VIA E-MAIL: CEQA.Rulemaking@resources.ca.gov, and
Hand Delivery

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Christopher Calfee, Special Counsel
ATTN: CEQA Guidelines
California Resources Agency
1017 L Street, #2223
Sacramento, CA 95814

Re: Proposed California Environmental Quality Act (CEQA) Guideline Amendments for Greenhouse Gas Emissions

Dear Mr. Calfee:

On behalf of the above-mentioned organizations, thank you for providing us with the opportunity to comment on the proposed CEQA Guideline Amendments for Greenhouse Gas (GHG) emissions. The proposed amendments do a good job of balancing the need for further guidance on how to treat GHG emissions with the discretionary authority granted to local lead agencies that are in the best position to meet the goals of AB 32 while taking into consideration local

circumstances.

SB 97 directs the Office of Planning and Research to develop CEQA Guidelines on how state and local agencies should analyze, and when necessary, mitigate greenhouse gas emissions. The Governor, in his signing message, noted that "litigation under CEQA is not the best approach to reduce greenhouse gas emissions and maintain a sound and vibrant economy. To achieve these goals, we need a coordinated policy, not a piecemeal approach dictated by litigation." It is our hope that these proposed Guidelines will achieve this goal.

The proposed Guidelines, Section 15093 adds a new subdivision (d) to allow an agency to consider region-wide or statewide benefits when making a statement of overriding considerations for local adverse environmental effects. This new provision brings common sense to the California Environmental Quality Act and actually specifies what is contained in SB 375.

AB 32 was predicated on the fact that human activities, specifically greenhouse gas emissions, cause global climate changes, including increased flooding, sea level rise, increased risk of fire, health risks to humans, risks to frail species of plants and animals, among others. And as the 2009 Climate Change Adaptation Strategy asserts, these effects are global in nature and affect the entire state. Therefore, it makes good sense to consider those far-reaching benefits if we are to be instrumental in reducing GHG emissions. There may be those who do not like the adverse local environmental effects associated with increased traffic due to higher density development in an infill location. However, those impacts are less substantial, considered in their entirety, than they would be if such development occurred in another location or at a reduced density. It was for this reason that SB 375 incorporated subdivision (b) of Public Resources Code §21159.28(b), which provides:

> (b) Any environmental impact report prepared for a project described in subdivision (a) shall not be required to reference, describe, or discuss a reduced residential density alternative to address the effects of car and light-duty truck trips generated by the project.

Therefore, we believe that proposed subdivision (d) of Section 15093 is consistent with SB 375 and AB 32.

There are a few other provisions, however, that appear confusing and we believe could benefit from some further clarification.

<u>Section 15064 (h)(3) – p. 3:</u>

The proposed amendments to this section provide an appropriate list of examples of previously approved plans or mitigation programs that, if complied with, may be the basis for an agency's determination that a project's incremental contribution to a cumulative effect is not cumulatively considerable. However, the last sentence of subdivision (h)(3) provides:

If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the specified plan or mitigation program addressing the cumulative problem, an EIR must be prepared for the project.

This sentence takes away the benefits this section provides. The time for challenging one of the listed plans expires after the applicable statute of limitations has run, and the plan should then be conclusively presumed to be valid. The preceding sentence, however, gives project opponents a second bite at the apple to challenge one of the listed plans, and under the "fair argument" standard at that.

Additionally, it is contrary to both the Governor's signing message for SB 97 (quoted above) and SB 375 which provides that if a project complies with a plan, i.e., the sustainable communities plan or the alternative planning strategy, the CEQA document shall not be required to reference, describe or discuss…cumulative impacts …." (See Public Resources Code §21159.28(a)). For all of these reasons, the last sentence of (h)(3), quoted above, should be deleted.

