## Lockey, Heather@CNRA

**From:** dave@earsi.com on behalf of CEQA.Guidelines@resources.ca.gov
**Sent:** Friday, March 2, 2018 3:23 PM
**To:** CEQA Guidelines@CNRA
**Subject:** FW: Comments on proposed amendments to the State CEQA Guidelines
**Attachments:** NRA Supp Comment Ltr CEQA.pdf

Mr. Calfee,

Attached are EARSIs Supplemental comments on the amendments and additions to the State CEQA Guidelines.

Feel free to contact me directly with any questions.

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March 2, 2018

Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

Subject: Amendments and Additions to the State CEQA Guidelines – **Supplemental Comments**

Dear Mr. Calfee:

Thank you for the opportunity to submit supplemental comments on the proposed amendments and additions to the state CEQA Guidelines.

When considering whether to adopt and/or modify the California Environmental Quality Act (CEQA) Guidelines, please consider how the CEQA Guidelines currently function, how any changes will affect its functionality and the effects CEQA has and will continue to have on the environment and the economy.

These supplemental comments express concerns about the potential effects from the legislature's past and potential future actions and the effects the proposed CEQA Guidelines Update may have on jobs and the state and local government economies.

In the prior comments I reiterated concerns expressed by many who provided written comments to OPR over the potential increased risk of litigation. In my prior comments I expanded their concerns to include the risk of litigation from recent legislative bills including AB 2299 and proposed SB 827 on the adequacy of existing CEQA documents certified for future planning documents.

In these supplemental comments I will continue to using these bills as examples. I will demonstrate their potential effects on the CEQA and the choices faced by local governments. In addition, I will explain the situation local governments will find themselves in should the proposed CEQA Guidelines Updates be approved as written. In reviewing the public records, it is my opinion OPR has not adequately characterized the comments received, the gravity of the comments or identified the current unresolved issues in their thematic responses. As a result, I will identify how this has increased tension between the state, local governments and the public. Finally, I will provide recommendations on what steps I recommend the Resources Agency consider.

Here is an example of the affect of recent legislation (AB 2299) on CEQA. Let's use a common project example, a proposed subdivision of 250 single-family detached dwellings. To demonstrate the point let's make things simple.

Assumptions:
**Applicant**: Developer
**Project**: A 250 unit single-family housing subdivision
**Location**: City
**Project size**: 250 acres
**General Plan**: Residential R-1
**Zoning**: R-1, 1 acre minimum lot size
**CEQA Documentation**: EIR
**Sensitive on-site resources**: none
**AB 2299 Compliance**: State law - no city ordinance


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Project 1

The Developer files a subdivision application and the city deems the application complete. Let's assume the Initial Study determined the appropriate CEQA document for the project is an EIR whose scope would include analysis potential impacts on a range of topics including Land Use and Planning. On the surface, based on these assumptions there is reasonable expectation that the project would not result in potentially significant impacts to Land Use and Planning due to the project's consistency with the general plan and zoning designations for the site. As part of the EIR analysis, the city will make a finding of the proposed project's consistency with its general plan. Let's assume the city determines the project to be in conformance with its general plan. All other potentially significant impacts are mitigated to a level of less than significant, the EIR is certified and the project receives all entitlements needed for development.

The Builder then decides pursuant to AB 2299 to construct 250 ADUs in addition to the 250 dwelling units evaluated in the EIR and approved by the subdivision application. The city has no discretionary authority to deny the 250 ADUs. The Builder submits all appropriate plans and city issues building permit for 500 dwellings. It appears obvious the legislature intended CEQA not to address the impacts resulting from the construction of the 250 ADUs. This is not an unintended consequence. ADUs are exempt from CEQA, considered accessory structures or uses, not new units. It is likely some cities and some residents might be upset, feeling they have been gamed by the system. This would be particularly aggravating if the project was served by qualifying bus service and the ADUs qualified for reduced parking standards.

Project 2

An application for a second identical subdivision of 250 single-family dwellings is filed by a different Developer in the same city on a similar site. It is likely someone will ask during the EIR scoping process or prior to project approval if the project will include construction of ADUs. The Developer could honestly say there are no plans at this time to construct ADUs. What does the city do?

1. As before, the city could choose to make a determination the project is in conformance with its general plan, certify the EIR and approve the requested entitlements for the project.

   One or more of those feeling they have been gamed by the system and not wanting to be gamed again could challenge the project's CEQA document.

   What will be the likely impact to the city if the determination of general plan consistency was challenged claiming the general plan and the general plan's certified CEQA document are inadequate, based on a regulatory change in circumstances (CCR§15162), the failure to address the effects of AB 2299) and therefore, the project's EIR is flawed?

   City options:

   a) The city fully aware of AB 2299 denies their general plan and its certified CEQA document are inadequate (a probable response) and it is litigated. The courts could (choose to error on the side of the environment and) impose some form of development moratorium while considering the facts of the case. The court could determine there is no merit and dismiss the suit. Ultimately, the court will decide the outcome based on merit. One party will prevail, one party will not prevail.

