hazards and Hazardous Materials. There are three legal deficiencies with these thresholds:

Threshold VII.d carries forward a statutory disqualification for reliance on a categorical exemption in some circumstances, namely whether the project site is on a list of sites to be maintained by other state agencies of potential or confirmed contamination from hazardous materials releases. There is ample evidence that the statutory list at issue is not frequently updated, resulting in both omission of contaminated property and inclusion of formerly contaminated property that has since been remediated as approved by an environmental oversight agency. There is also a standard professional site assessment protocol in common use (“ASTM Phase I”) for identifying potentially significant contamination conditions, and describing the status of any investigation, cleanup, and regulatory activity on the site. Threshold VII.d should be replaced with the following plain language text:

"Does the project site have any historic or existing contamination conditions, and if so has the site been remediated as required for the proposed project use by an authorized state or local environmental remediation oversight agency?"

Threshold VII.e is unlawfully vague: the “excessive noise” criteria must be linked to the decibel levels established in the applicable airport land use plan (or in the applicable local agency noise ordinance if no such plan exists).

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14 California for Biological Diversity v California Department of Fish and Wildlife. (2015) 62 Cal.4th 204
15 Cleveland National Forest Foundation v San Diego Association of Government. (2017) 3 Cal.5th 497
Threshold VII.h is unlawful under BAAQMD as written since it addresses hazards from existing environmental conditions. As properly framed under BAAQMD, it duplicates thresholds relating to flooding and geotechnical risks that are located in the Hydrology and Geology thresholds. This must be deleted.

X. Hydrology and Water Quality. The OPR 2017 Proposals appropriately delete duplicative thresholds from this section. However, OPR’s revised thresholds fail to include the plain language APA and CEQA mandates.

Threshold IX.a first appropriately retains reliance on whether the project complies with adopted water quality standards or waste discharge permit requirements, but then adds a second, unlawfully vague "or otherwise substantially degrade surface or ground water quality" threshold. Water quality standards and waste discharge permits are required by statute to protect surface and ground water quality from degradation, and there are state as well as regional boards – and more than a thousand employees – who establish and manage these standards and permit programs. Compliance with legal mandates imposed in other parts of California statutes – from seismic safety, to water and air quality, to greenhouse gas emissions – have been repeatedly upheld in EIR cases as substantial evidence of the absence of an adverse environmental impact for the regulated complying project activity. The new text addition in this threshold must be removed to avoid this unlawfully vague language, and unlawful rejection of ample court precedent confirming compliance avoids significant impacts under these circumstances.

Threshold IX.b would introduce substantial new uncertainty for all projects that would use groundwater and are located in areas of groundwater overdraft, even to the extent that the overdraft conditions are being remedied through other state laws and planning mandates such as the Sustainable Groundwater Management Act (SGMA). Deletion of the text providing an example of a potential adverse impact to groundwater – dropping the production rate of nearby existing wells – also eliminates an appropriate localized focus of this threshold, since even if a project complies with sustainable groundwater plans adverse localized impacts can occur and be significant.

This threshold should be converted into a two-part threshold applicable only to projects that rely on groundwater supplies: part one should ask about the project’s compliance status with groundwater management plans (similar to the threshold for the extent to which the project’s population growth is consistent with planned growth in General Plans), and part two should ask whether the project would adversely affect localized wells.

Threshold IX.c is generally an improvement, except for the last clause which asks whether the project would "impede or redirect flood flows" even if such flood management is entirely consistent with flood management infrastructure and would not cause or contribute to any flooding hazard. This abstract question could be used to challenge any project that includes legally-mandated storm drains, detention facilities, and other flood management measures which by definition "impede or redirect" stormwater – which is arguably equivalent to the undefined term, "flood flows." The last clause should be deleted.

XI. Land Use and Planning. The revised text is a significant improvement.

XII. Mineral Resources. No changes were proposed to these thresholds.

XIII. Noise. Revised Threshold XI.a is a significant improvement, but inappropriately conflates temporary and permanent increases in ambient noise and should be limited to permanent noise. A separate threshold is needed for temporary, construction-phase noise – which is one of the most litigated issues for CEQA infill projects. The revised threshold for construction noise should appropriately refer to the noise element required in all General Plans, which defines community standards and expectations regarding noise, by stating: "Will project-related construction activities result in temporary noise that exceeds applicable

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16 Cal. Wat. Code, §10720
noise thresholds adopted in the General Plan or by local ordinance by causing noise levels that exceed week day permissible construction noise, or weekend and evening construction noise prohibitions?"

Threshold XI.b lacks the required clarity in identifying when ground borne noise or vibration levels are "excessive." This is precisely the type of opaque and ambiguous threshold that is prohibited by CEQA and the APA. "Excessive" ground borne noise or vibration can be adverse impacts, but without reference to a relevant legal (or alternate technical standard supported by expert study), this is an unlawful form of CEQA Guideline.

XIV. Population and Housing. The first revised thresholds are helpful clarifications that improve predictability.

XV. Public Services. No changes were made to this section, which is unlawful given the announced "comprehensive" nature of the OPR 2017 Proposals. Specifically, the open-ended list of "government facilities" that are subject to CEQA at all remains unresolved, which has led to confusion and litigation about the extent to which CEQA applies to libraries, jails, hospitals or ambulance services, that are partly subsidized by government funds, etc. The modified "government facilities" recognized by the legislature and judicial precedent are limited to schools, as well as fire and police stations. This list should be limited to these facilities, and if OPR believes it has the legal authority to include in CEQA changes to other types of government facilities that are not proposed as part of the project (or required as conditions of approval outside CEQA by permitting agencies), then OPR should provide the requisite statutory authority for this expansion to CEQA.

XVI. Recreation. The second of these unchanged thresholds simply restates CEQA’s existing requirements that the "whole of the project" – including any new or expanded recreational facilities – must be evaluated to the extent they have an adverse physical effect on the environment. This is not a threshold, and should be deleted from Appendix G.

XVII. Transportation and Traffic. These threshold revisions are linked to the OPR 2017 Proposals’ many provisions, and an accompanying complex technical guidance document, to mandate use of a new transportation metric for passenger cars and trucks – Vehicle Mile Traveled (VMT) – even if such vehicle usage does not cause any noise or air pollutant or safety or environmental impact. This VMT expansion of CEQA is addressed in greater detail in the comments that follow the Appendix G thresholds. With respect to the transportation changes to the Appendix G thresholds, however, there are several legal deficiencies that violate the APA and CEQA that require modified text.

Threshold XVII.a deletes the existing reference to the requirement that the transportation plan, ordinance or policy at issue be “applicable” to the project. Without preserving this “applicability” requirement, the revised threshold provides zero clear or practical direction on the universe of existing transportation plans, ordinances or policies that may – or may not – actually apply to the project. For example, there are other contested CEQA expansions – such as the “vibrant communities” appendix, GHG numeric thresholds for projects and climate action plans, and undefined but "substantial" VMT reductions, included in the CARB Scoping Plan approved in 2017. Many of these Scoping Plan “Vibrant Communities” measures are absolutely not legally “applicable” – such as establishment of an “eco-system service fee” to charge urban area residents for management of open space areas elsewhere in California, and the requirement to establish urban growth boundaries. Varying transportation agencies, from varying regions, all have differing transportation plans, policies and ordinances. Deleting the term “applicable” puts all of these (and many more) transportation plans, ordinances and policies in play – while actually omitting references to state statutory requirements such as the Congestion Management Act and the circulation

element mandates in General Plan law. The term “applicable” should be restored to this measure, as should references to highways and not simply “roadways.”

Threshold XVII.b deletes a threshold requiring a compliance analysis of congestion management legal mandates, even though these mandates are informed by both air quality and safety standards that fall within the scope of CEQA – and even though OPR’s authorizing statute for proposing VMT as a new CEQA metric instead of the “level of service” congestion delay metric expressly mandates that air quality and safety measures must still be addressed under CEQA. This metric must be revised to acknowledge the continuing role of traffic delays, and longer commute times from traffic gridlock, in calculating criteria, toxic, and greenhouse gas emissions from vehicles – and in assessing public safety and roadway noise issues. Threshold XVII.b is also invalid in relying on a cross-reference to another CEQA Guideline, rather than converting that Guideline into plain language text in the checklist as required by APA and CEQA.

XVIII. Tribal Cultural Resources. These are not proposed for change, although they violate the APA and CEQA in relying on statutory cross-references which are not even defined in the Guidelines. The Guidelines, as the regulations interpreting CEQA in plain and clear language, must be revised to provide clear direction on the statutory requirements, including by providing regulatory definitions to terms such as “sacred site” that are not defined in the statute itself. Given that this is a “comprehensive” update to the Guidelines, OPR is legally obligated to correct these flawed thresholds – and the fact that these were unlawful in form when originally adopted does not shelter these from these legal objectives given OPR’s claimed “comprehensive” CEQA Guideline revision scope.

XVIX. Utilities and Service Systems. These thresholds suffer from several legal deficiencies that must likewise be corrected as part of this comprehensive update.

Threshold XVIX.a, like the Recreational facility threshold, simply restates CEQA’s basic requirement that the “whole of the project” – inclusive of required utility systems – must be evaluated in compliance with CEQA. This basic CEQA requirement can be clarified, to the extent OPR believes it needs to be clarified, by including these utilities in the Guidelines definition of “project.” As written, however, it does not identify an applicable threshold for defining whether the utility components of the project would cause an adverse impact on the environment, and should thus be struck.

Threshold XVIX.b restates a portion of the Supreme Court’s Vineyard decision18, but improperly conflates the required cumulative analysis required to assess other reasonably foreseeable development with the remainder of the project-level thresholds. While it would be useful for OPR to include cumulative impact thresholds in Appendix G, conflating the project-level and cumulative-level analyses in a single threshold introduces inappropriate inconsistency with other thresholds and should accordingly be modified to include a clear project-level threshold.

Threshold XVIX.d introduces a new undefined term, “local infrastructure”, with respect to solid waste management. Under applicable state law19, local governments are obligated to divert most waste away from landfill and into recycling, reuse, composting, and other beneficial uses. These beneficial use waste facilities are often not present in a “local” location, and in fact there has been a significant reduction in the number of local recycling facilities and an increased consolidation of these facilities into regional or even multi-regional facilities. Other localities have declined to approve composting or other required solid waste facilities, and most urban communities now ship solid waste to less populated areas. Virtually all projects generate some level of solid waste, so introducing the new “local infrastructure” ambiguity – which conflicts with the reality of how solid waste is actually managed in urbanized areas – is both unlawful under the APA and

18 Vineyard Area Citizens for Responsible Growth Inc. v City of Rancho Cordova. (2007) 40 Cal 4th 412
19 CalRecycle, 75 Percent Initiative, http://www.calrecycle.ca.gov/75percent/ (as of Mar. 12, 2018)
CEQA standards, and inappropriately counterproductive with the state’s many laws and policies encouraging the beneficial reuse of solid wastes.

Threshold XVIX.e is similarly unlawful and ambiguous: what is the plain language meaning of “negatively impact the provision of solid waste services”?

Threshold XVIX.f again elevates compliance with “federal, state and local” statutes and regulations into a CEQA threshold, instead of recognizing that it is a legal mandate that apply independent of CEQA, and actually mitigate rather than cause adverse environmental impacts.

XX. Wildfire. This new set of thresholds was added based on a new state statute, and one of the new thresholds is entirely duplicative of the “hazards” category of threshold that already addresses wildfire risks (Threshold IX.f and Threshold XX.a are virtually identical, and Threshold XX.b has a significant overlap with Threshold IX.f). This new category should be consolidated with Hazards, rather than unnecessarily expand and add duplicative new CEQA thresholds with commensurate increases in costs and litigation risks.

Threshold XX.b is also an appropriate and lawful interpretation of the BAAQMD “exacerbation” decision of the Supreme Court, which should be extended to all of the unlawful proposed thresholds that willfully ignore this decision in favor of the unlawful equivalency finding that an “indirect” impact is the same as the “exacerbation” Court test.

The second clause of Threshold XX.c is, like Threshold XVIX.a, a restatement of CEQA’s core requirement that the whole of the project be analyzed – including in this the examples of project infrastructure. This clause should be deleted, since the mere existence of this project infrastructure does not result in any significant adverse impact, and this type of infrastructure needs to be evaluated under all applicable topical areas (e.g., Biological Resources), not simply wildfire.

Threshold XX.d unlawfully omits the BAAQMD “exacerbation” requirement, and must be revised accordingly.

XXI. Mandatory Findings of Significance. OPR’s failure to provide clarity in this section of Appendix G is another example of OPR’s failure to lawfully complete its asserted “comprehensive” update to the CEQA Guidelines in the OPR 2017 Proposals.

With respect to Threshold XXI.a, OPR must provide clear and plain text that explains the extent to which these statutory mandatory findings are simply restatements of the corresponding topical thresholds (e.g., is a project that will cause a fish or wildlife population to drop below self-sustaining levels the same as an adverse Biological Resources impact – and if so, why isn’t this included in the Biological Resource thresholds?). If it is a project that has some significant unavoidable environmental impacts, when are these impacts “substantial” enough to warrant a mandatory finding of significance?

For Threshold XXI.b, virtually all project-level CEQA decisions now occur within the context of a General Plan, regional plan (e.g., for regional infrastructure and for greenhouse gas reduction land use and transportation plans included in Sustainable Communities Strategies prepared under SB 375), or state plan or project (e.g., for statewide infrastructure like the High Speed Rail or Delta Tunnels). All of these program-level CEQA documents find significant unavoidable cumulative impacts, usually for more than a dozen topical CEQA impact areas. OPR has long shirked its duty to advise lead agencies and other stakeholders as to how to address the “mandatory” finding of significance for a project that is generally or even precisely consistent with an earlier programmatic EIR for which significant unavoidable plan-level and/or cumulative impacts have previously been identified.

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20 Supra, note 8
And what is the plain language meaning of “cumulatively considerable” under CEQA?

Finally, Threshold XXI.c asks whether the project has substantial direct or indirect effects on human beings – but OPR again fails to provide clear language on how this relates to the earlier thresholds relating to human health and safety. Is this simply a surrogate for a mandatory finding for any project that has a significant unavoidable impact, or is it something different – and if so, what?

In conclusion, Appendix G is used tens of thousands of times each month, by hundreds of public agencies, throughout California. Appendix G remains full of vague, duplicative, and unlawful provisions notwithstanding OPR’s assertion that its 2017 Proposals provide a “comprehensive” update to the CEQA Guidelines. There is no better, or more clear proof of OPR’s failure to comply with the APA and CEQA than a close examination of Appendix G.

B. Other “Efficiency Improvements” to CEQA

OPR’s 2017 Proposals include the revisions to Appendix G as an “efficiency” improvement to CEQA; as demonstrated in Part A, the Appendix G revisions will result in only more cost and litigation risks, and do absolutely nothing to promote “efficiency.” Four of the six other “efficiency” improvements included in the OPR 2017 Proposals suffer from precisely the same legal deficiencies, including but not limited to ambiguity, duplication, internal or external inconsistencies with legal mandates, which collectively make these proposed regulatory changes unlawful under the APA and CEQA.

1. Using Regulatory Standards Under CEQA—§§ 15064, 15064.7. OPR proposes to update two existing sections of the CEQA Guidelines to more clearly explain how the hundreds of state environmental laws enacted since CEQA’s 1970 enactment should be integrated into CEQA. However, instead of actually accomplishing this goal, this section of the OPR 2017 Proposals entirely ignore the role of public health and safety regulatory standards under CEQA, and leave hundreds of agencies guessing as to how or whether to apply which standards for which purposes under CEQA.

First, OPR’s revisions are first unlawfully limited to regulations to protect the “environment.” However, as noted above in Appendix G Threshold XXI.c, a CEQA analysis must also examine the extent to which a project would have a substantial adverse effect on human beings. Many of the CEQA thresholds, and hundreds of CEQA judicial decisions, involve CEQA impacts to human health and safety such as air quality, accident risks, seismic safety. This component of OPR’s 2017 Proposals must be revised to include environmental, as well as health and safety, statutes and regulations.

Second, OPR references only regulations; in fact, CEQA impacts can and are also mitigated by the hundreds of post-1970 environmental and public health statutes, even before or in the absence of implementing regulations. Similarly, some statutes call for agencies to develop plans and programs to protect the environment or public health, again without the need for or existence of “regulations” based on these statutory legal mandates. OPR’s 2017 Proposals must be revised to encompass both laws and regulations, and as prescribed by law approved implementing agency plans and programs.

Third, OPR provides only generalized text to help guide lead agencies to identify, and then consider whether, or to what extent, to use these environmental legal mandates. OPR shirks its duties under CEQA and the APA with this “punt” to lead agencies: OPR is the agency charged by CEQA to develop CEQA Guidelines which must provide with specificity direction to lead agencies. OPR then pours further salt on the wound by requiring each of every one of the hundreds of implementing CEQA agencies to provide substantial evidence in defense of their reliance on adopted regulations. Consider the practical effect of OPR’s failure to do this job as part of its 2017 “comprehensive” Proposals: unlike stressed and overburdened local, special district and regional agency planning staffs, OPR staff is
paid—each and every day, for each and every member of its staff—to figure out on behalf of lead agencies how to apply other environmental and public health laws, regulations and plans to CEQA. OPR's 2017 Proposals should be revised to include an appendix that "matches" federal and state agency statutes, regulations and plans to the corresponding impact assessment methodology, significance thresholds, and mitigation of adverse impacts, required by CEQA.

Fourth, the OPR 2017 Proposals do not reconcile other conflicting guidance issued by OPR or other expert agencies—or the effect of new appellate and Supreme Court cases. For example, in its SB 97 rulemaking, OPR reported that there was no "one molecule" rule in CEQA thresholds; but OPR does not reference or reconcile that statement in this "comprehensive" update with the new presumptive "nonzero" GHG CEQA threshold adopted by the California Air Resources Board in its 2017 Scoping Plan. Similarly, in the same SB 97 rulemaking and in various briefs filed in CEQA lawsuits, OPR argued that CEQA mitigation should be "additive" to the mitigation value of compliance with other laws and regulations; this is directly at odds with both the Supreme Court's SAN D AG decision23 (which upheld reliance on the SB 375 standard for GHG reductions required by 2020) and with the recent Alon decision24, which the Supreme Court declined to review or republish, and which concluded that compliance with the "Cap and Trade" program was satisfactory mitigation of GHG impacts for transportation fuels.

OPR's omission of health and safety standards, its omission of statutes as well as statutorily-mandated plans and programs, its omission of a clear roadmap on how each of these should be applied under CEQA, and its omission of Guideline revisions that reconcile conflicting interpretations about how CEQA impacts can be appropriately mitigated by existing environmental laws and planning targets (rather than regulations) by the Supreme Court and CARB, is another example of OPR's unlawful shirking of its duty in completing a "comprehensive" update to the CEQA Guidelines. OPR's failure translates into an increased, and completely unacknowledged, excess burden on other state and local agencies. It also translates into higher compliance costs and litigation risks for projects that are required to "reinvent the wheel" over and over again, to the benefit of the army of professionals who benefit from the ambiguities in the current CEQA Guidelines and who will reap a financial windfall from trying to parse through the ambiguous new CEQA Guidelines. Unlike OPR staff and CEQA practitioners, these ambiguous and incomplete new Guidelines will harm the Californians who desperately need CEQA to work more efficiently, with far less duplication and litigation under existing laws, and who suffer daily from homelessness, housing they can't afford, inhumane and anti-environmental commutes, and the personal and family harms created by the nation's highest poverty rate.

2/3. "Within the Scope" and Tiering - §15168 15152. Two of OPR's 2017 "efficiency" Proposals continue to endorse the longstanding Legislated CEQA streamlining tool of relying on a previously approved EIR when a project is "within the scope" of that EIR, and to completing only a more streamlined "tiered" subsequent CEQA analyses for subsequent projects for which an earlier EIR has been approved. The purpose of both approaches is to avoid unnecessary CEQA duplication, costs, delays and litigation risks where at least one prior level of CEQA compliance has already been completed.

OPR's 2017 Proposals, however, again completely avoid resolving the practical and ongoing uncertainty about whether either "within the scope" and/or "tiering" is appropriately applied to the details of the specific subsequent project, or whether "within the scope" and/or "tiering" is appropriately applied to the magnitude or location of the environmental impacts caused by a subsequent project.

The practical difference between this "is the project included" or "is there a new or worse significant impact" approaches is vast: under the former approach,
the legal inquiry is almost entirely focused on whether the subsequent project was identified with particularity and itself evaluated in the earlier EIR, and under the latter approach, the legal inquiry is whether the subsequent activity would cause a significant new (or worsen a previously-identified significant) adverse impact. This is the single most common circumstance faced by CEQA implementing agencies and practitioners, and OPR simply avoids addressing or resolving this situation completely.

For example, cities are strongly encouraged to adopt plans that encourage higher density housing and transit systems. A planning area may include a small or large neighborhood, but for purposes of this example consider a planning area that is only 10 blocks long by 10 blocks wide. Within this planning area, the specific distribution of housing density – which lots are 4 stories, which are 8, which are 12 – is unlikely to be specified given the unknown availability and market circumstances that will exist over the 10+ year duration of the plan. Instead, a density range will be considered in the planning area, and blocks eligible for increased density will be identified, and the environmental impacts of that increased housing density will be considered in the EIR. Mitigation measures to avoid adverse impacts are also required, such as pedestrian and bicycle safety measures to minimize accident risks in relation to the anticipated new density. Two years after the plan is adopted, a 6-story housing structure is proposed within the plan area on a former strip mall. The building design and location was never described with specificity, but it is absolutely consistent with the adopted plan, and an addendum is prepared that the building will cause zero new or worse significant adverse impacts.

For this – the absolute most common and critical solution to expediting critically-needed new housing – example of CEQA “tiering” implementation, it is not possible to discern from OPR’s 2017 Proposals whether the new building’s absence from the plan is a fatal flaw triggering the need for a new EIR, or whether the absence of any new or significant adverse impacts and general consistency of the new building with the density approved in the plan means that no subsequent CEQA documentation and processing is necessary.

The same fundamental tiering ambiguity also exists for transportation projects. For example, a General Plan circulation element may include a transit corridor, but not whether new bus stops will or won’t have nighttime security lights, or precisely how many parking spots will be removed for a particular stop, or whether a bench or windscreen or shade of whatever color will be installed. Use of existing rail for more commuter rail will prompt more localized traffic and parking at rail stations and will be described in the initial commuter rail service EIR, but the precise geometry of intersection improvements or number of parking spots for each and every train station will not be known or knowable when the commuter rail service is being planned and approved; when (if ever) is another round of CEQA required for each and every new train station?

OPR’s failure to confront, and revise the Guidelines to clearly address these real life tiering situations, is one of several examples of OPR’s very academic approach to CEQA – what one CEQA law professor calls a “Talmudic” approach to CEQA that can be the subject of centuries of debates among experts in passionate disagreement with each other. This is precisely the opposite of what OPR is legally obligated to do in its “comprehensive” update to the CEQA Guidelines. The “tiering” Guidelines must be revised to address, with specificity, whether new CEQA documentation is required for projects that are within what was “generally” described in a prior plan, by clarifying that CEQA would apply – if at all – only to a significantly new or significant adverse impact not previously considered in the earlier EIR.

4. Remedies and Remand - § 15234. To its credit, OPR takes on the CEQA litigation feature that – along with CEQA’s tolerance for anonymous lawsuits, lawsuits filed by identified parties who are pursuing an expressly economic interest, and serial duplicative lawsuits – most often results in CEQA litigation abuse against environmentally benign and beneficial projects such as housing, transit, and renewable energy (the top three targets of statewide CEQA lawsuits based on a
OPR's 2017 Proposals include a new CEQA Guideline to advise agencies about how CEQA lawsuits affect project implementation, and to more expressly summarize and endorse the authority of judges to allow projects to proceed while CEQA deficiencies – often very minor corrections to technical reports – are completed. This is generally useful, but omits a very important Supreme Court precedent. In *Friends of Mammoth*, the California Supreme Court directed that CEQA be "interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." The critical language in this holding is that CEQA is about "protecting the environment" and not about advancing the economic objectives of anonymous litigants with vague environmental-sounding names, or advancing the objectives of those who would lack "standing" to sue under federal environmental laws because their predominant interest is economic rather than environment. If a court concludes that a CEQA impact should have been studied, or possibly mitigated, differently, then the court should appropriately inquire as to the identity and economic interest of the CEQA litigant in weighing whether the appropriate remedy is to require correction of the deficient study – or the "nuclear option" if disapproving a project.

As several CEQA practitioners, including Shute Mihaly founder Clem Shute, have observed, the mere act of filing a lawsuit is often enough to shut a project down entirely because the lawsuit outcome (in many years) could be to vacate the project approval altogether. The Legislature expressly recognized this risk, and chose to relieve themselves of this risk in two specific bills designed to avoid delays and cost-overruns to its home town basketball arena and its Legislative office building remodel. While OPR cannot extend this form of "remedy relief" to all CEQA lawsuits, it must in its new "Remedies and Remand" Guideline remind courts, agencies, and affected stakeholders that CEQA lawsuit remedies can appropriately consider the identity and non-environmental interests of CEQA litigants, consistent with the Supreme Court's direction that CEQA be broadly interpreted to protect the "environment" and not become a "gotcha" zone of minor technical glitches exploited by anonymous and economic litigants.

C. "Substantive Improvements" to CEQA

Each of OPR's four purported "substantive improvements" to CEQA are in fact substantial expansions to CEQA that include vague and ambiguous language, are both duplicative of and contrary to other statutes and laws, and collectively provide a virtual full employment act for "the CEQA industry" of consultants and lawyers that will continue to thrive under OPR's decision to promote expansive, ambiguous, litigious new requirements into CEQA. Instead of using nearly 50 years of CEQA experience, and a housing/poverty/homelessness/transportation crisis, to "improve" CEQA, OPR instead proposes to import into CEQA what the Legislature, and the Courts, have declined to require or even authorize.

1. Energy Impacts- §15126.2. This is a blatant expansion of CEQA, based on a single case – and willfully ignores decades of contrary case law as well as the plain language of CEQA and the absence of any statutory authority to expand CEQA. This is one of several examples of OPR's very selective recognition of case law, including most notably its willful refusal to comply with BAAQMD with its sleight of hand "exacerbation = indirect = business as usual under CEQA" as described in the Appendix G comments.

CEQA has long required consideration of whether a project's energy use was "wasteful, inefficient, or unnecessary." For the vast majority of projects, Courts have consistently held that this impact is appropriately addressed in the context of whether the project complies with California's notoriously-stringent energy efficiency building code, appliance and vehicle standards, and other legal mandates. An indoor mall proposed in Davis was found to have insufficiently studied energy

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26 *Friends of Mammoth v. Board of Supervisors.* (1972) 8 Cal.3d 247
under CEQA, based on that court’s invalidation of an EIR that on less than one page summarily concluded that a conclusionary statement regarding the project’s compliance with building code standards was insufficient (200+ acre new shopping mall): the EIR did not identify energy demand, or evaluate energy use at all outside the occupied building structure context (e.g., during the construction and transportation)\(^{27}\).

As explained in the Appendix G Energy Thresholds context in the preceding section, this Guideline lacks the required clarity and plain language. Some commenters – including representatives of OPR – have questioned whether an indoor mall is an inherently wasteful use; others have questioned whether requiring energy-intensive air circulation and filtration systems for housing in one of the most temperate climates on the planet is an inherently wasteful use\(^{28}\). These are just two of the more common disputes about what is a potentially “significant” energy impact under CEQA. OPR is legally obligated to provide a clear and practical threshold on this topic in its “comprehensive” update to the Guidelines, and it has failed to do so. However, because energy efficiency is a standard prescribed by the Legislature\(^{29}\) for buildings, and the criteria by which the state Building Standards Commission and local governments may establish energy requirements for structures has likewise been prescribed in detail by the Legislature, compliance with these legal mandates is substantive evidence of the absence of an adverse energy impacts for structures. Vehicular efficiency standards, including fuel mix and fleet mileage standards, are likewise prescribed under both federal and state laws and regulations – and projects that comply with such standards cannot have a significant adverse impact on vehicular energy efficiency under CEQA\(^{30}\). OPR should update the Guidelines to direct practitioners to clearly describe these and other energy efficient compliance mandates, which provide substantial evidence of the absence of an adverse energy impact under CEQA.

2. **Water Supply - § 15155.** This new Guidelines substantially expands the required level of water availability under CEQA, and as such is anything but an “efficiency” improvement. It also goes far beyond the scope of the Supreme Court’s definitive CEQA water supply opinion in Vineyard. This Guideline also inappropriately assumes that the lead agency has the legal authority to control water supplies by allocating water to a proposed project or some other project; however, this is not the case for the vast majority of cities and counties, for which water is supplied by water supply special purpose entities that are outside of the jurisdiction and control of the local lead agency. Also, as described above under the Appendix G comments, OPR’s proposed threshold improperly conflates project-level and cumulative effects. The Guideline also improperly bypasses the Legislature’s comprehensive regulation of groundwater in the Sustainable Groundwater Management Act (SGMA)\(^{31}\), which establishes a comprehensive and preemptive governance structure for managing groundwater including mandates regarding sustainable supplies and protection of groundwater resources by threats such as salt intrusion and drought preparation and response. Overall, this Guideline is invalid under CEQA: it expands CEQA well beyond any statutory or judicial authority.

Notwithstanding this unauthorized OPR intrusion into conflicting water laws, and effort to import into CEQA and assign to lead agencies the role of implementing water laws for every community in the state of California, OPR again ducks its actual CEQA and APA statutory obligation in providing clear and practicable direction to lead agencies and CEQA practitioners. Again, the most common

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\(^{27}\) [California Clean Energy Committee v City of Woodland](https://www.californiaandusedevelopmentlaw.com/2016/08/22/eirs-energy-impacts-analysis-fails-to-satisfy-ceqa-s-requirements/, Perkins Coie, (August, 2016)].


\(^{31}\) Cal. Code Regs., Title 24
practical situations are completely ignored by OPR. Some CEQA petitioners have asserted that CEQA effectively prohibits new housing in areas with depleted groundwater and standardized 10-year surface water delivery contracts; others have argued that reliance on an Urban Water Management Plan is invalid given the water supply uncertainties predicted from climate change; still others have asserted that CEQA requires a “net zero” approach to water supply, which requires new projects to pay to fund recycled water for other users in order to consume potable water. Water is among the most frequently litigated CEQA issue, including CEQA lawsuits against housing projects, and OPR both expands what it unlawfully asserts is needed under CEQA and fails to provide the practical clear Guidelines revisions actually needed to apply the Vineyard decision, and both Water Supply Assessment and SGMA laws, under CEQA.

3. Transportation Impacts - § 15064.3. Although OPR used less temperate language in earlier versions of its proposed new mandates for evaluating transportation impacts under CEQA, the substantive requirements that the OPR 2017 Proposals demands be applied to housing projects remains unchanged: under the banner of a 2050 “climate policy” that has been repeatedly rejected by the Legislature and was expressly rejected as a current CEQA requirement by the Supreme Court, the 2017 Proposals include:

- CEQA must be used to intentionally increase roadway congestion and worsen commutes to “induce” drivers to use public transit instead of cars;
- Any mile travelled by a passenger vehicle or pickup truck, even by an electric vehicle, is a new CEQA “impact” called a Vehicle Mile Travalled (VMT) that is unrelated to any quantum of required greenhouse gas emission (GHG), or other public safety or environmental impact;
- Building even one mile of new highway capacity – even for carpools, and even for transportation projects already approved by federal and state air quality and transportation agencies and approved by voters – is likewise presumptively a new adverse CEQA impact, because it “induces” more vehicular use.

