

February 2, 2009

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Dear Mr. Calfee,

Thank you for the opportunity to comment upon the proposed Amendments to the Guidelines for the Implementation of the California Environmental Quality Act (CEQA)(Title 14, California Code of Regulations). The Amendments are proposed in order to implement Senate Bill 97 (Dutton), which directs the Governor's Office of Planning and Research (OPR) to develop guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas (GHG) emissions (Public Resources Code Section 21083.05).

As part of the California Code of Regulations, it is the function of the Guidelines to implement, interpret, or make specific the law as enacted by the California Legislature and to govern its procedure. As such, the Guidelines must hew closely to the law and judicial precedent interpreting that law.

In adopting the California Environmental Quality Act, the Legislature declared that it is the policy of California to take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state. In furtherance of that goal, CEQA requires government at all levels to consider environmental factors in its decision making and avoid significant effects on the environment whenever it is feasible to do so. It is through the environmental impact review process that information is developed regarding an action's potential impacts on the environment and the means available to avoid those impacts, informing both decision makers and the public generally

CEQA provides for public agencies to balance competing needs and values (Sections 21002, 21002.1). "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action... The [Environmental Impact Report] EIR process protects not only the environment but informed self-government" (*County of Amador v. El Dorado County Water Agency* (76 Cal.App.4th 933)). Thus, the Guidelines must not be utilized in furtherance of the extra-legislative preferences or values of the administration or even the planning community at large, however laudable those preferences or values may be, but must be directed toward providing the most comprehensive and useful information possible for public decision making.

After reviewing the proposed Amendments, I urge that the Amendments not be adopted as currently drafted. The proposed Amendments must be redrafted due to two fundamental flaws as discussed in more detail below:

- Failure to adequately address mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as directed under SB 97
- Proposed Amendments that are beyond the scope of SB 97, and could actually result in increased impacts on the environment.

By way of background, I am a professional planner with over twenty five years of experience in dealing with the California Environmental Quality Act (CEQA), working primarily for public agencies and environmental groups. A significant portion of my practice consists of the review of environmental documents for CEQA compliance. In the past, I served on a local city council and on the Southern California Association of Governments Regional Council and currently serve on the boards of a number of environmental groups and a non-profit housing corporation.

The Proposed Amendment Must Be Revised to Address the EFFECTS of Greenhouse Gas Emissions

OPR has been directed to develop guidelines for the **mitigation of the effects of greenhouse gas emissions**. As stated in Assembly Bill 32, also known as the California Global Warming Solutions Act of 2006:

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.

(California Health and Safety Code Section 38501(a))

The portion of the proposed Amendment addressing mitigation is found in the new Section 15126.4(c). As currently drafted, the Amendment provides no guidance at all for mitigation of many of the effects of greenhouse gases recognized by the California Legislature in AB 32.

CEQA does not require the analysis of impacts that are merely speculative. However, not only have the above impacts been recognized by the Legislature, various State agencies have conducted a plethora of studies regarding those impacts, including:

- California Department of Water Resources (Managing An Uncertain Future, Climate Change Adaptation Strategies for California's Water, October 2008; Climate Change in California, June 2007)

- California Energy Commission (The Economic Cost of Climate Change Impact on California Water: A Scenario Analysis, September 2006; Climate Warming and Water Supply Management in California March 2006)
- California Coastal Commission (Overview of Sea Level Rise and Some Implications for Coastal California, June 2001)

While many EIRs in the last couple of years have included potential generation of greenhouse gases, the preparers for the most part appear to be oblivious to the effects of greenhouse gases as these effects relate to a proposed project. For example, the sample environmental checklist accompanying the existing and proposed Guidelines include the following potential impact issues:

Section IV. Biological Resources:

- c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

Section IX. Hydrology and Water Quality

- c) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff?

...

- h) Place structures within a 100-year flood hazard area which would impede or redirect flood flows?
- i) Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?

Section XVII Utilities and Service Systems:

- d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed?