      - This process could take a considerable period of time and expense and the city runs the risk of losing.


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b) The city may elect to avoid the threat of litigation and update its general plan. During this process the city may try to avoid a development moratorium by imposing some level of development restrictions. The success of this strategy is political and should be viewed on a case by case basis (city by city). Cities facing high opposition to increased development are at higher risk of litigation.

In updating its general plan the city would determine how many potential ADUs could be constructed within the city pursuant to AB 2299 (and/or dwelling units permitted by SB 827 (if approved)) and estimate the number of ADUs expected to be constructed over the life of the general plan. The city would then determine if additional supplemental CEQA documentation would be required for the update to its general plan. Assuming supplemental CEQA documentation is needed, the city will be cognizant of the threat of CEQA litigation and could choose to error on the side of the environment (leaning toward the worst-case assumptions (greater number of ADUs constructed)) knowing their methodology could be challenged as speculative because no historical data exists for all types of ADUs permitted by AB 2299.

If the city chooses to lean toward the worst-case assumptions for implementation of AB 2299 in its general plan update (more ADUs will be constructed than they actually believe will be constructed) the analysis could identify the need for significantly greater development constraints and infrastructure upgrades resulting in general plan policy changes and development restrictions throughout the city.

- This process could take a considerable period of time and expense;
- Conservative over-planning will have a significant adverse economic impact on the city; and
- The risk of litigation will be present.

c) The city could chose to use what it considers a reasonable assumption of the number of ADU constructed through the general plan's horizon year. Perhaps adopt a mid-range projection indicating to the public it will periodically update its projections. Should the city take this course it faces litigation from one or more of those feeling they have been gamed by the system and not wanting to be gamed again challenge the general plans CEQA document citing the fact that the city has no discretionary authority to deny ADUs and knowing if the general plan CEQA document is certified and the general plan is approved additional in-fill development will occur.

For coastal cities the general plan update will likely include a revision to their Local Coastal Plan. Another time consuming process, exposing the city to the potential for litigation, additional delay and expense.

2. The city could chooses to make a finding that the project is not in conformance with the general plan to avoid CEQA litigation. If the city were to choose this option:

a) The city could choose to evaluate the project in the EIR as if it was a 500 unit subdivision and certify the EIR hoping to provide public transparency and avoid a CEQA challenge from one or more of those feeling they had been gamed by the system.

If the city elects this option there is the potential the EIR would identify additional potentially significant impacts and the city would either impose CEQA mitigation measures or impose subdivision conditions of approval on the project based on the potential future construction of ADUs. Alternatively, as was the case with the SEIR for the Sunset and Gordon Mixed-Use


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Project,[1] the EIR could identify the potential impacts should ADUs be constructed at some time in the future, noting they are not a part of CEQA and are being provided for information purposes only.

Additional CEQA mitigation measures and/or subdivision conditions of approval based on the potential for construction of ADUs could subject the city to legal challenge from the Developer (increased road/intersection improvements, up-sized infrastructure requirements, increased impact fees or other exactions that would have the effect of devaluing the project).

Alternatively, if the potential adverse impacts from construction of ADUs are not included in the EIRs alternatives analysis and mitigation measures or equivalent conditions of approval imposed for identified potentially significant adverse physical impacts on the environment from the future construction of ADUs there would be at an increased risk of litigation to the Developer and city from those feeling gamed by the system.

Either way the risk of litigation is increased. For coastal cities the general plan update will likely include amendment to its Local Coastal Plan. Another time consuming process, exposing the city to the potential for litigation, additional delay and expense.

3. Based on the threat of litigation, the city does not take action, delays action or denies the Project. The result is a potential negative impact to jobs and the economy carrying with it an increased risk of litigation from the Developer against the city.

4. Based on the threat of litigation, the Developer sees the handwriting on the wall and does not file the subdivision application or withdraws the application. The result is a potential negative impact to jobs and the economy.

In general, the same potential for litigation challenging the adequacy of a general plan and its certified CEQA document cited in the example above applies to any project proposing to intensify an urbanized area whether it is a mixed use, commercial, multi-family, affordable housing project. This increased risk of litigation is not restricted to the states 480+ cities and 58 counties. It includes the 18 metropolitan planning organizations and county or regional governing authorities who receive data from their members and prepare future planning documents subject to CEQA.

**Additional Concerns**

Growth Projections: Many local governments will provide future growth projections based on whatever historical data they have to associations of governments and the state when updating their housing elements and obtaining their RHNA numbers. The provision of future growth projections based on historical data which does not account for regulatory changes in circumstances increases the risk of litigation to all parties involved in the process.