OPR proposed two earlier “Discussion Draft” versions of this proposal, which prompted the most comment letters ever received by OPR for any CEQA Guideline proposal. All of these comment letters are hereby incorporated by reference into this comment letter, with each and every one of the objections raised in those letters restated in this comment letter; since these comments are already in OPR’s possession, physical re-transmittal of these letters is not repeated. Also incorporated, and raised in objection to this component of the OPR 2017 Proposals, is Attachment A.1 (Petition filed with the Office of Administrative Law, striking as an

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32 Landwatch Monterey County v County of Monterey, (2007) 55 Cal.Rptr 3d 34; see also Kronick, Court Highlights Importance of Technical Analysis in Upholding Negative Declaration Against Allegations of Inadequate Groundwater Supplies for Monterey County Housing Project, (March 2017), http://kmtg.com/court-highlights-importance-of-technical-analysis-in-upholding-negative-declaration-against-allegations-of-inadequate-groundwater-supplies-for-monterey-county-housing-project/ (as of March 12, 2018)


unlawful “underground regulation” the Transportation “Technical Guidance” issued concurrently with the OPR 2017 Proposals but put into immediate effect notwithstanding its failure to complete the rulemaking process required by statute). Also incorporated, as Attachment A.2, are all comments and legal arguments, including but not limited to all comments regarding the unconstitutional and unlawful mandate to reduce “vehicle miles travelled” and expand CEQA as set forth in the “Scoping Plan”38 adopted in December 2017 by the California Air Resources Board.

As background, “transportation” impacts were quickly included in CEQA because of the “environmental” and “public health” consequences of the vehicular use by “projects” – most specifically in relation to air quality and public safety. For example, when CEQA was enacted in 1970, passenger cars emitted such high pollutant loads that heavily-congested locations such as intersections and toll booths had carbon monoxide levels that were high enough to cause people to faint or even suffocate. Congested conditions – up to and included gridlock – meant more localized pollution in congested locations, as well as more overall pollution as cars operated longer to get to destinations on congested roadways.

Criteria emissions – those for which ambient air quality standards are established to protect public health – have fallen 99% for today’s fossil-fuel cars as compared with the passenger fleet in existence in the 1960’s.39 Vehicular emissions remain extremely important, and as ambient air quality standards have become more stringent, vehicular standards – which now include state mandates on electric vehicles – have followed suit. Particulate emissions from diesel engines create a more localized health hazard, and as this hazard worsens the longer trucks are stuck on congested roadways. OPR and its sister agencies have already been implementing a “de facto” road diet, as congestion and commutes have steadily worsened to the point that vehicular emissions – including particulates and GHG - actually increased in 2017 statewide for the first time since the 1970s.

Meanwhile, public transit use has declined even as billions of dollars have been spent in California’s urban areas – and University of Minnesota studies4041 have confirmed that far fewer than 10% of California’s most urbanized metro area workforce can travel from home to job in less than one hour each direction. Innovative transportation services have exploded in popularity, such as Uber and Lyft, which most studies conclude result in more, rather than less VMT. Automated vehicles, scheduled to roll out more broadly in 2018, likewise are predicted to result in more rather than less VMT. Actual VMT increases, the ever-increasing national and state rejection of bus ridership, the explosion of new transportation services and technologies, even CARB itself declined in December of 2017 to timely adopt new VMT reduction targets under SB 375, based on testimony from all major metropolitan transportation agencies and CARB staff that VMT was actually increasing with population and employment. Finally, apart from the very few half-mile circles around commuter rail stations and ferry terminals, OPR’s 2017 Proposal is dependent on commuter bus service stops. To qualify, the bus stop must provide morning and evening commuter service, with bus intervals of 15 minutes for at least one hour. Each qualifying bus line requires four actual buses, and eight shifts of bus drivers – bus lines that cost in excess of $2 million annually. However, bus ridership has dropped dramatically in California and elsewhere in the nation42, and even the largest bus operators are dropping and adjusting routes, as well as

38 Supra note 17
41 Andrew Owen and Brendan Murphy, Access Across America: Auto 2015, (Sept. 2016), University of Minnesota, file:///C:/Users/rabove/Downloads/CTS16-07.pdf, (as of March 12, 2018)
experimenting with "on demand" ride services (or vouchers) similar to Uber and Lyft.\textsuperscript{43}

Building sufficient highway and roadway capacity to accommodate vehicular use and mobility is also required by scores of federal, state and state-mandated elements of local transportation laws and plans (including but not limited to the Congestion Management Act itself)\textsuperscript{44}. The Legislature, and California voters, have repeatedly confirmed the importance of vehicular mobility in funding new projects. Finally, although climate laws such as SB 375 have redirected the vast majority of public dollars toward transit and away from highway and roadway capacity improvements, those improvements that remain have been evaluated under CEQA in program EIRs prepared by regional metropolitan planning organizations, which have then been reviewed and approved by federal and state agencies as meeting both air quality and greenhouse gas reduction mandates.

Safety is also a critical component in vehicular mobility, and is required to be assessed under CEQA, including for example ambulance access, emergency vehicle access, safe accommodation of multiple transit modes (e.g., light rail, delivery trucks, passenger cars, bikes and pedestrians) which require improvements to intersections and roads.

Finally, vehicular mobility is a major civil rights and equity issue: the Legislature authorized undocumented immigrants to obtain California Drivers’ Licenses\textsuperscript{45} so they can get insured, and more safely travel to and from work; numerous studies have shown that owning and using an automobile is the single most important asset – after housing – required to bring a family out of poverty\textsuperscript{46}; and minority communities are currently suffering from a lower home ownership rate than the pre-civil rights era of World War 2, and are uniquely far more likely to drive farthest to work as they are forced to “drive until they qualify” for housing they can afford to own or rent – and hold jobs requiring physical presence ranging from construction and retail workers to teachers and firefighters. “Intentionally increasing congestion” causes unlawfully discriminatory impacts on the California minorities and other working families already suffering from inhumane commutes and the acute housing shortage. Finally, longer commute times – the result of OPR’s “intentionally increasing congestion” strategy as explained in its earlier Discussion Drafts – means more than just increased pollution and GHG, and more public safety risks. Intentionally increasing commute times for the disproportionately minority workforce that is forced by the housing crisis to drive the greatest distances to work, and to be physically present on job sites to be paid, is a civil rights violation. Longer commute times also means less time helping kids with homework, insufficient sleep and higher rates of high blood pressure and asthma, and much higher diesel pollution loads to communities located next to the chronically congested trucking routes that power the goods movement industry.\textsuperscript{47} Expanding CEQA to intentionally increase traffic congestion also unconstitutionally and unlawfully interferes with interstate and international commerce, putting at risk the millions of California households that rely on efficient goods movement in the global economy; in the state’s most populous region in Southern California, the


\textsuperscript{44} 23 CFR 450.322; FAST Act § 6004; 23 U.S.C. 503

\textsuperscript{45} Assem. Bill No. 60 (2013-2014 Reg. Sess)


goods movement industry directly employs tens of thousands of workers and comprises nearly 40% of the SCAG regional economy.  

OPR acknowledges none of these adverse environmental, public health, or discriminatory impacts of its decision to use CEQA to put California on a “road diet” to meet the Governor’s 2050 GHG reduction goal – a goal expressly considered and rejected by the Legislature on a near annual basis, and by the Supreme Court under CEQA in SANDAG.

Senate Bill 743[49], which OPR cites as its authorizing statutory authority – along with the Governor’s unenacted climate goals – was a crony bill that provided “remedy reform” to assure timely completion of the Kings Arena. It was introduced and enacted in a classic “gut and amend” format in the closing days of the 2013 legislative session, by the then-Senate Pro Tem just ahead of his successful run to be Mayor of Sacramento. Based on widespread outrage that the Senate leadership was willing only to promote his own basketball team agenda with CEQA reform, SB 743 also promised some CEQA streamlining for “infill” housing projects, including the very straightforward Legislative “deletion” from CEQA of parking and aesthetic impacts for certain infill projects. SB 743 also directed OPR to develop a different transportation metric under CEQA for neighborhoods – “transit priority areas” (TPAs) – located within half a mile of rail and ferry stops, and express commuter bus lines. SB 743 authorized, but did not require, OPR to adopt a different transportation metric for the 98% of Californians located outside TPAs.

The policy, and politics, behind this transportation metric component of SB 743 were complex, but clear. The Legislature has repeatedly been asked to mandate reductions in VMT, including in early versions of SB 375 and in an Allen bill in 2016[50], and each and every time the Legislature declined to adopt a restriction on California’s ability to drive ever-cleaner cars. There was widespread agreement, however, that in neighborhoods with frequent, high quality transit, CEQA should not be used to require “mitigation” by expanding the same roadways to reduce automobile delay.

Notwithstanding repeated pleas by hundreds of stakeholders including sister state agencies acting under unchanged transportation legal mandates under federal and state laws like Caltrans, OPR chose to subvert this Legislative rejection of a VMT reduction mandate. Instead of replacing automobile delay with VMT in TPAs, OPR decided to impose its version of a “road diet” and discriminatory “intentionally increase congestion” policy statewide, even in areas not served by transit.

OPR’s transportation impact “substantive improvements” to CEQA are in fact unlawful: rejected by the Legislature, contrary to reality and feasibility as determined by CARB and the state’s leading transportation agencies, and unconstitutional both as a civil rights and interstate commerce matter.

OPR’s transportation impact “substantive improvements” also fall as Guidelines under CEQA and the APA for numerous reasons. For example, OPR’s thresholds impose a 15% below “regional average” VMT for housing and commercial projects, and imposes a “no net increase” VMT threshold for retail projects. OPR does not define what constitutes an adequate “region,” does not acknowledge or address the cost or complexity of trying to enforce a “no net increase” market-capture zone analysis for restaurants and other (struggling) retailers, does not identify thresholds for the dozens of other uses (hospitals, colleges, tourist attractions, ski and beach resorts, professional sports facilities or soccer fields, churches, schools, etc.), does not acknowledge the fundamentally conflicting and unresolved conflicts between different VMT models, and offers no practical or implementable measures for “reducing” VMT for the projects located in the 99% of California that are not in TPAs.

Nor does OPR offer any evidence that this statewide VMT reduction is in fact necessary to meet any GHG reduction mandate. The entire state of California contributes less than 1% to global GHG emissions, and in the only available study a UC Berkeley team concludes that building all required new homes exclusively in existing urban communities will decrease California’s annual GHG emissions by 1.67 MMtCO2e, which is less than 1% of the GHG reductions that the California Air Resources Board has determined are required to be achieved under Senate Bill 32.\textsuperscript{51} 52 Since all of California emits less than 1% of global GHG, worsening the housing crisis, virtually ending home ownership opportunities by demolishing tens if not hundreds of thousands of existing single family homes and building only higher density housing units that are overwhelming rentals in their place, is an unconscionable and unconstitutional GHG reduction strategy given the huge, and far less costly, range of strategies that are readily available to reduce GHG emissions globally. Even within California, simply managing forest lands to prevent and minimize the severity of wildfires, while producing jobs and timber products for Californians that actually sequester GHG rather than emit GHG as it is the case with the typical steel and concrete used in high density high rise buildings, is a simple and effective GHG reduction strategy that would result in much more dramatic GHG reductions – without worsening the housing, poverty, homelessness, and transportation crisis that disproportionately affects Californians majority minority and millennial households.

OPR should follow the lead of cities that have adopted local CEQA thresholds that reject traffic delay as a CEQA threshold in transit-served TPA areas, for which there are existing “traffic analysis zone” maps readily available from regional transportation planning agencies that provide substantial evidence in support of the fact that people living near high quality transit travel less by car – and building more density nearer public transit systems is appropriately dependent on focusing street improvements to prioritize public transit, as well as those who bike, scooter, and walk with or without transit connections. Instead, OPR has established a complex new set of evaluation mandates, and a mere “presumption” – which can and will be argued in CEQA lawsuits, and thus must be addressed in CEQA compliance documentation prepared in anticipation of lawsuits – that VMT is lower in TPAs.

And in every case, what OPR has not done under the SB 743 "CEQA streamlining for infill projects" legislation, as explained in greater detail on separate commentaries submitted for all versions of the VMT technical guidance and a related Caltrans guidance (all of which are available on these websites, and are incorporated by reference and repeated in their entirety in this comment letter), is to eliminate CEQA’s existing requirements to complete traditional “level of service” traffic studies. LOS studies are required to calculate project-level VMT as prescribed by OPR; LOS studies are also required to calculate criteria, toxic and GHG emissions – and to evaluate public service – which continues to be required under SB 743.

4. Greenhouse Gas Emissions - § 15064.4. Resolving the issue of how GHG and climate change should be addressed under CEQA is the single most litigated CEQA issue addressed by the California Supreme Court in recent years. Although OPR was directed, and CARB was invited, by the Legislature in SB 97, to develop CEQA Guidelines to explain to practitioners how to address GHG under CEQA, OPR instead adopted its usual utterly opaque and “Talmudic” provisions in the CEQA Guidelines – and in Appendix G as commented upon above. OPR’s Guidelines drew the expected response, which was utter confusion, compliance chaos, and more than ten years of lawsuits affecting both housing production as well as housing and transportation planning, in the Newhall\textsuperscript{53} and SANDAG\textsuperscript{54} cases. In Newhall, the Court identified four “compliance pathways” that “may” be compliant with

\textsuperscript{51} Sen. Bill No. 32 (2015-2016 Reg. Sess.)

\textsuperscript{52} Nathaniel Dockor, Carol Galante, Karen Chapple & Amy Martin, Right Type, Right Place: Assessing the Environmental and Economic Impacts of Infill Residential Development through 2030, Mar. 7 2017, http://termcenter.berkeley.edu/uploads/right_type_right_place.pdf; see also, https://www.arb.ca.gov/cc/scopingplan/scopingplan.htm

\textsuperscript{53} supra note 14

\textsuperscript{54} supra note 15
addressing GHG under CEQA, but almost immediately the California Attorney General’s office submitted comment letters objecting to one of the Supreme Court’s compliance pathways (compliance with applicable GHG reduction laws). In SANDAG, the Supreme Court upheld reliance on the GHG reduction regional target established under SB 375 for a 2020 Sustainable Communities Strategy, but again cautioned that its holding did not extend to a definitive ruling on the adequacy of post-2020 plans. And in San Diego,55 the Court invalidated a local government climate action plan – one of the “compliance pathways” identified in Newhall – because its GHG reduction measures were not sufficiently enforceable, even though the vast majority of GHG emissions are caused by activities wholly outside the jurisdiction and control of any local government.

CARB and OPR also collaborated in developing the SB 32 Scoping Plan adopted in December 201756, including CARB’s GHG expert agency determination that effectively adopts a “net zero” project-level GHG significance threshold, and numeric standards for local climate action plans that correspond to the per capita GHG emissions of some of the poorest nations on earth. (See Attachment B, The Two Hundred comment letter on the CARB Scoping Plan, also referenced above.)

The OPR 2017 Proposals do nothing to clarify how CEQA applies to GHG, how GHG reduction legislation and regulations (e.g., cap and trade and low carbon fuels, solid waste and composting waste diversion mandates, SB 375 sustainable communities strategies setting forth comprehensive regional transportation and land use plans that meet established GHG reduction legal mandates, the electric and zero emission vehicular mandates and related infrastructure mandates such as electric car charging building code infrastructure requirements in CalGreen, the 50% renewable energy portfolio mandate, various water and energy conservation programs, and the 50% renewable energy standard), and it completely ignores the CARB Scoping Plan CEQA thresholds for project-level “net zero” GHG emissions, climate action plans, above-and-beyond SB 375 VMT mandates, and “Vibrant Communities” appendix for eight state agencies to intervene without any corresponding statutory authority into local agency approvals of plans and projects to address the housing, transportation and poverty crises, in their entirety.

OPR has instead spawned even more confusion by asserting that GHG emissions should be more properly evaluated based on “incremental” project GHG emissions rather than the project-level quantitative evaluation and mitigation approach now commonly in use based on OPR’s original guidance along with lead agency and practitioner parsing of judicial precedent. Yet OPR provides no direction on how to do this different “incremental” assessment – since every project-level analysis already addresses the “increment” of impacts attributable to a project.

OPR’s 2017 Proposals utterly fail to explain, in plain language, how CEQA applies to GHG emissions – what level of analysis is required, can a project reasonably rely on compliance with state and local GHG mandates (laws, regulations, plans and programs) as adequate mitigation and/or a conclusion that a project’s GHG emissions are less than significant, and how should cumulative impacts be addressed since the current housing crisis has prompted substantial out-migration of Californians to ever more distant housing locations in the state (with higher GHG emissions based on hotter climates and longer commutes), and to even higher per capita GHG emissions to the states most likely to receive California housing refugees (states with far lower housing, transportation and utility costs for average residents) such as Texas, Arizona and Nevada.

In the midst of the state’s cruel housing, poverty, homeless and transportation crises, it shocks the conscience that OPR, which considers itself the state agency expert on planning and CEQA, has actually increased CEQA’s ambiguity – and lawsuit risks – in how to deal with GHG and climate change under CEQA. California produces less than 1% of the world’s GHG emissions, and California’s per capita emissions are lower than all but two states (a new England

55 Cleveland National Forest Foundation et al. v San Diego Association of Governments et al. (2014). 180 Cal.Rptr.3d 548
state with virtually no manufacturing or energy sector, and New York which still operates six zero emission nuclear power plants. California’s economy (and population) can cease to exist, and global climate change attributed to the 99+% of the world’s GHG emissions from other countries and states will continue. The Legislature directed OPR to adopt CEQA Guidelines in SB 97 to clearly explain, as required by CEQA and the APA, how to comply with CEQA in addressing GHG emissions and climate change. OPR’s failure to do so, notwithstanding ten years of judicial uncertainty and the contemporaneous adoption of conflicting CEQA Guidelines by the state’s GHG agency expert (CARB), is an unlawful abuse of discretion.

As with all other legal deficiencies in this “comprehensive” update to the CEQA Guidelines, OPR’s failure to comply with CEQA and APA also results in the unconstitutional and unlawful disparate impacts to minority families and other hard working Californians who are deprived of housing they can afford, who can safely and timely commute to jobs. It also conflicts with existing federal, state and local laws intended to assure consumer protection (e.g., building code requirements that increase housing costs must be cost-effective), transportation mobility (e.g., federal and state mandates to assure effective transportation networks that accommodate interstate commerce, and local General Plan circulation element requirements to assure safe and effective local transportation networks), and conflicting GHG mandates (e.g., AB/SB 32 and SB 375 mandates requiring agency GHG reduction implementation actions to accommodate population and economic growth and prosperity).

D. **Technical Improvements**

OPR’s 2017 Proposals include 17 additional changes in the “comprehensive” amendments to the CEQA Guidelines. This list is both incomplete (e.g., regulatory definitions are required to clarify some statutory provisions, including those described above for GHG, transportation, and numerous other issues), and itself includes modifications that are unlawful under CEQA and the APA because they introduce more ambiguity, resulting in more litigation risks, which will continue to be used in CEQA lawsuits to oppose housing, transportation, and the other public infrastructure and service projects critically needed to address the housing, poverty, homelessness and transportation crises.

1. **Hazards - § 15126.2(a).** As previously discussed in the context of the BAAQMD Supreme Court decision, OPR unlawfully conflates the Supreme Court’s “exacerbation” standard for considering the extent to which CEQA requires consideration of the existing environment’s effect of a project, with a new “indirect impact” approach that is not supported by or consistent with the Supreme Court’s decision. OPR and various advocacy groups have repeatedly attempted, and failed, to persuade the Legislature to overturn BAAQMD and its predecessor case Ballona Wetlands and expand CEQA to require consideration of an existing environmental condition’s impacts to a project rather than the project’s impacts to the environment. This proposed revision to the CEQA Guidelines is not authorized by CEQA and simply “blinks away” the Supreme Court’s BAAQMD decision. It is unlawful, and must be rewritten to provide clear and understandable direction on how the “exacerbation” standard articulated by the Supreme Court is to be applied for each particular impact issue. OPR got it right in its Wildfire threshold under Appendix G, as discussed above – and it should revise the 2017 Proposals to get it right for each topic addressed in Appendix G, with further consistent and corresponding explanatory text revisions to § 15126.2(a)).

2. **Baseline - § 15125.** It is a testament to the “Talmudic” legal tradition created by OPR’s affection for opaque and ambiguous Guidelines that lawsuits – including lawsuits elevated all the way up to the California Supreme Court – continue to include contested versions of the appropriate “baseline” condition against which project impacts should be evaluated. The current state of the law is completely clear: reliance on existing physical conditions is always legally defensible; reliance on either past or future reasonably foreseeable conditions is sometimes defensible if supported by substantial evidence in the record.
Instead of drafting clear regulatory language that explains this law, and then clarifies when deviations from the "existing conditions" baseline is appropriate and what "substantial evidence" is required to deviate to a past or future baseline, OPR adds an opaque new "purpose" sentence in § 15125(a) that itself introduces new ambiguity: "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" (emphasis added). How does this new "most . . . understandable" text clarify when and to what extent deviations from existing conditions are appropriate? Further, CEQA requires consideration of project impacts – how does introducing a new distinction between "near-term" and "long-term" impacts affect the level of analysis required in all impacts under CEQA? Is "near term" simply intended to cover project construction (a well understood and litigated concept) or the "whole of the project" – or is it more? Does "long-term" require a different set of assumptions about future conditions, and if so how does it relate to the existing CEQA requirement to consider "reasonably foreseeable" future conditions in the cumulative impacts assessment?

OPR is not content to introduce this level of new uncertainty into the CEQA Guidelines: it triples down with even more undefined and ambiguous new text. New subsection § 15125(b)(1) adds a new requirement that the evaluation must address impacts from "both a local and regional perspective." How does this relate to the Appendix G thresholds: is something new intended here, or is this "local vs regional" scope of required CEQA analysis captured in Appendix G – and if not, why not?

OPR then internally contradicts itself with its final subsection, § 15125(b)(3), which says that a lead agency may not rely on "hypothetical" conditions, such as those that "might have been allowed" but "have never actually occurred" as the baseline. By definition, a future conditions baseline – expressly allowed in § 15125(b) if supported by substantial evidence – includes allowable new uses that have not yet occurred. This flat contradiction is beyond sloppy drafting: when applied in the context of assessing the impacts of housing, transportation, public services and other infrastructure projects, it increases compliance costs and litigation uncertainty, thereby exacerbating California’s poverty, housing, homeless, and transportation crises.

3. Deferral of Mitigation Details - § 15126.4. This is another example of OPR drafting that introduces unlawful new ambiguity into CEQA which is inconsistent with existing statutes and definitive court precedent. CEQA compliance is required at the earliest feasible time to assure that mitigation measures and alternatives will be meaningfully considered and adopted if feasible, to reduce significant adverse project impacts to the environment. The issue of how detailed mitigation measures need to be at this initial phase of project planning, when CEQA compliance must have occurred, has repeatedly been litigated.

In the absence of useful or clear CEQA Guidelines, CEQA’s requirements on this issue has been defined by the courts. In Sundstrom57, and as cited in the most authoritative CEQA judicial precedent treatise58, mitigation measure details in Negative Declarations are required to show that there is no "fair argument" that the impact at issue would be significant and unavoidable.59 [For EIRs, in contrast, this issue was definitively addressed in the Richmond Chevron decision60, which has been cited with approval in many other court decisions, which allows deferral of mitigation details as long as the mitigation measure includes a clear "performance standard" explaining the mitigation that will be achieved by the mitigation measure, as well as at least some examples of feasible mitigation measures that will achieve that standard. Courts have also made clear that changes to mitigation measures

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59 No Wetlands Landfill Expansion v. County of Marin (2014), 2014 WL 7036032; POET, LLC v. California Air Resources Board (2013), 150 Cal.Rptr.3d 69
60 Communities for a Better Environment v City of Richmond. (2010) 184 Cal.App.4th 70
that themselves result in significant new impacts not previously analyzed trigger the need for additional CEQA review.

OPR’s 2017 Proposals include unlawful new constraints on the “performance standard/feasible measure list” form of mitigation measures expressly allowed by courts. Specifically, OPR’s revision to § 15126.4(a)(1)(B) asserts – with no authorizing statutory authority – that this form of court-approved mitigation measure is only allowed if it is “impractical or infeasible to include those details during the environmental review.”

There is no better example of the harm caused to housing and transportation projects by this unlawful new constraint on mitigation measures than the rapidly evolving transportation technologies and services, and equally rapidly evolving pattern of retailing and medical services, now occurring throughout California. A fixed route “shuttle” required for a particular project to connect to a shopping center, a medical center, and a regional bus terminal may make sense – or it may run empty if on-demand private commuter vanpools, home delivery of internet purchases, and “telemedicine” check-in for routine medical appointments – make such fixed route shuttle service an obsolete, expensive, and ineffective transportation solution. Instead, requiring a transportation “performance standard” – such as limiting single-occupancy private auto commuter trips – along with a list of feasible measures that could comply with this standard (e.g., carpool matching, subsidized vanpools or vouchers for on-demand ride services, secure bike parking at public transit nodes, and a fixed route shuttle) is in common use today as a completely lawful and practical CEQA mitigation measure.

For no good reason – and with no legal authority – OPR would disallow this performance standard/feasible mitigation measure practical, lawful and common sense approach for reducing rush hour single-occupancy automobile use. CEQA also requires annual Mitigation Monitoring and Reporting Plans (MMRPs), which provide an ongoing compliance check for compliance with the mitigation performance standard. Instead, OPR adds an unlawful new legal prohibition on this mitigation approach, which is that a lead agency must demonstrate that it is “infeasible” or “impracticable” to lock down all mitigation measure details in an EIR for a project that will last decades. OPR’s “Talmudic” drafting traditions veers well into abstract academe, handing yet another ambiguous and litigious new windfall to the legions of CEQA litigants who make infill housing projects their top CEQA lawsuit target.

4. Common Sense Exemption - § 15061. This Guideline substitutes the term “general rule” for “common sense” in describing a class of discretionary government actions that would if “it can be seen with certainty that the activity in question may have a significant effect on the environment.” The terminology change brings this Guideline into conformance with the definitive Supreme Court decision on this issue, see Muzzy Ranch. However, OPR misses the mark entirely in this “comprehensive” update to the CEQA Guidelines by failing to describe the types of government actions that are covered by this “common sense” exemption. For example, in the numerous projects that benefit from or require public funding from multiple agencies – from homeless shelters to affordable housing to transit systems to playground renovations – for which a lead agency has already completed CEQA, is the mere granting of some public funds by other agencies yet another CEQA-trigging event? It is OPR’s statutory role to parse through this and other “common sense” exemption circumstances and provide clear and plain CEQA Guideline direction to agencies and stakeholders. OPR has failed to fulfill its duty in this and the many other “comprehensive” Guideline update provisions commented on herein.

5. Citations in Environmental Documents - § 15072/ §15087. These Guidelines clarify that only documents “incorporated by reference” rather than those “referenced” in CEQA documents must be made available for public review. Like the “Common Sense Exemption” example noted above, with this modified text

61 Pub Res C §21166; 14 Cal Code Regs §15162
63 Muzzy Ranch Co., v Solano County Airport Land Use Commission, (2007) 41 Cal.4th 372

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OPR completely shirks its obligation to provide direction in its “comprehensive” Guidelines update on the three most common practical issues that arise in relation to referenced documents.

First, an increasing percentage of the public reads CEQA documents online, and lead agencies and practitioners commonly use a “hyperlink” to a document incorporated by reference. These Guidelines should be updated to recognize, and endorse, this practice.

Second, some referenced documents can be quite voluminous. For example, the “program EIR” commonly prepared for SB 375 plans typically includes multiple volumes, including comment letters and responses, and technical reports on numerous subjects, that span many hundreds or even thousands of pages. Where a document is “incorporated by reference” but readily available online, OPR should clarify that only the portion(s) of the document actually relied on in the CEQA document at issue need to be printed in hard copy for library and public review.

Third, both technical handbooks and scientific books are typically copyright protected, and cannot be reproduced in their entirety – or used by unlicensed readers. The Guidelines need to clarify that excerpts of these copyright and or limited license documents relied on in CEQA documents, rather than the entirety of the documents, satisfy these public disclosure and access requirements.

The need for this level of Guidelines clarification is by no means abstract: disputes about whether all relevant documentation is available in hard copy are common in CEQA comment letters on Draft EIRs and in lawsuits, as are disputes about the need to print hyperlink documents.

6. Conservation Easement as Mitigation - § 15370. This text change recognizes an important court decision affirming reliance on an agriculture easement as mitigation for a project’s permanent loss of agricultural lands. OPR’s proposed text change, however, neither includes the clear judicial precedent established by the Court case, nor addresses the ongoing and litigious dispute about preservation of agricultural or wildlands as mitigation under CEQA.

First, OPR goes well beyond the scope of the court decision cited by OPR and recognizes only “conservation easements” rather than “agriculture easements” (which can and are different forms of easements under applicable federal and state law). OPR also errs in recognizing only “permanent” easements even though the court case at issue involved a “permanent” loss of agricultural lands, and the court did not opine on the duration of agricultural easements for less than permanent losses of farmland. The lawful duration of the mitigation easement is also subject to both the “nexus” and “rough proportionality” constitutional requirements, which have been expressly incorporated into and made part of the CEQA Guidelines in § 15126.4(a)(4)(A, B). This Guideline must be revised to expressly recognize the mitigation measure validity of “agricultural” easements for loss of agricultural lands, and further endorse agricultural easements that are less than “permanent” if the project at issue results in only a temporary loss of agricultural lands.

Equally important in this “comprehensive” update to the CEQA Guidelines, is that this Guideline must also expressly recognize that “preservation” of agricultural or natural resources lands is valid CEQA mitigation for project losses of agricultural or natural resources lands.

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64 Masonite Corporation v County of Mendocino. (2013) 218 Cal.App.4th 230
Attachment B: OPR Must Comprehensively Revise Its Fatally Incomplete and Flawed Economic Analysis

OPR is required by statute to complete an economic study of the impacts of its 2017 Proposals, and has instead prepared a fatally flawed study that essentially quantitatively addresses only one portion of its proposed new transportation thresholds (its proposed new ‘VMT” based transportation metric), and ignores the nearly 100 other proposed changes to the CEQA Guidelines. This is fatal “piecemealing” of the required economic assessment, which makes it legally invalid. OPR’s failure to assess the economic impacts of the whole of its 2017 Proposals significantly understates the cost of implementing this suite of vague, ambiguous, incomplete, duplicative, conflicting, and unlawful new requirements, as described in Part 1 below. OPR has also confined even its VMT analysis to cost impacts for what one consultant advised would be a low cost VMT study ($5000) which would be $15,000 lower than what another consultant advised would be a higher cost ($20,000) study of traffic delay using the traditional Level of Service (“LOS”) transportation impact metric. This “analysis” fails under even the most rudimentary scrutiny, as described in Part 2 below.

