

CALIFORNIA NATURAL RESOURCES AGENCY



FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

AMENDMENTS TO THE STATE CEQA GUIDELINES

OAL NOTICE FILE NO. Z-2018-0116-12

NOVEMBER 2018

# Final Statement of Reasons

## Update to the Initial Statement of Reasons

The California Natural Resources Agency (the “Natural Resources Agency” or “Agency”) proposes to amend the Guidelines Implementing the California Environmental Quality Act (Pub. Resources Code section 21000, et seq.) (“CEQA Guidelines”). The proposed amendments address legislative changes to the California Environmental Quality Act (CEQA), clarify certain portions of the existing CEQA Guidelines, and update the CEQA Guidelines to be consistent with recent court decisions.

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387, plus appendices. Public agencies, project proponents, and third parties, who wish to enforce the requirements of CEQA, rely on the CEQA Guidelines to provide a comprehensive guide on compliance with CEQA. Subdivision (f) of section 21083 requires the Agency, in consultation with the Office of Planning and Research (“OPR”), to certify, adopt, and amend the CEQA Guidelines at least once every two years.

The Natural Resources Agency has made the following changes to the CEQA Guidelines:

Add sections: 15064.3 and 15234.

Amend sections: 15004, 15051, 15061, 15062, 15063, 15064, 15064.4, 15064.7, 15072, 15075, 15082, 15086, 15087, 15088, 15094, 15107, 15124, 15125, 15126.2, 15126.4, 15152, 15155, 15168, 15182, 15222, 15269, 15301, 15357, 15370, and Appendix G, Appendix M and Appendix N.

The CEQA Guidelines are unique among administrative regulations. They provide a carefully organized, step-by-step guide to the environmental review process. As a result, rather than turning to the statute and case law, many agency staff and planners look to the CEQA Guidelines as a comprehensive source of information regarding CEQA’s requirements.

## Background

The last comprehensive update to the CEQA Guidelines occurred in the late 1990s. Since 2011, the Governor’s Office of Planning and Research (“OPR”) and the Natural Resources Agency have informally collected ideas on possible improvements to the CEQA Guidelines. In 2013, OPR and the Agency distributed a formal [Solicitation for Input](#) on possible improvements. Specifically, the solicitation asked for suggestions on efficiency improvements, substantive improvements, and technical improvements. Stakeholders offered many ideas. After considering this input, OPR developed a [possible list of topics](#) to

address in the update, and again sought and received substantial public input. Based on that input, as well as input received during informal stakeholder meetings, conferences, and other venues, OPR, in consultation with the Agency, developed a Preliminary Discussion Draft of proposed changes to the CEQA Guidelines. As that process proceeded, OPR, again in consultation with the Agency, developed proposed updates related to transportation impacts, as well as a proposed update related to the evaluation of hazards in response to the California Supreme Court's holding in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal. 4th 369.

In November 2017, OPR finalized the package of updates and transmitted them to the Natural Resources Agency. The Agency then prepared the rulemaking documents required by the Administrative Procedures Act, including a Standardized Regulatory Impact Assessment to evaluate the potential economic impacts of the package.

### Anticipated Benefits of the Proposed Regulations

Approximately thirty (30) sections have been identified for adoption or amendment during this rulemaking process. Several of those changes are intended to, both directly and indirectly, reduce greenhouse gas emissions and better enable communities to respond to the effects of climate change. Additionally, several changes should help agencies accommodate more homes and jobs within California's existing urban areas. Doing so should help people find homes and get to where they need to go more quickly and affordably while also preserving California's natural resources. Finally, many of the changes are intended to make the CEQA process easier to navigate by, among other things, improving exemptions, making existing environmental documents easier to rely on for later projects, and clarifying rules governing the CEQA process.

Regarding the change related to transportation impacts, the Agency's Statement of Regulatory Impact Assessment identified numerous potential direct and indirect benefits of reducing vehicle miles traveled. Realization of those benefits will depend on the degree to which, pursuant to this CEQA Guidelines update, lead agencies use the streamlined approaches for analysis of low-VMT projects, mitigate high-VMT projects, or choose lower VMT project alternatives.<sup>1</sup> Some of the benefits, among many others, that may result from reducing vehicle miles traveled are described qualitatively below:

- *Better health and avoided health care costs.* Higher vehicle miles traveled is associated with more auto collisions, more air pollution, more greenhouse gas emissions, less active transportation, and less transit use. If California achieves its goals of doubling walking and tripling biking (Caltrans Strategic Management Plan), 2,095 annual deaths will be avoided. Increasing active transit modes would help reduce air pollution and greenhouse gas emissions. Estimates of the annual monetized value of prevented deaths and disabilities in California resulting from achieving those targets ranges from \$1 billion to \$15.5 billion.<sup>2</sup>

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<sup>1</sup> Lead agencies determine whether any particular mitigation measure is feasible in the context of the project under review. (See, e.g., CEQA Guidelines § 15091.) Further, CEQA allows a lead agency to approve a project that has significant environmental impacts so long as it finds that the benefits of the project outweigh those impacts. (*Id.* at § 15093.)

<sup>2</sup> Maizlish N. *Increasing Walking, Cycling, and Transit: Improving Californians' Health, Saving Costs, and Reducing Greenhouse Gases. Final Report.* California Department of Public Health (CDPH), 2016.

- *Reduction in transportation, building energy, and water costs.* Less vehicle travel reduces vehicle fuel (or electricity), maintenance, parking, and in some cases vehicle ownership costs. Transportation costs are typically the second greatest category of household expenditure after housing itself ([Bureau of Labor Statistics, Consumer Expenditures](#)). Compact development, which is associated with lower vehicle miles traveled, tends to consume less building energy and irrigation water, leading to savings to residents and businesses. Busch et al., 2015 estimated that if 85 percent of new housing and jobs added in the state until 2030 were located within existing urban boundaries, it would reduce per capita vehicle miles traveled by about 12 percent below 2014 levels.<sup>3</sup> That combination of reduced vehicle miles traveled and more compact development would, in turn, result in an estimated \$250 billion in household cost savings cumulative to 2030 (with an average annual savings per household in 2030 of \$2,000). Household costs analyzed in the Busch, et al. study included auto fuel, ownership and maintenance costs, as well as residential energy and water costs.
- *Reduction in travel times to destinations.* Reducing vehicle miles traveled reduces congestion regionally, decreasing travel times, and may also encourage more investment in multi-modal infrastructure. Even if there is localized congestion, due to increased density of development, travel times decrease because of better proximity (Mondschein, 2015).<sup>4</sup>
- *Cleaner water.* Motor vehicle travel can cause deposition of pollutants onto roadways, which can then be carried by stormwater runoff into waterways. Fuel, oil, and other liquids used in motor vehicles can leak from vehicles onto the ground (Delucchi, 2000). Brake dust and tire wear can further cause particles to be deposited onto the ground (Thorpe and Harrison, 2008). Brake pads and tire compounds are made out of compounds that include metal. Further, motor vehicles require roadways for travel. Paved roadways are impervious surfaces which prevent infiltration of storm water in the ground. Impervious surfaces can increase the rate, volume, and speed, and temperature of stormwater runoff (US Environmental Protection Agency, 2003). Wearing down of roadways can further cause particles to be deposited onto the ground (Thorpe and Harrison, 2008). The Victoria Transportation Policy Institute (2015) estimates that in total that motor vehicle contributions to water pollution cost approximately 42 billion dollars per year or 1.4 cents per mile.

The Agency also expects more sustainable development decisions to result from the clarified sections addressing water supply, energy, wildfire, greenhouse gas emissions, as well as the clarified exemptions for transit oriented developments and upgrades to existing facilities. Other benefits of the remainder of the CEQA Guidelines update are expected to include greater certainty for both public agencies and private applicants, as well as time and cost savings due to clearer rules.

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<https://www.cdph.ca.gov/programs/Documents/IncreasingWalkingCyclingTransitFinalReport2016rev2017-01-28.pdf>

<sup>3</sup> Busch C., et al., *Moving California Forward, How Smart Growth Can Help California Reach Its 2030 Climate Target While Creating Economic and Environmental Co-Benefits*, Nov. 2015, at p. 26.

<sup>4</sup> Mondschein A. *Congested Development: A Study of Traffic Delays, Access, and Economic Activity in Metropolitan Los Angeles*, Institute of Transportation Studies, UCLA Luskin School of Public Affairs, Sept. 2105.

## What is in this Package?

This rulemaking package contains changes or additions involving nearly thirty different sections of the Guidelines addressing nearly every step of the environmental review process. It is a balanced package that is intended to make the process easier and quicker to implement, and better protect natural and fiscal resources consistent with California's environmental policies.

### Efficiency Improvements

The package includes several changes intended to result in a smoother, more predictable process for agencies, project applicants and the public.

First, the package promotes use of existing regulatory standards in the CEQA process. Using standards as "thresholds of significance" creates a predictable starting point for environmental analysis, and allows agencies to rely on the expertise of the regulatory body, without foreclosing consideration of possible project-specific effects.

Second, the package updates the environmental checklist that most agencies use to conduct their environmental review. Redundant questions in the existing checklist are proposed to be eliminated and some questions would be updated to address contemporary topics. The checklist has also been updated with new questions related to transportation and wildfire, pursuant to Senate Bill 743 (Steinberg, 2013), and Senate Bill 1241 (Kehoe, 2012), respectively.

Third, the package includes several changes to make existing programmatic environmental review easier to use for later projects. Specifically, it clarifies the rules on tiering, and provides additional guidance on when a later project may be considered within the scope of a program EIR.

Fourth, the package enhances several exemptions. For example, consistent with Senate Bill 743 (Steinberg, 2013), it updates an existing exemption for projects implementing a specific plan to include not just residential, but also commercial and mixed-use projects near transit. It also clarifies the rules on the exemption for changes to existing facilities so that vacant buildings can more easily be redeveloped. Changes to that same exemption will also promote pedestrian, bicycle and streetscape improvements within an existing right of way.

Finally, the package includes a new section to assist agencies in complying with CEQA following resolution of a court challenge, and help the public and project proponents understand the effect of the remand on project implementation.

### Substantive Improvements

The package also contains substantive improvements related to environmental protection.

First, the package provides guidance regarding energy impacts analysis. Specifically, it requires an EIR to include an analysis of a project's energy impacts that addresses not just building design, but also transportation, equipment use, location, and other relevant factors.

Second, the package includes guidance on the analysis of water supply impacts. The guidance is built on the holding in the California Supreme Court decision in *Vineyard Area Citizens for Responsible Growth v.*

*City of Rancho Cordova* (2007) 40 Cal. 4th 412. It requires analysis of a proposed project’s possible sources of water supply over the life of the project and the environmental impacts of supplying that water to the project. The analysis must consider any uncertainties in supply, as well as potential alternatives.

Third, as directed in Senate Bill 743, the package includes a new section addressing the evaluation of transportation impacts. The current emphasis on traffic congestion in transportation analyses tends to promote increased vehicle use. This new guidance instead focuses on a project’s effect on vehicle miles traveled, which should promote project designs that reduce reliance on automobile travel.

Fourth, the package updates the guideline addressing greenhouse gas emissions to reflect recent case law. Among other changes, the Agency clarifies that a project’s incremental contribution to the impacts of climate change should not be compared to state, national or global emissions to determine whether the project’s emissions are cumulatively considerable. The changes also clarify that, if relying on consistency with state goals and policies to determine significance, the lead agency should explain how the project’s emissions are consistent with those goals.

### Technical Improvements

The package also includes many technical changes to conform to recent cases and statutory changes. For example, one of the changes clarifies when agencies must consider the effects of locating projects in hazardous locations, in response to the California Supreme Court’s ruling in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal. 4th 369. Others clarify when it may be appropriate to use projected future conditions as the environmental baseline. Another change addresses when agencies may defer specific details of mitigation measures until after project approval. The package also includes a set of changes related to the duty of lead agencies to provide detailed responses to comments on a project. The changes clarify that a general response may be appropriate when a comment submits voluminous data and information without explaining its relevance to the project. Other changes address a range of topics such as selecting the lead agency, posting notices with county clerks, clarifying the definition of “discretionary,” and others. Detailed Description of Proposed Changes

The specific changes proposed in this package are described in detail below in the order in which they would appear in the CEQA Guidelines.

### 15004. TIME OF PREPARATION

#### Specific Purposes of the Amendment

CEQA Guidelines section 15004 states the requirement that environmental impact reports (EIRs) and Negative Declarations be prepared before an agency makes a decision on the project and early enough to help influence the project’s plans or design.

In *Save Tara v. City of West Hollywood* (“*Save Tara*”) (2008) 45 Cal.4th 116, the California Supreme Court addressed the issue of when CEQA applies to certain activities that precede project approval. The court declined to set forth a bright-line rule. Instead, the court concluded

that several factors are relevant to the determination of when CEQA review must be completed. The purpose of the addition of subdivision (b)(4) is to assist lead agencies in applying the principles identified by the California Supreme Court in the *Save Tara* decision. The first sentence of subdivision (b)(4) acknowledges that pre-approval agreements may fall on a spectrum between mere interest in a project and a commitment to a definite course of action. That sentence also reflects the Supreme Court's holding that circumstances surrounding the activity are relevant to the determination of whether an agency has, as a practical matter, committed to a project. The second sentence provides an example of what could likely not precede CEQA review, such as an agreement that vests development rights. The third sentence, on the other hand, provides examples of characteristics of agreements that may be executed prior to CEQA review. These include agreements that do not foreclose any mitigation measures or project alternative and that are conditioned on completion of CEQA review.

### **Necessity**

The proposed addition of (b)(4) of CEQA Guidelines section 15004 is reasonably necessary to reflect the California Supreme Court's decision in *Save Tara*. The additional language will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with case law that has interpreted CEQA, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to the California Supreme Court's determination in *Save Tara*.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing case law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## 15051. CRITERIA FOR IDENTIFYING THE LEAD AGENCY

### **Specific Purposes of the Amendment**

This CEQA Guidelines section provides criteria for identifying the Lead Agency when a project may require approval by more than one public agency under CEQA. Public Resources Code section 21067 defines “lead agency” as “the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.” Similarly, the CEQA Guidelines define the lead agency as “the public agency which has the principal responsibility for carrying out or approving a project.... Criteria for determining which agency will be the lead agency for a project is contained in section 15051.” (CEQA Guidelines, § 15367.) CEQA Guidelines section 15051, subdivisions (a) and (b), explain which entity will act as lead agency under usual circumstances, and subdivisions (c) and (d) address circumstances when more than one agency could potentially be lead.

CEQA Guidelines, section 15051, subdivision (c), states that, “[w]here more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the lead agency.” However, subdivision (d) states that “[w]here the provisions of subdivisions (a), (b), and (c) leave two or more public agencies with a substantial claim to be the lead agency, the public agencies may by agreement designate an agency as the lead agency....” As these sections are currently written, where two public agencies equally meet the criteria for lead agency, the agency which will act first must be the lead under subdivision (c), which effectually renders subdivision (d) inapplicable other than with respect to subdivision (a). The existing language, if read literally, would prevent two potential lead agencies which meet the criteria in subdivision (b), each with a substantial claim to be the lead, from agreeing to designate one as the lead unless both happen to act at the exact same moment on the project.

The purpose of the amendment is to increase the flexibility in the determination of a lead agency by changing the word “shall” to “will normally” to clarify that where more than one public agency meets the criteria in subdivision (b), the agencies may agree pursuant to subdivision (d) to designate one entity as the lead.

### **Necessity**

The proposed changes are reasonably necessary to provide clarity and to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose



for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be internally consistent, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law and makes this CEQA Guideline internally consistent. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15061. REVIEW OF EXEMPTION**

### **Specific Purposes of the Amendment**

CEQA Guidelines section 15061 describes when a project or activity is exempt from CEQA. The Natural Resources Agency proposes to amend subdivision (b)(3) of Section 15061. Currently, subdivision (b)(3) states that an activity is covered by the "general rule" that an activity is exempt from CEQA if there is no possibility that activity may have a significant effect on the environment. The Natural Resources Agency proposes to replace the phrase "general rule" with the phrase "common sense exemption" in order to match the language used by the California Supreme Court when evaluating the application of this CEQA exemption. (See, *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 389 (using the phrase "common sense exemption" to apply Section 15061).)

### **Necessity**

This clarification is needed to match practitioners' customary use of the term "common sense exemption" and to prevent possible confusion for others who see or hear references to the term but cannot find it in the text of the CEQA Guidelines. Additionally, the proposed change is reasonably necessary to provide clarity and to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected

private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with case law that has interpreted CEQA, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing case law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

### **15062. NOTICE OF EXEMPTION Specific Purposes of the Amendment**

This section prescribes the use and content of the Notice of Exemption. Agencies are authorized but, in most cases, not required to file this notice. The regulation spells out minimum contents so that people can recognize whether a particular notice applies to the project with which they are concerned. The section notes that the effect of filing the notice is to start a short statute of limitations period. If the notice is not filed, a longer period would apply. Failure to comply with all of the requirements for filing notices of exemption results in the longer, 180-day, statute of limitations.

Pursuant to Assembly Bill 320 (Hill, 2011), the Natural Resources Agency added a new subdivision (a)(6) to Section 15062 of the CEQA Guidelines. AB 320 amended Public Resource Code, sections 21108 and 21152 requiring certain information to be included in the Notice of Exemption consistent with CEQA Guidelines section 21065, subdivisions (b) and (c). Specifically, AB 320 requires the Notice of Exemption to include the identity of the person undertaking an activity, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use. Thus, the Natural Resources Agency added subdivision (a)(6) to section 15062 of the CEQA Guidelines to provide consistency with Public Resources Code, section 21108 and 21152.

### **Necessity**

This addition is necessary to implement the requirements of AB 320 (Hill, 2011) and to be consistent with Public Resources code, sections 21108 and 21152.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with Sections 21108 and 21152 of the Public Resources Code, and the proposed action adds no new substantive requirements per se. Rather, additional information regarding the project applicant must be included in the forms filed by public agencies. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15063. INITIAL STUDY**

### **Specific Purposes of the Amendment**

The purpose of this section is to describe the process, contents, and use of the Initial Study. The Natural Resources Agency proposes to add a new subsection (4) to Section 15063, subdivision (a), to specify the arrangements a lead agency may use to prepare an initial study. The Public Resources Code states that a public agency may prepare a draft environmental impact report or negative declaration directly or under contract to that public agency. (Pub. Resources Code, § 21082.1.) Section 15084 of the CEQA Guidelines implements the Public Resources Code by allowing lead agencies to prepare a draft environmental impact report directly or under contract. (See CEQA Guidelines, § 15084 subd. (d).) The CEQA Guidelines do not currently, however, contain a parallel provision for negative declarations or mitigated declarations.

A draft or mitigated negative declaration must include a copy of an initial study. (See CEQA Guidelines, § 15071, subd. (d) (stating that a negative declaration circulated for public review must include a copy of the initial study).) Therefore, the Natural Resources Agency proposes to add the new subsection to Section 15063, subdivision (a) to match the methods and arrangement used to prepare a draft environmental impact report and increase consistency in report preparation.

## **Necessity**

This addition is necessary to provide consistent guidance for lead agencies preparing environmental documents.

## **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be internally consistent, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

## **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing case law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15064. DETERMINING THE SIGNIFICANCE OF THE ENVIRONMENTAL EFFECTS CAUSED BY A PROJECT**

### **Specific Purposes of the Amendment**

A key step in the environmental review process is to determine whether a project may cause a significant effect on the environment. Section 15064 of the CEQA Guidelines provides general criteria to guide agencies in determining the significance of environmental effects of their projects as required by section 21083 of the Public Resources Code. The Natural Resources Agency updated CEQA Guidelines Section 15064 to expressly clarify that agencies may rely on standards adopted for environmental protection as thresholds of significance. Specifically, the Natural Resources Agency added subdivision (b)(2) to Section 15064.

The first sentence of subdivision (b)(2) states the rule, set forth in cases interpreting CEQA, that thresholds of significance may be used in the determination of significance. (See *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 111; see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1111.) Importantly, this new sentence also provides a cross-reference to CEQA Guidelines, Section 15064.7, which defines a threshold of significance.

The second sentence of this new subdivision provides that an agency that relies on a threshold of significance should explain how application of the threshold indicates a less than significant effect. This sentence recognizes the court’s caution in *Protect the Historic Amador Waterways* that “thresholds cannot be used to determine automatically whether a given effect will or will not be significant.” (*Protect the Historic Amador Waterways, supra*, 116 Cal. App. 4th at pp. 1108-1109.) This sentence is also consistent with several other provisions in the Guidelines. (See, e.g., CEQA Guidelines § 15064(h)(3) (“When relying on a plan, regulation or program [to evaluate cumulative impacts], the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project’s incremental contribution to the cumulative effect is not cumulatively considerable”); § 15063, subd. (d)(3) (initial study must include sufficient information to support its conclusions).) Notably, the explanation need not be lengthy. CEQA Guidelines Section 15128 provides the explanation that an impact is determined to be less than significant, and therefore was not analyzed in an EIR, need only be brief.

Finally, the third sentence of this new subdivision cautions that a lead agency must evaluate any substantial evidence supporting a fair argument that, despite compliance with thresholds, the project’s impacts are nevertheless significant. (*Protect the Historic Amador Waterways, supra*, 116 Cal. App. 4th at pp. 1108-1109 (“thresholds cannot be used to determine automatically whether a given effect will or will not be significant[;]” rather, “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”); see also *CBE, supra*, 103 Cal.App.4th at 112-113.)

This sentence does not alter the standard of review. Thus, in the context of an environmental impact report, a lead agency may weigh the evidence before it to reach a conclusion regarding the significance of a project’s effects. This added sentence clarifies, however, that a project’s compliance with a threshold does not excuse an agency of its obligation to consider the information presented to it regarding a project’s impacts. (*Rominger v. County of Colusa* (2014) 229 Cal. App. 4th 690, 717.) In other words, thresholds shall not be applied in a rote manner; analysis and evaluation of the evidence is still required. In this regard, this sentence is similar to a lead agency’s requirement to review and consider comments submitted on its environmental documents. (CEQA Guidelines, §§ 15074, subd. (b), 15088.)

### **Necessity**

The change is necessary to clarify a lead agency’s obligation to determine the significance of a proposed project and what evidence it must consider in reaching that conclusion. The Natural Resources Agency’s revision will clarify that compliance with relevant standards may be a basis for determining that the project’s impacts are less than significant.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be internally consistent, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. The proposed action also does not alter the applicable standard of review. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

### **15064.3. DETERMINING THE SIGNIFICANCE OF TRANSPORTATION IMPACTS**

Californians drive approximately 332 billion vehicle miles each year. Traffic studies used in CEQA documents have typically focused on one thing: the impact of projects on traffic flows. Senate Bill 743 (2013) required OPR and the Natural Resources Agency to develop alternative methods of measuring transportation impacts under CEQA. At a minimum, the new methods must apply within areas that are served by transit; however, the Guidelines may extend the new methods statewide. Once the Agency adopts the new transportation guideline, automobile delay (often called Level of Service) will no longer be considered to be an environmental impact under CEQA.

### **Explanation of Proposed New Section 15064.3**

New section 15064.3 contains several subdivisions, which are described below. In brief, these Guidelines provide that transportation impacts of projects are, in general, best measured by evaluating the project's vehicle miles traveled. Methodologies for evaluating such impacts are already in use for most land use projects, as well as many transit and active transportation projects. Methods for evaluating vehicle miles traveled for highway capacity projects continue to evolve, however, and so these Guidelines recognize a lead agency's discretion to analyze such projects, provided such analysis is consistent with CEQA and applicable planning requirements.

