February 24, 2012

Christopher Calfee
Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Re: Comments to the proposed guidelines for CEQA Streamlining for Infill Projects (SB 226)

Dear Mr. Calfee:

These comments are submitted on behalf of the Center for Biological Diversity in response to the proposed guidelines for implementation of Senate Bill 226. We appreciate the opportunity to provide input on this proposal and we look forward to working with the Office of Planning and Research ("OPR") to address these issues.

The Center for Biological Diversity opposed SB 226 on the grounds that the bill ran counter to the goals and specific requirements of CEQA. The proposed guidelines largely reflect the elements of SB 226 that prompted our opposition. We recognize that the guidelines cannot fix problems inherent in the bill itself. Nonetheless, we feel that the proposed guidelines not only overlook opportunities to improve the projects that will be eligible for streamlining, but also conflict in some instances with CEQA.

Indeed, the overall effect of the guidelines as proposed is to provide an option for virtually any kind of broadly-defined infill project to qualify for the streamlining provisions, without requiring those projects to achieve meaningful improvements over current, run-of-the-mill development practices. This letter thus focuses primarily on specific concerns with the proposed performance standards and proposed CEQA guidelines, and offers recommendations for strengthening these provisions.

**Comments on Appendix M: Performance Standards**

**1. The performance standard for renewable energy must be strengthened.**

The performance standard for renewable energy is extremely weak. "Renewable Energy. All projects shall include renewable energy components, such as solar rooftops, where feasible." Proposed New Appendix M at 1. This provision is largely meaningless without a specific standard. Presumably, a highly energy intensive project could claim compliance with this provision simply by installing a few solar panels or by claiming that the costs of installing renewable energy components make such installation infeasible. SB 226 explicitly establishes as among its goals the "reduction of greenhouse gas emissions under the California Global Warming Solutions Act of 2006 (Division 25.5, commencing with Section 38500, of the Health and Safety Code) [AB 32]." To achieve this goal, the projects would need to result in lower per-capita emissions. A specific quantitative standard is necessary to ensure that new projects have lower per-capita energy consumption than the average for the area. In the absence of a quantitative standard, projects should be required to include renewable energy components capable of

providing as much of the project's energy needs as is feasible, and should be required to support determinations of infeasibility with specific evidence and analysis in accordance with CEQA case law.[1]

**2. The performance standard should require projects to achieve 75% or less of regional average VMT.**

The transportation and land use sector is the largest source of GHG emissions in the state, and SB 226 explicitly establishes as among its goals the "implementation of the land use and transportation policies in the Sustainable Communities and Climate Protection Act of 2008 (SB 375)" and the "reduction of greenhouse gas emissions under the California Global Warming Solutions Act of 2006 (Division 25.5, commencing with Section 38500, of the Health and Safety Code) [AB 32]."[2] By allowing streamlining of projects that exceed 100 percent of regional per capita VMT, the proposal would undermine statewide and local efforts to reduce regional VMT. Streamlining should be reserved for projects that improve on common practices and promote sustainable development. When a project is located in a red zone and cannot reduce its VMT to less than 75% of the regional average through project design elements, that project simply should not be eligible for infill streamlining.

**3. The performance standard for housing near high-volume roadways must be strengthened.**

The proposed performance standard for development near high-volume roadways is extremely weak. The proposed requirement to comply with general plan policies, specific plan policies, and zoning provisions is not a meaningful performance standard; the law already requires compliance with these provisions. Many regions of the state lack any such policies, and the alternative standard—incorporation of design elements that promote public health—is too vague to be useful. Specific performance standards should be developed by OPR, in cooperation with local air districts and air quality and public health experts, to require the implementation of best practices from around the state.

