

June 1, 2012

Via Electronic Mail

CEQA Guidelines Update
c/o Christopher Calfee
1400 Tenth Street
Sacramento, CA 95814
CEQA.Guidelines@ceres.ca.gov

RE: Comments on Revised SB 226 CEQA Guidelines

Dear Mr. Calfee:

Thank you for the opportunity to comment on the Proposed Updates to the CEQA Guideline Section 15183.3: Streamlining for Infill Projects (“Proposed Guidelines”). This section incorporates Senate Bill No. 226 (“SB 226”), in order to streamline the environmental review process under CEQA for eligible infill projects. SB 226 limits the topics subject to review at the project level where the effects of infill developments have been addressed in a planning level discussion or by uniformly applicable development policies. Proposed Guidelines § 15183.3 (a). Communities for a Better Environment (CBE) has reviewed the proposal and suggests the following:

I. PERFORMANCE STANDARDS

CBE is a social justice organization with a focus on environmental health and justice. We organize in working class communities of color because those communities suffer the most from environmental pollution and toxics, and suffer from very high rates of asthma and respiratory illnesses, heart problems, cancer, low birthrate, and miscarriages. The proposed CEQA guidelines for SB 226 will have significant public and environmental impacts on communities that live on the frontline of polluters and see first-hand the damage that occurs when residential and industrial areas are close together.

- A. In Order to Advance SB 226’s Clear Objective to Protect Public Health, the Performance Standards Must Require Exempted Projects to be Outside Specified Buffer Zones*

In enacting CEQA, the Legislature intended that “the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being

reached.” Pub. Res. Code § 21000(d). The California Legislature clearly intended for the Guidelines accompanying SB 226 to include the “[p]rotection of public health, including the health of vulnerable populations from air or water pollution, or soil contamination.” Pub. Res. Code § 21094.5.5(b)(7). In order to meet this clear mandate, the Guidelines must not exempt projects that are close to pollution sources from the important goals of CEQA, including public information, and full evaluation of impacts, mitigation, and alternatives.

The Performance Standards state that residential projects within 500 feet (or other distance as deemed appropriate by the local agency or air district) of a high volume roadway or stationary source of air pollutions, “the project shall comply with any policies and standards identified in the local general plan, specific plan, zoning code, ordinance or community risk reduction plan for the protection of public health.” (Performance standards, III.) In essence, the Guidelines are telling agencies to comply with other laws, which they are must do. For the reasons set forth below, the Performance Standard must include stronger protections for public health. Especially because there is no provision for public review and comment of an agency’s determinations of whether a project meets the Performance Standards and whether the *uniformly applicable development plans* (“UADP”) mitigate significant impacts, or whether local codes and plans protect projects from pollution sources (Performance Standards, III), *and* because OPR has determined the standard of review of such agency decisions to be the highly deferential “substantial evidence” standard, the Guidelines *must* exclude from exemption projects within specific buffer zones in order to meet its clear mandate to protect public health. Anything less would continue haphazard zoning and siting practices in Los Angeles and elsewhere that lead to schools and houses sitting next to, or across the street from, freeways and industrial operations that spew pollution into their water, air, and soil.

OPR states that “thresholds and buffer zones may differ from location to location depending on variables such as prevailing winds and local topography.” (Summary and Response to Comments, p. 6.) There is clear evidence, however, that these variables mean very little when one lives, works, or goes to school near a freeway or other source (or cumulative sources) of pollution.¹

¹ OPR also states that “[p]eople also generally spend less time in workplaces and commercial areas than in residential areas.” (Summary and Response to Comments, p. 6.) This assertion is not necessarily true, however; people spend business hours—the time when industrial operations are most and commutes are most likely—at school or work, while they spend nights and weekends, when industrial operations are less likely to occur, at home. Furthermore, children are sensitive receptors (http://www.aqmd.gov/prdas/aqguide/doc/School_Guidance.pdf).

