



February 16, 2012

CEQA Guidelines Update
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Subject: **Proposed Additions to the CEQA Guidelines Implementing CEQA Streamlining for Infill Projects (SB 226)**

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Dear Mr. Calfee:

Michael Brandman Associates (MBA) is a full service environmental consulting firm that has been integral in the development, revision, and practice of environmental impact assessment documents under the California Environmental Quality Act (CEQA) since its inception. Accordingly, we greatly appreciate this opportunity to provide comments on OPR's proposed additions to the CEQA Guidelines Implementing CEQA Streamlining for Infill Projects (SB 226).

The currently proposed Guideline amendments appear to establish a new parallel process for the review of infill projects under CEQA. When compared with the existing provisions under CEQA (i.e. statutory exemption; tiering; Master EIRs; Section 21083.3), it is unclear whether this new distinctive process will provide tangible and practical benefits. It is our recommendation that the proposed additions be revised to incorporate and address the following in hope of creating an effective streamlining tool for Lead Agencies across the State:

- **Minimize local agency staff time in processing Infill Projects.** The new Appendix N Infill Environmental Checklist Form would set up a pre-qualifying checklist to verify that projects meet infill criteria and performance standards. This pre-qualifying process precedes the actual Evaluation of the Environmental Impacts of Infill Projects, which relies upon an expanded Appendix G checklist with 5-columns. It appears that a significant effort, similar to that of completing the Appendix G checklist, will be required to verify that proposed infill projects satisfy performance standards. This effort includes review of project details including renewable energy features, alternative modes of transportation, Phase 1 environmental site assessment and/or preliminary endangerment results, potential compliance with CALGreen Tier 1 or Tier 2 requirements, as well as project VMT per capita modeling and comparison with a regional VMT per capita data base. It is unclear whether the effort involved for most projects will be worth the streamlining benefit of avoiding a public hearing with a conformity finding. It is currently unclear who will be deemed "qualified" to complete such an analysis and at what stage in the development/ application process this new analysis will be required. Does OPR anticipate this discretion will be delegated to each municipality? There are a number of items in the analysis that require technical disciplines which often are not readily available to most municipalities, Does OPR anticipate providing a statutorily required timeline to complete this qualifying infill determination? If so, how will that interact with the existing CEQA timing provisions? Will VMT traffic modeling results and data be verified?

- **Reduce the overall time frame and cost for processing a qualifying infill project.** The overall time frame from project application through adoption of an exemption or approval of an infill CEQA document (i.e. infill ND, MND, EIR or Addendum), should be substantially reduced as compared with the current CEQA Guidelines relying upon use of the Appendix G Checklist and any of the streamlining tools already available. Other than statutory exemptions, is the front-loaded time investment in qualifying an infill project and demonstrating compliance with performance standards likely to be offset by the streamlining benefits at the back end of the CEQA process (i.e. focused ND, MND, or reduced scope infill EIR?). To promote a better understanding of the process and potential advantages with the Guidelines amendments, OPR should develop a new CEQA Infill Project Process Flow Chart, in a format similar to the existing Appendix A: CEQA Process Flow Chart.
- **Provide additional legal protections and/or litigation streamlining.** To reduce the “true” CEQA process life-cycle cost and time frame, additional protections should be afforded to narrow the scope and or shorten the length of a proposed infill project CEQA lawsuit involving NDs, MNDs, Sustainable Communities Environmental Assessments, and Infill EIRs. Given the compelling state interest described by OPR in promoting infill in CEQA, consideration should be given to extending the AB 900 benefits of streamlined resolution of lawsuits for job-creating projects to all qualifying infill projects under SB 226. Traffic and density issues raised by infill litigants (see *Wollmer v. City of Berkeley* (2011) 191 Cal.App.4th 1559) will continue to be a source of legal filings for infill projects under the new streamlining rules and process. It is unlikely, for example, that the removal of reduced density alternatives and growth inducement from the scope of new Infill EIRs will lead to fewer lawsuits; in fact, the outcome may be just the opposite.
- **Eliminate streamlining inconsistencies and redundancies in CEQA.** As evidenced by Table 1 and Table 2 in OPR’s Narrative Explanation of the Proposed Addition to the CEQA Guidelines Implementing SB 226, there are a number of existing streamlining mechanisms in CEQA available to infill projects, some of them overlapping and each with limitations in their application. In implementing SB 226, OPR should be careful to avoid the perception that another CEQA layer is being added; the current infill streamlining provisions should not become another underutilized tool being added to a crowded toolbox. Consideration should be given in subsequent CEQA clean-up legislation to streamlining and consolidating these mechanisms into a more coherent and simplified framework for tiering and processing infill projects. Moreover, the specific language and terms used in the new materials should match existing terms and language in CEQA and its Guidelines (e.g., adverse impact).
- **Advantages of the Infill EIR.** Proposed Section 15183.3 establishes a new kind of EIR—the Infill EIR. Apart from not requiring analysis of growth inducement potential, alternative locations, and reduced density or building intensity alternatives, the Infill EIR appears to be a project-level, focused EIR with certain discussions being scoped- out due to existing information and determinations. Is this really a new type of EIR? Should an even more narrowly scoped ‘short-form EIR’ be used to support infill streamlining?

