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May 31, 2012

VIA EMAIL

CEQA Guidelines Update
c/o Christopher Calfee
1400 Tenth Street
Sacramento, CA 95815
Email: CEQA.Guidelines@ceres.ca.gov

Re: Comments on Revised State CEQA Guideline Section 15183.3
Streamlining for Infill Projects and Appendix M Performance
Standards

Dear Mr. Calfee:

This letter provides our comments on the Office of Planning and Research's Revised Proposed State California Environmental Quality Act Guideline Section 15183.3 Streamlining for Infill Projects and Performance Standards ("Revised Proposed Guideline"). OPR prepared Section 15183.3 to implement SB 226, which added, among other provisions, section 21094.5 to the Public Resources Code.

The CEQA Guidelines include objectives and criteria for the orderly evaluation of projects under CEQA.¹ Any provision of the Guidelines that is unauthorized or erroneous under the statutory law is invalid.² Therefore, our comments identify specific provisions in section 15183.3 and the Performance Standards that exceed the scope of authority in SB 226.

¹ Pub. Resources Code, § 21083; Cal. Code Regs, tit. 14, §§ 15000 et seq. (hereafter CEQA Guidelines).

² See Pub. Resources Code, §§ 21083, 21083.1; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, n. 2; *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109-110; see also *Azusa Land Reclamation Co. v. Marin San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1218-19 (guidelines invalid if they exceed statutory scope).

I. OPR SHOULD REVISE SECTION 15183.3'S DEFINITION OF "SUBSTANTIALLY MITIGATE"

SB 226 states that a project's effect upon the environment shall not be considered a new specific effect, if uniformly applicable development policies or standards will "substantially mitigate" that effect.³ The Revised Proposed Guideline defines "substantially mitigate" as a policy or policies that "will substantially lessen the effect, but not necessarily below the level of significance."⁴ OPR's interpretation of "substantially mitigate" in the Revised Proposed Guideline violates CEQA and is not supported by the plain language or any statement of legislative intent reflected in the statute or the legislative history of SB 226.

First, "the foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford *the fullest possible protection to the environment* within the reasonable scope of the statutory language."⁵ OPR's interpretation fails to afford the fullest possible protection to the environment by allowing a lead agency to *not* require mitigation that would reduce an effect below the level of significance. This interpretation violates the foremost principle of CEQA that the Act be interpreted to afford the fullest possible protection to the environment.

Second, OPR's definition of "substantially mitigate" is inconsistent with the Legislature's express statement of policy in Public Resources Code section 21002:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures,

³ Pub. Resources Code, § 21094.5, subd. (a)(2).

⁴ Revised Proposed Guideline, § 15183.3, subd. (d)(1)(E).

⁵ *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*, *supra*, 47 Cal. 3d at p. 390 (emphasis added).

individual projects may be approved in spite of one or more significant effects thereof.⁶

As is clear from these legislative findings and declarations, CEQA prohibits an agency from approving a project if feasible mitigation measures exist which would avoid or “substantially lessen” the project’s significant environmental effects.⁷ Pursuant to the policy stated section 21002, Public Resources Code section 21081 prohibits agencies from approving a project with significant impacts unless the agency incorporates changes to avoid or “mitigate” those impacts or makes a statement of overriding considerations.⁸ The Legislature’s use of “substantially lessen” in section 21002 and “mitigate” in section 21081 demonstrates that the Legislature uses these terms interchangeably.⁹ OPR also uses these terms interchangeably by interpreting “mitigate” in section 21081 to mean “substantially lessen” in CEQA Guidelines section 15093.¹⁰ Finally, the courts interpret “substantially lessened” to be synonymous with “substantially mitigated.”¹¹ Therefore, OPR’s definition of “substantially mitigate” is inconsistent with the plain language of CEQA, as interpreted by the Legislature, OPR itself and the courts.

Finally, OPR’s interpretation of “substantially mitigate” would render the entire Revised Proposed Guideline inconsistent with CEQA. SB 226 does not explicitly exempt from subsequent review environmental effects that were considered in a prior CEQA document, but that remain significant. Proposed Section 15183.3 would expand the scope of the statute by exempting a significant effect from subsequent review if uniformly applicable development policies “will substantially lessen the effect, but not necessarily below the level of significance.”¹² The proposed language impermissibly allows an agency to approve an infill project that has significant unavoidable impacts without making a statement of overriding considerations specifically tied to that project.

In *Communities for a Better Environment v. California Resources Agency*, the court invalidated former CEQA Guideline section 15152(f)(3)(C) because it

⁶ Pub. Resources Code, § 21002.

⁷ Pub. Resources Code, § 21002.

⁸ Pub. Resources Code, § 21081.

