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 revised guidelines for implementation of Senate Bill 226 ("Revised 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.

SB 226 marks an unprecedented removal of CEQA's environmental safeguards to what are broadly viewed as "infill" projects. Because environmental review and public participation will be significantly curtailed under the statute, only well-situated and well-designed projects merit the expedited and deferential review afforded under SB 226. Unfortunately, the Revised Draft Guidelines' Performance Criteria continue to reward mediocrity and would function to undermine California's greenhouse gas pollution reduction targets in contravention of SB 226's statutory mandate. (Pub. Res. Code § 21094.5.5(b)(3)) (performance criteria must promote reductions under AB 32.) For example, the Revised Draft Guidelines would allow for the possibility a complete exemption from project-level environmental review for projects located in a "below average" vehicle miles travelled ("VMT") area. Because AB 32 requires California to significantly reduce greenhouse

gas pollution from existing levels, a project sited in an area that represents only an incremental improvement from business as usual impedes achievement of this objective. Moreover, whether a project is located in a "below average" VMT area has no relationship to whether that project is designed in a manner that would reduce average VMT. In addition, the lack of guidance on how this and other criteria should be appropriately implemented will lead to inconsistent application, encourage gaming, and result in projects that do not legitimately meet even a median level of performance taking advantage of curtailed environmental review and improperly eluding public scrutiny. We urge OPR to tighten performance criteria and provide additional specificity on their application.

We are also concerned that the Revised Draft Guidelines foreclose public review and participation of an agency's determination that further environmental review is not required for a particular project. Given the many considerations inherent in this determination, a brief twenty day public review period should be incorporated to ensure consideration of issues that could easily be overlooked by a lead agency. A review period of this limited duration would remain consistent with SB 226's goal of expedited review and avoid needless litigation.

I. Comments on Proposed Guideline Section 15183.3

A. Section 15183.3(d)(2)(A) Should be Revised To Include Public Review Prior to Adoption of Notice of Determination Finding that a Project Does Not Require Further Environmental Review

The determination of whether a project can avoid further environmental review under SB 226 calls for, among other things: 1) an evaluation of whether impacts specific to the project were previously analyzed in a prior programmatic document; 2) whether additional mitigation for significant effects that were not considered or available could be adopted; 3) whether circumstances have sufficiency changed since the prior EIR – which could be of any vintage – such that the prior analysis no longer constitutes an adequate assessment of a particular impact; and 4) whether uniformly applicable polices would "substantially" mitigate new or more substantial effects. This multi-faceted inquiry is unique to CEQA. Public review of this determination is essential to ensure potential issues are considered prior to project approval.

The Revised Draft Guidelines foreclose any opportunity for public review and comment on a lead agency's determination that a prior planning level EIR adequately addressed the impacts of a proposed project. Rather, the Revised Draft Guidelines propose that a lead agency may simply make this determination internally and file a Notice of Determination (NOD). The Revised Draft Guidelines justify this departure from CEQA's purpose of informed self-government on the grounds that proposed Section 15183.3 "is similar to the operation of Section 15164."[1] The operation of Section 15164 is in no way similar to Section 15183.3. Section 15164 addresses an addendum to an EIR or negative declaration that involves minor technical changes or additions to the *same* project. Section 15183.3 by contrast, involves the applicability of a planning level EIR that may not have fully mitigated project impacts or even addressed them in the first instance.

OPR's reference to Brown Act noticing requirements also fails to ameliorate the Revised Draft Guideline's departure from CEQA's core principles. Merely agendizing approval of a

[1] OPR Summary of Revisions at 12.

proposed project absent disclosure and the opportunity to comment on a lead agency's reasoning of the applicability of Section 15183.3 improperly denies the public CEQA's right to meaningfully participate in environmental decisionmaking. *See, e.g., Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 392 ("If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.").

The fact that Public Resources Code Section 21094.5 is silent with regard to the procedure for approval of projects that may not require further review does not limit OPR's ability to include a short public review period. *Laurel Heights*, 47 Cal.3d at 391 n.2 ("courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA."). The Revised Draft Guidelines' proposal that an NOD need only be filed absent any public review is also absent from Section 21094.5. Indeed, allowing a lead agency to file an NOD prior to any public review is inconsistent with the "foremost principle under CEQA" that CEQA "be interpreted in such a manner as to afford the fullest possible protection to the environment." *Id.* at 390. Accordingly, proposed Section 15183.3(d)(2)(A) should be revised as follows:

> (A) No Further Review. No additional environmental review is required if the infill project would not cause any new specific effects or more significant effects, or if uniformly applicable development policies would substantially mitigate such effects. Where the lead agency determines that no additional environmental review of the effects of the infill project is required, the lead agency shall provide a public review period of the basis for this determination not less than 20 days prior to approving the infill project. ~~file a Notice of Determination as provided in Section 15094.~~ Where the lead agency finds that uniformly applicable development policies substantially mitigate a significant effect of an infill project, the lead agency shall make the finding described in subdivision (c)(2)(D).

