STATE OF CALIFORNIA
GOVERNOR'S OFFICE *of* PLANNING AND RESEARCH

EDMUND G. BROWN JR.
GOVERNOR

KEN ALEX
DIRECTOR

Summary of Revisions to the Proposed Updates to the CEQA Guidelines Addressing Infill Streamlining (SB 226) and Evaluation of Comments

May 1, 2012

Following release of its preliminary discussion draft of updates to the CEQA Guidelines addressing streamlining for infill development in late January, the Governor's Office of Planning and Research (OPR) received many suggestions for improvement. OPR's revised proposal reflects many of those comments, as well as OPR's continued research on issues raised during this update process. We appreciate that stakeholders and interested persons devoted time and thoughtful energy to participate in this process, and believe this revised proposal is better as a result.

Changes have been made in Proposed Section 15183.3 and Proposed Appendices M and N which are available on OPR's website: http://opr.ca.gov/s_sb226.php. OPR invites additional public comment on these proposed revisions until **June 1, 2012**. We encourage electronic submission of your comments, which may be e-mailed to CEQA.Guidelines@ceres.ca.gov. Comments may also be mailed or hand delivered to:

CEQA Guidelines Update
c/o Christopher Calfee
1400 Tenth Street
Sacramento, CA 95814

This document summarizes the major revisions to those documents and also contains responses to some of the prominent themes raised in the public comments.

I. Summary of Revisions

A. Revised Proposed Section 15183.3

Revisions to Proposed Section 15183.3 clarify procedure and intent, and further simplify the regulatory text. Clarifications include the following:

- Many infill projects will not require additional review when the prior EIR contains a good and detailed analysis of the effects of infill development (see § 15183.3(c))
- Determinations pursuant to Section 15183.3 are questions of fact that are to be resolved by the lead agency (see § 15183.3(d))

- Completion of the Infill Checklist in Appendix N is recommended, but is discretionary (see § 15183.3(d)(1))
- Circumstances requiring additional analysis are similar to those described in Section 15162 (see § 15183.3(d)(1)(D))
- Where no further review is required, a notice of determination must be filed instead of a notice of exemption (see § 15183.3(d)(2)(A))
- Additional examples of uniformly applicable development policies and standards have been provided (see § 15183.3(e)(8))

B. Revised Proposed Appendix M

The major changes to Proposed Appendix M include:

- Addition of a definitions section (see Appendix M, § II)
- Removal of performance standards that are not essential to achieving the objectives in Section 21094.5.5
- Addition of major point sources to standards related to near roadways health measures (see Appendix M, § III)
- Elimination of CalGreen Tiers 1 and 2 in higher VMT areas
- Restrict use of streamlining in higher VMT areas (see Appendix M, § IV)
- Provide proximity to transit as alternate path to streamlining (see Appendix M, § IV)
- Simplified measures of distance to households and transit
- Simplified application of performance standards for mixed-use projects (see Appendix M, § IV(G))

C. Proposed Appendix N

Changes were made to Proposed Appendix N to conform to the changes described above.

Explanation of these changes is provided in the responses to comments below.

II. Responses to Prominent Thematic Comments

OPR received many helpful comments during the public review period on the preliminary discussion draft both in writing and during public workshops held in Sacramento, Fresno and Los Angeles in February 2012. While responses have not been prepared for each individual comment, the more frequently raised comments are summarized and grouped thematically below in italics, followed by responses to those comments.

A. Comments Related to Vehicle Miles Traveled

Many comments suggested that the Performance Standards should not allow streamlining in areas with above average vehicle miles traveled (VMT). Comments objected in particular to the suggestion that green building techniques could compensate for a project's contribution to

increased regional VMT. No comments supported the application of streamlining in areas with higher than average VMT.

OPR agrees that building energy efficiency does not compensate for a project's contribution to increased VMT. The Narrative Explanation accompanying the initial preliminary draft acknowledged, for example, that green building techniques will not have the same potential for reducing greenhouse gas emissions as reducing VMT. The Performance Standards have, therefore, been revised to apply primarily in lower than average VMT areas, and references to CalGreen Tiers 1 and 2 have been deleted. This revision further supports the environmental objectives set forth in SB 226, including promoting the land use and transportation patterns set forth in SB 375 and improving energy efficiency including "transportation energy." (Pub. Resources Code, § 21094.5.5(b)(1), (b)(6).) To further encourage the creation of transit supportive communities, however, the Performance Standards will also allow streamlining for those residential projects that are within ½ mile of an existing major transit stop or high-quality transit corridor.