#### *Subdivision (a): Purpose*

Subdivision (a) sets forth the purpose of the entire new section 15064.3. First, the subdivision clarifies that the primary consideration, in an environmental analysis, regarding transportation is the amount

and distance that a project might cause people to drive. This captures two measures of transportation impacts: auto trips generated and vehicle miles traveled. These factors were identified by the legislature in SB 743. The last sentence clarifies that automobile delay is not a significant effect on the environment.

#### *Subdivision (b): Criteria for Analyzing Transportation Impacts*

While subdivision (a) sets forth general principles related to transportation analysis, subdivision (b) focuses on specific criteria for determining the significance of transportation impacts. It is further divided into four subdivisions: (1) land use projects, (2) transportation projects, (3) qualitative analysis, and (4) methodology.

#### Subdivision (b)(1): Land Use Projects

SB 743 did not authorize the Agency to set thresholds, but it did direct OPR and the Agency to develop Guidelines “for determining the significance of transportation impacts of projects[.]” (Pub. Resources Code § 21099(b)(2).) Therefore, to provide guidance on determining the significance of impacts, subdivision (b)(1) describes factors that might indicate whether the amount of a project’s vehicle miles traveled may be significant, or not.

#### Subdivision (b)(2): Transportation Projects

While subdivision (b)(1) addresses vehicle miles traveled associated with land use projects, subdivision (b)(2) focuses on impacts that result from certain transportation projects. Subdivision (b)(2) clarifies that lead agencies should presume that projects that reduce vehicle miles traveled, such as pedestrian, bicycle and transit projects, will have a less than significant impact. This subdivision further provides that lead agencies have discretion in which measure to use to evaluate highway capacity projects, provided that any such analysis is consistent with the requirements of CEQA and any other applicable requirements (e.g., local planning rules). Importantly, this provision does not prohibit capacity expansion. It also does not relieve agencies of the requirement to analyze any other potential impacts of such projects, including, but not limited to, greenhouse gas emissions and other air pollutants. Finally, recognizing that highway capacity projects may be analyzed at a programmatic level, subdivision (b)(2) states that lead agencies may be able to tier from a programmatic analysis that adequately addresses the effects of such capacity projects.

#### Subdivision (b)(4): Methodology

Lead agencies have the discretion to choose the most appropriate methodology to analyze a project’s vehicle miles traveled. Depending on the project, vehicle miles traveled may be best measured on a per person, per household or other similar unit of measurement. Subdivision (b)(4) also recognizes the role for both models and professional judgment in estimating vehicle miles traveled.

#### *Subdivision (c): Applicability*

The new procedures may be used immediately upon the effective date of these Guidelines by lead agencies that are ready to begin evaluating vehicle miles traveled, but jurisdictions will have until 2020 to start analyzing vehicle miles traveled if they need that time to update their procedures. In that case, those agencies would continue to evaluate transportation impacts by measuring congestion.

### **Necessity**

The proposed addition of CEQA Guidelines section 15064.3 is reasonably necessary to implement the direction in Public Resources Code 21099 that the CEQA Guidelines provide for a new methodology for analyzing transportation impacts of projects. The language of this section of the CEQA Guidelines follows the direction of the Legislature and ensures that that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered and rejected two alternatives to the proposed action. Under Alternative 1, the change from level of service to vehicle miles traveled would apply only to proposed projects within "transit priority areas." This is the minimum scope of what Senate Bill 743 requires. Proposed projects outside of transit priority areas would continue to prepare traffic analyses using level of service, or other measures of congestion.

The Agency rejected Alternative 1 for several reasons. First, this alternative would forgo substantial cost and time savings that are expected to result from studying vehicle miles traveled instead of congestion. Second, this alternative would be more likely to cause confusion and increase litigation risk. Greater uncertainty would result because this alternative would require two different types of analyses to be conducted, depending on location. Third, research indicates that a transportation analysis focused on vehicle miles traveled may result in numerous indirect benefits to individuals including improved health; savings on outlay for fuel, energy, and water; reduction of time spent in transport to destinations. Finally, this alternative would be less likely to achieve the purposes of SB 743. That legislation requires the updated CEQA Guidelines "promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses." As explained in the Office of Planning and Research's Preliminary Evaluation of Alternative Methods of Transportation Analysis, as a metric, vehicle miles traveled promotes those statutory purposes better than level of service.

Under Alternative 2, the analysis of vehicle miles traveled would apply to land use projects only and not to transportation projects. In other words, under this alternative, congestion analysis would continue to apply to roadway, transit, bicycle and pedestrian projects reviewed under CEQA.

The Agency rejected Alternative 2 because it would forgo the cost and time benefits described above for transit, bicycle and pedestrian projects. Those types of projects in particular are more likely to provide healthier, lower cost, more equitable transportation options. They are also a key strategy to reducing



greenhouse gas emissions. As a result, this alternative would be less likely to achieve the purposes of Senate Bill 743, requiring the CEQA Guidelines update to “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.”

### **The Action Will Not Have a Significant Adverse Economic Impact on Business**

The Agency has determined that the proposed action will not have a significant adverse economic impact on businesses, and instead, would lead to an overall economic benefit. Project proponents, including businesses, would experience time and cost savings related to document preparation largely because, with the changes required by SB 743, traffic studies would be less complicated and CEQA analysis may be streamlined, depending on the project’s proximity to transit. Private consulting businesses that prepare environmental documents may generate less revenue for preparing less expensive studies, but their receipts would vary based on project-specific factors, including project complexity and location.

## **15064.4 DETERMINING THE SIGNIFICANCE OF IMPACTS FROM GREENHOUSE GAS EMISSIONS**

### **Specific Purposes of Amendment**

The Agency has amended several portions of existing section 15064.4, as described below. The Agency added section 15064.4 to the CEQA Guidelines in 2010 as part of a package of amendments addressing greenhouse gas emissions, as directed by Senate Bill 97 (Dutton, 2007). The purpose of section 15064.4 is to assist lead agencies in determining the significance of a project’s greenhouse gas emissions on the environment.

#### *Subdivision (a)*

The first change is in subdivision (a) of section 15064.4. Subdivision (a) currently states that lead agencies “should” make a good faith effort to estimate or describe a project’s greenhouse gas emissions. The Agency replaced the word “should” with the word “shall” to clarify that evaluation of a project’s greenhouse gas emissions is a requirement of CEQA. (See Pub. Resources Code, § 21083.05; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 90-91 [“climate-change impacts are significant environmental impacts requiring analysis under CEQA”]; *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497 (SANDAG); see also CEQA Guidelines, § 15005 [defining the terms “should” and “shall”].) This clarification is necessary because some agencies continue to provide information regarding climate change in their projects’ environmental documents without actually determining whether the project’s greenhouse gas emissions are significant. A similar clarifying change has been made in subdivision (b), replacing the word “assessing” with the word “determining.” CEQA requires a lead agency to determine the significance of all environmental impacts. (Pub. Resources Code, § 21082.2; CEQA Guidelines, § 15064.)

#### *Subdivision (b)*

The Agency updated subdivision (b) of section 15064.4 by adding four sentences. That subdivision currently provides a list of factors that a lead agency should use when evaluating a project's greenhouse gas emissions. First, the Agency added a sentence clarifying that the focus of the lead agency's analysis should be on the project's effect on climate change. This clarification is necessary to avoid an incorrect focus on the quantity of emissions, and in particular how that quantity of emissions compares to statewide or global emissions. (See, e.g., *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 842 [invalidating an EIR that based its significance determination partly on comparing the project's emissions to statewide emissions]; *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 228 [invalidating an EIR because the lead agency did not provide sufficient evidence that "the Scoping Plan's statewide measure of emissions reduction can also serve as the criterion for an individual land use project"]; see also *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160-198-200 [upholding agency's greenhouse gas analysis that did not quantify emissions].) The Agency further clarified that lead agencies should consider the reasonably foreseeable incremental contribution of the project's emissions to the effects of climate change. In doing that analysis, agencies should avoid speculation. (CEQA Guidelines, §§ 15144 ["an agency must use its best efforts to find out and disclose all that it reasonably can"], 15145 ["[i]f, after a thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact"].)

In the second sentence of subdivision (b), the Agency clarified that a project's incremental contribution may be cumulatively considerable even if it appears relatively small compared to statewide, national or global emissions. This change is consistent with existing case law discussing cumulative impacts and the applicable portions of the Public Resources Code. The impacts analysis of greenhouse gas emissions is global in nature; "the fact that carbon dioxide and other greenhouse gases, once released into the atmosphere, are not contained in the local area of their emission means that the impacts to be evaluated are also global rather than local." (*Center for Biological Diversity v. Dept. of Fish & Wildlife, supra*, 62 Cal.4th at p. 220; *SANDAG, supra*, 3 Cal.5th at p. 512.) "[A]n individual project's emissions will most likely not have any appreciable impact on the global problem by themselves, but they will contribute to the significant cumulative impact caused by greenhouse gas emissions from other sources around the globe." (*Center for Biological Diversity v. Dept. of Fish & Wildlife, supra*, 62 Cal.4th at p. 219; *SANDAG, supra*, 3 Cal.5th at p. 512.) Thus, the primary question to be answered in the impacts analysis is "whether the project's incremental addition of greenhouse gases is 'cumulatively considerable' in light of the global problem, and thus significant." (*Ibid.*) Depending on the proposed project, the project's incremental contribution of greenhouse gases, even if minor, may be cumulatively considerable. (See *SANDAG, supra*, 3 Cal.5th at p. 515 ["The fact that a regional plan's contribution to reducing greenhouse gas emissions is likely to be small on a statewide level is not necessarily a basis for concluding that its impact will be insignificant in the context of a statewide goal."].)

In the third sentence of subdivision (b), the Agency added that lead agencies should consider a timeframe for the analysis that is appropriate for the project. CEQA requires agencies to consider a project's direct and indirect significant impacts on the environment, "giving due consideration to both the short-term and long-term effects." (CEQA Guidelines, § 15126.2, subd. (a); see Pub. Resources Code,

§ 21001, subd. (d) [state policy “[e]nsure[s] that the long-term protection of the environment . . . shall be the guiding criterion in public decisions”]; § 21001, subd. (g) [state policy requires “governmental agencies at all levels to consider . . . long-term benefits and costs, in addition to short-term benefits and costs . . .”]; § 21083 [requiring preparation of an EIR for a project that “has the potential to . . . achieve short-term, to the disadvantage of long-term, environmental goals”].) In some cases, it would be appropriate for agencies to consider a project’s long-term greenhouse gas impacts, such as for projects with long time horizons for implementation.

In the fourth sentence of subdivision (b), the Agency clarified that an agency’s analysis must reasonably reflect evolving scientific knowledge and state regulatory schemes. This clarification acknowledges *SANDAG, supra*, 3 Cal.5th 497. In that case, the California Supreme Court addressed the adequacy of an EIR prepared for a long-range regional transportation plan. In addressing the plan’s greenhouse gas emissions, the Court held the lead agency did not abuse its discretion by declining to analyze the consistency of projected long-term greenhouse gas emissions with the goals of an executive order declaring an emissions reduction goals for 2050. But the Court further stated: “we do not hold that the analysis of greenhouse gas impacts employed by SANDAG in this case will necessarily be sufficient going forward. CEQA requires public agencies like SANDAG to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes.” (*Id.* at p. 504; *see id.* at p. 519.)

The agency also changed subdivision (b)(3) of section 15064.4. That subdivision currently discusses the consideration of whether a project complies with a plan or regulation to reduce greenhouse gas emissions. The Agency clarified the first sentence of subdivision (b)(3) by adding a reference to CEQA Guidelines section 15183.5, which governs the contents of an agency’s plan for the reduction of greenhouse gas emissions. This addition is needed to clarify that lead agencies may rely on plans prepared pursuant to section 15183.5 in evaluating a project’s greenhouse gas emissions. This change is consistent with the Agency’s Final Statement of Reasons for the addition of section 15064.4, which states that “proposed section 15064.4 is intended to be read in conjunction with . . . proposed section 15183.5. Those sections each indicate that local and regional plans may be developed to reduce GHG emissions.” (Natural Resources Agency, Final Statement of Reasons (December 2009), p. 27; *see Mission Bay Alliance v. Office of Community Investment & Infrastructure, supra*, 6 Cal.App.5th at pp. 201-202 [upholding agency’s reliance on greenhouse gas strategy].)

Finally, the Agency added another sentence to subdivision (b)(3). The Agency clarified that in determining the significance of a project’s impacts, the lead agency may consider a project’s consistency with the State’s long-term climate goals or strategies, provided that substantial evidence supports the agency’s analysis of how those goals or strategies address the project’s incremental contribution to climate change and its conclusion that the project’s incremental contribution is consistent with those plans, goals, or strategies. This clarification implements the California Supreme Court’s decision in *Center for Biological Diversity v. Dept. of Fish & Wildlife, supra*, 62 Cal.4th 204. In that case, the EIR used consistency with Assembly Bill 32’s greenhouse gas emissions reduction goals as a significance threshold. The EIR also discussed the California Air Resources Board’s Scoping Plan and “business as usual” (BAU) scenario, and found that the project would emit less than the BAU scenario. The Court concluded that the agency used a permissible significance threshold, but failed to support with

substantial evidence the finding that the project’s greenhouse gas emissions would not have a cumulatively significant impact on the environment. (Id. at pp. 218-222, 225.) As the Court stated, the lead agency failed to establish through substantial evidence “a quantitative equivalence between the Scoping Plan’s statewide comparison and the EIR’s own project-level comparison . . . .” (Id. at p. 227.)

#### *Subdivision (c)*

The Agency added subdivision (c) to address the use of models and methodologies. The Agency clarifies that the lead agency has discretion to select the model or methodology it considers most appropriate to enable decision makers to intelligently take into account the project’s incremental contribution to climate change. Most of the text in the new subdivision (c) was taken from subdivision (a)(1) of the current section 15064.4. Additionally, the clarification regarding the agency’s discretion in selecting an appropriate model or methodology is consistent with CEQA Guidelines section 15151, which addresses the standards for adequacy of EIRs. (*Ibid.* [“An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make decision which intelligently takes account of environmental consequences.”].) Models play a role not only in estimating a project’s greenhouse gas emissions, but also in determining baseline emissions and applying thresholds. Moving the text to subdivision (c) clarifies that the guidance on models applies to the entire section. However, when an agency relies completely on a single quantitative method, it must research and document the quantitative parameters essential to that method. (*Center for Biological Diversity v. Dept. of Fish & Wildlife, supra*, 62 Cal.4th at p. 228.)

#### **Necessity**

The proposed amendments to CEQA Guidelines section 15064.4 are necessary to reflect recent case law involving climate change analysis, including decisions from the California Supreme Court. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497; *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70.) In addition to proposing necessary updates to this section, the Agency intends these changes to result in analyses that help decisionmakers and the public to meaningfully understand a project’s potential contribution to climate change.

#### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with case law. Additionally, the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only and would be implementing existing case law.

## **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The action implements and clarifies existing case law. Because the action does not add new substantive requirements, it will not result in an adverse impact on businesses in California.

### **15064.7. THRESHOLDS OF SIGNIFICANCE**

#### **Specific Purposes of the Amendment**

This section provides additional explanation of thresholds of significance. Section 15064.7 defines a threshold as “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).)

Thresholds of significance can inform not only the decision of whether to prepare an EIR but also the identification of effects to be analyzed in depth in the EIR, the requirement to make detailed findings on the feasibility of alternatives or mitigation measures to reduce or avoid the significant effects, and when found to be feasible, changes in the project to lessen the adverse environmental impacts.

Because environmental standards, if used correctly, may promote efficiency in the environmental review process, the Natural Resources Agency added subdivision (d) to CEQA Guidelines, Section 15064.7 on thresholds of significance. Consistent with the rulings in both *Communities for a Better Environment, et al., v. Resources Agency* (2002) 103 Cal.App.4th and *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4<sup>th</sup>, the first sentence recognizes that lead agencies may treat environmental standards as thresholds of significance. By promoting the use of environmental standards as thresholds of significance, the changes in Section 15064.7 are intended to make determinations of significance simpler and more predictable for all participants in the environmental review process.

The second sentence explains that in adopting or applying an environmental standard as a threshold, the lead agency should explain how application of the environmental standard indicates a less than significant effect. This sentence recognizes the court’s caution in *Protect the Historic Amador Waterways* that “thresholds cannot be used to determine automatically whether a given effect will or will not be significant.” (*Protect the Historic Amador Waterways, supra*, 116 Cal. App. 4th at pp. 1108-1109; see also *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 717.) This sentence is also consistent with a similar provision in existing subdivision (h)(3), which states: “When relying on a plan, regulation or program [to evaluate cumulative impacts], the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project’s incremental

contribution to the cumulative effect is not cumulatively considerable.” (CEQA Guidelines, § 15064, subd. (h)(3); see also §§ 15063, subd. (d)(3) (requiring an initial study to include sufficient information to support its conclusions); and, 15128 (requiring a lead agency to explain briefly the reasons that an impact is determined to be less than significant and therefore was not analyzed in an EIR).)

Finally, the third sentence provides criteria to assist a lead agency in determining whether a particular environmental standard is appropriate for use as a threshold of significance. The first criterion requires that the standard actually be adopted by some formal mechanism. Standards that have already undergone the scrutiny of a formal adoption process are more likely to provide a sound benchmark against which to measure a particular project’s impacts. The second criterion requires the standard to actually be adopted for the purpose of environmental protection. Such standards are more likely to provide useful information about a project’s environmental impacts than, for example, consumer protection standards. The third criterion requires that the standard actually govern the impact at issue. This is necessary to ensure that the standard relates to the impact of concern. (See, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16–20; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1382 (requiring analysis of single event noise despite compliance with cumulative noise standard).) The last criterion is that the standard must actually govern the project type. For example, some standards address plan-level activities, while others address project-specific activities.

Other changes in this section clarify that lead agencies may, but are not required to, formally adopt thresholds. Lead agencies may also use thresholds on a case-by-case basis.

### **Necessity**

The change is necessary to clarify a lead agency’s obligation to determine the significance of a proposed project and what evidence it must consider in reaching that conclusion. The Natural Resources Agency’s revision clarifies that compliance with relevant standards may be a basis for determining that the project’s impacts are less than significant. The changes in this section are necessary to assist lead agencies in determining when environmental standards may be used for this purpose.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with current case law, and the proposed action adds no new substantive

requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15072. NOTICE OF INTENT TO ADOPT A NEGATIVE DECLARATION OR MITIGATED NEGATIVE DECLARATION**

### **Specific Purposes of the Amendment**

CEQA Guidelines section 15072 describes a lead agency's obligations to provide notices of intent to specified recipients before the lead agency adopts a negative declaration or a mitigated negative declaration. The Natural Resources Agency made two changes to this section in response to concerns raised by stakeholders.

First, stakeholders have noted that there is some confusion about the word "referenced" as used in the CEQA Guidelines. (CEQA Guidelines, §§ 15072 and 15087.) Specifically, Section 15072(h) states that a notice of intent must list the address where all documents referenced in an initial study must be specified. Some agencies interpret "referenced" to mean every document that is cited in the environmental document, where others interpret it to mean every document that is incorporated by reference into the document pursuant to CEQA Guidelines, section 15150.

Documents that are "incorporated by reference" provide a portion of the document's overall analysis, and because the final initial study must reflect the independent judgment of the lead agency, one would expect a copy of the incorporated document to actually be among the lead agency's files. Other referenced documents may only provide supplementary information, and may be contained in a consultant's files or research libraries. While still valid sources of information, it is less important for such documents to actually be in the lead agency's possession. The Natural Resources Agency, therefore, finds that the latter interpretation to be a more practical interpretation of CEQA.

Second, the Natural Resources Agency added a sentence to subdivision (e) of Section 15072. The purpose of this subdivision is to list the agencies and entities in which a lead agency shall or may consult prior to completing an environmental impact report. (See, Pub. Resources Code, § 21104 (stating that the lead agency shall consult with, and obtain comments from each responsible,

trustee, or public agency that has jurisdiction over the project).) The Agency has clarified in this subdivision that lead agencies should consult public transit agencies with facilities within one-half mile of the proposed project. Doing so is likely to promote early information sharing and to avoid potential conflicts.

### **Necessity**

This addition is necessary to improve noticing standards, provide internal consistency between sections 15072, 15082 and 15150 of the CEQA Guidelines, and clarify that CEQA itself does not mandate that a lead agency include every document cited in an EIR for public review.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be internally consistent, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15075. NOTICE OF DETERMINATION ON A PROJECT FOR WHICH A PROPOSED NEGATIVE OR MITIGATED NEGATIVE DECLARATION HAS BEEN APPROVED**

### **Specific Purposes of the Amendment**

This section prescribes the use and content of a Notice of Determination on a project for which a proposed negative or mitigated negative declaration has been approved. The existing regulation spells out minimum contents so that people can recognize whether a particular notice applies to the project with which they are concerned. The section notes that the effect of filing the notice is to start a short statute of limitations period. If the notice is not filed, a longer period would apply. Failure to comply with all the requirements for filing notices of determination results in the longer, 180-day, statute of limitations.



Pursuant to Assembly Bill 320 (Hill, 2011), the Natural Resources Agency has added a new subdivision (b)(8) to Section 15075 of the CEQA Guidelines. AB 320 amended Public Resource Code sections 21108 and 21152 to require certain information to be included in the Notice of Determination consistent with CEQA Guidelines section 21065, subdivisions (b) and (c). AB 320 requires the Notice of Determination to include the identity of the person undertaking an activity, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use. Thus, the Natural Resources Agency added subdivision (b)(8) to section 15075 of the CEQA Guidelines to provide consistency with Public Resources Code, section 21108 and 21152.

### **Necessity**

The amendment to CEQA Guidelines section 15075 is necessary to reflect the Legislative changes. The language of this section of the CEQA Guidelines follows the direction of the Legislature and ensures that that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with Sections 21108 and 21152 of the Public Resources Code, and the proposed action adds no new substantive requirements per se. Rather, additional information regarding the project applicant must be included in the forms filed by public agencies. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

### **15082. NOTICE OF PREPARATION AND DETERMINATION OF SCOPE OF EIR Specific Purposes of the Amendment**

CEQA Guidelines section 15082 describes the consultation process (commonly referred to as “scoping”), including the use of a notice of preparation of a draft EIR, among a lead agency and responsible and trustee agencies where the lead agency is preparing an EIR that will be used by these agencies in reviewing and approving a project.

The Natural Resources Agency amended subdivision (a) of Section 15082 of the CEQA Guidelines. Currently, subdivision (a) of Section 15082 states that a lead agency must send a notice of preparation stating that an environmental impact report will be prepared to the Office of Planning and Research and each responsible and trustee agency involved in the project. Public Resources Code, Section 21092.3 also requires that the notices be posted in the office of the county clerk of each county in which the project will be located. The Natural Resources Agency, therefore, included a statement that the notice must also be filed with the county clerk of each county within which the project is located.

### **Necessity**

This addition is necessary to accurately reflect the procedural requirement stated in the Public Resources Code, which also requires posting with the county clerk.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the Act, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15086. CONSULTATION CONCERNING DRAFT EIR Specific Purposes of the Amendment**

This section implements the statutory requirements for consultation with other public agencies and the authority to consult with people who have special expertise concerning the environmental effects of the project. (Pub. Resources Code, § 21092.4.)

Among the other agencies with whom a lead agency should consult, the Natural Resources Agency clarified in subdivision (a)(5) of Section 15086 that lead agencies should also consult public transit agencies facilities within one-half mile of the proposed project. Doing so is likely to promote early information sharing and resolution of potential conflicts.

### **Necessity**

This addition is necessary to improve noticing standards by involving affected public transit agencies in the preparation of an environmental impact report and to ensure environmental transportation impacts are fully considered in accordance to the general statutory mandate under CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the Act, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15087. PUBLIC REVIEW AND DRAFT EIR**

### **Specific Purposes of the Amendment**

CEQA Guidelines section 15087 sets forth procedures for public notice applying to the public review of draft EIRs.

