

CALIFORNIA NATURAL RESOURCES AGENCY



INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION

**Proposed Amendments to the State CEQA Guidelines
Addressing Analysis and Mitigation of Greenhouse Gas
Emissions Pursuant to SB97**

July 2009

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INTRODUCTION

The California Natural Resources Agency (“the Resources Agency”) is proposing this action to amend and add certain guidelines implementing the California Environmental Quality Act (Public Resources Code section 21000 *et seq.*) (“CEQA”). Specifically, these amendments implement the Legislature’s directive in Public Resources Code section 21083.05 (enacted as part of SB97 (Chapter 185, Statutes 2007)). That section directs the Resources Agency to “certify and adopt guidelines prepared and developed by the Office of Planning and Research” “for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions[.]” (Pub. Resources Code, § 21083.05(a)-(b).)

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the “Guidelines” or “State CEQA Guidelines”). At present, public agencies, project proponents, and third parties who wish to enforce the requirements of CEQA, rely on the Guidelines to provide a comprehensive guide on compliance with a lead agency’s obligations under CEQA. Subdivision (f) of section 21083 requires the Resources Agency, in consultation with the Office of Planning and Research (“OPR”), to certify, adopt and amend the Guidelines at least once every two years.

Section 21083.05, as noted above, requires the promulgation of Guidelines specifically addressing analysis and mitigation of the effects of greenhouse gas emissions. The Resources Agency proposes the following changes to the Guidelines (“Proposed Amendments”) to implement that directive:

Add sections: 15064.4, 15183.5 and 15364.5.

Amend sections: 15064, 15064.7, 15065, 15086, 15093, 15125, 15126.2,
 15126.4, 15130, 15150, 15183, Appendix F and Appendix G.

In addition to guidelines implementing SB97, some of the amendments listed above are non-substantive corrections.

The Resources Agency considered reasonable alternatives to the proposed action. The Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 and to update the Guidelines to reflect recent case law. Thus, the Proposed Amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's existing requirements. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in SB97. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to existing requirements of CEQA and not the proposed action.

The Resources Agency has also initially determined that the proposed action will not have a significant adverse economic impact on business. The Resources Agency has determined that the proposed changes in this action have no impacts on project proponents. However, the Resources Agency is aware that certain of the statutory changes enacted by the Legislature and judicial decisions, described in greater detail below, that are reflected in this proposed action could have an economic impact on project proponents, including businesses. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with CEQA's requirement for analysis of greenhouse gas emissions. However, the proposed changes to the Guidelines merely reflect these legislative and judicial requirements, and the Resources Agency knows of no less costly alternative. The proposed action clarifies and updates the Guidelines to be consistent with legislative enactments that have modified CEQA, and recent case law interpreting it, but does not impose any new requirements. Therefore, the proposed action does not itself have a significant, adverse economic impact on business.

The proposed action does not duplicate or conflict with any federal statutes or regulations. CEQA is similar in some respects to the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321-4343. Federal agencies are subject to NEPA, which requires environmental review of federal actions. State and local agencies are subject to CEQA, which requires environmental review before state and local agencies may approve or decide to undertake discretionary actions and projects in California. Although both NEPA and CEQA require an analysis of environmental impacts, the substantive and procedural requirements of the two statutes differ. Most significantly, CEQA requirements for feasible mitigation of environmental impacts exceed NEPA's mitigation provisions. A state or local agency must complete a CEQA review even for those projects for which NEPA review is also applicable, although Guidelines sections 15220-15229 allow state, local and federal agencies to coordinate review when projects are subject to both CEQA and NEPA. Because state and local agencies are subject to CEQA unless exemptions apply, and because CEQA and NEPA are not identical, guidelines for CEQA are necessary to interpret and make specific provisions of SB97 and do not duplicate the Code of Federal Regulations.

Below is a brief background on the science relating to the effects of greenhouse gas emissions, as well as the various initiatives that California is implementing to reduce those emissions. Following that background, OPR's public engagement process is briefly described,. Next, this Initial Statement of Reasons explains the purpose and necessity of each proposed change to the Guidelines. Finally, several issues that are not addressed in these Proposed Amendments are discussed.

BACKGROUND ON THE EFFECTS OF GREENHOUSE GAS EMISSIONS AND CALIFORNIA'S EFFORTS TO REDUCE THOSE EMISSIONS

This section provides a brief background on the potential effects of greenhouse gas emissions and California's efforts to reduce those emissions.

What Are Greenhouse Gases?

Certain gases in Earth's atmosphere naturally trap solar energy to maintain global average temperatures within a range suitable for terrestrial life. Those gases – which primarily include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride – act as a greenhouse on a global scale. (Health and Safety Code, § 38505(g).) Thus, those heat-trapping gases are known as greenhouse gases ("GHG").

The Legislature defined "greenhouse gases" to include the six gases mentioned above in California's Global Warming Solutions Act. (Health & Saf. Code, § 38500 et seq.) Similarly, the U.S. EPA has proposed regulation of those same six gases under the authority of the Clean Air Act. According to the U.S. EPA:

These six greenhouse gases are well studied by and have been the primary focus of climate change research, and are therefore the Administrator's first priority in addressing endangerment for greenhouse gases. These six greenhouse gases share common physical properties relevant to the climate change problem: all are long-lived in the atmosphere; all become globally well mixed in the atmosphere regardless of where the emissions occur; all trap outgoing heat that would otherwise escape to space; and all are directly emitted as greenhouse gases rather than forming as a greenhouse gas in the atmosphere after emission of a precursor gas. Because of these properties, the climate effects of these greenhouse gases are generally better understood than the climate effects associated with most other climate-forcing agents....

(EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18895 (April 24, 2009) (footnote omitted).) The United Nations Framework Convention on Climate Change also addresses these six gases. (*Ibid.*)

What Causes Greenhouse Gas Emissions?

The incremental contributions of GHGs from immeasurable and innumerable direct and indirect sources result in elevated atmospheric GHG levels. (EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18904 (April 24, 2009) (“cumulative emissions are responsible for the cumulative change in the stock of concentrations in the atmosphere”).) Some GHG emissions occur through natural processes such as plant decomposition and wildfires. One large source of GHG emissions, for example, is wildfire on forestlands and rangelands, which release carbon as a result of material being burned. (California Board of Forestry and Fire Protection, *2008 Strategic Plan and Report to the CARB on Meeting AB32 Forestry Sector Targets* (October, 2008), at p. 2.)

Human activities, such as motor vehicle use, energy production and land development, also result in both direct and indirect emissions that have contributed to highly elevated concentrations of GHGs in the atmosphere. (California Energy Commission, *Inventory of California Emissions and Sinks: 1990 to 2004* (2006).)¹ Transportation alone is estimated to account for nearly 40 percent of California’s GHG emissions. (California Air Resources Board, *Climate Change Proposed Scoping Plan* (2008), at p. 11 (“Scoping Plan”); California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF (“2007 IEPR”) at p. 18, Figure 1-2.) Emissions attributable to transportation are largely a result of the majority of California’s urban growth characterized by travel-inducing features: low density, unbalanced land uses separating jobs and housing, and a focus on single-occupancy vehicle travel. (California Energy Commission, *The Role of Land Use In Meeting California’s Energy and Climate Change Goals*. (2007) at p. 9.) In approaching regulation of GHG emissions in California, for example, the California Air Resources Board (“ARB”) proposes to regulate various economic sectors that are known to emit GHGs, including electric power, transportation, industrial sources, landfills, commercial and residential sectors, agriculture and forestry. (Scoping Plan, Appendix F.) With a growing population and economy, California’s total GHG emissions continue to increase. As explained below, this rapid rate of increase in GHG emissions is causing a change in the composition of atmospheric gases that may cause life threatening adverse environmental consequences.

What Effects May Result from Increased Greenhouse Gas Emissions?

Several measurable effects, including, among others, an increase in global average temperatures have been attributed to increases in GHG emissions resulting from human activity. (Intergovernmental Panel on Climate Change, *Working Group 1*

¹ Multiple statewide emission inventories covering the same period of time may vary. This is largely due to inventories characterizing an emission source by sectors (e.g. agriculture, cement, transportation, etc.) which may not be treated the same depending on the methodology used and access to information. Thus, two statewide emissions inventories may be different depending on the agency that created them or its intended application. The CARB is in the process of updating its statewide data and methodologies to be consistent with international and national guidelines. The typical emissions inventory covers 1990 to 2004.

Report: The Physical Science Basis (2001), at p. 101.) Evidence further indicates that a warmer planet may in turn lead to changes in rainfall patterns, a retreat of polar icecaps, a rise in sea level, and changes in ecosystems supporting human, animal and plant life. (U.S. Environmental Protection Agency, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act*, April 17, 2009 (“Technical Support Document”), at pp. ES-1 to ES-3.) Climate change is not the only effect of increased GHG emissions. Impacts to human health and ocean acidification are also attributed to increasing concentrations of GHGs in the Earth’s atmosphere. (*Id.* at p. 57.)

Globally elevated concentrations of GHGs have been observed to induce a range of associated effects. For example, the effects of atmospheric warming include, but are not limited to, increased likelihood of more frequent and intense natural disasters, increased drought, and harm to agriculture, wildlife, and ecological systems. (Technical Support Document at pp. ES-1, ES-6.) According to a report prepared for the California Climate Change Center:

Climate change is likely to affect the abundance, production, distribution, and quality of ecosystem services throughout the State of California including the delivery of abundant and clean water supplies to support human consumption and wildlife, climate stabilization through carbon sequestration, the supply of fish for commercial and recreational sport fishing. For example, as described in this report, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. The ability of the State’s forests to sequester carbon and support climate stabilization could be hindered as productivity decreases and fires increase. And increased water temperatures in streams due to a decrease in provision of fresh water could seriously reduce salmon reproduction and subsequently reduce the number of salmon available for commercial and recreational harvest. Also, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. All of these ecosystem services have economic value and that value and its distribution is likely to changes under a changing climate.

(Rebecca Shaw, et al., for the California Climate Change Center, *The Impact of Climate Change on California’s Ecosystem Services*, March 2009, CEC-500-2009-025-D, at p. 1.)

The effects of increased GHG concentrations are already being felt in California. For example, global atmospheric changes are causing sea levels to rise. An increase of approximately 8 inches has been recorded at the Golden Gate Bridge over the past 100 years. Such sea level rise threatens low coastal areas with inundation and increased erosion. (Scoping Plan, at p. 10.)

While sea levels continue to rise, the Sierra snowpack has been shrinking. Average annual runoff from spring snowmelt has decreased 10% in the last 100 years. Because snow in the Sierra acts as a reservoir, holding winter water for use later in the year, reduced snowpack creates greater potential for summer droughts and reduced hydroelectricity generation. (Office of Environmental Health and Hazard Assessment, April, 2009, Indicators of Climate Change in California, at p. 76.) Climate change is also thought to account for changes in the timing of California's major precipitation events. As explained in a report prepared for the California Climate Change Center:

reservoirs were designed to store only a fraction of the state's entire yearly precipitation, under the assumption that the annual mountain snowpack would melt at roughly the same time every year. During anomalously high rain or snowmelt events, reservoirs must not only store water, but also discharge excess water to avoid flooding. Water must sometimes be discharged in anticipation of large events to reduce flood risk. The dual functions of storage and flood management require reservoir managers to carefully balance factors such as precipitation, snowmelt timing, reservoir storage capacity, and demand. Even if future precipitation remains unchanged, shifts in snowmelt timing can affect California's water supply during the warm season due to reservoir storage capacity constraints.

(Sarah Kapnick and Alex Hall, for the California Climate Change Center, *Observed Changes in the Sierra Nevada Snowpack: Potential Causes and Concerns*, March 2009, CEC-500-2009-016-D, at p. 1.)

Climate change is also expected to increase the number and intensity of forest fires. (Technical Support Document, at p. 91; *see also* Indicators of Climate Change (2009) at p. 131.) A generally warmer climate is associated with a longer summer season, which in turn dries vegetation and fuels making ignition easier and hastens wildfire spread. (*Ibid*; *see also* A. L. Westerling, for the California Climate Change Center, *Climate Change, Growth and California Wildfire*, March 2009, CEC-500-2009-046-D, at pp. 1-2.) Not only do wildfires release additional carbon and increase air pollutants, but they also cause indirect effects. For example, wildfires reduce vegetative cover leading to increased water runoff, which has affected watersheds and dampens the effectiveness of California's water works infrastructure. This will degrade California's water quality and challenge water treatment operations to provide safe drinking water. Adverse health impacts from heat-related illnesses are expected with hotter temperatures, and, due to poorer air quality, lung disease, asthma, and other respiratory and circulatory problems will be exacerbated. (California Climate Action Team, Executive Summary Report to Governor Schwarzenegger and the California Legislature (2006) at pp. xii to xiii, 27.); *see also* Technical Support Document, at pp. ES-4, 69-71.)