⁹ Compare Pub. Resources Code, § 21002, with Pub. Resources Code, § 21081.

¹⁰ Compare Public Resources Code, § 21081, subd. (a)(1), with CEQA Guidelines, § 15093, subd. (b).

¹¹ Compare CEQA Guidelines, § 15093, subd. (b), with *Vedanta Soc. Of Southern Cal. v. Cal. Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 529; *Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 847; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 380.

¹² CEQA Guidelines, § 15183.3, subd. (d)(1)(E).

impermissibly allowed “an agency, in approving a later project that has significant unavoidable impacts, to forego making a statement of overriding considerations *specifically tied to that project*.”¹³ Under CEQA, an agency must make specific findings in a statement of overriding considerations before approving a project that has a significant effect on the environment.¹⁴ This requirement is “central to CEQA’s role as a public accountability statute.”¹⁵ The court found that the guideline would allow an agency to adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and its statement of overriding considerations.¹⁶ The court concluded that, for later projects, “the responsible public officials must still go on the record and explain why they are approving the later project despite its significant unavoidable impacts.”¹⁷ Therefore, the court found that the guideline section was inconsistent with CEQA and invalid.

Like the guideline section that was invalidated in *Communities for a Better Environment v. California Resources Agency*, Revised Proposed Guideline Section 15183.3 impermissibly allows an agency in approving a later project that has significant unavoidable impacts, to forego making a statement of overriding considerations “*specifically tied to that project*,” if uniformly applicable development policies will substantially mitigate those effects, but not necessarily below the level of significance.¹⁸ CEQA requires an agency to make specific findings in a statement of overriding considerations before approving a project that has a significant effect on the environment.¹⁹ The Revised Proposed Guideline would allow an agency to adopt one statement of overriding considerations for a prior, more general EIR evaluating the uniformly applicable development policies. As a result, the Revised Proposed Guideline would allow an agency to avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR for uniformly applicable development policies and its statement of overriding considerations. The Revised Proposed Guideline could even allow an agency to avoid any political accountability by approving later, more specific projects with significant unavoidable impacts without preparing any EIR or

¹³ *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 124 (emphasis in original) (hereafter *Communities for a Better Environment*).

¹⁴ Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15091, 15092, 15093.

¹⁵ *Communities for a Better Environment*, *supra*, 103 Cal.App.4th at p. 124.

¹⁶ *Ibid.*

¹⁷ *Id.* at p. 124-25.

¹⁸ *Id.* at p. 124 (emphasis in original).

¹⁹ Pub. Resources Code, § 21081; CEQA Guidelines, §§ 15091, 15092, 15093.

issuing any statement of overriding considerations. Consequently, OPR's interpretation of "substantially mitigate" would render the entire Revised Proposed Guideline inconsistent with CEQA and invalid.²⁰

OPR should revise the meaning of substantially mitigate, or the proposed guideline in its entirety, to either require uniformly applicable development policies or standards to mitigate an infill project's impacts below the level of significance before CEQA streamlining may apply, or require agencies to evaluate significant impacts that were not previously reduced to a less-than-significant level.

II. OPR SHOULD REVISE SECTION 15183.3 TO REQUIRE PREPARATION OF A WRITTEN CHECKLIST

SB 226 requires lead agencies to support their finding that an infill project is subject to CEQA streamlining with substantial evidence.²¹ The draft proposed guideline recommended that agencies prepare a written checklist, noting that the "purpose of a written checklist prepared pursuant to this section is to document the substantial evidence supporting the lead agency's determinations."²² However, OPR weakened this requirement in the Revised Proposed Guideline by recommending that agencies prepare a written checklist *or similar device* and deleting language regarding the purpose of a written checklist.²³ As a result, the Revised Proposed Guidelines does not require agencies to prepare anything to document the substantial evidence supporting their decisions.

We recommend that OPR revise section 15183.3 to require preparation of a written checklist for two reasons. First, while SB 226 does not specifically require preparation of a written checklist, it does require agencies to support their determinations with substantial evidence.²⁴ OPR could reasonably interpret SB 226 to require a written checklist as substantial evidence to support a lead agency's determination that an infill project is subject to CEQA streamlining. There is nothing in SB 226 that supports OPR's authorization of excessive agency discretion at the expense of disclosure to decision makers and the public.

Second, requiring preparation of a written checklist would be consistent with CEQA's requirement that OPR develop guidelines that lead to the orderly

²⁰ *Communities for a Better Environment, supra*, 103 Cal.App.4th at 124.

²¹ Pub. Resources Code, § 21094.5, subd. (a)(1).

²² Proposed CEQA Guidelines, § 15183.3, subd. (c) (January version).