Need to Amend General Plans and local Coastal Plans: A number of commenter's stated in their written comments to OPR that general plan amendments or updates would be required following adoption of the proposed CEQA Guidelines Update due in part by the conversion from a Traffic LOS metric to a Transportation VMT metric. Converting general plans to a VMT metric will affect a wide range of general

[1] Draft Supplemental Environmental Impact Report Sunset and Gordon Mixed-Use Project, City of LA, State Clearinghouse # 2006111135. A qualified in-fill project pursuant to SB 743 "Aesthetic impacts are exempted and discussed for information purposes only" (Page IV.A.2-13)
https://planning.lacity.org/eir/SunsetAndGordon/Deir/assets/IV.A.2%20Aesthetics%20Shade%20and%20Shadow.pdf


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plan policies affecting implementation of planned infrastructure and infrastructure funding. In addition to the time and cost of conversion, the 480+ cities and 58 counties face an increased risk of litigation each time they amend or update their general plans and local coastal plans. Why have these costly crumbs and the risks of litigation resulting from implementation of the proposed Guidelines Update not been disclose to the public?

Impact on certified CEQA documents: A number of concerns were expressed that this update will invalidate the transportation impact sections of existing certified EIRs or adopted NDs/MNDs due to a change in circumstances (CCR§15162).

Need to resize infrastructure and its environmental effects: We would like to express our concerns regarding the need to resize existing and planned infrastructure and the effect on groundwater recharge within urbanized areas from the cumulative effects of in-fill development. In-fill development includes construction of ADUs pursuant to AB 2299. The cumulative impact of increased impervious surfaces from in-fill development in built-out urbanized areas is significant. Infrastructure facilities include storm drains, flood control channels, bridges and utility drainage crossings. The cumulative effects from in-fill could impact projected 100 year flood levels, and existing development. The cumulative effects have the potential to increase runoff (volume and velocity) and impact the rate of erosion, water quality resulting in the potential to impact public health and safety, sensitive/protected species and their habitats within stream channels and coastal resources.

Entities that have not commented: Notably missing from the written comments provided on the Resources Agency's website are comments from the U.S. Army Corps, RWQCB, and public utility and service entities. We suggest they be contacted and asked if they care to provide comments on the cumulative effects of in-fill within built-out urban areas prior to any action on the CEQA Guidelines Update.

Statutory Authority: A number of commenter's expressed written concerns to OPR that it was exceeding its statutory authority under the Administrative Procedures Act requiring regulations to be clear, necessary and legally valid. It is clear the proposed CEQA Guidelines Update is anything but clear! Commenter's also questioned OPR authority to eliminate reference in CEQA to voter approved legislation (example: Congestion Management Programs) and the need to mandate a VMT Metric.

CEQA was intended as an evaluation document not a document intended to promote a political agenda.

In this regard the state legislature, the Resources Agency and OPR have each engaged in social engineering. The legislature has passed Bills (one example being AB 2299) exempting activities from CEQA that will result in potentially significant adverse physical impacts to the environment. The Resources Agency and OPR have previously updated the CEQA Guidelines to exempt or streamline projects (such as affordable housing project density bonus units and in-fill projects) which could result in potentially significant adverse physical impacts to the environment. Previous OPRs Guideline updates have had a relatively minor effect on the environment and have not generated significant controversy.

In this case, OPR is attempting to radically change the way Californian's live through provisions incorporated throughout the proposed Guidelines Update. None are more evident than the "presumptions" included in evaluating thresholds of significance designed to encourage in-fill development, or the proposed elimination of Traffic (LOS) analysis from CEQA and the shift to Transportation analysis (VMT) to allow in-fill development to be streamlined through the CEQA process. To support its decision OPR has cherry picked analysis not representative of the conditions existing throughout California. OPR acknowledges their presumptions may not be correct, and are subject to rebuttal, but believes it is within their authority and appropriate to include presumptions in the proposed CEQA Guidelines. However, the presumption that development located near transit may cause less than significant transportation impacts is inconsistent with public resources code section 21099(b)(e)'s prohibition on creating a presumption for anything other than "automobile delay'.


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OPR's presumption in section 15064.3(b)(1) that development near transit may be presumed to create less than significant transportation impacts is inconsistent with the Legislature's prohibition on creating a presumption "related to air quality, noise, safety, or any other impact associated with transportation."

Numerous written concerns were expressed to OPR about the appropriateness of the state establishing this type of presumption and the need for any presumptions to be established by the lead agency, not the state. One example being written comments submitted to OPR by the **City of Los Angeles** in 2016. The City concluded:

"*Presumption of Less than Significance of Projects Near High Quality Transit*

*While OPR has made substantive improvements to the Guidelines that clarify the lead agencies ability to develop significance thresholds, we continue to have reservations with the language as proposed in Section 15064.3(b)(1), which provides presumption of less than significant solely based on project proximity to existing major transit stops and stops along high quality transit corridors (HQTC). Based on data acquired from the Southern California Association of Governments (SCAG), staff found that qualifying areas around HQTC and major transit stops constitute 80 percent of the urbanized area within the City of Los Angeles boundaries. The qualifying areas included large sections of the city with very low residential density and low transit utilization, though by definition would qualify for a presumption of less than significance based on proximity of a transit stop with a corresponding bus service that operates within minimum 15-minute peak headways. An evaluation that concludes that large scale development project in such locations would result in a less-than-significant transportation impact would be hard to defend to the public solely based on qualifying service, rather than transit utilization or other land use factors associated with low vehicle miles travelled (VMT). We continue to affirm that lead agencies should be allowed to make the determination when a project would be presumed to be less than significant based on supporting evidence."*

The inclusion of presumptions exceeds the provision of PRC § 21083.1 which states, the guidelines shall not "imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." While the proposed presumptions are rebuttable, they are intended to influence/bias the decision making of the lead agency and the public. If the state feels presumptions are appropriate for inclusion in the Guidelines, they should be neutral, rules/guidelines for the lead agency to use in determining presumptions if it so chooses.