Section 15064.4 - p.4:

This section appropriately reemphasizes the discretion CEQA grants to lead agencies in determining the significance of environmental impacts in the context of a specific project and provides guidance on how lead agencies should assess the significance of GHG emissions impacts. By providing a list of tools and analytic approaches that a lead agency may utilize to calculate or estimate greenhouse gas emissions, the proposed amendments correctly acknowledge that there is no one-size-fits-all analysis or threshold of significance that can be applied to all projects throughout the state.

Section 15064.4(b)(3) also correctly makes clear that a lead agency may valuate the extent to which a project complies with regulations, requirements, or plans for the reduction or mitigation of greenhouse gas emissions when determining significance. However, the last sentence of this section, which is identical the final sentence in Section 15064(h)(3) discussed above, undermines the very purpose and benefit of recognizing the critical role of local, regional and statewide greenhouse gas mitigation programs. Given the developing nature of global warming science and public policy, and the robust and ongoing debate surrounding it, deference should be provided to a lead agency's decisions in this area that are supported by substantial evidence and consistent with applicable public policy, law and regulations. As the preceding language in this section makes clear, there may be more than one way to correctly evaluate a project's greenhouse gas emissions, and discretion and deference should be provided to the lead agency in doing so. Accordingly, we suggest that the last sentence in paragraph (b)(3) be deleted.

Section 15064.7(c) – p. 5:

This subdivision provides:

> (c) When adopting thresholds of significance, a lead agency may consider thresholds of significance previously adopted or recommended by other public

agencies, or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence.

Very few agencies formally adopt thresholds of significance. Instead, they use Appendix G for thresholds, rely on thresholds in their general plan or adopted by another agency (e.g., the local air district) or they formulate custom thresholds to be used in a specific CEQA document. Therefore, we recommend the introductory clause of this section be deleted as follows:

(c) ~~When adopting thresholds of significance, a~~ A lead agency may consider thresholds of significance previously adopted or recommended by other public agencies, or recommended by experts, provided the decision of the lead agency to adopt such thresholds is supported by substantial evidence.

Section 15093 – p. 8:

This section addresses circumstances under which a statement of overriding considerations may be made. As these Guidelines specifically address greenhouse gas emissions, we believe that, to that extent, they should also take into consideration AB 32. AB 32 specifically provides for relief due to a declaration of significant economic harm by the Governor as provided in Health and Safety Code section 38599. In adopting this section, the legislature has determined that pursuing certain measures to reduce GHG emissions when there is a threat of economic harm may sometimes be inappropriate. CEQA should not require actions to address GHG emissions when the legislature has determined that those actions are not appropriate under AB 32 due to the threat of economic harm. Therefore, we believe the proposed Guidelines could be improved by revising new subdivision (d) as follows:

(d) When an agency makes a statement of overriding considerations, the agency may balance any unavoidable adverse environmental effects against the threat of economic harm, as set forth in Health and Safety Code section 38599, if the project were not to be approved or were to be approved only with the inclusion of certain mitigation measures or alternatives.

This revision reinforces the purpose of proposed Guidelines section 15093(d).

Section 15125(d) – p.9:

This section deals with describing the environmental setting of the project. In particular, subdivision (d) provides that an "EIR shall discuss any inconsistencies between the proposed project and applicable…regional blueprint plans, greenhouse gas reduction plans…." SB 375 provides that a project may address global warming by complying with either a sustainable communities strategy (SCS) or an alternative planning strategy (APS). Public Resources Code §21159.28(a). If a project complies with either the SCS or APS, then the CEQA document "shall *not* be required to reference, describe or *discuss* (1) growth inducing impacts; or (2) any project specific or cumulative impacts from cars and light duty truck trips generated by the project on global warming or the regional transportation network." Accordingly, for treatment of global warming issues in the CEQA context, SCS and APS are interchangeable.

Moreover, SB 375, at Government Code §65080(b)(2)(H)(v), provides that:

> (v) For purposes of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), an alternative planning strategy shall not constitute a land use plan, policy, or regulation, and the inconsistency of a project with an alternative planning strategy shall not be a consideration in determining whether a project may have an environmental effect.