The Natural Resources Agency made two separate amendments to this section. The first is an addition to subdivision (c)(2) of section 15087 that the lead agency may specify the manner in

which it will receive written comments. The second clarifies the requirement in (g)(4) of section 15087 that all documents referenced in the draft environmental impact report or negative declaration be available for review.

*CEQA Guidelines section 15087, subd. (c)(2)*

Advances in technology have altered the nature of the public's interactions with government agencies. Many public agencies now incorporate the internet and social media into their outreach and public participation strategies. (See, e.g., Office of Planning and Research, Book of Lists (2003), pp. 94-99 (listing local governments that use the internet and e-mail as forms of public engagement); see also Institute for Local Government, "A Local Official's Guide to Online Public Engagement" (2012).) In light of these changes, it is appropriate to allow a lead agency to specify that formal written comments must be submitted to a particular physical or electronic mail address and not, for example, a posting on social media.

Similarly, the public has expanded its use of the internet and digital storage to provide increasing amounts of data and information to decision-makers.

Therefore, the Natural Resources Agency clarified in Section 15087, subdivision (c)(2) that the lead agency may specify the manner in which it will receive written comments. This is an important clarification given that failure to respond to a timely submitted comment may lead to invalidation of a project for failure to comply with CEQA. Further, it is important for the public to understand the way to best make its views known to decisionmakers. Thus, this change promotes both public participation in the CEQA process and predictable outcomes in the CEQA process.

*CEQA Guidelines, 15087, subd. (c)(5)*

CEQA requires a lead agency to provide notice that it is preparing an EIR or a negative declaration, and such notice "shall specify ... the address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review ...." (Pub. Resources Code § 21092, subds. (a) and (b).) Stakeholders have noted that there is some confusion about the word "referenced" as used in that section and in the CEQA Guidelines. (CEQA Guidelines §§ 15072, 15087.) Some agencies interpret "referenced" to mean every document that is cited in the environmental document, where others interpret it to mean every document that is incorporated by reference into the document pursuant to Section 15150.

Documents that are "incorporated by reference" provide a portion of the document's overall analysis, and because the final initial study must reflect the independent judgment of the lead agency, one would expect a copy of the incorporated document to actually be among the lead agency's files. Other referenced documents may only provide supplementary information, and may be contained in a consultant's files or research libraries. While still valid sources of information, it is less important for

such documents to actually be in the lead agency's possession. The Natural Resources Agency, therefore, finds that the latter interpretation to be a more practical interpretation of CEQA.

### **Necessity**

The clarification of subdivision (c)(2), of section 15087 is necessary to accommodate those agencies that wish to publicize the availability a draft environmental impact report on the internet or social media, and to make clear that responses will not be prepared for comments made in internet chat-rooms or via social media.

Additionally, in enacting CEQA, the Legislature declared that "it is the policy of the state that ... [a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner ...." (Pub. Resources Code § 21003, subd. (f).) The changes to subdivision (c)(5) would also provide internal consistency between sections 15072, 15082 and 15150 of the Guidelines and would clarify that CEQA itself does not mandate that a lead agency include every document cited in an EIR for public review.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Natural Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Natural Resources Agency's determination that the proposed action is necessary to update the CEQA Guidelines to carry out the CEQA process in the most efficient, expeditious manner, to be internally consistent, and the proposed action adds no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15088. EVALUATION OF AND RESPONSE TO COMMENTS**

### **Specific Purposes of the Amendment**

This section explains that evaluation and response to public comments is an essential part of the CEQA process. Failure to comply with these requirements can lead to disapproval of a project. To avoid this problem, it is necessary to identify the requirements for responding to comments

in the CEQA Guidelines. This section is also necessary to explain different ways in which the responses to comments can be prepared. The options of revising the draft or adding the comments and responses as a separate section of the final EIR match the permissible approaches under NEPA.

In light of the increasing use of the internet in public engagement, as well as current case law, the Natural Resources Agency clarified the scope of a lead agency's duty to respond to comments as described in Section 15088. Specifically, the Agency updated that section to state that responses to general comments may be general. Further, the Agency clarified that general responses may be appropriate when a comment does not explain the relevance of information submitted with the comment, and when a comment refers to information that is not included or is not readily available to the agency.

The Natural Resources Agency also clarified in Section 15088, subdivision (b) that a lead agency may provide proposed responses to public agency comments in electronic form. This change is consistent with the policy stated in Public Resources Code Section 21003, subdivision (f), that "agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner[.]" The change is also consistent with the trend of making more government documents available electronically. (*See, e.g.*, Senate Bill 122 (Jackson, 2016) (allowing the State Clearinghouse to require submission of documents in electronic form).)

### **Necessity**

This clarification is necessary to define the scope of a lead agency's duty to respond to comments as described in section 15088. Specifically, these changes are necessary to clarify that responses to general comments may be general. Further, these changes are necessary to clarify that general responses may be appropriate when a comment does not explain the relevance of information submitted with the comment, and when a comment refers to information that is not included or is not readily available to the agency. Additionally, in enacting CEQA, the Legislature declared that "it is the policy of the state that ... [a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner ...." (Pub. Resources Code § 21003, subd. (f).)

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to carry out the CEQA process in the most efficient, expeditious manner, to be internally consistent, and the

proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15094. NOTICE OF DETERMINATION**

### **Specific Purposes of the Amendment**

This section prescribes the use and content of the Notice of Determination. The existing regulation spells out minimum contents so that people can recognize whether a particular notice applies to the project with which they are concerned. The section notes that the effect of filing the notice is to start a short statute of limitations period. If the notice is not filed, a longer period would apply. Failure to comply with all of the requirements for filing notices of determination results in the longer, 180-day, statute of limitations.

Pursuant to Assembly Bill 320 (Hill, 2011), the Natural Resources Agency added a new subdivision (b)(10) to Section 15094 of the CEQA Guidelines. AB 320 amended Public Resource Code, sections 21108 and 21152 requiring information to be included in the Notice of Determination consistent with CEQA Guidelines section 21065, subdivisions (b) and (c). AB 320 requires the Notice of Determination to include the identity of the person undertaking an activity, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies or the identity of the person receiving a lease, permit, license, certificate, or other entitlement for use. Thus, the Agency added subdivision (b)(10) to section 15094 of the CEQA Guidelines to provide consistency with Public Resources Code, section 21108 and 21152.

### **Necessity**

The amendment to CEQA Guidelines section 15094 is necessary to reflect the Legislative changes made in AB 320 (2011). The language of this section of the CEQA Guidelines follows the direction of the Legislature and ensures that that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with Sections 21108 and 21152 of the Public Resources Code, and the proposed action adds no new substantive requirements. Rather, additional information regarding the project applicant must be included in the forms filed by public agencies. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

### **15107. COMPLETION OF NEGATIVE DECLARATION FOR CERTAIN PRIVATE PROJECTS Specific Purposes of the Amendment**

This section reflects the statutory requirement that a Negative Declaration be completed and adopted within 180 days of the day a private project is accepted as complete for processing. The Natural Resources Agency added a sentence to Section 15107 clarifying that a lead agency may extend the 180-day time limit once for a period of no more than 90 days upon the consent of both the lead agency and the applicant.

### **Necessity**

This addition is necessary to allow the lead agency the same flexibility to extend the deadline for the completion of a negative declaration as is allotted for the completion of an environmental impact report. (CEQA Guidelines, § 15108 (lead agency may extend the deadline for the completion of an environmental impact report "...[O]nce for a period of not more than 90 days upon consent of the lead agency and the applicant".))

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be



internally consistent, and the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15124. PROJECT DESCRIPTION**

### **Specific Purposes of the Amendment**

This section requires the EIR to describe the proposed project in a way that will be meaningful to the public, to the other reviewing agencies, and to the decision-makers. The Natural Resources Agency amended subdivision (b) of Section 15124 to clarify that the general description of a project may also discuss the proposed project's benefits to ensure the project description allows decision makers to balance, if needed, a project's benefit against its environmental cost.

### **Necessity**

This clarification is necessary to ensure that the CEQA Guidelines are consistent with case law. (See *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 192 (determined an accurate project description allows decision makers to balance the proposal's benefit against its environmental cost).) The clarification ensures that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the case law, and the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

## **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

### **15125. ENVIRONMENTAL SETTING**

#### **Specific Purposes of the Amendment**

This section of the CEQA Guidelines requires an EIR to describe the environmental setting of the project so that the changes can be seen in context. Section 15125 of the CEQA Guidelines has for years described the general rule: “normally,” the baseline consists of physical environmental conditions “as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced.” In recent years, several decisions of the courts of appeal and the California Supreme Court have focused on exceptions to this general rule. In response, the Natural Resources Agency has added a statement of purpose and three subdivisions to subdivision Section 15125, subdivision (a).

#### *Subdivision (a) – Purpose*

In the body of subdivision (a), the Natural Resources Agency added a sentence stating that the purpose of defining the environmental setting is to give decision-makers and the public an accurate picture of the project’s likely impacts, both near-term and long-term. This sentence paraphrases the Supreme Court’s description of the requirement in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439. (See *id.* at 455 (“Even when a project is intended and expected to improve conditions in the long term--20 or 30 years after an EIR is prepared--decision makers and members of the public are entitled under CEQA to know the short- and medium-term environmental costs of achieving that desirable improvement. ... [¶] ... The public and decision makers are entitled to the most accurate information on project impacts practically possible, and the choice of a baseline must reflect that goal”); see also *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310.) The purpose of adding this sentence to subdivision (a) is to guide lead agencies in the choice between potential alternative baselines. When in doubt, lead agencies should choose the baseline that most meaningfully informs decision-makers and the public of the project’s possible impacts.

#### *Subdivision (a)(1) – General Rule*

New subdivision (a)(1) sets forth the general rule: normally, conditions existing at the time of the environmental review should be considered the baseline. The first sentence largely consists of language that was moved from the body of existing subdivision (a) and that states this general rule. The second sentence provides that a lead agency may look back to historic conditions to establish a baseline where existing conditions fluctuate, provided that it can

document such historic conditions with substantial evidence. (See, *Communities for a Better Environment, supra*, 48 Cal.4th at pp. 327-328 (“Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods”) (quoting *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125); see also *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316.)

The third sentence provides that a lead agency may describe both existing conditions as well as future conditions. (*Neighbors, supra*, 57 Cal. 4th at p. 454 (“nothing in CEQA law precludes an agency... from considering both types of baseline--existing and future conditions--in its primary analysis of the project's significant adverse effects”).) The court in the *Neighbors* decision described examples of when it might be appropriate to focus on conditions existing at the time the project commences operations:

For example, in an EIR for a new office building, the analysis of impacts on sunlight and views in the surrounding neighborhood might reasonably take account of a larger tower already under construction on an adjacent site at the time of EIR preparation. For a large-scale transportation project ..., to the extent changing background conditions during the project's lengthy approval and construction period are expected to affect the project's likely impacts, the agency has discretion to consider those changing background conditions in formulating its analytical baseline.

(*Id.* at 453.)

#### *Subdivision (a)(2) – Exceptions to the General Rule*

Proposed subdivision (a)(2) sets forth the exception to the general rule, and conditions allowing lead agencies to use an alternative baseline. The first sentence explains that existing conditions may be omitted in favor of an alternate baseline where “use of existing conditions would be either misleading or without informative value to decision-makers and the public.” (See, *Neighbors, supra*, 57 Cal.4th at p. 453 (“To the extent a departure from the ‘norm[.]’ of an existing conditions baseline (CEQA Guidelines, § 15125(a)) promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project's likely impacts, CEQA permits the departure. Thus, an agency may forego analysis of a project's impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public”).) Notably, the Court in the *Neighbors* case highlighted a useful example of when future conditions might provide a more useful analysis:

In this illustration, an existing industrial facility currently emits an air pollutant in the amount of 1,000 pounds per day. By the year 2020, if no new project is undertaken at the facility, emissions of the pollutant are projected to fall to 500 pounds per day due to enforcement of regulations already adopted and to turnover in the facility's vehicle fleet. The operator proposes to use the facility for a new project that will emit 750 pounds per day of the pollutant upon implementation and through at least 2020. An

analysis comparing the project's emissions to existing emissions would conclude the project would reduce pollution and thus have no significant adverse impact, while an analysis using a baseline of projected year 2020 conditions would show the project is likely to increase emissions by 250 pounds per day, a (presumably significant) 50 percent increase over baseline conditions.

(*Neighbors, supra*, 57 Cal. 4th at 453, n 5.)

The first sentence in subdivision (a)(2) also describes the procedural requirement that the lead agency must expressly justify its decision not to use existing conditions as the baseline for environmental analysis, and that justification must be supported with substantial evidence in the record. (See *id.* at 457.) The second sentence provides that if future conditions are to be used, they must be based on reliable projections grounded in substantial evidence. This provision reflects the court's concern regarding gamesmanship and manipulation as stated in the *Neighbors* decision, as well as the concern that predictive modeling may not be readily understood by the public. (*Id.* at pp. 455-456; see also Pub. Resources Code, §§ 21003(b) (CEQA documents shall "be organized and written in a manner that will be meaningful and useful to decision makers and to the public"), 21080(e)(2) ("Substantial evidence" does not include "speculation ... or ... evidence that is clearly inaccurate or erroneous").)

#### *Subdivision (a)(3) – Hypothetical Conditions*

Subdivision (a)(3) specifies that hypothetical conditions may not be used as a baseline. Specifically, this proposed subdivision states that lead agencies may not measure project impacts against conditions that are neither existing nor historic, such as those that might be allowed under existing permits or plans. As the Supreme Court explained in its *CBE* decision: "[a]n approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." (*Communities for a Better Environment, supra*, 48 Cal. 4th at 322 (quoting *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal. App. 3d 350, 358).)

These changes reflect in large part suggestions of the Association of Environmental Professionals and American Planning Association, and, to a degree, those submitted by the California Building Industry Association. (See "Recommendations for Updating the State CEQA Guidelines American Planning Association, California Chapter; Association of Environmental Professionals; and Enhanced CEQA Action Team (August 30, 2013), at pp. 1-2; see also Letter from the California Building Industry Association, February 14, 2014.) This proposal, however, breaks the new guidance into subdivisions to more clearly identify (1) the general rule, (2) acceptable exceptions to the general rule and conditions for using alternative baselines, and (3) prohibited alternative baselines.

#### **Necessity**

This clarification is necessary to reflect the California Supreme Court’s decision in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4<sup>th</sup> 439. The description of the environmental setting plays a key role in the CEQA process by providing the baseline against which the project’s potential impacts are measured. It is necessary to guide lead agencies in the choice between potential alternative baselines.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the California Supreme Court’s decision, and the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15126.2. CONSIDERATION AND DISCUSSION OF SIGNIFICANT ENVIRONMENTAL IMPACTS**

### **Specific Purposes of the Amendment**

This section of the CEQA Guidelines describes how an EIR must identify and focus on the significant environmental effects, unavoidable significant environmental effects, unavoidable significant environmental effects, significant irreversible environmental changes, and growth-inducing impacts which may result from a project. The Natural Resources Agency made two separate additions to this section.

#### *Changes in Subdivision (a), Relating to Hazards*

First, the Natural Resources Agency changed subdivision (a) to specifically address the California Supreme Court’s decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4<sup>th</sup> 369. In that case, the Court held that “agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project’s future users or residents” but they must analyze hazards the project might risk

exacerbating. In reaching that conclusion, the Court also found that two sentences in existing Section 15126.2, subdivision (a), were invalid.

Changes appear in the first, as well as the fifth through the eighth, sentences in existing Section 15126.2(a). The first change clarifies that the focus of a CEQA analysis is the project's effect on the environment. Second, these changes add the words "or risks exacerbating" to the fifth sentence regarding impacts a project may cause by bringing people or development to the affected area. This addition clarifies that an EIR must analyze not just impacts that a project might cause, but also existing hazards that the project might make worse. This clarification implements the Supreme Court's holding in the *CBIA* case. (62 Cal. 4th at 377 ("when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users".)) In this context, an effect that a project "risks exacerbating" is similar to an "indirect" effect. Describing "indirect effects," the CEQA Guidelines state: "If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment." (State CEQA Guidelines § 15064(d)(2).) Just as with indirect effects, a lead agency should confine its analysis of exacerbating effects to those that are reasonably foreseeable. (*Id.* at subd. (d)(3).) Notably, by stating that EIRs should analyze effects that a project might "cause or risk exacerbating," this clarification also makes clear that EIRs need not analyze effects that the project does not cause directly or indirectly.

The third change deletes the sentences (using developing on a fault-line as an example of a hazard that requires analysis) that the Supreme Court specifically held exceeded CEQA's scope. This change is necessary to implement the Court's holding regarding the scope of analysis that CEQA requires.

Notably other laws require analysis of seismic hazards. Public Resources Code Section 2697, for example, requires cities and counties to prepare a site-specific geologic report prior to approval of most projects in a seismic hazard zone. Regulations further clarify that such "project shall be approved only when the nature and severity of the seismic hazards at the site have been evaluated in a geotechnical report and appropriate mitigation measures have been proposed." (Cal. Code Regs, tit. 14, § 3724.) Further, the California Building Code contains provisions requiring all buildings to be designed to withstand some seismic activity. (See, e.g., tit. 24, § 1613.1.)

The safety elements of local general plans will also describe potential hazards, including: "any unreasonable risks associated with the effects of seismically induced surface rupture, ground shaking, ground failure, tsunami, seiche, and dam failure; slope instability leading to mudslides and landslides; subsidence; liquefaction; and other seismic hazards ..., and other geologic hazards known to the legislative body; flooding; and wildland and urban fires." (Gov. Code § 65302(g)(1).) Hazards associated with flooding, wildfire and climate change require special consideration. (*Id.* at subd. (g)(2)-(g)(4).) Lead agencies must "discuss any inconsistencies between the proposed project and applicable general plans" related to a project's potential environmental impacts in a project's environmental review. (State CEQA Guidelines § 15125(d).) Local governments may regulate land use to protect public health and welfare pursuant to their police power. (Cal. Const., art. XI, § 7; *California Building Industry Assn. v. City of San*

*Jose* (2015) 61 Cal. 4th 435, 455 (“so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible”).)

The fourth change clarifies that a project’s direct and indirect and cumulative effects may affect the hazardous condition, and therefore, must still be evaluated in CEQA. In fact, such effects are particularly important when a project locates in a hazardous location. For example, a project proposed on a coastline may not itself cause pre-existing erosive forces. However, according to the Court in the *CBIA* case, a lead agency would need to include any relevant hazards in the environmental document’s description of the environmental setting. Further, in the case of coastal development, if sea walls or other shoreline structures are necessary to protect the project from erosion, the sea wall may contribute to cumulative erosion impacts nearby on the coast. Such a development might also lead to indirect effects such as dispersion of pollutants from inundation, increased maintenance and repair-related construction, impedance of evacuation routes, increased demand on emergency services, etc. Thus, harm to the project would not mandate a finding of a significant effect; however, any environmental effects that might result from the harm to the project, and predictable responses to that harm, are properly evaluated in a CEQA evaluation.

The final addition clarifies that a lead agency should consider not just existing hazards, but the potential for increasing severity of hazards over time. This change is necessary because certain types of hazards are expected to be more severe in the future due to our changing climate. Examples include increased flooding (resulting from more precipitation falling as rain instead of snow as well as from rising sea levels) and more intense wildfires. These types of climate change impacts may worsen a proposed project’s direct, indirect, or cumulative environmental effects in the future. A lead agency need not engage in speculation regarding such effects. Rather, hazard zones may be clearly identified in authoritative maps, such as those found on the Cal-Adapt website (<http://cal-adapt.org/>), or in locally adopted general plan safety elements and local hazard mitigation plans. Notably, pursuant to new requirements in Government Code section 65302(g)(4), added by Senate Bill 379, general plans will identify “geographic areas at risk from climate change impacts[.]” Focus on both short-term and long-term effects is also necessary to implement express legislative policy. (Pub. Resources Code §§ 21001(d), (g); 21083(b)(1).)

Consideration of future conditions in determining whether a project’s impacts may be significant is consistent with CEQA’s rules regarding baseline. “[N]othing in CEQA law precludes an agency ... from considering both types of baseline—existing and future conditions—in its primary analysis of the project’s significant adverse effects.” (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 454.) “The key ... is the EIR’s role as an informational document.” (*Id.* at 453.)

#### *New Subdivision (b), Relating to Energy Impacts*

The Natural Resources Agency also added a new subdivision (b) to Section 15126.2 discussing the required contents of an environmental impact report. The new subdivision specifically addressed the required analysis of a project’s potential energy impacts which is currently

housed within Appendix F of the CEQA Guidelines. Appendix F was revised in 2009 to clarify that analysis of energy impacts is mandatory. The Agency adds a subdivision on energy impacts to further elevate the issue and remove any question about whether such an analysis is required.

As background, in 1974, the Legislature adopted the Warren-Alquist State Energy Resources Conservation and Development Act. (Pub. Resources Code, § 25000 et seq.) That act created what is now known as the California Energy Commission, and enabled it to adopt building energy standards. (See, e.g., *id.* at § 25402.) At that time, the Legislature found the “rapid rate of growth in demand for electric energy is in part due to wasteful, uneconomic, inefficient, and unnecessary uses of power and a continuation of this trend will result in serious depletion or irreversible commitment of energy, land and water resources, and potential threats to the state’s environmental quality.” (*Id.* at § 25002; see also § 25007 (“It is further the policy of the state and the intent of the Legislature to employ a range of measures to reduce wasteful, uneconomical, and unnecessary uses of energy, thereby reducing the rate of growth of energy consumption, prudently conserve energy resources, and assure statewide environmental, public safety, and land use goals”).)

The same year that the Legislature adopted Warren-Alquist, it also added section 21100(b)(3) to CEQA, requiring environmental impact reports to include “measures to reduce the wasteful, inefficient, and unnecessary consumption of energy.” As explained by a court shortly after that provision was enacted, the “energy mitigation amendment is *substantive* and not procedural in nature and was enacted for the purpose of requiring the lead agencies to focus upon the energy problem in the preparation of the final EIR.” (*People v. County of Kern* (1976) 62 Cal.App.3d 761, 774 (emphasis added).) It compels an affirmative investigation of the project’s potential energy use and feasible ways to reduce that use.

Though Appendix F of the CEQA Guidelines has contained guidance on energy analysis for decades, implementation among lead agencies has not been consistent. (See, e.g., *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 209.) While California is a leader in energy conservation, the importance of addressing energy impacts has not diminished since 1974. On the contrary, given the need to avoid the effects of climate change, energy use is an issue that we cannot afford to ignore. As the California Energy Commission’s Integrated Energy Policy Report (2016) explains:

Energy fuels the economy, but it is also the biggest source of greenhouse gas emissions that lead to climate change. Despite California’s leadership, Californians are experiencing the impacts of climate change including higher temperatures, prolonged drought, and more wildfires. There is an urgent need to reduce greenhouse gas emissions and increase the state’s resiliency to climate change. . . . ¶ . . . With transportation accounting for about 37 percent of California’s greenhouse gas emissions in 2014, transforming California’s transportation system away from gasoline to zero-emission and near-zero-emission vehicles is a fundamental part of the state’s efforts to meet its climate goals. . . . ¶ . . . Energy efficiency and demand response are also key components of the state’s strategy to reduce greenhouse gas emissions.



(*Id.* at pp. 5, 8, 10.)

Appendix F was revised in 2009 to clarify that analysis of energy impacts is mandatory. The Agency now adds a subdivision in section 15126.2 on energy impacts to further elevate the issue, and remove any question about whether such an analysis is required.