Why is California Involved in Greenhouse Gas Regulation?

The California Legislature has determined that California is vulnerable to the effects of global warming, and, despite its global nature, action to curb GHG emissions is needed on a statewide level. The legislative findings in Assembly Bill 32 (Chapter 448, Statutes 2006) (“AB32”) state:

... Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.

... Global warming will have detrimental effects on some of California’s largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing, and forestry. It will also increase the strain on electricity supplies necessary to meet the demand for summer air-conditioning in the hottest parts of the state.

(Health & Safety Code, § 38501(a), (b).) The Legislature further declared: “action taken by California to reduce emissions of greenhouse gases will have far-reaching effects by encouraging other states, the federal government, and other countries to act.” (*Id.* at subd. (d).) As the world’s fifteenth largest emitter of GHGs from human activity and natural sources, California is uniquely positioned to act to reduce GHGs. (Scoping Plan, at pp. 11.)

What is California Doing to Reduce its Greenhouse Gas Emissions?

Due to its potential vulnerability to the effects of GHG emissions, and the wide variety of GHG emissions sources within its borders, California has enacted several laws and programs designed to reduce the State’s GHG emissions. The primary legislative initiatives are described below.

AB32 – The Global Warming Solutions Act

Assembly Bill 32 (Chapter 448, Statutes 2006) is a key piece of California’s effort to reduce its GHG emissions. AB32 requires the California Air Resources Board (“ARB”) to establish regulations design to reduce California’s GHG emissions to 1990 levels by 2020. (Health & Safety Code, § 38550.) On December 11, 2008, ARB adopted its Scoping Plan, detailing how California will achieve that goal through sector-by-sector regulation. (ARB, Resolution No. 08-47; see also Health & Safety Code, §

38561.) ARB must adopt, no later than January 1, 2012, rules and regulations to implement the GHG emissions reductions envisioned in the Scoping Plan. (Health & Safety Code, § 38562.)

The AB32 Scoping Plan outlines a comprehensive set of actions designed to reduce overall GHG emissions in California to 1990 levels by 2020. The Scoping Plan presents GHG emission reduction strategies and measures that combine regulatory approaches, voluntary measures, fees, policies, and programs. Reduction strategies are expected to evolve as technologies develop and progress toward the State's goal is monitored. Thus, the Scoping Plan represents California's comprehensive strategy to reduce GHG emissions on a statewide basis.

SB375

As noted above, nearly 40 percent of California's GHG emissions come from the State's transportation sector. (Chapter 728, Statutes 2007, § 1(a).) Technology innovation and lower-carbon fuels alone will not reduce transportation-related emissions sufficiently for California to reach the reduction goals set out in AB32. (*Id.* at § 1(c).) Therefore, in SB375, California enacted several measures to reduce vehicular emissions through land-use planning.

Specifically, SB375 requires ARB to develop "greenhouse gas emission reduction targets for the automobile and light truck sector" for each metropolitan planning organization (MPO). (Gov. Code, § 65080(b)(2)(A).) Once that target is set, each MPO must develop a sustainable communities strategy (SCS), as part of its regional transportation plan, that will set forth a development pattern that will achieve the reduction target approved by the ARB. (*Id.* at subd. (b)(2)(B).) The MPO's transportation planning activities must be consistent with the adopted SCS. (*Id.* at subd. (b).) While an SCS does not supersede a local government's land use authority, SB375 created an exemption from CEQA for local transit-oriented residential projects that are consistent with the applicable SCS as an incentive. (*Id.* at subd. (b)(2)(J); Pub. Resources Code, § 21155.1.)

CEQA and SB97

Many activities that will not be regulated by either AB32 or SB375 may still result in significant GHG emissions. Where those emissions may result in a significant adverse environmental impact, the California Environmental Quality Act ("CEQA") requires that a lead agency analyze those emissions, and, if those emissions are determined to be significant, to implement mitigation to reduce those emissions. Despite the enactment of AB32, however, uncertainty existed among public agencies regarding how to analyze GHG emissions in environmental documents prepared pursuant to CEQA.

Recently, environmental groups and the Attorney General have initiated several lawsuits regarding the adequacy of the GHG analysis in some environmental

documents. To provide greater certainty to lead agencies, Governor Schwarzenegger signed Senate Bill 97 (Chapter 148, Statutes 2007). (Governor Schwarzenegger's Signing Message, SB 97.) That statute, among other things, constitutes the Legislature's determination that GHG emissions and the effects of GHG emissions are appropriate subjects for CEQA analysis. Pursuant to SB97, OPR developed, and the Resources Agency will adopt, amendments to the State CEQA Guidelines to address analysis and mitigation of the potential effects of GHG emissions in CEQA documents and processes. As new information or criteria established by ARB in the AB 32 process becomes available, OPR and the Resources Agency will periodically update the CEQA Guidelines to account for that new information. This rulemaking package responds to the Legislature's directive in SB97.

BACKGROUND ON THE DEVELOPMENT OF THE PROPOSED AMENDMENTS

OPR developed the Proposed Amendments pursuant to Public Resources Code section 21083.05, which states in part:

On or before July 1, 2009, the Office of Planning and Research shall prepare, develop, and transmit to the Resources Agency guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by this division, including, but not limited to, effects associated with transportation or energy consumption.

In developing the Proposed Amendments, OPR actively sought the input, advice, and assistance of numerous interested parties and stakeholder groups. (Letter from OPR Director, Cynthia Bryant, to Secretary for the Natural Resources Agency, Mike Chrisman, April 13, 2009.) Specifically, OPR met with representatives of numerous agencies and organizations to discuss the perspectives of the business community, the environmental community, local governments, non-governmental organizations, state agencies, public health officials, CEQA practitioners and legal experts. In addition, OPR took advantage of numerous regional and statewide conferences to raise awareness about CEQA and GHG emissions among diverse audiences and to seek their input. These activities satisfy the provisions of Government Code section 11346.45 which require early public involvement in complex proposals.

After publishing a preliminary draft, on January 8, 2009, OPR continued to conduct extensive public outreach, including two public workshops, to receive input on the Preliminary Amendments. Both public workshops were well attended, drawing over two hundred participants representing various California business interests, environmental organizations, local governments, attorneys and consultants. In addition to oral comments at its workshops, OPR received over eighty written comment letters.

Some comments suggested additional amendments to the CEQA Guidelines. Other comments sought clarification of the language in the preliminary amendments. OPR incorporated those suggestions and clarifications to the extent possible and appropriate into its April 13, 2009, submittal to the Resources Agency. Some suggestions were not appropriate for inclusion, however, due to conflict with existing statutory authority and/or case law. The reasoning supporting the text of the Proposed Amendments is explained in depth in this Initial Statement of Reasons.

PROPOSED AMENDMENTS

Analysis of GHG emissions in a CEQA document presents unique challenges to lead agencies. Such analysis must be consistent with existing CEQA principles, however. Therefore, the Proposed Amendments suggest relatively modest changes to various portions of the existing CEQA Guidelines. Modifications address those issues where analysis of GHG emissions may differ in some respects from more traditional CEQA analysis. Other modifications are suggested to clarify existing law that may apply both to analysis of GHG emissions as well as more traditional CEQA analyses. The incremental approach in the Proposed Amendments is consistent with Public Resources Code section 21083(f), which directs OPR and the Resources Agency to regularly review the Guidelines and propose amendments as necessary.

The Legislature expressly left development of the Guidelines to the discretion of OPR and the Resources Agency. That discretion is governed by the Government Code, which requires that any administrative regulations be consistent, and not conflict, with existing statutory authority. (Gov. Code, § 11342.2.) Thus, the Resources Agency intends, as did OPR, the Proposed Amendments to incorporate existing law, and where necessary “to implement, interpret, make specific or otherwise carry out the provisions of the statute.” (*Ibid.*) In addition, the Guidelines must be “reasonably necessary” to carry out a legislative directive. (*Ibid.*) Because the determination of “reasonable necessity” implicates an agency’s expertise, courts will defer to an agency’s findings of necessity unless the action is arbitrary, capricious or without reasonable basis. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109 (“CBE”).)

The Proposed Amendments recommend changes to or additions of fourteen sections of the existing Guidelines, as well as changes to Appendices F (Energy Conservation) and G (Environmental Checklist Form). The Proposed Amendments are discussed below.

SECTION 15064. DETERMINING THE SIGNIFICANCE OF THE ENVIRONMENTAL EFFECTS CAUSED BY A PROJECT

Specific Purposes of the Amendment

Amendments are proposed to two subdivisions of the existing section 15064. The first, to subdivision (f)(5), is a grammatical correction that qualifies as a “change without regulatory effect” pursuant to section 100(a)(4) of the Office of Administrative Law’s regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).) The second set of amendments is to subdivision (h)(3). The latter amendments are described in detail below.

Cumulative Impacts

Existing subdivision (h)(3) allows an agency to find that a project’s potential cumulative impacts are less than significant due to compliance with requirements in a plan or mitigation program. (*CBE, supra*, 103 Cal.App.4th at 111 (“a lead agency’s use of existing environmental standards in determining the significance of a project’s environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation”).) In effect, that section creates a rebuttable presumption that compliance with certain plans and regulations reduces a project’s potential incremental contribution to a cumulative effect to a level that is not cumulatively considerable.

The existing Guidelines text includes several criteria that define which plans or programs may create such a presumption. To satisfy those criteria, a plan or program must: (1) have been previously approved, (2) contain specific requirements that avoid or substantially lessen the cumulative problem within a defined geographic area, and (3) be either specified in law or approved by a public agency with jurisdiction over affected resources. These criteria ensure that the presumption applies only where plans or programs have undergone public scrutiny and include binding requirements to address a cumulative problem. The existing text lists three types of plans as examples that may be relied upon for a cumulative analysis. The word “e.g.” in the existing text indicates, however, that the list is not exclusive. The Third District Court of Appeal upheld what is now section 15064(h)(3) in the *CBE* decision. (*CBE, supra*, 103 Cal.App.4th at 115-116.)

Use of Plans and Regulations in a Cumulative Impacts Analysis

The Proposed Amendments include two changes to subdivision (h)(3). First, the Amendments would add several plans and regulations to the list of examples. The Proposed Amendments would add “habitat conservation plan, natural community conservation plan, [and] plans or regulations for the reduction of greenhouse gas emissions” to the list of plans that may be considered in a cumulative impacts analysis.

As explained below, the Resources Agency finds that the added plans and regulations satisfy the criteria in the existing text.

“Habitat conservation plans” are defined in the federal Endangered Species Act, and typically include specific requirements to protect listed species within a defined geographic area. (16 U.S.C. § 1539.) Though a habitat conservation plan (“HCP”) may be prepared to address the impacts of one particular project, HCPs may also be, and often have been, prepared to address the impacts of cumulative development within a defined area. (Fish and Wildlife Service and National Marine Fisheries Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (November 4, 1996), at pp. 1-6 to 1-7, 1-14 to 1-15.) Most HCPs, other than “low effect HCPs,” will also likely need to undergo environmental review under the National Environmental Policy Act. (*Id.* at Ch. 5.) In such cases, an applicable HCP may appropriately be used in a cumulative impacts analysis as described in subdivision (h)(3).

“Natural community conservation plans” (“NCCPs”) are defined in the California Natural Community Conservation Planning Act. (Fish & G. Code, §§ 2800 et seq.) The purpose of an NCCP is to conserve natural communities at the ecosystem scale while accommodating compatible land uses. An NCCP includes, among others, measures to avoid or minimize impacts to natural communities, conservation obligations, and compliance monitoring. An NCCP is adopted by the Department of Fish and Game as well as local agencies with land use authority in a defined area. As discretionary acts of public agencies, NCCPs must undergo environmental review pursuant to CEQA. Thus, NCCPs satisfy the criteria in existing subdivision (h)(3).

The Legislature recognized local GHG planning efforts in Health & Safety Code section 38561(c) by directing the ARB to consider such programs in developing its Scoping Plan. Greenhouse gas emission reduction plans are not currently specified in law. However, the California Air Resources Board’s (ARB) Climate Change Proposed Scoping Plan includes a recommended reduction target for local governments and community-level emissions of 15 percent by 2020. (California Air Resources Board, *Climate Change Proposed Scoping Plan* (2008), at p. 27 (“Scoping Plan”).) The Scoping Plan also recognized the important role local greenhouse gas reduction plans would play in achieving statewide reductions. The Scoping Plan itself suggests elements that such plans should include. (Scoping Plan, Appendix C, at p. C-49.)