Therefore, if a project's inconsistency with an APS shall not be considered in determining whether a project may have an environmental effect, it makes no sense to require a discussion of a project's inconsistency with an SCS in proposed §15125(d). Therefore, we request that this subdivision be revised as follows:

(d) The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation, regional blueprint plans~~,~~ and greenhouse gas reduction plans (except as provided in Public Resources Code §21159.28(a) and Government Code §65080(b)(2)(H)(v)), ….

Section 15126.4(c) – p. 13:

The CEQA Guidelines for greenhouse gas emissions should be consistent with CEQA's general rules regarding resource analysis and mitigation. Accordingly, we believe this proposed guidelines provision correctly requires lead agencies to consider *feasible* mitigation measures and provides a useful list of potential mitigation strategies.

Section 15130(b)(1)(B) and (f) – p. 14-15:

This section is intended to address how cumulative impacts should be discussed in CEQA documents. However, as mentioned above, SB 375 provides that if a project complies with either the SCS or APS, then the CEQA document "shall not be required to reference, describe or discuss (1) growth inducing impacts; or (2) any project specific or *cumulative impacts* from cars and light-duty truck trips generated by the project on global warming or the regional transportation network." Public Resources Code §21159.28(a) (emphasis added). Accordingly, we suggest the following modifications:

> (B) Except as provided in Public Resources Code §21159.28(a), a summary of projections contained in an adopted local, regional or statewide plan, or related planning document that describes or evaluates conditions contributing to the cumulative effect.

Section 15183.5 – p. 19-20

This proposed new CEQA Guideline provision discusses the tiering and streamlining of greenhouse gas emissions analysis. The section correctly reiterates that "…a lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements in a previously adopted plan or mitigation program under specified circumstances." However, as with previous provisions discussed above, subsection (b)(2) largely undermines its value by concluding with a final sentence that gives project opponents another bite at the apple, even when a lead agency's conclusion is supported by substantial evidence in the record. As stated previously, the time for challenging a greenhouse gas reduction plan expires after the applicable statute of limitations has run, and the plan should then be conclusively presumed to be valid. Therefore, we suggest that the last sentence of subsection (b)(2) be deleted.

Section 15364.5 – p. 21

This section defines "greenhouse gas" or "greenhouse gases" as follows:

"Greenhouse gas" or "greenhouse gases" includes but is not limited to, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. (Reference: Health and Safety Code section 38505(g).)

This open ended and unlimited definition invites confusion and litigation. It also conflicts with the definition of "greenhouse gas" and "greenhouse gases" in Health and Safety Code section 38505(g), which is one of the provisions under AB 32. The legislature has seen fit to anchor the state's regulatory program for addressing climate change under AB 32 by defining greenhouse gases as a list of specific substances in Health and Safety Code section 38505(g). It would therefore be inappropriate for agencies to engage in speculation under CEQA regarding other substances that are not part of this defined list.

Furthermore, the legislature has delegated exclusive authority for addressing climate change under AB 32 to the California Air Resources Board (ARB) and has determined that ARB should address the specific substances listed in Health and Safety code section 38505(g). By potentially requiring an analysis of different substances that are not listed in Health and Safety code section 38505(g), the proposed definition in section 15364.5 would lead to duplicative or conflicting regulatory decisions under AB 32 and CEQA.

Therefore, we suggest amending the definition in section 15364.5 as follows to track the exact language in Health and Safety Code section 38505(g):

> "Greenhouse gas" or "greenhouse gases" includes ~~but is not limited to~~, all of the following gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride. (Reference: Health and Safety Code section 38505(g).)

CEQA Guidelines Appendix G, Section VII(a) and (b) – p. 7:

This section asks "Would the project:

a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?