One comment suggested that VMT is not a reliable metric and so it should not be used to determine eligibility for streamlining.

OPR does not agree that VMT is not a reliable metric. On the contrary, metropolitan planning organizations (MPOs) across the state have invested considerable resources, with the assistance of the Strategic Growth Council, in improving the quality of their travel demand models. Many of those travel demand models reflect the best data available and decades of research. Sketch models, such as CalEEMod, are similarly based on empirical data and research. Therefore, both regional travel demand models and sketch models provide sufficient bases on which to forecast future travel behavior. (CEQA Guidelines, § 15144 (since environmental analysis "necessarily involves some degree of forecasting," a lead agency's obligation is to "use its best efforts to find out and disclose all that it reasonably can").) Nevertheless, OPR does agree with the suggestion to provide an alternative basis for streamlining, and so has revised to the Performance Standards in several instances to allow streamlining for those projects that are close to transit.

Some comments expressed concern that local governments do not have sufficient access to regional VMT information.

VMT data are being developed as part of the SB 375 process and most MPOs have already indicated that they will prepare maps to illustrate which geographic areas exhibit below average VMT based on regional travel demand models. Sketch models are widely available and are frequently used in environmental analysis. As noted above, however, the Performance Standards have in several cases been revised to allow streamlining for those projects that are close to transit. The location of major transit stops and high-quality transit corridors is easily verifiable.

Some comments suggested that the focus on regional VMT ignores the local effects of traffic density, which has health and other impacts.

The focus on regional VMT in the Performance Standards is an appropriate reflection of the environmental objectives specified in Public Resources Code section 21094.5.5. Local traffic is not one of those environmental objectives. Notably, however, Appendix N asks about a project's potential traffic-related impacts.

One comment suggested that the size of a commercial project does not necessarily correlate with VMT.

Regional-serving retail operations tend to attract shoppers from farther distances, and so tend to encourage more driving and associated increases in greenhouse gas emissions. Such stores also tend to be large in floor space. Therefore, the performance standards appropriately treat larger stores differently than smaller retail stores. While the performance standards originally proposed a 75,000 square foot cap on commercial building size in order to screen out regional-serving retail, that limit has been revised to a 50,000 square foot floor-plate. This smaller size more accurately approximates neighborhood serving retail. For example, according to the Food Marketing Institute, the median size of grocery stores in 2010 was 46,000 square feet. (See http://www.fmi.org/research-resources/supermarket-facts .)

Several comments argued that building energy efficiency is not an adequate trade-off for high VMT projects.

OPR agrees that building energy efficiency does not compensate for increased VMT. Therefore, the Performance Standards have been revised to remove references to CalGreen Tiers 1 and 2.

One comment suggested that demographics can influence VMT and so VMT is not necessarily a good indication of good regional location.

While VMT can be influenced by several factors, including demographic factors, VMT remains the best aggregated proxy for density, transit accessibility and travel behavior.

Some comments urged that when a project relies on sketch-tools and project features to reduce VMT, those project features should be binding and enforceable.

To the extent that a project includes certain features designed to reduce VMT, those features would be part of the project description. A project approval that differs from the project description in an environmental review is vulnerable to challenge.

Some comments suggested that the Guidelines should specify which sketch-tools and models are acceptable, and should annually update them.

OPR declines to specify certain sketch models as "acceptable" for several reasons. First, CEQA typically defers to the methodology selected by the lead agency so long as the agency's conclusions are based on substantial evidence. (See, e.g., *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) Second, sketch models are continually being improved. Presently, a new generation of sketch models is emerging which will be calibrated and validated with locally specific data, and therefore calculate VMT with even greater accuracy.

B. Comments Related to Public Health

Some comments objected to the inclusion of performance standards related to public health, suggesting that such issues are not an appropriate subject in a CEQA analysis.

OPR disagrees that the performance standards should not address health. Human health is a proper CEQA consideration as the statute specifically calls for analysis of environmental effects of a project that "will cause substantial adverse effects on human beings, either directly or indirectly." (Pub. Resources Code, § 21083(b)(3).) Moreover, SB 226 expressly requires the performance standards to include measures to protect public health from air and other sources of pollution. (*Id*. at § 21094.5.5(b)(7).) Therefore, the Performance Standards appropriately address public health considerations.