1. The Proposed Guidelines Should Not Exempt from CEQA Projects—
Especially Schools and Residences—Within 500 Feet of a Heavily
Trafficked Roadway or a Freeway

Dozens of studies have concluded that proximity to highly trafficked roadways is associated with real and significant negative health effects, including asthma, cancer and reproductive impacts. These types of studies persuaded the California Air Resources Board (“CARB”), the California agency primarily responsible for achieving clean air, to recommend that local governments “[a]void siting new sensitive land uses within 500 feet of a freeway, urban roads with 100,000 vehicles/day, or rural roads with 50,000 vehicles/day.” ER-33. CARB explained that “traffic-related studies [have shown that] the additional non-cancer health risk attributable to proximity was seen within 1,000 feet and was strongest within 300 feet.”²

Children are sensitive receptors to pollution, and many studies have shown that children who go to school near busy roads and freeways are much more likely to develop asthma, regardless of where they live.³ *Schools within 500 feet of a freeway or busy road should not be exempted from the requirements of CEQA.* A recent nationwide study of almost 9,000 U.S. public schools finds that children spend a significant amount of time at school, making exposure to pollution at school an important consideration; the study found that approximately one-third of students were likely to be at an increased risk of acute and chronic respiratory disorders due to close proximity of their schools to a freeway.⁴ Additionally, continuing to site schools near freeways create an environmental injustice: in California, over two percent of public schools (K-12) are within 150 meters of high traffic roads and a disproportionately large percentage of students attending these schools are economically disadvantaged and nonwhite.⁵

The Performance Standards include minimal requirements for residential projects within

² California Air Resources Board, *Air Quality Land Use Handbook: A Community Health Perspective*, April 2005, <http://www.arb.ca.gov/ch/handbook.pdf>.

³ See fn 1. See e.g., McConnell, R. et al., Childhood Incident Asthma and Traffic-Related Air Pollution at Home and School, *Environmental Health Perspectives* 2010; 118(7): 1021-1026 (study of thirteen southern California communities found children exposed to traffic-related pollution in school were more likely to develop asthma irrespective of residential exposure); Kim, J. et al., Traffic-Related Air Pollution and Respiratory Health: East Bay Children’s Respiratory Health Study, *American Journal of Respiratory and Critical Care Medicine* 2004; 170: 520-526 (study of over 1,000 elementary school students in northern California found higher rates of asthma and bronchitis symptoms in children attending schools near busy roads and freeways);

⁴ Appatova, A.S. et al., Proximal Exposure of Public Schools and Students to Major Roadways: a Nationwide U.S. Survey, *Journal of Environmental Planning and Management* 2008; 51(5): 631-646.

⁵ Green, R.S. et al., Proximity of California Public Schools to Busy Roads, *Environmental Health Perspectives* 2004; 112(1): 61-66.

500 feet of a pollution sources (Performance Standards, III), but none for schools. Additionally, even these standards are wholly inadequate to protect public health. For example, they state that agencies *may* include measures to protect public health that have been recommended by CARB and local air districts, but does not require agencies to do so; in other words, agencies do not have to follow CARB's land use recommendations to site schools farther than 500 feet from freeways or busy roadways. Given the plethora of evidence that children who go to school near freeways and busy roadways are at much higher risk of developing acute and chronic respiratory disorders, this oversight clearly fails to comply with SB 226's mandate that the Guidelines protect public health.

