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Considerations for Mitigating Vehicle Miles Traveled under SB 743

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# Considerations for Mitigating Vehicle Miles Traveled under SB 743

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## Issue

Pursuant to Senate Bill 743 (Steinberg, 2013), which reformed the process for California Environmental Quality Act (CEQA) review of transportation impacts to align with greenhouse gas emissions reduction goals, the Governor's Office of Planning and Research identified vehicle miles traveled (VMT) as the key metric to measure transportation impacts of new developments under CEQA.<sup>1</sup> As a result, project developers will now have to reduce VMT to mitigate significant transportation impacts.

While methods for reducing VMT impacts are well understood, implementing VMT reduction measures that are directly linked or near to individual developments may be difficult in some situations. As a result, broader and more flexible approaches to VMT mitigation may be necessary, such as VMT mitigation "banks" or "exchanges." In a mitigation bank, developers would commit funds instead of undertaking specific on-site mitigation projects, and then a local or regional authority could aggregate funds and deploy them to top-priority projects throughout the jurisdiction. Similarly, in a mitigation exchange, developers would be permitted to select from a list of pre-approved mitigation projects throughout the jurisdiction (or propose their own), without needing to mitigate their transportation impacts on-site.

To understand how VMT banks or exchanges could be implemented in California, researchers from UC Berkeley assessed the structural and legal considerations of VMT banks and exchanges to determine which approach and scope would be most appropriate for each implementing jurisdiction (i.e., city, county, region, state). Key research findings are presented in this brief.

## Key Research Findings

**State and local governments and various agencies could employ a VMT bank or exchange model depending on the scale and flexibility of mitigation regime desired.** A VMT bank could offer increased flexibility in project selection

and facilitate regional-scale projects, but potentially involve greater risk of implicating CEQA and constitutional concerns and may draw opposition from local communities. A VMT exchange might increase efficiency by allowing developers to select off-the-shelf projects, but may not maximize use of funds and could have limited regional applicability.

### **CEQA and legal considerations shape, but do not block, the creation of VMT banks and exchanges.**

Under long-standing interpretations of the U.S. Constitution, CEQA, and the California Mitigation Fee Act, any fee or condition on development must be proportional to the impact and scale of the development, and there must be a reasonable relationship between the fee's use and the type of development.<sup>2</sup> Implementing agencies must take extreme care to demonstrate these relationships in their program design, with safeguards to ensure mitigation projects align with legal requirements, but the fundamental structures likely will not be limited.

**Implementing agencies should include measures to verify VMT reductions.** Since VMT mitigation projects may rely on complex human decision-making processes around development, employment, and transportation use, it is important not only to verify on the front end that a project's anticipated reductions will match the need generated by the development in question, but also to confirm that those reductions actually occur as anticipated after implementation or construction. It is also essential to verify that reductions are "additional"—that they would not have occurred absent funding from the bank. Implementing agencies could consider creating or retaining independent third parties to verify compliance, such as those involved in the state's greenhouse gas cap-and-trade program.<sup>3</sup>

**Agencies should include clear mitigation project prioritization criteria.** In order to maximize total VMT reduced, a mitigation bank or exchange should prioritize projects that reduce VMT at lowest cost and can be completed as early as possible. Priority project types that may fit this model include items such as transit pass subsidies and transit

service increases, which do not require construction of new infrastructure and are amenable to near-term calculation of vehicle trips avoided or reduced (these project types may also serve the added benefit of reducing the “additionality” concerns described above). Other potential factors for prioritization include verifiability, duration and potential for cost increases, administrative and legal requirements, and the need to pool funds.

**Agencies should include rigorous equity safeguards.** Any program that transfers impacts from one location to another necessarily implicates equity considerations, as a community affected by the environmental impacts of development may not be the destination of associated mitigation commitments. If mitigation banks or exchanges are established regionally instead of locally, localized equity considerations may still exist even if disadvantaged communities are protected within the region. Mitigation bank or exchange designers should ensure that individual communities that host new developments—and disadvantaged communities in particular—do not suffer disproportionate impacts. Implementing agencies could consider following the approach of SB 535, and AB 1550, which require a minimum percentage of total funds generated to be directed to disadvantage communities; as well as offering matching or contributory funds for mitigation projects in disadvantaged areas.

**Agencies could look to existing models within and outside California for guidance.** Mitigation banking or exchanges are novel in application to VMT reduction but have been employed in other contexts that offer useful examples

to implementing agencies. The SB 1148 Conservation and Mitigation Banking program permits aggregation of mitigation sites, and the Department of Fish and Wildlife hosts document templates including a model enabling instrument that helps ensure compliance and consistency.<sup>4</sup> The AB 2087 Regional Conservation Investment Strategy program includes regulatory requirements for bank proposals, which mitigation banks could follow to ensure compliance with reasonable relationship and proportionality requirements.<sup>5</sup> The Regional Greenhouse Gas Initiative has a built-in market price adjustment mechanism, which could be a model for agencies that anticipate increases in the cost of mitigation projects over time. And the Arizona Water Banking Authority’s annual program-wide reporting requirement could be replicated to help track price changes and actual VMT reductions.

## More Information

This policy brief is drawn from “Implementing SB 743: An Analysis of Vehicle Miles Traveled Banking and Exchange Frameworks,” a policy report prepared for the University of California Institute of Transportation Studies by Ethan Elkind and Ted Lamm (Center for Law, Energy & the Environment) and Eric Prather (UC Berkeley School of Law), which can be found on the UC ITS website at: [www.ucits.org/research-project/2018-40](http://www.ucits.org/research-project/2018-40).

For more information about the findings presented in this brief, please contact Ethan Elkind at [eelkind@law.berkeley.edu](mailto:eelkind@law.berkeley.edu) or Ted Lamm at [tlamm@law.berkeley.edu](mailto:tlamm@law.berkeley.edu).

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<sup>1</sup> California Governor’s Office of Planning and Research, *Preliminary Evaluation of Alternative Methods of Transportation Analysis* (2013).

<sup>2</sup> *Nollan v. California Coastal Com’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Cal. Gov. Code* § 66000 et seq.

<sup>3</sup> See *California Air Resources Board, Technical Guidance for Offset Verifiers: Verification of Offset Project Data Reports* (2013), at 7, 40; 17 CCR §§ 95972-73.

<sup>4</sup> Templates and other information can be located at <https://www.wildlife.ca.gov/Conservation/Planning/Banking/Templates>.

<sup>5</sup> See *Cal. Fish & Game Code* § 1852(c).

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