Several comments indicated that focusing on near-roadway locations ignores other potential hotspots. Others suggested that a cumulative assessment of background pollutant concentrations is needed.

OPR agrees that roadways are not the only sources of harmful pollution. Therefore, the Performance Standards have been revised to include consideration of other stationary sources of potential pollutants identified by local air districts. Basing siting decisions on background pollutant concentrations may not be feasible at this time for several reasons. First, while background data are improving in some regions, monitoring stations may only provide region-wide data, and not provide accurate information at the neighborhood level. Second, monitoring stations may only monitor some, but not all, pollutants of concern. Requiring consideration of nearby stationary sources is sufficient to promote the protection of public health.

One comment suggested setting specific thresholds and study zones, and incorporating a set list of air filters into the Performance Standards.

OPR declines to set specific thresholds or to specify particular mitigation to protect against air pollutants. SB 226 did not authorize OPR to develop thresholds; rather, it requires performance standards to promote protection of public health. Further, thresholds and buffer zones may differ from location to location depending on variables such as prevailing winds and local topography. The Performance Standards accommodate that potential for variability. Similarly, the need for or utility of any mitigation strategy may vary depending on the specifics of the project and its location. Therefore, lead agencies are in the best position to determine which measures would adequately promote the protection of public health.

Several comments suggested that the Performance Standards address other health concerns such as noise, pedestrian safety, affordability, increases in local traffic density.

OPR declines to modify the Performance Standards to include other potentially health-related issues for several reasons. First, Title 24 building standards already address insulation requirements for noise, and the General Plan Guidelines currently require analysis of projected noise at a community level. Those regulations already promote the protection of public health from noise, and so further limitations in Performance Standards are not needed. Similarly, Appendix N already asks about impacts related to localized traffic impacts and pedestrian safety. (See, e.g., Appendix N, Section XVI (a), (b) and (f).) See also responses regarding affordability below.

Some comments suggested that performance standards related to air pollution should not apply only to residential uses, but also schools and workplaces.

The Education Code contains specific requirements for schools related to location near sources of air pollution, so the Performance Standards need not duplicate those rules. Moreover, such rules generally need not apply to the other land use types. People also generally spend less time in workplaces and commercial areas than in residential areas.

C. Comments Related to Affordability

Several comments suggested that the Performance Standards include a provision requiring "no net loss" of affordable units.

Though OPR supports protection and enhancement of the state's stock of affordable housing, OPR declines to include a "no net loss" requirement in the Performance Standards for several reasons. First, CEQA already requires evaluation of displacement, so additional performance standards are not needed to address that potential adverse effect. Second, a strict no net loss rule could discourage currently substandard housing from being rehabilitated or improved.

Third, a strict no net loss rule may discourage infill development and make greenfield development more attractive. Such a requirement would, therefore, counter the intent of SB 226 to promote infill.

Other comments suggest that the Performance Standards should require that projects include a certain minimum percentage of affordable units that are income restricted for a certain number of years, similar to an inclusionary housing requirement.

Though OPR supports the development of affordable housing, OPR declines to require an inclusionary housing requirement in the Performance Standards. First, many jurisdictions already have inclusionary housing ordinances, and others provide density bonus incentives. (OPR, California Planner's Book of Lists (2007) at p. 83.) Second, establishing a statewide inclusionary requirement may not be effective. The precise formula for such a requirement depends on local conditions, sometimes even down to the neighborhood level. (California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California, "Inclusionary Housing In California: 30 Years of Innovation," NHC Affordable Housing Policy Review, February 2004.) Notably, though inclusionary standards are not expressly included in the draft Performance Standards, when transportation costs are considered together with housing costs, incentivizing new development in transportation efficient locations (as the Performance Standards currently do) will lead to increased affordability overall. (See, e.g., Center for Neighborhood Technology, "Safe, Decent, and Affordable: The Transportation Costs of Affordable Housing in the Chicago Region," January 2012; Urban Land Institute, "Bay Area Burden: Examining the Costs and Impacts of Housing and Transportation on Bay Area Residents, Their Neighborhoods, and the Environment," 2009.)

Several comments suggested that the Performance Standards should address displacement effects.

While displacement is an effect that requires attention in planning and revitalization efforts, OPR declines to add further Performance Standards related to displacement. The purpose of the performance standards is to promote development that maximizes certain specified environmental benefits. CEQA already requires analysis of adverse environmental effects, including displacement. (See, e.g., *Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 41 Cal. 4th 372, 383.) Thus, where a project would cause displacement, CEQA would require analysis of that effect.

