



VIA E-MAIL: CEQA.Rulemaking@resources.ca.gov

November 10, 2009

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

Re: Changes to Proposed Amendments to the State CEQA Guidelines dated October 23, 2009

Dear Mr. Calfee:

On behalf of the above-mentioned organizations, thank you for providing us with the opportunity to comment on the Changes to Proposed Amendments to the State CEQA Guideline released on October 23, 2009. 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.

We incorporate by reference the comments contained in our August 27, 2009 letter on the Proposed CEQA Guideline Amendments dated July 3, 2009. The recommendations contained in our earlier comment letter would greatly improve the Proposed Guidelines by further clarifying their intent and application consistent with SB 97, AB 32 and SB 375.

There are a few other places where additional revisions to the most recent changes to the Proposed Amendments are necessary.

15064.4(b) – p. 6:

This subdivision now provides:

- (b) A lead agency should consider the following **factors, among others**, when assessing the significance of impacts from greenhouse gas emissions on the environment.

The addition of the words “among others” may be interpreted to require a lead agency to always consider *more* than the 3 factors outlined in subsections (b)(1), (b)(2) & (b)(3). While the circumstances of an individual project may indeed require a lead agency to consider additional factors, that will not always be the case. As the Proposed Guidelines recognize elsewhere, CEQA grants considerable discretion to lead agencies in determining the significance of environmental impacts in the context of a specific project. The Proposed Guidelines and supporting documents also acknowledge that there is no one-size-fits-all greenhouse gas (GHG) analysis that can be applied to all projects throughout the state. For these reasons, lead agencies should also be given the discretion to determine what, if any, additional factors should be considered when assessing the significance of GHG impacts in the context of a specific project. Therefore, we suggest that the words “among others” be deleted from Section 15064.4(b).

Section 15126.2 (a) – p.15:

One of the primary purposes of an environmental impact report (EIR) under CEQA is to “to identify the *significant effects* on the environment of a project.” Public Resources Code Section 21002.1(a) (emphasis added). The CEQA Guidelines further clarify that an EIR is required to be “a detailed statement...describing and analyzing the *significant environmental effects* of a project and discussing ways to mitigate or avoid the effects.” CEQA Guidelines Section 15362 (emphasis added). Thus, the law makes clear that CEQA requires an EIR to evaluate those environmental impacts that are determined to be potential significant.

To avoid confusion and the implication that the new language added to Section 15126.2(a) of the Changes to Proposed Amendments requires an EIR to evaluate *all* impacts of locating development in certain hazardous areas, we recommend the subsection be amended to read:

- (a) Similarly, the EIR should evaluate the **potentially significant** impacts, **if any**, of locating development in other areas susceptible to hazardous conditions (e.g., floodplains,

coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

Section 15126.4(c) – p.19:

The Changes to Proposed Amendments add the following new sentence to Section 15126.4 (c):

“Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision.”

This meaning of this sentence is unclear and its interpretation and application will lead to confusion and unnecessary litigation—precisely what the Legislature and Governor sought to avoid by passing and signing SB 97 into law. The use of the language “not otherwise required” appears to be advising that the only GHG mitigation that is recognized under CEQA is that which is not otherwise required by current law. The implication is that standards set forth in existing environmental law and code requirements cannot be cited as mitigation. Such an approach would be inconsistent with a long line of CEQA case law that makes clear that compliance with environmental standards is an appropriate form of mitigation in CEQA documents (See, *Sundstrom v. County of Medocino*. (1988) 202 Cal.App.3d and *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337 and more recently, *Tracy First v. City of Tracy* 177 Cal. App. 4th 1 (2009)).

Furthermore, the use of the language "not otherwise required" can also be construed to mean that a measure cannot be considered as mitigation for greenhouse gas emissions if it is required to mitigate other impacts. It is common practice in EIRs to recognize that a mitigation measure for one impact may help to reduce others, and to cross-reference such measures in different sections of the EIR. In fact, the literature and policy discussions on GHG impacts clearly recognize the idea of "co-benefits" where measures to reduce one type of emissions also help in reducing others.

Second, the word "may" is typically permissive in the CEQA Guidelines, but the structure of this sentence suggests that a measure could only be considered valid mitigation if it were "not otherwise required." This awkward construction will lead to confusion, and give rise to claims against projects based on types of mitigation that have been widely accepted in CEQA practice and in CEQA case law for many years.

Finally, the second sentence of Section 15126.4(c) is inconsistent with the many efforts at the state, regional and local levels to adopt GHG emissions reduction and energy conservation standards. The very purpose of such standards is to incentivize individual projects to be designed to comply with them. The new language of 15126.4(c) would have an unintended punitive effect of penalizing projects that comply with government adopted plans or standards by leaving them open to claims that the project must be further redesigned or even denied in order to further reduce GHG emissions. This is fundamentally at odds with existing CEQA practice, SB 97.

For these reasons we request that the second sentence of Section 15126.4 be deleted.

The Proposed CEQA Guidelines on GHG Must Be Consistent With SB 375

The importance of the Proposed Guidelines Amendments reflecting SB 375's CEQA provisions cannot be overstated. For this reason, we reiterate below our concern that several places in the Proposed Guidelines Amendments continue to conflict with the plain language of SB 375.

Section 15125(d) – p.14:

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 15130(b)(1)(B) p. 14-15:

This section is intended to address how cumulative impacts should be discussed in CEQA documents. However, 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...

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

Subsection b) asks “Would the project:

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

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