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Senate Bill 743 and the LOS to VMT Paradigm Shift: A CEQA Attorney's Perspective

SB 743 – Preparing for Implementation
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The Current Landscape

- Land Use/Planning Perspective: Many jurisdictions (including many within the Los Angeles basin) use “level of service” or LOS standards (A through F) to measure roadway function. These delay-based standards are often reflected in local general plan circulation elements.
- CEQA Perspective: Appendix G expressly asks agencies to evaluate whether a project’s traffic impacts conflict with “level of service standards” or other standards established for roadway/highway function. These standards are often reflected in local CEQA guidelines or traffic analysis manuals.



Potential Limitations on LOS in CEQA

- LOS tends to focus on localized impacts (i.e., delay at specific nearby intersections), rather than regional impacts (i.e., increased VMT).
- LOS tends to put burden of impact on the last development in the door (i.e., the one that trips the LOS threshold).
- Mitigation for LOS impacts tends to widen roadways and increase capacity.



The New Landscape (Senate Bill 743)



- Governor Brown signs into law in 2013 as part of effort to reduce GHGs.
- States that delay will no longer be considered a traffic impact (does not preclude agencies from using LOS for other types of impacts).
- Directs OPR to update the CEQA Guidelines to analyze traffic using a metric something other than LOS (specifically mentions VMT as one option).

Draft CEQA Guidelines

Updating Transportation Impacts Analysis in the CEQA Guidelines

*Preliminary Discussion Draft of Updates to the CEQA Guidelines Implementing
Senate Bill 743 (Steinberg, 2013)*

Governor's Office of Planning and Research
8/6/2014



- 2014: OPR released proposed CEQA Guidelines that would implement the new law.
- Draft Guidelines state:
 - Traffic delay is not an impact
 - VMT to be used to measure transportation impacts
- Revised Guidelines are still forthcoming.

How to Quantify the Impact?



- Agencies choice of one model over another is entitled to review under CEQA’s “substantial evidence” test. (*City of Hayward v. Trustees of California the California State University* (2015) 242 Cal.App.4th 833, 839.)
- Substantial Evidence = Facts, Reasonable Assumptions Predicated Upon Facts, and Expert Opinion Supported By Facts. (State CEQA Guidelines, § 15384.)

How to Quantify the Impact (cont.)?

- Get ready for the forthcoming “battle of the experts”!!
- Key Caveat: Courts appear to be increasingly more willing to look behind the numbers and question the lead agency’s methodology. (See, e.g., *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 227.)
 - “At bottom, the EIR’s deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the [GHG] reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments . . . to measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location. The EIR simply assumes that the level of effort required in one context, a 29% reduction from BAU statewide, will suffice in the other, a specific land use development.”.)

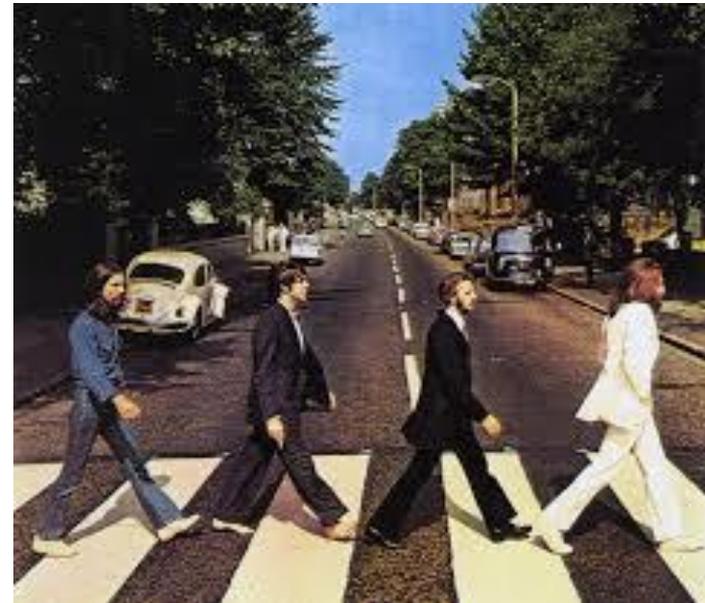
What Are the *Types* of Impacts?

- As train, bicycling, and pedestrian transportation increases, the reasonably foreseeable impacts that may result from transportation projects is changing.
- Draft Guidelines suggested they may create an express category of transportation-related “safety” impacts.
 - A transportation sector issue?
 - A hazards issue?
 - An impact to humans issue?
- Consider addition or removal of trails or bike lanes, increasing of crossing occurrences, changes in speed, distances between crossings for cyclists and pedestrians, etc.



How to Decide if the Impact is Potentially Significant?

- Lead agencies maintain broad discretion to formulate thresholds of significance. (See, e.g., *San Francisco Baykeeper, Inc. v. State Lands Commission* (2015) 242 Cal.App.4th 202, 227.)
- Significance conclusions are reviewed under the substantial evidence test.
- Key Caveat: Courts can be skeptical in reviewing thresholds.
 - “We begin with the broadest question posed: Did DFW abuse its discretion in adopting consistency with [AB 32’s] reduction goals as its significance criterion for the project’s [GHG] emissions? ***We review the issue de novo, as it is predominately a legal question*** of correct CEQA procedure.” (*CBD v. CDFW, supra*, 62 Cal.4th at 219.)



How to Decide if the Impact is Potentially Significant (cont.)?

- Agencies must be careful when establishing thresholds of significance compliant with SB 743
 - If VMT threshold is too low, an EIR will be required for virtually every project.
 - If VMT threshold is too high, this may subject the agency to legal challenge.
- How far down the road must an agency analyze?
 - CEQA does not require lead agencies to analyze impacts that are speculative. (State CEQA Guidelines, § 15145.)
 - However, agencies must analyze all those impacts that are ***reasonably foreseeable***. (State CEQA Guidelines, § 15064.) Documentation is crucial here.

How to mitigate for VMT?

- May be seeing transition away from traditional roadway widening projects (arguably could make VMT worse in some cases).
- May see greater focus on GHG-reducing measures:
 - Offsite mitigation (GHG credits/renewable energy)?
 - Cap and Trade?
 - Addition of bicycle lanes or pedestrian facilities?
 - Carpool or flex-lanes?
 - Monetary incentives (or dis-incentives)?

Where Does This Leave Us?

- New Guidelines should confirm that they are not intended to alter CEQA's general rule of giving deference to lead agencies. Thus, lead agencies can continue to use:
 - Rule of reason
 - Models to estimate
 - Inputs/outputs reflecting professional judgment
- Analysis remains subject to “substantial evidence” test.
- Ultimate rules under CEQA for transportation experts:
(1) Document your assumptions; (2) show your work; and (3) explain things in terms that the public (or your future judge!) can understand.

Thank you for attending.