D. Comments Raising Legal Issues

Some comments suggested that section 15183.3 require more analysis if the prior EIR did not reduce impacts to a less than significant level.

Section 15183.3 is consistent with the directive in SB 226 that CEQA analysis of infill projects "shall be limited" to effects that were not analyzed in a prior EIR or are more significant than previously analyzed. (See Pub. Resources Code, § 21094.5(a) ("the application of this division to the approval of an infill project shall be limited to the effects on the environment that (A) are specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) substantial new information shows the effects will be more significant than described in the prior environmental impact report") (emphasis added).) The limiting language in SB 226 contrasts with the section on tiering, which does require further analysis unless effects are fully mitigated in the first tier document. (Pub. Resources Code, § 21094(a)(1).) By creating a separate process for infill projects that satisfy a set of performance standards, SB 226 is intended to be meaningfully different than tiering under Section 21094.

Some comments suggested that Section 15183.3 should define "substantially mitigate" to mean that effects are mitigated to a less than significant level.

SB 226 does not define the phrase "substantially mitigate." In fact, term "mitigate" is not itself defined in the CEQA statute. Some meaning can be gleaned from related words and contexts, however. Section 21064.5, for example, defines "mitigated negative declaration" to mean a negative declaration that is adopted where the initial study finds that potentially significant effects may occur, but measures are incorporated into the project that would "mitigate the effects to a point where clearly no significant effect on the environment would occur[.]" In other words, a mitigated negative declaration is appropriate when measures can be adopted that will "fully mitigate" an impact. Similarly, in the context of tiering, Section 21094 requires additional review of an effect unless a first tier EIR "adequately addressed" that effect. "Adequately addressed" has been interpreted to mean mitigated to a less than significant level. (*Communities for a Better Environment v. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125.) In prescribing the use of uniformly applicable development policies, however, the legislature used a very different vocabulary. We must assume that the legislature intended the phrase "substantially mitigate" to mean something different than fully mitigate or mitigate to a less than significant level. Indeed, because the dictionary definition of "substantially" includes "being largely but not wholly that which is specified," proposed Section 15183.3 appropriately interprets "substantially mitigate" to mean that the uniformly applicable development policy does not need to mitigate an effect to a less than significant level.

Some comments suggested that uniformly applicable development policies cannot be used where effects have not been previously analyzed.

OPR disagrees that uniformly applicable development policies can only be used when effects have been analyzed in a prior EIR. Section 21094.5(a)(2) states: "An effect of a project upon the environment shall not be considered a specific effect of the project or a significant effect that was not considered significant in a prior environmental impact report, or an effect that is more significant than was described in the prior environmental impact report if uniformly applicable

development policies or standards … will substantially mitigate that effect." (Emphasis added.) The interpretation suggested in this comment would fail to give meaning to the words "a significant effect that was not considered significant in a prior environmental impact report."

Several comments suggested that Section 15183.3 should require consideration of mitigation measures that have not been previously considered. Conversely, other comments suggested that the availability of new mitigation does not lead to an effect being more significant.

Section 21094.5(a) states that new analysis is required for an infill project where "substantial new information shows the effects will be more significant than described in the prior environmental impact report." This language is similar to that found in Section 21166, which requires supplemental review in the face of certain new information. CEQA Guidelines Section 15162, which implements Section 21166, provides that "new information" includes information showing that new mitigation measures are feasible and will mitigate an effect previously found to be significant. Thus, proposed Section 15183.3(d)(1)(D) mimics the circumstances described in section 15162(a)(3). Specifically, additional analysis will be required where new feasible mitigation measures would substantially reduce a previously disclosed significant effect, and such measures are not included in the project.

One comment suggests that the checklist and proposed Section 15183.3 should focus on whether an effect is worse than previously analyzed, not whether the project's effect is worse.

Proposed Section 15183.3 and Appendix N appropriately focus on effects of infill projects since the purpose of any environmental review is to examine effects caused by a project. Effects that are not caused by a project need not be analyzed. (CEQA Guidelines, § 15130(a)(1)("An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR").) The hypothetical situation described in the comment, in which new information shows that a given level of pollution would cause worse effects than previously analyzed, would be an example of a "more significant" effect. Under proposed Section 15183.3(d)(1)(D), an effect would be "more significant" if "substantial new information shows that the effects of the infill project would be substantially more severe than described in the prior EIR."