While schools must be one priority, studies also show that living near traffic causes respiratory impacts, including cough, wheeze, persistent cough, asthma and chronic obstructive pulmonary disorder, and hospital admissions for asthma and COPD, among children especially.⁶ Importantly, distance matters. A study in rural New York found that children living in neighborhoods with heavy traffic within 200 meters of their homes had an increased risk of asthma hospitalization.⁷ Living near a freeway or busy road also contributes to increased risks of cancer, reproductive impacts, and coronary diseases.⁸ Children living within 250 yards of a freeway or street with 20,000 vehicles a day or more are six times more likely to develop all types of cancer and eight times more likely to

⁶ Gauderman, W. J., et al., Effect of Exposure to Traffic on Lung Development from 10 to 18 Years of Age: A Cohort Study, *Lancet* 2007; 369 (19561): 571-7. Wilhelm et al., Environmental Public Health Tracking of Childhood Asthma Using California Health Interview Survey, Traffic, and Outdoor Air Pollution Data, *Environmental Health Perspectives* 2008; 116(8): 1254-1260. Gauderman, W. J. et al., Childhood Asthma and Exposure to Traffic and Nitrogen Dioxide, *Epidemiology* 2005; 16:737-743. This study was confirmed by a separate southern California study finding an 85% higher likelihood for an asthma diagnosis among children living within 75 meters of a major road. McConnell R., et al., Traffic, Susceptibility, and Childhood, *Environmental Health Perspectives* 2006; 114(5):766-772.

⁷ Lin, et al., Childhood Asthma Hospitalization and Residential Exposure to State Route Traffic, *Environmental Research, Section A* 2002; 88:73-81. Similarly, a San Diego study found increased medical visits in children living within 550 feet of heavy traffic. English P., et al., Examining Associations Between Childhood Asthma and Traffic Flow Using a Geographic Information System, *Environmental Health Perspectives* 1999; 107(9): 761-767.

⁸ Raaschou-Nielsen, O. et al., Air Pollution from Traffic at the Residence of Children with Cancer, *Am. J. Epidemiology* 2001; 153:433-443. Knox and Gilman, Hazard Proximities of Childhood Cancers in Great Britain from 1952-1980, *J. of Epidemiology and Community Health* 1997; 51:151-159. Wilherm M. et al., Local Variations in CO and Particulate Air Pollution and Adverse Birth Outcomes in Los Angeles County, California, USA, *Environmental Health Perspectives* 2005; 113(9):212-21. Ritz B. et al., Ambient Air Pollution Risk and Risk of Birth Defects in Southern California, *Am. J. Epidemiology* 2002; 155:17-25. Hoek, et al., Association Between Mortality and Indicators of Traffic-Related Air Pollution in the Netherlands: A Cohort Study, *Lancet* 2002; 360(9341):1203-9. Finkelstein, et al., Traffic Air Pollution and Mortality Rate Advancement Periods, *Am. J. Epidemiology* 2004; 160:173-177. Gan, W. Q., Changes in Residential Proximity to Road Traffic and Risk of Death from Coronary Heart Disease, *Epidemiology* 2010; 21(5):642-649.

contract leukemia.⁹

If, despite clear evidence that buffer zones between projects and freeways and busy roads are necessary to protect public health, OPR is unwilling to create buffer zones of at least 500 feet, CBE supports the position advanced in the comments provided on these proposed Guidelines by Physicians for Social Responsibility-LA and the Natural Resources Defense Council, (NRDC) based on NRDC's near-roadway guidance recommendation to have infill projects demonstrate that risk exposure levels do not exceed certain thresholds:

- An increase of 10/1,000,000 cancer risk, and an increase of 0.2 micrograms/m³ in concentrations of PM 2.5.
- Residential projects within 200 feet of a high-volume roadway (100,000 AADT+) must demonstrate based on data approved by an air district, or through risk assessment and modeling, that exposure concentrations are below these thresholds. These studies can include mitigation measures.

2. The Performance Standards Must Include Buffer Zones for Projects Along Border Areas in Order to Protect Public Health

Additionally, residential, school, or commercial projects on the border of another political division—a city, for instance—may not be protected by the UADPs or any other local code or plan of a neighboring city, just a few feet away. The Performance Standards state that residential projects within 500 feet (or other distance as deemed appropriate by the local agency or air district) of a high volume roadway or stationary source of air pollutions, “the project shall comply with any policies and standards identified in the local general plan, specific plan, zoning code, ordinance or community risk reduction plan for the protection of public health.” (Performance standards, III.) Almost all of these codes and plans apply within a specific city or other political division, however. A project may comply with the local codes, but fail to comply with, or be protected by, the codes and plans for the city across the street.