EIRs which have an extensive discussion of GHG emissions due to a proposed project then go on to address water supply for a proposed project as if GHG had no effect on water availability, basing analyses on Urban Water Management Plans (UWMPs) prepared without consideration of reductions in snowpack or increased drought. EIRs may even acknowledge rising sea level, increased flood peaks or stress on habitat as effects of GHG emissions in the section devoted to GHG, but then ignore these effects in analyses of flooding or other hazards related to a proposed project.

In accordance with SB 97, the Guidelines are to address mitigation of the *effects* of greenhouse gas (GHG) emissions (Public Resources Code Section 21083.05. Mitigation for the impacts of GHG emissions that must be addressed include:

- Measures to address rising sea level, including placement of structures to ensure safety from future storm surges, and minimization of development designs that will require future coastal armature with associated impacts on such factors as sand deposition and habitat
- Measures to address increased flood peaks, including placement of structures to avoid expanded flood hazard areas and retention of stormwater on-site to reduce runoff, also potentially increasing percolation to groundwater
- Measures to address reduced availability of water due to reduced snowpack
- Measures to address increased stress on habitat including reducing non-climate stressors on ecosystems, controlling opportunistic invasive species, and protecting coastal wetlands and accommodating sea level rise through provision of adequate buffers.

The Amendments Must Focus on Mitigation of the Effects of Greenhouse Gas Emissions

OPR has been directed to develop guidelines for the **mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions**. However, the proposed Amendment includes many changes unrelated or only tangentially related to mitigation. For the most part, these should not be included in the amendment and in some cases are contrary to basic concept that CEQA should be interpreted “as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language” (*Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247).

Section 15064.4

This section is lacking in that it completely neglects the **effects** of greenhouse gases discussed above. The technology does not exist to determine an individual project’s contribution to sea level rise, changes in snowpack or other greenhouse gas effects. However, a reasonable range for the expected rise in sea level, for example, has been developed and environmental analyses must take that into account. Likewise, analyses required pursuant to SB 221 (Kuehl, 2001) and SB 610 (Costa, 2001) must take into consideration state estimates regarding future reduction in snowpack.

The proposed Amendment creating Section 15064.4 must be revised to address the specific **effects** of greenhouse gases.

Section 15064.7

Where a local agency defers to an agency exercising primary jurisdiction over a given issue, such as an air quality management district in matters of air quality or a water quality control boards in matters of water quality, it makes sense to utilize the expertise of such agencies. At the same time, such situations would likely be covered under the existing, adopted Section 15125 (d), rendering the proposed change superfluous.

Unfortunately, as currently worded, the proposed revision may be interpreted to enshrine a common and sometimes lamentable practice. All too often shorts-staffed cities take a “what are

the other kids doing?” approach to an issue, merely adopting whatever the city next door adopted, lacking the resources to do much investigation or analysis on their own. Often, the original framer of the “standard” made a seat-of-the-pants guess, but has then become regarded to be the “expert”, regardless of technical background or potential conflict of interest.

In this manner a threshold becomes the “standard” whether or not support by dubious “evidence” or originally intended for a different purpose, such as a shade and shadow standard originally designed to address impacts on use of solar energy becoming the sine qua non of aesthetic, horticultural, and basic quality of life evaluations of shadow impacts. Once these “standards” are widespread, it is exceedingly difficult to change the tide, even when substantial evidence shows that a change is in order.

It is not clear whether the proposed Section 15064.7(c) is intended to require substantial evidence for the initial standard or substantial evidence for adoption of a commonly used, though not technically supported, standard, which evidence would be usage by the next town up the road. If the latter is intended that would be inappropriate and contrary to the purposes of CEQA, both because it would fail to provide the maximum protection of the environment and because this would allow thresholds adopted without benefit of peer review or public review to become a standard.

The following alternate wording is suggested:

When adopting thresholds of significance, a lead agency may consider thresholds of significance adopted by other public agencies having primary jurisdiction over the matter in question or recommended by experts, provided ~~the decision of the lead agency to adopt such thresholds~~ such standard is supported by substantial evidence.