The first sentence clarifies that an EIR must analyze whether a project will result in significant environmental effects due to “wasteful, inefficient, or unnecessary consumption of energy.” This clarification is necessary to implement Public Resources Code section 21100(b)(3). Because the duty to impose mitigation measures arises when a lead agency determines that the project may have a significant effect, section 21100(b)(3) necessarily requires both analysis and a determination of significance in addition to energy efficiency measures. (Pub. Resources Code, § 21002.)

The second sentence further clarifies that all aspects of the project must be considered in the analysis. This clarification is consistent with the rule that lead agencies must consider the “whole of the project” in considering impacts. It is also necessary to ensure that lead agencies consider issues beyond just building design. (*See, e.g., California Clean Energy Com. v. City of Woodland, supra*, 225 Cal.App.4th at pp. 210-212.) The analysis of vehicle miles traveled provided in proposed section 15064.3 (implementing Public Resources Code section 21099 (SB 743)) on transportation impacts may be relevant to this analysis.

The third sentence signals that the analysis of energy impacts may need to extend beyond building code compliance. (*Ibid.*) The requirement to determine whether a project’s use of energy is “wasteful, inefficient, and unnecessary” compels consideration of the project in its context. (Pub. Resources Code, § 21100(b)(3).) While building code compliance is a relevant factor, the generalized rules in the building code will not necessarily indicate whether a particular project’s energy use could be improved. (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933 (after analysis, lead agency concludes that project proposed to be at least 25% more energy efficient than the building code requires would have a less than significant impact); *see also* CEQA Guidelines, Appendix F, § II.C.4 (describing building code compliance as one of several different considerations in determining the significance of a project’s energy impacts).) That the Legislature added the energy analysis requirement in CEQA at the same time that it created an Energy Commission authorized to impose building energy standards indicates that compliance with the building code is a necessary but not exclusive means of satisfying CEQA’s independent requirement to analyze energy impacts broadly.

The new subdivision (b) also provides a cross-reference to Appendix F. This cross-reference is necessary to direct lead agencies to the more detailed provisions contained in that appendix.

Finally, new subdivision (b) cautions that the analysis of energy impacts is subject to the rule of reason, and must focus on energy demand caused by the project. This sentence is necessary to place reasonable limits on the analysis. Specifically, it signals that a full “lifecycle” analysis that would account for energy used in building materials and consumer products will generally not

be required. (See also Cal. Natural Resources Agency, Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97 (Dec. 2009) at pp. 71-72.)

### **Necessity**

The changes in subdivision (a) are necessary to assist lead agencies in applying the California Supreme Court's holding agencies subject to CEQA are generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents unless the impacts of the project risk exacerbation of the impact. Further, the proposed changes will assist lead agencies in applying the principles identified by the California Supreme Court in the *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369 decision.

Additionally, it is necessary to add the language to the CEQA Guidelines regarding energy impact analyses because CEQA has long required energy impact analyses. However, the description of the required analysis is currently located in a stand-alone Appendix and goes largely unnoticed and implementation among lead agencies has not been consistent. Further, the proposed changes will assist lead agencies in applying the principles identified by courts in several recent cases, including *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256.

The additional language in both subdivisions will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with case law, and the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

#### 15126.4. CONSIDERATION AND DISCUSSION OF MITIGATION MEASURES PROPOSED TO MINIMIZE SIGNIFICANT EFFECTS

##### **Specific Purposes of the Amendment**

When a lead agency identifies a potentially significant environmental impact, it must propose feasible mitigation measures in the environmental document for a project. (Pub. Resources Code, §§ 21002 (duty to mitigate), 21080(c)(2) (mitigated negative declaration), 21100(b)(3) (EIR must include mitigation measures).) The formulation of mitigation measures cannot be deferred until after project approval. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92 (“reliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA’s goals of full disclosure and informed decisionmaking; and consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment”).)

Practical considerations, however, sometimes preclude development of detailed mitigation plans at the time of project consideration. In such cases, courts have permitted lead agencies to defer some of the *details* of mitigation measures provided that the agency commits itself to mitigation and analyzes the different mitigation alternatives that might ultimately be incorporated into the project. (See, e.g., *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028–1030.)

A line of recent cases developed more specific rules on what details may or may not be deferred. (See, e.g., *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70; *Sheryl Gray v. County of Madera* (2008) 167 Cal.App.4th 1099; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261.)

In light of those cases, and stakeholder requests for clarification in the CEQA Guidelines, the Natural Resources Agency made several amendments to Section 15126.4.

First, the amendments clarify in section 15126.4, subdivision (a)(1)(B), that the lead agency “shall” not defer identification of mitigation measures. This binding requirement is clearly stated in a number of cases. (See, e.g., *Preserve Wild Santee, supra*, 210 Cal.App.4th 260; *Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th 899; *City of Maywood, supra*, 208 Cal.App.4th 362; *CBE, supra*, 184 Cal.App.4th 70; *Gray v. County of Madera, supra*, 167 Cal.App.4th 1099; *San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th 645; *Endangered Habitats League, supra*, 131 Cal.App.4th 777; *Defend the Bay, supra*, 119 Cal.App.4th 1261.) Therefore, replacing the word ‘should’ with ‘shall’ conforms the Guidelines to case law. (State CEQA Guidelines § 15005.)

Second, the amendments describe situations when deferral of the *specific details* of mitigation may be allowable under CEQA, including which commitments the agency should make in the environmental document. Specifically, the amendments explain that deferral may be permissible when it is impractical or infeasible to fully formulate the details of a mitigation measure at the time of project approval and the agency commits to mitigation. (See, e.g., *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884 (deferral of mitigation was proper where practical considerations prohibited devising mitigation measures early in the planning process, and the agency committed to performance criteria); *Defend the Bay, supra*, 119 Cal.App.4th 1261 (deferral of specifics of mitigation measures was permissible where practical considerations prohibited devising such measures for a general plan amendment and zoning change); and *Preserve Wild Santee, supra*, 210 Cal.App.4th 260 (deferral of mitigation details was improper where performance standards were not specified and lead agency did not provide an explanation for why such standards were impractical or infeasible to provide at the time of certification of the EIR).)

Further, these changes clarify that when deferring the specifics of mitigation, the lead agency should adopt specific performance standards and provide a list of the types of possible mitigation measures that would achieve the standard. This approach is summarized in *Defend the Bay v. City of Irvine, supra*. In that case, the court stated that deferral may be appropriate where the lead agency “lists the alternatives to be considered, analyzed and possibly incorporated into the mitigation plan.” (*Defend the Bay, supra*, at p. 1275; see also *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376; *Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th 899; *Gray v. County of Madera, supra*, 167 Cal.App.4th 1099; *San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th 645; *Endangered Habitats League, supra*, 131 Cal.App.4th 777.)

Adoption of performance standards in the environmental document is described by the court in *Rialto Citizens for Responsible Growth v. City of Rialto, supra*. There, the court ruled that where mitigation measures incorporated specific performance criteria and were not so open-ended that they allowed potential impacts to remain significant, deferral was proper. (*Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th 899; see also *Laurel Heights, supra*, 47 Cal.3d 376; *Preserve Wild Santee, supra*, 210 Cal.App.4th 260; *City of Maywood, supra*, 208 Cal.App.4th 362; *CBE, supra*, 184 Cal.App.4th 70; *Gray v. County of Madera, supra*, 167 Cal.App.4th 1099; *San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th 645; *Endangered Habitats League, supra*, 131 Cal.App.4th 777.)

Finally, the amendments explain that such deferral may be appropriate “where another regulatory agency will issue a permit for the project and is expected to impose mitigation requirements independent of the CEQA process so long as the EIR included performance criteria and the lead agency committed itself to mitigation.” (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 237; see also *Oakland Heritage Alliance, supra*, 195 Cal.App.4th 884; *Defend the Bay, supra*, 119 Cal.App.4th 1261.)

## **Necessity**

The amendments are necessary to bring the current CEQA Guidelines in conformance to recent case law. The amendments will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with case law. Additionally, the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15152. TIERING**

### **Specific Purposes of the Amendment**

The tiering concept authorized in this section is designed to promote efficiency in the CEQA review process. This section recognizes that the approval of many projects will move through a series of separate public agency decisions, going from approval of a general plan, to approval of an intermediate plan or zoning, and finally to approval of a specific development proposal. Tiering focuses environmental review on the environmental issues that are relevant to the approval being considered. At the same time, tiering requires the lead agency to analyze reasonably foreseeable significant effects and does not allow deferral of such analysis to a later tier document.

The Natural Resources Agency has updated CEQA Guidelines, Section 15152, subdivision (h). That section currently states that “[t]here are various types of EIRs that may be used in a tiering situation.” The Agency rewrote that section to clarify that tiering is only one of several streamlining mechanisms that can simplify the environmental review process. (See, e.g., CEQA Guidelines, § 15006 (lists methods to reduce or eliminate duplication in the CEQA process).) Tiering is one such efficiency measure. (See, e.g., Pub. Resources Code, § 21093 (states that

tiering may be appropriate “to exclude duplicative analysis” completed in previous EIRs), § 21094 (states that a lead agency may examine significant effects of a project by using a tiered EIR.) Public Resources Code Section 21094 is broadly worded to potentially be used for any number of programs, plans, policies, or ordinances, with a wide variety of content. (*Ibid.*) In adopting Section 21094, the legislature did not indicate that it intended to replace any other streamlining mechanisms. For example, the legislature did not override existing provisions including, but not limited to, Program EIRs (CEQA Guidelines, § 15168) and projects consistent with general plans (Pub. Resources Code, § 21083.3). In fact, the legislature created additional streamlining mechanisms after tiering was adopted. (See, e.g., Pub. Resources Code, § 21157 (Master EIR), § 21158 (Focused EIR).) Thus, this revision clarifies that tiering describes one mechanism for streamlining the environmental review process, but where other methods have more specific provisions, those provisions shall apply. The revision also adds infill streamlining to the list of specialized streamlining tools.

### **Necessity**

The amendments are necessary to clarify that tiering describes one mechanism for streamlining the environmental review process, but where other methods have more specific provisions, those provisions shall apply. The amendments will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with Public Resources Code as well as internally consistent with other sections of the CEQA Guidelines. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## 15155. CITY OR COUNTY CONSULTATION WITH WATER AGENCIES

### Specific Purposes of the Amendment

California recently experienced the worst water crisis in our state’s modern history over multiple consecutive years of extremely dry conditions. During that time, precipitation and snowpack were a small fraction of their normal averages, reservoirs were at extremely low levels, and rivers had severely diminished flows. In response to the growing crisis, Governor Brown proclaimed a [state of emergency](#) in January 2014 and called on all Californians to reduce their water consumption by 20 percent. In April 2014, the Department of Water Resources announced a five percent allocation of the State Water Project—the lowest ever. (DWR, [Water Conditions](#).) Allocations remained low in 2015. The State Water Resources Control Board began to notify water rights holders that they must curtail their diversions in certain watersheds. (See State Water Resources Control Board, “[Notices of Water Availability \(Curtailed and Emergency Regulations\)](#)”). In September 2014, Governor Brown signed into law the [Sustainable Groundwater Management Act](#), historic legislation to strengthen local management and monitoring of groundwater basins most critical to the state's water needs. Responding to continuing dry conditions, in April 2015, the Governor issued Executive Order B-29-15, calling on Californians to redouble their water conservation efforts. Specifically, urban water agencies are required to reduce water use by a combined 25 percent. After unprecedented water conservation efforts and high levels of winter water and snow, Governor Brown issued Executive Order B-40-17 in April 2017, lifting the drought emergency in all counties except Fresno, Kings, Tulare, and Tuolumne.

Even so, climate change is expected to increase long-term variability in California’s water supplies. (Esther Conrad, “[Preparing for New Risks: Addressing Climate Change in California’s Urban Water Management Plans](#)” (June 2013).)

The Department of Water Resources has identified several climate change effects that could affect water supplies, including:

- Water Demand — Hotter days and nights, as well as a longer irrigation season, will increase landscaping water needs, and power plants and industrial processes will have increased cooling water needs.
- Water Supply and Quality — Reduced snowpack, shifting spring runoff to earlier in the year ..., increased potential for algal bloom, and increased potential for seawater intrusion—each has the potential to impact water supply and water quality.
- Sea Level Rise — It is expected that sea level will continue to rise, resulting in near shore ocean changes such as stronger storm surges, more forceful wave energy, and more extreme tides. This will also affect levee stability in low-lying areas and increase flooding.
- Disaster — Disasters are expected to become more frequent as climate change brings increased climate variability, resulting in more extreme droughts and floods. This will challenge water supplier operations in several ways as wildfires are expected to become larger and hotter, droughts will become deeper and longer, and floods can become larger and more frequent.

(Department of Water Resources, "[Guidebook to Assist Urban Water Suppliers to Prepare a 2010 Urban Water Management Plan](#)," (March 2011), at G-3.) These risks are now being incorporated into long-term water supply planning.

California courts have long recognized CEQA's requirement to analyze the adequacy of water supplies needed to serve a proposed project. (See, e.g., *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818.) Accordingly, the sample initial study checklist in Appendix G asks whether the project would have "sufficient water supplies available to serve the project..." (CEQA Guidelines, App. G., § XVII(d).)

In recent years, the California Legislature added water supply assessment and verification requirements for certain types of projects. (See Wat. Code, §§ 10910 et seq. (water supply assessments); Gov. Code, § 66473.7 (water supply verifications).) Shortly after those statutory requirements were enacted, the California Supreme Court articulated several principles describing the content requirements for an adequate water supply evaluation in CEQA. (*Vineyard, supra*, 40 Cal.4th 412.) The Natural Resources Agency added section 15155 to the CEQA Guidelines to describe the consultation and documentation that must occur between water suppliers and lead agencies. (CEQA Guidelines, § 15155.) Because that section was developed before the Supreme Court's decision in *Vineyard*, it focuses on compliance with the consultation requirements in SB 610, and does not discuss the issue of adequacy of a water supply analysis in CEQA more broadly.

CEQA Guidelines section 15155 describes the process city or county lead agencies must follow with respect to the development of a water supply assessment for specified types of projects and required the inclusion of the water supply assessment and other information in any environmental document prepared for the project. Because water is such a critical resource in California, and because California courts have required specific content in environmental documents regarding water supply, the Natural Resources Agency proposes to revise section 15155 to incorporate the adequacy principles described in the Supreme Court's decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412. Doing so should ensure that lead agencies consistently develop the information needed to evaluate the impacts associated with providing water to their projects.

#### **New Subdivision (f) – Water Supply Analysis and Degree of Specificity**

The Natural Resources Agency added a new subdivision (f) to section 15155 to set forth the content requirements for a water supply analysis in CEQA. While subdivision (f) describes these content requirements, it is important to note that the Agency is not creating new requirements. Rather, it is merely stating explicitly in the CEQA Guidelines the Supreme Court's holding in the *Vineyard* case. (See, Pub. Resources Code, § 21060.5 ("environment" defined as "the physical conditions that exist within the area which will be affected by a proposed project, including ... water ..."); *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 4th 412 (setting forth the required elements of a water supply analysis).)



The first two sentences in subdivision (f) state the rule that the level of certainty regarding water supplies will increase as the analysis moves from general to specific. (*Vineyard, supra*, 40 Cal. 4th at 434 (“we emphasize that the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a conceptual plan is much lower than for issuance of building permits”).) This rule is consistent with other portions of the CEQA Guidelines governing forecasting and the degree of specificity required in environmental documents. (CEQA Guidelines, §§ 15144 “[w]hile foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can”), 15146 (“degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR”).)

#### *Subdivision (f)(1) – Purpose*

Subdivision (f)(1) states the requirement that a water supply analysis provide enough information to the lead agency to evaluate the pros and cons of providing water to the project. (*Vineyard, supra*, 40 Cal. 4th at 431; *Santiago, supra*, 118 Cal. App. 3d at pp. 829-831.) This will necessarily require information regarding the project’s water demand as well as the quantity of water that is available to serve the project.

#### *Subdivision (f)(2) – Environmental Impacts of Supplying the Water*

Subdivision (f)(2) states the requirement to analyze the environmental effects of supplying water to the project. This sentence further specifies that the analysis must account for all phases of the project. (*Vineyard, supra*, 40 Cal. 4th at 431 (“an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years”).) This is an important clarification because the water supply assessment and verification statutes only require looking twenty years into the future. Some projects may have a lifespan of fifty or more years. In that circumstance, some degree of forecasting may be required. (CEQA Guidelines § 15144.) Pure speculation, however, is not required. (*Id.* at § 15145.)

Additionally, the focus of this subdivision should be on the environmental impacts associated with a particular water supply. (*Vineyard, supra*, 40 Cal. 4th at 434 (the “ultimate question under CEQA ... is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project”) (emphasis in original).) For example, after establishing the amount of water a project will need, the analysis might examine whether supplying that amount from groundwater might lead to subsidence or unsafe yield, or whether diverting that amount from surface flow might adversely affect fish and wildlife.

#### *Subdivision (f)(3) – Circumstances Affecting the Likelihood of Supplies*

Since water supply availability is variable in California, subdivision (f)(3) requires acknowledging any circumstances that might affect the availability of water supplies identified for a project. (*Vineyard, supra*, 40 Cal. 4th at 432 (an environmental document “must address the impacts of likely future water sources, and the EIR’s discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water’s availability”).) The magnitude of variability should also be disclosed. (*Id.* at p. 434 (“an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved”).) Subdivision (f)(3) also provides a list of circumstances that might potentially affect water supplies, including but not limited to: “drought, salt-water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.”

#### *Subdivision (f)(4) – Alternatives and Mitigation*

Subdivision (f)(4) provides that when supplies for the project are not certain, the analysis should address alternatives. (*Vineyard, supra*, 40 Cal. 4th at 432.) Again, the focus of the analysis should be on the environmental impacts that would flow from using those alternative sources of supply. (*Ibid.*) However, the level of detail of that analysis need not be as great as that provided for the project itself. (See, CEQA Guidelines § 15126.6(d) (“If an alternative would cause one or more significant effects in addition to those that would be caused by the project as proposed, the significant effects of the alternative shall be discussed, but in less detail than the significant effects of the project as proposed”).) Thus, subdivision (f)(4) states that the analysis of impacts from alternative sources should be stated “at least in general terms.” (*Napa Citizens for Honest Government v. Napa County Bd. of Sup.* (2001) 91 Cal. App. 4th 342, 373.) Further, subdivision (f)(4) provides that in addition to analyzing alternative water supplies when identified supplies are uncertain, a lead agency may also consider project alternatives that require less water. For example, if supplies are certain up to a certain amount, a lead agency should be able to consider alternative project designs that would use less water and that could be confidently served.

Finally, subdivision (f)(4) provides that if water supplies are not certain, and if the agency has fully analyzed water supply availability as described above, curtailing later project phases may be an appropriate mitigation measure.

#### **Necessity**

The additions are necessary to ensure that the CEQA Guidelines are consistent with current case law. The amendments will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

#### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the Public Resources Code as well as current case law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

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## **15168. PROGRAM EIR**

### **Specific Purposes of the Amendment**

Administrative efficiency has long been an explicit policy in CEQA. (See Pub. Resources Code, § 21003(f) (statement of legislative intent that “[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment”).) The CEQA Guidelines encourage efficiency in several ways, including the provisions regarding program EIRs.

Program EIRs can be used to evaluate a series of connected actions, such as adoption and implementation of regulations or land use plans, in one environmental document. Section 15168 of the CEQA Guidelines governs the preparation and later use of program EIRs. It suggests that program EIRs are particularly useful in addressing big picture alternatives and cumulative impacts. When a program EIR is sufficiently detailed, later activities may be approved on the basis of that document without conducting further environmental review. The key question in determining whether additional review is required is whether the later activity falls “within the scope” of the program analyzed in the EIR. (CEQA Guidelines, § 15168(c)(2).)

Courts have treated the determination of whether an activity is within the scope of a program EIR to be a question of fact to be resolved by the lead agency. Several organizations representing CEQA practitioners have suggested that additional guidance should be provided to help lead agencies make that determination. (See, “[Recommendations for Updating the State CEQA Guidelines](#),” American Planning Association, California Chapter; Association of Environmental Professionals; and Enhanced CEQA Action Team (August 30, 2013).)

In response to those cases, and suggestions from stakeholders, the Natural Resources Agency updated Section 15168 on Program EIRs.

First, the additions to subdivision (c)(2) clarify that the determination of whether a later activity falls within the scope of the program EIR is a question of fact to be resolved by the lead agency, and supported with substantial evidence in the record. This addition implements judicial opinions that have addressed the issue. (See, e.g., *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 610 (*CREED*) (“the fair argument standard does not apply to judicial review of an agency’s determination that a project is within the scope of a previously completed EIR”); *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320-1321 (“evidence does not support a determination that [the] proposed site-specific project was either the same as or within the scope of the project, program, or plan described in the program EIR”).)

Second, the additions to subdivision (c)(2) provide a list of factors that may assist a lead agency in determining whether a later activity is within the scope of a program EIR. Again, those factors have been recognized in judicial opinions as being instructive. Those factors include:

- Consistency with allowable land uses included in the project description (*compare Sierra Club, supra*, 6 Cal.App.4th at pp. 1320-1321 (later activity could not have been within the scope of the prior EIR because it involved engaging “in terrace mining on land which was specifically designated in the Plan as an agricultural resource”) *with CREED, supra*, 134 Cal.App.4th at p. 616 (“the Community Plan designated the area where the hotel [project] is to be built as a “Commercial/Office District” in which “hotels and motels” would be emphasized as among the allowable land uses”));
- Consistency with densities and building intensities included in the project description (see *ibid* (the “MEIR forecast[ed] that a total of 5,880 additional hotel rooms would be constructed over a 35-year period within the Planning Area, and expressly contemplate[d] the completion of the Horton Plaza Redevelopment Project, which the hotel project will complete”));
- Being within the geographic area that the program EIR analyzed for potential impacts (see, e.g., *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 704 (the project “will use recycled water in the same way and in the same general location evaluated by the previous studies”));
- Being included in the infrastructure described in the program EIR (see *ibid*).

Notably, this list of factors is not intended to be exclusive.

Third, the Natural Resources Agency added a sentence to subdivision (c)(1) to clarify how to proceed with the analysis of a later activity that a lead agency determines is not “within the scope” of the program EIR. Specifically, the new sentence states that if additional analysis is needed, that analysis should follow the tiering process described in section 15152. This addition is necessary to clarify that even if a project is not “within the scope” of a program EIR, the lead agency might still streamline the

later analysis using the tiering process. This might allow a lead agency, for example, to focus the analysis of the later activity on effects that were not adequately analyzed in the program EIR. (See CEQA Guidelines, § 15152(d).) This addition promotes administrative efficiency. (Pub. Resources Code, § 21093(b) (“environmental impact reports shall be tiered whenever feasible”).) This addition also follows the analysis in the *Sierra Club* decision, which addressed the relationship between program EIRs and tiering. (*Sierra Club, supra*, 6 Cal.App.4th at pp. 1320-1321 (because the project was not within the scope of the program EIR, “section 21166 was inapplicable, and the [agency] was obligated by section 21094, subdivision (c), to consider whether [the] site- specific new project might cause significant effects on the environment that were not examined in the prior program EIR”).)

Fourth, in subdivision (c)(5), the Natural Resources Agency notes that program EIRs will be most useful for evaluating later activities when those activities have been included in the program EIR’s project description. (*CREED, supra*, 134 Cal.App.4th at p. 616.)

Finally, the Natural Resources Agency made minor word changes throughout this section to improve clarity.