The importance of public review of a determination that a project can avoid additional environmental review cannot be overstated. A short public review period would prevent needless litigation over disputes that could have been resolved had the public been notified and offered the chance to voice its concerns, provide a check against improper use of a no further review determination, and encourage accountability and a more robust and thoughtful analysis under Section 15183.3. In addition, a twenty day review period is expeditious and consistent with SB 226's purpose to streamline review of appropriate projects. We therefore ask OPR to incorporate this review period into Guideline Section 15183.3.

B. Clarify the Use of Infill Checklist or Similar Document is Required

Comments on the Revised Draft Guidelines provide that a lead agency is not required to use the infill checklist in Appendix N. While a lead agency does have the discretion in determining the manner in which a project is evaluated, providing that evaluation – in whatever form - is required to ensure meaningful public review. As Section 15183.3(e) is currently drafted, it could be improperly read to suggest that while and infill checklist should be prepared, it need not be and therefore the information that checklist conveys also need not be disclosed to the public. Were this to occur, it would be impossible to evaluate a lead agency's determination that a particular impact should not be subject to further review. Accordingly, Section 15183.3(e) should be revised as follows:

(e) Infill EIR Contents. An infill EIR shall analyze only those significant effects that uniformly applicable development policies do not substantially mitigate, and that are either new specific effects or are more significant than a prior EIR analyzed. All other effects of the infill project must ~~should~~ be described in the written checklist or similar document as provided in subdivision (b)(1), and that written checklist or similar document must ~~should~~ be circulated for public review along with the infill EIR. The written checklist or similar document must ~~should~~ clearly set forth those effects that are new specific effects, and are subject to CEQA, and those effects which have been previously analyzed and are not subject to further environmental review. The analysis of alternatives in an infill EIR need not address alternative locations, densities, or building intensities. An infill EIR need not analyze growth inducing impacts. Except as provided in this subdivision, an infill EIR shall contain all elements described in Article 9.

C. Proposed Section 15183.3(d) Creates Unnecessary Confusion

The last sentence of proposed Section 15183.3(d) provides a partial definition of substantial evidence as defined under Section 15384 (referenced in Section 15183.3(d)). Partial reference to a defined term is unnecessary and creates needless ambiguity. This sentence should be stricken and replaced with "Such determinations must be supported by substantial evidence."

(d) Procedure. Following preliminary review of an infill project pursuant to Section 15060, the lead agency must examine an eligible infill project in light of any prior EIR to determine whether the infill project will cause any effects that require additional review under CEQA. Determinations regarding this section's applicability to an infill project are questions of fact to be resolved by the lead agency. Such determinations must be supported by substantial evidence. ~~with enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.~~ (See Section 15384.)

I. Comments on Proposed Performance Standards

SB 226 goes far beyond CEQA's existing tiering mechanisms in affording projects significant deference in relying on prior EIRs that fail to fully mitigate impacts and development policies that purport to "substantially mitigate" project impacts that were never analyzed in the first instance. 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 utilize the curtailed review process under SB 226. Unfortunately, the performance standards continue to allow projects that do not meaningfully further these objectives to qualify for truncated review and fail to provide sufficient guidance to avoid gaming and inconsistent application. The Sierra Club recommends the following changes to ensure the performance standards are consistent with their statutory purpose. (Pub. Res. Code § 21094.5.5.)

A. Define "Low Vehicle Travel Area" as 75% of Existing Average Level of VMT or Require Projects in "Below Average" VMT Areas to Demonstrate The

Project Would Result in 75% or Less of Average VMT

The current proposal in the Revised Draft Guidelines to allow projects that are located in "below average" VMT areas must be significantly strengthened. With significant greenhouse gas pollution reductions required to meet California's short and longer term reduction targets, allowing projects that are only an increment better than business as usual frustrates achievement of these goals and meaningful forward thinking land use planning. In addition, project location says nothing about how that particular project may or may not reduce VMT. Indeed, a poorly designed project in a "below average" VMT area could easily have above average VMT. Moreover, because projects that qualify for streamlining under SB 226 need not analyze alternative locations, density and building intensities, consideration of changes to project design that would make a significant difference in project VMT are foreclosed. To remedy these concerns and ensure consistency with SB 226's mandate that performance standards promotes greenhouse gas reductions in a manner consistent with AB 32, the performance criteria should be revised to either define "low vehicle travel area" as 75% below the existing average level of VMT or require projects sited in areas that are only "below average" to demonstrate that the project would result in 75% or less of average regional VMT.

In addition, further clarity is needed on how a project would evaluate eligibility for this standard to ensure consistent application across jurisdictions and avoid gaming.