Other Appendix G questions relating to thresholds do not include the phrase "directly or indirectly." *See, e.g.*, CEQA Guidelines, App. G, § III(a)-(e) (air quality). While direct and indirect impacts are part of the background general law of CEQA, including the phrase "directly or indirectly" in one place in Appendix G and not everywhere else in Appendix G may lead to confusion about the implications of doing so. Therefore, this section should delete the phrase "directly or indirectly" to ensure consistency with the other questions in Appendix G.

Subsection b) asks "Would the project:

b) Conflict with any applicable plan, policy or regulation of an agency adopted for the purpose of reducing the emissions of greenhouse gases?

As discussed above, SB 375 provides that inconsistencies with an APS shall not be considered in determining whether a project may have an environmental effect. Government Code section 65080(b)(2)(H)(v). Therefore, (b) should be modified to read:

b) Conflict with any applicable plan <u>other than an alternative planning strategy if a sustainable community strategy does not apply</u>, policy or regulation of an agency adopted for the purpose of reducing the emissions of greenhouse gases?

<u>Comments Based on the Public Hearings</u>

Several comments were made at the public hearings on the proposed CEQA Guidelines Amendments that made suggestions that we believe would significantly complicate the CEQA process. The following comments respond to the general issues raised in those comments. In general, we note that many of these comments appear to advocate the adoption of rules for analysis of greenhouse gas emissions that would be stricter than CEQA's general rules that apply to all other categories of impact. Without diminishing the serious nature of climate change, we do not believe it makes sense to adopt CEQA Guidelines for climate change and greenhouse gas emissions that depart from existing CEQA practice and impose standards that are more difficult for public agencies and project applicants to meet. It would be particularly anomalous to impose these higher standards on the analysis of an impact that is necessarily cumulative in nature, and this would be contrary to the existing provisions of the Guidelines which specify that the analysis of cumulative impacts of a project should be less detailed than the analysis of project-specific impacts. Guideline 15130(b).

A. <u>Qualitative versus quantitative analysis</u>

Some speakers stated that all projects should be required to quantify greenhouse gas emissions and the reductions that can be achieved by mitigation measures. They argued that proposed Guideline 15064.4 should not allow lead agencies the discretion to rely on a qualitative analysis.

This comment ignores the fact that Guideline 15064.4 would be added to the section of the Guidelines that governs the determination of significance generally. This Guideline will thus be applied by lead agencies in preparing negative declarations, mitigated negative declarations, and environmental impact reports for the broad range of projects subject to CEQA. It would be a far-reaching change in CEQA practice to require a quantified analysis of a topic in a negative declaration or a mitigated negative declaration, where textual or qualitative analyses of potential impacts (including emissions and air quality impacts) are often provided. This is particularly significant for housing, as mitigated negative declarations are often prepared as the CEQA documents for smaller housing projects, including infill housing development.

Even in EIRs, lead agencies should have the discretion to determine whether a qualitative or quantitative analysis is provided. EIRs are not uncommonly prepared for projects that result in minor emissions (an EIR that is triggered by the demolition of a historic resource is one example of this).

B. Discussion Draft Climate Adaptation Strategy

Some speakers stated that the proposed Guidelines should be revised to more specifically address the 2009 California Climate Adaptation Strategy Discussion Draft that was recently released by the Natural Resources Agency. This suggestion is both unnecessary and unworkable from a time perspective.

The suggestion is unnecessary because, as the Climate Adaptation Strategy itself notes, the CEQA process and Guidelines already include provisions addressing the analysis of climate change impacts, such as threats such as flooding that may affect particular projects. The Appendix G checklist questions require the evaluation, when applicable, of threats to projects such as wildland fires (question VII.h) and flooding or inundation (questions VII.i and VII.j).

The suggestion is unworkable from a time perspective because the Natural Resources Agency is acting under a legislative mandate to adopt Guidelines by the end of this year. SB 97 reflects the fact that both lead agencies and project applicants need to have a set of Guidelines in place that can start to bring some level of certainty to what is currently a very uncertain area of CEQA practice, and a common source of legal claims and litigation against projects. The Guidelines have also been under development for some months, with extensive consultation through the Office of Planning and Research's process of developing recommendations, and now through the formal administrative law process. The adaptation strategy, in contrast, is a newly released discussion draft that is open for public comment through early October, and that may well change in response to comments that are yet to be submitted.