Standards adopted by public agencies having jurisdiction over a matter are normally supported by massive evidence on the public record along with thorough peer review and opportunities for public review. Standards set by undefined “experts” are sometimes supported by nothing more than “I’m the expert and I said so” asserted very confidently in a public hearing. At the very least, if “experts” are to be considered a reliable source, some standard for “experts” must be provided.

Section 15093

This change suggests that a local agency consider region-wide or state-wide benefits as a part of over-riding considerations. As currently adopted, Section 15093 directly echoes Public Resources Code Section 21081 (b), and provides administrative direction as to maintaining the public record. The Section is now silent as to consideration of region-wide or state-wide benefits as is the Act itself.

The proposed Amendment to Section 15093 goes beyond the scope of SB 97 and of CEQA itself and therefore should not be adopted.

Section 15125

The proposed Amendment to Section 15125 would add specific plans, regional blueprint plans, and greenhouse gas reduction plans to the list of plans to be addressed for consistency in an environmental impact report (EIR). There is no need to add additional specific elements to a list that is not intended to be exhaustive, and in fact is qualified by the words “but are not limited to”.

If there is a desire to needlessly expand the list, it might make sense to include specific plans in Section 15125, inasmuch as specific legal requirements exist for the content and adoption process for specific plans. Oddly state mandated congestion management programs have been left out, though they would normally be addressed under the broad language of this section.

That is not the case for the remaining items, i.e. regional blueprint plans, and greenhouse gas reduction plans. While the general purpose of “regional blueprint plans” is spelled out in both the Health and Safety Code and the Government Code, specifics are lacking as to content and procedures for adoption. State law does not address greenhouse gas reduction plans, although the Section 15183.5(b) includes a list of elements that may—or may not—be included in the GHG reduction plans, including public review. This section must be limited only to plans which have been fully vetted by technical experts and the general public.

As currently adopted, this section adequately provides for examination of ALL relevant plans. Expanding the list in a manner that may appear exhaustive, but is actually not, may increase the likelihood that relevant plans, such as a CMP, will be ignored.

The proposed Amendment to Section 15125 should not be adopted.

Section 15130

This section includes greenhouse gas reduction plans among the plans which may be used as a basis for analysis of cumulative impacts. This is inappropriate for two reasons: potentially limited scope of the plans and lack of public review.

The proposed Section 15183.5 provides for greenhouse reduction plans but it is not clear whether or not the plans would be adopted city by city or on a regional basis. Reliance on a plan designed to address only activities within the boundaries of a given municipality would exclude other cumulative impacts. Impacts are rarely contained entirely within the boundaries of a given municipality but spread far and wide. Impacts due to GHG are not merely local or even regional, but are global. Unless GHG plans are adopted over a wide area, they cannot address cumulative impacts.

Section 15183.5(b) includes a list of elements that may—or may not—be included in the GHG reduction plans, including public review. The framework for the content and adoption of reduction plans is so open, that reliance on the plans to reach any conclusions pursuant to CEQA would be inappropriate.

While proposed Section 15183.5(b)(2) indicates that the plans are to be reviewed pursuant to CEQA, it is possible and highly likely that the plans would be adopted pursuant to a negative declaration. While public notices are required prior to adoption of a negative declaration, public hearings are not. Pursuant to existing Guidelines Section 15074, a negative declaration need not be adopted by an elected body and in some communities are adopted by administrative personnel. In any case, though the negative declarations would be subject to public review, the underlying action, i.e. the greenhouse gas reduction plan, may not be.

It is inappropriate and contrary to the purposes of CEQA to suggest reliance on plans that are not subject to any statutory standards or public review. This section must be limited only to plans which have been fully vetted by technical experts and the general public.

Section 15183.5(b)

This section provides for preparation of greenhouse reduction plans. Section 15183(b)(1) provides optional guidance for the content and adoption of the plans. The proposed language is permissive in nature, so plans may—or may not—quantify GHG emissions; they may—or may not—establish thresholds at which emissions would be considered cumulatively considerable; they may—or may not—specify measures that would reduce emissions to an acceptable level; and they may—or may not—be adopted in a public process. The word “may “ in 15183(b)(1) should be changed to “shall”. Absent this change, GHG reduction plans cannot be relied upon for conclusions in a CEQA analyses.