More fundamentally, OPR has ignored its political, legal and moral duty to be accountable to California’s consumers—and its hard-working California families—who are suffering from the housing crisis, poverty crisis, homelessness crisis, and transportation crisis. Numerous non-partisan studies have confirmed that CEQA is one of the causative factors of this problem: CEQA lawsuits and lawsuit threats that derail, delay, and increase the cost of all housing, as well as homeless centers, transportation projects, and other infrastructure (how many CEQA lawsuits have been filed against High Speed Rail to date—and how many more are expected to be filed—and just how much money have taxpayers spent on “soft costs” like CEQA instead of actual construction of actual physical improvements that actually provide housing and other critical infrastructure?). OPR should expand its economic assessment to consider the “pass through” costs to consumers, and the differentially higher cost burdens to be paid by the majority minority California families and millennials, of its ambiguous and litigious 2017 Proposals.

1. Major New Cost Burdens Imposed by OPR 2017 Proposals. While many of the OPR 2017 Proposals impose significant new direct costs, or costs of litigation defense, delay and risk, the following provide just a few examples of why OPR’s unlawfully piecemealed economic assessment fail to disclose or assess the adverse economic consequences of its proposals.


All of the new CEQA compliance mandates included in the 2017 OPR Proposals have been drafted to be effective immediately upon compliance, with no recognition or “grandfathering” of pre-existing CEQA documents that are presumptively valid under CEQA if not litigated—and those that were litigated and found to be fully in compliance with CEQA’s statutory requirements and then-
applicable Guidelines – creates new litigation risks and compliance uncertainties for
the thousands of EIRs in use today to support subsequent project approvals and
ongoing agency practices – including but not limited to implementation of local land
use plans to authorize housing projects, and implementation of transportation plans
to authorize transportation projects. Even the portion of the transportation metric
threshold that OPR proposes to phase in over less than two years was in fact made
effective upon immediate adoption of the VMT Technical Guidance document¹,
unlawfully issued as an underground regulation without completion of the required
rulemaking process.

However, OPR is not authorized to impose new, or different, legal
requirements in the CEQA Guidelines except as expressly authorized to do so by
statute. The CEQA Guidelines are supposed to be practical and clear interpretations
of existing CEQA requirements – based on enacted statutes and judicial precedent.
OPR’s new mandates to expand CEQA, and unlawful new restrictions on lawful
CEQA compliance practices, add new compliance costs and litigation uncertainties
into CEQA. Since OPR has decided to embrace sweeping and ambiguous new CEQA
mandates into the 2017 Proposals, its economic assessment must acknowledge,
quantify, and assess the economic consequences of requiring the preparation of
hundreds of supplemental CEQA documents – each of which can be targeted by a
CEQA lawsuit – to simply continue to implement housing, transportation, and other
infrastructure projects that have already gone through the CEQA process.

These costs will be especially high, and could create fatal funding shortfalls,
for the scores of infrastructure and affordable housing projects already approved by
voters with bond funding. The bond funding amounts were calculated based on the
pre-2017 Proposals – and certainly did not anticipate or account for new rounds of
CEQA documentation, new and more costly mitigation, new litigation costs, delay,
and defeat risks. OPR’s willingness to simply toss voter-approved, taxpayer funded
housing and transportation projects back into the CEQA cost abyss must be
expressly acknowledged, quantified, and assessed in a revised economic impact
assessment.


As discussed in Attachment A at Section D.3, courts have long recognized
and upheld the lawful status of mitigation measures that establish a clear
performance objective that mitigates an impact, but provides for implementation
flexibility with a list of measures that are feasible and can reasonably achieve the
performance standard. OPR’s proposed amendments to § 15126.4 would prohibit
this lawful practice unless an agency proves, with substantial evidence, that
specifying all details in each and every mitigation measure is infeasible or
impracticable.

This counterproductive new CEQA straightjacket elevates form over function:
the goal of CEQA is effective mitigation built in as early as possible in the project

¹ See http://opr.ca.gov/docs/20171127_Transportation_Analysis_TA_Nov_2017.pdf
planning process (well before, for example, architectural drawings are finished in multi-phase mixed use projects for buildings that may not be built for 5 years or longer). Litigation about the interpretation and implementation of mitigation measures is also not hypothetical: one of the most notorious CEQA anti-NIMBY housing lawsuits\(^2\) involved the interpretation of a mitigation measure to “preserve” a non-historic building stucco façade as allowing the façade to be carefully removed, and then re-installed on the high density housing tower that was being built on this transit corridor in Hollywood. A court decision decided that “preserve” could only be interpreted as “preserve in place” rather than “disassemble and reinstall” – and invalidated the approvals for this completed project, which in turn required tenants to be escorted out of their occupied housing units. This travesty resulted in multiple years of an empty high rise apartment building in the midst of a housing crisis – and this one project alone cost millions of dollars.

OPR’s unlawful invalidation of court-approved performance standard mitigation measures would substantially increase pre-litigation CEQA compliance costs at two levels: (a) in the initial CEQA document, by requiring far more mitigation design details to be worked out far ahead of actual construction and occupancy, as described in more detail in the example of the transportation mitigation measure requiring fixed route shuttle buses discussed in Attachment A.D.3; (b) as subsequent project approvals occur (e.g., for later phases) or simply as the operation of the project demonstrates the greater effectiveness of an alternate mitigation measure that causes no new significant impacts, revised mitigation measures with additional rounds of CEQA documentation and lawsuit reopeners. This component of the 2017 Proposals would also substantially increase litigation risks as untested new “infeasible” and “impracticable” restrictions on lawful performance standard mitigation measures are used in the next rounds of CEQA lawsuits against favored housing project targets.


As discussed in greater detail in Attachment A in Section B.1, OPR has unlawfully proposed to restrict integrating CEQA with other legal mandates that help avoid or minimize CEQA impacts, ignoring many court interpretations upholding this practice. OPR’s 2017 Proposal on this issue increases CEQA compliance costs and litigation risks by requiring redundant CEQA mitigation measures and significance evaluations (often invented by costly CEQA consultants and applied unpredictably and inconsistently across similar projects even within the same jurisdiction. Instead of taking this opportunity to simply and accurately update the Guidelines to endorse reliance on other legal mandates that avoid or minimize CEQA impacts (such as health and safety mandates), to endorse legal mandates in whatever form such mandates apply (statutes, regulations, ordinances, plans and programs), and to identify the many court decisions that uphold this practice, OPR’s 2017 Proposals instead impose an unlawful new cost on

agencies (including a new state mandated cost on local government), and further increase compliance costs and litigation risks for critical new housing, transportation, and other projects.  

\[\text{Page 4}\]

\[\text{Paragraph 4}\]

\[\text{Section 4}\]

\[\text{Subsection 4}\]

\[\text{Subsubsection 4}\]

\[\text{Subsubsubsection 4}\]

\[\text{Footnote 4}\]

e. New Ambiguities and Enhanced Compliance and Litigation Defense/Risk Costs for Greenhouse Gas Emissions

As discussed further in Attachment A.C.4, instead of providing clear and practical direction on how to address GHG emissions under CEQA, OPR chastises CEQA practitioners for focusing too much on determining whether quantitative project-level GHG emissions are significant – and avoiding the apparently more appropriate GHG impact assessment methodology of the “incremental” evaluation of GHG impacts. This vague and ambiguous new mandate provides zero discernable practical direction to agencies or stakeholders. It also shirks OPR’s statutory responsibility to update the CEQA Guidelines based on judicial interpretations, including major Supreme Court decisions such as *Newhall*⁴, *SANDAG⁵*, and San Diego climate action plan cases⁶.

For example, in *Newhall* the Court invalidated a CEQA threshold based on a statewide GHG reduction goal and instead suggested that thresholds should be developed for different types of projects in different locations; the Court also identified four alternate compliance pathways that “may” be appropriate under CEQA. Justice Leu, responding to a question in the 2017 Yosemite Environmental Law Section Conference, declined to state what CEQA actually did require for GHG emissions – but made the obvious point that this was a topic ready for regulatory agency action. Instead of grappling with, and proposing Guidelines updates that actually provide the statutorily-required practical direction on this impact issue, OPR simply chides practitioners for what they are not doing. OPR also declines to acknowledge, or reconcile, conflicting GHG thresholds developed by various expert regional and state air agencies.

This OPR 2017 Proposal will increase GHG compliance costs by introducing yet another ambiguous new analytical methodology, with no clear corresponding threshold. It will also perpetuate and expand CEQA lawsuit GHG claims, which along with the related topics of traffic and air quality are the most frequent claims made against housing in CEQA lawsuits.

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f. **New Ambiguities and Enhanced Compliance and Litigation Defense/Risk Costs for Defending Baselines**

As discussed in Attachment A.D.2, the 2017 Proposals impose ambiguous as well as restrictive new standards on how “baseline” conditions, against which the significance of project impacts are to be measured, thereby increasing compliance costs and litigation risks for a foundational component of the CEQA evaluation process that applies to every one of nearly one hundred impact thresholds that must be evaluated under Appendix G.

g. **New Ambiguities and Enhanced Compliance and Litigation Defense/Risk Costs for Impacts of the Environment On Projects**

OPR’s decision to ignore the California Supreme Court’s holding in *BAAQMD*\(^7\) and unlawfully conflate the environment’s impact on a project as an “indirect” impact of the project, as discussed in Attachment A.D.2, also expands the scope of the required CEQA analysis without Legislative authorization and in contravention of the Supreme Court decision. The Legislature has repeatedly declined to amend CEQA to require consideration of the environment’s impacts on a project, which is a statutory constraint OPR likewise fails to acknowledge or obey.

As discussed in detail in the Appendix G comments included in Attachment A, this has resulted in the addition of more than a dozen CEQA thresholds with corresponding analytical impact analyses, mitigation mandates, and litigation costs and uncertainties. This is yet another example of an economic impact of the 2017 Proposals that are ignored in OPR’s economic assessment.

2. **New Transportation Impacts/New VMT and Traffic Inducement Proposal**

Notwithstanding voluminous comments and objections to OPR’s proposal to use CEQA’s transportation impact thresholds to legally mandate its unlegislated “road diet” policy of intentionally increasing congestion to induce public transit use (in an era of plunging bus and even decreases in rail transit ridership in California notwithstanding billions of public transit dollar investments, and in an era of the state’s most acute housing crisis in history where minority and young workers are disproportionately forced to “drive until they qualify” for housing they can afford to rent to areas not served, or very poorly served, by timely public transit services to employment centers. First, OPR lacks substantial evidence in the record supporting the $5000 VMT study cost. As several noted traffic experts, including those advising OPR have concluded, there are no professional standards or regulatory definitions that prescribe and resolve numerous variables with “VMT” based studies, numerous VMT methodologies resulting in very different results are available even within the same geographic area, there are no thresholds for dozens of common land uses (parks, schools, hospitals, hotels, etc.), and there is no evidentiary basis supporting a prescribed level of effectiveness for various purported VMT reduction

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\(^7\) *California Building Industry Association v Bay Area Air Quality Management District.* (2015) 62 Cal.4th 369
strategies like providing secure bike parking (or not).\(^8\) Traffic-related objections are the most commonly litigated CEQA issue, and housing is the most common litigation target. Developing and then litigating such new issues into some level of judicial stability – a mandate given the vague and incomplete VMT regulations and guidance that OPR has elected to issue – is a decade-long exercise, with fights among experts and inconsistencies in practices and precedent inevitable. “Armoring up” for VMT lawsuit fights, and then actually litigating these complex issues into stability, will cost many millions of dollars more – and raise housing prices for all housing projects at risk of CEQA lawsuits – than the facile $5000 estimate offered up by OPR in its economic analysis.

OPR’s economic assessment likewise avoids acknowledging or quantifying the economic consequence of intentionally worsening traffic congestion, including but not limited to traffic congestion that adds tons of air pollutants, adverse individual health consequences such as stress and high blood pressure, adverse family health and welfare consequences from exhausted parents forced into 3 or more hours of daily commute time that can never be used to help kids with homework or regular dinners – or the billions and billions of dollars of California’s economy that requires efficient goods movement.

Finally, OPR’s economic assessment completely ignores the economic consequences of requiring its new transportation metrics to be applied to projects that have already been assessed in pre-2018 EIRs: the next discretionary approval for these projects must apparently be delayed for the 2 or more years required to complete a further round of CEQA review, and then the next 3-5 years for CEQA lawsuits (note that the Senate 2017 study of state agency CEQA practices\(^9\) shows that about half of Caltrans EIRs are litigated), and then the cost overruns from more studies, more delays, more mitigation, and more litigation uncertainties including attorney fee awards to CEQA petitioners. Taxpayer funded infrastructure projects, housing projects that comply with previously-adopted housing plans for which EIRs have been approved, and the other public service and infrastructure needed to serve these housing and transportation projects, will all experienced much higher CEQA costs under the OPR 2017 Guidelines.

OPR simply ignores – completely – all of these costs, as well as the secondary costs of economic losses ranging from homelessness to increased high school dropout rates caused by California’s housing, poverty, homeless and transportation crises. These are real costs, suffered by actual people as well as the environment and the economy, that appear to be invisible to OPR. These costs must be identified, quantified, and disclosed as part of the required revisions to the “comprehensive” update of the CEQA Guidelines that OPR is statutorily required to complete under CEQA and the APA.


OPR also ignores federal and state civil rights laws, and independent studies, confirming that vehicular transportation is a critical pathway out of poverty. In fact, public transit allows far fewer than 10% of Californians to commute to work in 60 minutes.\textsuperscript{10} Intentionally increasing congestion to “induce” transit use for the disparate number of minority workers who must be physically present at their job to get paid, and who are forced by the housing crisis to live ever greater distances from tony coastal enclaves most likely to use CEQA and other tools to block new housing, is a fundamentally racist – and unlawful – policy and regulation. The fact that OPR’s purported economic study ignores the racist consequences of its new transportation thresholds, and ignores both the increased fuel and other direct economic costs to California’s majority minority households, as well as the lost opportunity time for families, health, and economic productivity from grinding daily commutes lasting more than three hours each day, is unconscionable – and unlawful.\textsuperscript{11}

3. Conclusion

OPR’s economic analysis ignores the fact that estimated GHG reductions from the high cost housing, infill-only, “transit inducement” strategy of intentionally increasing traffic congestion is estimated to only result in about 1.67 MMTCO2e/year in GHG reductions.\textsuperscript{12} The OPR 2017 Proposals’ poverty-worsening, housing crisis worsening, commute worsening, civil rights violations against Californians majority minority population would result, in turn, in reducing less than 1% of California’s GHG reduction goal per the 2017 Scoping Plan adopted by CARB, within a global context in which the entirety of California produces less than 1% per year in GHG emissions.\textsuperscript{13}

Even as a purported climate policy, the “necessity” of imposing new CEQA mandates that violate the civil rights of California’s minority communities is entirely unsupported – and far more meaningful GHG reductions can be achieved, far more cost-effectively, without increasing the misery and poverty of California’s middle


income, minority, and millennial households. To cite just one example, instead of trying to make the life of California’s dwindling middle class – and its minorities and millennials – ever more costly and challenging with these new CEQA expansions in transportation and other Guidelines, many millions of GHG emissions could be avoided by finally forcing state bureaucrats to allow for effective management of California’s forests, which among other features provide both sustainable building materials as well as jobs and economic revenues for many of California’s rural poor communities. As recently documented by the Little Hoover Commission, wildfire GHG emissions easily wipe out all GHG reductions achieved by California’s legal mandates – and shockingly ineffective forest management practices in one fire that spanned the California-Mexico border left the California forest levelled while allowing 95% of trees to survive across the border in Mexico.14

There are effective GHG reduction strategies (including forcing federal and state forestry and species bureaucrats to immediately start doing their job and allow for safe forestry management), and to the extent that the OPR 2017 Proposals were distorted to unlawfully elevate GHG reductions and climate above all other CEQA impacts, then OPR must expressly disclose and defend this climate-first regulatory agenda, and then must disclose all economic as well as environmental consequences of its new regime. It is still a fundamentally unconstitutional and unlawful regime, but OPR has an independent statutory obligation to fully disclose the economic consequences of its proposals – and has failed to do so.

December 11, 2017

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Richard Corey, Executive Officer
1001 “I” Street
Sacramento, CA 95814

RE: Draft 2017 Scoping Plan

Dear Board Members and Mr. Corey:

The Two Hundred is a group of community civil rights leaders advocating for homeownership for California’s minority families. We are committed to increasing the supply of housing, to reducing the cost of housing to levels that are affordable to California’s hard working families, and to restoring and enhancing homeownership by minorities so that our communities can also benefit from the family stability, enhanced educational attainment over multiple generations, and improved family and individual health outcomes, that white homeowners have long taken for granted.

We also support the quality of the California environment, and the need to protect and improve public health in our communities.

We have, for many decades, watched with dismay as decisions by government bureaucrats discriminate against and disproportionately harm minority communities. We have battled against this discrimination for our entire careers, which for some of us means working to combat discrimination for more than 50 years. In litigation and political action, we have worked to force government bureaucrats to reform policies and programs that included blatant racial discrimination – by, for example, denying minority veterans college and home loans that were
available to white veterans. We sued and lobbied and legislated to force federal and state agencies to end redlining practices that denied loans and insurance to aspiring minority home buyers and small businesses. We sued and lobbied to force regulators and private companies to recognize their own civil rights violations, and end discriminatory services and practices, in the banking, telecommunication, electricity, and insurance industries.

We have learned, the hard way, that environmental regulators and lobbyists are as oblivious to the needs of minority communities, and are as supportive of ongoing racial discrimination in their policies and practices, as their banking, utility and insurance bureaucratic peers. Several years ago, we waged a three year battle in Sacramento to successfully overcome environmentalist opposition to establishing clear rules for the cleanup of the polluted properties in our communities, overcoming the cozy crony relationships between regulators and environmentalists who financially benefited from cleanup delays and disputes instead of creating the clear, understandable, financeable, insurable, and equitable rules for the cleanup and redevelopment of the polluted properties that blighted our communities.

Having successfully fought for decades to overcome government and business discrimination against minority working families, we were deeply saddened – but not surprised – that the predatory lending practices and discriminatory regulatory oversight deficiencies that led to the Great Recession disproportionately harmed minority homeowners, who lost homes to foreclosures at a far greater rate than white families. Just as the civil rights promises of laws enacted in the 1960s and 1970s had reached their stride, and the homeownership race gap was starting to close, the Great Recession wiped out generations of homeownership progress in our communities.

We were not surprised, but were likewise deeply saddened, when the regulatory climate change passions of California’s environmental leaders were quickly distorted from their purported goals of reducing global GHG emissions to address climate change, into a series of regulatory proposals that impose stunningly regressive new costs on California middle income families. This regressive new regulatory regime, which punishes most harshly those Californians who work hard in middle income jobs, is presented by CARB as a global necessity – but in fact imposes higher costs for basic necessities like utilities, transportation, and housing that decades of anti-discrimination and pro-consumer protection statutes and agencies have sought to prevent. CARB’s regressive and discriminatory agenda also embraces as California GHG “reductions” the relocation of higher wage manufacturing jobs accessible to those with high school degrees to other states and countries that have far higher per capita GHG emissions and then importing these formerly made-in-California products back to California, with still more GHG produced from transportation back to California! It is no surprise that the GHG habits of the wealthy, like jet plane travel, is ignored in favor of charging more for basic necessities, to be paid as a disproportionately greater share of earned income, by California’s majority minority households.

We write to object to the 2017 Scoping Plan as a violation of the equal protection clause of the Federal and California constitution by disproportionately placing new cost burdens and regulatory obstacles on aspiring minority homeowners, while also disproportionately and arbitrarily reducing access to the higher wage jobs that allow members of California’s minority communities to become homeowners. Approval of the proposed 2017 Scoping Plan would also
violate numerous other federal and state statutes, including but not limited to the federal Clean Air Act and Fair Housing laws, as described below.

We urge your Board to reject the 2017 Scoping Plan, and direct preparation of a revised Scoping Plan (inclusive of a revised environmental and fiscal analysis) that actually advances your climate change goal of reducing global GHG emissions with California leadership that does not discriminate against minority communities or violate constitutional and statutory protections, that advances rather than the discriminates against aspiring minority homeowners, and that results in meaningful global GHG reductions rather than simply causing the “leakage” of people and jobs to higher GHG states and countries that result in higher global GHG emissions.

While we recognize that the Scoping Plan also increases costs and reduces higher wage job access for aspiring white working families and workers, because California is now a minority majority state the imposition of new regulatory programs that unfairly burden middle and working class families and workers – the majority of which are now minorities - are unconstitutional.

CARB’s constitutional violation is particularly egregious in the context of GHG emission reduction mandates that allow California to claim GHG reductions for driving people and jobs out of California, while ignoring both the increased GHG emissions caused when people and jobs move to higher per capita and per gross domestic product (GDP) states and countries as well as the GHG emissions created by Californians’ consumption of goods and services (like cement imported from China and jet travel for the wealthy). As recently demonstrated in a joint study completed by scholars from the University of California at Berkeley and regulators at the Bay Area Air Quality Management District, high wealth households cause far more global GHG emissions – yet the Scoping Plan ignores this scientific truth and unfairly, and unlawfully, burdens California’s minority and middle class households with new regulatory costs and burdens to further reduce the less than 1% of global GHG emissions that are actually produced within California’s borders.

**Background**

As has been our lifelong mission, we have resolved to once again advocate for equity, and against discrimination, on behalf of our communities and against discriminatory bureaucracies.

California has the nation’s highest poverty rate, highest housing prices, greatest housing shortage, highest homeless population - and highest number of billionaires. The housing supply and housing cost crisis has resulted in a diaspora of minority families from the core metropolitan cities with the greatest number of jobs and highest wages to ever more distant suburbs, exurbs, and even regions. Hard working families, which are disproportionately minorities in contrast to the wealthier whiter elites who bought into or can afford to remain in our wealthiest job centers, are forced to “drive until they qualify” for housing they can own (or even rent). Workers and their families then suffer a cascading series of adverse health, educational, and financial consequences from their unconscionably long commutes – sometimes sleeping during the week in cars and trucks parked overnight on construction job sites, in industrial neighborhoods, and in abandoned parking lots. This problem is not limited to minimum wage, other low income workers, and college students already struggling with staggering debt burdens: our skilled
construction workers, teachers, nurses, firefighters, police officers and sheriff’s deputies, city staffers and truck drivers and union members – all once solid middle class California jobs that produced the world’s greatest middle class of homeowners – can no longer afford to buy homes near where they work.

In our communities, homeownership is not a “developer” issue – it is a core value that allows each monthly housing check to contribute to financial security, and it is the only proven pathway to create the family wealth needed to pay for the inevitable periods of illness or lost jobs, and the inevitable multi-generational needs of financing college educations and senior health care.

Yet we see, over and over and over again, our government agencies taking actions to deny our people access to homeownership – always purportedly a “color blind” approach that they are shocked (shocked!) to learn has a disparate impact on minority communities.

If the California Air Resources Board (CARB) approves the October 2017 version of its Scoping Plan, CARB will enter the hall of shame occupied by other federal and state agencies who violate the equal protection clause of the federal and state constitution, and other federal and state laws – not the least of which is the Clean Air Act itself – by discriminating against California’s minority communities.

California produces less than 1% of global GHG emissions, and has lower per capita GHG emissions than any other large state except New York – which unlike California still has multiple operating nuclear power plants. As everyone from Governor Brown to members of this Board have repeatedly stated, California climate change leadership depends not on further mass reductions in the 1% of global GHG emissions generated within our boundaries, and instead demands leadership that can and will be politically emulated by other states and countries.

Promoting leakage of jobs and people to higher per capita GHG states and jurisdictions, and exacerbating the state’s extreme poverty, homelessness and housing crisis while depriving hard working minority Californians from homeownership and middle class stability, achieves only the twin goals of increasing global GHG emissions and promoting ever more acute income inequality and racial discrimination. The Legislature and Governor directed CARB to reduce GHG emissions – and did not direct CARB to violate applicable constitutional and statutory protections and mandates. California’s climate leadership in promoting renewable energy and other technologies, such as solar panels and electric vehicles, can and has spurred GHG reduction measures that can and have been replicated by other states and countries. CARB’s proposed expansion of the California Environmental Quality Act, and its promotion of “Vibrant Community” state agency land use interventions designed to intentionally increase road congestion and home prices throughout California, do not create meaningful reductions in GHG emissions in California – they just increase costs and misery for California’s working families, and promote migration to other higher GHG states.

We Urge You To Direct Staff To Revise The 2017 Scoping Plan To Avoid Increasing Poverty and Worsening Housing Crisis for California’s Minorities and Other Working Families
There are four components of the Scoping Plan that must be eliminated, and a revised Scoping Plan along with corresponding revisions to the Scoping Plan’s statutorily required fiscal and environmental analyses must be completed and circulated for public review and comment, to avoid federal and state constitutional and statutory violations, and avoid increasing California’s acute poverty, homelessness, and housing crisis.

I. Disapprove Expanding the California Environmental Quality Act.


Earlier this month, the Office of Planning and Research (OPR) separately released a massive regulatory amendment package that would make changes to the regulatory requirements implementing CEQA (CEQA Guidelines) with the convenient (for state agency bureaucrats assured lifetime employment, pension and medical insurance) and disgraceful (for California working families hoping to spend any quality time at home instead of in multi-hour daily commutes) public review process to begin over the holidays.

The Scoping Plan’s vague and ambiguous CEQA provisions, coupled with the massive unknowns and ambiguities in OPR’s proposal, would raise housing and homeowner transportation costs - and further delay completion of critically needed housing by increasing CEQA litigation risks – and thereby exacerbate California’s acute housing and poverty crisis. This effect would be disproportionately felt by the disproportionately minority population of renters unable to afford homeownership, younger workers more generally including even the well-paid technology, artist and internet workforce that organized the new Yes In My Backyard (YIMBY) party with the bold motto that “Housing Is Not Illegal,” and Californians that do not already have

1. A recent report prepared for the Senate Environmental Quality Committee concluded that CEQA litigation was not a problem – a conclusion made possible by the study’s omission of housing entirely notwithstanding the housing crisis, with a methodology that ignores both the cost and time required to deal with CEQA compliance and litigation in relation to taxpayer funded public projects such as the CEQA lawsuit threat against expiring federal funding that caused “Carmageddon). http://sd10.senate.ca.gov/news/2017-12-07-survey-state-projects-finds-ceqa-not-barrier; see also, http://ceqaworkinggroup.com/carmageddon
adequate housing supply options at prices they can afford. Recent studies have confirmed that higher density infill housing is the most frequent target of CEQA lawsuits statewide. [Link to study]

For example, in the part of our state that has the greatest population, highest density, and most acute housing affordability problem — the six-county area that comprises the Southern California Association of Governments (SCAG) region — 98% of the 14,000 housing units targeted by CEQA lawsuits between 2013 and 2015 are located in urban infill locations, 70% are within one-half mile of transit, and almost 80% are located in the whiter, wealthier and healthier areas of the region. Another study confirmed that California’s transit projects were more frequently targeted by CEQA lawsuits than roadway and highway projects combined! *Ibid.*

If CARB actually cared about increasing density and transit services as a GHG reduction strategy, the Scoping Plan should have identified CEQA litigation — pursued by anonymous shadowy groups, business competitors, NIMBYs and labor unions — as a major obstacle and delay factor in achieving its ambitious GHG reduction goals for promoting infill housing, transit and public services. If CARB cared about working Californians, or about the poverty or housing crisis, or the transportation gridlock that is causing criteria air emissions from the transportation sector to actually increase for the first time in decades, then the Scoping Plan would have strongly advocated for statutory amendments to CEQA that would expedite housing, transportation, schools, parks and public infrastructure. If CARB cared about global climate change, the Scoping Plan would have strongly advocated for amendments to CEQA and other statutes that help California retain its middle income workforce instead of driving this disproportionately minority population to higher per capita GHG states for housing they can afford based on jobs they can access based on the educational attainment levels delivered by California’s schools and colleges.²

Instead of taking any of these constructive steps, all of which would improve the political resiliency of climate change policies in the face of hyper-partisanship and staggering income inequality, the Scoping Plan proposes to actually expand CEQA by adding ambiguous, litigious, and unlawful new expert agency net zero CEQA thresholds, substantial reductions in total Vehicle Miles Travelled (VMT), land use growth controls such as urban limit lines and new ecosystem service fees which further increase housing costs in existing communities, and legally infeasible local climate action plan standards under CEQA. These components of the Scoping

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² With respect to education, we note that separate legal action is again underway to force California leaders to meet even minimal educational standards for its minority students, including an elementary school for which fewer than ten percent of students pass reading competency tests in yet another round of litigation forced by California leaders’ repeated inaction on core civil rights in the educational arena. Elitist special interests continue patterns of discrimination against California’s minority communities with many established policies, but only CARB (and OPR) are proposing to launch a new generation of “environmental” mandates to actually worsen the housing, poverty, and transportation gridlock crises that continue this unlawful history of racial discrimination against minorities.
Plan, like the massive OPR rulemaking just initiated, will benefit only the “CEQA industry” of lawyers, consultants, special interests, and bureaucrats who profit from repetitive studies, gain financial advantages from secret lawsuit settlements and duplicative lawsuits against projects that have already gone through one or more rounds of CEQA. The Scoping Plan is an elitist tool that will further empower our BANANA (Build Absolutely Nothing Anywhere Near Anyone) republics of wealthy coastal elites who refuse to build their fair share of housing that is affordable to California’s hard working families.

A. Eliminate Presumptive Net Zero GHG CEQA Threshold

The Scoping Plan recommends, based on CARB’s status as an expert state agency on GHG, that all new development projects – of all kinds – achieve no net increase in GHG emissions (“net zero GHG”) unless the lead agency or project proponent can prove that a project cannot meet this CEQA threshold based on “substantial evidence.”

This Scoping Plan component is not proposed to go through any future rulemaking proceeding: it stands, as senior CARB official Kurt Karperos recently confirmed at a Sacramento Climate Conference, as a “self-implementing” element of the Scoping Plan that takes legal effect as of CARB’s adoption of the Scoping Plan.

First, this Scoping Plan component is flatly at odds with OPR’s contradictory legal conclusion that CEQA cannot be interpreted to impose a “zero molecule” standard and prior definitive rejection of a “net zero” GHG mandate in the only completed CEQA GHG rulemaking in effect today. OPR’s voluminous new proposal on CEQA rulemaking includes a variant of this Scoping Plan CEQA threshold, but this new OPR proposal is the beginning – not the end – of the rulemaking process. There is zero evidence in the CARB record supporting presumptive imposition by a lead agency of this net zero GHG threshold for each type of individual project – from home renovations to high-rise towers, from rail to ferry to carpool lane expansions, from wineries to hotels, from universities to hospitals, from parks to schools – that is subject to CEQA.

Second, GHG emissions are the most litigated CEQA topic, and notwithstanding several decade-long lawsuits, the California Supreme Court declined to decide in two recent cases what CEQA (a 1970 statute) actually requires in the context of determining when a GHG emission is potentially “significant” under CEQA.

It is the height of agency irresponsibility and racial insensitivity, given the severity of the housing, poverty and homelessness crisis and their collective effect on California’s minority communities, for CARB in its expert agency role to interpret CEQA as requiring use of this net zero GHG CEQA threshold unless a lead agency can prove otherwise with substantial evidence.

It is also the height of arrogance, similar to decisions by California’s redevelopment agencies to demolish whole minority communities, for a billion dollar Sacramento agency staffed with hundreds of well-paid scientists and policy advisors to suggest that a CEQA lead agency – most often a city struggling with numerous complex budget and policy priorities, operating with minimal staff and no climate change experts – to develop its own “substantial evidence” to
withstand a CEQA court challenge to rejection of this expert agency net zero GHG CARB standard.

