

Questions on SB-743 and Evolutionary Change to CEQA Practices

Although SB 743 pertains to CEQA rather than the Mitigation Fee Act (AB 1600), per se, could you please discuss how you envision SB 743 changing the development of transportation impact mitigation fee programs by cities and counties across the State.

1. Specifically, do you think that SB 743 will result in:

- The increasing use of VMT (as opposed to LOS-based “existing deficiencies”) in establishing Nexus to new development?

In general, yes. This has already started before SB 743 for those agencies that were interested in developing multimodal capital improvement programs (CIPs). These tend to be cities in urban areas where the existing roadway network is relatively mature and where transit, bicycling, and walking are key elements of accommodating the travel needs for population and employment growth.

- The increasing use of trip length (as opposed to straight trip generation) in calculating per-unit fees?

This started well before SB 743 due to 'equity' issues associated with the impact fee cost distribution across different land use categories. In particular, many agencies were sensitive to the cost burden on retail. Using trip length (or VMT) as the basis for the 'fee schedule' increases the dwelling unit equivalent (DUE) value for residential uses and decreases it for non-residential uses such as retail and commercial.

- The increasing incorporation of transit service, bike/ped improvements, and ITS & TDM measures in developing CIPs?

In general, yes. For communities that desire a multimodal CIP, using a VMT reduction goal as a nexus is one means to justify these types of improvements.

2. If so, what is the essential Nexus argument that needs to be made to ensure that such a shift is politically acceptable for developers and local agencies and legally defensible for the Courts?

Here's a simple response that doesn't provide all the details but outlines a basic framework for the first part of the question. Obviously, no answer will be complete until validated by the courts.

Similar to vehicle LOS, VMT could be used as the basis for a nexus. As noted in the AB1600 section below, a fee may be used to pay for public facilities need to achieve an adopted level of service that is consistent with the general plan.

Government Code 66001.

*(g) A **fee** shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan.*

For a VMT based impact fee, the city or county would ideally establish a VMT reduction goal as their 'level of service'. Alternatively, they could establish the existing VMT/capita as a desired threshold to maintain. It should be noted here, that the use of the term 'level of service' in AB 1600 did not specifically reference vehicle level of service but tends to cover the broader definition related to quality, quantity, or acceptability of government provided facilities or equipment.

The main difference, at least compared to vehicle LOS, is likely to be how a threshold is set to determine deficiencies and to justify improvements for inclusion in the CIP. Jurisdictions wanting to justify inclusion of multimodal improvements could use a VMT reduction goal or VMT/capita threshold as the basis for their nexus argument. For example, consider the selected nexus requirements in AB1600 below. For the first question, the fee would be used to pay for multimodal improvements that would directly reduce VMT being generated by development projects. For the second question, the need for multimodal improvement is to achieve the VMT reduction (or the VMT/capita threshold), which would also accomplish other public goals related to air pollution and GHG reduction. For the last question, the amount of fee would be proportional to the project's VMT generation.

Government Code 66001.

*(3) Determine how there is a reasonable relationship between the **fee**'s use and the type of development project on which the **fee** is imposed.*

*(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the **fee** is imposed.*

*(b) In any action imposing a **fee** as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the **fee** and the cost of the public facility or portion of the public facility attributable to the development on which the **fee** is imposed.*

As to political acceptability for developers and local agencies, that will depend on each specific jurisdiction. Fee programs that are politically acceptable tend not to be legally challenged. If challenged though, the VMT based nexus approaches above are very similar to what's used for LOS so we should expect similar legal outcomes if challenged. What's probably more important is to consider how a fee program relates to the general plan. The general plan should reflect community values about growth and the quality of the transportation network. Presuming that exists, and a community values VMT reduction and increasing travel choices by investing in transit and active transportation, then the circulation element should reflect that. If the jurisdiction then chooses to finance those public transportation improvements in the circulation element through an impact fee program that also relies on VMT reduction for the nexus, then they have generally connected all the dots. In this type of community, the development community

would generally consider VMT reducing transportation improvements as desirable and would want an equitable method of financing the improvements. A fee program is one option but there are also others.

You also mentioned ITS and TDM improvements. To the extent these can be connected to facilities and equipment within the technical framework above, then they may also be justified. Extending the nexus to cover ITS and TDM programs may even be possible given the AB 1600 definition of 'public facilities below.

(d) "Public facilities" includes public improvements, public services, and community amenities.

3. If not, why not?

- Is an amendment to AB 1600, or new legislation, needed before such a shift will become universally adopted?

Not sure. As explained above, AB 1600 provides a framework that can be applied for a VMT based nexus. That said, attorneys tend to be conservative and may want definitive statute language before universal adoption occurs.

Specifically on the Planning Horizons presentation:

CalSTA and others, particularly within the infill segment of the building industry, have expressed a concern that the cost of performing quantitative impact on and mitigating the potentially adverse impacts of infill development is an economic burden that undermines its financial viability, thereby resulting in

practical harm to a high priority land use strategy that is needed to implement AB 32, SB 375, SB 226, and various other Executive Orders, as well as the Department's planning priorities. Others, particularly Department staff, feel that the State statutes and underlying requirements of CEQA (e.g. Sections 15003 (i), 15125 (c), 15144, 15151, etc.) that establish our role as caretakers of the State Highway System require us to request such quantitative analysis and as seek mitigation where needed.