Independent of the Scoping Plan, many local governments have adopted, or are currently developing, various plans and programs designed to curb GHG emissions. (Office of Planning and Research, *The California Planner’s Book of Lists* (January 2009) (“Book of Lists”), at pp. 92-100; see also Scoping Plan, at p. 26.) Other public agencies, such as school districts and public universities, may also adopt greenhouse gas reduction plans to govern their own activities. Provided that such plans contain specific requirements with respect to resources that are within the agency’s jurisdiction to avoid or substantially lessen the agency’s contributions to GHG emissions, both from its own projects and from private projects it has or will approve, such plans may be appropriately relied on in a cumulative impacts analysis. Additional guidance regarding

the characteristics of greenhouse gas reduction plans that may be used in this context is provided in the proposed Section 15183.5, and is explained in greater detail below. Thus, greenhouse gas reduction plans satisfying such criteria would satisfy the criteria in existing subdivision (h)(3).

AB 32 requires ARB to adopt regulations that achieve the maximum technologically feasible and cost effective GHG reductions to reach the adopted state-wide emissions limit. (Health & Safety Code, § 38560.) ARB has already identified several discrete early action items that will reduce GHG emissions as part of the State's effort to achieve the adopted emissions limit. Pursuant to Health and Safety Code section 38560(b), ARB will adopt regulations to make those measures enforceable by January 1, 2010. ARB's GHG reduction regulations may satisfy the criteria in existing subdivision (h)(3).

Pursuant to the proposed amendments to section 15064(h)(3), where a regulation governs a project's GHG emissions, and the project complies with that regulation, a lead agency may presume those emissions are not cumulatively considerable. That presumption is rebuttable, however. The Proposed Amendments do not alter the standard, reflected in the existing Guidelines, that if substantial evidence supports a fair argument that, despite compliance with the requirements in a plan or program, a project may have a significant effect on the environment, then an EIR must be prepared.

Demonstrating How the Plan Addresses Cumulative Impacts

In addition to augmenting the list of plans and regulations that give rise to the presumption that a project's contribution is not cumulatively considerable, the Proposed Amendments also contain explanatory language designed to ensure that the plan or regulation relied on in a cumulative impacts analysis actually addresses the cumulative effect of concern. This language is necessary to avoid misapplication of subdivision (h)(3). For example, shortly after ARB identified early action items, some lead agencies determined that a project's contribution of GHG emissions was not cumulatively considerable because the project was not inconsistent with the early action items. (See, e.g., Tentative Ruling, San Bernardino County Superior Court Case Nos. 810232, 800607 (ruling that consistency with CAT Strategies alone does not provide sufficient information about the potential impacts of a project); see also California Environmental Protection Agency, *Climate Action Team Report to Governor Schwarzenegger and the Legislature*, March 2006, at pp. 39-63.) Such an analysis, however, would fail to account for emissions that are not addressed by the early action items. Because those early action items largely addressed industrial-type emissions, consistency with the early action items would have little relevance for a residential subdivision project. Likewise, consistency with plans that are purely aspirational (i.e., those that include only unenforceable goals without mandatory reduction measures), and provide no assurance that emissions within the area governed by the plan will actually address the cumulative problem, may not achieve the level of protection necessary to give rise to this subdivision's presumption. Thus, by requiring that lead agencies draw a link between

the project and the specific provisions of a binding plan or regulation, section 15064(h)(3) would ensure that cumulative effects of the project are actually addressed by the plan or regulation in question.

Demonstrating that compliance with a plan addresses a cumulative problem is already impliedly required by CEQA. For example, an initial study must include sufficient information to support its conclusions. (State CEQA Guidelines, § 15063(d)(3).) Similarly, section 15128 requires a lead agency to explain briefly the reasons that an impact is determined to be less than significant and therefore was not analyzed in an EIR. The added sentence, therefore, reflects existing law and is necessary to ensure that plans are not misapplied in a CEQA analysis.

Policy Goals

Inclusion of additional plans and programs to the list of examples supports two policy goals. First, an expanded list promotes integration of various regulatory mechanisms to reduce duplication. (See, e.g., Pub. Resources Code, § 21003(a) (state policy is that “[l]ocal agencies integrate the requirements of [CEQA] with planning and environmental review procedures otherwise required by law or by local practice ...”), (f) (“[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment”).) Second, the addition of GHG emissions reduction plans and regulations for the reduction of GHG emissions reflects the view of both the OPR and the Resources Agency that the effects of GHG emissions resulting from individual projects are best addressed and mitigated at a programmatic level.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Guidelines must address the determination of whether the “possible effects of a project are individually limited but cumulatively considerable.” (*Id.* at § 21083(b)(2).) Due to the global nature of GHG emissions and their potential effects, GHG emissions will typically be addressed in a cumulative impacts analysis. (See, e.g., EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18904 (April 24, 2009) (“cumulative emissions are responsible for the cumulative change in the stock of concentrations in the atmosphere”); California Air Pollution Control Officers Association, *CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act* (January 2008) (“CAPCOA White Paper”), at p. 35 (“GHG impacts are exclusively cumulative impacts; there are no non-cumulative GHG emission impacts from a climate change perspective”).) Existing section 15064(h) governs the analysis of cumulative effects in an initial study. The proposed amendments to section 15064(h)(3), on determining the significance of

cumulative impacts in an initial study, are therefore necessary to carry out this legislative directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and that the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).)² Thus, the amendments to the CEQA Guidelines developed pursuant to

² Federal court decisions interpreting NEPA is persuasive authority in CEQA cases. (*Western Placer Citizens for an Ag. & Rur. Env. v. County of Placer* (2006) 144 Cal.App. 4th 890, 902.)

SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15064.4. DETERMINING THE SIGNIFICANCE OF IMPACTS FROM GREENHOUSE GAS EMISSIONS

Specific Purposes of the Amendment

A key component of environmental analysis under CEQA is the determination of significance. (Pub. Resources Code § 21002; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106-07.) Guidelines on the analysis of GHG emissions must, therefore, include provisions on the determination of significance of those emissions.

The proposed section 15064.4, on the determination of significance of GHG emissions, reflects the existing CEQA principle that there is no iron-clad definition of “significance.” (State CEQA Guidelines, § 15064(b); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1380-81 (“*Berkeley Jets*”).) Accordingly, lead agencies must use their best efforts to investigate and disclose all that they reasonably can regarding a project’s potential adverse impacts. (*Ibid*; see also State CEQA Guidelines, § 15144.) Section 15064.4 is designed to assist lead agencies in performing that required investigation. In particular, it provides that lead agencies should quantify GHG emissions where quantification is possible and will assist in the determination of significance. In addition, lead agencies should also consider qualitative factors where relevant. The specific provisions of section 15064.4 are discussed below.

Quantify Emissions Where Possible

Subdivision (a) of section 15064.4 states that lead agencies should calculate or estimate the GHG emissions resulting from the proposed project. This directive reflects the holding in *Berkeley Jets* case, which required a Port Commission to quantify emissions of toxic air contaminants even in the absence of a universally accepted methodology for doing so. (*Berkeley Jets, supra*, 91 Cal.App.4th at p. 1370 (“The fact that a single methodology does not currently exist that would provide the Port with a precise, or ‘universally accepted,’ quantification of the human health risk from TAC exposure does not excuse the preparation of any health risk assessment--it requires the Port to do the necessary work to educate itself about the different methodologies that are available”) (emphasis in original).) That case also required quantitative analysis of single-event noise, even though the applicable thresholds were expressed as cumulative noise levels. (*Id.* at 1382.) Quantification was required in that context in order to identify existing noise levels, the number of additional flights, the frequency of those flights, the degree to which the increased flights would cause increased noise levels at a given location, and ultimately, the community’s reaction to that noise. (*Ibid.*) In other words, quantification would assist the lead agency in determining whether the increased noise would be potentially significant. (*Ibid.* (“CEQA requires that the Port and the inquiring public obtain the technical information needed to assess whether the ADP will merely inconvenience the Airport’s nearby residents or damn them to a somnambulate-like existence”); see also *Protect the Historic Amador Waterways, supra*,

116 Cal.App.4th at 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect”).)

With the foregoing principles in mind, the quantification called for in proposed section 15064.4(a)(1) is reasonably necessary to ensure an adequate analysis of GHG emissions using available data and tools, in accordance with Public Resources Code Section 21083.05. Even where a lead agency finds that no numeric threshold of significance applies to a proposed project, the holdings in the *Berkeley Jets* and *Protect the Historic Amador Waterways* cases, described above, require quantification of emissions if such quantification will assist in determining the significance of those emissions. OPR and the Resources Agency find that quantification will, in many cases, assist in the determination of significance, as explained below. (State CEQA Guidelines, § 15142 (“An EIR shall be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors”).)

First, quantification of GHG emissions is possible for a wide range of projects using currently available tools. Modeling capabilities have improved to allow quantification of emissions from various sources and at various geographic scales. (Office of Planning and Research, *CEQA and Climate Change: Addressing Climate Change Through the California Environmental Quality Act Review*, Attachment 2: Technical Resources/Modeling Tools to Estimate GHG Emissions (June 2008); CAPCOA White Paper, at pp. 59-78.) Moreover, one of the models that can be used in a GHG analysis, URBEMIS, is already widely used in CEQA air quality analyses. (CAPCOA White Paper, at p. 59.) Second, quantification informs the qualitative factors listed in proposed section 15064.4(b). Third, quantification indicates to the lead agency, and the public, whether emissions reductions are possible, and if so, from which sources. Thus, if quantification reveals that a substantial portion of a project’s emissions result from energy use, a lead agency may consider whether design changes could reduce the project’s energy demand.

Proposed section 15064.4(a)(1) also reflects existing case law that reserves for lead agencies the precise methodology to be used in a CEQA analysis. (See, e.g., *Eureka Citizens for Responsible Gov’t v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) As indicated above, a wide variety of models exist that could be used in a GHG analysis. (CAPCOA White Paper, at pp. 59-78.) Further, not every model will be appropriate for every project. For example, URBEMIS may be an appropriate tool to analyze a typical residential subdivision or commercial use project, but some public utilities projects, such as waste-water treatment plants, may require more specialized models to accurately estimate emissions. (*Id.* at pp. 60-65.) The requirement to disclose any limitations in the model or methodology chosen also reflects the standard for adequacy of EIRs in existing State CEQA Guidelines section 15151.

Qualitative and Performance Standard Based Analysis

If the lead agency determines that quantification is not possible, or would not yield information that would assist in analyzing the project's impacts and determining the significance of the GHG emissions, proposed section 15064.4(a) would allow the lead agency to consider qualitative factors or performance standards. Consideration of qualitative factors is appropriate for several reasons. First, CEQA directs lead agencies to consider qualitative factors. (Pub. Resources Code, § 21001(f) (CEQA's purpose includes to: "require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment").) Second, existing section 15064.7 of the State CEQA Guidelines indicate that thresholds of significance may be qualitative, which implies that a determination of significance without a threshold could also evaluate qualitative factors. Third, the existing CEQA Guidelines state that the determination of significance requires a lead agency to use its judgment based on *all* relevant information. (State CEQA Guidelines, § 15064(b); see also *id.* at §§ 15064.7 (thresholds may be qualitative), 15142 (analysis should be interdisciplinary and both qualitative and quantitative).)

Subdivision (a) would also allow a lead agency to rely on performance-based standards to assist in the determination of significance. Just as with quantification, the purpose of engaging in a qualitative or performance standard based analysis is to develop information relevant to a significance determination. Similar to use of a significance threshold, a lead agency must exercise care to ensure that performance standards do not replace a full analysis of all potential emissions. (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1109 ("in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect").) For example, while a Platinum LEED® rating could assist a lead agency in determining whether emissions related to a building's energy use may be significant, that performance standard may not reveal sufficient information to evaluate transportation-related emissions associated with that proposed project.

Qualitative Factors

The qualitative factors listed in the proposed section 15064.4(b) are intended to assist lead agencies in collecting and considering information relevant to a project's incremental contribution of GHG emissions and the overall context of such emissions. Notably, while subdivision (b) provides a list of factors that may assist public agencies to consider all relevant information, other factors can and should be considered as appropriate.

