

Name: Jason Flanders
Organization: Public
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Christopher Calfee, Special Counsel
California Resources Agency
1017 L Street, #2223
Sacramento, CA 95814
CEQA.Rulemaking@resources.ca.gov

Dear Mr. Calfee:

Thank you for considering these comments on the OPR's draft Guidelines for greenhouse gas emissions. Proposed Guideline section 15064.4(b) should be revised to be consistent with CEQA's fair argument standard. The draft provision's use of the permissive "may" rather than the mandatory "shall," leaves the Guideline open to a reasonable interpretation that a lead agency could choose *not* to consider the items listed in draft Guidelines section 15064.4 (b)(1)-(3) when assessing the significance of a project's greenhouse gas emissions. However, under CEQA's fair argument standard, a lead agency *must* consider any substantial evidence in the record supporting a fair argument that a project may have a significant effect. (CEQA Guidelines, § 15064, subd. (f).) Therefore, a lead agency has no discretion to *not* consider substantial evidence supporting a fair argument under items (b)(1)-(3) that a proposed project may have significant impacts from greenhouse gas emissions, contrary to the permissive standard in this draft provision. Because the substance of each item in draft subsections (b)(1)-(3) lends itself to the creation of a fair argument that a proposed project may have a significant greenhouse gas impact, draft Guideline section 15064.4(b) should be revised to require that a lead agency shall consider each of items (b)(1)-(3).

Indeed, the draft Guidelines' use of the word "may" rather than "shall" in this regard departs from the ordinary approach taken under CEQA Guidelines Article 5, in determining the significance of a project's impacts. For example, the Guidelines state that "the lead agency shall consider the views held by members of the public" (CEQA Guidelines, §15064, subd. (c)), "the lead agency shall consider direct physical changes in the environment" (CEQA Guidelines, § 15064, subd. (d)), and shall consider any impact to "a resource listed in . . . the California Register of Historical Resources" (CEQA Guidelines, § 15064.5, subd. (a)(1)). Given the magnitude of global warming impacts faced by California, the draft Guidelines for greenhouse gas emissions should be at least as protective as the Guidelines adopted for impacts to historic and archeological resources.

In addition, the permissive standard of draft section 15064.4 contradicts other existing Guidelines. First, the draft Guidelines' provision that a lead agency "may consider . . . [t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting" (draft CEQA Guidelines, § 15064.4, subd. (b)(1)) directly contradicts the Guidelines' existing mandate that the lead agency "shall consider direct physical changes in the environment" (CEQA Guidelines, § 15064, subd. (d)), since increasing greenhouse gas emissions would result in a direct physical change to the environment, the impact of which a lead agency must consider.

Second, the draft provision that a lead agency “may consider . . . [w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project,” undermines the very purpose of an established threshold of significance, which is “an identifiable . . . level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant . . .” (CEQA Guidelines, § 15064.7, subd. (a).) Why would a lead agency ever simply not consider whether a proposed impact would exceed an established threshold of significance? Under the fair argument standard, a lead agency has no discretion to not consider a project’s noncompliance with an adopted threshold of significance. Third, the draft Guidelines’ provision that a lead agency may consider “[t]he extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions,” should be changed, because noncompliance with an adopted plan for greenhouse gas emissions would likely support a fair argument that the proposed project may have a significant impact. In fact, a lead agency must make this determination when following the draft Appendix G checklist, item VII (b).

In sum, under any reasonable evaluation of a proposed project’s greenhouse gas emissions’ impacts, a lead agency must be required to consider each of the items described in draft Guidelines section 15064.4, subd. (b)(1)-(3).

Thank you for your consideration of these comments.

Sincerely,

/s/ Jason R. Flanders