The language contained in Section 15183(b)(2) requires that environmental documents be prepared for GHG reduction plans. However, it is possible and highly likely that the plans would be adopted pursuant to no more than negative declaration. Would an “environmental document” for this purpose include a notice of exemption?

While public notices are required prior to adoption of a negative declaration, public hearings are not. Pursuant to existing Guidelines Section 15074, a negative declaration need not be adopted by an elected body, merely by the decision-making body, which would be the person or persons delegated authority over the given action. In some communities certain actions and the accompanying environmental documents are adopted by administrative personnel. In any case, though the negative declarations would be subject to public review, the underlying action, i.e. the greenhouse gas reduction plan, may not be. This section must be revised to stipulate that GHG reduction plans must be subject to public review and adopted only after a public hearing.

Appendices

The introductory note at the beginning of the checklist in Appendix G helps to reduce confusion as to the status of the checklist. Despite the fact that the checklist in Appendix G is clearly labeled “Sample Question”, the checklist is often represented as a list of state mandated thresholds. Thus, it is helpful to have this clarified at the beginning of the checklist in the manner proposed. The material in Section II. Agricultural and Forest Resources appears to reflect State law and is also helpful, as is the material in Appendix F regarding energy conservation.

I strongly urge, however, that the proposed changes in Section XVI. Transportation/Traffic be rejected.

As currently proposed, the section eliminates cumulative considerations from the examination of transportation impacts. An impact would be considered significant only if the capacity of the transportation system were exceeded.

As stated by the court in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 quoting Selmi's *Judicial Development of CEQA*:

“One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. Perhaps the best example is air pollution, where thousands of relatively small sources of pollution cause a serious environmental health problem.

"CEQA has responded to this problem of incremental environmental degradation by requiring analysis of cumulative impacts. Because of the critical nature of this concern, courts have been receptive to claims that environmental documents paid insufficient attention to cumulative impacts. For example, in *San Franciscans for Reasonable Growth*, [*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 198 Cal.Rptr. 634] the court stated that absent meaningful cumulative analysis, there would never be any awareness or control over the speed and manner of downtown development. Without that control, 'piecemeal development would inevitably cause havoc in virtually every aspect of the urban environment.'

"This judicial concern often is reinforced by the results of cumulative environmental analysis; the outcome may appear startling once the nature of the cumulative impact problem has been grasped." (*Selmi, Judicial Development of CEQA* (1984) 18 U.C. Davis L.Rev. 197, 244, fn. omitted.)

The court continued:

We agree with the foregoing assessment of a cumulative impacts analysis. We find the analysis used in the EIR and urged by GWF avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling ... We conclude the standard for a cumulative impacts analysis is defined by the use of the term "collectively significant" in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have ...

The proposed change to Section XVI suggests that only the final increment in increased demand for transportation systems would be significant, by which time impacts would be startling and cause havoc.

In addition, this approach would virtually guarantee that impacts would NOT be mitigated. In accordance with *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard*, (1994) 512 U.S. 374, required mitigation must be directly related to an impact and must be proportional to be impact. If impacts are considered significant, and thus requiring mitigation, only when a given project brings the system to a state of havoc, that final project would be required to provide mitigation. Absent identification of an impact, no mitigation can be required. However, the project which finally pushed the system into a state of havoc may be a relatively small project, making a relatively small contribution to the havoc. Legally and morally, one small project cannot be required to mitigate a problem largely created by a string of previous projects. Thus, the impact would be unmitigated.

The approach suggested in the revised checklist Section XVI, is not only contrary to the purposes of CEQA, it is counterproductive to the stated goal of reducing GHG emissions. Standard traffic analyses are geared toward differences between LOS D, LOS E, and LOS F, which are defined as follows:

LOS D-Highway movement approaching unstable flow. Speed tolerable but subject to sudden and considerable variation. Less maneuverability. Average speed 40 mph.