Our specific comments with regard to the components supporting proposed Section 15183.3 follow.

Narrative Explanation of Proposed Addition to the CEQA Guidelines Implementing SB 226

Table 3 of the Narrative Explanation document provides eligibility requirements. The project site eligibility requirement requires a previously developed or vacant site. The term “vacant” is subject to interpretation without further definition or clarification. We interpret this to mean “essentially open in an unimproved or

undeveloped condition". However, others may apply either a narrower or a broader definition. Would a paved or unpaved parking lot qualify? Additional clarification is suggested.

Appendix M: Performance Standards

Section II – Renewable Energy. The discussion as written appears to restrict the renewable energy components to the project site. A form of distributed solar energy is entering the marketplace whereby a property owner can purchase solar panels in a utility-scale solar farm. The rebate would come through the public utility. With this potential scenario, a project would have a renewable energy component albeit not physically connected to the project envelope. The performance standard related to renewable energy should be revised to include such a scenario.

Section II – Active Transportation. The discussion as written pertains to active transportation elements (ATE) incorporated into and part of the proposed project. However, this would exclude existing ATEs that by circumstance are outside the project element, but contribute to a proposed project's ATE and hence the performance standard.

Utilizing a not uncommon scenario, an infill project site may be located adjacent existing bicycle lanes and multi-purpose trails that are outside the project envelope. The Greenhouse Gas study prepared for the project justifiably includes these among the list of design features that reduce GHG emissions.

The performance standard related to ATEs should be revised to allow for inclusion of existing features outside the project envelope that contribute to the infill benefits of the project. Of course, this would need to be documented in the analysis.

Section II – Soil and Water Remediation. This section identifies the need to implement recommendations from a Phase I ESA or preliminary endangerment assessment (PEA) if a project site is included on a list compiled pursuant to Government Code 65962.5 (Cortese list). The mechanism of implementation (i.e. project design feature, condition of approval, or mitigation measure) is not specified. Curiously, the proposed Appendix N provides for a potential exemption (Item no. 6 on page 4) without specifying whether such exemption would be a *statutory* or *categorical* exemption. Finally, Guidelines Section 15300.2(e) nullifies the use of a *categorical* exemption for project sites located on the Cortese list. An example of the streamlining inconsistencies noted in our bullet comments above, the apparent conflicts between these various provisions must be reconciled.

Appendix N: Infill Environmental Checklist Form

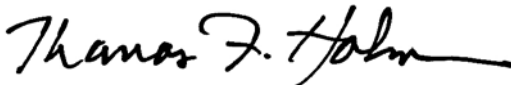
Consideration should be given to adding to the front of Appendix N screening questions that can be answered either 'yes' or 'no'. The answers to these yes/no questions would determine whether a project would qualify for SB 226 treatment and whether completing the remainder of Appendix N is warranted.

On page 2 of Appendix N, Section 6a, the 4th box should read "one-half mile".

Within the remainder of the Appendix N Checklist, two new columns have been added to what was essentially the Appendix G checklist to indicate whether the potential impact is 'Within the scope of analysis of a plan level EIR', or 'Substantially mitigated by uniformly applicable development policies'. Clearly, these are not mutually exclusive conditions, and quite often, both findings would apply. Clarification in the checklist or its notes is needed to indicate both boxes may be checked.

As Michael Brandman Associates celebrates its 30th year in the environmental consulting field, we have developed a keen appreciation of the need for CEQA reform and streamlining wherever practicable. While we understand the basis for carving out exemptions for certain types of projects that advance broader environmental objectives (e.g. solar, infill development, etc.) we sincerely hope the narrow focus and potential complexity of applying the new CEQA Guidelines Amendments to Implement SB 226 do not serve as a deterrent to their use by infill project applicants, local agency staffs and consultants.

Sincerely,



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