February 24, 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 SB 226 CEQA Guidelines

Dear Mr. Calfee:

Thank you for the opportunity to comment on the proposed guidelines for implementation of Senate Bill 226 ("Draft Guidelines"). These comments are submitted on behalf of Sierra Club California. Sierra Club California is the state regulatory and legislative advocacy arm of the Sierra Club, a non-profit public benefit corporation, incorporated in California, with over 750,000 members nationwide, and more than 150,000 members living in California.

Our mission includes promotion of the responsible use of the earth's ecosystems and resources, and education of the public about the need to protect and restore the quality of the natural and human environment. As one of the largest environmental organizations in California, the Sierra Club is significantly involved in myriad environmental policy issues throughout the state, including CEQA issues.

We appreciate the significant effort that went into developing the Draft Guidelines. We are also cognizant of the challenges posed in drafting a Guideline intended to strike a balance between speeding approval of well-situated and well-designed projects while still ensuring environmental impacts are adequately analyzed and mitigated. Unfortunately, the Draft Guidelines miss the mark. Rather than focus on projects that advance California's smart growth and greenhouse gas objectives, the Draft Guidelines inappropriately ensure that even poorly situated, subpar projects far from transit have a mechanism to avoid project-level environmental review.

As proposed, the Draft Guidelines will encourage low-density sprawl, needlessly eliminate opportunities to reduce significant project impacts, and frustrate forward-thinking land-use planning.

Consistent with the purpose of SB 226 and California's overall goals of achieving significant reductions in greenhouse gas pollution, the Draft Guidelines and accompanying Performance Criteria should be geared toward facilitating well-situated and well-designed projects. Indeed, limiting project-level environmental review can only be legitimately justified where meaningful location and performance criteria would function to limit the additional environmental benefit from further analysis of significant impacts. To ensure that SB 226 promotes well-designated and well-located projects rather than environmentally damaging sprawl, we urge the Office of Planning and Research to adopt the following changes to the Draft CEQA Guidelines.

I. Comments on Proposed Guideline Section 15183.3

A. The Draft Guidelines Are Inconsistent with Public Resources Code § 21094.5 By Allowing Reliance on Uniformly Applied Development Standards to Significant Effects Not Previously Addressed 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 consideration of any other substantial evidence showing there may be a significant effect." 103 Cal.App.4th 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 protective standards is limited. Under Section (b), it does not apply "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. For example, 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 Public Resources Code § 21094.5, uniformly applicable development standards may not be relied upon for an impact that was never disclosed or addressed in the prior EIR. As proposed, the

Guideline is illegal because it runs afoul of both Section 21094.5 and CEQA's general prohibition on presumptive reliance on regulatory standards.

Accordingly, please amend the Draft Guidelines to clarify that where an impact was not considered in a prior EIR, uniformly applied development policies that "substantially mitigate" but do not fully mitigate that impact may not be relied upon to avoid an analysis of that impact.

B. 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[1] and will result in significant lost opportunities to reduce environmental damage and foreclose meaningful public participation. Indeed, as currently proposed, the Guidelines allow a project to tier off a prior EIR of any vintage even where it failed to fully mitigate project impacts. Should a member of the public be denied the opportunity to suggest additional mitigation not originally considered because that individual was not a member of the community when the prior EIR was adopted 20 years ago? Even if that person was a member of the community or the EIR was more recent, 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 the right to propose additional mitigation to lessen significant impacts is directly counter to CEQA's focus on environmental protection and public participation. Accordingly, Section 15183.3(c)(1)(C) should be modified as follows:

> 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.

In addition to minimizing environmental harm and safeguarding public participation, the above modification will encourage more robust planning documents. When relying on a prior EIR that thoroughly considered potential mitigation to reduce project impacts, there would be little need to revisit the issue at the project level. If however, the planning EIR was cursory in its consideration of mitigation, it is appropriate to provide additional opportunity to further reduce impacts during project-level review.

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[1] *See, e.g., 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 even though those claims would not first be raised in over 10 years).

C. The Guidelines Should Limit Reliance on Past EIR's to No More than Five Years Following Certification

As OPR's Narrative Explanation of the Draft Guideline details, the history of California is one of rapid change to the built environment. The changes we are experiencing, and will continue to experience, due to climate change will only amplify their pace and severity. Planning documents adopted over five years ago do not accurately capture and mitigate the environmental effects of projects proposed today. For this reason, the ability of a project to benefit from an infill exemptions under CEQA has been limited to projects completed within five years of adoption of community-level environmental review. (Pub. Res. Code § 21159.24; see also Pub. Res. Code § 21157.6 (5-year limit on Master EIRs).) These time limitations suggest that a programmatic document is no longer able to accurately capture current impacts after five years. For this reason, the Guidelines should limit reliance on prior EIRs to those certified less than five years ago.