What advice can you offer on how we might be able to resolve this tension and strike a balance between these apparently contradictory points of direction. Specifically;

A) How can the Department acquire or develop (either independently or in conjunction with its partners) the quantitative analysis needed to carry out its responsibilities to protect the environment and traveling public without unduly "burdening" infill development with such costs?

The following includes a brief response in the interest of conciseness, but this is a complex topic worthy of a much longer dialogue and multiple perspectives. I've provided one potential perspective below but have many others to offer if interested.

Let's start with some related questions...

How can Caltrans be most effective in planning, managing and expanding the State highway system to accommodate planned population and employment growth? Is it through reviewing the CEQA analysis conducted by others for individual development projects or is by performing their own planning and operations analysis based on planned population and employment growth as part of the RTP process?

The current approach focuses substantial resources on IGR review of the CEQA documents for individual development projects. Is this required by current laws as suggested above or is a choice being made by Caltrans? I couldn't find any evidence in the sections cited above or by looking through other statutes that requires Caltrans to conduct these reviews. If you have other evidence, please share it. I also

couldn't find evidence establishing a formal 'caretaker' role for Caltrans at least under CEQA. While it's clear that Caltrans is responsible for all aspects of planning, designing, managing, operating, and expanding the State highway system, its role with regard to CEQA appears to be largely governed by the traditional roles for all public agencies such as either acting as a lead, responsible, or reviewing agency. As such Caltrans may choose to review and comment on projects but there are no penalties (at least under CEQA) when Caltrans doesn't conduct a review. So, it appears that Caltrans is choosing to review individual projects and that is allowed under CEQA. Whether this is an effective approach is an important discussion.

While reviewing individual projects does allow the precise identification of potential problems and mitigation, it may be directing resources away from more traditional planning. Further, many local agencies often override impacts on the State highway system claiming they cannot guarantee that mitigation will be implemented by another agency or that the project only has a fair share responsibility for the mitigation and that a financing mechanism has not been established to collect the remaining fair-share. Hence, mitigation is not feasible. [While there are other mitigation options such as Ad-Hoc fees that could be paid to Caltrans, I won't get into those details for this discussion.] Suffice it to say, these types of outcomes contribute to the question of how Caltrans can be most effective. In states without CEQA, the DOT often does not have the opportunity to review individual development projects. Instead, the DOT normally performs substantial planning and traffic operations analysis of the State highway system in cooperation with the MPO to identify projects for inclusion in the RTP. As the MPO develops population and employment growth projections and allocations, the DOT is working to identify necessary improvement projects for the State highway system to accommodate that growth. This traditional planning approach may become more important to Caltrans given the changes to CEQA associated with SB 375, SB 226, and SB 743. Substantial CEQA relief or analytical changes associated with these laws will likely mean less analysis of the State highway system by individual development projects. Under that outcome, Caltrans can still identify traffic operations problems and capacity expansion needs required because of population and employment growth but it would likely occur through the RTP process. This would mean that Caltrans will perform more of the planning and operations analysis versus reviewing the work of others submitted as part of CEQA documents.

B) Similarly, how can the Department calculate and propose (either independently or in conjunction with its partners) adequate and appropriate mitigations that do not without unduly "burdening" infill development with such costs?

As outlined above, Caltrans could choose to focus on performing its own analysis of State highway system needs as part of the RTP process. They could also participate in city and county general plan updates to ensure that the State highway system is included as part of the general plan circulation diagram and considered in all aspects of the circulation element analysis to determine the transportation network expansion necessary to support planned population and employment growth. Local agencies not including the State highway system in their analysis has been an issue and one that shouldn't occur given the 'backbone' role the State highway system serves for almost all communities. Caltrans could also partner with local agencies in developing their local and regional impact fee programs (there are already many examples of this throughout the state).

An important aspect of both questions A and B is how all of this relates to funding transportation network needs. This is almost a philosophical issue. For example, should we consider current funding as decided by federal, state, and local elected officials (which includes impact fee programs) as the available resources for operating, maintaining, and expanding the transportation network and simply live within those means? Or, should the CEQA process be used to extract additional funding from individual projects as the cost of obtaining entitlements? Caltrans and many other public agencies currently function under the latter position and this contributes to the cost of development. These costs are not born exclusively by the developer but are distributed downstream to the development project affecting the cost of housing, commercial rents, etc. They can affect land values and are not consistent across jurisdictions adding uncertainty to the development process, which makes development more difficult. Since there is competition for the 'available mitigation dollars' that any project can reasonably pay, what priority should be placed on mitigating transportation network impacts versus other environmental impacts? And, since cities, counties, and Caltrans cannot afford to maintain and operate the roadway networks that have already been built based on current revenues and spending priorities, should CEQA review focus on mitigation that expands this network? While the development project may be able to fund the capacity expansion project, the new facility adds to the long-term O&M cost obligation that the public must cover. Given the above conditions, if agencies want to continue reviewing individual CEQA projects to identify impacts and mitigation for the transportation network, then should the focus change so that O&M impacts are a higher (or only) priority?