There have been examples of “net zero” buildings which rely on a combination of rooftop solar generation, various voluntary building construction materials and techniques that have not met California’s statutory consumer protection mandate of a ten year payback in reduced energy costs, and elimination of natural gas for heating and cooking (which thereby raises monthly utility costs for building occupants). All of these “net zero” buildings increase housing costs, which are already nearly triple the average housing costs for the nation.

However, none of these examples included the other components of a “project” as defined under CEQA, which span a much larger group of project-related activities including initial construction and ongoing occupancy as well as transportation fuel use by future project residents, guests, employees, and service providers.

CARB’s version of a CEQA net zero GHG threshold imposes even higher housing costs than the “net zero” housing structures in existence by including all of these project-related construction and future occupant transportation emissions, such that new project occupants will double pay in perpetuity for driving: once at the pump under the cap and trade program, and again (and again) as part of owning or renting and doing the same routine transportation activities living next door in pre-Scoping Plan housing. Since CEQA applies only to new projects, the Scoping Plan also doubles down on the broadly perceived generational inequities created by Proposition 13, where a new home owner can pay ten thousand dollars more than their next door neighbor – under the Scoping Plan, the new neighbor will also pay tens of thousands of dollars more in transportation-related GHG offsets or allowances than households not subject to this new CEQA regime.

Further, the CARB CEQA expansion proposal for net zero GHG would be triggered today for new projects (at the height of the housing crisis) notwithstanding the fact that over time less and less fossil fuel/GHG emissions are expected from future vehicle fleets.

In short, the direct effect of CARB’s net zero GHG project threshold CEQA expansion is to impose even higher housing costs on California families that are already suffering from an acute housing supply and affordability crisis.

Third, as noted in the studies cited above, the most frequent targets of CEQA lawsuits statewide are housing projects – and the most frequently challenged category of housing projects is higher density, multi-unit projects located in existing communities served by public transit. Anti-housing lawsuits are the reality of CEQA litigation, which is at odds with the academic theory of planners who believe that all neighbors (and CEQA leverage litigants like competitors and labor unions) welcome high density and crowded parks, schools and roads - or the idealized vision of what CEQA lawsuits “should be” in the minds of Sacramento agency lawyers bureaucrats.

If it is indeed a climate goal of CARB to promote costly, high density housing over the objections of neighboring voters, then again the solution is to reform and update CEQA – not to create a new litigious “net zero” standard for each new housing project that can be litigated for a decade or more while no housing is built, and California workers continue to suffer as well as migrate to other higher per capita GHG states.
Fourth, this “net zero” CEQA approach violates consumer protection statutes that were separately enacted to prevent Sacramento’s regulators from imposing on California homeowners (and renters) every last bell, whistle, and gizmo with a lobbyist or agency special interest champion behind it. CEQA is not, as courts have consistently held, a giant “workaround” to avoid compliance – or mandate “beyond compliance” measures that conflict with specific statutory mandates, or that attempt to impose through bureaucratic fiat what the Legislature has itself repeatedly rejected as a statutory mandate such as the Scoping Plan’s unlawful conflation of the SB 32 enacted mandate of reducing GHG 40% by 2030 with the decidedly NOT approved notwithstanding multiple years of unsuccessful legislative proposals mandate of reducing GHG 80% by 2050.

The Legislature, and not CARB, enacts new statutory standards.

California already has, and can enact future amendments to, vehicle standards and fuel standards that make vehicles and gas more costly for California consumers. The Legislature has done this twice already in 2017, with the new vehicle tax and the expansion of the cap and trade program. However, expanding CEQA to require only future occupants of acutely needed housing units to double-and triple-pay to get to and from work with a CEQA mitigation obligation to purchase GHG credits/offsets to satisfy CARB’s new “net zero” CEQA threshold unlawfully and unfairly discriminates against new occupants in violation of Constitutional protections for interstate commerce and equal protection, in addition to other fatal legal deficiencies.

California already has, and can enact future amendments to, building code standards that result in lower GHG emissions while also protecting consumers from excessive costs; expanding CEQA to impose “net zero” building mandates that are not cost-effective even over the ten year statutory payback period harms consumers in violation of this statute.

California already has, and can enact future amendments to, its renewable portfolio standards and electricity generation grid physical and governance configurations. Given the “duck curve” challenge of California’s current inability to consume the solar/wind power produced during some afternoons (as documented by the California Energy Commission’s building standards staff) coupled with the far lower rooftop ratios available in multi-story higher density housing advocated by CARB, forcing new home occupants to pay for ever more costly (and currently unproductive) rooftop solar arrays and/or pay for offsite renewable energy generation facilities in addition to paying normal consumer costs for electricity and natural gas (or banning natural gas entirely) increases housing project costs and CEQA uncertainties with virtually no corresponding GHG reduction benefits from lost afternoon renewable generation peaks.

Other GHG emissions of simply occupying a home – like composting and reusing trash or using a transit system instead of owning a car – likewise cannot be meaningfully assumed by the vast majority of individual housing projects, because these are community-scale facilities and systems that are neither feasible nor cost-effective measures applied to the individual projects subject to CEQA (and CEQA lawsuit challenges).

For example, does an apartment project near transit maximize density – or decide to use part of its property for composting its food waste but not the food waste of its neighbors, and then spending more money to arrange for the offsite use of the composted materials? Marin County is
among the most famously hostile to new housing, and notwithstanding its purported “environmental” values has also declined to allow any food waste composting facility to be built within the County. Is it CARB’s intention to hand Marin County NIMBYs still more CEQA lawsuit claims to block apartments near transit that decline to compost their own food waste because Marin County won’t provide this GHG reduction service to its residents?

On a much more significant cost and GHG emission scale, the existence of effective transit systems is far outside the control of an individual 20-unit housing project. The University of Minnesota’s authoritative, multi-year national metro region study of transit system confirms that far less than 10% of a metro region’s jobs can be accessed in a 60-minute one-way ride on public transit anywhere in California with the sole exception of the 49-square mile San Francisco peninsula. Notwithstanding billions of transit investments, and robust rail and express bus transit ridership, routine bus ridership has plummeted in California and nationally with transportation mode shifts to Uber/Lyft (and soon automated vehicles. Reforming CEQA – and rail projects in California routinely take 20 years or more (and multiple rounds of CEQA lawsuits) to get completed. Is it really CARB’s intention to let our whitest, wealthiest, healthiest enclaves – the wealthy communities who have fought for decades to block affordable housing, “crime trains” and transit stations – use the absence of effective transit systems as yet another reason to claim CEQA deficiencies in a lawsuit against housing??

The Scoping Plan’s “net zero” CEQA threshold violates multiple provisions of the state and federal constitution, and discriminates against future occupants of new housing units who are disproportionately members of minority communities, in violation of federal and state fair housing laws.

**B. Eliminate CEQA Numeric Standards for Local Climate Action Plans**

The Scoping Plan purports to endorse current CEQA Guidelines and court decisions upholding project compliance with locally-approved climate action plans as an alternative to the “net zero” CEQA compliance pathway. Our courts have struggled, to no clear outcome, to understand and apply CEQA to global climate change. Appellate courts and the current CEQA Guidelines both recognize that a project that complies with an approved local climate action plan is a valid compliance pathway through CEQA, and the California Supreme Court has opined that this “may” be a compliance pathway but also urged establishment of clearer CEQA thresholds for GHG emissions.

As with the “net zero” threshold itself, however, CARB’s proposal that local governments – cities and counties – adopt climate action plans that are themselves designed to reduce per capita greenhouse emissions from current levels of eleven metric tons per year, to six metric tons per year by 2030, and then two metric tons per year by 2050, demonstrates willful ignorance of the statutory jurisdictional authority of local government to substantially reduce the sources of GHG emissions that result in already low per capita emissions.

As the 2017 Scoping Plan itself acknowledges, the vast majority of GHG emissions are from the transportation sector (where local governments lack any legal authority to regulate passenger vehicle fuels or technology), from electricity generation (where local governments have made substantial strides in encouraging and producing rooftop and canopy solar power generation, but
at tiny fractions of what would be needed for an entire community), from stationary sources (which are regulated through the cap and trade program, with fees collected and disbursed by the state and not local government), and from sector-specific activities like agriculture and landfills that typically are not located in the cities where most new housing is proposed to be developed based on the eight-state agency “Vibrant Community” Scoping Plan Appendix vision of focusing future development only in higher density, transit-oriented cities).

Even the CARB Scoping Plan Appendix recommending local government actions does not identify any measures that would contribute more than a tiny fraction toward reducing the community’s per capita GHG emissions to CARB’s six and two metric tons per year numeric criteria, respectively. The mandate for achieving a “declining trajectory” in mass GHG emissions is likewise inconsistent with substantially increasing population densities in California cities, since GHG emissions do indeed track population growth – and any substantial increase in population includes a mass increase in GHG emissions even if per capita greenhouse emissions are reduced.

There is no question that cities and counties can reduce GHG emissions, by for example reducing emissions from their own municipal facilities. Even these strategies can have a significant fiscal consequence to financially struggling communities burdened with ever-increasing pension and other costs. For example, converting a municipal swimming pool to solar and eliminating gas heating will reduce GHG emissions, but also reduces the ability of the young and infirm to swim during the winter and on cloudy or cool days. Backup electricity generation from the grid will help maintain appropriate pool temperatures, but at a much higher operating cost give the availability of inexpensive natural gas. If CARB believes that local jurisdictions must never use natural gas to heat swimming pools, then it should conduct a rulemaking to impose this requirement. Country club kids will continue to swim; poor kids and the infirm will not. How important is eliminating occasional natural gas use in public swimming pools to global climate change is an issue to be appropriately addressed in a separate rulemaking, but the CARB-mandated six and two ton per year numeric thresholds for legally adequate local climate action plans demand an immediate “all of the above” GHG reduction strategy regardless of the tradeoffs.

Although the two ton per person metric has won support from many scientists, the hard work of approaching that target – even from California’s very low 11 ton per year per person rate – is appropriately managed with regulation, not a bureaucratic putsch. In the 1970’s, the chairwoman of CARB believed that the only possible strategy for reducing air pollution from cars was to prohibit driving every other day – an impossible proposition for middle income workers who must be physically present at their jobs or risk falling into homelessness and poverty, even then. Over time, through methodical and transparent rulemaking, US EPA officials under President Obama reported that vehicular emissions were reduced by 98-99% in relation to tailpipe emissions from the 1960s. We removed lead from gasoline entirely, eliminated the risk of carbon monoxide poisoning at intersections, and vastly decreased other smog-creating pollutants. If CARB was serious about local climate action plans, it would prioritize, quantify, fiscally and environmentally assess, and then recommend regulatory standards to be met by local government. Instead, by again conflating the statutory 2030 statutory reduction standard with the 2050 unenacted policy, CARB’s local climate action plan numeric standards are accompanied only by an unquantified and unquantifiable list of Appendix mush measures. Cities
and counties have already experienced the joys of being targeted by – and losing - CEQA lawsuits seeking to overturn local climate action plans. The Legislature has also repeatedly declined to mandate local agency adoption of climate action plans. It is illusory, disingenuous, and hugely litigious, for CARB to suggest that a 2 ton per capita climate action plan is an alternate compliance pathway for projects under CEQA.

The Scoping Plan is a major step in the wrong direction: it prescribes a clearly unattainable numerical per capita GHG emission standards for 2030 and 2050, identifies loosely framed and largely unquantifiable examples of potential measures that local government can seek to achieve in local climate action plans, and utterly fails to provide any clear direction on what local governments should do about the vast majority of GHG emissions sources over which local governments have no jurisdiction or control. CARB’s impractical, legally infeasible, and poorly-conceived mandatory numeric standards for local climate action plans will spawn even more CEQA lawsuits against local climate action plans, and spawn more judicial confusion and conflicting outcomes. Because adoption of climate action plans itself triggers CEQA, it will also discourage rather than encourage local jurisdictions to adopt such plans and face costly environmental impact report preparation and litigation defense gauntlets.

Like the ill-considered “net zero” presumptive CEQA threshold for projects, the bottom line of this Scoping Plan local climate action plan CEQA compliance pathway is to increase costs, add more delays, and expand litigation risks, for those filing CEQA lawsuits against housing, transit, and other critical local services and infrastructure projects.

Like the “net zero” presumptive CEQA threshold for projects, the numerical GHG per capita and trajectory criteria for climate action plans should be removed from the Scoping Plan. The quantum of GHG emissions that can feasibly be attained under existing legal authorities by local governments should be separately and clearly calculated and explained, and if this is indeed a new mandate then it should be separately legislated as such so that it can be placed in the context of the multitude of other legal and policy priorities, and fiscal opportunities and constraints, placed on local government.

At minimum, if this Scoping Plan numeric per capita and trajectory adequacy standard for local climate action plans is to be incorporated into CEQA, then this – like the GHG threshold issue – should be deleted from the Scoping Plan and assessed in the context of the OPR CEQA Guidelines update proposal for which the formal rulemaking process has just begun.

C. Delete CEQA and Land Use “Vibrant Communities” Appendix Scoping Plan Components, All of Which Ignore Regional, Racial, Economic, and Project Diversity

CARB is a state agency, with an extremely poor track record of CEQA compliance and multiple CEQA litigation lawsuit losses, and has virtually no experience, expertise, or statutory authority to regulate local land uses. CARB’s mission does not encompass even a small fraction of the public health and welfare, safety, economic development, public services, infrastructure development and maintenance, representative government by elected officials, or law enforcement duties or obligations placed on local government by the California constitution and myriad state laws.
At even the most conceptual level, the Scoping Plan’s assertion that a single “net zero” GHG emissions threshold should apply to projects in climates as varied as Mendocino and Palm Springs, and should apply equally to all project types including wineries, universities, hospitals, housing, carpool lanes, reclaimed water plants, bike lanes on busy urban streets, replacement homes lost to fires and earthquakes, ski resorts and marijuana grows, the High Speed Rail project and the Twin Tunnel project (to name just a few), confirms why CARB is not the appropriate agency to assert its “expert agency opinion” on how either GHG or land uses should be regulated under CEQA.

With respect to climate variants, to impose “net zero” as a threshold in a wealthier milder climate such as the Bay Area will increase housing costs and reduce the affordability of housing for minority communities. In the inland and desert areas of the state, in contrast, pricing new projects to achieve “net zero” compounds already extraordinarily high utility costs and will literally kill people – disproportionately minorities – who cannot afford either new housing, or monthly utility bills in excess of $1000 during the summer. A “net zero” structure that deprives new homes of far less costly natural gas extends this new CARB CEQA death zone to mountainous regions during cold winters.

Utility subsidies for the very poor do not come close to recognizing the scale of suffering and economic distress that already affects working Californians and their families, and it ignores in the housing context conclusions by the Governor and numerous other political and academic experts that we simply cannot count on public funding to solve this problem for us.

While CARB staff will undoubtedly point to utility cost assistance programs for the very poor, United Way of California determined that a full 40% of the state’s population cannot regularly meet even routine monthly costs even when taking into account public subsidies for food and health care. https://www.unitedwaysca.org/realcost How much more will Scoping Plan implementation cost these families – our teachers, health and food workers, retail clerks and truck drivers, construction workers and public safety employees – to heat and cool their homes, cook their foods, and get to and from work, school, and medical care?

Similarly, with respect to project variants, how much more will a “net zero” mandate add to the cost of subsidized affordable and supportive housing? How much more will it cost transit projects? How much more will reclaimed water treatment facilities cost, and how much will water cost consumers, with a “net zero” mandate? And is “net zero” paid up front, over time – and if over time is this a brand new annual cost imposed on the residents of all new housing everywhere??

Using CEQA – which applies solely to “new” projects - to impose these new costs – means that wealthier existing homeowners will never pay the same high cost as the unhoused victims of California’s current NIMBY-driven housing crisis, it means that existing businesses will always have a permanent economic advantage over competitors even if that drives up prices for consumers, and it means that the already extraordinarily high infrastructure costs in California will get higher still – at a time of diminishing availability of federal infrastructure investment.

As patiently, and exhaustively explained by NAACP and Haas Business School Fellow Richard Rothstein in his book, The Color of Law, government bureaucrats don’t always intentionally and
expressly engage in racial discrimination — but the repeated pattern of agency actions in California and nationally does indeed have this disparate discriminatory effect.

Discriminating against minorities by expanding CEQA will do nothing to advance California’s leadership role in global climate change. It will instead cement the growing reputation of Californians as elitists that openly demonstrate their contempt for middle class workers.

We do not believe that the Legislature enacted climate laws that authorized or anticipated that CARB would expand CEQA to intentionally increase housing costs, drive up poverty rates, and increase global climate change by eliminating homeownership opportunities for middle class workers. We do not believe that the Legislature intended CARB to drive middle income families to states with far higher per capita GHG emissions, and within California to further burden housing costs and CEQA litigation risks while still protecting CEQA litigation abusers that have forced more Californians to live in housing located ever-further from temperate climate coastal jobs centers to inland areas with health-critical needs for more summer air conditioning and winter heating.

d. Conclusion: Delete All CEQA Provisions from Scoping Plan

Prescribing new CEQA requirements that are practical, lawful, equitable and affordable given our poverty, homeless and housing crisis, existed as a Scoping Plan opportunity for CARB, us, and other Californians committed to the twin goals of civil rights and equal protection, along with environmental protection and climate change leadership.

However, the political sloganeering behind the 2017 Scoping Plan’s “net zero” CEQA threshold and local climate action plan numeric standards is irresponsible, inequitable, and unlawful. Because approval of the Scoping Plan is intended by CARB to give these CEQA expansions immediate legal effect as expert agency determinations regardless of the OPR or any other rulemaking, CARB’s CEQA expansions also cause the greatest harms to the housing, transit, public service, infrastructure, park and school projects, that are most likely to be targeted, threatened, forced to pay “greenmail” in secret settlements using taxpayer dollars or private sector dollars that get rolled into increased housing costs, and ultimately delayed or derailed, in CEQA lawsuits.

The Scoping Plan’s expansions to CEQA were also entirely ignored in the environmental and fiscal analyses prepared for the Scoping Plan, and thus also violated applicable rulemaking mandates for the Scoping Plan, as yet another set of legal violations by CARB in this ill-considered CEQA power grab.

CARB has previously received comments on its draft Scoping Plan, which instead of “net zero” proposed an equally opaque, litigious, and inequitable “all feasible” GHG mitigation standard on new projects. The 2017 Scoping Plan is even more extreme, and more unlawful, than earlier drafts by adopting the numeric “zero” threshold, and unveiling for the first time the six/two ton per capita standards for climate action plans.

All CEQA components of the 2017 Scoping Plan should be deleted (including the related land use measures in the Vibrant Communities Appendix). CEQA GHG requirements should be determined in the context of the just-commenced rulemaking process for amending the CEQA
Guidelines. We close these comments with a simple resolution that we ask you to approve in lieu of staff’s recommended approval of the entirety of the Scoping Plan.

II. **Delete Limits on New Vehicle Miles Travelled from Scoping Plan.**

The 2017 Scoping Plan states that CARB staff is “more convinced than ever” about the need for Californians to drive less – a lot less. However, CARB staff also recently issued a notice confirming that CARB staff was not ready to propose updated targets for GHG and vehicle mile travelled (VMT) reductions as part of the SB 375 process, and would not be ready to do so until sometime next year.

Like the CEQA components of the Scoping Plan discussed in Part I, the VMT reduction component of the Scoping Plan is not quantified or assessed in either the required environmental or fiscal analysis, and accordingly CARB has violated the fiscal and environmental review statutory requirements applicable to the Scoping Plan.

As background, while it has become a “political truth” that higher density transit oriented housing reduces VMT, the actual truth as documented in numerous studies including those funded by CARB and others is that adding density to transit-served urban neighborhoods adds VMT (even if it potentially reduces per capita VMT), that VMT is higher for the higher wealth households that can afford to pay the $4000/month rents charged in the tony Bay Area and Los Angeles neighborhoods that have sprouted high rise residential density in recent years, and that the only peer reviewed academic study of VMT reduction in higher density transit neighborhoods confirmed that there is almost no correlation between VMT reductions and the expensive high density transit oriented housing development sought by the Scoping Plan authors. See, e.g., https://wwwARB.ca.gov/research/apr/past/13-310.pdf, www.tandfonline.com/doi/abs/10.1080/01944363.2016.1240044

Add to this the fact that bus ridership has plummeted nationally and throughout California, even in San Francisco, which is the West Coast’s most transit-oriented city (and the only city that largely took shape before the automobile became the dominant mode of transportation). Gentrification and the outmigation of minorities and working class families from the central city neighborhoods with the most transit has also been well documented, including the “diapora” for example of African Americans to the San Joaquin Valley and distant suburbs like Antioch, Fairfield and Santa Rosa from the cities of Oakland, San Francisco and San Jose. While lower income workers may feasibly take transit where transit service can reasonably connect people to jobs (e.g., within cities like San Francisco), once such workers are forced by the housing crisis to “drive until they qualify” for housing they can afford regional VMT actually increases. Emerging transportation technologies and services like Uber and Lyft provide increasingly popular last-mile service between rail stations and work/home, but studies have confirmed these services also increase VMT. Automated vehicles likewise are projected to increase rather than decrease VMT.

Intentionally increasing road congestion as a climate strategy, as was explained in the “road diet” proposed in OPR’s second Discussion Draft of SB 743 CEQA Guidelines, and as has been with less inflammatory words adopted as policy by Caltrans without benefit of notice to or statutory authorization from the Legislature, compounds the racial injustice of the housing crisis since the
victims of intentionally increasing congestion are the workers already forced to more distant inland locations away from higher wage jobs and more ample job opportunities.

The “cause more gridlock” transportation strategy also doesn’t work from an environmental and public health perspective: for the first time in the many decades since the state started comprehensively tracking air pollution from vehicles, criteria and GHG and toxic air emissions actually increased rather than decreased – even as cars and fuels emit less pollution – because people are forced to drive longer distances, and spend more time stuck in traffic congestion. And who lives closest to the freeways and ports where vehicular emissions increase from this intentional gridlock? No surprise answer: these are neighborhoods dominated by poor and minority residents, who also have disproportionately high rates of pollution-induced asthma and other adverse health conditions.

Increasing congestion to induce bus transit has never been approved by Californians, is contrary to several existing federal and state laws, and is absolutely contrary to the political will of California voters. In recent years, several of California’s most congested counties voted to approve roadway and transit system improvements in an effort to get the transportation systems working again. The state’s congestion management statutes, the enacted duties of Caltrans and regional transportation agencies, federal transportation statutes, and the federal and state clean air act, all require efficient goods movement and vehicular passenger mobility as strategies to reduce air pollution and protect and enhance the efficient movement of passenger and commercial vehicles. California’s agricultural sector, its ports, and its tourism industry – to name just a few examples – must have adequate transportation mobility.

We have watched with dismay the enforced “road diet” that CARB and other bureaucrats and academic want to impose on California’s minority communities, and we will weigh in when next the opportunity arises in the SB 375 context, as regional transportation agencies and CARB attempt to identify ever more stringent VMT reduction targets. We will again, in that context and all others, note the real truth that differs from the political truth: VMT has actually risen (by about 3% in the SCAG region for example) as a common sense outcome of increased population, jobs, and economic activities notwithstanding billions spent on transit improvements.

 Ahead of the new SB 375 targets, we have been stunned by CARB’s willful refusal to accept the reality of the multi-year national study coordinated by the University of Minnesota that confirms that less than 10% of jobs even in California’s metro regions can be accessed in 60-minutes by public transit, and that roadway gridlock makes bus ridership – which has plummeted nationally – even less viable for minority residents forced by the housing crisis to live far from their jobs.

We have remained stunned by CARB’s refusal to accept the inequitable and unlawfully discriminatory outcome of VMT fees, which take the same poorer and browner populations forced to travel the longest distances – and impose regressive new VMT fees and mandatory reduction crackdowns on people who are barely making ends meet notwithstanding having two or more jobs per household.

We already have the most economically regressive vehicle use taxation scheme in the nation: Californians pay about 75 cents more for gasoline than the national average, and this high fuel price will further increase with new cap and trade costs, new transportation system taxes charged
for each gallon of gas, and higher vehicle registration fees. California’s middle income families, forced to live ever greater distances from their jobs and ever closer to the poverty line, also have the dubious privilege of paying far higher taxes and fees to the state than their proximate, wealthy, whiter work colleagues fortunate enough to be able to afford to live in coastal job centers – helped with financial inheritances or other contributions from parents who actually received the veteran home and college and small business loans that were denied to minority veterans by agency bureaucrats who also sincerely believed themselves to be acting in the public interest.

While recognizing that electric cars will comprise the majority of California’s future car fleet under the Scoping Plan, the Plan provides no transition plan – and certainly no practical or equitable transition plan – for the 25 million registered California vehicles that are not electric, or for the 95% of the 2 million new cars sold annually in California that are not electric, or for the fact that new cars generally – electric or otherwise – are typically well outside the budget reality for Californians already burdened with excessive housing costs. It should come as no surprise that the majority of hard-working Californians driving used cars are minorities, or that the modest subsidies and occasional give-aways of green cars to the lowest income Californians or politically favored workers, such as public employees, do not “trickle down” to the vast majority of California’s financially strapped middle income workers.

The social and racial inequity of imposing a VMT reduction mandate on California families cannot be overstated. A recent Stanford study shows that construction workers spend the absolute highest percentage of their income on transportation: is it really equitable, or necessary, to make that worker spend even more in VMT taxes and fees? Or perhaps CARB actually endorses the all-too common practice of having construction workers sleep in pickup truck beds at job sites or in city streets since they can’t afford to live near work, and can’t manage the 4+ hour daily commute between the Central Valley and Bay Area? Or is it better still for California to import construction workers from out of state, crammed into extended stay hotels with infrequent plane trips to their home state, since the residential GHG emissions for these workers and their families aren’t counted as GHG emissions within California so this temporary worker import model helps us achieve the illusive 80% GHG reduction target?

Assuming CARB is not trying to force workers to sleep in cars during the work, and not trying to play a shell game by counting only GHG emissions of California’s residents rather than its non-resident Reno/Phoenix/Las Vegas-based workforce, the fact is that mandating reductions in VMT discriminates against minority workers who drive the farthest because they can’t afford to live near their jobs. It is also arbitrary and capricious in relation to CARB’s focus on supporting clean car technologies that have steadily eroded the correlation between a vehicle mile driven and GHG emissions.

In fact, when asked to quantify the GHG reduction from an avoided vehicle mile travelled, CARB’s senior executive and VMT staff could not do so in meetings in both Los Angeles and Sacramento. This equation (one mile travelled = how much GHG?) is, however, the single most important metric to understanding the need for, and effectiveness of, CARB’s unquantified but unambiguous decision that significant VMT reductions are necessary and must be achieved as part of the Scoping Plan. If arbitrarily reducing VMT causes a million more Californians to slip into poverty, and 10,000 more to slip into homelessness, while only reducing GHG by 100,000
metric tons per year — is that really a necessary component of the Scoping Plan? Will this example really inspire other states or countries to follow California’s lead?

Or is this another example of the radical, unjust, and never implemented CARB proposal of this Governor’s first term, when allowing people to drive to work only every other day was identified as a necessary regulatory mandate to reduce criteria air pollutants? Of course this was not true, but the past is indeed the prologue in this tale — rather than embrace its own vision of an electric car future that reduces GHG emissions to a small fraction of today’s fleet, in reliance on the absolutely technically feasible existing electric car technology that already exists, the Scoping Plan imposes the longstanding desire environmentalists well before climate change policies took center stage to force people out of cars. Federal and state Clean Air Act mandates require cost-effectiveness transparency and accountable rulemaking, and absolutely worked to dramatically reduce criteria and toxic air pollutants based on technology that hadn’t even been invented at the time — without depriving people of the ability to get to work, school, and medical appointments.

CARB should have learned from the error of its over-the-top green advocacy against people thirty years ago, and engaged in a methodical GHG emission reduction regulatory process that focused on the most cost-effective, least harmful measures first. There is no mystery in identifying these measures: in 2017’s Drawdown: The Most Comprehensive Plan Ever Proposed To Reduce Global Warming, an award-winning, New York Times bestselling treatise on reducing climate change by renowned environmentalist Paul Hawkins, scores of measures are identified that do not discriminate against the working poor by depriving them of the right to drive to necessary destinations via a mandatory vehicle mile travelled reduction regime. In fact, transportation changes (trains and ridesharing) rank as 74th and 75th of the 80 GHG reduction strategies that made the cut for inclusion in the plan at all — while electric vehicles ranked a respectable 26th in effectiveness ratings, with cleaner cars slotting in at 49th. The Scoping Plan’s CEQA, VMT and Vibrant Communities fixation on high density urbanized “walkable” communities slotted in at 54th of 80 — which when coupled with its racial and economic disparate incomes, including perpetuating the virtual end of homeownership for middle income and minority families in California, would not make the political cut of any elected decisionmaker as a politically resilient or lawful component of the Scoping Plan.

CARB’s decision effectively limits the ability of the vast majority of Californians to get to work, school, and medical care. While asserting that “on average” Californians will only have to drive a mile or two less each day, CARB ignores both assumed population growth in California as well as the fact that the “average” driving distance increases dramatically for minorities forced to move inland and away from their jobs in order to pay rent or purchase homes. While a wealthy Santa Monica or San Francisco resident may have the luxury of walking to work, or catching an Uber or Lyft ride, or hopping on a luxury employer-provided direct service bus, the rest of California is stuck — for hours and hours — in traffic. Long gone are the days when average Californians decided to take a drive for fun: today Californians grit their teeth and suffer backaches, headaches, high blood pressure and heightened stress — and miss hours of time which should have been spent helping children with homework or afterschool activities — because CARB and other California bureaucrats have managed our most populated regions into gridlock.

Of course there are people — mostly wealthier and whiter people — who will flock to luxury city apartments after college, spending every spare nickel on rent and student loans, before getting...
married and having kids—and moving to a suburb where they can buy a house and raise their kids. Notwithstanding the academic hopes and aspirations of the “green blob,” data compiled from non-partisan experts (including Obama-era federal agencies like Fannie Mae) confirm that millennials want to raise their kids in the suburbs, and baby boomers are staying in their homes as long as their health allows. Suburbs are the fastest growing areas nationally, and a humane—and respectful of humans—transportation agenda would focus on expediting (inclusive of CEQA reform) construction of efficient rail service between suburban nodes so that suburbs can increase downtown densities and provide a more affordable range of multi-family housing options without worsening gridlock. Instead, the Scoping Plan engages in the “magic thinking” that there will be no future Californians needing to drive anywhere, that the steep fall in transit ridership in California metro areas (especially buses) notwithstanding major new transit funding investments can simply be ignored, and the use of our desired future fleet of electric cars—which have negligible GHG emissions—must be shut down in the same GHG reduction effort as a 1970 muscle car. If this makes no common sense, it’s because—as Mark Twain says—common says isn’t so common, and climate bureaucrats talking to each other have managed to park common sense—and the needs of California’s workforce—in a dark closet and tried to close the door.

We are not willing to be put in a dark closet and deprived of the ability to access work, school, medical care, and other driving destinations that wealthier white elites take for granted. Dedicated Latino leaders in the California Legislature battled for years to provide drivers’ licenses to undocumented immigrants: understanding and complying with traffic laws, and having appropriate insurance, were among the many reasons why providing drivers licenses to immigrants and driving is a necessity, and not an option, in our communities.

CARB’s “back to the future” version of forcing people to drive less, now expressed as a VMT reduction rather than the easier-to-understand “you can only drive to work every other day” proposal, represents an advance in obfuscatory communications in a failed attempt to mask its racial and economically disparate, and unconstitutional, effect.