Any changes to the Guidelines should be guided by the fundamental principle of CEQA, that being, when there is controversy supported by fact over one or more potentially significant adverse physical effects of a project on the environment, the lead agency should proceed cautiously and error on the side of the environment. In this case the OPR in its development of the proposed OPR Final Guidelines Update has not following this fundamental principle. Presumptions by definition are biased. Presumptions are not neutral or independent. OPRs proposed statewide presumptions have not evaluated their potential adverse impacts on the environment. There is a high level of controversy supported by facts from numerous organizations expressing concern, questioning OPRs interpretation of SB 743 and legal authority, recommending OPR seek legal counsel over the potential adverse physical impacts to the environment from the elimination of Traffic (LOS) analysis from CEQ (eliminating evaluation of traffic delay/congestion and its secondary effects on the environment).


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This path of transforming CEQA from a neutral, independent, non-biased evaluation tool to a tool encouraging a political agenda through social engineering is wrong and increases the risk of litigation to the state (i.e., the tax payers) and lead agencies when preparing CEQA documents. The Untied State is a country of laws. Our state agencies should implement the law not use their positions to interpret the law to establish policy. The building community should be provided a clear set of rules. If they follow the rules they should be allowed to build without undue regulatory delay. Not only does OPR fail to comply with the Administrative Procedures Act by not creating clear, necessary and legally valid Guidelines, but OPRs biased presumptions and provisions allowing interpretation of its Guidelines by lead agencies will lead to uncertainty and inconsistent application of standards which equals litigation.

Tension Between the State, Local Governments and the Public: The Resources Agency needs to be cognizant of the existing tension between the state legislature, local governments and the public when considering updates to the CEQA Guidelines. While numerous organizations have interacted with and submitted comments to OPR the general public has no idea whatsoever of what is being considered and its potential effect the proposed CEQA Guidelines Update will have on their livelihood.

Given the state legislatures goals for the future and the lack of progress in meeting those goals, the legislature believed it needed to intervene and did so by passing bills to help meet the state's housing shortage and increase housing affordability. There are many that believe additional intervention is needed to affect a transformation from individual mobility to accessibility oriented transport planning with the focus of development concentrated in in-fill areas. There is no one step to accomplish this paradigm shift. There are many that disagree with the states goals and are resisting. The legislative has taken steps and is proposing additional steps (SB 827) to accomplish its goals, focused on in-fill within build-out communities.

One of the proposed steps in this transformation is the reliance solely on a VMT metric. Experts agree the VMT metric has great potential for transportation planning and agree it does not evaluate traffic delay. The experts point out the VMT metric appears best suited to regional programmatic analysis and is not well suited to individual project analysis. Its results can vary dramatically between rural areas and urban area. When the metric is properly tuned, the VMT metric can be an important tool in calculating GHG emissions, noise levels and air quality emissions. OPRs justification for this proposed shift at this time is OPRs interpretation of SB 743. There are many commenters' who submitted written comments to OPR who disagree with OPRs interpretation. One this is clear, SB 743's intent. SB 743 stated intent is:

*"it is the intent of the Legislature to balance the need for level of service standards for traffic with the need to build infill housing and mixed use commercial developments within walking distance of mass transit facilities, downtowns, and town centers and to provide greater flexibility to local governments to balance these sometimes competing needs."*

OPRs proposed CEQA Guidelines Update do not contain provisions which "*balance the need for level of service standards for traffic with the need to build infill housing and mixed use commercial developments within walking distance of mass transit facilities, downtowns, and town centers and to provide greater flexibility to local governments to balance these sometimes competing needs"*

OPRs proposal simply proposes to eliminate the need for LOS from CEQA to accommodate in-fill housing.

Because of this failure, numerous comments were submitted expressing concerns to OPR that its proposal failed to include some other metric to evaluate the physical environmental impacts caused by traffic delay. OPR responded that LOS would remain a metric used for Traffic analysis, but would not be part of CEQA. This position has increased tension because publicly funded planning studies, such as traffic analysis used in general plan circulation elements, are part of CEQA. OPRs position clearly raises the risk of litigation for local governments.


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Traffic congestion on major roadways can impact nearby roadways and neighborhoods as drivers seek alternative routes to reach their destinations. The effects of traffic congestion are similar to temporary road/lane closures caused by construction or and accidents, except they are not temporary. In addition to impacting emergency response times, traffic delay impacts the time of those people affected by the delay and business, including trucking and freight movement which are responsible for a large part of the state's economy. Delay affects the quality of life and a host of other environmental factors. It has been long said that time equals money. Transportation delay places pressure on those caught in the delay to make up for lost time (talking and texting while driving) increasing health and safety risks. This is the today's reality. These concerns were raised by organizations in their written comments to OPR, but not disclosed in OPRs thematic responses.