²³ Revised CEQA Guidelines, § 15183.3, subd. (d)(1).

²⁴ Pub. Resources Code, § 21094.5, subd. (a)(1).

evaluation of projects under CEQA.²⁵ By requiring a written checklist, decision makers and the public will be afforded an opportunity to review an infill project's effects on the environment prior to a lead agency's approval of the project. Instead of searching for an agency's evidence in prior EIRs and various other documents, decision makers and the public would be able to efficiently review an agency's support for its findings in one document. Not requiring a written checklist could result in the opposite and unintended effect of delaying project approval for which the agency has substantial evidence to support its findings. In addition, a lead agency would have a clear record of the basis for its determination in the event its determination is challenged in court.

We strongly urge OPR to revise section 15183.3 to require agencies to prepare a written checklist to document their substantial evidence.

III. OPR SHOULD REVISE SECTION 15183.3 TO MAKE THE DEFINITION OF "SMALL WALKABLE COMMUNITY PROJECTS" CONSISTENT WITH SB 226

SB 226 applies to infill projects that consist of a "small walkable community project" located in an area designated for that purpose.²⁶ A "small walkable community project" is defined under SB 226 as a project in an incorporated city, that has a project area of approximately one-quarter mile that includes a residential area adjacent to a retail downtown area and has a density of at least eight dwelling units per acre or a floor area ratio for retail or commercial use of not less than 0.50.²⁷ Section 15183.3 provides a similar definition of small walkable community projects.²⁸ However, the section expands on SB 226's definition by allowing a city to designate an area for a small walkable community project within its general plan, zoning code, or by any legislative act concurrently with project approval.²⁹

There is no authorization in SB 226 that would allow cities to apply its streamlining provisions to its general plan, zoning or other land-use decisions designating areas for small walkable community projects. SB 226 only authorizes streamlining for projects that meet the statutory definition of an infill project.³⁰ A

²⁵ Pub. Resources Code, § 21083 (requiring OPR to develop guidelines with objectives and criteria for orderly evaluation of projects).

²⁶ Pub. Resources Code, § 21094.5, subd. (c)(1)(B).

²⁷ Pub. Resources Code, § 21094.5, subd. (e)(4).

²⁸ CEQA Guidelines, § 15183.3, subd. (f)(6).

²⁹ *Ibid.*

³⁰ Pub. Resources Code, § 21094.5, subs. (a)(1), (e)(1).

legislative action by a city to designate an area for a small walkable community project would not meet SB 226's definition of an infill project.³¹ Instead, the city's action on the proposed designation would be a discretionary project that may result in a significant impact on the environment and would not be exempt from environmental review.³² We recommend that OPR revise its definition of "small walkable community projects" to be consistent with SB 226.

IV. OPR SHOULD REVISE SECTION 15183.3'S DEFINITION OF "PREVIOUSLY DEVELOPED"

To be eligible for streamlining under SB 226, an infill project must be located in an urban area on a site that has been previously developed.³³ Section 15183.3 contains an ambiguous definition of "previously developed" for the purpose of determining infill project eligibility. Specifically, the section states that "previously developed" means "a substantial portion of the site has been mechanically altered for purposes authorized in a local zoning code."³⁴

Neither CEQA, the CEQA Guidelines, nor section 15183.3 quantify or otherwise define the phrase "substantial portion." As a result, there is no way for the public and decision makers to know whether half of the site must be previously developed, or whether a "substantial portion" requires more. Adding to the ambiguity is the lack of a definition or other explanation of the term "mechanically altered." To provide greater certainty and avoid disputes in implementation of the section 15183.3 by lead agencies, OPR should revise the definition to further define the terms "substantial portion" and "mechanically altered," and to require that the site already contain a qualified urban use, which is defined by the statute.

V. OPR SHOULD REQUIRE PROJECTS TO IMPLEMENT RENEWABLE ENERGY COMPONENTS

SB 226 *requires* eligible infill projects to satisfy all applicable statewide performance standards.³⁵ However, the draft proposed performance standards allowed projects to implement renewable energy components "*where feasible*."³⁶ Numerous agencies and organizations including the Association for Environmental

³¹ See Pub. Resources Code, § 21094.5, subd. (e)(1).

³² See Pub. Resources Code, §§ 21065, subd. (a), 21080, subd. (a).

³³ Pub. Resources Code, § 21094.5, subd. (e)(1)(B).

³⁴ CEQA Guidelines, § 15183.3, subd. (f)(3).

³⁵ Pub. Resources Code, § 21094.5, subd. (c)(2).

³⁶ Appendix M, Performance Standards, II (January version) (emphasis added).