### **Necessity**

This addition is necessary to clarify rules from case law governing whether a project is “within the scope” of a program EIR. These additions are also necessary to assist lead agencies in making the CEQA process as efficient as possible. Finally, these changes are necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with the Public Resources Code as well as current case law and to add clarity. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## 15182. RESIDENTIAL PROJECTS PURSUANT TO A SPECIFIC PLAN

### **Specific Purposes of the Amendment**

In 1978, Governor Brown adopted California's first Environmental Goals and Policy Report. Known as the Urban Strategy, it set forth key statewide environmental goals as well as an action plan to attain those goals. One of the recommendations in the action plan was to exempt certain types of projects that are consistent with a specific plan from further CEQA review. ([An Urban Strategy for California](#) (February 1978), at p. 14.) Shortly after adoption of the Urban Strategy, the legislature created an exemption, found in the Government Code, for residential projects that are consistent with a specific plan. (See Gov. Code, § 65453 (added in 1979, later renumbered to section 65457).) That exemption is described in existing section 15182 of the CEQA Guidelines.

The exemption in the Government Code was much more limited than the Urban Strategy's original recommendation. First, its provisions were difficult to apply in practice. For example, if changed circumstances occurred, the exemption could not be used until a supplemental EIR was prepared to cover the entire specific plan, even if the analysis remained valid for the individual project. Second, rather than exempting a variety of uses, section 65457 exempts only purely residential development. Commercial projects, or even projects that included a commercial component, could not use the exemption. In the decades since the exemption was first enacted, planners have recognized that promoting mixed use developments may reduce land consumption, air pollution, and other environmental ills.

In 2013, Governor Brown's administration proposed, and the Legislature enacted, a set of amendments to CEQA designed to better align the statute with other environmental goals, including the reduction of greenhouse gas emissions and promotion of infill development. ([Senate Bill 743, Steinberg 2013](#).) One of those amendments added section 21155.4 to the Public Resources Code. That section resembles Government Code section 65457, but extends beyond purely residential projects to include commercial and mixed-use projects as well. The trigger for requiring additional review also is more closely tied to the project under consideration, instead of to the entire specific plan area. This expanded exemption is available to projects that are located near transit and that are consistent with regional plans for reducing greenhouse gas emissions.

Section 15182 of the CEQA Guidelines discusses special provisions regarding specific plans. The Natural Resources Agency updated existing CEQA Guidelines section 15182 to reflect the new exemption in Public Resources Code section 21155.4 as well as the exemption in Government Code section 65457. The Agency included cross-references for further clarification to alert planners of the relevant statute of limitations. The specific amendments are explained in detail below.

#### *Subdivision (a)*

The Natural Resources Agency reorganized section 15182 to describe both the exemption in Public Resources Code section 21155.4 as well as the exemption in Government Code section 65457. As amended, subdivision (a) is a general section that points to the more specific provisions in subdivisions (b) and (c). Importantly, subdivision (a) clarifies that a specific plan is a plan that is adopted pursuant to the requirements set forth in Article 8, Chapter 3 of the Government Code. This clarification is necessary because cities and counties may give qualifying plans various titles, such as Master Plan or Downtown Plan. So long as the plan includes the contents described in the Government Code, it should enable use of the exemptions described in section 15182.

#### *Subdivision (b)*

As amended, subdivision (b) contains the provisions applicable to projects within transit priority areas.

Subdivision (b)(1) describes the eligibility criteria for use of the exemption. Those eligibility criteria are drawn directly from Section 21155.4(a). Notably, while section 21155.4 uses the term “employment center project,” proposed subdivision (b)(1) clarifies that term by referring to a commercial project with a floor area ratio of at least 0.75. (See Pub. Resources Code § 21099(a)(1) (defining “employment center project”).

Subdivision (b)(2) describes the limitation to the exemption. Specifically, it clarifies that additional review may be required if the project triggers one of the requirements for further review described in section 15162. New review may be required if, for example, the project requires changes in the specific plan that would result in new or worse significant impacts, or if circumstances have changed since adoption of the specific plan that would lead to new or worse significant impacts.

Subdivision (b)(3) includes a cross reference to the statute of limitation periods described in section 15112. This subdivision is necessary to alert planners that, unlike the exemption in section 65457 which provides for a 30 day statute of limitations regardless of whether a notice of exemption is filed, the exemption in section 21155.4 is subject to CEQA’s normal statute of limitations.

#### *Subdivision (c)*

As amended, subdivision (c) contains the provisions that apply to purely residential projects. The content in subdivision (c) largely mirrors the text in existing section 15182. The Natural Resources Agency made several clarifications, however. For example, section 15182 currently states that no further environmental impact report or negative declaration is required for residential projects that are consistent with a specific plan. Section 65457 actually states that such projects are exempt from any of CEQA requirements, not just preparation of a new environmental document. Therefore, the Agency clarified in subdivision (c) that such projects are exempt.

Also, the Natural Resources Agency pulled the existing description of the special statute of limitations into subdivision (c)(3).

#### *Subdivision (d)*

Subdivision (d) in existing section 15182 allows local governments to collect fees to cover the cost of preparing a specific plan. That authority is found in Government Code section 65456. Because fees may be collected to cover the preparation of specific plans, regardless of whether the plans cover residential, commercial or other uses, the Natural Resources Agency has left subdivision (d) as currently written.

### **Necessity**

This clarification is necessary to alert planners to the important differences between two similar statutory exemptions for projects that are consistent with a specific plan. Additionally, clarification is necessary to alert planners of the relevant statute of limitations. The amendments will ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to be consistent with current law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15222. PREPARATION OF JOINT DOCUMENTS**

### **Specific Purposes of the Amendment**

This section strongly encourages state and local agencies to work with the federal agency involved with the same projects.

The Natural Resources Agency amended CEQA Guidelines section 15222 to add a sentence encouraging a lead agency to enter into a Memorandum of Understanding with appropriate Federal agencies. This addition will encourage increased cooperation between the state and Federal agencies to coordinate project requirements, timelines, and reduce duplication under CEQA and NEPA provisions. The White House Council on Environmental Quality and the California Governor's Office of Planning and Research (OPR) jointly prepared a handbook, "NEPA and CEQA: Integrating Federal and State Environmental



Reviews,” that included a sample Memorandum of Understanding to assist state and Federal agencies in this process. (Available online at [http://opr.ca.gov/docs/NEPA\\_CEQA\\_Handbook\\_Feb2014.pdf](http://opr.ca.gov/docs/NEPA_CEQA_Handbook_Feb2014.pdf).)

### **Necessity**

This amendment is necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to be clarify current law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **15234. REMEDIES AND REMAND**

### **Specific Purposes of the Amendment**

CEQA is in most instances enforced through a form of judicial review known as a writ of mandate proceeding.<sup>5</sup> In reviewing a petition for writ of mandate, the court examines an agency’s administrative record to determine whether it properly implemented CEQA in connection with a project approval. If the court concludes that the agency did not comply with CEQA, it may order the agency to take further action before proceeding with the project. At that

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<sup>5</sup> Exceptions apply where challenges to certain types of agency actions specifically require a different procedure. For example, Government Code section 56103 requires that any challenge to any change of organization, reorganization, or sphere of influence determination approved by a local agency formation commission be accomplished through a validating action pursuant to Code of Civil Procedure section 860 et seq. (See *Protect Agricultural Land v. Stanislaus County Local Agency Formation Com.* (2014) 223 Cal.App.4th 550.)

point, questions may arise regarding what further environmental review is needed, and what project activities, if any, may continue while the agency takes further action. Proposed new section 15234 will assist agencies in complying with CEQA in response to a court's remand, and help the public and project proponents understand the effect of the remand on project implementation. Specifically, proposed new section 15234 reflects the language of the statutory provision governing remedies in CEQA cases, Public Resources Code section 21168.9, as well as case law interpreting that statute.

The Natural Resources Agency added a new section to the CEQA Guidelines, Section 15234, to codify the California Supreme Court's ruling in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, among other cases interpreting Section 21168.9. The court in that case held that not every violation of CEQA will compel a court to set aside project approvals and further explained that the court may order the agency to set aside all or a portion of the project approvals, and may require the agency to conduct additional environmental review.

Subdivision (a) of new Section 15234 is necessary to explain to public agencies and the public how CEQA litigation may affect project implementation. First, it clarifies that not every violation of CEQA will compel a court to set aside project approvals. Public Resources Code Section 21005 provides that "courts shall continue to follow the established principle that there is no presumption that error is prejudicial." The California Supreme Court recently reiterated that "[i]nsubstantial or merely technical omissions[are not grounds for relief]." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 463.) In order to justify setting aside a project approval, a violation must "preclude relevant information from being presented to the public agency." (Pub. Resources Code, § 21005, subd. (a).)

Second, subdivision (a) states that, except as provided in Public Resources Code section 21168.9 itself, CEQA does not limit the traditional equitable powers of the judicial branch and that remedies may be tailored based on the circumstances of the project. It further explains that the court may order the agency to set aside all or a portion of the project approvals, and may require the agency to conduct additional environmental review.

Next, subdivision (b) clarifies that in certain circumstances, portions of the project approvals or the project itself may proceed while the agency conducts further review. Specifically, Section 21168.9 of the Public Resources Code provides that a court may allow certain project approvals or activities to proceed as long as continued implementation of the project would not prevent the agency from fully complying with CEQA. In 1993, the legislature amended that section "to expand the authority of courts to fashion a remedy that permits a part of the project to continue while the agency seeks to correct its CEQA violations." (*Poet, LLC v. State Air Resources Bd.* (2013) 218 Cal.App. 4th 681, 756.)

Next, subdivision (c) codifies the outcome in *Poet, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681, in which the Court of Appeal found that the California Air Resources Board had

failed to fully comply with CEQA in enacting Low Carbon Fuel Standards regulations, but nevertheless exercised its equitable discretion to leave the challenged regulations in place during the remand period. The court reasoned that a remedy that left the regulations in place would achieve a higher level of environmental protection than would a remedy that left them inoperative.

Finally, subdivision (d) addresses how an agency should proceed with additional environmental review if required by a court. Specifically, it indicates that where a court upholds portions of an agency's environmental document, additional review of topics covered in the upheld portions is only required if the project or circumstances surrounding the project have changed in a way that results in new or worse environmental impacts. To illustrate, assume that a court concludes that an agency's analysis of noise impacts is inadequate, but that the remainder of its environmental impact report complies with CEQA. The agency may prepare a revised environmental impact report that focuses solely on noise. It would only need to revise the air quality analysis, for example, if the agency concluded that changes in the circumstances surrounding the project would result in substantially more severe air quality impacts.

### **Necessity**

The new CEQA Guidelines section is necessary to explain to public agencies how CEQA litigation may affect project implementation and to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to clarify existing case law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## 15269. EMERGENCY PROJECTS.

### **Specific Purposes of the Amendment**

This section identifies the emergency exemptions from CEQA. The Natural Resources Agency amended subdivisions (b) and (c) of Section 15269. Currently, subdivisions (b) and (c) state that emergency repairs may be exempt under CEQA and that this exemption does not apply to long-term projects undertaken for the purpose of preventing or mitigating an emergency. The Agency added a sentence to subdivision (b) clarifying that emergency repairs may require planning and qualify under this exemption. Further, the Agency added two subsections under subdivision (c) clarifying how imminent an emergency must be to fall within the statutory exemption. (See *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 537 (emergency repairs need not be “unexpected” and “in order to design a project to prevent an emergency, the designer must anticipate the emergency”).

### **Necessity**

These additions are necessary to clarify the application of this emergency exemption and to maintain consistency with a Court of Appeal decision stating that an emergency repair may be anticipated and to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to clarify current case law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

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## 15301. EXISTING FACILITIES

### Specific Purposes of the Amendment

Section 15301 of the CEQA Guidelines exempts ongoing operations and minor alterations of existing facilities from CEQA. The key in determining whether the exemption applies is whether the project involves an expansion to an existing use. Projects that involve no or only a negligible expansion may be exempt. This exemption plays an important role in implementing the state's goal of prioritizing infill development.

The Natural Resources Agency made two changes to Section 15301.

The first change appears in the first sentence of the exemption. It deletes the phrase "beyond that existing at the time of the lead agency's determination." Stakeholders noted that this phrase could be interpreted to preclude use of the exemption if a facility were vacant "at the time of the lead agency's determination," even if it had a history of productive use, because compared to an empty building, *any* use would be an expansion of use. (See, [Comments of the Building Industry Association](#), August 30, 2013.) Such an interpretation is inconsistent with California's policy goals of promoting infill development.

It would also not reflect recent case law regarding "baseline." Those cases have found that a lead agency may look back to historic conditions to establish a baseline where existing conditions fluctuate, again provided that it can document such historic conditions with substantial evidence. (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-328 ("Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods") (quoting *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125); see also *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316.)

The phrase at issue was apparently added in response to *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307. The court in that case was asked to decide whether the fact that the facility in question had never undergone CEQA review triggered an exception to the exemption. In analyzing that question, the court in *Bloom* relied on the analysis of a prior Supreme Court decision. It explained:

Under *Wine Train's* analysis, the term "existing facility" in the class 1 exemption would mean a facility as it exists at the time of the agency's determination, *rather than a facility existing at the time CEQA was enacted*. For purposes of the exception to the categorical exemptions, "significant effect on the environment" would mean a change in the environment existing at the time of the agency's determination, rather than a change in the environment that existed when CEQA was enacted.

(*Id.* at p. 1315 (citing *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 378, fn. 12) (emphasis added).) Nothing in that decision indicates, however, that a lead agency could not consider actual historic use in deciding whether the project would expand beyond that use.

The second change appears in subdivision (c). The purpose of this change is to clarify that improvements within a public right of way that enable use by multiple modes (i.e., bicycles, pedestrians, transit, etc.) would normally not cause significant environmental impacts. This change is consistent with the Complete Streets Act of 2008, which requires cities and counties to plan for the needs of all users of their streets. In this regard, because such improvements involve operation of public rights of way, they may be similar to the imposition of water conservation requirements for existing water facilities (see, *Turlock Irrigation Dist. v. Zanker* (2006) 140 Cal. App. 4th 1047,1065), or the regulation of the right of way for parking (see, *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 793 (“it is clear that the Class 1 exemption applies to the legislation/project here[; it] involves adjusting the particular group of persons permitted to use ‘existing facilities,’ in other words, the existing, unmetered, curbside parking on residential streets”)). Improvements to the existing right of way have long been understood to fall within the category of activities in subdivision (c), provided that the activity does not involve roadway widening. (See, *Erven v. Board of Supervisors* (1975) 53 Cal. App. 3d 1004.)

### **Necessity**

These additions are necessary to maintain consistency between this CEQA Guideline section and current case law. These additions are also necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

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## 15357. DISCRETIONARY PROJECT

### **Specific Purposes of the Amendment**

The Natural Resources Agency has amended Section 15357 to clarify that a discretionary project is one in which a public agency can shape the project in any way to respond to concerns raised in an environmental impact report. This addition reflects various cases distinguishing the term “discretionary” from the term “ministerial.” (See, e.g., *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 267 (“[T]he touchstone is whether the approval process involved allows the government to shape the project in any way that could respond to any of the concerns ... in an environmental impact report”).) The California Supreme Court and Fourth District Court of Appeal have consistently followed this interpretation. (See, e.g., *Mountain Lion Foundation v. Fish & Game Comm.* (1997) 16 Cal.4th 105, 177; *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 933; *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299.) This clarification is necessary to maintain consistency in determining “discretionary” projects and to improve practitioners’ ability identify when a project is required to complete environmental review under CEQA.

The Natural Resources Agency also added the words “fixed standards” to the end of the first sentence in the definition to be consistent with the holding in *Health First v. March Joint Powers Authority* (2009) 174 Cal. App. 4th 1135. Notably, the definition of “discretionary” in these Guidelines should be read in context with other statutes. For example, Government Code sections 65583(a)(4) and 65583.2(h) require that local governments zone specified areas for specified uses for “use by right.” In those circumstances, local government review cannot be considered discretionary pursuant to CEQA.

### **Necessity**

This clarification is necessary to maintain consistency in determining “discretionary” projects and to improve practitioners’ ability identify when a project is required to complete environmental review under CEQA. This change is necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to clarify current case law as well as other statutory law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the

objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

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## **15370. MITIGATION**

### **Specific Purposes of the Amendment**

The definition of the term “mitigation” in the CEQA Guidelines originally mirrored the definition contained in the federal NEPA regulations. The Natural Resources Agency revised Section 15370 of the CEQA Guidelines, however, to clarify in the CEQA Guidelines that permanent protection of off-site resources through conservation easements constitutes mitigation. The proposed changes incorporate the First District Court of Appeal holding in *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230 wherein the court ruled that off-site agricultural conservation easements constitute a potential means to mitigate for direct, in addition to cumulative and indirect, impacts to farmland.

### **Necessity**

These additions are necessary to maintain consistency between this CEQA Guideline section and current case law. These additions are also necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

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### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**



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## APPENDIX G. ENVIRONMENTAL CHECKLIST FORM

### Specific Purposes of the Amendment

Appendix G in the CEQA Guidelines contains a sample initial study format. The purpose of an initial study is to assist lead agencies in determining whether a project may cause a significant impact on the environment. (CEQA Guidelines, § 15063.) To help guide that determination, Appendix G asks a series of questions regarding a range of environmental resources and potential impacts. Appendix G's questions are not an exhaustive list of all potential impacts. (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at pp. 1109-1112 (seasonal reduction of surface flow in local streams may be an impact on the environment, even though that particular impact is not specifically listed in Appendix G).) For that reason, Appendix G advises that “[s]ubstantial evidence of potential impacts that are not listed on this form must also be considered.” Appendix G further advises that its environmental checklist is only a *sample* form that can be tailored to address local conditions and project characteristics.

When the checklist was originally developed, it contained only a handful of questions. Over time, the list of questions has grown in response to increasing awareness of the effects of development on the environment. Currently, the sample checklist contains 89 questions divided into 18 categories of potential impacts. Depending on the project's location and circumstances, the sample checklist questions may be both under- and over-inclusive. Because the purpose of an initial study is to provoke thought and investigation, and because the checklist cannot contain an exhaustive list, the sample in Appendix G should, in the Natural Resources Agency's view, contain questions that are (1) broadly worded, (2) highlight environmental issues *commonly* associated with *most* types of new development, and (3) alert lead agencies to environmental issues that might otherwise be overlooked in the project planning and approval process.

The Natural Resources Agency revised the sample environmental checklist in several ways. First, it reframed or deleted certain questions that should be addressed in the planning process to focus attention on those issues that must be addressed in the CEQA process. Second, it added questions that, although required by current law, tend to be overlooked in the environmental review process. Finally, it revised the questions related to transportation impacts, and wildfire risk as required by SB 743 and SB 1241, respectively, and relocated questions related to paleontological resources as required by AB 52 (Gatto, 2014).

While OPR originally proposed a far more streamlined and consolidated set of questions, stakeholders objected that confusion might ensue. The Natural Resources Agency agrees with OPR that further discussion of ways to streamline the checklist is appropriate. The changes in this package, however, are more narrowly tailored. A narrative description of the changes, and the intent behind those changes, is provided below.

### *Deleted or Consolidated Questions*

The Natural Agency deleted or consolidated numerous questions from the Appendix G checklist. Those questions, and the reason that they were deleted, are discussed below.

Soils Incapable of Supporting Septic Systems: Regarding Geology and Soils, Appendix G currently asks whether a project would “[h]ave soils incapable of adequately supporting the use of septic tanks or alternative waste water disposal systems where sewers are not available for the disposal of waste water.” According to the [U.S. Environmental Protection Agency](#), inappropriately placed or operated septic systems may be a source of significant groundwater contamination. The Agency revised the questions in Appendix G related to water quality. Specifically, among other revisions, the Agency clarified that the question asking whether a project would “substantially degrade water quality” refers to both surface and ground water quality. Thus, as revised, the broader question about groundwater quality would capture not just impacts from inappropriately placed septic tanks, but also any other possible sources of uncontrolled leachate.

Conflicts with a Habitat Conservation Plan: Existing Appendix G asks whether a project would conflict with a habitat conservation plan and other related plans in two separate sections: biological resources and land use planning. The Agency deleted the question from the land use planning section. The question in the biological resources section remains unchanged.

Wastewater Treatment Requirements: In the section on utilities, Appendix G currently asks whether a project would exceed wastewater treatment requirements of an applicable regional water quality control board. Similarly, in the water quality section, Appendix G asks whether a project would violate any waste discharge requirements. Since the question in the water quality section would encompass wastewater treatment requirements as well as other water quality standards, the Agency deleted the question from the utilities section.

#### *Updated Considerations*

As part of the reorganization of Appendix G, the Natural Resources Agency also updated some considerations or questions to the checklist. Those considerations, and the reason that they have been revised, are discussed below.

Aesthetics: Existing Appendix G asks whether a project would degrade the existing visual character of a site. Visual character is a particularly difficult issue to address in the context of environmental review, in large part because it calls for exceedingly subjective judgments. Both federal and state courts have struggled with the issue of precisely what questions related to aesthetics are relevant to an analysis of environmental impact. (See, e.g., *Maryland-National Cap. Pk. & Pl. Com'n. v. U.S. Postal Serv.* (D.C. Cir. 1973) 159 U.S. App. D.C. 158; see also *Bowman v. City of Berkeley* (2006) 122 Cal.App.4th 572.) As a practical matter, infill projects are often challenged on the grounds of aesthetics. (See, e.g., Pub. Resources Code, § 21099(d) (exempting certain types of infill projects from the requirement to analyze aesthetics).)

For these reasons, the Natural Resources Agency recast the existing question on “visual character” to ask whether the project is consistent with zoning or other regulations governing visual character. This

change is intended to align with the analysis of the aesthetics issue in the *Bowman* case, *supra*. The court in that case, which involved a challenge to a multifamily residential project in an urban area, noted:

Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment” ..., and architectural or design review ordinances, adopted “solely to protect aesthetics,” are increasingly common.... While those local laws obviously do not preempt CEQA, we agree with the Developer and the amicus curiae brief of the Sierra Club in support of the Project that aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA.

(*Bowman, supra*, 122 Cal.App.4th at p. 593 (citations omitted).) This revision is also consistent with the proposed changes in sections 15064 and 15064.7 that recognize the appropriate role of environmental standards in a CEQA analysis.

Air Quality: Existing Appendix G asks whether the project would create objectionable odors. The Agency updated this question in several ways. First, the term “objectionable” is subjective. Sensitivities to odors may vary widely. Therefore, the Agency recast the question to focus on the project’s potential to cause adverse impacts to substantial numbers of people. (See *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492–493 (“Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons”); see also *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 279.) Similarly, the Agency included odor as one of several examples of potential localized air quality impacts.

Biological Resources and State Wetlands: Appendix G currently asks whether a project would substantially adversely affect a federally protected wetland. California law protects all waters of the state, while the federal Clean Water Act governs only “navigable waters”. Because nothing in CEQA’s definition of environment limits consideration to federally regulated resources, the Agency clarified in Appendix G that lead agencies should consider impacts to wetlands that are protected by either the state or the federal government.

Cultural Resources: AB 52 required an update to Appendix G to separate the consideration of paleontological resources from tribal cultural resources and update the relevant sample questions, and to add consideration of tribal cultural resources with relevant sample questions. In September 2016, the Office of Administrative Law approved changes to Appendix G adding consideration of tribal cultural resources. This current package includes an amendment to Appendix G that separates the consideration of paleontological resources from cultural resources, and includes consideration of paleontological resources among the relevant sample questions related to geology and soils.

Energy: As explained in the discussion of proposed amendments to section 15126.2, CEQA has long required analysis of energy impacts. (Pub. Resources Code, § 21100(b)(3) (added in 1974, requiring EIRs to include measures to avoid wasteful and inefficient uses of energy); *California Clean Energy Com. v.*

*City of Woodland* (2014) 225 Cal.App.4th 173.) However, the description of the required analysis sits largely unnoticed in a stand-alone Appendix F. To better integrate the energy analysis with the rest of CEQA, the Agency replaced relevant questions regarding potential energy impacts to the sample environmental checklist that had been previously deleted from Appendix G.