Projects proposing increased urban densities in built-out cities result in increased traffic congestion and other secondary impacts with little to no benefits seen by local residents. These types of projects are increasingly resulting in voter initiatives to take the power away from local governments. Project approvals occur only after a public vote of approval. This voter initiative process costs the city (tax payers) money. Developers and decision makers recognize this cost, the increased tensions associated with voter initiatives and their decisions are influenced by the likelihood of a project being approved by a vote of the public.

Many communities built-out since the 1980's employ the planned community, mixed use land use model. Infrastructure is sized and balanced for the ultimate build-out of the planned community. Appropriately sized open space areas, parks, schools and environmental preserves are established. The planned community is consistent with the regional jobs/housing balance. Infrastructures, including roads, storm drains sewer and domestic water needs are sized to meet the planned community's needs. They are consistent with air quality management plans and a host of other plans designed to reduce their impact on the environment. Infrastructure is not overbuilt or upsized beyond the projected need upon build-out. There is no anticipation that significant additional density or urban intensity will occur. Significant financial investments are made in these communities based on the general plan and its master plans.

State mandated residential in-fill legislation is not wanted in many built-out communities because it upsets this balance. State mandated in-fill is seen as big brother trying to impose/force social engineering. This is a recipe for litigation in many parts of California. The state's policies of accommodating unlimited population growth within the California which has finite resources is kicking the can down the road; and concentrating new development in in-fill areas and proposed legislation like SB 827 are seen as government trying to force social engineering within built-out communities.

Many local governments are caught in the middle between constituents favoring "no-growth", "not in my backyard" or those for "responsible development" and the cities desire to do their part to meet the state's environmental goals. Local governments are also a business providing necessary public services and to protect the public's health and safety. Local governments don't want conflict, especially with the state where the state can use the threat of cutting off funding. Historically, local governments have had the ability of negotiating solutions. A compromise between state policy directives and community desires. Now through bills like AB 2299 and proposed SB 827 the state legislature has taken discretionary authority away from local governments, severely limiting their ability to find solutions, increasing the risk of litigation. The legislatures past and proposed actions are forcing the cities to rethink their ability to accommodate future population growth beyond the level anticipated in their general plans.

While the intent of the legislature, the Resources Agency and OPR is commendable, (to solve the housing shortage, increase efficiency, dramatically reduce GHG emissions and create a transformation from individual vehicles to mass transit) the manner in which the legislature is implementing its goals is facing resistance by local governments and their constituents throughout the state, increasing tensions and the risk of litigation.

The potential impacts to jobs and state's economy from the increased risk of CEQA related litigation is significant. Business associations throughout the state have submitted written concerns to OPR warning of dyer economic impact should the proposed Guidelines Update be adopted as written. Yet OPRs thematic responses to comments fail to express the gravity of these concerns.

In considering the proposed CEQA Guidelines Update, OPR received comments from numerous organizations and legal professionals warning against proceeding along the proposed course of action. While OPR has tried diligently to find solutions to comments received from the public, organizations and stakeholders many of the major concerns identified early in the CEQA Guidelines Update process remain unresolved. In addition, recently adopted legislation, including AB 2299, throws fuel on the fire, increasing tensions and inviting litigation. The proposed updates to the CEQA Guidelines are front and center in this debate.

Independent Review: The thematic responses prepared by OPR to written comments received throughout the CEQA Guidelines Update process do not adequately describe the range of concerns or characterize the gravity of the concerns expressed to OPR. The thematic responses appear to gloss over the seriousness of many concerns. An independent review and analysis should be conducted. Independent review is the heart of CEQA and should be applied to the Guidelines amendment/update process, particularly involving controversial issues.

Example: OPR stated:

- "Some comments suggested that changes in CEQA analysis may become an issue in future litigation, and that the proposal should reduce litigation risk to the extent possible."

You may recall the group of lawyers who provided written comments to OPR and met with OPR in April 2015 following their independent review of the proposed CEQA Guidelines Update. They concluded:

*"The Proposal intentionally makes traffic congestion levels worse in the hope of persuading California drivers to stop or substantially curtail driving automobiles."*

*The "Proposal does not reduce CEQA compliance costs and litigation risks."*

Nowhere in the thematic responses is this topic addressed even thought this opinion was expressed in numerous others in written comments submitted to OPR.

Another example is the disregard for the conclusions of the **Institute of Traffic Engineers**, the preeminent authorities on traffic and transportation engineering in their February 14, 2013 written comment to OPR[2]. ITE states:

*"VMT analysis is a useful tool that is applied in many transportation applications. However, VMT analysis requires estimates of both trip generation and trip length. Neither of these performance measures can be easily calculated or predicted with a high degree of accuracy. It is recommended that both roadway capacity/LOS analysis and VMT analysis continue to be used in various aspects of transportation analysis."*

One of the many concerns raised by a number of commenter's was the inability of the VMT metric to accurately predict results. VMT analysis presents different results at the local, county-wide and regional levels. It was demonstrated by example in written comments to OPR how working with averages can lead to misleading results, depending on how the averages are used.