Professionals, Center for Biological Diversity, Sierra Club, the Nature Conservancy and City of Oakland, recommended that OPR delete the term “where feasible” because it is vague and unenforceable.³⁷ However, OPR did not delete the language.

We recommend that OPR revise the performance standards so that the standards are clear, enforceable and capable of implementation.³⁸ Allowing projects to implement renewable energy components “where feasible” is inconsistent with the Legislature’s intent in SB 226 to require such projects to satisfy all applicable performance standards. Furthermore, allowing projects to implement renewable energy components “where feasible” does not provide clear criteria for lead agencies to follow when determining whether a project satisfies the required performance standards. In addition, unclear and unenforceable performance standards do not promote the reduction of greenhouse gas emissions, which is one of the fundamental purposes of SB 226.³⁹ To permit environmentally sustainable infill development that is consistent with the purposes of SB 226, we recommend that OPR delete “where feasible” and require renewable energy components for all infill projects.

VI. OTHER REVISIONS TO ENSURE CONSISTENCY WITH SB 266

We recommend that OPR make the following changes to ensure that section 15183.3 is consistent with SB 226 and the CEQA statute. To illustrate our recommendations we struck through words that should be deleted and underlined words that should be added in section 15183.3.

- *(b)(3) Be consistent with the general plan use designation, density, building intensity, and applicable policies . . .*
- *(b)(3)(B) Where an infill project is proposed outside of the boundaries of a metropolitan planning organization, the infill project must meet the*

³⁷ See letter from C. Eugene Talmadge, President, Assn. of Environmental Professionals, to Christopher Calfee, Office of Planning and Research (Feb. 24, 2012), p. 1; letter from Brian Nowicki, Cal. Climate Policy Director, Center for Biological Diversity, to Christopher Calfee, Office of Planning and Research (Feb. 24, 2012), pp. 1-2; letter from Kathryn Phillips, Director and Matthew Vespa, Staff Attorney, Sierra Club of California, to Christopher Calfee, Office of Planning and Research (Feb. 24, 2012), p. 5; letter from Pablo Garza, Associate Director, State Policy & External Affairs, The Nature Conservancy, to Christopher Calfee, Office of Planning and Research (Feb. 24, 2012), p. 3; letter from Eric Angstadt, Director, Dept. of Planning, Building and Neighborhood Preservation, City of Oakland to Christopher Calfee, Office of Planning and Research (Feb. 24, 2012), p. 3.

³⁸ See Pub. Resources Code, §§ 21083, 21094.5.5.

³⁹ Pub. Resources Code, § 21094.5.5, subd. (b)(3).

definition of a small walkable community ~~walkable~~ project in subdivision (e)(6), below.

- *(c)(1) . . . First, if an effect specific to the project or project site was addressed as a significant effect in a prior EIR for a planning level decision*
- *(d)(1)(D) . . . (2) feasible mitigation measures considerably different than those analyzed in a prior EIR could substantially reduce one or more of the significant effects described in the prior EIR . . .*
- *(d)(1)(E) . . . The explanation in the written checklist may be used to support the finding required in subdivision ~~(e)~~(d)(2)(D).*
- *(d)(2)(C) Infill EIR. If the infill project would result in new specific effects or more significant effects, and uniformly ~~applied~~ applicable development policies would not substantially mitigate such effects*
- *(e) . . . All other effects of the infill project should be described in the written checklist as provided in subsection ~~(b)~~(d)(1), and that written checklist*
- *~~(e)~~(f) Terminology. The following definitions apply to this section:*
- *(f)(1) “Infill project” includes the whole of an action consisting of residential, commercial, retail, transit station, school, or public office building ~~uses~~, or any combination of such uses that meet the eligibility requirements set forth in subdivision (b). No more than one half of ~~the a~~ a commercial or retail project area ~~of projects consisting of commercial and retail uses~~ may be used for parking.*
- *(f)(6) “Small walkable community ~~walkable~~ project” means a project that is all of the following:*

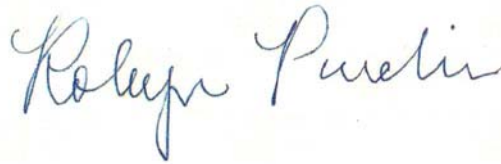
VII. CONCLUSION

Thank you for the opportunity to submit these comments on OPR’s Revised Proposed Guideline Section 15183.3. Our omission of comments on any portion of the proposed guideline does not constitute our acceptance of the guideline as

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accurate. Nor do our proposals for amending the language constitute our acceptance of such language as final.

Sincerely,

A handwritten signature in blue ink that reads "Robyn C. Purchia". The signature is written in a cursive style with a large initial 'R' and 'P'.

Robyn C. Purchia

RCP:vs