Impervious Surfaces: Appendix G currently asks a series of questions about hydrology, one of which asks whether the project will alter the drainage patterns of the site through alteration of the course of a stream or river. Another relevant factor in determining the effect of a project on existing drainage systems, however, is how much impervious surfaces a project might add. (See State Water Resources Control Board, Non-Point Source Encyclopedia, § 3.1 ([Impervious Surfaces](#)).) OPR's Technical Advisory on "low impact design" identifies the development of new impervious surfaces as a contributor to non-point source pollution and hydromodification. (Office of Planning and Research, "[CEQA and Low Impact Development Stormwater Design: Preserving Stormwater Quality and Stream Integrity Through California Environmental Quality Act \(CEQA\) Review](#)" (August 2009).) Therefore, the Agency added "impervious surfaces" to the considerations in the hydrology portion of the checklist.

Notably, the proposed addition of impervious surfaces as a consideration is not intended to imply that *any* addition of impervious material will necessarily lead to a significant impact. Rather, the modified question asks whether the addition of impervious surface would lead to substantial erosion, exceed the capacity of stormwater drainage systems, etc. Also, some water quality permits do already address the addition of impervious surfaces, and, as provided in updated sections 15064 and 15064.7, a project's compliance with those requirements will be relevant in determining whether the added surfaces create a significant impact.

Geology and Soils: The Agency clarified questions in Appendix G related to geology and soils by suggesting that agencies consider direct and indirect impacts to those resources. This change is consistent with CEQA's general requirement that agencies consider the direct and indirect impacts caused by a proposed project. (See generally, Pub. Resources Code, §§ 21065 [definition of a "project"], 21065.3 [definition of a "project-specific effect"].) And as noted earlier, this package includes an amendment to Appendix G that separates the consideration of paleontological resources from cultural resources, and includes consideration of paleontological resources among the relevant sample questions related to geology and soils.

Groundwater: The Agency made two changes to the existing question in Appendix G asking about a project's impacts to groundwater. First, the existing question asks whether a project will "substantially *deplete*" groundwater supplies. The word "deplete" could be interpreted to mean "empty". Therefore, the Agency revised the question to ask whether the project would "substantially *decrease* groundwater supplies." Second, the existing question asks whether the project would lower the groundwater table level and provides the following example: "e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted." There are many other potential impacts that could result from lowering groundwater levels, including subsidence, altering surface stream hydrology, causing migration of contaminants, etc.

Therefore, the Agency deleted the example from the question. These changes are consistent with the new regime governing groundwater passed in 2014.

Land Use Plans: Appendix G currently asks whether a project conflicts with certain land use plans. The question largely mirrors section 15125(d), which requires an EIR to analyze any inconsistencies with any applicable plans. The Agency revised that question in two ways in order to better focus the analysis.

First, the Agency clarified that the focus of the analysis should not be on the “conflict” with the plan, but instead, on any adverse environmental impact that might result from a conflict. For example, destruction of habitat that results from development in conflict with a habitat conservation plan might lead to a significant environmental impact. The focus, however, should be on the impact on the environment, not on the conflict with the plan. (See, e.g., *Marin Mun. Water Dist. v. Kg Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1668 (“A local agency engaged in EIR analysis may not ignore regional needs and the cumulative impacts of a proposed project. ... Thus the Guidelines require an EIR to discuss any inconsistencies between the proposed project and applicable general and regional plans”); see also Pub. Resources Code, § 21100(e) (“Previously approved land use documents, including, but not limited to, general plans, specific plans, and local coastal plans, *may be used in cumulative impact analysis*”) (emphasis added).) Application of a density bonus to exceed limits in a general plan or zoning, on the other hand, might not lead to any environmental impact. (See, e.g., *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933.)

Second, the Agency deleted the phrase “with jurisdiction over the project” from the question, again for the purpose of focusing the analysis on any *actual environmental impacts* that might result from the project. Finally, the Agency deleted the list of examples of plans from the question. Section 15125(d) contains numerous examples of potentially relevant land use plans, and so repetition in the question in Appendix G is not necessary.

Population Growth: Appendix G currently asks whether a project will cause substantial population growth. The Agency clarified that the question should focus on whether such growth is *unplanned*. Growth that is planned, and the environmental effects of which have been analyzed in connection with a land use plan or a regional plan, should not by itself be considered an impact.

Transportation: The Agency made several changes to the questions related to transportation in Appendix G. First, the Agency revised the questions related to “measures of effectiveness” so that the focus is more on the circulation element and other plans governing transportation. Second, the Agency deleted the second question related to level of service, and instead inserted a references to new Guideline section 16054.3, subdivisions (b), to focus on vehicle miles traveled where appropriate. Third, the Agency clarified the question related to design features.

Water Supply: Appendix G currently asks whether the project has adequate water supplies. The Agency updated the question to better reflect the factors identified by the Supreme Court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, as well as the water supply assessment and verification statutes. (Wat. Code, § 10910; Gov. Code, § 66473.7.)

Wildfire: Senate Bill 1241 (Kehoe, 2012) required the Office of Planning and Research, the Natural Resources Agency, and CalFire to develop “amendments to the initial study checklist of the [CEQA Guidelines] for the inclusion of questions related to fire hazard impacts for projects located on lands classified as state responsibility areas, as defined in section 4102, and on lands classified as very high fire hazard severity zones, as defined in subdivision (i) of section 51177 of the Government Code.” (Pub. Resources Code, § 21083.01 (emphasis added).) The Agency added several questions addressing this issue. Notably, while SB 1241 required the questions to address specific locations, it did not necessarily limit the analysis to those locations, and so the Agency posed the questions for projects located within “or near” those zones. Lead agencies will be best placed to determine precisely where such analysis is needed outside of the specified zones.

#### *Corrected Typo*

Finally, the Agency corrected a typo in the Note following question 11 in Appendix G. The Note briefly describes the tribal consultation process. It contains a reference to Public Resources Code Section 21083.3.2. The correct citation is 21080.3.2. The Agency discovered the typo after circulating the changes for public review. However, because the correction is a change without regulatory effect, pursuant to section 100(a)(4) of the Office of Administrative Law’s regulations governing the rulemaking process, no public review is required. (Cal. Code Regs., tit. 1, § 100(a)(4).)

#### **Necessity**

These changes are necessary to make the process simpler for lead agencies. These additions are also necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

#### **Reasonable Alternatives to the Regulations, Including Alternatives that Would lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency’s determination that the proposed action is necessary to update the CEQA Guidelines to clarify existing law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action implements and clarifies existing law. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## **APPENDIX M. PERFORMANCE STANDARDS FOR INFILL PROJECTS ELIGIBLE FOR STREAMLINED REVIEW**

### **Specific Purposes of the Amendment**

Appendix M in the CEQA Guidelines contains the performance standards that must be met for the streamlined environmental review process for infill projects under CEQA Guidelines section 15183.3. The Natural Resources Agency corrected typographical errors in Sections 4.A, 4.C, and 4.E of Appendix M to be consistent with the previously adopted regulatory text.

### **Necessity**

These changes are necessary to correct the typographical errors in Appendix M and thus to clarify the substantive requirements for performance standards applying to certain infill projects. These additions are also necessary to ensure that the CEQA Guidelines best serve their function of providing a comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to clarify existing law. The proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The proposed action clarifies existing law by correcting typographical errors. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

## APPENDIX N. INFILL ENVIRONMENTAL CHECKLIST FORM

### **Specific Purposes of Amendment**

Existing Appendix N provides a sample checklist that is intended to assist lead agencies in assessing infill projects according to the procedures in Public Resources Code section 21094.5. The Agency added Appendix N in 2013 when it added section 15183.3. In creating Appendix N, the Agency patterned the sample checklist on Appendix G, which also provides a sample environmental checklist that may be used by lead agencies in determining whether a project may cause a significant impact on the environment. In this package, the Agency updated Appendix N to be consistent with the changes to Appendix G, described above.

### **Necessity**

These changes are necessary to make it simpler for lead agencies. These additions are also necessary to ensure that the CEQA Guidelines best serve their function of providing comprehensive, easily understood guide for the use of public agencies, project proponents, and other persons directly affected by CEQA.

### **Reasonable Alternatives to the Regulations, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives**

The Natural Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Agency's determination that the proposed action is necessary to update the CEQA Guidelines to clarify existing law. Additionally, the proposed action adds no new substantive requirements. The Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses as the change is a clarifying change only.

### **Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business**

The action implements and clarifies existing law. Because the proposed action does not add substantive requirements, it will not result in an adverse impact on businesses in California. Appendix N, like Appendix G, advises that its environmental checklist is only a sample form that can be tailored to address local conditions and project characteristics.

## Determinations

### **C. No Imposition of a Mandate on Local Agencies and School Districts**

CEQA only applies to discretionary actions undertaken by public agencies, including school districts. Therefore, the proposed regulations do not impose any mandate on local agencies or school districts.



## D. Master Responses

Many comments submitted on the CEQA Guideline Update raised similar issues. The following are responses that address many of those commonly raised themes.

### 1. The New CEQA Guideline Regarding Transportation Squarely Reflects Legislative Direction in Senate Bill 743 (Steinberg, 2013).

Some comments suggested that the Legislature never intended to make changes outside of urban areas, and so the Agency has exceeded the scope of its authority. The Agency disagrees.

Senate Bill 743 stated the policy that CEQA analysis of transportation impacts needed to be updated to be consistent with California's climate objectives. (Senate Bill 743, Steinberg 2013, § 1(a)(1) (noting prior legislation in which "the Legislature signaled its commitment to encouraging land use and transportation planning decisions and investments that reduce vehicle miles traveled and contribute to the reductions in greenhouse gas emissions").) Specifically, the Legislature stated:

New methodologies under the California Environmental Quality Act are needed for evaluating transportation impacts that are better able to promote the state's goals of reducing greenhouse gas emissions and traffic-related air pollution, promoting the development of a multimodal transportation system, and providing clean, efficient access to destinations.

(*Id.* at subd. (a)(2).) To achieve that policy, the legislation required the Agency to adopt changes to the CEQA Guidelines "establishing criteria for determining the significance of transportation impacts of projects[.]" (Public Resources Code § 21099(b)(1).) While the statute required the change to be implemented within transit priority areas, it authorized the change to extend beyond those areas in the Agency's discretion. (*Id.* at subd. (c)(1).) Finally, the legislation suggested several potential metrics that could be used to measure transportation impacts, including "vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated." (*Id.* at subd. (b)(1).)

In sum, Senate Bill 743 required a change in the way that agencies evaluate transportation impacts, and left to the Agency to identify, following a public process, the metric to measure such impacts and the most appropriate geographic scope of the change. The Agency finds that proposed Section 15064.3 falls squarely within the authority provided in the Public Resources Code.

The Agency's reasons to identify vehicle miles traveled as the measure of transportation impact, and to apply the new rules statewide, are explained in greater detail below.

### 2. Vehicle Miles Traveled is the Most Appropriate Measure of Transportation Impacts.

Some comments argued that the CEQA Guidelines should either maintain the status quo, or that vehicle miles traveled was not the best measure of transportation impacts.

Shortly after SB 743 was enacted, the Governor’s Office of Planning and Research released its evaluation of various potential metrics, and invited public input on that evaluation. (See OPR, *Preliminary Evaluation of Alternative Methods of Transportation Analysis* (December 30, 2013).) The measures evaluated included:

- Vehicle miles traveled
- Automobile Trips Generated
- Multi-Modal Level of Service
- Fuel Use
- Motor Vehicle Hours Traveled

Having considered public input on the evaluation of these alternatives, OPR identified vehicle miles traveled as the most appropriate measure of transportation impacts. The Agency concurs with OPR’s recommendation, for several reasons.

First, as noted in OPR’s Preliminary Evaluation, the Legislature specifically recommended vehicle miles traveled. (Pub. Resources Code § 21099(b)(1) (OPR “shall recommend potential metrics to measure transportation impacts that may include ... vehicle miles traveled”); see also SB 743 (2013), § 1(a)(1) (noting Legislature’s “commitment to encouraging land use and transportation planning decisions and investments that reduce vehicle miles traveled”).)

Second, vehicle miles traveled achieves the purposes set forth in the statute. SB 743 required the new transportation metric to “promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses.” Vehicle miles traveled strongly correlates with greenhouse gas emissions. Thus, reducing vehicle miles traveled is likely to reduce greenhouse gas emissions. Further, since transit, bicycle and pedestrian projects reduce vehicle miles traveled, and this proposal presumes that such projects will result in a less than significant impact, measuring vehicle miles traveled promotes multimodal transportation networks. (See Handy, Susan, et al. “Impacts of Transit Service Strategies on Passenger Vehicle Use and Greenhouse Gas Emissions.” California Air Resources Board, Oct. 2013, [https://www.arb.ca.gov/cc/sb375/policies/transitservice/transit\\_brief.pdf](https://www.arb.ca.gov/cc/sb375/policies/transitservice/transit_brief.pdf) [discussing how improved transit service reduces VMT]; Handy, Susan, et al. “Impacts of Bicycling Strategies on Passenger Vehicle Use and Greenhouse Gas Emissions.” California Air Resources Board, Sept. 2014, [https://www.arb.ca.gov/cc/sb375/policies/bicycling/bicycling\\_brief.pdf](https://www.arb.ca.gov/cc/sb375/policies/bicycling/bicycling_brief.pdf) [concluding that better cycling facilities and infrastructure reduce VMT]; Handy, Susan, et al. “Impacts of Pedestrian Strategies on Passenger Vehicle Use and Greenhouse Gas Emissions,” California Air Resources Board, Sept. 2014, [https://www.arb.ca.gov/cc/sb375/policies/ped/walking\\_brief.pdf](https://www.arb.ca.gov/cc/sb375/policies/ped/walking_brief.pdf) [concluding that improved pedestrian facilities and infrastructure reduce VMT].) Finally, because mixed-use projects tend to reduce the need for driving, vehicle miles traveled is more likely to result in projects with a diversity of land uses. (Spears, Steven, et al. “Impacts of Land-Use Mix on Passenger Vehicle Use and Greenhouse Gas Emissions.” California Air Resources Board, Sept. 2014, [https://arb.ca.gov/cc/sb375/policies/mix/lu-mix\\_brief.pdf](https://arb.ca.gov/cc/sb375/policies/mix/lu-mix_brief.pdf).)

In addition to meeting the statutory objectives in SB 743, the Agency finds that lowering vehicle miles traveled may also result in numerous public and private benefits. As explained in the Agency’s Standardized Regulatory Impact Assessment, focusing on vehicle miles traveled instead of congestion in a CEQA analysis is anticipated to result in significant cost savings. Those savings result because studies are quicker and easier to perform, which reduces both the cost of the study but also the time spent on environmental review. The SRIA also explained that lowering vehicle miles traveled would also

- Better health and avoided health care costs
- Reduction in transportation, building energy, and water costs
- Reduction in travel times to destinations
- Cleaner water

The Agency received comments supporting the proposal from a broad cross-section of stakeholders that included, among others, developers of infill housing, local governments, environmental and public health organizations, and social equity advocates. Key points included:

- “San Francisco took a leadership position when we became the first county in California to remove automobile delay and adopt Vehicle Miles Traveled (VMT) as a measurement of transportation impacts in CEQA. We recognized that the prior paradigm of automobile delay was not allowing for the development and maintenance of a high-quality environment now and in the future, a legislative intent of CEQA; and it conflicted with numerous state, regional, and local plans, ordinances, and policies. *Two years later, we are seeing the benefits of this change as numerous transportation projects and infill developments that previously would have gone through time-consuming, costly vehicular level of service analysis with no beneficial environmental outcomes, are on the ground, approved, or under construction.*” – City and County of San Francisco (emphasis added) (Comment 5.3)
- “The transition to using Vehicle Miles Traveled (VMT) for the analysis of transportation impacts, pursuant to Senate Bill (SB) 743, is an exciting and important change. This change gives cities and the State a new tool to address numerous mutual goals including achieving climate action targets, increasing livability and access, and relieving the affordable housing crisis. Our city leaders express support for this change as demonstrated in the attached letter to OPR last July. We recognize the responsibility of local jurisdictions to plan for future development in areas that will result in low VMT outcomes. The State’s leadership in advancing to a VMT-based metric will help achieve this outcome.” – City of Long Beach, et al.
- “The replacement of LOS with VMT will improve transit service and walkability, benefiting low-income households who are more likely to take transit and walk. In addition, the proposed guidelines will help streamline the development process of housing in low-VMT and transit-oriented locations, thereby helping increase the supply of housing options in areas with low transportation costs.” – Climate Plan, et al.
- “Through its focus on infill development and greenhouse gas reduction, implementation of SB 743 will serve to facilitate achievement of many of the regional goals identified in our adopted 2016 RTP/SCS, specifically those pertaining to *regional sustainability, improving transportation*

*system efficiency, providing more and better mobility options including transit and active transportation, encouraging construction of more affordable housing, improved air quality, and promoting environmental preservation. These beneficial outcomes will improve economic, quality of life, and public health performance in the SCAG region and throughout the state while also supporting critical regional investments, particularly in active transportation and transit.” – Southern California Association of Governments (emphasis added)*

- “The proposed guideline to implement SB 743 is a crucial step toward realizing climate policy priorities shared by both the State and the City of Los Angeles. SB 743 has the potential to transform the way transportation and infrastructure projects are delivered. Until the guidelines are implemented, the state environmental process will remain disconnected from climate policy objectives.” – City of Los Angeles

Despite the anticipated benefits described above, the proposal to replace level of service with vehicle miles traveled as the primary measure of transportation impacts has been controversial. The Agency received comments from some business interests and some local governments expressing opposition to the proposal. Those opposing the proposal expressed fear that, among potential outcomes, mitigation costs and litigation may increase and, as a result, home building and business production may decrease. These are legitimate concerns; however, the Agency found those comments to be largely comprised of assumptions and opinion, but not evidence. (See, e.g., Comments of the Building Industry Association, et al.)

The Agency finds the comments of those agencies that have already switched to a vehicle miles traveled metric, including some of those quoted above, to be particularly persuasive because they are informed by real world experience. Notably, the Agency received no comments from any of the early adopters suggesting that the Agency should not proceed.

Finally, the Agency acknowledges those comments that expressed disappointment that their specific suggestion (largely, to maintain the status quo) was not adopted. In that regard, the Agency notes that the development of this rulemaking packages involved extensive stakeholder engagement over the course of several years. The proposal evolved substantially in response to that input. For example, much of the detail that OPR originally proposed to include in the new Guidelines section was moved to a purely advisory guidance document. OPR also refined its recommended thresholds of significance to provide more flexibility. Further, the proposal would enable many housing and infrastructure projects to be presumed, based on evidence in this rulemaking, to have a less than significant transportation impact. The proposal also includes an opt-in period allow those agencies that are ready to make the switch from level of service to vehicle miles traveled to do so, but gives time to other agencies that have indicated that they need more time to become acquainted with the new procedures. Finally, the proposal gives even greater discretion to agencies in how they evaluate roadway capacity projects. (Compare Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing Senate Bill 743 (2014), with Revised Proposal on Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA Implementing Senate Bill 743 (2016), and Proposed Updates to the CEQA Guidelines – Comprehensive Package (2017).)

In embarking on this update, the Agency and OPR announced their intention to develop a balanced package. Not every stakeholder will agree with the balance that has been struck. While the Agency acknowledges the disappointment expressed by some in the policy direction, the Agency the evolution of this proposal demonstrates that OPR and the Agency have indeed heard from stakeholders and responded as appropriate in light of statutory authority and policy objectives.

### **3. Vehicle Miles Traveled Should Be Analyzed Statewide, Not Just in Transit Priority Areas.**

Some comments noted that while SB 743 gave the Agency the discretion to require analysis of vehicle miles traveled statewide, it only mandated new transportation methodologies within transit priority areas. Because the Guidelines propose a significant shift in how transportation impacts are analyzed, some comments suggested that implementation should begin in a smaller geographic area. The Agency declines to adopt that approach because it would not advance the purposes of the statute, and would forego the cost savings and environmental benefits expected to result from this change.

OPR and the Agency conducted extensive outreach since 2013 to craft this proposal. During that outreach, OPR asked stakeholders in various regions of the state whether the status quo would do a better job promoting the purposes of the statute. No evidence demonstrated that the status quo, which focuses on traffic congestion, provides a more accurate analysis of the environmental effects of transportation than a methodology that focuses on vehicle miles traveled.

Conversely, outreach with the Institute for Transportation Engineers, transportation professionals, transportation agencies, local governments, and metropolitan planning organizations demonstrated that studying vehicle miles traveled is possible and mitigation is feasible when needed. The evidence, including the Standardized Regulatory Impact Assessment prepared for these Guidelines, further shows that studying vehicle miles traveled is cheaper and quicker than studies of traffic congestion. The City and County of San Francisco, which has already begun using vehicle miles traveled as its primary measure of transportation impacts in CEQA, has found that using vehicle miles traveled instead of level of service has allowed for bringing much needed housing and transportation projects online much quicker. (See Comments from City and County of San Francisco.)

This Agency has previously considered the many benefits that result from development with lower vehicle miles traveled. As we observed in the rulemaking instituting a streamlined CEQA process for infill developments, projects with lower vehicle miles traveled promote significantly improved health and safety outcomes, as well as air quality benefits. More specifically, low VMT projects encourage more reliance on neighborhood-oriented businesses, walking, cycling, and public transit. These activities indirectly reduce greenhouse gas emissions and other emissions that lead to smog and air and water quality issues because they result in less vehicle miles traveled by residents who would traditionally have to drive to obtain the same services and products. Taken together, these benefits create sustainable, vibrant, and economically viable neighborhoods. (See Initial Statement of Reasons (July 2012), at pp. 12-17.) As this Agency found then, the evidence continues to demonstrate the benefits of lowering vehicle miles traveled.

As a legal matter, limiting the application of the new transportation guideline may invite litigation that would counter the goals of the statute. Specifically, the definition of “transit priority areas” is not clear in the statute.<sup>6</sup> For example, the boundaries of a transit priority area may shift as bus routes and service frequencies change, and as plans for future transit investments change. Those changes may be made by multiple agencies, and no one agency is charged with maintaining current and accurate delineations of transit priority areas. As a result, applying one set of rules within transit priority areas and another outside would impose a significant burden on lead agencies to determine on a project by project basis which rules apply. As the City of Los Angeles noted in its comments, that uncertainty would impose a unique burden on infill projects, the very projects that the statute was designed to promote. (See Comments from the City of Los Angeles.) Such uncertainty could also encourage litigation.

Moreover, even if the Agency were to limit application of this Guideline to transit priority areas, ample evidence in this rulemaking record and elsewhere demonstrates the relationship between vehicle miles traveled and environmental impacts. (See, e.g., Master Response 2; OPR, Technical Advisory.) Vehicle miles traveled is also regularly analyzed as part of analyses of air pollutants, greenhouse gas emissions and energy, the analysis is reasonably feasible. Because CEQA requires environmental documents to “provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences,” and because courts look for “adequacy, completeness, and a good faith effort at full disclosure,” a prudent lead agency would analyze a project’s vehicle miles traveled regardless of whether the project is located near transit. (CEQA Guidelines § 15151.)

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

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

#### **4. Evidence Demonstrates that Projects Located Near Transit Are Likely to Reduce Vehicle Miles Traveled; Therefore, Agencies Should Presume that the Transportation Impact of Such Projects Is Less Than Significant.**

A significant body of research indicates that projects located close to existing transit will enable lower vehicle use because of the availability of transit. (See, e.g., Cervero, R. (2002). *Built Environments and*

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<sup>6</sup> “Transit priority area” means “an area within one-half mile of a major transit stop that is existing or planned, if the planned stop is scheduled to be completed within the planning horizon included in a Transportation Improvement Program adopted pursuant to Section 450.216 or 450.322 of Title 23 of the Code of Federal Regulations.” (Pub. Resources Code § 21099(a)(7).) A “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.” (Id. at § 21064.3.)