At intersections delays to approaching vehicles may be substantial during short peaks within the peak period, but enough cycles with lower demand occur to permit periodic clearance of developing queues.

LOS E-Highway flow unstable with rapidly fluctuating speeds and flow rates. Short headways, low maneuverability. Average speed 35 mph.

At intersections there may be long queues of vehicles waiting upstream of the intersection and delays may be great (up to several signal cycles).

LOS F-Highway flow forced. Speed and flow may drop to zero. Average speed less than 20 mph.

At intersections conditions are jammed, with traffic exceeding capacity. Back-ups from locations downstream or on the cross street may restrict or prevent movement of vehicles out of the approach under consideration.

Traffic at LOS D or E is within capacity of the system, but is fairly congested and well below free flow conditions. Air quality analyses in numerous EIRs show **greater emissions for more congested traffic**. Not only will hot spots be created at congested intersections as vehicles idle, but a given volume of traffic moving from Point X to Point Y will produce more emissions in a stop and go situation than at free flow. Public agencies routinely cite reduction in air emissions due to reduced congestion as an overriding consideration when approving roadway projects that may lead to other impacts. Granted, at upper speeds under a free flow condition emissions may increase, but emissions increase well before capacity is reached.

Failure to address parking could result not only on impacts on local neighborhoods but increased emissions due to people cruising a neighborhood looking for parking places, idling at the ends of parking aisles waiting for parking, etc.. Lack of parking is a common cause of local controversy, especially at the residential/commercial interface, and consideration of parking is consistent with the local balancing of values carried out by the individual public agency as part of its decision making process, pursuant to Public Resources Code Sections 21002, 21002.1 and 21081.

Optimistic thinking may be that increased congestion and lack of parking would result in greater use of commuter transit resulting in emissions reductions over the long term, but mass transit is not a practical alternative in many, if not most, areas of the state. Further, a recent MTA study found that commuting via Metro-link versus automobile-only commuting **increased** emissions of NOx and particulate matter.

If concerns exist that alternate means of transportation have been given short shrift in environmental analyses as compared to vehicular traffic, then the checklist should be augmented. Suggested items include:

- Would the project result in impairment of pedestrian circulation?
- Would the project result in impairment of bicycle circulation?
- Would the project interfere with any transit route?

The objective should be a win/win, not a lose/lose, situation.

The proposed Amendments in Section XVI. Transportation/Traffic must be rejected.

Additional items addressing the affects of global warming should also be considered as follows:

The need for additional buffers in coastal areas to provide areas for habitat retreat as sea levels rise should be addressed as follows in Section IV. Biological Resources:

- c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, elimination of buffer areas needed for habitat retreat necessitated by rising sea level, or other means?

Changes in sand deposition/beach replenishment, rising sea level, and flood hazard due to increased peak flood levels must be addressed in Section IX. Hydrology and Water Quality or other section as appropriate with the addition of the following items:

- Substantially alter sand transport in a manner which would affect beach replenishment, taking into account rising sea levels?
- Place homes or others structures in an area that would likely be inundated by rising sea levels within the next fifty years?
- Necessitate the construction of a coastal protection device to protect proposed structures either currently or with the next fifty years, taking into account current predictions as to rising sea levels?

- Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, taking into account changing patterns of precipitation and climate change?
- Place structures within a 100-year flood hazard area which would impede or redirect flood flows taking into account changing patterns of precipitation and climate change?
- Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam, taking into account changing patterns of precipitation and climate change?

Changes in water supply due to reduced snowpack/climate change must be addressed in Section XVII Utilities and Service Systems:

d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed, taking into account changing patterns of precipitation and climate change? (Climate change may already be addressed in the applicable urban water master plans.)

Conclusion

Thank you for the opportunity to comment on the proposed Amendments. The proposed Amendments should **NOT** be adopted as currently drafted.

Please notify me of other such opportunities in the future. Thank you.

Yours truly,

A handwritten signature in black ink, appearing to read 'Sandra L. Genis', with a stylized flourish at the end.

Sandra L. Genis