Determine Whether Emissions Will Increase or Decrease

The first factor in subdivision (b), for example, asks lead agencies to consider whether the project will result in an increase or decrease in different types of GHG emissions relative to the existing environmental setting. All project components, including construction and operation, equipment and energy use, and development phases must be considered in this analysis. (State CEQA Guidelines, § 15378 (project includes “the whole of the action”).) For example, a mass transit project may involve GHG emissions during its construction phase, but substantial evidence may also indicate that it will cause existing commuters to switch from single-occupant vehicles to mass transit use. Operation of such a project may ultimately result in a decrease in GHG emissions. Such analysis may support a lead agency’s determination that GHG emissions associated with a project are not cumulatively considerable.

This section’s reference to the “existing environmental setting” reflects existing law requiring that impacts be compared to the environment as it currently exists. (State CEQA Guidelines, § 15125.) This clarification is necessary to avoid a comparison of the project against a “business as usual” scenario as defined by ARB in the Scoping Plan. Such an approach would confuse “business as usual” projections used in ARB’s Scoping Plan with CEQA’s separate requirement of analyzing project effects in comparison to the environmental baseline. (*Compare* Scoping Plan, at p. 9 (“The foundation of the Proposed Scoping Plan’s strategy is a set of measures that will cut greenhouse gas emissions by nearly 30 percent by the year 2020 as compared to business as usual”) *with Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (existing environmental conditions normally constitute the baseline for environmental analysis); see also *Center for Bio. Diversity v. City of Desert Hot Springs*, Riverside Sup. Ct. Case No. RIC464585 (August 6, 2008) (rejecting argument that a large subdivision project would have a “beneficial impact on CO2 emissions” because the homes would be more energy efficient and located near relatively uncongested freeways).) Business as usual may be relevant, however, in the discussion of the “no project alternative” in an EIR. (State CEQA Guidelines, § 15126.6(e)(2) (no project alternative should describe what would reasonably be expected to occur in the future in the absence of the project).)

Notably, the proposed section 15064.4(b)(1) is not intended to imply a zero net emissions threshold of significance. As explained in greater detail in the discussion of cumulative impacts below, there is no “one molecule rule” in CEQA. (CBE, *supra*, 103 Cal.App.4th at 120.)

Thresholds of Significance

The second factor in subdivision (b) asks whether a project exceeds a threshold of significance for GHG emissions. Section 21000(d) of the Public Resources Code expressly directs public agencies to identify whether there are any critical thresholds for health and safety to identify those areas where the capacity of the environment is limited. A threshold is a numeric or qualitative level at which impacts are normally less

than significant. (State CEQA Guidelines, § 15064.7(a); *see also Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1107.) Lead agencies may rely on thresholds developed by other agencies that have particular expertise in the subject matter under consideration. (See, e.g., State CEQA Guidelines, Appendix G, Sample Question III (“[w]here available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make” a significance determination).) For example, a lead agency may look to standards included in a Basin Plan to assist in the determination of whether water quality impacts are significant. (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1107 (“[s]uch thresholds can be drawn from existing environmental standards, such as other statutes or regulations”).)

Several agencies have developed, or are in the process of developing, thresholds of significance for GHG emissions. For example, thresholds are currently being developed, or have already been adopted by the Bay Area Air Quality Management District for operations and construction,³ the City of Davis for residential developments,⁴ and the South Coast Air Quality Management District for industrial projects.⁵ Regardless of the threshold chosen, however, this section does not alter the pre-existing rule under CEQA that if substantial evidence supports a fair argument that a project may result in significant impacts, despite compliance with a threshold, an EIR must be prepared. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.) Further, “in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect.” (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1109.)

Consistent with the above, lead agencies must exercise caution in selecting a threshold to ensure that the threshold is appropriately applied. For CEQA purposes, a threshold identifies a level below which an environmental impact will normally be less than significant. (State CEQA Guidelines, § 15064.7(a).) ARB has adopted several thresholds pursuant to AB32, for example, to address specific purposes that are unrelated to CEQA. For example, the *de minimis* threshold governs the level at which emissions will be regulated by ARB’s AB32 regulations. (Health & Safety Code, § 38561(e); Scoping Plan, at pp. 96-97.) CEQA does not permit use of a *de minimis* threshold, however. (*CBE, supra*, 103 Cal.App.4th at p. 121.) Additionally, the Reporting Threshold is the level at which emissions from large industrial sources are required to be reported. (Scoping Plan, at pp. 108-109; *see also* CARB Board Resolution 07-54 (2007).) Again, this reporting threshold reflects a policy decision regarding regulation by the ARB, but does not address the level at which environmental

³ BAAQMD CEQA Guidelines Update: work in progress - <http://www.baaqmd.gov/pln/ceqa/index.htm>.

⁴ City of Davis (2009) Greenhouse Gas Emission Threshold and Standards for New Residential Development; Accessed 5/27/09, http://cityofdavis.org/pgs/sustainability/pdfs/15_4.21.09_GHG%20Standards.pdf

⁵ SCAQMD (2008) Interim CEQA GHG Significance Threshold for Stationary Sources, Rules and Plans, Accessed 5/27/09 <http://www.aqmd.gov/hb/2008/December/081231a.htm>.

harm may occur, and does not satisfy a lead agency's duties under CEQA related to review of projects which may result in significant adverse environmental impacts.

Consistency with a Plan or Regulation

Finally, the third factor in subdivision (b) suggests consideration of the extent to which a project complies with a plan or regulation to reduce GHG emissions. That section further states, however, that to be used for the purpose of determining significance, a plan must contain specific requirements that result in reductions of GHG emissions to a less than significant level. This clarification is necessary because of the wide variety of climate action plans and GHG reduction plans that are currently being adopted by public agencies. ARB, for example, recently adopted its statewide Scoping Plan. That plan may not be appropriate for use in determining the significance of individual projects, however, because it is conceptual at this stage and relies on the future development of regulations to implement the strategies identified in the Scoping Plan. (Scoping Plan, at p. 9.) Regulations that will require actual reductions of GHG emissions may not be adopted until 2012. (*Ibid.*) Once those regulations are adopted and being implemented, they may, where appropriate, be used to assist in the determination of significance, similar to the current use of air quality, water quality and other similar environmental regulations. (*CBE, supra*, 103 Cal. App. 4th at 111 (“a lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation”).)

In addition to the regulations that will be developed to implement the Scoping Plan, this factor would also allow lead agencies to consider plans that are developed to reduce GHG emissions on a regional or local level. (Scoping Plan, at p. 26.) The proposed section 15064.4(b)(3) is intended to be read in conjunction with the section 15064(h)(3), as proposed to be amended, and proposed section 15183.5. Those sections each indicate that local and regional plans may be developed to reduce GHG emissions. If such plans reduce community-wide emissions to a level that is less than significant, a later project that complies with the requirements in such a plan may be found to have a less than significant impact.

Notably, CEQA does not provide a specific definition of “comply” in the context of determining a project's consistency with a particular plan. Some guidance may be gleaned, however, from case law interpreting the requirement that a local government's activities be consistent with its General Plan. In that context, a “zoning ordinance [for example] is consistent with the city's general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment.” (*City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal. App. 4th 868, 879.) Reading section 15064.4 together with 15064(h)(3), however, to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project. Thus, for example, a subdivision project could not demonstrate

“consistency” with the ARB’s Early Action Measures because those measures do not address emissions resulting from a typical housing subdivision. (ARB, Expanded List of Early Action Measures to Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration, October 2007; see also State CEQA Guidelines, §§ 15063(d)(3) (initial study must be supported with information to support conclusions), 15128 (determination in an EIR that an impact is less than significant must be briefly explained).)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) A key component of environmental analysis under CEQA is the determination of significance. (*Id.* at § 21002; *Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1106-07.) The proposed new section 15064.4, on determining the significance of impacts of GHG emissions, is therefore necessary to carry out this legislative directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency’s determination that the proposed action is necessary to implement the Legislature’s directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to “meaningfully attempt to quantify the Project’s potential impacts on GHG emissions and determine their significance” or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act (“NEPA”) to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).)⁶ Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

⁶ Federal court decisions interpreting NEPA is persuasive authority in CEQA cases. (*Western Placer Citizens for an Ag. & Rur. Env. v. County of Placer* (2006) 144 Cal.App. 4th 890, 902.)

SECTION 15064.7. THRESHOLDS OF SIGNIFICANCE

Specific Purposes of the Amendment

Proposed subdivision (c) of section 15064.7 would allow a lead agency to adopt a threshold developed by another agency, or recommended by experts, provided that such threshold is supported with substantial evidence. This proposed regulation is reasonably necessary because many lead agencies perform general governmental functions, and may lack the specific expertise necessary to develop their own thresholds of significance for GHG emissions. Such agencies may rely on thresholds developed by other agencies with specialized expertise (such as an air quality management district) in conducting their CEQA analyses. (OPR, Thresholds of Significance: Criteria for Defining Environmental Significance, September 1994, at p. 7.) In fact, Appendix G of the State CEQA Guidelines expressly encourages lead agencies to rely on thresholds established by local air quality management districts. (State CEQA Guidelines, Appendix G, Question III.)

Several local and regional air districts are in the process of developing thresholds for GHG emissions. As noted above, for example, thresholds are currently being developed, or have already been adopted by the Bay Area Air Quality Management District for operations and construction, the City of Davis for residential developments, and the South Coast Air Quality Management District for industrial projects.⁷ Lead agencies within the jurisdiction of an air district, or other agency, that adopts a GHG emissions threshold may adopt such a threshold as its own. In adopting any threshold of significance, including one developed by an expert or agency with specialized expertise, the lead agency must support the threshold with substantial evidence in the administrative record. (State CEQA Guidelines, § 15064.7(b).)

Independent experts may also develop such thresholds for use by public agencies. For example, the California Air Pollution Control Officers Association has published a White Paper on developing thresholds of significance for GHG emissions. (CAPCOA White Paper, at pp. 31-58.) A lead agency could potentially use CAPCOA's suggestions in developing its own thresholds. Because any threshold must be supported with substantial evidence, and must be adopted through a public process, any threshold recommended by an expert that is ultimately adopted will undergo sufficient scrutiny to ensure its legitimacy. (State CEQA Guidelines, § 15064.7(b).)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) Defining "significance" is a critical step in the lead agency's impact analysis and therefore needs to be addressed as part of the Proposed Action. Section 21000(d) of the Public

⁷ Reference to these thresholds and proposed thresholds does not reflect an endorsement of those thresholds; rather, they are cited solely for the purpose of demonstrating that agencies are developing such thresholds.

Resources Code encourages the development of thresholds. These sections together require OPR and the Resources Agency to develop and adopt regulations governing the adoption of thresholds of significance for GHG emissions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Murieltans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to

SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15065. MANDATORY FINDINGS OF SIGNIFICANCE

Specific Purposes of the Amendment

The proposed amendment to section 15065(b)(1) would change the word “preliminary” to “public.” The purpose of this amendment is to make section 15065 consistent with section 21064.5 of the Public Resources Code. The latter provision defines a mitigated negative declaration to be a negative declaration where mitigation measures are added to a project “before the proposed negative declaration and initial study are released for *public* review[.]” (State CEQA Guidelines, § 15070(b)(1).) In contrast, existing CEQA Guidelines section 15065(b)(1), dealing with mandatory findings of significance, would require a commitment to mitigation prior to “preliminary” review. “Preliminary Review,” as that term is used in section 15060, refers to a period following receipt of an application during which a lead agency determines whether an exemption applies to the project or whether an EIR would clearly be prepared. Read literally, existing section 15065 would require a commitment to mitigation before an initial study is even conducted. Because the statutory definition of mitigated negative declaration contemplates that mitigation measures may be developed during the preparation of the initial study prior to public review, the proposed change in 15065 from “preliminary” to “public” is appropriate.

Necessity

Section 21083 of the Public Resources Code directs OPR to develop, and the Resources Agency to adopt, guidelines on the implementation of CEQA. The proposed change is necessary to ensure that those guidelines are consistent with relevant statutory definitions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency’s determination that the proposed action would make the existing Guidelines easier to follow as a result of greater internal consistency. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revision. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific existing statutory CEQA provisions and/or case law interpreting CEQA. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, by providing greater consistency within the Guidelines, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15086. CONSULTATION CONCERNING DRAFT EIR

The proposed revision to this section is a non-substantive correction to this section's reference to the California Air Resources Board. This revision, therefore, qualifies as a "change without regulatory effect" pursuant to section 100(a)(4) of the Office of Administrative Law's regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).)