Explicitly limiting reliance on outdated EIRs will also increase certainty in Guideline application. It is entirely unclear what constitutes "substantial new information" showing an impact will be more severe than previously described. (Pub. Res. Code § 21094.5(a)(1).) A 5-year limit will avoid needless litigation over reliance on outdated documents that will invariably result should the Resources Agency fail to provide needed clarity on this issue.

Finally, permitting streamlining from antiquated planning documents will discourage needed updates to community-wide planning documents. A lead agency will have little incentive to update a community-wide plan if it can continue to use an outdated plan to avoid project-level analysis.

D. Guideline Section 15183.3(1)(D) Improperly Focuses on the Effects of the Infill Project

Public Resources Code Section 21094.5(a)(1) limits environmental review to effects that are (A) specific to the project or (B) where "substantial new information shows the effects will be more significant that described in the prior environmental impact report." The emphasis of subsection (B) is on the continued relevancy and accuracy of the underlying EIR. For example, a prior EIR may have analyzed air quality impacts but since that time, the air district has adopted more stringent thresholds based on an increased scientific understanding of risk. In this case, the effect would be more significant that previously described.

Guideline Section 15183.3(1)(D) misinterprets this provision by improperly emphasizing the effect of the project, not the effect itself. For example, the first sentence asks "whether substantial new information shows that the effects of the infill project are more significant than described or analyzed in the prior EIR." However, under Public Resources Code Section 21094.5(a)(1)(B), the issue is not the project's effect, it is whether the impact, as analyzed in the prior EIR, is more significant than previously described. To avoid ambiguity on this point, the first sentence of Section 15183.3(1)(D) should be revised to state:

> Indicate whether substantial new information shows that effects on the environment ~~of the infill project~~ are more significant than described or analyzed in the prior EIR.

Absent this revision, the Guideline could be interpreted to mean that because a project results in the same level of pollution analyzed in the prior EIR, the impact need not be analyzed even though current scientific understanding indicates that that same level of pollution would have a more significant effect than previously believed. Returning the focus to whether the analysis in the prior EIR is consistent with current understanding of environmental impacts and changed circumstances will discourage reliance on outdated community plans and incentivize local governments to ensure their community planning documents are current.

The second section of Section 15183.3(1)(D) provides that "'more significant' means the project would substantially increase the severity of a significant effect described in the prior EIR." In addition to having the same defect set forth above, this provision flies in the face of CEQA's emphasis on cumulative impacts. For example, in the greenhouse gas context, any one project will not "substantially increase the severity" of climate disruption. The effect will however, incrementally contribute to the cumulative problem. Indeed, whether any one particular project will substantially increase the severity of any impact analyzed on a community wide basis is unclear. We recommend deleting this sentence to maintain consistency with Public Resources Code Section 21094.5 and CEQA's requirement that the statute be interpreted in a manner that affords the fullest possible protection to the environment.

II. Comments on Proposed Performance Standards

At the outset, it is important to note that SB 226 goes far beyond CEQA's existing tiering mechanisms in allowing projects to avoid scrutiny of potentially significant impacts. Unlike existing procedures, under SB 226, a project would not have to analyze significant impacts previously subject to a statement of overriding considerations in the prior programmatic EIR, could rely on compliance with regulatory standards regardless of whether they functioned to fully mitigate a project's impacts, and is open to projects of all sizes. The comprised ability to analyze and mitigate significant impacts at the project-level underscores the importance of ensuring that performance criteria are tailored to allowing only those projects that significantly further the State's greenhouse gas and smart growth objectives to benefit from the SB 226's liberal tiering provisions.[2]

A. Performance Standards Applicable to All Project Types

Increased penetration of locally generated energy is an important State priority. Appendix M attempts to further this objective by calling for "[a]ll projects shall include renewable components, such as solar rooftops, where feasible." As currently drafted however, this language is vague and of limited value. "Where feasible" is not a performance criteria. It is an undefined standard than is afforded significant deference. In addition, a project may include a solar component but still fall far short of the full solar potential for a project. As one example, the EIR for the Villages of Lakeview Project provided for solar panels on public buildings (of which there were few) but not on the roofs of the over 11,000 homes or half million square feet of commercial space contemplated by that project.[3]

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[2] Our comments on the Appendix M performance standards are limited and should not be viewed as a lack of support for comments raised by environmental and public health organizations not addressed here.