Several comments indicated that the Guidelines should specify what standard of judicial review applies to determinations under proposed Section 15183.3.

Generally, courts review an administrative agency's conclusions on questions of fact using the "substantial evidence" standard. (See, e.g., Code of Civ. Proc. § 1094.5; Pub. Resources Code, §§ 21168, 21168.5; *Banker's Hill, et al. v. City of San Diego* (2006) 139 Cal. App. 4th 249, 263-264.) Under that standard, a court should affirm a lead agency's decision that is supported with substantial evidence.

A less deferential "fair argument" standard is an exception to the general rule of deference to lead agency decision-making. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal*. (1993) 6 Cal. 4th 1112, 1135.) Specifically, the California Supreme Court explained that "the 'fair argument' test was derived from an interpretation of the language of, and policies underlying, section 21151" and for this reason, "the 'fair argument' test has been applied only to the decision whether to prepare an original EIR or a negative declaration." (*Id*. (emphasis added).) Section 21151 requires preparation of an EIR in the first instance when the project "may" have a significant effect on the environment. Courts applying the fair argument test to circumstances other than the determination of whether to prepare an EIR in the first instance have done so only when the triggering words "may" or "reasonable possibility" appear in the statute or regulation. (See, e.g., *Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1319 (decision of whether to prepare a second tier EIR is subject to the fair argument test because the language in Section 21094(c) mirrors the language in Section 21151); *Banker's Hill, supra,* 139 Cal. App. 4th at 265 ("Because the fair argument standard was derived from a phrase in CEQA section 21151(a), which is substantively identical to the phrase in Guidelines section 15300.2(c), it is logical to apply the fair argument standard" to the question of whether a "reasonable possibility" triggers an exception to a categorical exemption).) In those circumstances where the fair argument test applies, the lead agency's task is not to weigh the evidence to determine whether an effect will be significant; rather, it only determines whether the record contains any substantial evidence indicating that an effect may be significant. Because the existence of evidence supporting a fair argument is a question of law, courts do not defer to an agency's conclusions under the fair argument standard. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 264.)

Turning to SB 226, Section 21094.5 applies only after an EIR for a planning level decision has already been certified. That section also requires lead agencies to resolve several questions of fact, including whether an infill project satisfies the performance standards in the CEQA Guidelines, whether the effects of the infill project are specific to the project and were not addressed in the prior EIR or are more significant than previously analyzed, and whether uniformly applicable development policies will substantially mitigate new or more significant effects. Section 21094.5 does not contain any language similar to Section 21151 (i.e., "may") that would suggest that those determinations are questions of law. Thus, in OPR's view, the substantial evidence standard will govern an agency's determinations made pursuant to Section 15183.3.

The policy underlying SB 226 supports this view. Section 21094.5 is a streamlining mechanism intended to promote the state's long-standing policy preference for infill development when the effects of such development were already analyzed at a programmatic level. Unlike tiering under Section 21094, which could apply to any type of project and which incorporates a fair argument standard, Section 21094.5 applies only to infill projects that will produce environmental benefits. Had the legislature intended to apply the same process and standard of review to such projects, it would not have enacted a separate statutory scheme.

Some observers have pointed to the section of CEQA addressing review of a "sustainable communities environmental assessment" as a relevant indication of legislative intent regarding

the standard of review. Section 21155.2(b)(7) states: a "lead agency's decision to review and approve a transit priority project with a sustainable communities environmental assessment shall be reviewed under the substantial evidence standard." Some interpret the absence of similar language in SB 226 as evidence that the legislature intended the fair argument to apply to section 21094.5. The SCEA provision must be read in context, however. Section 21151.2 contemplates a mechanism similar to tiering whereby a local lead agency can draw from analysis in an EIR prepared for a high-level regional transportation plan by a regional MPO. Indeed, parallel to the construction in section 21094, the provision on SCEAs requires further analysis of effects that are not "adequately addressed." As noted above, "adequately addressed" has been interpreted to mean mitigated to a less than significant level. (*Communities for a Better Environment, supra,* 103 Cal.App.4th at 122-125.) Thus, given Section 21155.2's parallels to Section 21094, and the case law applying the fair argument test to the latter section, it was appropriate for the legislature to clarify which standard applied to review of an SCEA. Here, however, Section 21094.5 is distinct from the tiering statute, and in fact more closely resembles Section 21166, a provision governing supplemental review and to which the substantial evidence standard applies. (*Sierra Club, supra,* 6 Cal. App. 4th at 1318.)