CARB’s refusal to postpone Scoping Plan approval until the SB 375 VMT reduction target decision can be appropriately disclosed and factored into the unspecified VMT reduction Scoping Plan mandate is also unlawful piecemealing, in violation of both the environmental and fiscal disclosure, analysis and mitigation mandates applicable to the Scoping Plan. This unlawful bureaucratic tactic splits the whole of CARB’s Scoping Plan action into smaller pieces—which in this case include OPR’s proposed amendments to the CEQA Guidelines and CARB’s future decision to adopt VMT reduction targets for all California regions.

As described in the proposed conditional approval of most of the Scoping Plan described below, all references to VMT reductions and reduction proposals should be deleted from the Scoping Plan. Any future VMT reduction proposal, including imposition of VMT reduction mandates that are separate from GHG reduction mandates in SB 375 plans, must be subject to its own comprehensive rulemaking process which includes environmental and fiscal disclosures that do not conceal today’s costs on today’s Californians behind the veil of the “social cost of carbon.”

We also note that the Legislature provided zero express authority to CARB to regulate VMT, just as it provided zero express authority to CARB to impose a “drive only every other day” mandate
several decades ago. Then, like now, legislation to vest this authority to limit Californians’ ability to drive created unconstitutional limitations on both intrastate and interstate commerce, and was considered and rejected by the California Legislature.

CARB should focus on measures to hasten completion of regional transit systems at lower costs, making such systems more quickly accessible, and more affordable, for more Californians. The Legislature and direct voter approval of taxes and bonds to fund designated transportation projects are aimed at improving transportation and mobility, in direct democracy opposition to the highway gridlock and increase in health-damaging vehicle pollution promoted as a climate strategy in the VMT components of the Scoping Plan and OPR proposal. More CEQA lawsuits targeted transit projects than highway and roadway projects combined over the first three year study cited above: why doesn’t the Scoping Plan find transportation solutions to keep more California workers here with their families, rather than forced to move to higher per capita GHG emitting states, as a global climate strategy?

Meanwhile, methodical and cost-effective promotion of lower GHG emitting vehicles – notably the Clean Car initiative for which Californians have invested hundreds if not billions of dollars – remains the signature transportation objective that actually does fall within CARB’s statutory mission, unlike VMT reductions even for electric cars and CEQA expansions creating new litigation risks for critically needed housing, transportation and infrastructure projects. Trying to falsely “balance the books” with an 80% GHG reduction scheme that has no practical or foreseeable alternative to replacing California’s 25M registered vehicles, or converting the 5% of electric vehicles sold annually to 95% of vehicles sold in 5 years, are just examples of the difference between the radicalized/politicized GHG regime which ignores people, and the success of the methodical rulemaking process (inclusive of technology promotion and recognition) that delivered 98+% decreases in vehicular tailpipe emissions under the federal Clean Air Act, thereby protecting both people and the environment.

III. Delete “Vibrant Communities” Appendix

Further increasing the threat to the timely development of more than a million critically-needed housing units that are affordable to working families, and restore homeownership opportunities to California minorities, is the EIGHT-state agency consortium that has appointed itself in the “Vibrant Communities” Appendix to the Scoping Plan to “help” local governments manage land use. This EIGHT-agency cabal formed in the absence of any statutory authorization from the Legislature, under the cover of addressing global climate change. With the exception of the California Department of Housing and Community Development (HCD), none of the other seven agency participants in “Vibrant Communities” has the expertise or statutory authority to regulate the approval of local land use plans and housing projects. In fact, based on the extreme housing emergency, the Legislature enacted, and the Governor signed, a package of 15 housing bills in 2017 – none of which authorized EIGHT state agencies to interfere with local and state agency statutorily-prescribed housing roles. Both the Legislature and the Governor have committed to taking further action to address the housing crisis in 2018, and again there is not a single introduced piece of Legislation that brings EIGHT state agencies into housing land use decisions.

No sane human being would agree that adding EIGHT state agencies in an unstructured and unauthorized consortium to the housing approval process will expedite the timely completion of
more than a million new homes, at costs that are actually affordable to Californians. The only state agency that has this direct land use authority in California communities is the Coastal Commission, with prescribed authorities and procedures enacted by both the Legislature and separately approved by popular vote. Even within this very prescribed legal structure, no sane human being would agree that the Coastal Commission in its state agency role has expedited (or even tolerated) much new housing construction.

The fact is that we need a lot more housing built, at prices that are affordable to working Californian families including our majority minority community members. Neither we nor the Legislature want EIGHT state bureaucracies waging turf battles for money and staff and control in an unstructured “Vibrant Communities” groupthink paradigm shift away from the enhanced local government accountability measures and the strengthened state enforcement tools like the Housing Accountability Act that were actually enacted by the Legislature in 2017. The “Vibrant Communities” appendix is yet another Scoping Plan workaround for decades of failed aspirational legislative proposals by environmental activists seeking top-down state control of local communities so they can impose urban growth boundaries (consistently shown to increase housing costs) and new urban ecosystem service taxes (direct new tax on urban area residents).

The Scoping Plan’s Vibrant Communities appendix, like the Scoping Plan’s proposal to expand CEQA’s litigation risks while doing nothing to expedite critically needed housing and related infrastructure for California’s low per capita GHG residents, and imposing regressive new costs and driving restrictions on the minority workforce forced by the housing crisis to drive the most, collectively reflect the profoundly negative cultural shift in the environmental advocacy community to an openly anti-human agenda.

Succinctly described by the co-founder of Greenpeace 1986, this anti-human agenda continues to persist today among the environmental advocacy community and environmental agency representatives.

It was not until 2017 and the election of Donald Trump that the Sierra Club and other environmental groups executed an accord to recognize the importance of civil rights and social justice to the environmental agenda. In describing the schism this caused (including membership resignations from protesting Sierra Club members), on November 18 of 2017 the Sierra Club’s Executive Director Michael Brune noted in defense of the accord that he was “proud of how the Sierra Club has begun to address the intersection of climate with inequality, race, class and gender, and I guarantee that we’ll go even deeper.” As described in an Outside Magazine article chronicling the environmental movement’s troubling history of ignoring minority community concerns:

What Brune is acknowledging is the darker legacy of the green movement. Some may believe that environmentalism has little to do with social justice issues, but the mission of the Sierra Club, and many conservation groups like it throughout the late-19th century and most of the 20th century, was anything but race neutral. In many ways, racial exclusivity actually shaped the environmental mission, which is what makes the Sierra Club’s leap toward civil rights advocacy such a radical move... Given the history of conservationists elevating endangered plant life over endangered people of color, it is environmentalism’s soul that most needs saving.
This profoundly racist historical underpinning of the environmental movement continues to exist today. Look no further than political deference still provided to special interests NIMBY environmentalist donor strongholds, such as the Legislature’s 2017 capitulation to Marin County’s demand for still more delays in ever having to build its share of affordable housing—this in a California subject to a consent agreement for violations of federal Fair Housing Act laws.

The CEQA, VMT and Vibrant Communities components of the Scoping Plan represent either the oblivious or intentional continuation of this environmentalist racist tradition; neither attitude, however, makes these Scoping Plan components morally acceptable or lawful.

As the San Francisco Chronicle reported on December 10, the reason the Oakland A’s aren’t leaping at the opportunity to build a stadium at the Coliseum site to be paid for by the “profit” from redeveloping the sea of surface parking into acutely needed dense transit-oriented housing comes down to the simple math, and hash, that has created the housing crisis:

At a minimum cost of $4.50 per square foot for construction, a 1,000-square-foot, two-bedroom apartment at the Coliseum would have to rent for as much as $4,600 a month. You might be able to charge that downtown, but it would be a tough sell in East Oakland.


The United Way report and numerous other non-partisan sources report that households are supposed to spend 30% of their income on housing so that there is enough money to pay for food, medicine, childcare, insurance, taxes, and savings. Under this 30% criteria, households would need to earn nearly $170,000 per year to rent one of these new urbanist, transit-oriented, dense apartments. Given that the median household income in Alameda County is less than half of that amount (just under $80,000), the “infill” high density apartments favored by the environmental community and threatened to be enshrined by CARB into the Scoping Plan can’t even be rented, let alone owned, by the vast majority of Alameda households, including Alameda’s hard-working minority families.

http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml?src=bkmk
http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF

Confronted with the harsh reality of an entire region’s housing costs, Alameda’s households—the majority of whom are minorities—can leave the region or the state (an outward migration pattern that surveys report is in fact occurring, see, e.g., https://sf.curbed.com/2017/3/31/15140036/bay-area-leaving-poll-san-francisco). It should come as no surprise that this “environmental” agenda of intentionally displacing minorities from California’s coastal communities has occurred only now in our minority majority state.

The EIGHT agency Vibrant Communities appendix, like the CEQA and VMT components of the Scoping Plan, should be deleted as unlawful and discriminatory, and as exacerbating rather than helping solve our housing, homeless, poverty, and transportation gridlock problems.

The 2017 CARB Scoping Plan fails to comply with applicable statutory mandates requiring completion of CEQA and fiscal analyses and public review process for the remainder of the Scoping Plan components. Even with deletion of the CEQA Expansions, VMT restrictions, and Vibrant Community appendix, final agency approval of any implementing actions under the Scoping Plan must be postponed pending lawful completion of the required CEQA and fiscal review procedures.

a. Violations of the California Environmental Quality Act

Notwithstanding its foray into expanding CEQA in the 2017 Scoping Plan, CARB has been sued, and has appropriately lost, numerous CEQA lawsuits. The same pattern of CEQA compliance deficiencies plague this Scoping Plan’s environmental document. No version of the Scoping Plan can be approved until these CEQA deficiencies are corrected. Specifically:

Regional agencies charged with implementing just the transportation/land use planning requirements of SB 375 have approved environmental impact reports documenting scores of significant impacts warranting mitigation, and scores of unavoidable adverse impacts that remain even after mitigation, which are associated with high density, transit oriented development of housing and transit systems required to comply with CARB’s panoply of GHG mandates, policies and directives including but not limited to those identified in the Scoping Plan. Examples of significant impacts warranting mitigation, and significant unavoidable impacts, from significantly increasing density and reducing vehicular mobility as a climate strategy include:

- adverse aesthetic impacts (e.g., from changes to public and private views and the character of existing communities based on increased building intensities and population densities),

- adverse air quality impacts (e.g., from increases in per capita emissions of GHG, criteria and toxic air pollutants, which has already occurred from the longer commutes caused by intentionally increasing auto congestion in advance and independent of the availability of any time- or cost-effective transportation alternatives for Californians forced to “drive until they qualify” for rental or ownership homes they can afford),

- adverse biological resource impacts (e.g., from increased usage intensities in urban parks from substantial infill population increases),

- adverse cultural impacts (e.g., including adverse changes to historic buildings and districts from increased building and population densities, and changes to culturally and religiously significant resources within urbanized areas, from increased building and population densities),
• adverse impacts to urban agriculture (e.g., from the conversion of low intensity urban agricultural uses to high intensity, higher density uses from increasing populations in urbanized areas, including increasing in the urban heat island GHG effect),

• adverse impacts to geology/soils (e.g., from building more structures and exposing more people to earthquake fault and other geologic/soil hazards in intensifying the intensity and use of these urbanized areas),

• adverse impacts hazards and hazardous materials (e.g., by locating more intense/dense housing and other sensitive uses such as schools and senior care facilities near freeways, ports, and stationary sources in urbanized areas)

• adverse impacts hydrology/water quality (e.g., by increasing volumes and pollutant loads from stormwater runoff from higher density/intensity uses in transit-served areas as allowed by current stormwater standards),

• adverse impacts from noise (e.g., from substantial ongoing increases in construction noise from increasing the density and intensity of development in existing communities, and ongoing operational noise from more intensive uses of community amenities such as extended nighttime hours for parks and playfields),

• adverse impacts to population/housing (e.g., from substantially increasing both the population and housing units in existing communities,

• adverse impacts to recreation/parks (e.g., from substantially increasing the population using natural preserve and open space areas as well as recreational parks and other amenities),

• adverse impacts to transportation/traffic (e.g., from substantial total increases in total vehicle miles travelled in higher density communities, increased VMT from rideshare/carshare services and future predicted VMT increases from automated vehicles notwithstanding predicted future decrease in private car ownership),

• adverse impacts from traffic-related gridlock and multi-modal congestion impacts (e.g., noise increases, adverse transportation safety hazards in multi-modal dense areas including bike/pedestrian/bus/truck/car accidents and fatalities),

• adverse impacts to first responder fire, police, and paramedic services (e.g., from congested and gridlocked urban streets with high population densities;

• adverse impacts to public utilities and public services (e.g., from substantial increases in population and housing/employment uses and demands on existing water, wastewater, electricity, natural gas, emergency services, libraries and schools).

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3 Although the California Supreme Court has determined that CEQA does not encompass impacts from existing environmental conditions on a project, OPR has repeatedly declined to recognize this decision and hence it is included here and in most other SB 375 SCS EIRs).
CARB is legally obligated to complete a comprehensive CEQA evaluation of these and related reasonably foreseeable impacts from forcing all or most development into higher densities within existing urban area footprints, intentionally increasing congestion and prohibiting driving, and implementing each of the many measures described in the "Vibrant Communities" appendix.

This CEQA analysis does not presuppose that CARB is prohibited from proceeding with these provisions of the Scoping Plan, or of the other provisions of the Scoping Plan. CEQA requires full disclosure, a comprehensive analysis, and approval of feasible mitigation measures. CEQA also requires an analysis of other feasible alternatives for achieving the Legislatively mandated GHG reductions, and separately considering the feasibility and differential impacts of achieving an 80% GHG reduction based solely on existing technologies, services, incomes, and constraints.

While outside the scope of CEQA, we also urge CARB to evaluate the gentrification and displacement impacts of its Scoping Plan.

While we very much respect the work of the environmental justice advocates assigned by law to a seat at CARB’s table, the civil rights of minority communities extend well beyond environmental justice: we are constitutionally entitled to equal protection under all laws, from education to housing to financial services to health care. California’s top national ranking in poverty and homelessness, and its acute housing shortage and extreme housing prices, require all agencies — including “environmental” agencies such as CARB, to carefully weigh their actions through the prism of equal protection — and not thoughtlessly ignore or dismiss the disparate racial consequences of purportedly color-blind actions like expanding CEQA or limiting driving.

Although the CARB Scoping Plan and environmental assessment are fulsome in their praise of GHG reductions and open space protection — including imposition of still more costs in the form of “ecosystem service fees” on urban area residents — the Scoping Plan’s willful refusal to acknowledge the corresponding adverse environmental and public health/welfare impacts of Scoping Plan implementation violates CEQA. The Scoping Plan’s equally unlawful inclusion of numerous strategies that will actually increase housing costs and poverty, and reduce housing affordability and homeownership opportunities in California communities, is equally unlawful. The purported "Vibrant Communities” appendix and the Scoping Plan itself include such discriminatory housing and pro-poverty strategies as growth control boundaries that numerous studies have confirmed actually increase in-boundary housing costs and reduce supplies (see, e.g., http://www.tandfonline.com/doi/abs/10.1080/02673037.2013.825695), its priority on the development of small high density housing units that cost 3-5 times more per square foot to build than homeownership units like single family, duplex, and town homes (see, e.g., https://termcenter.berkeley.edu/right-type-right-place ), and its endorsement of raising taxes on urban residents still higher to achieve “eco-system service” wealth transfers to rural areas, and for imposing VMT fees and restrictions on all new.

The only honest effort to translate the “Vibrant Community” vision into actual housing cost and housing production, completed by UC Berkeley professors, confirms that under the CARB vision families will pay the same for an 800 square foot apartment as they pay for a 2000 square foot home or town home — and that building the necessary number of homes to address California’s housing crisis within the growth control constraints imposed under this Vibrant Communities
vision will require the “demolition of tens of thousands, if not hundreds of thousands, of single family homes.” (Ibid.)

The 200 has lived through the last round of bureaucratic “do gooder” land use policies in the form of redevelopment programs that wiped out minority communities, permanently deprived minority homeowners of their equity and homeownership status, and took the already “vibrant” minority neighborhoods that white middle class agency elites concluded were “blighted” with sterile, failed, and largely unrealized new land uses more than 40 years later. Using climate change is this generation of bureaucrat’s new excuse to wipe out minority homeowners – since it’s obvious the “tens if not hundreds of thousands” of demolished homes will not be in Malibu or Marin, or Hillsborough or Beverly Hills, but will again be the last remaining homes owned by California’s minority and working class communities. Everyone associated with this latest “vision” of what constitutes a “vibrant community” should visit the actual existing minority vibrant communities that they are intent on demolishing, and visit with the minority families who have actually attained homeownership and used their equity to weather financial setbacks from temporary job losses and illnesses, fund college or senior care, and provide a modicum of multi-generational middle class security that is so scornfully dismissed by the anti-human environmentalist elites driving so much of California’s climate politics (and policies). As the co-founder of Greenpeace, ecologist Dr. Patrick Moore, announced when he resigned from that organization:

Greenpeace is an “evil organization” which has “lost concern for humans” and is part of an environmental movement that is now dominated by the “self-serving” and “highly-paid” network of environmental pressure groups that comprise the “green blob.”

The Scoping Plan is a dream come true for the “green blob” – it will further accelerate the elimination of younger, browner, working class people off of that piece of the planet that it governs: the state of California.

The CEQA expansion and driving limit provisions of the Scoping Plan are also unconstitutional, and unlawful.

For example, the Scoping Plan’s CEQA analysis wholly ignores substantial evidence of significant adverse impacts – conclusions reached by the SB 375 implementing agencies in the Bay Area, Sacramento, San Diego and Southern California – in violation of CEQA. Sustainable Communities Strategy EIRs approved throughout the state likewise identify scores of significant impacts warranting mitigation, and significant unavoidable impacts even with mitigation. The Program EIRs for current Sustainable Communities Strategies in each of these jurisdictions is hereby incorporated by reference in this comment letter, and all are available on the websites maintained by each regional agency. The Scoping Plan’s failure to identify, assess, and prescribe feasible mitigation measures, for each of the significant unavoidable impacts identified in each of these Program EIRs, and in a programmatic CEQA evaluation of the many components of the Scoping Plan such as the increase in transportation emissions associated with the production of goods once produced in California but now produced in other jurisdictions and transported to California (e.g., cement), is a prejudicial abuse of discretion and per se violation of CEQA given the ready availability and substantial evidence of significant adverse CEQA impacts identified in the regional SB 375 certified EIRs, in CARB’s prior environmental
assessments, and in the EIRs and CEQA equivalent documents approved by other agencies charged with the past and ongoing implementation of Scoping Plan components such as the California Energy Commission and California Public Utilities Commission. The Scoping Plan certainly does not acknowledge, nor does its environmental analysis disclose or assess, the environmental – or any other – impacts of the “demolition of tens or hundreds of thousands of single family homes” and the dispossession of minority homeowners and denial of aspiring minority homeowners.

b. Violations of Fiscal Evaluation Requirements

CARB was required to conduct a comprehensive fiscal evaluation to allow members of the public as well as Board members to understand the fiscal impact of its Scoping Plan.

CARB’s fiscal evaluation makes a mockery of this statutory requirement by completely failing to identify the reasonably foreseeable costs to California households of Scoping Plan implementation. Instead, CARB relies on the “social cost of carbon” metric to justify its determination that the Scoping Plan meets applicable fiscal consequence legal requirements. CARB’s reliance on the social cost of carbon includes two fundamental legal deficiencies.

First, this methodology allows CARB to fully conceal costs to current Californians in reliance on a methodology that presumes that all adverse future climate change costs will be avoided based on worldwide GHG emissions achieved at some future time. Current Californians struggling with poverty and the homeless crisis will bear these fiscal costs; future avoided costs will benefit future Californians.

Second, this methodology assumes that climate change adaptation costs will be avoided because the rest of the world will reduce GHG to the prescribed metric of two tons per capita per day – a metric that is indeed achieved by some of the poorest countries in the world, which no countries seek to emulate. Instead, growing economies like China and India continue to substantially increase their GHG emissions with robust ongoing growth in such technologies as coal-fired electric plants and petroleum-powered vehicles – and even countries committed to reducing GHG like Germany continue to derive nearly half of their electricity from coal. It is simply delusional – and economically false - to think that today’s Californians will never be burdened with the cost of climate adaptation infrastructure and related improvements, given the ongoing strong linkage in international and national GHG emission trajectories and economic productivity and human health.

The social cost of carbon is not a lawful “McGuffin” factor that can be used to mask the Scoping Plan’s actual costs on actual Californians today. At minimum, the Scoping Plan’s fiscal analysis needs to identify those actual projected costs to California households, by region, to allow for informed decisionmaking. The social cost of carbon is at a supplemental narrative explanation of this theory, and a hypothetical emissions and cost adjustment tables at the back of this real world analysis. The actual fiscal analysis, presented ahead of and separately from the social cost of carbon factor, must be a far more realistic assessment of the adaptation costs of climate change that must also be borne by today’s Californians.
These comments should not be interpreted to dismiss future climate change costs and risks to society in general, and Californians in particular. The scale of pain to individual Californians, especially the minority hard working Californians in our communities, needs to be assessed in relation to today’s costs as well as tomorrow’s costs. We have read with alarm that “leakage” of people from California to much higher per capita GHG states may have nearly offset all of California’s GHG reduction regulatory achievements. We have read that California successfully reduced GHG emissions this past year by almost 5%, but that this was almost entirely due to the unusually high rainfall that allowed greater reliance on hydropower from dams and reduced use of fossil fuels to produce electricity. http://www.mercurynews.com/2017/12/10/walters-the-ironic-cause-of-our-greenhouse-gas-decline/ We have read that California’s greenhouse gas emission reductions were in turn wiped out by the Northern California fires; with Southern California we assume that California’s total GHG emissions for the year are far higher than our reductions. http://www.sfchronicle.com/bayarea/article/Huge-wildfires-can-wipe-out-California-s-12376324.php

We do not intend that our comments be interpreted in any way that could be read as denying the importance of addressing climate change, or reducing greenhouse gas emissions. We do not believe that that this objective can only be achieved, or is politically or scientifically required to be implemented, so as to worsen California’s housing and poverty crisis. An honest cost-benefit analysis of measures to reduce GHG emissions should be completed as required by law, which steps back from the chaotic paralysis of an EIGHT-agency Vibrant Community policy, expanding CEQA, a mythic local climate plan, and regressive schemes to punish those forced to drive the longest distances — or the end of homeownership as an achievable aspiration for hard working California families.

It is a testament to the power the “green blob” that the intentional obfuscation of fiscal consequences and racial equity has been allowed to permeate climate policy. California has a remarkably effective track record in vastly reducing air and water pollution over 40 years, to levels that could not be effectively predicted based on technologies and processes that existed 40 years ago. Instead, the hard work of science and politics required a methodical cost-benefit analysis of potential air pollution reduction strategies, it required implementation of the most cost-effective strategies first to avoid or minimize economic disruption to California’s working families, and it established future objectives that could be — and were — ultimately met by innovative solutions such as technological advances.

The hard work of science and politics in reducing criteria and toxic air pollutants could not have been accomplished in the retaliatory echo chamber culture of what the Greenpeace co-founder calls the “green blob.”

Instead of rationally attempting to reduce GHG emissions to address climate change while also respecting the role of people on the planet (and the state), the Scoping Plan’s priorities and California’s climate change politics are hemmed in by a long list of “we oppose” environmentalist admonitions: we must shutdown nuclear plants and tear down hydro power (the only non-fossil fuel electric production options that provide close to the reliability of fossil fuel power generation); we must oppose utility-scale solar and wind in favor of far less efficient rooftop solar (and indeed solar/wind utility plants were the most frequent industrial/utility CEQA litigation target in California), we may not build powerline improvements anywhere near any one
or any species, we must shut down dairies and farms, we must end California extraction of oil and gas and “keep it in the ground” even though leading climate scientists like UC’s Severin Borenstein agree that this will simply result in importation of fossil fuels from other states with higher resultant GHG emissions while eliminating workforce jobs often held by minorities for which there are no financially equivalent proximate replacement job opportunities. Most unbelievably, given documented evidence of routine CEQA litigation abuse for non-environmental reasons by all major newspapers, the Governor, and other leaders, the 2017 Scoping Plan avoids suggesting revisions to CEQA that would expedite its desired transit and dense housing priorities because CEQA reform is, as the Governor reported, blocked by construction unions demanding project labor agreements. Instead the Scoping Plan proposes to expand CEQA with the litigation magnets of “net zero” GHG projects (unless they aren’t) and local climate action plans to reduce per capita GHG emissions by 80% (although local governments lack authority to do anything to come close to that outcome).

The Scoping Plan vision for minorities in California consists of bus riders calmly sitting through 4 hour daily commutes, giving an exhausted hour or two to their kids (or better yet having no kids at all) in a tenth floor micro-apartment in a neighborhood that once had porches and playgrounds, and where grandma used to own her own home (imagine!). And the alternative Scoping Plan vision is for California to achieve its 80% GHG reductions by simply exporting its people and jobs to other states, and not counting that pesky GHG consumption that’s so nettlesome to billionaires – and who cares about “global” greenhouse emissions anyway?

Californians didn’t vote for this vision, nobody’s figured out how to pay for it, and CARB’s environmental and fiscal assessments didn’t come close to honestly disclosing or “mitigating” the adverse equity, environmental and economic impacts of implementing the Scoping Plan’s CEQA expansions and driving restrictions. These components of the Scoping Plan make fundamental necessities (housing, transportation, utilities) more expensive for precisely the people who cannot afford it and are victims of the environmental NIMBYists who use (and continue to use) CEQA to block housing and transit projects. These components of the Scoping Plan would permanently end the ability of minorities to become homeowners, to raise kids safely, and to get where each of us needs to go without three bus transfers and highway gridlock. The biggest difference between the 2017 Scoping Plan and Paul Hawken’s vision for effective global climate change strategies, is encapsulated in the mission statement of Drawdown:

**Drawdown** is a message grounded in science; it also is a testament to the growing stream of humanity who understands the enormity of the challenge we face, and is willing to devote their lives to a future of kindness, security, and regeneration.

Expanding CEQA and restricting driving shows neither a commitment to science, nor a vision of the future that includes kindness, security, and regeneration to actual people (including minorities and the poor). Instead, the Scoping Plan’s CEQA, driving restrictions, and Vibrant Community measures, are an extension of the “green glob” political culture of “no” to the needs of people and “no” to “win-win” solutions that benefit the environment and also solve the state’s housing and poverty crisis.

None of this is news to CARB: we and our colleagues have submitted comment letters and had multiple conversations with CARB and OPR staff, to no avail.
We have been forced to sue government agencies in the past to protect the civil rights of our communities, and we anticipate needing to do so again if CARB approves the proposed Scoping Plan as is. We do not want to obstruct California climate change leadership activities that avoid disparate impacts to California’s minority community members who aspire to homeownership, and accordingly urge CARB to approve the following resolution when acting on the 2017 Scoping Plan:

“Resolved, in approving the 2017 Scoping Plan it is not the intent or mission of the California Air Resources Board to increase poverty, homelessness, or the housing crisis – or to discriminate against California minorities and working households. We therefore conditionally approve the Scoping Plan, subject to the following modifications:

1. All Scoping Plan recommendations and references to CEQA, VMT, Vibrant Communities and land use planning be removed, and replaced with a recommendation that the Office of Planning and Research complete a rulemaking process to clarify GHG compliance requirements under CEQA in the CEQA Guidelines (including but not limited to thresholds of significance).

2. The remainder of the Scoping Plan be adopted as proposed, provided that no new or amended regulations may be approved pursuant to the Scoping Plan until a revised environmental and fiscal analysis of the Scoping Plan is completed, and subject to additional public review and comment, that clearly describes the environmental and fiscal consequences of Scoping Plan implementation for current California households, that includes recommendations for increasing housing supplies and related transportation and other local infrastructure to help alleviate the current poverty, homeless and housing crisis, and that restores and improves opportunities for members of our hard working minority communities and other workforce Californians to become homeowners.

3. Legislative oversight hearings be convened and completed, with the enactment of further authorization legislation, prior to CARB’s proposal or adoption any fees, restrictions, CEQA provisions, or any other action or recommendation associated with reductions in VMT, or associated with any increase in the involvement of any state agency in local agency land use and housing approval decisions beyond those expressly authorized by current law, or imposition of regulations, mandates or recommendations that extend beyond the target of reducing GHG emissions 40% by 2030 as expressly set forth in SB 32, or any such additional deadline and emission mandate expressly specified in any other law mandating GHG reductions in California.

In conclusion, we have won many hard fought civil rights battles in our careers, and we ultimately win – because the law is on our side, and what we seek is justice. We did not anticipate needing to engage in this battle again, in deep blue California, to protect California’s minority community from environmentalists. We did battle with the environmentalists almost 20 years ago, and won, so we could access the financing and insurance needed to cleanup polluted properties in our neighborhoods and not just wealthy communities. We are ready to fight this next battle, which has caused much more severe hardship for millions of Californians in our communities, until we win, again.
We urge you to avoid this unnecessary fight, and take the right action by adopting the alternate resolution we have suggested above as you consider the proposed Scoping Plan.

We would also welcome the opportunity to meet and confer about other potentially mutually acceptable paths forward.

Joe Coto, Chair  
John Gamboa, Co-Chair  
Jennifer Hernandez

Cruz Reynoso  
Herman Gallegos  
Hyepin Im

Jose Antonio Ramirez  
Sunne Wright McPeak

Ortensia Lopez

Additional references:

*Color of Law*, Richard Rothstein (2017): Federal, state and local agency use of rulemaking, planning and practices to create and perpetuate racial segregation in housing and transportation projects, and in lending and funding practices

*Drawdown*, Paul Hawken (2017): Ranked list of effective strategies for reducing global GHG emissions

*Right Type, Right Place*, Terner Center/Berkeley Law (2017): mid-rise and high-rise buildings cost 3-5 times more per unit than single family/townhome/duplex/quadplex units (lower density units), and confirming that building necessary housing within existing communities with more affordable lower density units would require the demolition of tens if not hundreds of thousands of existing single family homes.
Summary Table of Impacts and Mitigation Measures for Regional Sustainable Communities Strategies that reduce GHG emissions from increasing density and intensity of development in urban cores, while causing significant new impacts:

For SCAG region see http://rtpscs.scag.ca.gov/Pages/Final-2012-PEIR.aspx, with updates reviewing only changes from 2012 RTP/SCS at http://rtpscs.scag.ca.gov/Pages/2016-PEIR.aspx


For SANDAG region see http://www.sandag.org/index.asp?projectid=349&fuseaction=projects.detail

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW

Re: Alleged Underground Regulation

From: Jennifer L. Hernandez, Holland & Knight, LLP, on behalf of the Building Industry Legal Defense Foundation ("BILDF")

Date: January 29, 2018

1. Identifying Information

Jennifer L. Hernandez
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2. Agency Being Challenged

Office of Planning and Research ("OPR")

3. Description of the Underground Regulation and of the Agency Action By Which It Was Issued

In November of 2017, OPR issued a guidance document entitled, “Technical Advisory on Evaluating Transportation Impacts in CEQA,” which requires consideration of vehicle miles travelled (“VMT”) as new “impacts” requiring evaluation and mitigation under the California Environmental Quality Act (“CEQA”).¹ ("VMT CEQA Guidance") (See Attachment A).²

The VMT CEQA Guidance is in fact a “regulation” and triggers the need to comply with the Administrative Procedure Act (“APA”).³ Specifically, the VMT CEQA Guidance instructs public agencies regarding the use of a new VMT metric to assess transportation impacts under CEQA. OPR was authorized by the State Legislature under Senate Bill 743 ("SB 743")⁴ to consider integrating these new metrics into CEQA, but only after completing the formal rulemaking process applicable to amending the CEQA Guidelines⁵ – which numerous courts have concluded are the equivalent of regulations – as required by the APA. OPR’s VMT CEQA Guidance is an unlawful underground regulation.