[3] Draft EIR No. 471, Villages of Lakeview at 5.3-99, SCH No. 2006071095 (2009).

We understand that because there may be a limited set of circumstances where solar may not be appropriate for a project, OPR is reluctant to require solar in all cases. Further clarity could be achieved by requiring solar "to the maximum extent practicable" and then provide specific examples of when and to what extent solar would be appropriate and when it would not. This additional guidance would help limit the potential for this important requirement to be rejected on spurious grounds.

In addition, to meet the stated goal of "[s]ubstantial energy efficiency improvements," the Guidelines should provide additional compliance options. Pub. Res. Code § 21094.5.5(b)(6). For example, if solar rooftops cannot be incorporate into the project, the Guidelines should require that project to achieve CALGreen Tier 2 standards or other efficiency standard.

B. Residential

Streamlining benefits under SB 226 should be awarded only to those well-situated projects that substantially advance California's smart growth and ambitious emission reduction objectives. Projects with above average VMT do not meet this description and should be eliminated from streamlining eligibility. Compliance with CALGreen Tier 2 standards, which compensate for only a tiny fraction of the impacts associated with high VMT projects, is not an adequate substitute.

Allowing projects exceeding 100 percent of regional VMT will also frustrate better land use planning. For example, projects that quality for streamlining under SB 226 need not analyze alternative locations, density and building intensities. Pub. Res. Code § 21094.5(b)(1). Yet projects located in subpar areas are exactly the types of projects that should consider these types of alternatives.

Projects that are located in areas with 75-100 percent VMT should demonstrate that through adopted transportation demand strategies, the project would result in 75% or less of average VMT. In addition, these projects should adopt the CALGreen Tier 2 standards or other improved efficiency metric. This is consistent with the requirement in Public Resources Code Section 21094.5.5(b)(6) that the standards promote "[s]ubstantial energy efficiency improvements, including improvements to projects related to transportation energy." Projects in areas with less than 75 percent per capita VMT should adopt CALGreen Tier 1 standards or other improved efficiency metric.

C. Commercial and Retail Buildings

The same comments set forth above on regional location apply to commercial and retail buildings. As set forth above, projects located in above average VMT areas should not receive the benefits of streamlining. Notably, this provision provides alternative means of compliance based on proximity to households or transit. If a project located in a region with poor VMT is surrounded by residences that would serve the project through a pedestrian network, it would still qualify for streamlining benefits. However, energy upgrades alone are not sufficient to offset the many negative impacts resulting from poor project location.

With regard to Transit Proximity, OPR's Narrative Explanation appropriately recognizes that "placing jobs especially near transit stations is important." However, the Performance Standards

vaguely refer to proximity to a single "transit stop." To ensure proximity to meaningful transit, please replace "transit stop" with "major transit stop" as defined in Public Resources Code Section 21064.3.

Large commercial projects are typically auto-oriented and undermine efforts to preserve or create historic, walkable commercial districts that are woven into the urban fabric. Moreover, the proposed transportation study developed by the project applicant is highly subject to gaming. Streamlining benefits should not be awarded to these types of projects.

D. Office Building

As above, please replace "transit stop" with "major transit stop" as defined in Public Resources Code Section 21064.3.

E. School Eligibility Requirements for Bicycle Parking is Inadequately Defined

The proposed performance standards require schools to "provide parking and storage for bicycles and scooters ..." The performance criteria should specify how much parking is required (i.e. sufficient to meet 50% of the student body) and the form of parking required (i.e. safe and secure bike racks or an enclosed bike cage).

Thank you for your consideration of these comments. If you have any question please contact Kathryn Phillips at Kathryn.Phillips@sierraclub.org/(916) 557-1100 x102 or Matt Vespa at Matt.Vespa@sierraclub.org/(415) 977-5753. We look forward to continue to working with the Office of Planning and Research in this important endeavor.

Respectfully Submitted,

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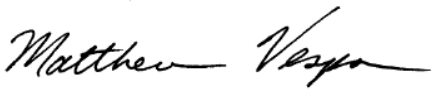
Director
Sierra Club California



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