[2] http://www.opr.ca.gov/docs/ITE_Final_Letter_to_OPR_2-14-14.pdf


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The thematic responses mischaracterized the written recommendations submitted to OPR. The maintenance of both LOS and VMT metrics is a common recommendation expressed by numerous transportation engineers, municipalities, organizations and legal professionals in written comments to OPR. Many expressed concerns citing instances where VMT analysis would not be appropriate and expressed concerns over the assumptions to be used. These comments did not recommending a "phase in" period as OPRs thematic response indicate, but rather, questioned the fundamental feasibility of deleting the LOS metric and converting solely to a VMT metric and the feasibility of implementing a uniform statewide standard given the diverse conditions existing throughout the state.

Another example is the disregard for the conclusions of the **California State Association of Counties** in their February 14, 2014 written comment to OPR. CSAC states:

*"CSAC recognizes the limitations of LOS analysis in certain instances; however, we believe that roadway capacity analysis still has a role in the CEQA Guidelines and in the design, planning, and operations of roadways."*

This concern was expressed by numerous others who provided written comments to OPR. OPR responded agreeing that LOS analysis is still needed, but proposes it will no longer be a part of CEQA. This position is taken for one reason, to allow in-fill projects to be streamlined through CEQA. This position increases the risks of litigation to cities and counties. However, this fact, (the increased risk of litigation from the omission of LOS in CEQA documents), is not included in OPRs thematic responses.

Yet another example is the disregard for the conclusions of the **Orange County Transportation Authority** in their February 14, 2014 written comment to OPR[3] which state:

*"Additionally the legal issues raised with replacing LOS with other measures could introduce major legal risks into the CEQA process. For instance consideration should be given to how LOS is used in federal law, especially as it relates to National Environmental Policy Act analysis and transportation reporting requirements. We encourage OPR to consult with legal experts on this matter."*

Many commenters's requested OPR conduct a pilot program prior to taking any action on the CEQA Guidelines Update. The comments cited circumstances where VMT analysis was not appropriate or concerns over the applicability modeling assumption for range of land use conditions existing within the state. Other commenter's raised concerns about the time and cost of converting from an LOS metric to a VTM metric. Local agencies commented they may have neither the requisite skill nor the funding to undertake this approach. Local agencies cited the need to amend their general plans and economic hardship of this approach. The skill sets needed and funding to implement this approach and the need to update general plans and its economic impacts were not included in OPRs thematic responses. The California Coastal Commission cited in their written comments to OPR the need for jurisdictions within the Coastal Zone to update their Local Coastal Plans. Still others raised concerns over the legal exposure from such amendments. These concerns were also not included in OPRs thematic responses.

Based on a review of the public records, many organizations submitted detailed written comments expressing concerns over major provisions of the proposed Guidelines Update recommending against OPRs proposed approval unless the Guidelines were modified. OPRs proposed Final CEQA Guidelines Update have not resolved the underlying major concerns. The fact that these concerns remain unresolved is not reflected in OPRs thematic responses to comments received.

[3] http://www.opr.ca.gov/docs/OCTA_Comments_OPR_Alt_Methods_of_Transp_Analysis.pdf


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Based on the many unresolved issues and inconsistencies with the Proposed Guidelines Update many expressed concerns about the increased risk of litigation and the effect to the state's economy. The **Association of California Cities Orange County** provided written comments to OPR in 2015. ACCOC concluded:

*"Most poignantly, these rules would threaten the General Plans of the more than 400 cities in California. These publicly developed plans contain significant congestion relief and mobility strategies to achieve existing state mandates. It is our belief that eliminating Level of Service in favor of Vehicle Miles Traveled as the standard of performance will threaten these policy documents. Our jurisdictions have studied, funded and approved projects that improve mobility and decrease VMT through local program, not state mandates. It is counterproductive to move the goal posts at this time.*

*The legal exposure to cities is also enormous and potentially crippling. Active approved environmental impact reports would be challenged based on these new rules. Approved projects would be placed on hold and economic progress halted. Transportation improvements as part of those plans would stall, which would have the exact opposite impact desired by SB 375 and SB 743. We had hoped that CEQA reform for smart transit projects would be included as part of this implementation and rule making. Alas, the opposite is true: good projects will take longer, cost more and ensure future congestion.*
*These rules are self defeating."*

Based on OPR's thematic responses the public and decision makers would have no indication of the seriousness of concerns expressed to OPR regarding the proposed Guidelines Update unless they reviewed every written comment submitted to OPR.