SECTION 15093. STATEMENT OF OVERRIDING CONSIDERATIONS

Specific Purposes of the Amendment

Section 21081(b) of the Public Resources Code provides that a lead agency may adopt a project with significant and unavoidable impacts only after the lead agency makes a finding that “specific overriding economic, legal, social, technical or other benefits of the project outweigh the significant effects on the environment.” The State CEQA Guidelines describes the factors that a lead agency must weigh in determining whether to approve a project with adverse environmental effects:

CEQA recognizes that in determining whether and how a project should be approved, a public agency has an obligation to balance a variety of public objectives, including economic, environmental, and social factors and in particular the goal of providing a decent home and satisfying living environment for every Californian. An agency shall prepare a statement of overriding considerations as described in Section 15093 to reflect the ultimate balancing of competing public objectives when the agency decides to approve a project that will cause one or more significant effects on the environment.

(State CEQA Guidelines, § 15021(d).) The California Supreme Court has further observed that “an agency’s decision that the specific benefits a project offers outweigh any environmental effects that cannot feasibly be mitigated ... lies at the core of the lead agency’s discretionary responsibility under CEQA...” (*City of Marina v. Board of Trustees of Cal. State Univ* (2006) 39 Cal.4th 341, 368.)

In the context of GHG emissions, some projects may cause adverse environmental impacts but still provide an overall benefit of reducing GHG emissions on a statewide or regional level. For example, a city may make a policy choice to allow increased housing density within a jobs-rich region in order to reduce region-wide GHG emissions from vehicles and transportation. (See, e.g., 2007 IEPR, at p. 210.) Though the introduction of new housing within the jurisdiction may result in near-term or local adverse impacts related to GHG emissions, doing so may assist the region as a whole in meeting region-wide reduction targets. Thus, a new subdivision (d) is proposed to be added to section 15093 that would expressly allow a lead agency to consider this type of environmental benefit of a project in making a statement of overriding considerations.

The proposed addition to section 15093 accomplishes two objectives. First, it reminds lead agencies and the public that even a project that appears environmentally beneficial may itself cause adverse environmental impacts, and such impacts must undergo full CEQA review, and, if applicable, a statement of overriding considerations. Second, it discourages purely local interests from dominating consideration of a project by expressly allowing a lead agency to consider region- and statewide benefits of a project. Further, “economic, legal, social, technical and other benefits” could be interpreted to refer to local benefits. This addition would ensure that lead agencies may

consider regional and statewide benefits in considering a project's adverse impacts. Finally, the proposed addition makes clear, consistent with section 15021(d) of the existing State CEQA Guidelines, that the lead agency may consider environmental benefits to balance a project's significant adverse environmental effects that remain even after the adoption of all available feasible mitigation measures.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) If a lead agency determines that a project's GHG emissions will result in significant and unavoidable impacts, a lead agency may only approve the project if it makes specified findings. (*Id.* at § 21081(b).) This amendment is necessary to ensure that a lead agency considers state-wide and regional benefits of a project in addition to purely local benefits. Because consideration of state-wide and region-wide benefits may also apply to impacts unrelated to GHG emissions, the amendment was worded broadly to address any significant environmental impact.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and/or makes specific statutory CEQA provisions and case law interpreting CEQA for making statements of overriding considerations. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

SECTION 15125. ENVIRONMENTAL SETTING

Specific Purposes of the Amendment

Section 15125 reflects existing law requiring examination of project impacts in relation to the existing environment. Subsection (d) states that lead agencies should consider whether the proposed project is inconsistent with applicable local and regional plans. That subsection provides a non-exclusive list of plans for potential consideration. The Proposed Amendments would add specific plans, regional blueprint plans and greenhouse gas reduction plans to subdivision (d). The added plans are necessary to ensure that GHG emissions analyses in such plans are addressed.

Specific Plans

Specific Plans address a defined geographic area within the area covered by a General Plan. (Gov. Code, § 65450 (“After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan”).) Specific Plans must contain “[s]tandards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable.” (*Id.* at § 65451(a)(3).) Thus, given that so many local governments are addressing GHG emissions in their policy documents, and that Specific Plans must contain standards and criteria, it is likely that Specific Plans may address GHG emissions, and consistency with adopted Specific Plans should be considered in EIRs.

Regional Blueprint Plans

Regional Blueprint Plans are being developed in many of California’s Metropolitan Planning Organizations through grants provided by the California Department of Transportation. While originally designed to address transportation efficiencies, Regional Blueprint Plans typically involve smart growth planning with an aim to reducing vehicle miles traveled at a regional level. As a result, Regional Blueprint Plans can provide information regarding the region’s existing transportation setting and identify methods to reduce region-wide transportation-related impacts. (Scoping Plan, Appendix C, at pp. C-74-C-84.) Land use decisions impact many sectors responsible for GHG emissions, including transportation, electricity, water, waste, and others. However, the primary impact of land use development on GHG emissions relates to vehicle use. (Land Use Subcommittee of the Climate Action Team, *LUSCAT Submission to CARB Scoping Plan on Local Government, Land Use, and Transportation* (2008), at p. 13.) Blueprint Plans highlight this relationship between land use and transportation and how this relationship may impact a local community’s and region’s GHG emissions. Analysis of GHG reduction is not required by Blueprint grants but it is recommended. Therefore, Blueprint Plans provide an indication of the GHG emissions potentially created or reduced by the plan. (LUSCAT (2009), at p. 30.) Given the large percentage of GHG emissions that result from transportation in

California, a project's consistency with a Regional Blueprint Plan can provide information indicating whether the project could have significant environmental impacts related to GHG emissions. (*Ibid.*) Regional Blueprint Plans may, therefore, provide evidence to assist the lead agency in determining whether a project may tend to increase or decrease GHG emissions relative to the existing baseline. Thus, where such a plan has been developed and adopted by an MPO, lead agencies may find it useful to evaluate the project's consistency with that Blueprint Plan.

Greenhouse Gas Reduction Plans

The Proposed Amendments would add greenhouse gas reduction plans to the list of plans in section 15125(d). Many local and regional plans now include policies relating to, and analyses of, GHG emissions. (OPR, Book of Lists, at pp. 92-100; Scoping Plan, at p. 26.) Many such plans include detailed information on the jurisdiction's inventory of GHG emissions and measures to reduce such emissions. (*Ibid.*) Such plans may also include prescriptions for specific mitigation measures to address GHG emissions. (Scoping Plan, Appendix C, at p. C-49.) Where such a plan has been developed and adopted within the relevant jurisdiction, a project's inconsistency with that plan could be an indication of potential adverse environmental impacts.

Notably, while section 15125(d) requires an EIR to discuss any inconsistencies of a project with the listed plans, it does not mandate a finding of significance resulting from any identified inconsistencies. The plans simply provide information regarding the project's existing setting and inconsistency may be an indication of potentially significant impacts. The determination of significance is to be made by the lead agency.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines addressing the mitigation of GHG emissions and the effects of the GHG emissions. (Pub. Resources Code, § 21083.05.) As indicated above, one potential indicator of a project's potential GHG emissions impacts is whether the project is consistent with applicable plans that have addressed that impact. Thus, the addition of plans that may address GHG emissions to the list of plans in the existing section 15125 is reasonably necessary to ensure that such analysis occurs.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action

is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analyzing the effects of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental information where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15126.2. CONSIDERATION AND DISCUSSION OF SIGNIFICANT ENVIRONMENTAL EFFECTS

The proposed revision to this section adds a cross-reference to the Public Resources Code and another section of the State CEQA Guidelines. This revision, therefore, qualifies as a “change without regulatory effect” pursuant to section 100(a)(4) of the Office of Administrative Law’s regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).)

SECTION 15126.4. CONSIDERATION AND DISCUSSION OF MITIGATION MEASURES PROPOSED TO MINIMIZE SIGNIFICANT EFFECTS

Specific Purposes of the Amendment

Section 21083.05 of the Public Resources Code expressly requires OPR and the Resources Agency to develop regulations on the “mitigation of greenhouse gas emissions.” The goals of this legislative mandate are to (1) reduce GHG emissions and (2) to provide consistency in the development of GHG emissions reduction measures. There is no indication, however, that the Legislature intended to alter any existing laws governing mitigation under CEQA. The Proposed Amendments, therefore, interpret and make specific existing CEQA law and regulations for mitigation of significant impacts resulting from GHG emissions. The proposed amendments identify five general methods of mitigation that may be tailored to the specific circumstances surrounding a specific project.

Mitigation Identified in an Existing Plan

The first type of mitigation of GHG emissions that may be considered includes measures identified in an existing plan. As indicated above, many agencies are beginning to address GHG emissions at a planning level. (OPR, Book of Lists, at pp. 92-100.) Some of those GHG reduction plans include specific measures that may be applied on a project-by-project basis. (*Ibid*; see also Scoping Plan, Appendix C, at p. C-49.) Proposed subdivision (c)(1), therefore, would encourage lead agencies to look to adopted plans for sources of mitigation measures that could be applied to specific projects.

Project Design Features

The second type of measure that a lead agency should consider is project design features that will reduce project emissions. Various project design features could be used to reduce GHG emissions from a wide variety of projects. The CAPCOA White Paper provides examples of various project design features that may reduce emissions from commercial and residential buildings. (CAPCOA White Paper, at pp. B-13 to B-18.) For example, according to the California Energy Commission, “[r]esearch shows that increasing a community’s density and its accessibility to jobs centers are the two most significant factors for reducing vehicle miles traveled,” which is an important component of reducing statewide emissions. (California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF (“2007 IEPR”), at p. 12; see also CEC, *The Role of Land Use in Meeting California’s Energy and Climate Goals* (2007) at p. 20.) This subdivision also refers specifically to measures identified in Appendix F, which include a variety of measures designed to reduce energy use. By encouraging lead agencies to consider changes to the project itself, this subdivision further encourages the realization of co-benefits such as reduced energy costs for project occupants, increased amenities for non-vehicular transportation, and others. Thus, project design can reduce GHG emissions directly through efficiency and

indirectly through resource conservation and recycling. (Green Building Sector Subgroup of the Climate Action Team, Scoping Plan Measure Development and Cost Analysis (2008) at p. 6 to 9.)

Off-Site Measures

The third type of measures addressing GHG emissions is off-site measures and offsets. Proposed subdivision (c)(3) recognizes the availability of various off-site mitigation measures. Such measures could include, among others, the purchase of carbon offsets, community energy conservation projects, and off-site forestry projects. (See, e.g., South Coast Air Quality Management District, SoCal Climate Solutions Exchange (June 2008), at pp.1; Rodeo Refinery Settlement Agreement, BAAQMD Carbon Offset Fund; Recommendations of the ETAAC, Final Report (February 2008) at pp. 9-5; ARB, Staff Report: Proposed Adoption of California Climate Action Registry Forestry Greenhouse Gas Protocols for Voluntary Purposes (October 17, 2007), at p. 15 (“[t]he three protocols together – the sector, project, and certification protocols – are a cohesive and comprehensive set of methodologies for forest carbon accounting, and furthermore contain all the elements necessary to generate high quality carbon credits”); see also Scoping Plan, Appendix C, at pp. C-21 to C-23.) Off-site mitigation may be appropriate under various circumstances. For example, such mitigation may be appropriate where a project is incapable of design modifications that would sufficiently reduce GHG emissions within the project boundaries. In that case, a lead agency could consider whether emissions reductions may be achieved through such measures as energy-efficiency upgrades within the community or reforestation programs.

Sequestration

The fourth type of GHG emissions mitigation measure is sequestration. Indeed, one way to reduce a project’s GHG emissions is to sequester project-related GHG emissions and thereby prevent them from being released into the atmosphere. At present, the most readily available, and accountable, way to sequester GHGs is forest management. California forests have a “unique capacity to remove [carbon dioxide, a GHG,] from the air and store it long-term as carbon.” (Scoping Plan, Appendix C, at p. C-165.) Forest sequestration functions are, therefore, a key part of the ARB’s Scoping Plan and reduction effort. (Scoping Plan, at pp. 64-65.)

The California Climate Action Team has also identified several forest-related sequestration strategies, including, reforestation, conservation forest management, conservation (i.e., avoided development), urban forestry, and fuels management and biomass. (ARB, Staff Report: Proposed Adoption of California Climate Action Registry Forestry Greenhouse Gas Protocols for Voluntary Purposes (October 17, 2007), at pp. 6-7.) ARB has adopted Forest Protocols for large forestry projects. (ARB, Resolution 07-44 (adopting California Climate Action Registry Forestry Sector Protocol (September 2007), Forest Project Protocol (September 2007) and Forest Verification Protocol (May 2007).) ARB has also adopted Urban Forest Protocols for urban forestry projects. (California Climate Action Registry, Urban Forest Project Reporting Protocol and

Verification Protocol (August 2008) (ARB adopted on September 25, 2008).) Such projects could be located on the project site or off-site. (Urban Forest Project Reporting Protocol, at pp. 4-5.) The protocols include methods of measuring the ability of various forestry projects to store capture and store carbon.