The Guidelines have in other contexts signaled whether a lead agency should weigh evidence and reach a factual determination, or instead determine only the presence of substantial evidence supporting a fair argument. (See, e.g., CEQA Guidelines, §§ 15064(f)(1) (determining whether an EIR is required in the first instance), 15177(c) ("Whether a subsequent project is within the scope of the Master EIR is a question of fact to be determined by the lead agency…").) As administrative regulations, it is appropriate for the CEQA Guidelines to provide guidance on the mandate in SB 226. (Pub. Resources Code, § 21094.5.5(a); Gov. Code, § 11342.600; see also *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal. 4th 32, 49 (noting OPR's "special expertise in interpreting the CEQA statutes").) Therefore, proposed Section 15183.3 has been revised to clarify that the determinations called for in Section 21094.5 are questions of fact to be determined by the lead agency.

Several comments urged that the Guidelines require a Notice of Exemption to be filed and to provide for public review of the determination that no further review is required. Conversely, other comments indicated that no notice should be required.

As originally proposed, Section 15183.3 provided that lead agencies "may" file a Notice of Exemption under certain circumstances. The filing of a Notice of Exemption is generally discretionary. (See, e.g., Pub. Resources Code, § 21152(b); but see 21152.1 (requiring the filing of a Notice of Exemption for projects that utilize the statutory housing exemptions).) Proposed Section 15183.3 has been revised, however, to require the filing of a Notice of Determination. While Section 21094.5 is clear that CEQA does not apply when the infill project would not cause any new or more significant effects, since a prior EIR must have been certified, the appropriate notice to file is set forth in Sections 21108(a) and 21152(a). (See *Committee for Green Foothills v. Santa Clara County Bd. of Sup*. (2010) 48 Cal. 4th 32, 46-52.) Because

Sections 21108(a) and 21152(a) require the filing of a notice of determination following project approval, proposed Section 15183.3 has been revised to state that such notice "shall" be filed.

While proposed Section 15183.3 has been revised to require the filing of a Notice of Determination following project approval, Section 21094.5 does not require public review of a lead agency's determination that all effects of an infill project have either been previously addressed or are substantially mitigated by uniformly applicable development policies. Therefore, proposed Section 15183.3 cannot impose such a requirement. Notably, this is similar to the operation of Section 15164, which addresses adoption of an addendum. In such cases, public review of the lead agency's decision not to prepare supplemental review is not required. Further, to the extent that the infill project requires approval of a planning commission, city council, or other local public body, Brown Act notice requirements would apply.

Several comments suggested that proposed Section 15183.3 should not introduce new terms such as "more significant" and "substantially mitigate".

OPR agrees that consistent and familiar terminology should be used where possible. Where Section 21094.5 uses particular phrases, however, it is appropriate to use the terminology found in the statute and to give meaning to that terminology in the Guidelines.

Many counties commented that CEQA streamlining benefits should apply equally in counties and incorporated cities.

SB 226 does apply to unincorporated areas within counties under limited circumstances; however, it will apply mostly in incorporated cities. Proposed Section 15183.3 reflects the limitation set forth in SB 226 itself. Projects proposed in unincorporated counties may still qualify for other CEQA exemptions and streamlining mechanisms, however. (See, e.g., Pub. Resources Code § 21159.24.)

Several comments suggested that prior EIRs should be subject to a five or ten year age limit.

As administrative regulations, the CEQA Guidelines can only interpret the CEQA statute. They cannot add new requirements that are not found in the statute. SB 226 provides a specific definition of "prior environmental impact report" which "means the environmental impact report certified for a planning level decision" as well as any supplements or addenda. (Pub. Resources Code, § 21094.5(e)(3).) Neither that definition nor anything else in SB 226 suggests that any time limit applies to a prior EIR. (*Contrast id*. at § 21157.6(a)(limiting the use of Master EIRs more than five years following certification).) No time limit is needed, moreover, since changes in circumstances since certification may require additional analysis where effects of the infill project are new and specific or are more significant than were previously analyzed.

E. Comments Related to Implementation

Some comments suggested that the Infill Checklist in Appendix N should not be required.