A partial list of these organizations included the following:

**Partial list of organizations, transportation engineers and legal experts recommending against the wording included in OPR's proposed CEQA Guidelines Update**

Adams Broadwell Joseph & Cardozo
American Planning Association California Chapter
Association of California Cities, Orange County
Automobile Club of Southern California
Bat Area Council
Building Industry Association
Building Industry Association of Southern California Inc
BIZFED, the Los Angeles County Business Federation
Brandt Hawley Law Group
CALCHAMBER, et. al.
California Chamber for Environmental and Economic Balance
California Coalition of California Neighborhoods
California Department of Fish and Wildlife
California Economic Summit
California Infill Federation
California Manufacturers & Technology Association
California Rural Counties Task Force
California State Association of Counties
California Unions for Reliable Energy
Central City Association of Los Angeles
Coalition for San Francisco Neighborhoods
Chatten-Brown & Carstens LLP
City/County Association of Governments of San Mateo County
City of Anaheim

City of Chula Vista
City of Corona
City of Cupertino
City of Escondido
City of Glendale
City of Goleta
City of Irvine
City of Irvine Chamber of Commerce
City of Laguna Hills
City of Los Angeles
City of Menifee
City of Mission Viejo
City of Moreno Valley
City of Napa
City of Oakland
City of Riverside
City of Redding
City of Roseville
City of San Diego
City of San Marcos
City of Santa Monica
City of Santee
City of Shafter
Coalition for San Francisco Neighborhoods
Council of INFILL Builders
County of Colusa Transportation Commission
County of El Dorado
County of Kings
County of Riverside Office of County Council
County of Riverside Transportation and Land Management Agency
County of Sacramento Department of Community Development
County of San Bernardino
County of San Diego
County of San Joaquin
County of San Mateo Joint Comments: Department Public Works and Planning & Building
County of Santa Barbara
County of Santa Clara Department of Planning and Development
County of Santa Clara Roads and Airports Division
County of Santa Clarita Office of the County Executive
County of Trinity
County of Tuilume
County of Ventura
County Sanitation Districts of Los Angeles County
Courtney Ann Coyle, Attorney at Law
Culver City
Environmental Defense Center
Federation of Hillside and Canyon Associations
Gatzke Dillon & Balance LLP
Gibson Transportation Consulting Inc
Institute of Traffic Engineers
Kern Council of Governments
KOA Corporation
League of California Cities

Los Angeles Area Chamber of Commerce
Mary Miles, Attorney at Law
Mono County Community Development Department
NAIOP Commercial Real Estate Development Association
On Track North America and California Clean Energy Committee
Orange County Business Council
Orange County Council of Governments
Orange County Transportation Authority
PAH Transportation Consultants
Planning & Conservation League
Port of Long Beach
Public Counsel
Richmond Community Association
Riverside County Transportation Commission
Rural County Representatives of California
Sacramento Area Council of Governments
San Bernardino Association of Governments
San Diego Association of Governments
San Diego Regional Chamber of Commerce
San Francisco Planning Department
Santa Barbara County Association of Governments
Serra Club & Center for Biological Diversity
Sharks Sports & Entertainment
Sonoma County Transportation Authority/Regional Climate Protection Authority
Southern California Association of Governments
Southern California Leadership Council
State Building and Construction Trade Council of California
Studio City Neighborhood Council
Sunset-Parkside Education and Action Committee
Thomas Law Group
Transolutions Inc.
Transportation Agency for Monterey County
Transportation Corridor Agencies
Valley Industry and Commerce Association

None of the above have stated their belief more clearly or bluntly than the **Building Industry Association of Southern California** (BIASC) in their October 12, 2015 written comment to OPR[4].

To put CIASC's comments into context, the southern portion of the state is projected to accommodate the largest share of the projected increase in population and development. The Building Industry Association (BIA) of California represents businesses that would profit from in-fill development and permit streamlining. For the past 44 years my business has been dependant on development for its lively hood. I could not agree more with the BIASC's conclusions. BIASC stated:

*"BIASC believes there is an absolute need for a comprehensive overall of the CEQA Statue and Guidelines, as over the decades it has been amended and "updated" and as a result strayed into areas of non-environmental impact relevance including attempts at social engineering"*

*"BIASC suggests that what is needed to re-invigorate this vital California environmental protection statute is a complete intensive overhaul and cleansing for original intent and purpose"*

[4] http://www.opr.ca.gov/docs/Schuyler101215.pdf

Businesses organizations throughout the state expressed grave concerns. One such organization **BIZFED, the Los Angeles County Business Federation**[5] eloquently reflected the private business sectors concerns. BIZFED is an organization in the southern portion of the state standing to profit from in-fill development and permit streamlining. BIZFED represents 170 business organizations representing 390,000 employers with 3.5 million employees throughout LA County. BIZFED states:

*"The vast majority of the OPR proposal shows neither "common sense" nor the "practical experience of processing land use applications." Together with OPR's 2014 proposal to define the act of riding or driving a vehicle for each and any mile – any type of vehicle, including electric scooters and cars – as a new environmental "impact" under CEQA, and to impose elaborate new analytical and unprecedented new mitigation requirements on California projects based on this new "vehicle mile travel impact" - this proposal demonstrates a fundamental misunderstanding of how CEQA is used in practice to delay and derail public and private sector projects that are critical to solving the economic, equity, and environmental challenges of our time."*

*"OPR's proposal to expand CEQA, and increase CEQA's compliance costs, delays, and litigation risks, is also entirely at odds with the Governor's frequent criticism of CEQA and his characterization of CEQA reform as the "Lord's work."*

This general sentiment was expressed in written comments to OPR by numerous private sector business organizations like a the chamber of commerce and other legal professionals who expressed concerns OPR was exceeding its scope of authority and the effect of the proposed CEQA Guidelines Update if approved would be detrimental to jobs and the state's economy. Yet these concerns were not stated in OPRs thematic responses.