C. Mitigation Hierarchy

Some commenters stated that the new Guidelines should specify a mitigation hierarchy, giving preference to certain types of mitigation measures and limiting the discretion of lead agencies to determine what mitigation measures best suit a particular project. In particular, some speakers encouraged additional Guidelines amendments that establish a strong preference for on-site

mitigation, regardless of the legitimacy and effectiveness of any proposed off site mitigation measures.

This would be an example of imposing stricter rules on the analysis and mitigation of greenhouse gas emissions than generally apply to the analysis and mitigation of other resource impacts under CEQA. The only provisions of the Guidelines which even approach a mitigation hierarchy are the provisions for mitigation of impacts on historical resources, a project-specific impact, and those provisions are considerably more flexible, and leave more discretion to lead agencies, than the concept of a mandatory mitigation hierarchy. For other impacts, CEQA traditionally leaves the formulation of mitigation measures to lead agencies, and lead agencies, with their familiarity with the circumstances of particular projects, are in the best position to determine what type of mitigation is best.

D. Overriding Considerations

At least one speaker stated that Guideline 15093 should not be amended to specify that lead agencies may consider adverse environmental effects in the context of regional or statewide environmental benefits when adopting a statement of overriding considerations. As a preliminary note, given the broad authority that CEQA currently provides for making a statement of overriding considerations, including generally "economic, legal, social, technological or other benefits" of a project, agencies have the authority under current law to consider adverse environmental effects in the context of regional or statewide benefits.

The comment appears to be motivated by a concern that lead agencies may ignore localized impacts, or local environmental justice impacts, if this provision is added. CEQA's general provisions, however, will still require all potentially significant impacts to be addressed and to be mitigated when feasible. Further, the proposed addition is helpful in providing guidance to lead agencies about balancing the impacts of a project. Often, for example, an infill housing project may help to fulfill greenhouse gas emissions reduction goals, but will generate local traffic impacts. In that type of situation, this provision helps to guide lead agencies by specifying that such traffic impacts can be considered in the context of the more regional emission reduction benefits of the project.

Thank you for considering our comments.

Sincerely,

Nick Cammarota
General Counsel
California Building Industry Association
1215 K Street, Suite 1200
Sacramento, CA 95814
(916) 443-7933
Ncammarota@cbia.org

Rex S. Hime

President and Chief Executive Officer
California Business Properties Association
International Council of Shopping Centers
National Association of Industrial and Office Properties, California Council
Building Owners and Managers Assn. of California
1121 L Street, Suite 809
Sacramento, CA 95814
(916) 443-4676
rexhime@cbpa.com

Robert Callahan
Policy Advocate
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814
(916)444-6670
robert.callahan@calchamber.com

Mark Smith
American Council of Engineering Companies California
1303 J Street, Suite 450
Sacramento, CA 95814
(916) 441-7991
msmith@acec-ca.org

Elizabeth Gavric
California Association of Realtors
980 9th Street, #1430
Sacramento, CA 95814
(916) 492-5204
elizabethg@car.org

Michael Quigley
Manager of Government and Environmental Affairs
California Alliance for Jobs
928 Second Street, Ste. 200
Sacramento, CA 95814
(916) 446-2259
mpquigley@rebuildca.org

Rock Zierman
California Independent Petroleum Association
1112 I St, Suite 350
Sacramento, CA 95814-2823
(916) 447-1177
rock@cipa.org

Cc: Mike Chrisman, Secretary, Natural Resources Agency
Cynthia Bryant, Director, Governor's Office of Planning and Research
Doug Ito, California Air Resources Board
Terry Roberts, California Air Resources Board