This is not merely a hypothetical situation. In the Long Beach / Wilmington area, for example, the Southern California International Gateway (SCIG) rail yard project illustrates the point. The proposed rail project would potentially sit on Port of Los Angeles land. The Executive Summary of the SCIG's Draft EIR describes the general area as “characterized by heavy industry, goods handling facilities and port-related commercial uses consisting of

⁹ Pearson et al., Distance-Weighted Traffic Density in Proximity to a Home is a Risk Factor for Leukemia and Other Childhood Cancers, *Journal of Air and Waste Management Association* 2000; 50:175-180.

warehousing operations, trucking, cargo operations, transloading, container and truck maintenance, servicing and storage, and rail service.” (SCIG DEIR, ES-4, 1-3.) This description of the “general area” ignores most of the uses just east of the project, located in Long Beach, which include residences, schools, parks, and places of worship, among other sensitive receptors. Noting that the project itself sat in an industrial zoned area, the DIER concluded that the project was “not inconsistent with any relevant plan or zoning determination. (SCIG DEIR, 3.8-21-23.) While the Wilmington-Harbor City Community Plan sets out objectives to protect parks, schools, and residences from industrial impacts, the project-adjacent parks, schools, and residences are located in Long Beach, and not protected by the Wilmington-Harbor City Community Plan. Meanwhile, the Long Beach General Plan lays out policies for rail-related emissions, but because the project itself is not located in Long Beach, these provisions do not protect the adjacent residents and school children either. This is precisely the dilemma that CBE is concerned about. Although the proposed SCIG project is sited in an industrial area, that does not preclude it from having severe impacts on nearby communities.

The inability of the public to review an agency’s determination that a UADP will mitigate significant impacts or that local codes, plans, and ordinances will protect projects near pollution sources, along with the deferential “substantial evidence” standard of review mean that it is likely that this problem of pollution traveling across jurisdictions will be often missed.

Furthermore, buffer zones of specified feet in the Guidelines would also ensure consistency across jurisdictions. For example, school siting guidelines vary from jurisdiction to jurisdiction. While Los Angeles Unified School District provides criteria recommending against siting schools near pollution sources, these are merely strong suggestions, rather than requirements.¹⁰ Other school districts, even in urban areas, do not contain such guidelines.¹¹ Even with an EIR, siting schools too close to pollution sources occurs.¹² Without one, there will be even less protection, information, and informed decision making. Although the California Education Code states schools may not be sited near major traffic thoroughfares without mitigation, this requirement is easily avoided by allowing schools districts to adopt a statement of Overriding Considerations if these conditions cannot be met but the district is unable to locate an alternative site.¹³ If the district adopts such a statement, *and* the school project is exempt from CEQA, the public information goal of CEQA is entirely undermined for schools near pollution sources. Without buffers between

¹⁰ Office of Environmental Health and Safety Distance Criteria for School Siting, http://www.lausd-oehs.org/docs/Misc/DistanceCriteriaTable%20Rev12_10_08.pdf. LAUSD uses a distance criteria of 500 ft from freeway/major transportation corridors.

¹¹ E.g., Long Beach Unified School District.

¹² See, e.g., *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889.

¹³ Cal. Educ. Code § 17213(c)(2)(C), (D).

exempted infill projects and pollution sources, such as freeways, California will end up with residences and schools built too close to pollution.

B. The Performance Standards Should Include Protections for Projects in Pollution “Hot Spots”

Requiring lead agencies to determine that a project will not be located in a highly impacted area will at least begin to remedy this jurisdictional problem. The standards purport to provide some protection for projects within 500 feet (or other distance) of a pollution source. (Performance Standards, III.) The revised guidelines should also take into consideration the cumulative exposure of air pollution from a multitude of local sources such as rail yards and highways, and other stationary sources of pollution that together create pollution “hot spots.”