*Mode Choice: Toward a Normative Framework*. Elsevier Science Ltd.; Cervero, R. & Duncan, M. (2006). *Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing?* Journal of the American Planning Association; Cervero, R. (2006). *Transit Oriented Development's Ridership Bonus: A Product of Self-Selection and Public Policies*. University of California Transportation Center; Ewing, R. & Cervero, R. (2001). *Travel and the Built Environment: A Synthesis*. Transportation Research Record 1780 – Paper No. 01-3515; Ewing, R. & Cervero, R. (2010). *Travel and the Built Environment: A Meta-Analysis*. Journal of the American Planning Association; Handy, S., Cao, X. & Mokhtarian, P. (2005). *Correlation or causality between the built environment and travel behavior? Evidence from Northern California*. Elsevier Ltd.; Kolko, J., Meija, M., Reed, D., & Schiff, E. (2011). *Make the Most of Transit: Density, Employment Growth, and Ridership around New Stations*. Public Policy Institute of California; Lund, H., Cervero, R., & Willson, R. (2004). *Travel Characteristics of Transit-Oriented Development in California*. Funded by Caltrans Transportation Grant – “Statewide Planning Studies” – FTA Section 5313 (b); Ewing, R., K. Bartholomew, S. Winkelman, J. Walters, and D. Chen, *Growing Cooler: The Evidence on Urban Development and Climate Change*, Washington, D.C.: Urban Land Institute, 2008 [see section 7.3.4, citing and discussing ample evidence of transit proximity reducing vehicle travel].) The California Air Pollution Control Officers Association’s report “*Quantifying Greenhouse Gas Mitigation Measures*” also cites several studies that quantify VMT reductions resulting from transit proximity. (Lee, Barbara, et al. “*Quantifying Greenhouse Gas Mitigation Measures*.” California Air Pollution Control Officers Association, Aug. 2010, pp. 171-174.) This reduction in vehicle miles traveled is most pronounced within one-half mile of transit. Notably, because many other programs and other statutory provisions focus on one-half mile surrounding transit, using that distance in the presumption promotes consistency with other policies. (See, e.g., Public Resources Code § 21155(b) (defining projects that may benefit from CEQA streamlining as those projects within one-half mile of transit); see also Strategic Growth Council, *Affordable Housing and Sustainable Communities Program Guidelines*.)

Some comments correctly noted that factors beyond transit proximity may affect vehicle miles traveled. The Agency does not disagree, and that is why the presumption is rebuttable. However, the body of evidence described above supports the Agency’s statement in the Guidelines that agencies should presume that projects that locate near transit will have a less than significant transportation impact. That body of evidence, together with the statement in the Guidelines, also gives lead agencies a basis to fill out the initial study checklist and at least initially determine that a project’s transportation impacts are less than significant.

#### **5. Transportation Impacts of Roadway Capacity Expansion Can Be Measured in Multiple Ways.**

Section 15064.3(b)(2) states that agencies analyzing roadway capacity projects have discretion to use a metric other than vehicle miles traveled. Allowing this discretion for such projects is appropriate at this time for several reasons. For example, many types of roadway capacity projects, such as the addition of new local streets or capacity on existing local streets, the addition of new collector streets or capacity on new collector streets, the addition of capacity in rural areas where there is not current or projected future congestion (i.e. solely to address safety issues), the addition of capacity on-ramps or off-ramps, methods may not yet exist or are still under development for assessing VMT impacts. Many capacity projects are also being conducted jointly with federal partners that may use other metrics. Therefore,

leaving the lead agency with the discretion to make this determination and tailor its metrics accordingly will be helpful to ensuring that impacts are adequately analyzed.

Meanwhile, where methods exist, measurement of induced travel needs to be undertaken in order to assess greenhouse gas emissions impacts, impacts from air pollutant emissions, energy impacts, and noise impacts, and transportation impacts described by any metric. In these cases, implementing vehicle miles traveled as the metric of transportation impact may assist the lead agency in addressing those other environmental impacts. Where vehicle miles traveled is already assessed as a step in analyzing other impacts, lead agencies would likely disclose the results of such analyses to promote informed public participation and decision-making. (See, Pub. Resources Code § 21099(b)(3) (“This subdivision 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”); CEQA Guidelines § 15151 (“courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure”); see also proposed Section 15064.3(b)(2) (“For roadway capacity projects, agencies have discretion to determine the appropriate measure of transportation impact consistent with CEQA and other applicable requirements”) (emphasis added); California Department of Transportation, *Guidance for Preparers of Growth-related, Indirect Impact Analyses* (2006).)

#### **6. Mitigation to Reduce Vehicle Miles Traveled is Feasible.**

CEQA requires mitigation of significant environmental impacts. Even independent of these Guidelines, some courts have found that this requirement includes consideration of measures to reduce the driving required by a project. (See, e.g., *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173.)

Some comments, however, questioned whether the vehicle miles traveled of certain suburban or rural projects could be feasibly mitigated. Many mitigation options exist. The California Air Pollution Control Officers Association, for example, developed a guide, supported with peer-reviewed research, that includes various measures to reduce vehicle miles traveled in a variety of geographic settings. (California Pollution Control Officers Association, *Quantifying Greenhouse Gas Mitigation Measures, A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures* (2010) at pp. 155-331.)<sup>7</sup> The determination of whether any particular measure is feasible in connection with a specific project is to be made by the lead agency.

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<sup>7</sup> The Agency finds the CAPCOA Guide to be a particularly credible source of information because it was prepared by expert air quality agencies, with the assistance of highly regarded consultants in air quality and transportation planning, and is supported by peer-reviewed research. Additionally, U.C. Berkeley’s Center for Law, Energy & the Environment recently published a paper discussing the use of VMT banks and exchanges as possible mitigation options. (Elkind, et al. “Implementing SB 743: An Analysis of Vehicle Miles Traveled Banking and Exchange Frameworks,” Oct. 2018, <https://www.law.berkeley.edu/wp-content/uploads/2018/09/Implementing-SB-743-October-2018.pdf>.) While the Agency has not relied on that document in developing this rulemaking, it is sharing this citation for informational purposes.



Notably, OPR's Technical Advisory explains that because such impacts of vehicle miles traveled are largely regional in nature, mitigation may also be regional in scope. Thus, regional mitigation programs to reduce vehicle miles traveled may be an effective way to reduce such impacts.

#### **7. A Phase-In Period Will Allow Agencies Time to Update Their Own Procedures.**

The Agency's current proposal states that the new rules for VMT analysis will become mandatory beginning on July 1, 2020. (July 2018 Proposed 15-Day Revisions, p. 11.) The regulatory text posted in January 2018 included a typographical error in Guidelines section 15064.3(c). In response, some comments expressed concerns about the proposed phase-in date of July 1, 2019, for lead agencies to apply the VMT metric in transportation analyses. The Agency corrected the error to July 1, 2020, in the 15-day revisions, which the Agency posted in July 2018. This correction aligns with the Initial Statement of Reasons, which states that "jurisdictions will have approximately two years to switch to VMT if they so choose." (Initial Statement of Reasons, p. 16.)

This phase-in period provides sufficient time for lead agencies to update their procedures. The Agency notes that typically, agencies must update their procedures within 120 days of revisions to the CEQA Guidelines. (See CEQA Guidelines, § 15007(d).) Although lead agencies would have a phase-in period, those who are ready to begin evaluating vehicle miles traveled may use the new transportation metric immediately upon the effectiveness of the Guidelines. In fact, some cities (namely, San Francisco, Oakland, Pasadena, and San Jose) have already updated their own procedures to analyze VMT. Those cities that have already updated their procedures to include vehicle miles traveled can serve as a model for other agencies. The Agency notes there are compelling reasons for other agencies to move forward as well.

First, the proposed vehicle miles traveled metric has been circulating in OPR's discussions with the public since 2013 when OPR began its process to comprehensively update the Guidelines. Notably, the proposed changes to section 15064.3 have been circulating in substantially similar form since 2014. Also, since the release of the preliminary discussion draft in August 2014, the Agency, OPR, or both engaged in nearly two hundred meetings, presentations, and conferences. (Initial Statement of Reasons, p. 46.) The Agency and OPR have also conducted extensive training and outreach to educate lead agencies on the proposed requirements. In short, the Agency believes that over the past four to five years, the public and lead agencies have had sufficient time to learn about the proposed changes in transportation impact metric.

Second, vehicle miles traveled is relatively simple to calculate compared to level of service, and the analysis is generally less costly and time consuming. That is because, unlike level of service, vehicle miles traveled does not require counting existing trips, estimating project trip distribution, or traffic microsimulation for determining congestion. (Standardized Regulatory Impact Assessment, pp. 8-12, 38.) Assessing vehicle miles traveled requires estimates of trip generation rates and trip length, and can be readily modeled using readily available and existing tools such as CalEEMod or URBEMIS. (Standardized Regulatory Impact Assessment, pp. 8, 16.) Because vehicle miles traveled analysis is much simpler and faster to do, the Standardized Regulatory Impact Assessment explained that while an

congestion-based study may cost approximately \$25,000 on average, a study of vehicle miles traveled may be approximately \$5,000. (Standardized Regulatory Impact Assessment, p. 16.)

Third, vehicle miles traveled is currently used to analyze a project's environmental impacts to other resources, including air quality, GHG emissions, and energy resources. More to the point, making a reasonably accurate estimate of transportation projects' effects on vehicle travel is important to making reasonably accurate estimates of GHG emissions, air quality emissions, energy impacts, and noise impacts. Additionally, two appellate courts have recently determined that the lead agency's failure to discuss the transportation energy impacts of a project in an EIR was a prejudicial abuse of discretion under CEQA. (*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.) An analysis of transportation energy impacts generally includes assessing trip length and the number of trips, which is precisely the calculation for VMT. Lead agencies can streamline their environmental analyses by using VMT to measure a number of impacts, including transportation, air quality, greenhouse gas, noise, and energy impacts.

Finally, many professional organizations, such as the Association of Environmental Professionals and American Planning Association, have hosted continuing education seminars on this topic, and the Agency anticipates more once this rulemaking is complete. Thus, because the analysis is relatively simple to conduct, and in fact is being studied in connection with other impacts, and the opportunities for training are many, delaying full implementation until July 2020 is a reasonable phase-in period.

#### **8. Analyzing Vehicle Miles Traveled, Instead of Congestion, Should Benefit Housing Production, Including Affordable Housing**

The proposed shift to VMT analysis will benefit low-income earners in at least three ways.

First, it streamlines transit and active transit modes, which a disproportionate number of low income residents rely upon for transportation. Providing greater transportation choices, such as transit and active transit modes, can save low-income residents money. (See Fang, K. and Volker, J. "Cutting Greenhouse Gas Emissions Is Only the Beginning: A Literature Review of the Co-Benefits of Reducing Vehicle Miles Traveled," National Center for Sustainable Transportation, March 2017, pp. 12-13; see also California Department of Housing and Community Development, "California's Housing Future: Challenges and Opportunities," Feb. 2018, p. 3 ["In California's rural areas, high transportation costs often negate the relatively more affordable housing prices."], 50 ["The proximity of jobs and services, density, and the availability of public transportation are among the factors that can affect the need for automobile travel and thus transportation costs."; "When households move further from job- and transit-rich areas to find more affordable homes, they encounter consequences in the form of higher transportation costs and commute times."].)

Second, because low-income earners generate less household VMT, affordable housing is more likely to be found to have a less than significant transportation impact with VMT analysis. (See, e.g., Lee, Barbara, et al. "Quantifying Greenhouse Gas Mitigation Measures." California Air Pollution Control Officers Association, Aug. 2010, pp. 160-161, 176 ["Income has a statistically significant effect on the

probability that a commuter will take transit or walk to work. [Below market rate] housing provides greater opportunity for lower income families to live closer to jobs centers and achieve jobs/housing match near transit. . . Lower income families tend to have lower levels of auto ownership, allowing buildings to be designed with less parking . . . ”], 178 [“[R]egardless of distance from BART, lower income households generate at least 50% higher BART use for school trips than higher income households.”].) This is particularly noteworthy because opponents to affordable housing often cite increased traffic congestion as a reason to oppose such projects.

Third, the shift to VMT analysis would lead to more infill and transit-oriented development, and such development often allows lower living costs when transportation and housing costs are both taken into account. (See Center for Neighborhood Technology, *Losing Ground* (2012) [available at [https://www.cnt.org/sites/default/files/publications/CNT\\_LosingGround.pdf](https://www.cnt.org/sites/default/files/publications/CNT_LosingGround.pdf)]; Center for Neighborhood Technology, *Penny Wise, Pound Foolish* (2010) [available at [https://www.cnt.org/sites/default/files/publications/CNT\\_pwof.pdf](https://www.cnt.org/sites/default/files/publications/CNT_pwof.pdf)].) Relatedly, encouraging infill development is strongly correlated to economic mobility and thus infill would benefit low-income communities in urban areas. (See Fang, et al., *supra*, pp. 12-13 [discussing the direct financial impacts on households in reducing vehicle miles traveled]; see also Center for Neighborhood Technology, “Penny Wise, Pound Foolish,” March 2010, pp. 7-8 [concluding that location efficiency reduces transportation costs].)

Comments submitted by a coalition of equity advocates similarly suggest that focusing on vehicle miles traveled instead of congestion should benefit lower-income Californians by providing greater transportation options and access to housing. While recommending that further work be done to discourage displacement effects, the group explained:

The replacement of LOS with VMT will improve transit service and walkability, benefiting low-income households who are more likely to take transit and walk. In addition, the proposed guidelines will help streamline the development process of housing in low-VMT and transit-oriented locations, thereby helping increase the supply of housing options in areas with low transportation costs.

(See, Comments Submitted by Climate Plan, et al.)

The Agency acknowledges comments to the contrary. Primarily submitted by proponents of the building industry, some comments assert that analyzing vehicle miles traveled will hinder the production of affordable housing. Some even argue that the change will disproportionately impact affordable housing.

No one disputes that far fewer homes are currently being built than are needed; however, the Agency does not find arguments that the CEQA Guidelines will worsen housing affordability to be persuasive for several reasons. First, the comments are unsupported with evidence. Instead, they consist largely of fear, speculation and unsubstantiated opinion. Second, while the Agency shares the concern about housing affordability, myriad factors affect housing production and pricing. They include, among others, availability and costs of skilled labor, availability and costs of buildable land, costs of materials (which

are now being affected by global markets and federal trade policy), building regulations, entitlement processes and profit expectations. While some comments referred to a study that described these factors,<sup>8</sup> neither the building industry nor those that represent them acknowledge these other factors in their comments on the Guidelines, nor did they offer any explanation of the complex interactions between those factors. Third, even focusing on the potential effect of environmental mitigation on ultimate housing costs, the comments fail to acknowledge that lead agencies today require applicants to study and mitigate congestion impacts. They offer no evidence to suggest that mitigation to reduce vehicle miles traveled would be any more expensive than mitigation of congestion.

For the reasons stated above, this Agency has little, if any, ability to affect housing affordability. However, within the scope of this rulemaking, the Agency has implemented the changes required by statute in a way that is expected to lower the costs of environmental study and to remove barriers to infill development. Evidence based on the experience of those agencies that have already implemented such changes on the local level indicates that housing approvals will happen quicker and with fewer costs under this proposal.

Some comments suggested that the proposed changes would make infill projects more difficult. Again, the evidence suggests otherwise. For example, the SRIA included a reference to an op-ed penned by the president of the Council of Infill Builders and advocate for infill development, urging completion of these changes. “As leading developers and advocates of infill projects throughout California, we recognize that this proposed reform will remove one of the most common roadblocks used to stop smart city-centered development[.]” (See “‘Driving Miles’ is best measure of new development,” San Francisco Chronicle, Opinion by Curt Johansen and Jeremy Madsen (Nov. 19, 2014), available online at <http://www.sfgate.com/opinion/openforum/article/Driving-miles-is-best-measure-of-new-5904868.php>.) Similarly, as noted above, cities that have already made a similar change at the local level have observed that the change actually facilitates infill development. (See, e.g., Comments of the City and County of San Francisco (“Two years later, we are seeing the benefits of this change as numerous transportation projects and infill developments that previously would have gone through time-consuming, costly vehicular level of service analysis with no beneficial environmental outcomes, are on the ground, approved, or under construction”).) Faced with conflicting assertions regarding the impact on housing, the Agency finds the assertions of the industry association that is focused on infill development, and the observations of local governments that approve infill developments, to be more credible than the unbacked assertions of the comments to the contrary.

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<sup>8</sup> The study referenced is “California’s High Housing Costs: Causes and Consequences,” Legislative Analyst’s Office (2015). The study noted, for example, that one way to reduce costs associated with high land values is to build more units per acre of land. (See *id.* at 13.) CEQA’s current focus on congestion makes it more difficult to build more densely. That same report notes that traffic is a frequently raised concern and that developer responses usually include reducing the project’s size and scope. (See *id.* at 18.) By focusing on vehicle miles traveled instead of congestion, this update to the CEQA Guidelines will remove an existing impediment to building more densely, which will enable lower housing costs. Other sources cited in the Standardized Regulatory Impact Assessment describe other reasons this Agency expects a positive impact on housing prices. The Agency discusses the LAO study only for the purpose of responding to the comments suggesting that it is relevant.

**9. Local Governments that Wish to Address Congestion May Do So Through Their Planning Processes.**

Some comments submitted by local governments objected to analyzing vehicle miles traveled in CEQA because they asserted that their community places a high value on avoiding traffic congestion. Others asserted that their communities also valued a suburban lifestyle. Studying vehicle miles traveled in CEQA will not prevent either objective. SB 743 states expressly that it “does not preclude the application of local general plan policies, zoning codes, conditions of approval, thresholds, or any other planning requirements pursuant to the police power or any other authority.” (Pub. Resources Code § 21099(b)(4).) Thus, cities and counties can still plan for new development that is consistent with their community’s values. Moreover, to the extent that cities and counties have already adopted fee programs to fund roadway infrastructure, nothing in the CEQA Guidelines will prevent them from continuing those programs.

**10. The CEQA Guidelines Appropriately Leave Analysis of Transportation Safety to the Discretion of Lead Agencies.**

Some comments suggested that the transportation guideline should specifically address transportation safety. The Agency declines to do so. In an initial draft of the transportation Guideline, OPR included a subdivision devoted to transportation-related safety. Many comments objected to that subdivision, however, indicating that the evaluation of safety is far more nuanced than any general statement in the Guidelines would allow. Therefore, OPR explained in a revised draft that “[w]hile safety is a proper consideration under CEQA, the precise nature of that analysis is best left to individual lead agencies to account for project-specific and location-specific factors.” (Governor’s Office of Planning and Research, “Revised Proposal on Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA, at p. 5.) Instead, OPR added a discussion of safety considerations to its Technical Advisory. The Agency concurs with OPR, and so declines the comment’s suggestion to add a separate requirement to analyze safety in the transportation section.

**11. OPR’s Technical Advisory Provides Non-Binding Technical Assistance, and Is Not a Part of This Rulemaking Package.**

Several comments addressed recommendations contained in the Governor’s Office of Planning and Research’s Technical Advisory on Evaluating Transportation Impacts in CEQA (“Technical Advisory”). That document explains its purpose as follows:

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 assistance on issues that broadly affect the practice of land use planning and the California Environmental Quality Act (CEQA) (Pub.

Resources Code, § 21000 et seq.). (Gov. Code, § 65040, subds. (g), (l), (m).) The purpose of this document is to provide advice and recommendations, which agencies and other entities may use at their discretion. This document does not alter lead agency discretion in preparing environmental documents subject to CEQA. This document should not be construed as legal advice.

...

This advisory contains technical recommendations regarding assessment of VMT, thresholds of significance, and mitigation measures. Again, OPR provides this Technical Advisory as a resource for the public to use at their discretion. OPR is not enforcing or attempting to enforce any part of the recommendations contained herein. (Gov. Code, § 65035 [“It is not the intent of the Legislature to vest in the Office of Planning and Research any direct operating or regulatory powers over land use, public works, or other state, regional, or local projects or programs.”].)

This April 2018 technical advisory is an update to the advisory it published in November 2017. 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.

(Technical Advisory, April 2018, at p. 1.) As the Technical Advisory explained, it offers non-binding technical assistance, and will be updated from time to time as the state of the art improves. That document is separate from this CEQA Guidelines rulemaking, and was developed pursuant to OPR’s technical assistance function. (Gov. Code, § 65040, subds. (g), (l), (m).)

Where comments addressed matters that were involved in this rulemaking, the Agency responded in detail in the responses to comments. Where comments addressed the recommendations in OPR’s Technical Advisory, the Agency has forwarded such comments to OPR for its consideration in a future update of that advisory document.

## **12. CEQA Requires Analysis of the Potential Impacts Associated with Wildfire.**

Some comments suggested that the Agency should not include questions in Appendix G related to wildfire. In part, those comments suggested that the California Supreme Court’s decision in *CBIA v. BAAQMD* (2015) 62 Cal.4<sup>th</sup> 369 precludes the analysis of such hazards on proposed projects. The Agency disagrees. In that decision, the Court held that “agencies subject to CEQA *generally* are not required to analyze the impact of existing environmental conditions on a project’s future users or residents.” (*Id.* at p. 377 (emphasis added).) The Court’s opinion also included a significant caveat: “[w]hen a proposed project risks exacerbating those environmental hazards or conditions that already exist an agency must analyze the potential impact of such hazards on future residents or users.” (*Id.*, at p. 377.) In this

context, an effect that a project “risks exacerbating” is similar to an “indirect” effect. Describing “indirect effects,” the CEQA Guidelines state: “If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment.” (CEQA Guidelines, § 15064, (d)(2).) Just as with indirect effects, a lead agency should confine its analysis of exacerbating effects to those that are reasonably foreseeable. (*Id.* at subdivision (d)(3).)

In the context of wildfire, it is clear that development may exacerbate wildfire risks. OPR’s General Plan Guidelines, for example, includes an extensive discussion of the interaction between development and wildfire risk areas, including the “wildland-urban interface.” While wildfire risk already exists in such areas, bringing development to those areas makes the risk worse, and not just for fire risk. Recent research explains:

The close proximity of houses and wildland vegetation does more than increase fire risk. As houses are built in the WUI, native vegetation is lost and fragmented; landscaping introduces nonnative species and soils are disturbed, causing nonnatives to spread; pets kill large quantities of wildlife; and zoonotic disease, such as Lyme disease, are transmitted.

(Radeloff, et al., “Rapid growth of the US wildland-urban interface raises wildfire risk,” *PROC NATL ACAD SCI USA* (March 27, 2018) 115 (13) 3314-3319 [citations omitted].) Not all development types are likely to create the same risks, however:

The recognition that homes are vulnerable to wildfire in the wildland-urban interface (WUI) has been established for decades... Analysis of hundreds of homes that burned in southern California the last decade showed that housing arrangement and location strongly influence fire risk, particularly through housing density and spacing, location along the perimeter of development, slope, and fire history. Although high-density structure-to-structure loss can occur, structures in areas with low- to intermediate-housing density were most likely to burn, potentially due to intermingling with wildland vegetation or difficulty of firefighter access. Fire frequency also tends to be highest at low to intermediate housing density, at least in regions where humans are the primary cause of ignitions.

(Syphard AD, Bar Massada A, Butsic V, Keeley JE (2013) “Land Use Planning and Wildfire: Development Policies Influence Future Probability of Housing Loss.” *PLoS ONE* 8(8): e71708.

<https://doi.org/10.1371/journal.pone.0071708> [citations omitted].) In other words, low-density, leapfrog development may create higher fire risk than high-density, infill development.