Proposed Section 15183.3 does not require that lead agencies use the infill checklist in Appendix N. Rather, Appendix N is a tool that lead agencies can use to help document the infill project's eligibility for streamlining, as well as determinations regarding whether the infill project would result in any new or more significant effects. Notably, initial studies must be prepared when relying on tieirng or Master EIRs. (See, e.g., Pub. Resources Code, §§ 21094(c), 21157.1(b); see also CEQA Guidelines, § 15168(c)(4).) Appendix N will be particularly helpful where analysis of the infill project's effects is contained in several different documents (i.e., a prior EIR and various supplements) and where the lead agency relies on uniformly applicable development policies to substantially mitigate any new or more significant effects. Proposed Section 15183.3 has been revised, however, to make clear that use of the infill checklist is discretionary.

Several comments noted that CEQA contains other streamlining mechanisms, and asked how proposed Section 15183.3 offers streamlining beyond other those other tools?

Other mechanisms fall into two general categories: (1) exemptions and (2) tiering and streamlining. Regarding exemptions, proposed Section 15183.3 provides several advantages. First, compared to the stringent eligibility criteria in the statutory exemption in Section 21159.24, proposed Section 15183.3 will apply in a much broader range of circumstances. Second, even the more broadly written categorical exemption in Section 15332 only applies to smaller projects that are consistent with all applicable general plan and zoning designations that will not contribute to any significant effects. Proposed Section 15183.3 may be useful for projects that are larger, would require some plan or zoning amendments, or might contribute to significant impacts. Regarding tiering and streamlining, proposed Section 15183.3 removes many of the hurdles that accompany other mechanisms. For example, the prior EIR is not subject to a specific time limit, later projects need not be specifically identified in the prior EIR, the analysis of significant effects does not need to be repeated at the project level, and uniformly applicable development policies can be used in a greater range of circumstances. Even when an infill EIR is required, it can be limited to just the new issues requiring additional review. Further, an infill EIR need not include a growth-inducing impacts analysis and can include a more limited alternatives analysis. For additional detail regarding the streamlining advantages of SB 226, please refer to pages 7 to 9 of the Narrative Explanation that accompanied the preliminary discussion draft.

Several comments asked how proposed Section 15183.3 would affect the Class 32 Infill Exemption?

Proposed Section 15183.3 provides an additional streamlining tool for lead agencies and project applicants. It will not replace the existing categorical exemption for infill development.

Some comments requested additional guidance on when analysis for planning level documents may be sufficient for later projects.

As originally proposed, Section 15183.3 stated that impacts of an infill project likely fell within the scope of a prior EIR if that EIR addressed the magnitude and nature of the infill project's effects. A review of case law addressing the "within the scope" question revealed that the question is highly fact dependent. (See, e.g., *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal. App. 4th 598 (considering factors such as geographic scope of the plan, plan designations, buildout projections, and other factors).) Rather than attempt to list every potentially relevant factor in the Guidelines, the revised Section 15183.3 recognizes that the question of whether an infill project's effects were analyzed in a prior EIR is a question of fact for the lead agency to resolve. As noted above, in the discussion of standards of review, because it is a question of fact, courts should defer to the lead agency's conclusions so long as they are supported with substantial evidence. (See, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1198.)

Comments indicated that the amount of streamlining under SB 226 will depend on the quality of local plans, and that OPR should commit to providing assistance and support.

OPR agrees that EIRs for planning decisions will be most helpful in dealing infill projects if they deal with the effects of infill as specifically and comprehensively as possible. With a good and detailed analysis of the program, the effects of many infill projects could be found to be within the scope of analysis in such EIRs, and no further environmental documents would be required. OPR is committed to providing guidance and assistance to local communities that plan for the effects of infill development. Additional guidance on infill issues will be provided, for example, in a forthcoming update to the General Plan Guidelines. Further, financial support for such planning activities is available through the Strategic Growth Council. For additional information on the Council's grant programs, please see their website at www.sgc.ca.gov.

F. Definitions

One comment suggested that "Transit Station" should be more specifically defined in proposed Section 15183.3.

OPR agrees, and has revised the definition of "infill project" in Section 15183.3 to provide a more specific definition of transit station. That definition was drawn in part from the definition of "transit station" in the Transit Village Development Planning Act, but also includes improvements necessary to facilitate access to such facilities. (Gov. Code, § 65460.1(b)(5).)

Some comments suggested that all references to transit should match the definition of "major transit stop" in Section 21064.3.