In recent years there has been an expansion of residential and institutional (primarily school) uses into industrial districts, spurred by the desire to avoid removing housing in densely built-up communities for such projects, and to take advantage of the lower cost of industrially zoned land, compared to land zoned for residential or commercial uses. The result has been the placement of new sensitive uses in the midst of operating industrial districts, creating new conflicts with potentially nuisance industrial activities. To avoid further expansion of such conflicts, SB 226 must limit the encroachment of sensitive uses into industrial districts. The need to streamline the CEQA process with infill projects must weighed against the need to protect communities impacted by potential multiple sources of pollution.

Additionally, with respect to the Proposed Guidelines, the courts have recognized that where there already is a high pollution burden on a community, the “relevant question” is “whether *any* additional amount” of pollution “should be considered significant in light of the serious nature” of the existing problem. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 661 [emphasis added]; see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025. As a result, OPR should require UADPs to fully mitigate all impacts of a project (not just substantially mitigate) in a heavily burdened area in order to avoid contributing to any further cumulative pollution impacts.

C. In Order to Advance the Goal of Reducing Greenhouse Gases, the Performance Standards Should Include Requirements for Local Solar Electrical Generation Where Feasible

OPR is tasked with creating guidelines that advance SB 226’s goal of “reduc[ing] greenhouse gas emissions. . .” Pub. Res. Code § 21094.5.5. The Governor has called for building for building 12,000 MW of distributed generation (local, solar projects distributed

throughout local grids) out of 20,000 MW of new renewable generation.¹⁴ Currently, the California Legislature is considering Assembly Bill 1990 (which passed the Assembly on May 30, 2012, and is now proceeding to the Senate).¹⁵ AB 1990 establishes a 375-megawatt Feed in Tariff (“FiT”) program, which provides long-term, fixed-rate payments to renewable energy producers to cover the costs of clean energy projects smaller than 500 kilowatts. It seeks to “support small-scale local clean energy in communities throughout the state in order to increase green jobs and businesses that benefit the communities where electrical utility customers live, especially in the most impacted and disadvantaged communities with high unemployment that bear a disproportionate burden from air pollution, disease, and other impacts from the generation of electricity from the burning of fossil fuels.”¹⁶

SB 226 is intended to help shepherd in California’s renewable energy, sustainable communities future. In order to ensure the projects exempted under SB 226 truly meet goals of the statute, the Governor, and the Legislature, the Performance Standards must require that exempted projects include small-scale solar generation where feasible, with the burden on the lead agency to show that it is infeasible.¹⁷

II. PROPOSED GUIDELINES

A. *The Proposed Guidelines Should Include a Provision for Public Notice and Comment*

“Public participation is an essential part of the CEQA process.” CEQA Guidelines § 15201. The public must be able to “know the basis on which its responsible officials either approve to reject environmentally significant action,” to be able to “respond accordingly to action with which it disagrees.” *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 392. In this way, CEQA promotes “informed self-government.” *Ibid.*

¹⁴ http://gov.ca.gov/s_energyconference.php

¹⁵ <http://www.sustainablebusiness.com/index.cfm/go/news.display/id/23748>

¹⁶ http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1951-2000/ab_1990_bill_20120525_amended_asm_v95.html

¹⁷ CBE supports the recommendations of PSR-LA and others to provisions to ensure no net loss of affordable housing, as well as guidelines for residents displaced as a result of a project. As PSR-LA notes, these measures are necessary to ensure the Guidelines advance SB 226’s goal of decreasing greenhouse gases.