**Comments on CEQA Guidelines (New Section 15183.3)**

**1. Proposed guideline sections 15183.3(c)(2)(C) and (D) are inconsistent with CEQA by allowing reliance on uniformly applied development standards to significant effects not previously analyzed in a prior EIR.**

Because CEQA is uniquely concerned with the potential environmental impacts of a proposed project based on "scientific and factual data," the statute has long prohibited blind reliance on regulatory standards. Guidelines § 15064(b). While regulatory standards may, at times, be set at a level that renders impacts less than significant, they may also be a product of countervailing concerns. Accordingly, regulatory standards are not themselves determinative of whether a project may result in significant impacts. Thus, in *Communities for a Better Env't v. California Resources Agency*, the court invalidated a CEQA Guideline that would apply "an established regulatory standard in a way that forecloses the

[1] See, e.g., *Save Round Valley Alliance v. County of Inyo*, 157 Cal.App.4th 1437, 1461-62 (2007) (holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible); *Uphold Our Heritage v. Town of Woodside*, 147 Cal.App.4th 587, 600 (2007) (requiring evidence that comparative marginal costs would be so great that a reasonably prudent property owner would not proceed with the project); *Preservation Action Council v. City of San Jose*, 141 Cal.App.4th 1336, 1356-57 (2006) (holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party).

[2] California Public Resources Code, Ch. 469, SEC. 7, Section 21094.5.5 (b)

consideration of any other substantial evidence showing there may be a significant effect." 103 Cal.App.4 th 98, 114 (2002).

Public Resources Code § 21094.5 undercuts CEQA's focus on scientific and factual data to assess significance. Section (a)(2) provides that an agency may avoid preparing an EIR if the effect was not considered significant in a prior EIR or the effect will be more significant than described in the prior EIR, but the agency makes findings that application of development policies or standards will substantially mitigate that impact. This provision significantly weakens CEQA's environmental protections by: 1) setting a vague and undefined standard of "substantially" mitigating an impact rather than fully mitigating that impact; and 2) applying a regulatory standard in a manner than forecloses consideration of evidence showing an impact may be significant. However, this diminishment of CEQA's standards is limited. Under Section (b), it does not apply where "an infill project would result in significant effects that are specific to the project of the project site, or if the significant effects of the infill project were not addressed in the prior environmental impact report." In that case, an environmental impact report must be prepared.

The proposed guidelines violate Public Resources Code § 21094.5 by failing to capture the distinction of when uniformly applicable standards may be relied upon and when they may not. Proposed Guideline 15183.3, subdivisions (c)(2)(C) and (c)(2)(D), provide that "[i]f the written checklist shows that the infill project would result in new specific effects, and that uniformly applied development policies would not substantially mitigate such effects, those effects shall be subject to CEQA," and that an agency may summarily make findings, based on substantial evidence, that such new specific impacts have been mitigated by such uniform development policies. Under the clear terms of Public Resources Code § 21094.5, uniformly applicable development standards may only be relied upon where the impact is more significant that described in the prior EIR, not where the impact is specific to the project or where it was not addressed at all in the prior EIR. As proposed, the Proposed Guideline is illegal because it runs afoul of both Section 21094.5 and CEQA's general prohibition on presumptive reliance on regulatory standards.

**2. A lead agency must be required to consider mitigation that was not evaluated in a prior EIR to further reduce significant impacts**

The proposed guidelines allow a lead agency to rely on a prior EIR that failed to fully mitigate project impacts. As currently proposed, additional mitigation that would function to further reduce these significant effects need only be considered where "it was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified." Proposed guideline § 15183.3(c)(1)(C). This standard is virtually impossible to meet and will result in significant lost opportunities to reduce environmental damage and foreclose meaningful public participation. [3] Indeed, as currently proposed, the proposed guidelines allow a project to tier off a prior EIR of any vintage even where it failed to fully mitigate project impacts. The expectation until SB 226 was passed was that additional mitigation could be proposed and considered at the project level. Proposing a guideline that strips the public of this right is directly counter to CEQA's focus on informed self-government and public participation. This section should be modified as follows:

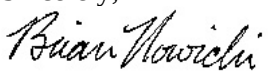
[3] *See Citizens for Responsible Equitable Env't Development v. City of San Diego*, 196 Cal.App.4th 515 (2011) (holding that petitioner should have known to raise potential climate impacts in CEQA comments in 1994).

An effect is a new specific effect if new information, which ~~was not known and could not have been known with the exercise of reasonable diligence~~ was not considered at the time the previous EIR was certified, shows that new mitigation measures could substantially reduce the significant effects described in the prior EIR, but such measures are not included in the project.

**Thank you for your consideration.**

Thank you for your consideration of these comments. We appreciate the opportunity to comment on the proposed guidelines and look forward to working with the Office of Planning and Research to address these issues. Please contact me if you have any questions.

Sincerely,



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