Section 21064.3 defines "major transit stop" to mean: "a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods." That definition was added by the same bill that created the statutory exemption for infill housing. (Stats 2002 ch 1039 § 3 (SB 1925).) That exemption only applies in large urban areas, and so the definition of "major transit stop" is appropriate for that setting. SB 226 applies in all incorporated cities, regardless of size, and so a more expansive definition of transit is appropriate. Thus, Appendix M has been revised to clarify that transit includes either a major transit stop or a high quality transit corridor as defined in Section 21155(b)(defining "high quality transit corridor" as "a corridor with fixed route bus service with service intervals no longer than 15 minutes during peak commute hours"). The definition of high quality transit corridor comes from SB 375 and is so appropriate here given the ties in SB 226 to Sustainable Communities Strategies.

One comment noted that for the purpose of determining whether a site qualifies as "infill," the site should be surrounded with "qualified urban uses" that are actually developed, and not just zoned.

OPR agrees that to effectuate the intent of facilitating infill, a site should be surrounded by actual development, and not just planned uses. Thus, Section 15183.3 has been revised to clarify that a vacant site is only eligible if it adjoins "existing" qualified urban uses on at least seventy-five percent of the site's perimeter.

G. Comments Regarding the Performance Standards

Some comments suggested that multiple performance standards create additional hurdles to development of infill projects, and create fodder for litigation. On the other hand, several comments suggested that additional performance standards should be added to address a wider range of urban conditions and design considerations.

As noted in the Narrative Explanation accompanying the preliminary draft of the Guidelines, OPR's policy objective is to facilitate infill development and to maximize the environmental benefits called out in SB 226. Another policy objective was to make the performance standards as simple and easy to implement as possible. Deciding which measures to include necessarily involves a balance of sometimes competing interests. Ultimately, having considered all suggestions regarding the performance standards, OPR agrees that while the standards related to active transportation and transit area planning promote important policies, they are not essential to maximizing the objectives set forth in SB 226. Those standards have therefore been removed from Appendix M.

Other suggested standards related to stormwater, climate change adaptation, urban tree canopy, green spaces, and others are equally valuable, and OPR agrees that they are important considerations in urban design. Such issues can and should be dealt with on the local level, and so the definition of "uniformly applicable development policies" in proposed Section 15183.3 has been revised to include such local policies. In light of the specific direction in Section 21094.5.5, however, OPR does not agree that they must be addressed as performance standards.

Several comments suggested that the Guidelines avoid unfamiliar metrics such as "pedestrian network miles."

As originally proposed, some distances in the Performance Standards would be measured in "pedestrian network miles" (i.e., the distance that one would walk to travel from point A to point B). The reason for doing so would be to account for barriers to pedestrian travel that might undermine one use's proximity to another use. Nevertheless, given OPR's policy of favoring ease of implementation, Appendix M has been revised to provide simpler measures (i.e., radius).

Some comments recommended providing a specific category for mixed-use projects.

Appendix M originally would have required that mixed-use projects satisfy all of the performance standards for each applicable land use. To further simplify implementation, however, Appendix M has been revised to provide that the standards applicable to the predominant land use shall apply to the entire project. The phrase "predominant land use" is used because the precise square-footage, acreage or other metrics may not be known at the time of environmental review. Also, such metrics are less useful in the context of vertical mixes of uses.

Many of the comments suggested that the Guidelines and Performance Standards should be regularly updated.

OPR agrees that updates to the Guidelines and Performance Standards may be appropriate as measurements of VMT and understanding of health-effects of urban living improve. SB 226 contemplates that the Performance Standards may be updated as often as necessary to protect the environment.

H. Comments Related to Process

Several comments suggested that 30 days is not a sufficient review period.

OPR appreciates both the interest in this update process as well as the need for adequate review. As noted in the Narrative Explanation, OPR released the preliminary discussion draft

for public review as soon as feasible in order to allow for a high degree of public input. The initial review period was limited to thirty days so that OPR could review all public input and revise the proposal package in sufficient time to allow for additional public review before the July 1 deadline for submission to the Natural Resources Agency. Notably, OPR's development of the CEQA Guidelines involves pre-rulemaking public outreach. The Natural Resources Agency will conduct additional public outreach pursuant to the California Administrative Procedure Act.

III. Who Can I Contact with Additional Questions?

Questions about the revised proposal can be directed to either Chris Calfee (Christopher.Calfee@opr.ca.gov) or Chris Ganson (Chris.Ganson@opr.ca.gov) at (916) 322-2318.