The VMT CEQA Guidance provides qualitative and quantitative significance and screening thresholds for various types of projects,⁶ it includes guidance to public agencies

³ Gov. Code § 11340 et seq.
⁵ 14 C.C.R. § 15000 et seq.
⁶ See VMT CEQA Guidance, pp. 10-21.
on assessment methodology and the utilization of models to estimate VMT,\(^7\) and it specifies mitigation measures and project alternatives that could potentially reduce a project’s VMT.\(^8\) As described below, OPR did not comply with the mandatory APA procedures in issuing the VMT CEQA Guidance, and therefore it is an “underground regulation” under the APA. In light of OPR’s violation of the APA and SB 743, the VMT CEQA Guidance should be repealed and withdrawn.

It should also be noted that OPR has proposed formal rulemaking for a comprehensive update to the CEQA Guidelines involving amendments to nearly 30 sections, including VMT provisions pursuant to SB 743 addressed and expanded upon in the VMT CEQA Guidance.\(^9\) OPR has an obvious and efficient means of correcting its unlawful promulgation of an underground regulation by including the VMT CEQA Guidance as part of this proposed formal rulemaking as it was directed by the State Legislature under SB 743, discussed below.

In conjunction with the comprehensive CEQA Guidelines update, OPR has for the past three years been working to update the CEQA Guidelines pursuant to SB 743 to include criteria for assessing the significance of transportation impacts using new VMT metrics.\(^10\) While the comprehensive CEQA Guidelines update, discussed above, includes updates to the CEQA Guidelines pursuant to SB 743 which have been proposed pursuant the APA, OPR additionally released the VMT CEQA Guidance as a separate, standalone document with no compliance with the APA. Below is a detailed description of OPR’s actions in relation to the VMT CEQA Guidance showing that OPR in fact “issued” the VMT CEQA Guidance and that this is in fact an unlawful underground regulation that leaps ahead of the required corresponding regulatory amendments to the CEQA Guidelines.

In August 2014, OPR released a preliminary “discussion draft” of the CEQA Guidelines update for public review and comment.\(^11\) This package included a new CEQA Guidelines section regarding analysis of transportation impacts using new VMT metrics and appendices containing detailed technical guidance. In January 2016, OPR released a second “discussion draft” for public review and comment that again included a new CEQA Guidelines section regarding transportation impact analysis using new VMT metrics, in addition to a document entitled, “Technical Advisory on Evaluating Transportation Impacts in CEQA – Implementing Senate Bill 743 (Steinberg, 2013)” (“2016 Technical Advisory”), which contained technical instructions and guidance to supplement the new CEQA Guideline section.\(^12\)

\(^7\) See VMT CEQA Guidance, pp. 2-4, Appendix 1 and 2.
\(^8\) See VMT CEQA Guidance, pp. 21-23.
In November 2017, OPR released a third, more comprehensive, CEQA update package, which has been proposed for adoption pursuant to the APA. Again, a proposed new CEQA Guideline section that prescribed a new form of required transportation analysis using VMT metrics was included in the draft regulatory amendments to the CEQA Guidelines.

However, in this third version of its proposal, instead of including an updated version of the 2016 Technical Advisory as part of its VMT rulemaking proposal itself, OPR issued the VMT CEQA Guidance as a standalone document to take effect independent of the required VMT regulatory changes to the CEQA Guidelines in violation of the APA. In doing so, OPR gave no explanation for this bifurcation, which leapfrogged a portion of its VMT expansion of CEQA ahead of the corresponding regulatory amendments to the CEQA Guidelines that are specifically authorized by SB 743.

It is noteworthy that the VMT CEQA Guidance contains sections that are identical to sections of the 2016 Technical Advisory, and contains the bulk of the new criteria for determining the significance of transportation impacts that is required by SB 743. By extracting the VMT CEQA Guidance from the ongoing regulatory amendments to the CEQA Guidelines, and issuing it as an applicable advisory on the appropriate criteria for addressing VMT as a CEQA impact, OPR deliberately avoided its duties under the APA and SB 743, and issued an unlawful underground regulation.

4. Legal Basis For Concluding That the Challenged VMT CEQA Guidance Is a Regulation under Government Code § 11342.600 and Not within Any Express APA Exemption

A. The VMT CEQA Guidance is a “regulation” under Government Code § 11342.600.

OPR’s VMT CEQA Guidance is a “regulation” under Government Code § 11342.600 and therefore requires adoption pursuant to the APA. The APA requires that, “[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a “regulation” under the APA unless it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA.” Under the APA, “regulation” means, “every

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13 This CEQA update package was more comprehensive than the previous packages, including updates to nearly 30 different sections of the CEQA Guidelines, including the section regarding transportation impact analysis required by SB 743. Available at http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf (accessed January 9, 2018).


17 Gov. Code § 11340.5(a).
rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”

Thus, to be considered a “regulation” under the APA, the VMT CEQA Guidance must contain 1) any guideline, criterion, bulletin, manual, instruction, order, standard, or other rule, 2) that is generally applicable, and 3) adopted to implement, interpret, or make specific the law enforced or administered by OPR.

i. The VMT CEQA Guidance contains guidelines, criteria, and instructions.

It is the substance of the regulatory measure that determines its status as a “regulation” under the APA, not the agency’s label, and the substance of the VMT CEQA Guidance meets the definition of a “regulation.” The APA’s definition of regulation is deliberately broad to include, “rules, regulations, orders, or standards,” but only those rules, regulations, orders, or standards that are generally applicable and that implement or interpret the law administered by the agency. Similarly, the APA’s general requirement that regulations are adopted pursuant to APA procedures applies to “any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule,” (emphasis added) indicating legislative intent that the term regulation under the APA is to include regulatory measures beyond “rules, regulations, orders, or standards.” The catch-all phrase “or other rule” further indicates legislative intent to construe the term broadly.

OPR’s claims that the VMT CEQA Guidance contains only recommendations and may be used at the discretion of public agencies do not negate its status as a regulation under the APA. No matter OPR’s categorization of the VMT CEQA Guidance, it contains guidelines, criteria, and instructions for assessing transportation impacts under CEQA. As mentioned above, it provides qualitative and quantitative significance and screening thresholds for various types of projects; it advises agencies on assessment methodology and the utilization of models to estimate VMT; and it specifies mitigation measures and project alternatives that could potentially reduce a project’s VMT. These components

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18 Gov. Code § 11342.600.
19 For example, the VMT CEQA Guidance contains the following screening threshold for small projects: “Absent substantial evidence indicating that a project would generate a potentially significant level of VMT, or inconsistency with a Sustainable Communities Strategy or general plan, projects that generate or attract fewer than 110 trips per day generally may be assumed to cause a less-than-significant transportation impact.” For residential and office projects, the VMT CEQA Guidance includes the following significance threshold: “A proposed project exceeding a level of 15 percent below existing regional VMT per employee may indicate a significant transportation impact.” See VMT CEQA Guidance, pp. 10-21 generally for screening and significance thresholds.
20 For example, the VMT CEQA Guidance provides the following guidance on assessment methodology: “Tour- and trip-based approaches offer the best methods for assessing VMT from residential/office projects and for comparing those assessments to VMT thresholds. These approaches also offer the most straightforward methods for assessing VMT reductions from mitigation measures for residential/office projects. When available, tour-based assessment is ideal because it captures travel behavior more comprehensively. But where tour-based tools or data are not available for all components of an analysis, a trip-based assessment of VMT serves as a reasonable proxy.” See VMT CEQA Guidance, pp. 2-4, Appendix 1 and 2 generally for guidance on assessment methodology.
21 Examples of proposed mitigation measures include: “Incorporate affordable housing into the project,” and, “Incorporate neighborhood electric vehicle network.” Examples of proposed alternatives include: “Locate the
of the VMT CEQA Guidance certainly guide, instruct, and provide criteria to public agencies and CEQA practitioners evaluating transportation impacts.

Although the definition of regulation under the APA contains no requirement that a regulation be compulsory, the compulsory requirements of the VMT CEQA Guidance indicate OPR’s intent that the provisions of the VMT CEQA Guidance be considered regulations. For example, the VMT CEQA Guidance contains express compulsory thresholds of significance for residential projects:

In MPO areas, development in unincorporated areas measured against aggregate city VMT per capita (rather than regional VMT per capita) must not cumulatively exceed the population or number of units specified in the SCS for that city.

...

Proposed development referencing city VMT per capita must not cumulatively exceed the number of units specified in the SCS for that city, and must be consistent with the SCS.\(^{22}\)

Further, the VMT CEQA Guidance is compulsory in practice. To illustrate this point, it is important to understand that CEQA has various forms of compliance. The most rigorous form of compliance is through the preparation of an Environmental Impact Report (‘‘EIR’’), which requires volumes of technical studies that take expensive experts months, even years, to produce. An agency must prepare an EIR, as opposed to a lesser form of compliance, if it finds that a project exceeds a threshold of significance for any impact covered by CEQA, indicating that the project would have a significant impact. CEQA gives agencies discretion to utilize their own significance thresholds;\(^{23}\) however, an EIR is further required if the agency “is presented with a fair argument that a project may have a significant effect on the environment...even though it may also be presented with other substantial evidence that the project will not have a significant effect [i.e., the project does not exceed any of the agency’s chosen significance thresholds].”\(^{24}\) This means that despite an agency’s own efforts to gather and consider substantial evidence and despite its determination that a project will not have a significant effect on the environment, it must prepare an EIR if it is presented with evidence that conflicts with its own.

The VMT CEQA Guidance contains so-called “recommended” significance thresholds and corresponding findings in support. However, based on the principles discussed above, these thresholds are mandatory minimums because they provide an agency-authored “fair argument” that a project exceeding them would cause a significant impact. For example, to support the fifteen percent below existing VMT threshold, the VMT

\(^{22}\) VMT CEQA Guidance, p. 12, emphasis added.

\(^{23}\) 14 C.C.R. § 15064.7.

\(^{24}\) 14 C.C.R. § 15064(f)(1).
CEQA Guidance states that, “Based on OPR’s extensive review of the applicable research and literature on this topic, OPR finds that in most instances a per capita or per employee VMT that is fifteen percent below that of existing development may be a reasonable threshold.” If an agency exercises its discretion to use a less stringent threshold and determines that a project would not cause significant transportation impacts, any party may cite to the thresholds and findings contained in the VMT CEQA Guidance as part of a “fair argument” that the project would nevertheless result in a significant impact, thus triggering the EIR requirement. Accordingly, the VMT CEQA Guidance effectively requires an agency to prepare an EIR for all projects that would exceed the “recommended” thresholds contained in the VMT CEQA Guidance.

As such, the VMT CEQA Guidance is a regulation under the APA that contains guidance, criteria, and instructions that are compulsory by its express language and in practice.

ii. The VMT CEQA Guidance is generally applicable.

The VMT CEQA Guidance instructs agencies how to analyze transportation impacts for all projects covered by CEQA. Under CEQA, a “project” is any discretionary activity, which is either undertaken by the agency or requires an approval by the agency, that may cause either a direct physical change or a reasonably foreseeable indirect physical change in the environment. Because CEQA applies to both an agency’s own actions and its approval of private actions, the VMT CEQA Guidance will apply to public and private projects alike. Further, while the definition of a project most obviously includes physical developments and improvements, it also includes planning efforts and any other discretionary decision that may cause even an indirect change in the environment.

The VMT CEQA Guidance covers all types of land use projects, of all sizes, and in rural and urban locations. It includes screening thresholds for “small projects,” for residential and office projects, and for projects near transit stations. The VMT CEQA Guidance contains numeric significance thresholds for residential projects, for office projects, for retail projects, for mixed-use projects, for redevelopment projects, and for rural projects. It contains extensive guidance and instruction on assessing impacts resulting from transportation projects.

25 VMT CEQA Guidance, p. 8 (emphasis original).
27 See VMT CEQA Guidance, p. 10.
28 See VMT CEQA Guidance, p. 10.
29 See VMT CEQA Guidance, pp. 11-12.
31 See VMT CEQA Guidance, p. 13.
35 See VMT CEQA Guidance, p. 15.
36 See VMT CEQA Guidance, pp. 16-21.
The VMT CEQA Guidance includes guidance on every aspect of environmental analysis under CEQA. It contains screening and significance thresholds,\textsuperscript{37} impact assessment methodology,\textsuperscript{38} and mitigation methods and project alternatives that would reduce impacts.\textsuperscript{39} Thus, the VMT CEQA Guidance will play a role in assessing project transportation impacts whether the project requires an EIR, which includes mitigation measures and analyzes project alternatives, or a less rigorous compliance track, which relies on screening thresholds to determine the project would have no significant impacts.

Therefore, it is plain to see that the VMT CEQA Guidance applies generally to all agency actions that constitute a “project” under CEQA no matter the type, size, location, and level of CEQA compliance.

\textbf{iii. The VMT CEQA Guidance implements SB 743.}

As discussed above, SB 743 requires OPR to establish criteria for determining the significance of transportation impacts and to revise the CEQA Guidelines to reflect the new criteria.\textsuperscript{40} In doing so, SB 743 expressly requires OPR to comply with the rulemaking procedures in the APA.\textsuperscript{41} To implement SB 743, OPR is updating the CEQA Guidelines through a public review and comment process pursuant to the APA. The most recent package released for public review and comment includes a new CEQA Guideline section that specifies that VMT is the, “most appropriate measure of transportation impacts,” and contains general criteria for evaluating impacts using a VMT metric.\textsuperscript{42} However, absent from the most recent package is the VMT CEQA Guidance, which establishes more detailed criteria regarding VMT analysis. The VMT CEQA Guidance also includes extensive background on SB 743 and cites to SB 743 15 times in its 23 pages, not including the appendices. Because the new proposed CEQA Guideline section and the VMT CEQA Guidance both provide criteria for determining the significance of transportation impacts, both implement SB 743 and both should be adopted pursuant to the APA.

Further, OPR’s January 2016 CEQA Guidelines update package that was released for public review and comment pursuant to the APA included the 2016 Technical Advisory (previously defined), which contains sections that are identical to sections in the VMT CEQA Guidance. With no explanation, OPR extracted the VMT CEQA Guidance from its November 2017 CEQA Guidelines update package and released it as a standalone document not subject to public review under the APA.\textsuperscript{43} One glaring, and telling, difference in the two advisories is their title. The VMT CEQA Guidance is entitled,

\begin{small}
\textsuperscript{37} See VMT CEQA Guidance, pp. 10-21.
\textsuperscript{38} See VMT CEQA Guidance, pp. 2-4, Appendix 1 and 2.
\textsuperscript{39} See VMT CEQA Guidance, pp. 21-23.
\textsuperscript{40} Pub. Res. Code § 21099(b).
\textsuperscript{41} Pub. Res. Code §§ 21099(b), 21083.
\end{small}
“Technical Advisory on Evaluating Transportation Impacts in CEQA,” and the 2016 Technical Advisory is entitled, “Technical Advisory on Evaluating Transportation Impacts in CEQA – Implementing Senate Bill 743 (Steinberg, 2013)” (emphasis added). The 2016 Technical Advisory’s title is evidence that OPR intended the 2016 Technical Advisory to implement SB 743. In light of the change in title between the two nearly identical drafts to exclude the words, “Implementing Senate Bill 743,” it appears obvious that OPR intended to avoid the procedural requirements of the APA despite the fact that it was aware that the VMT CEQA Guidance contains regulations implementing SB 743.

B. The VMT CEQA Guidance is not expressly exempt from the APA by statute.

The VMT CEQA Guidance is not a regulation that is expressly exempt from the APA. In fact, as mentioned above, the State Legislature in SB 743 expressly directed that in order to expand or modify CEQA to include a new or modified transportation impact metric, such as VMT, OPR must adopt regulations in the form of amendments to the CEQA Guidelines pursuant to the APA.\(^\text{44}\)

5. The VMT CEQA Guidance Fails to Comply with Applicable Rulemaking Criteria under the APA

Had OPR followed the APA and subjected the VMT CEQA Guidance to the applicable rulemaking procedures, the clear and repeated legal deficiencies in the VMT CEQA Guidance could have been readily identified and corrected. As drafted, numerous provisions of the VMT CEQA Guidance violate applicable provisions of the APA and specifically Section 11349.1(a) of the Government Code. Specifically, the VMT CEQA Guidance:

- Is unnecessary to effectuate the purpose of CEQA generally and SB 743 specifically;

- Includes new mandates that are beyond OPR’s authority pursuant to CEQA and SB 743;

- Does not provide the requisite level of clarity that would allow its provisions to be easily understood by those directly affected by them;

- Includes provisions that are inconsistent with other laws, including laws intended to protect public health and safety, air quality, and vehicular mobility;

- Contains reference to, but intentionally evades the appearance that it implements, SB 743;\(^\text{45}\) and

- Duplicates the purpose of the CEQA Guidelines update regarding transportation impacts presented as part of the comprehensive CEQA update package released in

\(^{44}\) Pub. Res. Code §§ 21099(b), 21083.

\(^{45}\) Compare the 2016 Technical Advisory, which includes in its title, “Implementing Senate Bill 743 (Steinberg, 2013),” and the VMT CEQA Guidance, which intentionally omits this phrase.
November 2017 for which formal rulemaking is required pursuant to the APA and has commenced in January of 2018.⁴⁶

However, these shortcomings are appropriately addressed in the context of the critique of the VMT CEQA Guidance provided for under the formal rulemaking process specifically required by the APA and SB 743.

6. **Reasons Why This Petition Raises an Issue of Considerable Public Importance Requiring Prompt Resolution**

In adopting the APA, the State Legislature intended to lessen the, “unnecessary burden on California citizens,” and declared that, “language of many regulations is frequently unclear and unnecessarily complex...[and] is often confusing to the persons who must comply with the regulations.”⁴⁷ This is especially true for regulations under CEQA. Impact analysis, and especially transportation impact analysis, is a highly technical endeavor requiring expertise in specialized planning concepts and complex modeling. For decades, transportation experts have relied on the level of service metric to analyze transportation impacts under CEQA, so the introduction of the VMT metric will require a complete overhaul in the analysis of these impacts. Understanding the technical nature of transportation impact analysis, the State Legislature had the foresight in SB 743 to direct OPR to adopt the new transportation metrics pursuant to the APA in order to allow public and agency review and comment to shape the new metrics and avoid future confusion. Instead, OPR denied the public and other public agencies the right to have a meaningful influence on the new VMT metrics that could avoid unnecessary confusion and burden.

OPR created further complications by bifurcating its rulemaking duties under SB 743 creating uncertainty on what CEQA requires. By processing a new CEQA Guideline through the APA rulemaking process and separately publishing a technical guidance on the same subject, OPR has confused an already complicated and technical regulatory environment. It is the purpose of the APA to limit, “the complexity and lack of clarity in many regulations.”⁴⁸ By ignoring its duties under the APA, OPR has created an unnecessarily complex and confusing regulatory scheme in direct conflict with the purpose of the APA.

Confusion in the context of CEQA is of particular public importance due to the high financial burden of CEQA compliance. Because CEQA requires complex analysis it necessarily involves consultation with expensive experts who must prepare expensive studies that must be reviewed by expensive lawyers, all of which rely on the CEQA Guidelines for guidance and instruction. If CEQA regulations are unclear, CEQA practitioners are unable to produce analysis that can withstand the scrutiny of reviewing courts. Further, if a court invalidates a CEQA document based on insufficient analysis,

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⁴⁷ Gov. Code § 11340(b).

⁴⁸ Gov. Code § 11340(g).
all project approvals are invalidated until the analysis is updated. As such, CEQA compliance is expensive, and it is especially expensive when it must be repeated.

Because public agencies are responsible for CEQA compliance, confusion in the law is especially costly to the public. It is true that in practice applicants of private projects often reimburse public agencies for the cost of CEQA compliance, however, because CEQA applies to both private and public projects agencies are often paying the CEQA compliance bill. For example, it is public agencies that pursue transportation projects, such as new roads and transit systems. In doing so the agency is responsible for the cost of CEQA compliance, including transportation impacts governed by OPR’s new SB 743 regulations. As such, confusion resulting from the VMT CEQA Guidance could potentially lead to lawsuits and repetitive analysis that will have a high financial burden on the public.

Although the burden to all manner of development from confusing CEQA regulations is high, perhaps the most burdensome to Californians is the barrier on housing development. Every Californian is aware of the State’s severe shortage of housing, both market rate and affordable housing; there is even a radio podcast dedicated to California’s housing crisis. The State Legislature recently adopted and the Governor signed into law a housing package that includes 15 new laws aimed to increase housing stock in California. However, CEQA is being litigated in a way that severely affects California’s housing stock. Between 2013 and 2015 CEQA lawsuits have targeted nearly 14,000 housing units in southern California alone. Confusion introduced into CEQA only further affects the State’s ability to produce desperately needed housing.


In conclusion, OPR is committing an obvious and serious abuse of its authority. As described above, the VMT CEQA Guidance contain “regulations” that trigger the procedural requirements of the APA based on its content, and based on the State Legislature’s specific and express directive in SB 743. OPR ignored this statutory directive. Further, there is evidence that OPR avoided the procedural requirements of the APA intentionally and in bad faith. In light of OPR’s violation of the APA, the VMT CEQA Guidance should be repealed and adopted pursuant to the APA as part of OPR’s ongoing CEQA regulatory update pursuant to Senate Bill 743.

7. Certifications

I certify that I have submitted a copy of this petition and all attachments to:

Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814
Attention: Chapter 2 Compliance Unit
Fax: 916-323-6826
Email: staff@oal.ca.gov

I certify that all of the above information is true and correct to the best of my knowledge.

[Signature]

JENNIFER L. HERNANDEZ

DATE 1/29/18
ATTACHMENT A
TECHNICAL ADVISORY

ON EVALUATING TRANSPORTATION IMPACTS IN CEQA

November 2017
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A. Introduction

This technical advisory is one in a series of advisories provided by the Governor’s Office of Planning and Research (OPR) as a service to professional planners, land use officials, and CEQA practitioners. OPR issues technical guidance on issues that broadly affect the practice of land use planning and the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The purpose of this document is to provide advice and recommendations, which agencies and other entities may use at their discretion. This document should not be construed as legal advice.

Senate Bill 743 (Steinberg, 2013) required changes to the guidelines implementing CEQA (CEQA Guidelines) (Cal. Code Regs., Title 14, Div. 6, Ch. 3, § 15000 et seq.) regarding the analysis of transportation impacts. OPR has proposed changes to the CEQA Guidelines that identify vehicle miles traveled (VMT) as the most appropriate metric to evaluate a project’s transportation impacts. The proposed changes also provide that the analysis of certain transportation projects must address the potential for induced travel. Once the California Natural Resources Agency adopts these changes to the CEQA Guidelines, automobile delay, as measured by “level of service” and other similar metrics, generally will no longer constitute a significant environmental effect under CEQA.

This advisory contains technical recommendations regarding assessment of VMT, thresholds of significance, and mitigation measures. OPR will continue to monitor implementation of these new provisions and may update or supplement this advisory in response to new information and advancements in modeling and methods.

B. Background

VMT and Greenhouse Gas Emissions Reduction. Senate Bill 32 (Pavley, 2016) requires California to reduce greenhouse gas emissions 40 percent below 1990 levels by 2030, and Executive Order B-16-12 provides a target of 80 percent below 1990 emissions levels for the transportation sector by 2050. The transportation sector has three major means of reducing greenhouse gas emissions: increasing vehicle efficiency, reducing fuel carbon content, and reducing the amount of vehicle travel. The California Air Resources Board (CARB) has provided a path forward for achieving these emissions reductions from the transportation sector in its 2016 Mobile Source Strategy. CARB determined that it will not be possible to achieve the State’s 2030 and post-2030 emissions goals without reducing VMT growth.

VMT and Other Impacts to Health and Environment. Beyond greenhouse gas emissions, increases in VMT also impact human health and the natural environment. Human health is impacted as increases in vehicle travel leads to more vehicle crashes, poorer air quality, increases in chronic diseases associated with reduced physical activity, and worse mental health. Increases in vehicle travel also negatively affects other road users, including pedestrians, cyclists, other motorists, and many transit users. The natural environment is impacted as higher VMT leads to more collisions with wildlife and fragments habitat. Additionally, development which leads to more vehicle travel also tends to consume more energy, water, and open space (including farmland and sensitive habitat). This increase in impermeable surfaces raises the flood risk and pollutant transport into waterways. (Fang et al., 2017.)
**VMT and Economic Growth.** While it was previously believed that VMT growth was a necessary component of economic growth, data from the past two decades shows that economic growth is possible without a concomitant increase in VMT. (Figure 1.) Recent research shows that requiring development projects to mitigate LOS may actually reduce accessibility to destinations and impede economic growth.\(^1\)

![Graph showing GDP and VMT Index](image)

**Figure 1.** VMT and Gross Domestic Product (GDP), 1960-2010 *(Kooshian and Winkelman, 2011)*

**C. Technical Considerations in Assessing Vehicle Miles Traveled**

Many practitioners are familiar with accounting for VMT in connection with long-range planning, or as part of the CEQA analysis of a project’s greenhouse gas emissions or energy impacts. This document provides technical information on how to assess VMT as part of a transportation impacts analysis under CEQA. Appendix 1 provides a description of which VMT to count and options on how to count it. Appendix 2 provides information on induced travel resulting from roadway capacity projects, including the mechanisms giving rise to induced travel, the research quantifying it, and information on additional approaches for assessing it.

1. **Recommendations Regarding Methodology**

Proposed Section 15064.3 explains that a “lead agency may use models to estimate a project’s vehicle miles traveled...” CEQA generally defers to lead agencies on the choice of methodology to analyze

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\(^1\) Haynes et al., *Congested Development: A Study of Traffic Delays, Access, and Economic Activity in Metropolitan Los Angeles*, Sept. 2015.

impacts. (Santa Monica Baykeeper v. City of Malibu (2011) 193 Cal.App.4th 1538, 1546.) This section provides suggestions to lead agencies regarding methodologies to analyze VMT associated with a project.

**Vehicle Types.** Proposed Section 15064.3, subdivision (a), states, “For the purposes of this section, ‘vehicle miles traveled’ refers to the amount and distance of automobile travel attributable to a project.” Here, the term “automobile” refers to on-road passenger vehicles, specifically cars and light trucks. Heavy-duty truck VMT could be included for modeling convenience and ease of calculation (for example, where models or data provide combined auto and heavy truck VMT). For an apples-to-apples comparison, vehicle types considered should be consistent across project assessment, significance thresholds, and mitigation.

**Residential and Office Projects.** Tour- and trip-based approaches\(^3\) offer the best methods for assessing VMT from residential/office projects and for comparing those assessments to VMT thresholds. These approaches also offer the most straightforward methods for assessing VMT reductions from mitigation measures for residential/office projects. When available, tour-based assessment is ideal because it captures travel behavior more comprehensively. But where tour-based tools or data are not available for all components of an analysis, a trip-based assessment of VMT serves as a reasonable proxy.

Models and methodologies used to calculate thresholds, estimate project VMT, and estimate VMT reduction due to mitigation should be comparable. For example:

- A tour-based assessment of project VMT should be compared to a tour-based threshold, or a trip-based assessment to a trip-based VMT threshold.
- Where a travel demand model is used to determine thresholds, the same model should also be used to provide trip lengths as part of assessing project VMT.
- Where only trip-based estimates of VMT reduction from mitigation are available, a trip-based threshold should be used, and project VMT should be assessed in a trip-based manner.

When a trip-based method is used to analyze a residential project, the focus can be on home-based trips. Similarly, when a trip-based method is used to analyze an office project, the focus can be on home-based work trips.

When tour-based models are used to analyze an office project, either employee work tour VMT or VMT from all employee tours may be attributed to the project. This is because workplace location influences overall travel. For consistency, the significance threshold should be based on the same metric: either employee work tour VMT or VMT from all employee tours.

For office projects that feature a customer component, such as a government office that serves the public, a lead agency can analyze the customer VMT component of the project using the methodology for retail development (see below).

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\(^3\) See Appendix 1, *Considerations About Which VMT to Count*, for a description of these approaches.
Retail Projects. Generally, lead agencies should analyze the effects of a retail project by assessing the change in total VMT\(^4\) because retail projects typically re-route travel from other retail destinations. A retail project might lead to increases or decreases in VMT, depending on previously existing retail travel patterns.

Considerations for All Projects. Lead agencies should not truncate any VMT analysis because of jurisdictional or other boundaries. CEQA requires environmental analyses to reflect a “good faith effort at full disclosure.” (CEQA Guidelines, § 15151.) Thus, where methodologies exist that can estimate the full extent of vehicle travel from a project, the lead agency should apply them to do so. Analyses should also consider a project’s both short- and long-term effects on VMT.

Any project that includes in its geographic bounds a portion of an existing or planned Transit Priority Area (i.e., the project is within a ½ mile of an existing or planned major transit stop or an existing stop along a high quality transit corridor) may employ VMT as its primary metric of transportation impact for the entire project. (See Pub. Resources Code, § 21099, subds. (a)(7), (b)(1).)

D. General Principles to Guide Consideration of VMT

SB 743 directs OPR to establish specific “criteria for determining the significance of transportation impacts of projects.” (Pub. Resources Code, § 21099, subd. (b)(1).) In establishing this criterion, OPR was guided by the general principles contained within CEQA, the CEQA Guidelines, and applicable case law. A brief summary of the relevant principles is found below.

The CEQA Guidelines set forth the general rule for determining significance:

The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.

(CEQA Guidelines, § 15064, subd. (b) (emphasis added).) This confirms that context matters in a CEQA analysis and that lead agencies have discretion in the precise methodology to analyze an impact. (See Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 409 [“the issue is not whether the studies are irrefutable or whether they could have been better” ... rather, the “relevant issue is only whether the studies are sufficiently credible to be considered” as part of the lead agency’s overall evaluation]; Santa Monica Baykeeper v. City of Malibu, supra, 193 Cal.App.4th p. 1546 [substantial evidence standard applies to agency’s choice of methodology].) Therefore, lead agencies may perform a multimodal impact analysis that incorporates the technical approaches and

\(^4\) See Appendix 1, Considerations About Which VMT to Count, “Assessing Change in Total VMT” section, for a description of this approach.
mitigation strategies that are best suited to the unique land use/transportation circumstances and specific facility types they are evaluating.

To assist in the determination of significance, many lead agencies rely on “thresholds of significance.” The CEQA Guidelines define a “threshold of significance” to mean “an identifiable **quantitative, qualitative** or **performance level** of a particular environmental effect, non-compliance with which means the effect will **normally** be determined to be significant by the agency and compliance with which means the effect **normally** will be determined to be less than significant.” (CEQA Guidelines, § 15064.7, subd. (a) (emphasis added).) Agencies may adopt their own, or rely on thresholds recommended by other agencies, “provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence.” (Id. at subd. (c).) Substantial evidence means “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Id. at § 15384 (emphasis added).)

Thresholds of significance are not a safe harbor under CEQA; rather, they are a starting point for analysis:

[T]hresholds cannot be used to determine automatically whether a given effect will or will not be significant. Instead, thresholds of significance can be used only as a measure of whether a certain environmental effect “will normally be determined to be significant” or “normally will be determined to be less than significant” by the agency . . . In each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant.