Consistent with section 15126.4(a), a lead agency must support its choice of, and its determination of the effectiveness of, any reduction measures with substantial evidence. Substantial evidence in the record must demonstrate that any mitigation program or measure is reasonably likely to result in actual emissions reductions. As a practical matter, where a mitigation program or measure is consistent with protocols adopted or approved by an agency with regulatory authority to develop such a program, a lead agency will more easily be able to demonstrate that off-site mitigation will actually result in emissions reductions. Examples of such protocols include the forestry protocols described above. Where a mitigation proposal cannot be verified with an existing protocol, a greater evidentiary showing may be required.

Measures to be Implemented on a Project-by-Project Basis

Finally, the fifth type of measure that could reduce GHG emissions at a planning level is the development of binding measures to be implemented on a project-specific basis. As explained in greater detail in the discussion of proposed section 15183.5, below, ARB's Scoping Plan strongly encourages local agencies to develop plans to reduce GHG emissions throughout the community. In addition, the CEC's Power Plant Siting Committee is assessing the impacts of GHG emission from proposed new power plants and how they can be mitigated. Comments received during the CEC's informational proceedings warranted a lengthy discussion on the practical application of a programmatic approach to mitigating GHG emissions from new power plants. (CEC, *Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications* (2009) at p. 26 to 28.) Existing State CEQA Guidelines sections 15168(b)(4) and 15168(c)(3) recognize that programmatic documents provide an opportunity to develop mitigation plans that will apply on a project-specific basis. Proposed subdivision (c)(5) recognizes that, for a planning level decision, appropriate mitigation of GHG emissions may include the development of a program to be implemented on a project-by-project basis. (State CEQA Guidelines, § 15126.4(a)(2) (“[i]n the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation or project design”).)

This type of mitigation is subject to the limits of existing law, however. Thus, proposed subdivision (c)(5) should not be interpreted to allow deferral of mitigation. Rather, it is subject to the rule in existing section 15126.4(a)(1)(B) that such measures “may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” (See also *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 670-71.)

Suggestions Rejected

During its public involvement process, OPR received comments on its preliminary draft of the proposed amendments related to mitigation. Some comments suggested provisions that were not included in these Proposed Amendments. Several comments, for example, suggested that the Guidelines provide a specific “hierarchy” of mitigation requiring lead agencies to mitigate GHG emissions on-site where possible, and to allow consideration and use of off-site mitigation only if on-site mitigation is impossible or insufficient. OPR and the Resources Agency recognize that there may be circumstances in which requiring on-site mitigation may result in various co-benefits for the project and local community. However, CEQA leaves the determination of the precise method of mitigation to the discretion of lead agencies. (State CEQA Guidelines, § 15126.4(a)(1)(B); *see also San Franciscans Upholding the Downtown Plan v. City & Co. of San Francisco* (2002) 102 Cal. App. 4th 656, 697.)

Several comments also suggested that mitigation for GHG emissions must be “real, permanent, quantifiable, verifiable, and enforceable.” The Proposed Amendments do not include such standards, however, for several reasons. The proposed standard appears to have been derived from section 38562(d) of the Health and Safety Code, which prescribes requirements for regulations to be promulgated to implement AB32. AB32 is a separate statutory scheme, and, as noted above, there is no indication that the legislature intended to alter standards for mitigation under CEQA. Similarly, standards for mitigation under CEQA already exist and are set out in section 15126.4(a). Specifically, mitigation must be fully enforceable, which implies that the measure is also real and verifiable. Additionally, substantial evidence in the record must support an agency’s conclusion that mitigation will be effective, and in the context of an EIR, courts will defer to an agency’s determination of a measure’s effectiveness. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 147 Cal.App.4th 1018, 1041 (mitigation ratio is supportable even at less than 1:1 given the project’s circumstances); *Ass’n of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1398 (lead agency has discretion to resolve dispute regarding the effectiveness of an EIR’s mitigation measures).) No existing law requires CEQA mitigation to be quantifiable. Rather, mitigation need only be “roughly proportional” to the impact being mitigated. (State CEQA Guidelines, § 15126.4(a)(4)(B); *see also id.* at § 15142.)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the mitigation of GHG emissions. (Pub. Resources Code, § 21083.05.) The proposed subdivision (c) sets out types of mitigation of GHG emissions that a lead agency may consider. Thus, that subdivision is reasonably necessary to implement the Legislature’s directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for mitigating the impacts of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, *Environmental Assessment Documents Containing a Discussion of Climate Change* (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15130. DISCUSSION OF CUMULATIVE IMPACTS

Specific Purposes of the Amendment

The Proposed Amendments include two revisions to the existing section 15130 of the State CEQA Guidelines. The two proposed amendments are described below.

Section 15130(b)(1)(B)

Section 21083(b) of the Public Resources Code requires that an EIR be prepared if the “possible effects of a project are individually limited but cumulatively considerable.” That section further defines “cumulatively considerable” to mean that “the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”

In determining whether a project may have significant cumulative impacts, a lead agency must engage in a two-step process. First, it must determine the extent of the cumulative problem. To do so, a lead agency must examine the “effects of past projects, the effects of other current projects, and the effects of probable future projects.” Once it does so, the lead agency then determines whether the project’s incremental contribution to that problem is cumulatively considerable. Section 21100(e) further provides that “[p]reviously approved land use documents, including but not limited to, general plans, specific plans, and local coastal plans, may be used in a cumulative impact analysis.”

The existing Guideline section 15130(b) addresses the first step of the process. It offers two options for estimating the effects resulting from past, present and reasonably foreseeable projects. A lead agency may either rely on a list of such projects, or a summary of projections to estimate cumulative impacts. Existing section 15130(b)(1)(B) allows a lead agency to rely on projections in a land use document or certified environmental document that addresses the cumulative impact under consideration.

The proposed amendments would clarify that plans providing such projections need not be limited to land use plans, so long as the plan evaluates the relevant cumulative effect. The proposed amendments would also allow a lead agency to rely on information provided in regional modeling programs. The best projections of the cumulative effect of GHG emissions may be available in up-to-date models such as the International Council for Local Environmental Initiative’s Local Government GHG Protocol⁸ and the California Climate Action Reserve’s Registry general,⁹ industry¹⁰ and

⁸ ICLEI (2008) Local Government Operations Protocol; Accessed 6/08/09, <http://www.icleiusa.org/action-center/tools/lgo-protocol-1>

⁹ California Climate Action Registry (2009) General Reporting Protocol: Accessed 6/08/09, http://www.climateregistry.org/resources/docs/protocols/grp/GRP_3.1_January2009.pdf

project type protocols.¹¹ Such projections may also be supplied in plans that are not strictly “land use” plans. For example, regional transportation plans in certain areas will ultimately include sustainable community strategies which will include projections a region’s GHG emissions and related cumulative effects. (Gov Code, § 65080(b)(2).) Finally, some agencies are beginning to develop GHG reduction plans or climate action plans that may also include such projections. (ARB, Scoping Plan, Appendix C, at p. C-49; OPR, Book of Lists, at pp. 92-100.)

The proposed amendments are consistent with section 21083 of the Public Resources Code and CEQA case law. Section 21083 requires consideration of “the effects of past projects, the effects of other current projects, and the effects of probable future projects.” Projections in the listed types of plans and models may include inventories of existing emissions and projected future emissions. Section 21100 of the Public Resources Code provides that land use plans “may” be used in a cumulative impacts analysis, but that section does not purport to limit the types of plans that can be used in a cumulative impacts analysis to land use plans. Finally, case law has supported reliance on projections provided by industry, for example, to satisfy the requirement for a discussion of impacts caused by closely related projects. (*Ass’n of Irrigated Residents, supra*, 107 Cal. App. 4th at 1404.)

While models may provide the most up to date information, lead agencies should still look first to information provided in adopted or certified environmental documents. First, such information has already gone through a public and agency review process. Second, to the extent the model provides information that is not provided in the prior environmental document, the relationship of the model and applicable plans must be explained, along with any changes in circumstances.

Section 15130(f)

Proposed subdivision (f) clarifies that sections 21083 and 21083.05 of the Public Resources Code do not require a detailed analysis of GHG emissions solely due to the emissions of other projects. (State CEQA Guidelines, § 15130(a)(1); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799.) Rather, proposed subdivision (f) provides that a detailed analysis is required when evidence shows that the incremental contribution of the project’s GHG emissions is cumulatively considerable when added to other cumulative projects. (*CBE, supra*, 103 Cal.App.4th at 119-120.) Analysis of GHG emissions as a cumulative impact is consistent with case law arising under the National Environmental Policy Act. (See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Other portions of these proposed Guidelines address how lead agencies may determine whether a project’s emissions are cumulatively considerable. (See, e.g., Proposed Sections 1506(h)(3) and 15064.4.)

¹⁰ California Climate Action Registry (2005) Industry Specific Protocols: Accessed 06/08/09, <http://www.climateregistry.org/tools/protocols/industry-specific-protocols.html>

¹¹ California Climate Action Registry (2007) Project Protocols: Accessed 06/08/09, <http://www.climateregistry.org/tools/protocols/project-protocols.html>

This clarification is reasonably necessary because OPR has observed that some lead agencies have avoided an analysis of a project's GHG emissions by claiming that no one project could be responsible for climate change. OPR has similarly observed that public comments on some projects have focused on the cumulative global effects of GHG emissions, without providing evidence related to the project under consideration. The proposed amendment would state clearly that both elements (the incremental contribution and the cumulative effect) are required in the analysis of GHG emissions.

Necessity

Sections 21083 and 21083.05 of the Public Resources Code respectively require that an EIR analyze cumulative impacts and that the effects of GHG emissions be analyzed in CEQA documents. The Proposed Amendments include guidance to assist lead agencies to evaluate the cumulative impacts of GHG emissions where an EIR is required. Thus, the Proposed Amendments are reasonably necessary to implement the Legislature's directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions.

(See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to “meaningfully attempt to quantify the Project’s potential impacts on GHG emissions and determine their significance” or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act (“NEPA”) to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15150. INCORPORATION BY REFERENCE

Specific Purposes of the Amendment

The existing CEQA Guidelines allow lead agencies to incorporate information from other documents by reference. (State CEQA Guidelines, § 15150.) Doing so permits a lead agency to avoid repetitious analysis of general matters and to reduce paperwork. (Pub. Resources Code § 21003 (it is state policy that “persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment”).) Existing Guidelines section 15150(f) provides that “[i]ncorporation by reference is most appropriate for including long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis of the problem at hand.”

The key requirements for documents that may be incorporation by reference are set forth in the statutory definition of “EIR.” (Pub. Resources Code, § 21061.) Those requirements include:

- The incorporated information is a matter of public record or is generally available to the public; and
- The incorporated information is reasonably available for inspection at a public place or public building.

Descriptions of global, statewide and regional GHG emissions are particularly well-suited to incorporation by reference. Such descriptions can be technical and lengthy. (Public Policy Institute of California, *Climate Policy at the Local Level: A Survey of California’s Cities and Counties* (November 2008), at pp. 24-32 (describing barriers and constraints to adoption of climate action plans and policies).) General descriptions may also remain current enough to be used in several successive environmental documents. In fact, OPR has found that many agencies are addressing GHG emissions in programmatic documents that could be incorporated by reference into later documents. (OPR, *Book of Lists*, at pp. 92-100.) Thus, the Resources Agency and OPR find that proposed subdivision (e)(4) is reasonably necessary to effectuate the legislative directive that public agencies conduct environmental review in the most efficient manner possible.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Legislature has further directed that resources be conserved wherever possible in the analysis of environment impacts. (*Id.* at § 21003.) Thus, the amendment to add GHG

analyses to the list of documents that may be incorporated by reference is reasonably necessary to implement the Legislature's directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Murieltans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15183. PROJECTS CONSISTENT WITH A COMMUNITY PLAN OR ZONING

Specific Purposes of the Amendment

Section 21083.3 of the Public Resources Code provides that projects that are consistent with a General Plan, Community Plan or Zoning may not need to analyze cumulative effects that have already been analyzed in an EIR on the prior planning or zoning action. The exemption may apply, for example, where “uniformly applied development policies or standards” will substantially mitigate a cumulative effect. (Pub. Resources Code, § 21083.3(d).) The statute does not define what types of development policies or standards may be used in this context. It does provide, however, that such standards or policies must have been adopted by the lead agency with a finding, supported with substantial evidence, that the policy or standard will substantially mitigate the environmental effect under consideration. (*Ibid.*) Existing Guidelines section 15183 provides several non-exclusive examples of policies and standards that might apply in the context of section 21083.3, including grading ordinances and floodplain protection ordinances.