CBE, therefore, does not support the Guidelines' combination of providing no opportunity for public review and comment regarding an agency's decision that a project qualifies as exempt under SB 226, the discretionary nature of Appendix N, and the application of the highly deferential "substantial evidence" standard of review. In particular, despite the fact that the burden is still on the agency to demonstrate that "substantial evidence" supports its determination (*Bankers Hill, et al. v. City of San Diego* (2006) 139 Cal.App.4th 249, 269 n. 19), CBE worries this combination will forestall any meaningful public participation in the decision making process, and any meaningful judicial review of the agency's decision. As a result, CBE urges OPR to amend 15183(d)(2)(A) to include requirement that the agency complete Appendix N, and offer a brief public review and comment period (30 days) of the agency's determination that no additional environmental review is required, but before it files the NOD.

CEQA requires that agency's provide the "material necessary to informed decision making and informed public participation." *State Water Resources Control Bd. Cases*, 136 Cal.App.4th at 723. Appendix N is the only way provided in the Proposed Guidelines for the agency to document the "analytic route [it] traveled from evidence to action." *Laurel Heights*, 47 Cal.3d at 404 [citation omitted]. In order to fulfill CEQA's goal of facilitating "informed decisionmaking," therefore, OPR should require Appendix N to be mandatory and provide a period for the public to review and comment on the agency's determination.

OPR justifies its failure to require public review by citing to Section 15164, which addresses the adoption of an addendum. (Summary and Response to Comments, p. 12.) This case is entirely unlike an addendum, since it exempts projects that come after—sometimes long after—the certification of a planning-level EIR. OPR also states that it cannot impose a public review period because the statute does not require one. (Summary and Response to Comments, p. 12.) Yet, the Proposed Guidelines require an agency to file a NOD upon finding a project exempt, even though the statute does not explicitly provide for this procedural requirement. Indeed, adding procedural requirements is clearly not beyond the scope of OPR's authority. For example, the Guidelines require Subsequent Negative Declarations to provide for public notice and comment, even though the statute itself does *not* explicitly require Subsequent Negative Declarations to include a public notice and comment period. CEQA Guidelines § 15162(d).

OPR can and should require agencies to complete Appendix N before filing their NODs for projects they determine are exempt under SB 226. OPR can and should provide a public review and comment period of an agency's decision to exempt a project under SB 226. Anything less undermines the public participation and informed decision making goals of CEQA.

B. Exhaustion and Statute of Limitations

Under CEQA, potential petitioners must exhaust administrative remedies before filing an action against an agency in court, unless no opportunity to raise objections orally or in writing prior to the approval of a project was given, or if the public agency failed to give the required notice by law. Pub. Res. Code § 21177(a)-(e). The Proposed Guidelines do not provide any opportunity for public hearing or comment on an agency's determination that a project is exempt under SB 226. The proposed regulation should either clearly provide the public an opportunity to present objections, or clarify that judicial review of an agency's determination that a project is exempt under the SB 226, or should make clear that agency determination is governed by CEQA Guideline § 15094, which provides that the NOD should be made available for public review for at least 30 days, and section 21177 of CEQA, which provides that administrative remedies do not need to be exhausted in order for petitioners to file suit if no public comment is made available.

C. "Substantially Mitigate" Must be Defined as "Mitigate to a Less Than Significant Level."

The case to which OPR cites for the proposition that "substantially mitigate" does *not* mean mitigate to a less than significant level (*CBE v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98) does not stand for that proposition. (Summary and Response to Comments, p. 8.) It only briefly looked at the language "adequately addressed" in a section of the CEQA Guidelines that court ultimately invalidated, and never discussed the meaning "substantially mitigate." It makes no sense here for the Proposed Guidelines to allow a project to be exempt from CEQA if there are significant impacts, but those impacts are only mostly mitigated by the UADPs or the prior EIR. If the impacts are still significant, the project is not exempt. OPR should change and clarify this definition.

Thank you for your consideration of these comments. If you have any question please contact Maya Golden-Krasner, CBE Staff Attorney, at 323-826-9771 ext: 121, or maya@cbeval.org. We look forward to continue to work with the Office of Planning and Research on this project.

Respectfully Submitted,



Maya Golden-Krasner

Staff Attorney
Communities for a Better Environment