Finally, just as the determination of significance is ultimately a “judgment call,” the analysis leading to that determination need not be perfect. The CEQA Guidelines describe the standard for adequacy of environmental analyses:

An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to **make a decision which intelligently takes account of environmental consequences**. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is **reasonably feasible**. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The **courts have looked not for perfection** but for **adequacy, completeness, and a good faith effort** at full disclosure.

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5 Because the amount of a project’s VMT is needed (and is currently being used in practice) to assess the environmental impacts on a variety of resources (such as air quality, greenhouse gases, energy, and noise), qualitative analysis should only be applied when models or methods do not exist for undertaking a quantitative analysis.

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These general principles guide OPR’s recommendations regarding thresholds of significance for VMT set forth below.

E. Recommendations Regarding Significance Thresholds

As noted above, lead agencies have the discretion to set or apply their own thresholds of significance. *(Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 218-223 [lead agency had discretion to use compliance with AB 32’s emissions goals as a significance threshold]). However, Section 21099 of the Public Resources Code states that the criteria for determining the significance of transportation impacts must promote: (1) reduction of greenhouse gas emissions; (2) development of multimodal transportation networks; and (3) a diversity of land uses. It further directed OPR to provide guidance on criteria for determining significance. *(Pub. Resources Code, § 21099, subd. (b)(1)).* This section provides OPR’s suggested thresholds, as well as considerations for lead agencies that choose to adopt their own thresholds.

Various legislative mandates and state policies establish quantitative greenhouse gas emissions reduction targets. For example:


- **Senate Bill 32** (2016) requires at least a 40 percent reduction in greenhouse gas emissions by 2030.

- Pursuant to **Senate Bill 375** (2008), the California Air Resources Board establishes greenhouse gas reduction targets for metropolitan planning organizations (MPOs) to achieve based on land use patterns and transportation systems specified in Regional Transportation Plans and Sustainable Community Strategies. Current targets for the largest metropolitan planning organizations range from 13% to 16% reductions by 2035.


- **Executive Order S-3-05** (2005) sets a GHG emissions reduction target of 80 percent below 1990 levels by 2050.

- **Executive Order B-16-12** (2012) specifies a GHG emissions reduction target of 80 percent below 1990 levels by 2050 specifically for transportation.

- **Senate Bill 391** requires the **California Transportation Plan** to support 80 percent reduction in GHGs below 1990 levels by 2050.
• The California Air Resources Board Mobile Source Strategy (2016) describes California’s strategy for containing air pollutant emissions from vehicles, and quantifies VMT growth compatible with achieving state targets.

• The California Air Resources Board’s 2017 Climate Change Scoping Plan Update: The Strategy for Achieving California’s 2030 Greenhouse Gas Target describes California’s strategy for containing greenhouse gas emissions from vehicles, and quantifies VMT growth compatible with achieving state targets.

Considering these various targets, the California Supreme Court observed:

Meeting our statewide reduction goals does not preclude all new development. Rather, the Scoping Plan ... assumes continued growth and depends on increased efficiency and conservation in land use and transportation from all Californians.

(Center for Biological Diversity v. California Dept. of Fish & Wildlife, supra, 62 Cal.4th at p. 220.) Indeed, the Court noted that when a lead agency uses consistency with climate goals as a way to determine significance, particularly for long-term projects, the lead agency must consider the project’s effect on meeting long-term reduction goals. (Ibid.) And more recently, the Supreme Court stated that “CEQA requires public agencies . . . to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes.” (Cleveland National Forest Foundation v. San Diego Assn. of Governments (2017) 3 Cal.5th 497, 504.)

Meeting the targets described above will require substantial reductions in existing VMT per capita to curb greenhouse gases and other pollutants. But those targets do not translate directly into VMT thresholds for individual projects for many reasons, including:

• Some, but not all, of the emissions reductions needed to achieve those targets could be accomplished by other measures, including increased vehicle efficiency and decreased fuel carbon content. The CARB’s First Update to the Climate Change Scoping Plan explains: “Achieving California’s long-term criteria pollutant and GHG emissions goals will require four strategies to be employed: (1) improve vehicle efficiency and develop zero emission technologies, (2) reduce the carbon content of fuels and provide market support to get these lower-carbon fuels into the marketplace, (3) plan and build communities to reduce vehicular GHG emissions and provide more transportation options, and (4) improve the efficiency and throughput of existing transportation systems.” (CARB, First Update to the Climate Change Scoping Plan, May 2014, p. 46 (emphasis added).) In other words, vehicle efficiency and better fuels are necessary, but insufficient, to address the greenhouse gas emissions from the transportation system. Land use patterns and transportation options must also change to support reductions in vehicle travel/VMT.

• New land use projects alone will not sufficiently reduce per-capita VMT to achieve those targets, nor are they expected to be the sole source of VMT reduction.

• Interactions between land use projects, and also between land use and transportation projects, existing and future, together affect VMT.
Because location within the region is the most important determinant of VMT, in some cases, streamlining CEQA review of projects in travel efficient locations may be the most effective means of reducing VMT.

When assessing climate impacts of land use projects, use of an efficiency metric (e.g., per capita, per employee) may provide a better measure of impact than an absolute numeric threshold. *(Center for Biological Diversity, supra.)*

Public Resources Code section 21099 directs OPR to provide guidance on determining the significance of transportation impacts. While OPR’s guidance is not binding on public agencies, CEQA allows lead agencies to “consider thresholds of significance . . . recommended by other public agencies, provided the decision to adopt those thresholds is supported by substantial evidence.” *(CEQA Guidelines, § 15064.7, subd. (c).)* Based on OPR’s extensive review of the applicable research and literature on this topic, *OPR finds that in most instances a per capita or per employee VMT that is fifteen percent below that of existing development may be a reasonable threshold.*

First, as described above, Section 21099 states that the criteria for determining significance must “promote the reduction in greenhouse gas emissions.” SB 743 also states the Legislature’s intent that the analysis of transportation in CEQA better promotes the State’s goals of reducing greenhouse gas emissions. It cites in particular the reduction goals in the Global Warming Solutions Act (AB 32) and the Sustainable Communities and Climate Protection Act (SB 375), both of which call for substantial reductions. As indicated above, CARB established long-term reduction targets for the largest regions in the state that ranged from 13 to 16 percent.

Second, Caltrans has developed a statewide VMT reduction target in its *Strategic Management Plan.* Specifically, it calls for a 15 percent reduction in per capita VMT, compared to 2010 levels, by 2020.

Third, fifteen percent reductions in VMT are achievable at the project level in a variety of place types. *(Quantifying Greenhouse Gas Measures, p. 55 CAPCOA, 2010.)*


The current draft of the Scoping Plan states,

> VMT reductions are necessary to achieve the 2030 target and must be part of any strategy evaluated in this plan. Stronger SB 375 GHG reduction targets will enable the State to make significant progress towards this goal, but alone will not provide all of the VMT growth reductions that will be needed. There is a gap between what SB 375 can provide and what is needed to meet the State’s 2030 and 2050 goals.” *(CARB, *The 2017 Climate Change Scoping Plan*: The Strategy for Achieving California’s 2030 Greenhouse Gas Target)*
Furthermore,

At the State level, a number of important policies are being developed. Governor Brown signed Senate Bill 743 (Steinberg, 2013), which called for an update to the metric of transportation impact in the California Environmental Quality Act (CEQA). That update to the CEQA Guidelines is currently underway. Employing VMT as the metric of transportation impact statewide will help ensure GHG reductions planned under SB 375 will be achieved through on-the-ground development, and will also play an important role in creating the additional GHG reductions needed beyond SB 375 across the State. “(Id. at p. 112.)

....

Employing VMT as the metric of transportation impact statewide will help to ensure GHG reductions planned under SB 375 will be achieved through on-the-ground development, and will also play an important role in creating the additional GHG reductions needed beyond SB 375 across the State. Implementation of this change will rely, in part, on local land use decisions to reduce GHG emissions associated with the transportation sector, both at the project level, and in long-term plans (including general plans, climate action plans, specific plans, and transportation plans) and supporting sustainable community strategies developed under SB 375. The State can provide guidance and tools to assist local governments in achieving those objectives. (Id. at p. 113)

....

California’s future climate strategy will require increased focus on integrated land use planning to support livable, transit-connected communities, and conservation of agricultural and other lands. Accommodating population and economic growth through travel- and energy-efficient land use provides GHG-efficient growth, reducing GHGs from both transportation and building energy use. GHGs can be further reduced at the project level through implementing energy-efficient construction and travel demand management approaches. Further, the State’s understanding of transportation impacts continues to evolve. The CEQA Guidelines are being updated to focus the analysis of transportation impacts on VMT. OPR’s Technical Advisory includes methods of analysis of transportation impacts, approaches to setting significance thresholds, and includes examples of VMT mitigation under CEQA. (Id. at p. 153.)

Also, the Scoping Plan includes the following item as a “Recommended Action”: “forthcoming statewide implementation of SB 743.” (Ibid.)

Achieving 15 percent lower per capita (residential) or per employee (office) VMT than existing development is both generally achievable and is supported by evidence that connects this level of reduction to the State’s emissions goals. The following pages describe a series of screening thresholds below which a detailed analysis may not be required. Next, this advisory describes numeric thresholds
recommended for various project types. Finally, this advisory describes the analysis for certain unique circumstances.

1. Screening Thresholds for Land Use Projects

Many agencies use “screening thresholds” to quickly identify when a project should be expected to cause a less-than-significant impact without conducting a detailed study. (See e.g., CEQA Guidelines, §§ 15063(c)(3)(C), 15128, and Appendix G.) As explained below, this technical advisory suggests that lead agencies may screen out VMT impacts using project size, maps, and transit availability.

Screening Threshold for Small Projects

Many local agencies have developed screening thresholds to indicate when detailed analysis is needed. Absent substantial evidence indicating that a project would generate a potentially significant level of VMT, or inconsistency with a Sustainable Communities Strategy (SCS) or general plan, projects that generate or attract fewer than 110 trips per day\(^6\) generally may be assumed to cause a less-than-significant transportation impact.

Map-Based Screening for Residential and Office Projects

Residential and office projects that locate in areas with low VMT, and that incorporate similar features (i.e., density, mix of uses, transit accessibility), will tend to exhibit similarly low VMT. Maps created with data from a travel survey or travel demand model can illustrate areas that are currently below threshold VMT (see recommendations below). Because new development in such locations would likely result in a similar level of VMT, such maps can be used to screen out residential and office projects from needing to prepare a detailed VMT analysis.

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\(^6\) CEQA provides a categorical exemption for existing facilities, including additions to existing structures of up to 10,000 square feet, so long as the project is in an area where public infrastructure is available to allow for maximum planned development and the project is not in an environmentally sensitive area. (CEQA Guidelines, § 15301, subd. (e)(2).) Typical project types for which trip generation increases relatively linearly with building footprint (i.e., general office building, single tenant office building, office park, and business park) generate or attract an additional 110-124 trips per 10,000 square feet. Therefore, absent substantial evidence otherwise, it is reasonable to conclude that the addition of 110 or fewer trips could be considered not to lead to a significant impact.
Figure 2. Example map of household VMT that could be used to delineate areas eligible to receive streamlining for VMT analysis. (Source: City of San José, Department of Transportation, draft output of City Transportation Model.)

Presumption of Less Than Significant Impact Near Transit Stations

Proposed CEQA Guideline Section 15064.3, subdivision (b)(1), states that lead agencies generally should presume that certain projects (including residential, retail, and office projects, as well as projects that are a mix of these uses) proposed within ½ mile of an existing major transit stop\(^7\) or an existing stop along a high quality transit corridor\(^8\) will have a less-than-significant impact on VMT. This presumption would not apply, however, if project-specific or location-specific information indicates that the project

\(^7\) Pub. Resources Code, § 21064.3 ("Major transit stop' means a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the 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.").

\(^8\) Pub. Resources Code, § 21155 ("For purposes of this section, a high-quality transit corridor means a corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours.").
will still generate significant levels of VMT. For example, the presumption might not be appropriate if the project:

- Has a Floor Area Ratio (FAR) of less than 0.75
- Includes more parking for use by residents, customers, or employees of the project than required by the jurisdiction (if the jurisdiction requires the project to supply parking)
- Is inconsistent with the applicable Sustainable Communities Strategy (as determined by the lead agency, with input from the Metropolitan Planning Organization)

If any of these exceptions to the presumption might apply, the lead agency should conduct a detailed VMT analysis to determine whether the project would exceed VMT thresholds (see below).

2. Recommended Numeric Thresholds for Residential, Office, and Retail Projects

**Recommended threshold for residential projects**: A proposed project exceeding a level of 15 percent below existing VMT per capita may indicate a significant transportation impact. Existing VMT per capita may be measured as regional VMT per capita or as city VMT per capita. Proposed development referencing city VMT per capita must not cumulatively exceed the number of units specified in the SCS for that city, and must be consistent with the SCS.

Residential development that would generate vehicle travel that is 15 or more percent below the existing residential VMT per capita, measured against the region or city, may indicate a less-than-significant transportation impact. In MPO areas, development measured against city VMT per capita (rather than regional VMT per capita) should not cumulatively exceed the population or number of units specified in the SCS for that city because greater-than-planned amounts of development in areas above the region-based threshold would undermine the VMT containment needed to achieve regional targets under SB 375.

For residential projects in unincorporated county areas, the local agency can compare a residential project’s VMT to (1) the region’s VMT per capita, or (2) the aggregate population-weighted VMT per capita of all cities in the region. In MPO areas, development in unincorporated areas measured against aggregate city VMT per capita (rather than regional VMT per capita) must not cumulatively exceed the population or number of units specified in the SCS for that city because greater-than-planned amounts of development in areas above the regional threshold would undermine achievement of regional targets under SB 375.

These thresholds can be applied to either household (i.e., tour-based) VMT or home-based (i.e., trip-based) VMT assessments.\(^9\) It is critical, however, that the agency be consistent in its VMT measurement.

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\(^9\) See Appendix 1 for a description of these approaches.
approach throughout the analysis to maintain an “apples-to-apples” comparison. For example, if the agency uses a home-based VMT for the threshold, it must also use home-based VMT for calculating project VMT and VMT reduction due to mitigation measures.

**Recommended threshold for office projects:** A proposed project exceeding a level of 15 percent below existing regional VMT per employee may indicate a significant transportation impact.

Office projects that would generate vehicle travel exceeding 15 percent below existing VMT per employee for the region may indicate a significant transportation impact. In cases where the region is substantially larger than the geography over which most workers would be expected to live, it might be appropriate to refer to a smaller geography, such as the county, that includes the area over which nearly all workers would be expected to live.

Office VMT screening maps can be developed using tour-based data, considering either total employee VMT or employee work tour VMT. Similarly, tour-based analysis of office project VMT could consider either total employee VMT or employee work tour VMT. Where tour-based information is unavailable for threshold determination, project assessment, or assessment of mitigation, home-based work trip VMT should be used throughout all steps of the analysis to maintain an “apples-to-apples” comparison.

**Recommended threshold for retail projects:** A net increase in total VMT may indicate a significant transportation impact.

Because new retail development typically redistributes shopping trips rather than creating new trips, estimating the total change in VMT (i.e., the difference in total VMT in the area affected with and without the project) is the best way to analyze a retail project’s transportation impacts.

By adding retail opportunities into the urban fabric and thereby improving retail destination proximity, local-serving retail development tends to shorten trips and reduce VMT. Thus, lead agencies generally may presume such development creates a less-than-significant transportation impact. Regional-serving retail development, on the other hand, which can lead to substitution of longer trips for shorter ones, may tend to have a significant impact. Where such development decreases VMT, lead agencies should consider the impact to be less-than-significant.

Many cities and counties define local-serving and regional-serving retail in their zoning codes. Lead agencies may refer to those local definitions when available, but should also consider any project-specific information, such as market studies or economic impacts analyses that might bear on customers’ travel behavior. Because lead agencies will best understand their own communities and the likely travel behaviors of future project users, they are likely in the best position to decide when a

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project will likely be local-serving. Generally, however, retail development including stores larger than 50,000 square feet might be considered regional-serving, and so lead agencies should undertake an analysis to determine whether the project might increase or decrease VMT.

**Mixed-Use Projects**

Lead agencies can evaluate each component of a mixed-use project independently and apply the significance threshold for each project type included (e.g., residential and retail). Alternatively, a lead agency may consider only the project’s dominant use. In the analysis of each use, a project should take credit for internal capture. Combining different land uses and applying one threshold to those land uses may result in an inaccurate impact assessment.

**Other Project Types**

Of land use projects, residential, office, and retail projects tend to have the greatest influence on VMT. For that reason, OPR recommends the quantified thresholds described above for purposes of analysis and mitigation. Lead agencies, using more location-specific information, may develop their own more specific thresholds, which may include other land use types. In developing thresholds for other project types, or thresholds different from those recommended here, lead agencies should consider the purposes described in section 21099 of the Public Resources Code and regulations in the CEQA Guidelines on the development of thresholds of significance (e.g., CEQA Guidelines, § 15064.7).

Strategies and projects that decrease local VMT but increase total VMT should be avoided. Agencies should consider whether their actions encourage development in a less travel-efficient location by limiting development in travel-efficient locations.

**Redevelopment Projects**

Where a project replaces existing VMT-generating land uses, if the replacement leads to a net overall decrease in VMT, the project would lead to a less-than-significant transportation impact. If the project leads to a net overall increase in VMT, then the thresholds described above should apply.

If a residential or office project leads to a net increase in VMT, then the project’s VMT per capita (residential) or per employee (office) should be compared to thresholds recommended above. Per capita and per employee VMT are efficiency metrics, and, as such, apply only to the existing project without regard to the VMT generated by the previously existing land use.

If the project leads to a net increase in provision of locally-serving retail, transportation impacts from the retail portion of the development should be presumed to be less than significant. If the project consists of regionally-serving retail, and increases overall VMT compared to with existing uses, then the project would lead to a significant transportation impact.
**RTP-SCS Consistency (All Land Use Projects)**

Section 15125, subdivision (d), of the CEQA Guidelines provides that lead agencies should analyze impacts resulting from inconsistencies with regional plans, including regional transportation plans. For this reason, if a project is inconsistent with the Regional Transportation Plan and Sustainable Communities Strategy (RTP/SCS), the lead agency should evaluate whether that inconsistency indicates a significant impact on transportation.

3. **Recommendations Regarding Land Use Plans**

As with projects, agencies should analyze VMT outcomes of land use plans over the full area over which the plan may substantively affect travel patterns, including beyond the boundary of the plan or jurisdiction’s geography. Analysis of specific plans may employ the same thresholds described above for projects. A general plan, area plan, or community plan may have a significant impact on transportation if it is not consistent with the relevant RTP-SCS.

Thresholds for plans in non-MPO areas may be determined on a case-by-case basis.

4. **Other Considerations**

**Rural Projects Outside of MPOs**

In rural areas of non-MPO counties (i.e., areas not near established or incorporated cities or towns), fewer options may be available for reducing VMT, and significance thresholds may be best determined on a case-by-case basis. Note, however, that clustered small towns and small town main streets may have substantial VMT benefits compared to isolated rural development, similar to the transit oriented development described above.

**Impacts to Transit**

Because criteria for determining the significance of transportation impacts must promote “the development of multimodal transportation networks,” lead agencies should consider project impacts to transit systems and bicycle and pedestrian networks. For example, a project that blocks access to a transit stop or blocks a transit route itself may interfere with transit functions. Lead agencies should consult with transit agencies as early as possible in the development process, particularly for projects that are located within one half mile of transit stops.

When evaluating impacts to multimodal transportation networks, lead agencies generally should not treat the addition of new transit users as an adverse impact. An infill development may add riders to transit systems and the additional boarding and alighting may slow transit vehicles, but it also adds
destinations, improving proximity and accessibility. Such development also improves regional vehicle flow by adding less vehicle travel onto the regional network.

Increased demand throughout a region may, however, cause a cumulative impact by requiring new or additional transit infrastructure. Such impacts may be adequately addressed through a fee program that fairly allocates the cost of improvements not just to projects that happen to locate near transit, but rather across a region to all projects that impose burdens on the entire transportation system, since transit can broadly improve the function of the transportation system.

F. Considering the Effects of Transportation Projects on Vehicle Travel

Many transportation projects change travel patterns. A transportation project which leads to additional vehicle travel on the roadway network, commonly referred to as “induced vehicle travel,” must quantify the amount of additional vehicle travel in order to assess air quality impacts, greenhouse gas emissions impacts, energy impacts, and noise impacts. Transportation projects must also examine induced growth impacts under CEQA. (See generally, Pub. Resources Code, §§ 21065 [defining “project” under CEQA as an activity as causing either a direct or reasonably foreseeable indirect physical change], 21065.3 [defining “project-specific effect” to mean all direct or indirect environmental effects], 21100, subd. (b) [required contents of an EIR].) For any project that increases vehicle travel, explicit assessment and quantitative reporting of the amount of additional vehicle travel should not be omitted from the document; such information may be useful and necessary for a full understanding of a project’s environmental impacts. (See Pub. Resources Code, §§ 21000, 21001, 21001.1, 21002, 21002.1 [discussing the policies of CEQA].) A lead agency that uses the VMT metric to assess the transportation impacts of a transportation project may simply report that change in VMT as the impact. When the lead agency uses another metric to analyze the transportation impacts of a roadway project, changes in amount of vehicle travel added to the roadway network should still be analyzed and reported. (See, e.g., California Department of Transportation, Guidance for Preparers of Growth-related, Indirect Impact Analyses (2006).)

While CEQA does not require perfection, it is important to make a reasonably accurate estimate of transportation projects’ effects on vehicle travel in order to make reasonably accurate estimates of GHG emissions, air quality emissions, energy impacts, and noise impacts. (See, e.g., California Clean Energy Com. v. City of Woodland (2014) 225 Cal.App.4th 173, 210 [EIR failed to consider project’s transportation energy impacts]; Ukiah Citizens for Safety First v. City of Ukiah (2016) 248 Cal.App.4th 256, 266.) Appendix 2 describes in detail the causes of induced vehicle travel, the robust empirical evidence of induced vehicle travel, and how models and research can be used in conjunction to quantitatively assess induced vehicle travel with reasonable accuracy.

If a project would likely lead to a measurable and substantial increase in vehicle travel, the lead agency should conduct an analysis assessing the amount of vehicle travel the project will induce. Project types that would likely lead to a measurable and substantial increase in vehicle travel generally include:
- Addition of through lanes on existing or new highways, including general purpose lanes, HOV lanes, peak period lanes, auxiliary lanes, or lanes through grade-separated interchanges

Projects that would not likely lead to a substantial or measurable increase in vehicle travel, and therefore generally should not require an induced travel analysis, include:

- Rehabilitation, maintenance, replacement and repair projects designed to improve the condition of existing transportation assets (e.g., highways, roadways, bridges, culverts, tunnels, transit systems, and assets that serve bicycle and pedestrian facilities) and that do not add additional motor vehicle capacity
- Roadway shoulder enhancements to provide “breakdown space,” dedicated space for use only by transit vehicles, to provide bicycle access, or to otherwise improve safety, but which will not be used as automobile vehicle travel lanes
- Addition of an auxiliary lane of less than one mile in length designed to improve roadway safety
- Installation, removal, or reconfiguration of traffic lanes that are not for through traffic, such as left, right, and U-turn pockets, or emergency breakdown lanes that are not utilized as through lanes
- Addition of roadway capacity on local or collector streets provided the project also substantially improves conditions for pedestrians, cyclists, and, if applicable, transit
- Conversion of existing general purpose lanes (including ramps) to managed lanes or transit lanes, or changing lane management in a manner that would not substantially increase vehicle travel
- Addition of a new lane that is permanently restricted to use only by transit vehicles
- Reduction in number of through lanes
- Grade separation to separate vehicles from rail, transit, pedestrians or bicycles, or to replace a lane in order to separate preferential vehicles (e.g., HOV, HOT, or trucks) from general vehicles
- Installation, removal, or reconfiguration of traffic control devices, including Transit Signal Priority (TSP) features
- Traffic metering systems
- Timing of signals to optimize vehicle, bicycle, or pedestrian flow
- Installation of roundabouts or traffic circles
- Installation or reconfiguration of traffic calming devices
- Adoption of or increase in tolls
- Addition of tolled lanes, where tolls are sufficient to mitigate VMT increase
- Initiation of new transit service
- Conversion of streets from one-way to two-way operation with no net increase in number of traffic lanes
- Removal or relocation of off-street or on-street parking spaces
- Adoption or modification of on-street parking or loading restrictions (including meters, time limits, accessible spaces, and preferential/reserved parking permit programs)
- Addition of traffic wayfinding signage
• Rehabilitation and maintenance projects that do not add motor vehicle capacity
• Addition of new or enhanced bike or pedestrian facilities on existing streets/highways or within existing public rights-of-way
• Addition of Class I bike paths, trails, multi-use paths, or other off-road facilities that serve non-motorized travel
• Installation of publicly available alternative fuel/charging infrastructure
• Addition of passing lanes in rural areas that do not increase overall vehicle capacity along the corridor

1. Recommended Significance Threshold for Transportation Projects

As noted in Section 15064.3 of the CEQA Guidelines, lead agencies for roadway capacity projects have discretion, consistent with CEQA and planning requirements, to choose which metric to use to evaluate transportation impacts. This section recommends considerations for evaluating impacts using vehicle miles traveled. Lead agencies have discretion to choose a threshold of significance for transportation projects. As explained above, Public Resources Code section 21099, subdivision (b)(1), provides that criteria for evaluating transportation impacts must promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.

Whether adopting a threshold of significance, or evaluating transportation impacts on a case-by-case basis, a lead agency should ensure that the analysis addresses:

• Direct, indirect and cumulative effects of the transportation project (CEQA Guidelines, § 15064, subds. (d), (h))
• Near-term and long-term effects of the transportation project (CEQA Guidelines, §§ 15063, subd. (a)(1), 15126.2, subd. (a))
• The transportation project’s consistency with state greenhouse gas reduction goals (Pub. Resources Code, § 21099)\(^\text{11}\)
• The impact of the transportation project on the development of multimodal transportation networks (Pub. Resources Code, § 21099)
• The impact of the transportation project on the development of a diversity of land uses (Pub. Resources Code, § 21099)

\(^{11}\) The Air Resources Board has ascertained, in *The 2017 Climate Change Scoping Plan: The Strategy for Achieving California’s 2030 Greenhouse Gas Target* (p. 116) and *Mobile Source Strategy* (p. 37), the limits of VMT growth compatible with California containing greenhouse gas emissions to levels research shows would allow for climate stabilization. The *Staff Report on Proposed Update to the SB 375 Greenhouse Gas Emission Reduction Targets* (Figure 1, p. 10, and Figure 2, p. 23), illustrates that Regional Transportation Plans and Sustainable Communities Strategies will fall short of achieving GHG reductions research says is needed to achieve climate stabilization, so OPR recommends not basing transportation project thresholds on those documents.
The recommendations in this technical advisory may be updated over time.

2. Estimating VMT Impacts from Transportation Projects

CEQA requires analysis of a project’s potential growth-inducing impacts. (Pub. Resources Code, § 21100, subd. (b)(5); CEQA Guidelines, § 15126.2, subd. (d).) Many agencies are familiar with the analysis of growth inducing impacts associated with water, sewer, and other infrastructure. This technical advisory addresses growth that may be expected from roadway expansion projects.

Because a roadway expansion project can induce substantial VMT, incorporating quantitative estimates of induced VMT is critical to calculating both transportation and other impacts of these projects. Induced travel also has the potential to reduce or eliminate congestion relief benefits. An accurate estimate of induced travel is needed to accurately weigh costs and benefits of a highway capacity expansion project.

The effect of a transportation project on vehicle travel should be estimated using the “change in total VMT” method described in Appendix 1. This means that an assessment of total VMT without the project and an assessment with the project should be made; the difference between the two is the amount of VMT attributable to the project. The assessment should cover the full area in which driving patterns are expected to change. As with other types of projects, the VMT estimation should not be truncated at a modeling or jurisdictional boundary for convenience of analysis when travel behavior is substantially affected beyond that boundary.

Transit and Active Transportation Projects

Transit and active transportation projects generally reduce VMT and therefore are presumed to cause a less-than-significant impact on transportation. This presumption may apply to all passenger rail projects, bus and bus rapid transit projects, and bicycle and pedestrian infrastructure projects. Streamlining transit and active transportation projects aligns with each of the three statutory goals contained in SB 743 by reducing GHG emissions, increasing multimodal transportation networks, and facilitating mixed use development.

Roadway Projects

Reducing roadway capacity (for example, by removing or repurposing motor vehicle travel lanes) will generally reduce VMT and therefore is presumed to cause a less-than-significant impact on transportation. Generally, no transportation analysis is needed for such projects.

Building new roadways, adding roadway capacity in congested areas, or adding roadway capacity to areas where congestion is expected in the future, typically induces additional vehicle travel. For the types of projects previously indicated as likely to lead to additional vehicle travel, an estimate should be made of the change in vehicle travel resulting from the project.

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For projects that increase roadway capacity, lead agencies can evaluate induced travel quantitatively by applying the results of existing studies that examine the magnitude of the increase of VMT resulting from a given increase in lane miles. These studies estimate the percent change in VMT for every percent change in miles to the roadway system (i.e., “elasticity”). (See U.C. Davis, Institute for Transportation Studies, *Increasing Highway Capacity Unlikely to Relieve Traffic Congestion*, (October 2015); Boarnet and Handy, *Impact of Highway Capacity and Induced Travel on Passenger Vehicle Use and Greenhouse Gas Emissions*, California Air Resources Board Policy Brief, September 30, 2014.) Given that lead agencies have discretion in choosing their methodology, and the studies on induced travel reveal a range of elasticities, lead agencies may appropriately apply professional judgment in studying the transportation effects of a particular project. The most recent major study (*Duranton and Turner, 2011*), estimates an elasticity of 1.0, meaning that every percent change in lane miles results in a one percent increase in VMT.

**To estimate VMT impacts from roadway expansion projects:**

1. Determine the total lane-miles over an area that fully captures travel behavior changes resulting from the project (generally the region, but for projects affecting interregional travel look at all affected regions).
2. Determine the percent change in total lane miles that will result from the project.
3. Determine the total existing VMT over that same area.
4. Multiply the percent increase in lane miles by the existing VMT, and then multiply that by the elasticity from the induced travel literature:

\[
\text{[\% increase in lane miles] \times [existing VMT] \times [elasticity] = [VMT resulting from the project]}\]

This method would not be suitable for rural (non-MPO) locations in the state which are neither congested nor projected to become congested. It also may not be suitable for a new road that provides new connectivity across a barrier (e.g., a bridge across a river) if it would be expected to substantially shorten existing trips. If it is likely to be substantial, the trips-shortening effect should be examined explicitly.

The effects of roadway capacity on vehicle travel can also be applied at a programmatic level. For example, in a regional planning process the lead agency can use that program-level analysis to streamline later project-level analysis. (See CEQA Guidelines, § 15168.) A program-level analysis of VMT should include effects of the program on land use patterns, and the VMT that results from those land use effects. In order for a program-level document to adequately analyze potential induced demand from a project or program of roadway capacity expansion, lead agencies cannot assume a fixed land use pattern (i.e., a land use pattern that does not vary in response to the provision of roadway capacity). A proper analysis should account for land use investment and development pattern changes that react in a
reasonable manner to changes in accessibility created by transportation infrastructure investments (whether at the project or program level).