The inclusion of “[r]equirements for reducing greenhouse gas emissions, as set forth in an adopted land use plan, policy or regulation” among the list of examples of “uniformly applied development policies or standards” is consistent with the direction in section 21083.3. First, the text provides that such requirements would be “adopted” by the lead agency. Second, they would be “development policies or standards” because the requirements would be contained in an adopted “land use plan, policy or regulation.” Finally, such requirements could substantially mitigate the effects of GHG emissions by “reducing greenhouse gas emissions” in the adopting jurisdiction. (Proposed Section 15183.5(b) would provide elements that may be included in a GHG emissions reduction plan that might be used in the context of section 15183.)

One comment submitted during OPR’s public involvement process questioned whether such requirements relating to reductions in GHG emissions would be kept current. (See, e.g., Letter from Joyce Dillard to OPR, January 26, 2009.) Section 21083.3 specifically provides, however, that such requirements would not apply in this context if “substantial new information shows that the policies or standards will not substantially mitigate the environmental effect.” (Pub. Resources Code, § 21083.3(d).) Therefore, lead agencies have an incentive to ensure that their policies remain current.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The proposed addition to section 15183 is reasonably necessary to carry out the legislature’s intent that projects that are consistent with General Plans, Community Plans and Zoning benefit from streamlined CEQA review. Several jurisdictions are beginning to include requirements for reducing GHG emissions in their general plans. (OPR, Book of Lists,

at pp. 92-100; Scoping Plan, Appendix C, at p. C-49.) The addition is also reasonably necessary to effectuate the legislature's intent that OPR and the Resources Agency provide guidance on how to analyze GHG emissions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to

SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15183.5. TIERING AND STREAMLINING THE ANALYSIS OF GREENHOUSE GAS EMISSIONS

Specific Purposes of the Amendment

In adopting SB375, the Legislature found that “[n]ew provisions of CEQA should be enacted so that the statute encourages ... local governments to make land use decisions that will help the state achieve its climate goals under AB 32[.]” (Statutes 2008, Ch. 728, § 1(f).) ARB’s Scoping Plan similarly recognizes the important role that local governments play in reducing the State’s GHG emissions. (ARB, Scoping Plan, at p. 26.) In particular, local government “[d]ecisions on how land is used will have large impacts on the GHG emissions that will result from the transportation, housing, industry, forestry, water, agriculture, electricity, and natural gas sectors.” (*Ibid.*) Decision-making on urban growth and land use planning begins with local general plans. (Gov. Code, § 65030.1 (“The Legislature ... finds that decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors”).)

GHG emissions may be best analyzed and mitigated at a programmatic level. “For local government lead agencies, adoption of general plan policies and certification of general plan EIRs that analyze broad jurisdiction-wide impacts of GHG emissions can be part of an effective strategy for addressing cumulative impacts and for streamlining later project-specific CEQA reviews.” (OPR, Technical Advisory: CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, June 19, 2008, at p. 8.) Other lead agencies may also address GHG emissions programmatically in long range development plans, facilities master plans, and other long-range planning documents.

This emphasis on long-range planning is consistent with state policy expressed in CEQA. The Legislature has clearly stated its preference that lead agencies tier environmental documents wherever feasible. (Pub. Resources Code, § 21093(b).) Specifically:

The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in successive environmental impact reports, and (3) ensuring that environmental impact reports prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and

declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.

(Pub. Resources Code, § 21093(a).) The Proposed Amendments, therefore, include the addition of a new section 15183.5 to address both tiering and streamlining of GHG analyses, as well as the proper use of GHG reduction plans in CEQA analyses. Explanation of the rationale of each proposed new subdivision is provided below.

Existing Methods of Streamlining and Tiering

Because GHG emissions raise a cumulative concern, analysis of such emissions in a long-range planning document lends itself to tiering and use in later project-specific environmental review. (Pub. Resources Code, § 21093.) The Legislature has created several tiering and streamlining methods that can reduce duplication in the analysis of GHG emissions. Proposed subdivision (a) clarifies existing statutory provisions in CEQA to provide that GHG analyses are appropriate subjects for tiering and streamlining.

Greenhouse Gas Emissions Reduction Plans

Many jurisdictions are beginning to address GHG emissions reductions in “climate action plans” and “gas emissions reduction plans.” (OPR, Book of Lists, at pp. 92-100; see also, Scoping Plan, Appendix C, at p. C-49.) ARB’s Scoping Plan specifically encourages local governments to develop such plans, and has created a local government operations protocol to assist in that effort. (Scoping Plan, at p. 26.) A community-wide emissions protocol is also under development.

Some comments raised during OPR’s public involvement process expressed concern that due to a lack of legislative criteria for such plans, existing provisions in the CEQA Guidelines regarding cumulative impacts may be misused. (See, e.g., Letter from Center for Biological Diversity, et al., to OPR, February 2, 2009, at p. 2.) For example, without specific guidance, a lead agency could erroneously rely on a plan with purely aspirational intent to determine that a later project’s cumulative impact is less than significant pursuant to section 15064(h)(3). The proposed subdivision (b) provides non-exclusive criteria to assist lead agencies in determining whether an existing greenhouse gas reduction plan is an appropriate document to use in a cumulative impacts analysis under CEQA.

The existing CEQA Guidelines allow lead agencies to rely on plans for cumulative analysis where the plan has been adopted in a public review process and contains specific requirements to avoid or substantially lessen a cumulative problem. (State CEQA Guidelines, § 15064(h)(3).) The criteria set out in proposed subdivision (b)(1) are designed to ensure that a greenhouse gas reduction plan would satisfy the

requirements described in sections 15064(h)(3) and 15130(d), for the reasons described below.

Criteria (A) and (C) are necessary to define the scope of GHG emissions within the defined geographic area and the incremental contribution of activities that will occur within that area to those emissions. (State CEQA Guidelines, § 15064(h)(3) (plan addresses cumulative impacts “within the geographic area in which the project is located”).) Criterion (B) establishes a benchmark to assist the lead agency in determining whether the plan provisions will avoid or substantially lessen cumulative effects of the area’s GHG emissions. (*Ibid.* (plan “provides specific requirements that will avoid or substantially lessen the cumulative problem”).) Criteria (D) and (E) are necessary to demonstrate that the plan will actually avoid or substantially lessen the cumulative effects of those emissions. (*Ibid.*) Finally, criterion (F) reflects the requirement in sections 15064(h)(3) and 15130(d) that the plan be adopted through a public review process, as well as case law requiring that mitigation plans themselves undergo environmental review. (*California Native Plant Society v. County of El Dorado* (2009) 170 Cal. App. 4th 1026, 1053 (mitigation “programs may offer the best solution to environmental planning challenges, by providing some certainty to developers while adequately protecting the environment” but “in order to provide a lawful substitute for the ‘traditional’ method of mitigating CEQA impacts, that is, a project-by-project analysis, the fee program must be evaluated under CEQA”).) Notably, the criteria provided in subdivision (b) are largely consistent with the elements that ARB recommends be included in a greenhouse gas reduction plan. (ARB, Scoping Plan, Appendix C, at p. C-49.)

Proposed subdivision (b)(2) describes the uses and limitations of greenhouse gas reduction plans in a cumulative analysis of later projects. Specifically, it provides a safeguard to ensure that the later activity was actually addressed in the greenhouse gas reduction plan, and that any applicable requirements of the plan are incorporated into the later project. This requirement is similar the requirement in case law that a lead agency determine that a particular threshold appropriately addresses the impact of concern. (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect”).) Finally, subdivision (b)(2) makes specific the requirement that, while the existence of an applicable greenhouse gas reduction plan may create a presumption that compliance with that plan will reduce the incremental contribution of later activities to a less than cumulatively considerable level, the existence of substantial evidence supporting a fair argument to the contrary may still require preparation of an EIR.

Special Situations

Proposed subdivision (c) provides necessary clarification of the partial exemption provided in sections 21155.2 and 21159.28 of the Public Resources Code, enacted as part of SB375 (see description above). The limitation on analysis of global warming

applies only to the effects caused by GHG emissions from cars and light duty trucks. That limitation should be read in conjunction with section 21083.05 of the Public Resources Code and proposed CEQA Guideline sections 15064.4 and 15126.4 which require analysis of all sources of GHG emissions and mitigation if those emissions are significant. Thus, projects that qualify for the limitation in sections 21155.2 and 21159.28 must still analyze emissions resulting from, as applicable, energy use, land conversion, and other direct and indirect sources of emissions. This clarification is reasonably necessary to effectuate the legislative directive in section 21083.3 that OPR and Resources develop guidelines on the analysis of GHG emissions and to avoid confusion regarding the streamlining provisions provided by SB375.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Legislature has also directed that EIRs be tiered wherever possible, and that duplication be minimized. (*Id.* at §§ 21003, 21093, 21094.) Proposed section 15183.5, which provides guidance on tiering and streamlining of GHG emissions analyses, is therefore reasonably necessary to carry out these directives.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions.

(Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to “meaningfully attempt to quantify the Project’s potential impacts on GHG emissions and determine their significance” or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act (“NEPA”) to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15364.5. GREENHOUSE GAS

Specific Purposes of the Amendment

The Legislature has not included a definition of “greenhouse gases” in CEQA, though it did include a definition in AB32. (Health & Saf. Code, § 38505(g).) Thus, proposed new section 15364.5 adds a definition of greenhouse gases. The specified gases are consistent with existing law as they are defined to include those identified by the Legislature in section 38505(g) of the Health and Safety Code.

Notably, the definition in AB32 states that GHG “includes all of the following...” In so stating, the Legislature implies that other gases may also be considered GHGs. The ARB’s Scoping Plan also acknowledges that other gases contribute to climate change. (Scoping Plan, at p. 11.) In fact, the EPA’s Endangerment Finding explained that several other gases share attributes with GHGs but would not be appropriate for regulation under the Clean Air Act at this time. (EPA Endangerment Finding, at pp. 18896-98.) Therefore, similar to the statutory definition of GHGs in AB32, the proposed definition in the Proposed Amendments is not exclusive to the six primary GHGs. The purpose of a more expansive definition is to ensure that lead agencies do not exclude from consideration GHGs that are not listed, so long as substantial evidence indicates that such non-listed gases may result in significant adverse effects. This approach is consistent with the Supreme Court’s directive that CEQA be interpreted to provide the fullest possible protection to the environment. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 390.)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) Proposed section 15364.5 is necessary to make specific the instruction to analyze GHG emissions because it states precisely which gases are considered to be “greenhouse gases” and should be included in the analysis.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency’s Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency’s determination that the proposed action is necessary to implement the Legislature’s directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives

available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to “meaningfully attempt to quantify the Project’s potential impacts on GHG emissions and determine their significance” or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act (“NEPA”) to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

APPENDIX F. ENERGY CONSERVATION

Specific Purposes of the Amendment

CEQA's requirement to analyze and mitigate energy impacts of a project is substantive, and is not merely procedural. (*People v. County of Kern* (1976) 62 Cal.App.3d 761, 774.) Despite the requirement, lead agencies have not consistently included such analysis in their EIRs. (Remy et al., Guide to CEQA, 11th Ed. 2007, at pp. 1007-1008, n. 34.) The following revisions to Appendix F are, therefore, reasonably necessary to ensure that lead agencies comply with the substantive directive in section 21100(b)(3).

Introduction

The revisions to the introduction section include a cross-reference to section 21100(b)(3) of the Public Resources Code to direct lead agencies to the statutory directive underlying Appendix F. This section also includes an addition to make clear that energy impacts that have already been analyzed may not need to be repeated in later EIRs. This sentence is consistent with the Legislative intent in CEQA that information in existing environmental review be used to "reduce delay and duplication in preparation of subsequent environmental impact reports." (Pub. Resources Code, § 21003(d).)

EIR Contents

The proposed amendments revise the section on EIR Contents in Appendix F to clarify that lead agencies "shall" analyze energy conservation in their EIRs. The word "shall" indicates that the duty is mandatory, and makes Appendix F consistent with Public Resources Code section 21100(b)(3). While Appendix F is revised to make clear that an energy analysis is mandatory, the Proposed Amendments to this section would also make clear that the energy analysis is limited to effects that are applicable to the project.