Notably, Senate Bill 1241 (Kehoe, 2012) specifically required the Agency to update Appendix G with questions related to wildfire risk. One could view wildfire as a specific legislatively-created exception to the general rule the Court described in the *CBIA* decision, though the Court did not specifically analyze its provisions. In any event, the Agency drafted the questions in the new wildfire section to focus on the effects of new projects in creating or exacerbating wildfire risks.

### **13. The CEQA Guidelines Appropriately Include a Discussion of Remand Following Judicial Review.**

Some comments objected to the addition of a guideline addressing remand following a court challenge. As the Agency explained in the Initial Statement of Reasons, “questions may arise regarding what further environmental review is needed, and what project activities, if any, may continue while the agency takes further action. Proposed new section 15234 will assist agencies in complying with CEQA in response to a court’s remand, and help the public and project proponents understand the effect of the remand on project implementation.” The Agency does not intrude on the judicial branch in doing so. The new section states at the outset: “Courts may fashion equitable remedies in CEQA litigation.” The new section does not limit a courts exercise of discretion in any way; rather, it explains to lead agencies and the public what a court may do, and what a lead agency’s obligations may be, once a project has been challenged based on CEQA compliance. This explanation is necessary because some participants in the CEQA process continue to assert that a defect in an environmental document requires complete decertification. (See, e.g., *Center for Biological Diversity v. Department of Fish & Wildlife* (2017) 17 Cal.App.5th 1245.)

### **14. The Baseline is Normally Existing Conditions, But Some Circumstances May Justify Consideration of an Alternative Baseline.**

CEQA Guidelines section 15125 requires an EIR to describe the environmental setting of the project so that the changes can be seen in context. Section 15125 describes the general rule for the environmental setting: “normally,” the baseline consists of physical environmental conditions “as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced.”

Recently, the California appellate courts have focused on exceptions to the general rule, particularly related to the use of a historic or future conditions baseline. In the January 2018 rulemaking package, the Agency proposed to add regulatory text to reflect those appellate decisions. In response to comments on the proposal, the Agency revised the proposed regulatory text in July 2018. As discussed below, the current proposal clarifies in Guidelines section 15125(a)(2) that the procedural requirement to justify a baseline other than existing conditions does not apply to reliance on historic conditions. Rather, that requirement only applies only to use of future conditions as a sole baseline.

Lead agencies have discretion to determine the appropriate environmental setting pursuant to Guidelines section 15125. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 [“an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence.”].) The “existing” conditions may be represented by historic or future conditions, as reflected in the Agency’s proposed addition of the following sentence to Guidelines section 15125(a)(1):

Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project’s impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions



expected when the project becomes operational, or both, that are supported with substantial evidence.

A lead agency may consider the historical conditions as the “existing conditions” against which to assess environmental impacts. That determination must be based on substantial evidence. (*North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 105-106 [traffic baseline of unoccupied retail project was “based on the actual historical operation of the space at full occupancy for more than 30 years”; *San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 218 [lead agency “did not abuse its discretion by adopting a baseline that accounted for mining conditions during the five-year period prior to the filing of the” notice of preparation].)

Additionally, a lead agency has the discretion, under appropriate factual circumstances, to use a future baseline that is based on substantial evidence. The California Supreme Court’s discussion in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 453-454, explains:

Is it ever appropriate for an EIR’s significant impacts analysis to use conditions predicted to prevail in the more distant future, well beyond the date the project is expected to begin operation, to the exclusion of an existing conditions baseline? We conclude agencies do have such discretion. The key, again, is the EIR’s role as an informational document. To the extent a departure from the “norm[]” of an existing conditions baseline (Guidelines, § 15125(a)) promotes public participation and more informed decisionmaking by providing a more accurate picture of a proposed project’s likely impacts, CEQA permits the departure. Thus an agency may forgo analysis of a project’s impacts on existing environmental conditions if such an analysis would be uninformative or misleading to decision makers and the public.

Parenthetically, we stress that the burden of justification articulated above applies when an agency *substitutes* a future conditions analysis for one based on existing conditions, omitting the latter, and not to an agency’s decision to examine project impacts on *both* existing and future conditions.

(*Ibid*, italics in original.)

Further, the Court stated that “nothing in CEQA law precludes an agency, as well, from considering both types of baseline—existing and future conditions—in its primary analysis of the project’s significant adverse effects.” (*Id.* at p. 454.)

Some comments expressed that the originally proposed Guidelines section 15125(a)(2) incorrectly applied the heightened need for justification when an agency uses an historical baseline. In the 15-day revisions, the Agency omitted reference to a “historic conditions baseline” in the current proposed text of section 15125(a)(2). The Agency believes that the current text now accurately reflects the California Supreme Court’s direction governing the appropriateness of the use of a future conditions baseline.

## **15. While Deferral of Some Details of Mitigation Measures is Permissible, Agencies Must Still Have Substantial Evidence Demonstrating Feasibility.**

The Agency updated Section 15126.4 to describe the circumstances in which courts have upheld a lead agency's deferral of mitigation details. In doing so, the Agency examined the decisions in those cases to identify principles supporting the courts' analyses that can guide future agency decision-making. The Agency found that the cases articulated several common factors.

Some comments expressed a different view of the cases, however, or at least how they were described in the Initial Statement of Reasons. Those comments suggested that an agency should be able to defer details if it either adopts a performance standard, or it lists possible measures, but should not be required to do both. Those comments further suggest that the Initial Statement of Reasons appears to support an either/or approach. Comments submitted on the initially proposed language persuade the Agency that both the text of the guideline and the Final Statement of Reasons should be updated to better capture the common principles described in the case law.

As revised, the guideline on mitigation states: "The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review, provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure."

Some comments on the 15-Day changes suggested that the guideline should not require all three factors to be present. Specifically, those comments relied primarily on *Defend the Bay* and *Rialto* to argue that a simple list of potential measures might be sufficient. Neither case supports that view, however. While there is a line in that case suggesting that a simple list will suffice, the analysis in the *Defend the Bay* case finds the measures were adequate because they specified performance standards and listed the potential actions that would ultimately mitigate the impacts. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4<sup>th</sup> 1261, 1276 ("The EIR was prepared at the beginning of the planning process, for a General Plan amendment and zoning change, the City has committed to mitigation, and it has specified the criteria to be met").) The court in the *Rialto* case summarized these requirements and the policy as follows:

In sum, "it is sufficient to articulate specific performance criteria and make further [project] approvals contingent on finding a way to meet them." [Citation.] Essentially, the rule prohibiting deferred mitigation prohibits loose or open-ended performance criteria. Deferred mitigation measures must ensure that the applicant will be required to find some way to reduce impacts to less than significant levels. If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation during project implementation, it would be unreasonable to conclude that implementing the measures will reduce impacts to less than significant levels.

Each of the criteria identified in the guideline support such a finding. The first, that the agency commit to implementing the measure, is essential to support a finding that project impacts have, in fact, been mitigated. The second, that the agency identify performance standards, is a key feature found in all of

the cases allowing deferral of mitigation details. It is also necessary to supply substantial evidence that impacts will in fact be reduced to a less than significant level. The third, identification of the types of measures that could achieve the standard, goes to the requirement that measures must be feasible. The case in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, illustrates the need for this criterion. In that case, the City committed to eliminating all new greenhouse gas emissions, essentially a net-zero standard. However, the court found the measure to be inadequate because there was no discussion of what measures could feasible attain that net-zero standard.

Other comments also opposed the statement in the guideline that deferral of mitigation details may be permissible when developing such details at the time of review is “impractical.” Those comments that “impractical” was too lenient of a standard. The Agency notes, however, that is the standard described in the cases. It is also consistent with CEQA’s policy favoring efficiency in the environmental review process. (See Pub. Resources Code § 21003(f) (“All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment”).)

#### **16. The Existing Facilities Exemption Appropriately Covers New Uses That Do Not Exceed the Intensity of Either Existing or Former Uses of a Facility.**

Some comments objected to the clarification that the Categorical Exemption for Existing Facilities applies when the activity would not expand upon an existing, *or former*, use. Such comments suggested that a use that has been abandoned for a long time, but is later restarted, is in effect a new use. Other comments suggested it would not be appropriate to reauthorize highly polluting uses without additional CEQA review.

As explained in the Initial Statement of Reasons, the phrase “beyond that existing at the time of the lead agency’s determination,” could be interpreted to preclude use of this exemption if a facility were vacant “at the time of the lead agency’s determination,” even if it had a history of productive use, because any use would be an expansion of use compared to an empty building. (See, Comments of the Building Industry Association, August 30, 2013.) The ISOR further noted that considering former uses in determining the applicability of the exemption is consistent with the reasoning in cases addressing the environmental baseline. (See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-328 (“Environmental conditions may vary from year to year and in some cases it is necessary to consider conditions over a range of time periods”); *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316.)

Some comments argued that the caselaw on baseline is not instructive here. The Agency disagrees. The purpose of the requirement to identify a baseline is to allow an agency to determine the degree, and therefore, significance of a change in the environment. Projects that result in only a negligible increase in the use of existing facilities are appropriately exempt because they are likely to result in little change to the environment. If an agency may appropriately look back in time to set the yardstick for analysis of

impacts, it should also be able to look back in time to determine whether a project would intensify uses of existing facilities.

Not only is this interpretation consistent with the cases interpreting baseline, it is also consistent with state policy. The State's planning priorities, for example, emphasize the importance of infill development, reuse and revitalization before expanding beyond the existing urban fabric. (See, e.g., Gov. Code § 65041.1 ("The state planning priorities, which are intended to promote equity, strengthen the economy, protect the environment, and promote public health and safety in the state, including in urban, suburban, and rural communities, shall be ... [t]o promote infill development and equity by rehabilitating, maintaining, and improving existing infrastructure that supports infill development and appropriate reuse and redevelopment of previously developed, underutilized land that is presently served by transit, streets, water, sewer, and other essential services, particularly in underserved areas, and to preserving cultural and historic resources".)) Doing so preserves important environmental values such as agricultural and forested lands, biological habitat and open space. These planning priorities have been part of the state's discourse for many years, and were first discussed in California's 1978 Urban Strategy:

Californians can no longer avoid city problems by moving farther and farther from the central cities. . . . ¶ The result is waste: waste of land, particularly valuable agricultural land; waste of older cities and suburbs; waste of air, water and other natural resources; waste of energy; waste of time spent in commuting; and, in the long, a vast waste of money. ¶ Future urban development should be determined with purpose, not solely by chance. Cities and suburbs should provide a productive and human environment for all: for the poor, the old and the disadvantaged, as well as those better able to protect their own interests.

(*Id.*, pp. 7-8, [http://opr.ca.gov/docs/urban\\_strategy.pdf](http://opr.ca.gov/docs/urban_strategy.pdf).)

The Agency is sympathetic to concerns about potential misuse of the exemption. Note, however, that categorical exemptions are subject to exceptions. Those exceptions, which include cumulative impacts and significant impacts due to unusual circumstances, will continue to provide a check on potential abuses. (See Public Resources Code, § 21084; CEQA Guidelines, §§ 15300, 15300.2.)

### **17. Conservation Easements May Be Appropriate Mitigation.**

The Agency proposes to revise the definition of "mitigation" in CEQA Guidelines section 15370 to clarify in the CEQA Guidelines that permanent protection of off-site resources through conservation easements constitutes mitigation. Some comments stated that conservation easements should not be considered appropriate mitigation to compensate the loss of agricultural land and other resources. As described below, the Agency believes that the proposed revision to section 15370 is appropriate and consistent with case law.

The Agency proposes to revise CEQA Guidelines section 15370 to incorporate the First District Court of Appeal holding in *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230. In that case, the court ruled that off-site agricultural conservation easements constitute a potential means to

mitigate for direct, in addition to cumulative and indirect, impacts to farmland. The court stated that although such easements do not replace lost onsite resources, they “may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use...” (*Id.* at p. 238.) Furthermore, the court stated that this preservation of substitute resources fits within the definition of mitigation in section 15370, subdivision (e), of the Guidelines. (*Ibid.* [“By thus preserving substitute resources, [agricultural conservation easements] compensate for the loss of farmland within the Guidelines’ definition of mitigation.”, citing CEQA Guidelines, § 15370, subd. (e).])

The Agency further points out that conservation easements are commonly used to mitigate and address adverse environmental impacts. (See *Masonite Corporation, supra*, 218 Cal.App.4th at p. 236 [California Department of Conservation’s (DOC’s) commenting that agricultural conservation easements are a “common and appropriate means of mitigating the loss of prime farmland”], 241 [“The DOC described [agricultural conservation easements] in its comments as ‘accept[ed] and use[d] by lead agencies as an appropriate mitigation measure under CEQA,’ and the administrative record includes evidence that [easements] are so employed by a number of cities and counties.”].) Moreover, off-site conservation easements are used in a variety of contexts to mitigate for a number of resources such as agricultural land, biological resources, and wetlands. (*Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238-239 [“[t]here is no good reason to distinguish the use of offsite [agricultural conservation easements] to mitigate the loss of agricultural lands from the offsite preservation of habitats for endangered species, an accepted means of mitigating impacts on biological resources”], citing *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 [habitat loss was appropriately mitigated by conservation of other habitat at a one-to-one ratio]; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 610–611, 614–626 [mitigation by offsite preservation of existing habitat or creation of new habitat]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [mitigation by “off-site preservation of similar habitat”]; *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1038 [purchase of habitat reserves for every acre of development].)

Some comments also suggested that the reference to “permanent easements” should be modified to include temporary easements. The Agency notes that conservation easements generally conserve land in perpetuity. (See Gov. Code, § 65966, subd. (a); Civ. Code, § 815.2, subd. (b) [“A conservation easement shall be perpetual in duration.”]; Pub. Resources Code, § 10211 [“shall be granted in perpetuity as the equivalent of covenants running with the land”]; Gov. Code, § 65966, subd. (a) [“conservation easement[s] created as a component of satisfying a local or state mitigation requirement shall be perpetual in duration . . . .”]; *Building Industry Assn. of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 594 [“A conservation easement is a voluntarily created interest in real property that is freely transferable in whole or in part and is perpetual in duration. (§ 815.2, subs. (a) and (b).)”.]) Thus, the Agency finds it appropriate to refer to easements as “permanent” in the definition of “mitigation.” The Agency acknowledges, however, that some dedications of land for conservation purposes may be of limited duration (such as a 30-year dedication). The proposed text does not preclude lead agencies from adopting temporary easements as mitigation measures, provided

that the lead agency has substantial evidence to support a finding that adopting such a temporary measure actually mitigates the impact of the project.

### **18. Appendix G is a Sample Form That Lead Agencies May Tailor As Appropriate.**

Changes to Appendix G, which contains the sample checklist that agencies use to prepare an initial study, prompted more comments than perhaps any other change in this update to the CEQA Guidelines. As OPR explained in its submission to the Agency, it had originally recommended a major reorganization of the checklist to consolidate categories and remove redundant questions, but stakeholders strenuously objected.

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

(OPR, Thematic Responses to Comments, November 2017.)

Thus, the changes the Agency proposes in this update represent a balance of removing redundant questions while keeping the overall format intact. Still, many comments objected, or suggested improvements, to the questions in Appendix G. Of those comments, many indicated that differently worded questions would better account for particular locations, agency activities, or unique circumstances. Again, the Agency reiterates that Appendix G is only a sample form. As explained in a recent case:

“[T]he Guidelines make clear that the checklist form in appendix G is ‘only suggested, and public agencies are free to devise their own format for an initial study.’ (Guidelines, § 15063, subd. (f).) Furthermore, ‘CEQA grants agencies discretion to develop their own thresholds of significance (CEQA Guidelines, § 15064, subd. (d)).’ [Citation] ‘To require any deviation from [the standards of significance in appendix G] to be documented and justified ... is to elevate Appendix G from a suggested threshold to the presumptive threshold. This flatly contradicts both CEQA’s description of Appendix G as only suggested and CEQA’s mandate that agencies have the power to devise their own thresholds.’ [Citation.]”

(*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 227 (quoting *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690).)

Note, none of the changes proposed in Appendix G are intended to limit the scope of analysis that CEQA might otherwise require.

### **19. Consistency with Plans May Be Relevant to a CEQA Analysis, but Only to the Extent that Inconsistency May Lead to a Significant Environmental Impact.**

Comments raised multiple variations of the following question: is inconsistency with a plan an environmental impact? Variations include: does it matter if that plan is “applicable” (i.e., legally binding, advisory, draft, etc.), and, even more specifically, what if a plan requires a certain roadway level of service, but the CEQA Guidelines state that automobile delay is not an environmental impact? Because those issues were raised repeatedly, the Agency addresses those themes below.

*Consistency with plan is similar to compliance with a regulation.*

Initially, the Agency notes that the question of consistency with a plan is similar to issues involving compliance with environmental regulations. Compliance or non-compliance does not conclusively indicate an impact or lack of impact, but it can be a starting point for a lead agency’s analysis. For example, compliance with a plan that has been adopted to address a cumulative environmental problem can be evidence that the project’s incremental contribution is not cumulatively considerable. (CEQA Guidelines § 15064(h)(3).) Additionally, the focus in the Guidelines has historically been, and continues to be, whether a project’s inconsistency with a plan will result in a significant environmental impact. (*Id.* § 15125(d).) Courts have confirmed this approach. (See, e.g., *The Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883, 893; *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933 (application of a density bonus to exceed limits in a general plan or zoning not necessarily an environmental impact); *Marin Mun. Water Dist. v. Kg Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1668 (“A local agency engaged in EIR analysis may not ignore regional needs and the cumulative impacts of a proposed project. ... Thus the Guidelines require an EIR to discuss any inconsistencies between the proposed project and applicable general and regional plans”); see also Pub. Resources Code, § 21100(e) (“Previously approved land use documents, including, but not limited to, general plans, specific plans, and local coastal plans, *may be used in cumulative impact analysis*”) (emphasis added).)

*Because the focus of the analysis should be on environmental impacts, whether the plan is “applicable” as a legal matter is not relevant to the environmental analysis.*

Under CEQA, the focus of the analysis is generally on the project’s impacts on the environment. When determining consistency with plans and policy documents, there are often questions asking whether the plan is “applicable,” and if so, whether the project is inconsistent with the applicable plan. Both of these are legal determinations. Thus, it is only those plans and regulations that are enforceable against a particular project than a lead agency should consider. A project’s inconsistency with an applicable plan may be relevant to analysis if the inconsistency supports whether a project may cause a significant effect. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207 (“an inconsistency between a project and other land use controls does not in itself mandate a finding of significance. (Citations.) It is merely a factor to be considered in determining whether a particular project may cause a significant environmental effect.”).)

*Automobile delay, even in conflict with a plan, is not an environmental impact.*

Because Public Resources Code section 21099 preserves local government authority to make planning decisions, congestion can still be measured for planning purposes. In fact, many general plans and zoning codes contain standards related to congestion. Some comments pointed to such standards to

argue that the Guidelines will still require level of service analysis. Those comments misapprehend the law. Public Resources Code section 21099 expressly states that upon the Agency Secretary's certification of the Guidelines, automobile delay is generally no longer a significant environmental impact. Because the statute states that delay is not an environmental impact, conflict with a plan's congestion standards is not relevant to a CEQA analysis.

**20. The CEQA Guidelines Can Only Implement the Statute; Broad Changes in CEQA Practice Require Legislative Changes.**

CEQA requires the Agency to adopt administrative regulations to guide the implementation of the statute. As recently explained by the California Supreme Court,

Section 21083 provides the Guidelines “shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with [CEQA].” (§ 21083, subd. (a).) The Guidelines therefore serve to make the CEQA process tractable for those who must administer it, those who must comply with it, and ultimately, those members of the public who must live with its consequences.

[¶]

Through these Guidelines, the Resources Agency gives public agencies a more concrete indication of how to comply with CEQA—including whether such agencies must determine the impact of existing environmental conditions on a proposed project's residents and users. The Guidelines also prove consequential given that under section 21082, CEQA requires agencies subject to its provisions ... to adopt “objectives, criteria and procedures” for evaluating projects and preparing environmental documents. These agencies may, in turn, adopt the Guidelines by reference to fulfill their statutory responsibilities. (§ 21082; see Guidelines, § 15022, subds. (a), (d).) The Guidelines, in effect, enable the Resources Agency to promote consistency in the evaluation process that constitutes the core of CEQA. And because these Guidelines allow the Resources Agency to affect how agencies comply with CEQA, they are central to the statutory scheme.

(*CBIA v. BAAQMD* (2015) 62 Cal.4th 369, 384-385.) While the Agency plays a key role in CEQA's statutory scheme, it is nevertheless constrained by the statute. It cannot adopt a guideline that “alters or amends the governing statute or case law, or enlarges or impairs its scope.” (*CBE v. Resources Agency* (2002) 103 Cal.App.4th 98, 108.) In other words, the Agency cannot create a requirement that does not exist in the statute, nor can it relieve agencies of requirements that are provided in the statute.

As explained in more detail in the individual responses to comments, the Agency had to reject suggestions for changes to the Guidelines that it simply is not authorized to make. For example, the Agency noticed that some comments expressed dire concern about the requirement to study and mitigate impacts and the potential effect of such studies and mitigation requirements on the ability to



carry out projects. On the other hand, some comments suggested that the Agency require more notice of projects, or additional opportunities to comment. While the Agency is sympathetic to economic concerns, and appreciates the value of public participation, the Agency cannot re-write CEQA. That is the province of the legislature.

Similarly, some comments expressed concern that the Guidelines would enable litigation or give opponents of projects a tool to create delay. Litigation risk and the potential for project delays exist with or without these Guidelines, and with or without CEQA. Our state's constitution defers most land use approvals to local governments, many of which require applicants to go through one or more discretionary project reviews. Moreover, our system of laws provide for judicial review of administrative decisions. Again, the Agency is mindful of those concerns, and where possible, has written the Guidelines to avoid those outcomes. The Agency simply does not have the power to remove development uncertainty completely.

## E. Summary and Response to Comments

See Appendix A.

## F. Statement of Availability

In issuing its 15-day notice to make modifications to the original proposal, the California Natural Resources Agency (Agency) complied with the requirements of Title 1, section 44. The Agency began the available period for comment to the proposed modifications on July 2, 2018 and closed the official comment period at 5:00 p.m., July 20, 2018. It mailed the notice and the proposed modifications to all persons specified in 1 CCR 44 (a)(1)(4). That same day, it also emailed the notice and proposed modifications to its official list serve for electronic notification. Finally, it made the modifications and changes available on its website along with the official notice on July 2, 2018.

## G. ALTERNATIVES THAT WOULD LESSEN ADVERSE ECONOMIC IMPACT ON SMALL BUSINESS

No alternatives were proposed to the Agency that would lessen any adverse economic impact on small business. Some commenters proposed limiting the analysis of vehicle miles traveled to transit priority areas, as that phrase is defined by Public Resource Code section 21099, instead of applying the measure statewide. While not expressly advocated, arguably a reduction in the scope of the application of the Guideline would reduce the negligible impact to impacted small-business consultants who are presently hired to analyze congestion. However, as has been described above, the Agency has determined this would not meet the objectives of the Legislature relative to lead agency consideration of impacts from transportation on the environment in a consistent or accurate way, nor would it result in more cost-savings, or efficiency, since vehicle miles traveled is a more affordable analysis that is already performed when greenhouse gas emissions are being analyzed. Accordingly, the Agency declines to adopt this

alternative. (See also Standardized Regulatory Impact Analysis, at pp. 24-27.) No other amendments or additions created any impacts to small business.

## H. ALTERNATIVES DETERMINATION

The Agency has determined that no alternative it considered or that was otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The amendments adopted by the Agency, by and through the Secretary are the only regulatory provisions identified by the Agency that accomplish the goal of providing accurate and efficient environmental metrics for public agencies legally tasked with applying CEQA.

Except as set forth and discussed in the summary and responses to comments, no other alternatives have been proposed or otherwise brought to the Agency's attention.