The **Automobile Club of Southern California** provided written comments to OPR in 2015. The Automobile Club concluded:

*"We believe that the proposal exceeds the legislative intent and authority of SB 743 and will result in adverse impacts on the development and delivery of needed transportation improvement projects with long term negative consequences for mobility, safety, economic growth, and quality of life in California."*

Given such overwhelming opposition it is unclear why OPR choose to forward to the Resources Agency the proposed Final CEQA Guidelines without first resolving the grave concerns expressed by the commenter's. The consequences identified in comments received on the Guidelines Update are known to OPR, and therefore the consequences resulting from the proposed Final CEQA Guidelines Update are not unintended. Since the majority of projected population growth and development will occur in the southern portion of the state, we caution that if the CEQA Guidelines Update is approved without first resolving in-fill and traffic congestion concerns it could have a divisive effect statewide, throwing fuel on the fire of those wanting a two state solution!

[5] http://www.opr.ca.gov/docs/TownsendFlemingRafter101215.pdf


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**Recommendations**

OPR has received a wide range of comments from the public and stakeholders on the content and direction of the proposed CEQA Guideline Update. There are a number of common concerns including the potential for an increased risk of litigation, potential adverse impacts to the state's economy, feasibility of replacing a Traffic LOS metric with a Transportation VMT metric, the feasibility of establishing a singular statewide transportation metric, the desire to initiate a pilot test program to explore the feasibility of replacing the LOS metric with a VMT metric or other metric prior to updating the Guidelines, and the desire to comprehensively re-evaluate the CEQA statute and Guidelines. Based on these common concerns, the following recommendations are provided.

- It is recommended the Resources Agency inform the legislature of the increased compliance costs and risks of litigation resulting from recent rule making (example AB 2299), the need for cities and counties to update their general plans and future planning documents to comply with this rulemaking and the potential effects such litigation could have on jobs and state's economy.

- The Resources Agency recommend to the legislature it takes immediate steps to rescind legislation responsible for any potential increased risk of litigation, until solutions are developed,

- It is recommended the Resources Agency re-evaluate the proposed CEQA Guidelines Update and not act at this time or if it does act, make the necessary updates and maintain Traffic LOS metric.

- It is recommended the Resources Agency conduct case studies on the effects of changing the CEQA Guidelines from a LOS metric to a VMT metric prior to any action approving the proposed Guidelines Update. The case studies should include a number of common examples of projects including a residential in-fill project within built-out communities. The case studies should provide required methodologies and compare the identified significant impacts between the two metrics for each case study. The case studies should include a monitoring program over time to determine feasibility, effectiveness and enforceability.

- In addition to case studies, it is recommended the Resources Agency conduct pilot test programs at locations throughout the state to determine the appropriate transportation metric(s) in compliance with SB 375.

- It is recommended the Resources Agency obtain a court opinion confirming their statutory authority make the decisions contained in the proposed CEQA Guidelines Update.

- It is recommended the proposed text of the CEQA Guidelines Update, all public comments and records be subjected to review by a qualified panel of independent experts and their findings and recommendations be circulated for public review and comment prior to final action in the CEQA Guidelines Update.

  It is recommended the panel include members representing both the private and public sectors with knowledge of all industries who submitted comments including legal, transit, transportation engineering, transportation logistics, air quality/GHG emissions, municipal representatives, planning, business, economists, etc.

  Based on the independent panel's findings and recommendations it is further recommended the Agency conduct an independent assessment of the burden, cost and legal exposure to cities, counties metropolitan planning organizations and regional governing authorities from implementation of the proposed CEQA Guidelines Update and this assessment be circulated for public review and comment prior to final action updating the CEQA Guidelines.


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- As of this time, the general public has no idea of these proposed changes or what LOS or VMT is or its affects on their lifestyle. Given the radical changes in lifestyle resulting from the proposed CEQA Guidelines Update, it is recommended that prior to the adoption by the Resource Agency of any CEQA Guidelines Update involving the deletion of Traffic LOS analysis and replacement with Transportation VMT analysis the Resources Agency initiate a public awareness campaign to insure that each SB 743 requirement, including the VMT metric is understandable to elected officials, local/regional stakeholders and the public.

- It is recommended the Resources Agency comply with PRC § 21083.1 and make available to the public a guidance document on key court decisions identifying issues raised and providing guidance on the changes necessary in preparing and certifying CEQA documents.

- It is recommended the Resources Agency publish Technical Advisories to provide additional detail not suited to the CEQA Guidelines.

  One such Technical Advisory would detail the optional use of Transportation VMT analysis in CEQA analysis containing recommended approaches, methodology, and case studies.

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