"Lifecycle"

The proposed amendments to Appendix F remove the term "lifecycle." No existing regulatory definition of "lifecycle" exists. In fact, comments received during OPR's public workshop process indicate a wide variety of interpretations of that term. (Letter from Terry Rivasplata et al. to OPR, February 2, 2009, at pp. 5, 12 and Attachment; Letter from Center for Biological Diversity et al. to OPR, February 2, 2009, at pp. 17.) Thus, retention of the term "lifecycle" in Appendix F could create confusion among lead agencies regarding what Appendix F requires.

Moreover, even if a standard definition of the term "lifecycle" existed, requiring such an analysis may not be consistent with CEQA. As a general matter, the term could refer to emissions beyond the direct control of the project applicant or sponsor.

An example of such emissions could be those resulting from the manufacture of building materials. (CAPCOA White Paper, at pp. 50-51.) Analysis of lifecycle emissions, as that term is used here, may not be appropriate within a traditional CEQA analysis for several reasons. First, CEQA only requires analysis of impacts that are directly or indirectly attributable to the project under consideration. (State CEQA Guidelines, § 15064(d).) In many instances, materials would be manufactured for many different projects, and would likely do so whether or not one particular project proceeds. Thus, such emissions may not be “caused by” the project under consideration. Similarly, in this scenario, a lead agency may not be able to require mitigation for emissions that result from the manufacturing process. Mitigation can only be required for emissions that are actually caused by the project. (State CEQA Guidelines, § 15126.4(a)(4).) Second, emissions resulting from materials manufacture may already be accounted for in other regulations or environmental review. Including such emissions in a “lifecycle” analysis could lead to double-counting. Certainly where substantial evidence supports a fair argument that such “lifecycle” emissions are attributable to a project, that evidence must be considered. However, to avoid potential confusion, the term is proposed to be removed from Appendix F.

Types of Energy Use

The proposed amendments clarify that project design may achieve energy savings through measures related to water use and solid waste disposal. (California Energy Commission, Water Supply-Related Electricity Demand in California, CEC 500-2007-114 (November 2007), at p. 3 (reporting that water related energy use, including water movement, treatment and heating, annually accounts for approximately 20 percent of California’s electricity consumption); Scoping Plan, Appendix C, at pp. C-158 to C-160.) The addition of these potential sources of energy reductions is consistent with the direction in section 21100(b)(3) to identify mitigation measures to reduce inefficient consumption of energy.

Grammar and Syntax

Finally, several minor revisions to Appendix F are proposed to improve grammar and syntax. Such revisions qualify as a “change without regulatory effect” pursuant to section 100(a)(4) of the Office of Administrative Law’s regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis and mitigation of GHG emissions. (Pub. Resources Code, § 21083.05.) Since a significant source of GHG emissions results from energy use (consumption), it is critical that these Proposed Amendments directly address energy use and conservation as a subject for CEQA analysis. Additionally, the legislature requires that lead agencies analyze energy use in their EIRs. (*Id.* at § 21100(b)(3).) The proposed

amendments to Appendix F are, therefore, necessary to ensure that lead agencies implement these directives.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA's requirements for analysis and mitigation of energy use. Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California.

APPENDIX G. INITIAL STUDY CHECKLIST

Specific Purposes of the Amendment

The Proposed Amendments include revisions to several portions of Appendix G, which contains a sample environmental checklist that lead agencies may use to satisfy the requirement to prepare an initial study. The proposed amendments and their necessity are described below.

Note Regarding Use of the Checklist

The proposed amendments would add a note to the beginning of Appendix G to clarify the checklist contained therein is only a sample that may be modified as necessary to suit the lead agency and to address the particular circumstances of the project under consideration. The proposed addition is necessary for two reasons. First, several lead agencies have expressed concern that the checklist does not reflect the circumstances existing in that particular agency. (Letter from Napa County – Department of Conservation, Development, and Planning to OPR, January 26, 2009; Letter from County of San Bernardino - Land Use Services Department to OPR, February 2, 2009.) Second, the Third District Court of Appeal recently issued an opinion that clarified that all substantial evidence regarding potential impacts of a project must be considered, even if the particular potential impact is not listed in Appendix G. (*Protect the Historic Amador Waterways, supra*, 116 Cal.App.4th at 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect”).) Thus, the proposed note emphasizes that Appendix G does not mandate a particular form that must be used for an Initial Study; rather, it provides merely an example.

Forest Resources

The proposed amendments would add several questions addressing forest resources in the section on Agricultural Resources. Forestry questions are appropriately addressed in the Appendix G checklist for several reasons. First, forests and forest resources are directly linked to both GHG emissions and efforts to reduce those emissions. For example, conversion of forests to non-forest uses may result in direct emissions of GHG emissions. (L. Wayburn et al., *A Programmatic Approach to the Forest Sector in AB32*, Pacific Forest Trust (May 2008); see also California Energy Commission Baseline GHG Emissions for Forest, Range, and Agricultural Lands in California (March, 2004) at p. 19.) Such conversion would also remove existing carbon stock (i.e., carbon stored in vegetation), as well as a significant carbon sink (i.e., rather than emitting GHGs, forests remove GHGs from the atmosphere). (Scoping Plan, Appendix C, at p. C-168.) Thus, such conversions are an indication of potential GHG emissions. Changes in forest land or timberland zoning may also ultimately lead to conversions, which could result in GHG emissions, aesthetic impacts, impacts to

biological resources and water quality impacts, among others. Thus, these additions are reasonably necessary to ensure that lead agencies consider the full range of potential impacts in their initial studies. In the same way that an EIR must address conversion of prime agricultural land or wetlands as part of a project (addressing the whole of the action requires analyzing land clearance in advance of project development), so should it analyze forest removal.

During OPR's public involvement process, some commenters suggested that conversion of forest or timber lands to agricultural uses should not be addressed in the Initial Study checklist. (Letter from California Farm Bureau Federation to OPR, February 2, 2009; Letter from County of Napa, Conservation, Development and Planning Department, to OPR, January 26, 2009.) As explained above, the purpose of the Proposed Amendments is to implement the Legislative directive to develop Guidelines on the analysis and mitigation of GHG emissions. Although some agricultural uses also provide carbon sequestration values, most agricultural uses do not provide as much sequestration as forest resources. (Climate Action Team, *Carbon Sequestration* (2009), Chapter 3.3.8 at p. 3.21; California Energy Commission, *Baseline GHG Emissions for Forest, Range, and Agricultural Lands in California* (2004), at p. 2.) Therefore, such a project could result in a net increase in GHG emissions, among other potential impacts. Thus, such potential impacts are appropriately addressed in the Initial Study checklist.

Greenhouse Gas Emissions

The proposed additions also include two questions related to GHG emissions. These questions are necessary to satisfy the Legislative directive in section 21083.05 that the effects of GHG emissions be analyzed under CEQA. The questions are intended to provoke a full analysis of such emissions where appropriate. More detailed guidance on the context of such an analysis is provided in other sections throughout the Guidelines. Despite the detailed provisions in the Guidelines themselves, questions related to GHG emissions should also appear in the checklist because some lead agencies will not seriously consider an environmental issue unless it is specifically mentioned in the checklist. (*Protect the Historic Amador Waterways, supra*, 116 Cal. App. 4th at 1110.)

Transportation

The Proposed Amendments make three primary changes to the questions involving transportation and traffic.

First, question (a) changes the focus from an increase in traffic at a given location to the effect of a project on the overall circulation system in the project area. This change is appropriate because an increase in traffic, by itself, is not necessarily an indicator of a potentially significant *environmental* impact. (Ronald Miliam, AICP, *Transportation Impact Analysis Gets a Failing Grade When it Comes to Climate Change and Smart Growth*; see also Land Use Subcommittee of the Climate Action Team

LUSCAT Submission to CARB Scoping Plan on Local Government, Land Use, and Transportation Report (May, 2008) at pp. 31, 36.) Similarly, even if some projects may result in a deterioration of vehicular level of service – that is, delay experienced by drivers – the overall effectiveness of the circulation system as a whole may be improved. (*Ibid.*) Such projects could include restriping to provide bicycle lanes or creating dedicated bus lanes. Even in such cases, however, any potential adverse air quality or other impacts would still have to be addressed as provided in other sections of the checklist. Finally, the change to question (a) also recognizes that the lead agency has discretion to choose its own metric of analysis of impacts to intersections, streets, highways and freeways. (Pub. Resources Code, § 21081.2(e); *Eureka Citizens for Responsible Gov't v. City of Eureka, supra*, 147 Cal.App.4th at 371-373 (lead agency has discretion to choose its methodology).) Thus, “level of service” may or may not be the applicable measure of effectiveness of the circulation system.

Second, the proposed revisions to question (b) clarify the role of a congestion management program in a CEQA analysis. Specifically, it clarifies that a congestion management program contains many elements in addition to a level of service designation. (Gov. Code § 65088 et seq.) The clarification is also necessary to address any projects within an “in-fill opportunity zone” that may be exempted from level of service requirements. (*Id.* at § 65088.4.)

Third, the proposed amendments would eliminate the existing question (f) relating to parking capacity. Case law recognizes that parking impacts are not necessarily environmental impacts. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, supra*, 102 Cal.App.4th at 697.) Therefore, the question related to parking is not relevant in the initial study checklist. As noted above, however, if there is substantial evidence indicating adverse environmental impacts from a project related to parking capacity, the lead agency must address such potential impacts regardless of whether the checklist contains parking questions. (*Ibid.*)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) An initial study may be used to assist in the determination of whether a project may have a significant effect on the environment. (*Protect the Historic Amador Waterways, supra*, 116 Cal. App. 4th at 1110.) Appendix G of the State CEQA Guidelines is intended to provide a sample of an initial study that lead agencies may use. (*Ibid.*) Amendment of Appendix G to include questions that will assist a lead agency in determining whether a project may result in significant impacts related to GHG emissions is, therefore, necessary to carry out the Legislature’s directive in section 21083.05 of the Public Resources Code.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, the

proposed amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

ISSUES NOT ADDRESSED IN THE PROPOSED AMENDMENTS

Two issues raised during OPR's public outreach effort that are not addressed in the Proposed Amendments are discussed below.

"Climate Change"

Some comments submitted to OPR during its public workshops indicated that the Guidelines should be addressed to "Climate Change" rather than just the effects of GHG emissions. The focus in the Guidelines on GHG emissions is appropriate for at least three reasons.

First, the Legislative authorization for the Proposed Amendments refers specifically to guidelines on the "mitigation of greenhouse gas emissions and the effects of greenhouse gas emissions." (Pub. Resources Code, § 21083.05.) Had the Legislature intended the Guidelines to address climate change or global warming specifically, it presumably would have so indicated. Second, the precise "effect" of GHG emissions from a project is a factual matter for the lead agency to determine. Such effects may include "climate change," "global warming" and other changes in the physical environment (increased ocean acidity or sea-level rise, for example). (EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886 (April 24, 2009), Technical Support Document, at pp. ES-2 to ES-3; see further discussion at pages 4-5, above.) Thus, rather than limit analysis to a particular effect, the proposed Guidelines on GHG emissions are consistent with the treatment of air pollutants in the existing Appendix G, which focus largely on the concentration of pollutants. (See, e.g., existing State CEQA Guidelines, Appendix G, III.d.) Third, the focus in a cumulative impacts analysis is "whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect." (*CBE, supra*, 103 Cal. App. 4th at 118.) Thus, the Proposed Amendments appropriately focus on a project's potential incremental contribution of GHGs rather than on the potential effect itself (i.e., climate change). Notably, however, the Proposed Amendments expressly incorporate the fair argument standard. (See, e.g., proposed Section 15064.4(b)(3).) Thus, if there is any substantial evidence supporting a fair argument that a project's GHG emissions may result in any adverse impacts, including climate change, the lead agency must resolve that concern in an EIR.

The Effects of Climate Change on the Project

Existing CEQA Guidelines and case law already address the potential need to analyze the effects of climate change on a project. Section 15126.2, for example, states:

The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future

occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.

Any lead agency will have to respond to evidence that is placed before it prior to project approval, however. As explained above, where evidence indicates that a changing climate may ultimately result in adverse effects on the project, CEQA requires a lead agency to analyze that potential effect. (*Protect the Historic Amador Waterways v. Amador Water Agency, supra*, 116 Cal.App.4th at 1109 (“in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect”).) Efforts are currently underway, for example, to develop regulatory guidance on adaptation strategies to protect against the effects of climate change. (See, e.g., Executive Order S-13-08 (requiring, among other things, the development of a state Climate Adaptation Strategy).) Depending on the state of the science, however, a lead agency may appropriately conclude that such impacts are speculative, and end the discussion. (State CEQA Guidelines, § 15145.)

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