B. Remove Proximity to "High Quality Transit Corridor" From Residential Project Performance Standard, or at Minimum, Reduce Proximity to ¼ Mile

The Revised Draft Guidelines propose a new criterion allowing residential projects within ½ of either a "major transit stop" or a "high quality transit corridor" to qualify for curtailed environmental review. CEQA defines a "major transit stop" as "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 major bus routes with a frequency of service interval of 15 minutes or less." Pub. Res. Code § 21064.3. A "high quality transit corridor" is defined under proposed Appendix M as "an existing corridor with fixed route bus service intervals no longer than 15 minutes during peak commute hours." Proximity to a single bus route is not a reliable proxy for project VMT or whether or not a project is located in a walkable community. Accordingly, this criterion should be removed.

If OPR strongly believes "high quality transit corridor" should remain in Appendix M, proximity should be reduced to ¼ mile to reflect the fact that "[t]he maximum distance that people will walk to transit varies depending on the situation."[2] Studies of North American cities have shown that "most passengers (75-80% on average) walk ¼ mile or less for bus service." *Id.* Indeed, "[t]he mode of the public transport trip is the most important determinant of walking distance, reflecting the different supply and spacing of each mode in which there are many more bus stops

[2] Transit Capacity and Quality of Service Manual—2nd Edition ("TCQSM"), at 3-9; http://onlinepubs.trb.org/onlinepubs/tcrp/tcrp100/part%203.pdf.

than train stations."[3] Consistent with this common sense understanding, the LEED-ND Rating system contains smart siting requirements that similarly distinguish between rail and bus service.[4]

In addition, consistent with LEED-ND, OPR should clarify that 50% of project dwelling units and nonresidential building entrances (inclusive of existing buildings) must be within the relevant distance from the transit mode to qualify.[5]

C. Commercial/Retail Projects Above 50,000 Square Feet Should Not Be Eligible for Curtailed Review

Commercial projects with a large footprint are auto-oriented and undermine efforts to preserve or create historic, walkable commercial districts that are woven into the urban fabric. These types of projects should not be eligible for curtailed review under any circumstances. A transportation study developed by the project applicant to demonstrate that a large commercial project would purportedly reduce total existing VMT is highly subject to gaming, dubious assumptions, and the undervaluing of big box impacts on community walkability. Such a study does not constitute a legitimate justification for including commercial/retail projects greater than 50,000 feet in Appendix M.

Removing this criterion from the performance standards does not mean large commercial/retail projects could not qualify for SB 226, only that they could not sprawl across the suburban landscape. For example, a 200,000 square foot commercial project could meet the existing 50,000 square feet floor-plate standard if it were four stories. Performance criteria should be encouraging this type of vertical growth, not commercial/retail with massive footprints.

D. Restore Requirement that Residential Projects Include Renewable Energy Where Feasible

Increased penetration of locally generated energy is an important State priority. Local clean energy offers numerous benefits to the electricity grid, avoids the cost and environmental impacts from construction of additional power plants and transmission lines, and creates local jobs. For this reason, Governor Brown has set a goal of 12 GW of electricity to be generated by local clean power sources by 2020 and recognized that achievement of this objective will require "all manner of investment, risk taking and collaboration."[6] Yet, if the face of this State priority, the Revised Draft Guidelines have actually been changed to diminish the renewable component of the performance standards. Whereas the original draft required all projects to include renewable components "where feasible," the Revised Draft now only "encourages" residential projects to include on-site renewable

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[3] *Explaining walking distance to public transport: the dominance of public transport supply*, Institute of Transport and Logistics Studies, The University of Sydney, Australia, Rhonda Daniels and Corinne Mulley (July 29, 2011), http://sydney.edu.au/business/__data/assets/pdf_file/0013/106501/Daniels-Mulley-Explaining.pdf.

[4] LEED 2009 for Neighborhood Development at 3, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=148 ("Locate the project on a site with existing and/or planned transit service such that at least 50% of *dwelling units* and nonresidential building entrances (inclusive of existing buildings) are within a 1/4 mile *walk distance* of bus and/or streetcar stops, or within a 1/2 mile walk distance of *bus rapid transit* stops, light or heavy rail stations, and/or ferry terminals, and the transit service at those stops …").

[5] *Id.* The same clarification should be added for proximity to households for commercial/retail projects.

[6] Tiffany Hsu, Gov. Brown Pushes 12-Gigawatt Clean-Power Goal, L.A. Times (July 26, 2011), http://articles.latimes.com/2011/jul/26/business/la-fi-small-renewables-20110726.

energy. At a minimum, the original text should be reinstated. To the extent OPR believes certain classes of residential projects, such as affordable housing, should not be required to incorporate renewable energy where feasible, OPR should exempt this class of projects from this performance standard rather that eliminate it for the entire residential sector.

In addition, 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.

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
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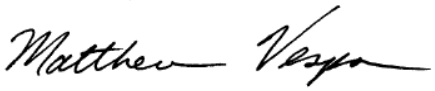

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