**Mitigation and Alternatives**

Induced VMT has the potential to reduce or eliminate congestion relief benefits, increase VMT, and increase other environmental impacts that result from vehicle travel.\(^{12}\) If those effects are significant, the lead agency will need to consider mitigation or alternatives. In the context of increased travel that is induced by capacity increases, appropriate mitigation and alternatives that a lead agency might consider include the following:

- Tolling new lanes to encourage carpools and fund transit improvements
- Converting existing general purpose lanes to HOV or HOT lanes
- Implementing or funding off-site travel demand management
- Implementing Intelligent Transportation Systems (ITS) strategies to improve passenger throughput on existing lanes

Tolling and other management strategies can have the additional benefit of preventing congestion and maintaining free-flow conditions, conferring substantial benefits to road users as discussed above.

**G. Analyzing Other Impacts Related to Transportation**

While requiring a change in the methodology of assessing transportation impacts, Public Resources Code section 21099 notes that this change “does not relieve a public agency of the requirement to analyze a project’s potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation.” OPR expects that lead agencies will continue to address mobile source emissions in the air quality and noise sections of an environmental document and the corresponding studies that support the analysis in those sections. Lead agencies should continue to address environmental impacts of a proposed project pursuant to CEQA’s requirements, using a format that is appropriate for their particular project.

Because safety concerns result from many different factors, they are best addressed at a programmatic level (i.e., in a general plan or regional transportation plan) in cooperation with local governments, metropolitan planning organizations, and, where the state highway system is involved, the California Department of Transportation. In most cases, such an analysis would not be appropriate on a project-by-project basis. Increases in traffic volumes at a particular location resulting from a project typically

cannot be estimated with sufficient accuracy or precision to provide useful information for an analysis of safety concerns. Moreover, an array of factors affect travel demand (e.g., strength of the local economy, price of gasoline), causing substantial additional uncertainty. Appendix B of the General Plan Guidelines summarizes research which could be used to guide a programmatic analysis under CEQA. Lead agencies should note that automobile congestion or delay does not constitute a significant environmental impact (Pub. Resources Code, §21099(b)(2)), and safety should not be used as a proxy for road capacity.

H. VMT Mitigation and Alternatives

When a lead agency identifies a significant impact, it must identify feasible mitigation measures that could avoid or substantially reduce that impact. Additionally, CEQA requires that an environmental impact report identify feasible alternatives that could avoid or substantially reduce a project’s significant environmental impacts.

Indeed, the California Court of Appeal recently held that a long-term regional transportation plan was deficient for failing to discuss an alternative which could significantly reduce total vehicle miles traveled. In Cleveland National Forest Foundation v. San Diego Association of Governments, et al. (Nov. 16, 2017, D063288) ___Cal.App.5th___, the court found that omission “inexplicable” given the lead agency’s “acknowledgment in its Climate Action Strategy that the state’s efforts to reduce greenhouse gas emissions from on-road transportation will not succeed if the amount of driving, or vehicle miles traveled, is not significantly reduced.” (Slip Op., p. 25.) Additionally, the court noted that the project alternatives focused primarily on congestion relief even though “the [regional] transportation plan is a long-term and congestion relief is not necessarily an effective long-term strategy.” (Slip Op., p. 26.) The court concluded its discussion of the alternatives analysis by stating: “Given the acknowledged long-term drawbacks of congestion relief alternatives, there is not substantial evidence to support the EIR’s exclusion of an alternative focused primarily on significantly reducing vehicle trips.” (Slip Op., p. 27.)

Several examples of potential mitigation measures and alternatives to reduce vehicle miles traveled are described below. However, the selection of particular mitigation measures and alternatives are left to the discretion of the lead agency. Further, OPR expects that agencies will continue to innovate and find new ways to reduce vehicular travel.

Potential measures to reduce vehicle miles traveled include, but are not limited to:

- Improve or increase access to transit.
- Increase access to common goods and services, such as groceries, schools, and daycare.
- Incorporate affordable housing into the project.
- Incorporate neighborhood electric vehicle network.
- Orient the project toward transit, bicycle and pedestrian facilities.
- Improve pedestrian or bicycle networks, or transit service.
• Provide traffic calming.
• Provide bicycle parking.
• Limit or eliminate parking supply.
• Unbundle parking costs.
• Provide parking or roadway pricing or cash-out programs.
• Implement or provide access to a commute reduction program.
• Provide car-sharing, bike sharing, and ride-sharing programs.
• Provide transit passes.
• Shifting single occupancy vehicle trips to carpooling or vanpooling, for example providing ride-matching services.
• Providing telework options.
• Providing incentives or subsidies that increase the use of modes other than single-occupancy vehicle.
• Providing on-site amenities at places of work, such as priority parking for carpools and vanpools, secure bike parking, and showers and locker rooms.
• Providing employee transportation coordinators at employment sites.
• Providing a guaranteed ride home service to users of non-auto modes.

Notably, because VMT is largely a regional impact, regional VMT-reduction programs may be an appropriate form of mitigation. In lieu fees have been found to be valid mitigation where there is both a commitment to pay fees and evidence that mitigation will actually occur. (Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 140-141; Gentry v. City of Murrieta (1995) 36 Cal.App.4th 1359; Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 727–728.) Fee programs are particularly useful to address cumulative impacts. (CEQA Guidelines, § 15130, subd. (a)(3) [a “project’s incremental contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact”].) The mitigation program must undergo CEQA evaluation, either on the program as a whole, or the in-lieu fees or other mitigation must be evaluated on a project-specific basis. (California Native Plant Society v. County of El Dorado (2009) 170 Cal.App.4th 1026.) That CEQA evaluation could be part of a larger program, such as a regional transportation plan, analyzed in a Program EIR. (CEQA Guidelines, § 15168.)

Examples of project alternatives that may reduce vehicle miles traveled include, but are not limited to:

• Locate the project in an area of the region that already exhibits low VMT.
• Locate the project near transit.
• Increase project density.
• Increase the mix of uses within the project or within the project’s surroundings.
• Increase connectivity and/or intersection density on the project site.
• Deploy management strategies (e.g., pricing, vehicle occupancy requirements) on roadways or roadway lanes.
Appendix 1. Considerations About Which VMT to Count

Consistent with the obligation to make a good faith effort to disclose the environmental consequences of a project, lead agencies have discretion to choose the most appropriate methodology to evaluate project impacts. A lead agency can evaluate a project’s effect on VMT in numerous ways. The purpose of this document is to provide technical considerations in determining which methodology may be most useful for various project types.

Background on Estimating Vehicle Miles Traveled

Before discussing specific methodological recommendations, this section provides a brief overview of modeling and counting VMT, including some key terminology.

Here is an illustrative example of some methods of estimating vehicle miles traveled. Consider the following hypothetical travel day (all by automobile):

1. Residence to Coffee Shop
2. Coffee Shop to Work
3. Work to Sandwich Shop
4. Sandwich Shop to Work
5. Work to Residence
6. Residence to Store
7. Store to Residence

Trip-based assessment of a project’s effect on travel behavior counts VMT from individual trips to and from the project. It is the most basic, and traditionally the most common, method of counting VMT. A trip-based VMT assessment of the residence in the above example would consider segments 1, 5, 6 and 7. For residential projects, the sum of home-based trips is called home-based VMT.

A tour-based assessment counts the entire home-back-to-home tour that includes the project. A tour-based VMT assessment of the residence in the above example would consider segments 1, 2, 3, 4, and 5 in one tour, and 6 and 7 in a second tour. A tour-based assessment of the workplace would include segments 1, 2, 3, 4, and 5. Together, all tours comprise household VMT.

13 The California Supreme Court has explained that when an agency has prepared an environmental impact report:

[T]he issue is not whether the [lead agency’s] studies are irrefutable or whether they could have been better. The relevant issue is only whether the studies are sufficiently credible to be considered as part of the total evidence that supports the [lead agency’s] finding[.]

Both trip- and tour-based assessments can be used as measures of transportation efficiency, using denominators such as per capita, per employee, or per person-trip.

**Trip- and Tour-based Assessment of VMT**

As illustrated above, a tour-based assessment of VMT is a more complete characterization of a project’s effect on VMT. In many cases, a project affects travel behavior beyond the first destination. The location and characteristics of the home and workplace will often be the main drivers of VMT. For example, a residential or office development located near high quality transit will likely lead to some commute trips utilizing transit, affecting mode choice on the rest of the tour.

Characteristics of an office project can also affect an employee’s VMT beyond the work tour. For example, a workplace located at the urban periphery, far from transit, can require an employee to own a car, which in turn affects the entirety of an employee’s travel behavior and VMT. For this reason, when estimating the effect of an office development on VMT, it may be appropriate to consider total employee VMT if data and tools, such as tour-based models, are available. This is consistent with CEQA’s requirement to evaluate both direct and indirect effects of a project. (See CEQA Guidelines, § 15064, subd. (d)(2).)

**Assessing Change in Total VMT**

A third method, estimating the change in total VMT with and without the project, can evaluate whether a project is likely to divert existing trips, and what the effect of those diversions will be on total VMT. This method answers the question, “What is the net effect of the project on area VMT?” As an illustration, assessing the total change in VMT for a grocery store built in a food desert that diverts trips from more distant stores could reveal a net VMT reduction. The analysis should address the full area over which the project affects travel behavior, even if the effect on travel behavior crosses political boundaries.

**Using Models to Estimate VMT**

Travel demand models, sketch models, spreadsheet models, research, and data can all be used to calculate and estimate VMT (see Appendix F of the preliminary discussion draft). To the extent possible, lead agencies should choose models that have sensitivity to features of the project that affect VMT. Those tools and resources can also assist in establishing thresholds of significance and estimating VMT reduction attributable to mitigation measures and project alternatives. When using models and tools for those various purposes, agencies should use comparable data and methods, in order to set up an “apples-to-apples” comparison between thresholds, VMT estimates, and VMT mitigation estimates.

Models can work together. For example, agencies can use travel demand models or survey data to estimate existing trip lengths and input those into sketch models such as CalEEMod to achieve more
accurate results. Whenever possible, agencies should input localized trip lengths into a sketch model to tailor the analysis to the project location. However, in doing so, agencies should be careful to avoid double counting if the sketch model includes other inputs or toggles that are proxies for trip length (e.g., distance to city center). Generally, if an agency changes any sketch model defaults, it should record and report those changes for transparency of analysis. Again, trip length data should come from the same source as data used to calculate thresholds to be sure of an “apples-to-apples” comparison.

Additional background information regarding travel demand models is available in the California Transportation Commission’s “2010 Regional Transportation Plan Guidelines,” beginning at page 35.
Appendix 2. Induced Travel: Mechanisms, Research, and Additional Assessment Approaches

Induced travel occurs where roadway capacity is expanded in an area of present or projected future congestion. The effect typically manifests over several years. Lower travel times make the modified facility more attractive to travelers, resulting in the following trip-making changes:

- **Longer trips.** The ability to travel a long distance in a shorter time increases the attractiveness of destinations that are farther away, increasing trip length and vehicle travel.
- **Changes in mode choice.** When transportation investments are devoted to reducing automobile travel time, travelers tend to shift toward automobile use from other modes, which increases vehicle travel.
- **Route changes.** Faster travel times on a route attract more drivers to that route from other routes, which can increase or decrease vehicle travel depending on whether it shortens or lengthens trips.
- **Newly generated trips.** Increasing travel speeds can induce additional trips, which increases vehicle travel. For example, an individual who previously telecommuted or purchased goods on the internet might choose to accomplish those tasks via automobile trips as a result of increased speeds.
- **Land Use Changes.** Faster travel times along a corridor lead to land development farther along that corridor; that new development generates and attracts longer trips, which increases vehicle travel. Over several years, this induced growth component of induced vehicle travel can be substantial, making it critical to include in analyses.

Each of these effects has implications for the total amount of vehicle travel. These effects operate over different time scales. For example, changes in mode choice might occur immediately, while land use changes typically take a few years or longer. CEQA requires lead agencies to analyze both short-term and long-term effects.

*Evidence of Induced Vehicle Travel.* A large number of peer reviewed studies\(^\text{14}\) have demonstrated a causal link between highway capacity increases and VMT increases. Many provide quantitative estimates of the magnitude of the induced VMT phenomenon. Collectively, they provide high quality evidence of the existence and magnitude of the induced travel effect.

Most of these studies express the amount of induced vehicle travel as an “elasticity,” which is a multiplier that describes the additional vehicle travel resulting from an additional lane mile of roadway capacity added. For example, an elasticity of 0.6 would signify an 0.6 percent increase in vehicle travel for every 1.0 percent increase in lane miles. Many of these studies distinguish “short run elasticity” (increase in vehicle travel in the first few years) from “long run elasticity” (increase in vehicle travel

---

beyond the first few years). Long run elasticity is larger than short run elasticity, because as time passes, more of the components of induced vehicle travel materialize. Generally, short run elasticity can be thought of as excluding the effects of land use change, while long run elasticity includes them. Most studies find a long run elasticity between 0.6 and just over 1.0 (See Impact of Highway Capacity and Induced Travel on Passenger Vehicle Use and Greenhouse Gas Emissions: Policy Brief, p. 2.), meaning that every increase in lanes miles of one percent leads to an increase in vehicle travel of 0.6 to 1.0 percent. The most recent major study (Duranton and Turner, The Fundamental Law of Road Congestion: Evidence from US Cities, 2011) finds the elasticity of vehicle travel by lanes miles added to be 1.03; in other words, each percent increase in lane miles results in a 1.03 percent increase in vehicle travel. (An elasticity greater than 1.0 can occur because new lanes induce vehicle travel that spills beyond the project location.) In CEQA analysis, the long-run elasticity should be used, as it captures the full effect of the project rather than just the early-stage effect.

Quantifying Induced Vehicle Travel Using Models. Lead agencies can generally achieve the most accurate assessment of induced vehicle travel resulting from roadway capacity increasing projects by applying elasticities from the academic literature, because those estimates include vehicle travel resulting from induced land use. If a lead agency chooses to use a travel demand model, additional analysis would be needed to account for induced land use. This section describes some approaches to undertaking that additional analysis.

Proper use of a travel demand model can capture the following components of induced VMT:

- Trip length (generally increases VMT)
- Mode shift (generally shifts from other modes toward automobile use, increasing VMT)
- Route changes (can act to increase or decrease VMT)
- Newly generated trips (generally increases VMT)
  - Note that not all travel demand models have sensitivity to this factor, so an off-model estimate may be necessary if this effect could be substantial.

However, estimating long-run induced VMT also requires an estimate of the project’s effects on land use. This component of the analysis is important because it has the potential to be a large component of the overall induced travel effect. Options for estimating and incorporating the VMT effects that are caused by the subsequent land use changes include:

1. Employ an expert panel. An expert panel could assess changes to land use development that would likely result from the project. This assessment could then be analyzed by the travel demand model to assess effects on vehicle travel. Induced vehicle travel assessed via this approach should be verified using elasticities found in the academic literature.
2. Adjust model results to align with the empirical research. If the travel demand model analysis is performed without incorporating projected land use changes resulting from the project, the
assessed vehicle travel should be adjusted upward to account for those land use changes. The assessed VMT after adjustment should fall within the range found in the academic literature.

3. *Employ a land use model, running it iteratively with a travel demand model.* A land use model can be used to estimate the land use effects of a roadway capacity increase, and the traffic patterns that result from the land use change can then be fed back into the travel demand model. The land use model and travel demand model can be iterated to produce an accurate result.

A project which provides new connectivity across a barrier, such as a new bridge across a river, may provide a shortened path between existing origins and destinations, thereby shortening existing trips. In some cases, this trip-shortening effect might be substantial enough to reduce the amount of vehicle travel resulting from the project below the range found in the elasticities in the academic literature, or even lead a net reduction in vehicle travel overall. In such cases, the trip-shortening effect could be examined explicitly.

Whenever employing a travel demand model to assess induced vehicle travel, any limitation or known lack of sensitivity in the analysis that might cause substantial errors in the VMT estimate (for example, model insensitivity to one of the components of induced VMT described above) should be disclosed and characterized, and a description should be provided on how it could influence the analysis results. A discussion of the potential error or bias should be carried into analyses that rely on the VMT analysis, such as greenhouse gas emissions, air quality, energy, and noise.
SB 743.

The Challenges of VMT Analysis

Ronald T. Milam, AICP, PTP
Fehr Peers
Change & Choice

Revised Proposal on Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA

Implementing Senate Bill 743 (Steinberg, 2013)

SB 743
AB 417
AB 2245
SB 226
AB 1358
SB 375
SB 97
AB 32
(4) Methodology. The lead agency's evaluation of the vehicle miles traveled associated with a project is subject to a rule of reason. A lead agency should not confine its evaluation to its own political boundary. A lead agency may use models to estimate a project's vehicle miles traveled, and may revise those estimates to reflect professional judgment based on substantial evidence. Any assumptions used to estimate vehicle miles traveled and any revisions to model outputs should be documented and explained in the environmental document prepared for the project.
## Change

**NO SYNCHRO EQUIVALENT?**

<table>
<thead>
<tr>
<th>Sketch Tool</th>
<th>Output</th>
<th>Technical &amp; Legal Defensibility</th>
<th>Parameter Sensitivity</th>
<th>Administrative Utility</th>
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<td>CalEEMod</td>
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<td>+</td>
<td>++</td>
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<td>Sketch 7</td>
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<tr>
<td>VMT Impact Tool/Salon</td>
<td>% Change in VMT</td>
<td>+</td>
<td>+</td>
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</tr>
<tr>
<td>Green TRIP Connect</td>
<td>VMT; Change in VMT</td>
<td>+</td>
<td>+</td>
<td>++</td>
</tr>
<tr>
<td>UrbanFootprint</td>
<td>VMT</td>
<td>+++</td>
<td>+</td>
<td>+</td>
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<tr>
<td>Envision Tomorrow</td>
<td>VMT</td>
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<td>+</td>
<td>+</td>
</tr>
<tr>
<td>CA Smart Growth Tool</td>
<td>Trips</td>
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<td>+</td>
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<tr>
<td>URBEMIS 2007</td>
<td>VMT</td>
<td>+</td>
<td>++</td>
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<td>VMT</td>
<td>++</td>
<td>+</td>
<td>+</td>
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<td>Trips; VMT</td>
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<td>+</td>
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<tr>
<td>TDM+</td>
<td>% Change in VMT</td>
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### WHAT VMT COUNTS?

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<th>GHG</th>
<th>Energy</th>
<th>SB 743 Transportation</th>
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<td><strong>Residential Project</strong></td>
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<td>Home-based work</td>
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<td>✓</td>
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<tr>
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<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Non-home-based</td>
<td>?</td>
<td>?</td>
<td>?</td>
<td>✓</td>
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<tr>
<td><strong>Office Project</strong></td>
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<td>✓</td>
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<tr>
<td>Visitor</td>
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<tr>
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<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Maintenance/Security</td>
<td>✓</td>
<td>✓</td>
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<td>✓</td>
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</tbody>
</table>
Choice

WHAT VMT COUNTS?

Project Generated VMT vs. the Project’s Effect on VMT
Project vs. Cumulative

FEHR & PEERS
Single-Family Detached Housing (210)

Average Vehicle Trip Ends vs: Dwelling Units
On or: Weekday

Number of Studies: 350
Avg. Number of Dwelling Units: 197
Directional Distribution: 50% entering, 50% exiting

Trip Generation per Dwelling Unit

<table>
<thead>
<tr>
<th>Average Rate</th>
<th>Range of Rates</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.57</td>
<td>4.31 - 21.85</td>
<td>3.69</td>
</tr>
</tbody>
</table>

Data Plot and Equation

Fitted Curve Equation: \( \ln(T) = 0.92 \ln(X) + 2.71 \), \( R^2 = 0.90 \)

PM Peak Hour

ITE

ITE Handbook

MXD

Counts

Fehr Peers
Daily Household VMT per Capita

Los Angeles: 9.3
SCAG: 17.2

Daily Work VMT per Employee

Los Angeles: 12.9
SCAG: 21.3
<table>
<thead>
<tr>
<th>Area Planning Commission</th>
<th>Daily Household per Capita</th>
<th>Daily Work VMT per Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central</td>
<td>6.2</td>
<td>7.8</td>
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<tr>
<td>East LA</td>
<td>7.5</td>
<td>12.9</td>
</tr>
<tr>
<td>Harbor</td>
<td>9.4</td>
<td>12.5</td>
</tr>
<tr>
<td>North Valley</td>
<td>9.4</td>
<td>14.9</td>
</tr>
<tr>
<td>South LA</td>
<td>6.2</td>
<td>11.8</td>
</tr>
<tr>
<td>South Valley</td>
<td>9.6</td>
<td>11.6</td>
</tr>
<tr>
<td>West LA</td>
<td>7.7</td>
<td>11.1</td>
</tr>
</tbody>
</table>
Uncertainty

Disruptive Trends

Gasoline Prices
GDP, Real Income Growth
Household Formation
Labor Force Participation
Driving Age Population
Licensing Regulations
Non-Auto Mode Options
Suburban & Urban Migration

Congestion & Time Use
Tele-Commuting
Social Networking
Internet Shopping
Vehicle Ownership
Goods & Services Delivery
Autonomous Cars
Shared Mobility Marketplace
Figure 1. The evolution of shared mobility services

<table>
<thead>
<tr>
<th>Carsharing 1.0</th>
<th>Early model of carsharing where vehicles are picked up and returned to the same location; typically through an hourly rental</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carsharing 2.0</td>
<td>Second generation of carsharing where vehicles can be picked up and dropped off in different locations (possibly by zone vs. designated parking spots); typically charged by minute</td>
</tr>
<tr>
<td>Carsharing 3.0</td>
<td>Peer-to-peer sharing where individuals can rent out their personal vehicles to others when not in use</td>
</tr>
<tr>
<td>Ride-hailing</td>
<td>Platform where individuals can hail and pay for a ride from a professional or part-time driver through an app</td>
</tr>
<tr>
<td>Shared Ride-hailing</td>
<td>Extension of ride-hailing where individuals can be matched in real-time to share rides with others going on a similar route</td>
</tr>
<tr>
<td>Microtransit</td>
<td>App and technology-enabled shuttle services, typically in a van-size vehicle; some with dynamic routing, others with semi-fixed routes</td>
</tr>
</tbody>
</table>

Source: Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States, October 2017, UC Davis Institute of Transportation Studies.
Figure 14. Mode substitution, weighted by frequency of ride-hailing use

Survey question: If Uber or Lyft were unavailable, which transportation alternatives would you use for the trips that you make using Uber or Lyft?

Source: Disruptive Transportation: The Adoption, Utilization, and Impacts of Ride-Hailing in the United States, October 2017, UC Davis Institute of Transportation Studies.
TNCs to AVs - shared vs owned
TNCs to AVs costs

12 - 50¢/mi.
AV effects

- 7 Regional Travel Demand Models
- 2 Freeway Simulations
- 2 Major Transit Station Simulations

How will automated vehicles influence the future of travel?

Agencies dedicate a great deal of time and effort developing and using software tools to estimate future travel behavior. It’s not clear how people’s travel choices will change as automated vehicles (AVs) become more prevalent, nor is it clear how to best predict those choices.

Although little is clear at this point, it is clear that our existing models need to evolve. So our FP Think Initiative tested how AVs might change the predicted outcomes of seven regional travel models from around the U.S. The results are shown for scenarios where AVs are privately owned and where half of trips are made as shared rides.
AV tests
what happened

VEHICLES
RANGE OF RESULTS

PRIVATE AV OWNERSHIP
50% SHARED AVs

-15%
0%
15%
30%
45%
60%

Vehicle Miles Traveled
Vehicle Trips
Average Vehicle Trip Length

AV model results
AV tests
what happened

PRIVATE AV OWNERSHIP

50% SHARED AVs results coming soon.

TRANSPORT

RANGE OF RESULTS

AV model results
Rail Transit Trips
Bus Transit Trips
Transit Trips

60%
45%
30%
15%
0%
-15%
-30%
-45%
-60%
On September 27, 2013, California Governor Jerry Brown signed SB 743 into law and started a process that could fundamentally change transportation impact analysis as part of CEQA compliance. These changes will include elimination of auto delay, level of service (LOS), and other similar measures of vehicular capacity or traffic congestion as a basis for determining significant impacts in many parts of California (if not statewide). Further, parking impacts will not be considered significant impacts on the environment for select development projects within infill areas with nearby frequent transit service. According to the legislative intent contained in SB 743, these changes to current practice were necessary to more appropriately balance the needs of congestion management with statewide goals related to infill development, promotion of public health through active transportation, and reduction of greenhouse gas emissions.
SB 743

Questions

The Challenges of VMT Analysis

Ronald T. Milam, AICP, PTP
r.milam@fehrandpeers.com

FEHR & PEERS
Villaraigosa and Newsom want to build more houses in California than ever before. Experts see the candidates' goal as an empty promise.
Two of California's leading candidates for governor say they're going to end the housing shortage, a driver of the state's affordability crisis.

Lt. Gov. Gavin Newsom and former Los Angeles Mayor Antonio Villaraigosa both have said they want developers in California to build a half million homes in a year — something that's never happened, at least in modern history. And they want builders to do it for seven straight years, resulting in 3.5 million new homes from the time the next governor takes office through 2025.
Those numbers are so out of scale with California's history that they might be impossible to achieve. Practical concerns, including developers lining up enough financing and construction workers to build so many homes so quickly, could stymie the effort. Meeting the goals could also require rolling back decades of popular state policies on growth, taxation and the environment, according to housing academics and economists.

Without specific plans to transform how housing gets approved in California, said Christopher Thornberg, founding partner of Los Angeles-based consulting firm Beacon Economics, Newsom and Villaraigosa's promises are empty.

"They make it sound so easy"

A message from Grainger

Tough questions are no match for these tech experts.

SEE MORE
"You're just saying it," Thornberg said of the homebuilding goals. "You don't really mean it."

Newsom and Villaraigosa said in separate statements to The Times that setting the 3.5-million home goal ensures they'll be held accountable to whatever needs to be done to attain it.

Here's why the two candidates' goals will be so difficult to achieve and how they say they're going to do it.

**How many houses are we actually talking about?**

For decades, not enough homes have been built in California to accommodate a growing population, leading to a spike in housing costs. Since 2011, for instance, the Bay Area has added about 627,000 new jobs but only 138,000 homes, according to the Building Industry Assn. of the Bay Area.

Newsom and Villaraigosa's homebuilding goals would address that problem, but they're without precedent.

Only twice since 1954 — the year the state building industry began tracking permits — have developers built more than 300,000 homes in a year. The highest year on record is 1963, when 322,018 home permits were issued.

To reach 500,000 homes in a year, the state would need to replicate its largest production in modern history plus an additional 178,000 homes, a number the state has surpassed just three times in the past 27 years.
Unprecedented homebuilding goals
Gubernatorial candidates Gavin Newsom and Antonio Villaraigosa want 500,000 new homes annually through 2025.

Source: Construction Industry Research Board @latimesgraphics
(Los Angeles Times)

Where do these numbers come from?

The goal of 3.5 million homes originated in a 2016 report on California's housing problems by the McKinsey Global Institute, a private think tank.

The report found that California ranked 49th in the country in housing production per capita and estimated the state would need 3.5 million new units through 2025 to build homes at a per capita rate equivalent to New Jersey and New York.

California could achieve that goal, the report said, through a dramatic increase in development near transit, increasing building on parcels already zoned for apartments and condominiums and adding some units to single-family parcels.

But there’s a crucial difference between the McKinsey report and the pledges from Newsom and Villaraigosa. The McKinsey report sets a goal for California to build 3.5 million homes from 2015 through 2025, an 11-year period. The gubernatorial
How do they plan to get there?

Housing affordability has emerged as one of the most prominent issues in the gubernatorial campaign, and all major candidates have pledged to address the problem. State Treasurer John Chiang, also a Democrat, has set a goal of having developers build 1.6 million homes for low-income Californians by 2030 through a mix of state bond funding, tax credits and other subsidies.

Newsom and Villaraigosa, however, are the only ones to have set the 3.5-million home goal.

Newsom’s proposal relies on spending hundreds of millions of dollars more on low-income homes, approving some development through regional governments rather than solely at the local level and financially rewarding cities and counties that approve housing, especially near transit, and punishing those that don't.

Villaraigosa emphasizes sequestering property tax dollars to finance low-income housing, making loans to homeowners who want to build a second unit on their lots and making unspecified changes to the California Environmental Quality Act, or CEQA, the 1970 law that requires developers to analyze and lessen a project's effect on the environment.
contend that simply setting a bold goal to reduce the red tape needed to meet it.

"A crisis of this magnitude requires ambitious goal setting matched with focused leadership and bold, innovative policy initiatives," Newsom said in a statement responding to questions from The Times. "It requires an affordable housing 'moonshot.'"

"Housing has to be delivered at the local level, and building consensus is the only way to get there," Villaraigosa said in a statement. "It comes down to having the courage and experience to lead on this issue, and I am committed to getting it done."

**What would it actually take?**

As governor, Newsom or Villaraigosa would have to reshape how housing gets permitted to make the process faster and more likely to result in approval.

Doing so, experts said, could require taking on three of the most substantial barriers to large-scale housing production, all of which have had long enjoyed broad support.

Proposition 13, the 1978 ballot initiative that restricts property tax increases, which gives cities incentives to approve commercial and hotel development instead of housing because those projects generate more local tax revenues. It has also helped protect homeowners from rising taxes.

— The California Environmental Quality Act, which creates a lengthy process for assessing the effects of new housing and leaves projects vulnerable to litigation. Environmental groups also credit the law with preserving the state's natural beauty.

— Local control over development decisions. Cities and counties determine what is built in their communities, and desirable coastal locales often prefer restrictions on development to protect their character.

— The 1978 Davis-Stirling Act, which requires a fair share of affordable housing, ranging from 10% to 40% of all units on new projects involving 10 or more residential units...
Michael Lens, an associate professor of urban planning and public policy at UCLA, said the candidates would need to make substantial changes to all three policies, potentially even scrapping them, if they wanted to reach the homebuilding targets.

"You could take away one of those pillars and have a wobblier table of housing resistance," Lens said. "But [removing] all three would be more useful."

The housing production goal also could conflict with other promises. Newsom and Villaraigosa support California’s ambitious greenhouse gas reduction targets, which require concentrating homes near jobs and transit so people drive less. That means the state couldn’t count on large, single-family developments, such as suburban projects built during an early 2000s surge in production, to meet the 3.5-million home target.

Even if it were politically possible to supercharge housing production, there are practical problems that the candidates would have less control over. After a long period of growth, Gov. Jerry Brown has warned that the state economy should expect a slowdown in the coming years, which could also decelerate development.

In addition, it takes time for builders to secure land and financing, no matter how quickly a government approves blueprints and permits. Changes implemented on
"Depending on the size of the project, the stuff that starts in 2019 might not even come online until somewhere around 2025," Lens said.

There have to be enough construction workers to build all those homes, too. California contractors already are having trouble finding labor, and that's before spending ramps up on more than $5 billion annually in road repairs and transit upgrades coming after the Legislature approved a gas tax hike last year, said Peter Tateishi, CEO of the Associated General Contractors of California.

"We don't see a path to building 500,000 homes in one year on top of all the other infrastructure projects that are on the docket," Tateishi said.

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ALSO

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Investigation finds state Sen. Bob Hertzberg's hugs were unwanted, but not sexual in nature

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