via electronic mail

November 10, 2009

Christopher Calfee, Special Counsel
ATTN: CEQA Guidelines
California Resources Agency
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Re: Comments on Revised Text of Proposed Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97

Dear Mr. Calfee:

Thank you for the opportunity to comment on the Revised Text of the Proposed Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions ("Proposed Guidelines"). We are pleased that the Resources Agency incorporated several of the suggestions identified in our August 27, 2009

comment letter, including changes to Section 15093 regarding the Statement of Overriding Considerations and modifications to language in Appendix G for assessing potential impacts to traffic and transportation. We do, however, have continued concerns over proposed language regarding the quantification of project greenhouse gas emissions and the analysis of the effects of climate change on proposed projects. In addition, while we appreciate added language regarding the need for greenhouse gas mitigation to be additional, the proposed text is ambiguous. We hope that Resources will carefully consider and incorporate our suggested improvements to the Proposed Guidelines.

I. Proposed Text of Section 15064.4(a) Continues to Conflict with Existing CEQA Guidance and Law

As a statute designed to ensure that information on environmental impacts is effectively communicated to decisionmakers and the public, CEQA requires that a lead agency "use its best efforts to find out and disclose all that it reasonably can" and that an EIR reflect "a good faith effort at full disclosure." Guidelines §§ 15144; 15151. Whether an EIR is sufficient as an informational document is a question of law, for which the lead agency is not afforded deference. *See, e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435. While proposed Section 15064.4(a) first acknowledges the good-faith effort requirement, it proceeds to state that a lead agency "shall have discretion to determine" whether to describe project impacts qualitatively, quantitatively, or through performance based standards. Because the determination of what constitutes a good-faith effort is a question of law, proposed Section 15064.4(a) improperly suggests that the lead agency is afforded deference in determining the adequacy of an EIR as an informational document. Thus, in cases where a lead agency only describes project emissions qualitatively and a good-faith effort at full disclosure would also require a quantitative analysis, the lead agency could point to Section 15064.4(a) to erroneously claim that its decision to only use a qualitative description of project impacts should be afforded deference.

Even prior to the Guidelines' final approval, Section 15064.4(a) is already fostering misplaced conclusions of CEQA's requirements. For example, in its proposed Guidance for Valley Land-Use Agencies in Addressing GHG Emission Impacts for New Projects Under CEQA, the San Joaquin Valley Air Pollution Control District asserts that "[e]mission reduction achieved through implementation of BPS would be pre-quantified, thus negating the need for project specific quantification of GHG emissions." (SJVAPCD, Guidance for Valley Land-Use Agencies in Addressing GHG Emission Impacts for New Projects Under CEQA at 3 (Nov. 5, 2009), *available at* http://www.valleyair.org/Programs/CCAP/CCAP_idx.htm). However, as the Statement of Reasons recognizes, quantification of the greenhouse gas emissions resulting from a project "is reasonably necessary to ensure an adequate analysis of GHG emissions …. [e]ven where a lead agency finds that no numeric threshold of significance applies to a proposed project." (Statement of Reasons at 18.) Indeed, numerical data on project emissions is often critical to supporting a fair argument that a project may have a significant impact on the environment notwithstanding compliance with a threshold of significance. *See, e.g., Center for Biological Diversity v. Town of Yucca Valley*,

CIVBS800607, San Bernardino County Sup. Ct. (May 14, 2009) (numerical emissions resulting from project in conjunction with scientific and factual analysis by CAPCOA presented fair argument that project GHG impacts were significant regardless of EIR's finding that project GHG impacts were less than significant through purported compliance with qualitative and performance based standards). Especially in the case of large projects with large emissions, it is not defensible to rely solely on qualitative or performance based standards to determine significance. (*See* BAAQMD, Proposed Thresholds of Significance at 6 (Nov. 6, 2009) (noting that "efficiency-based GHG thresholds for individual land use project may not be appropriate for very large projects. If there is a fair argument that the project's emissions on a mass level will have a cumulatively considerable impact on the region's GHG emissions, the insignificance presumption afforded to a project that meets an efficiency-based GHG threshold would be overcome.").

Despite the importance of quantitative data on project emissions in understanding project impacts, the language of Guidelines § 15064.4(a) serves to bolster the misplaced argument that readily available quantitative data on project emissions need not be provided to the public because a lead agency is only required to provide quantitative *or* qualitative information on project emissions to comply with CEQA. To maintain consistency with CEQA and avoid confusion and abuse, Sections 15064.4(a)(1) and (2) should be deleted. These provisions conflict with CEQA's informational mandates and do not add value in clarifying CEQA's requirements as applied to greenhouse gases. Accordingly, Section 15064.4(a) should be revised to state:

> (a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data on available information, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.~~ A lead agency shall have discretion to determine, in the context of a particular project, whether to:~~
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> > ~~(1) Use a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use. The lead agency has discretion to select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use; and/or~~
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> > ~~(2) Rely on a qualitative analysis or performance based standards.~~

II. The Proposed Addition to Section 15126.2 Should Explicitly Refer to an Analysis of the Potential Impacts of Climate Change

In explaining the proposed changes to Section 15126.2, the Notice of 15 Day Comment Period acknowledges that "particularly in light of the release of a discussion draft of the California Adaption Strategy, additional guidance on how to address the effects of a changing climate on a project would be appropriate." (Notice at 2.) Therefore, "the proposed revision specifically lists the types of areas (including floodplains, coastlines, and wildfire risk areas) that may be most impacted by the effects of climate change." (Id.) However, while the intent of the revisions is purportedly to provide guidance of the evaluation of the effects of climate change, climate change is nowhere referenced in the proposed language.

As set forth more fully in our comments dated August 27th, absent specific language reminding lead agencies to consider the effect of climate change on the project, it is unlikely that lead agencies will consider the consequences of placing a project in an area vulnerable to future sea level rise, increased wildfire risk, or other threats posed by climate change. Accordingly, the proposed revision to Section 15126.2 should be modified to state:

> Similarly, the EIR should evaluate the impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), including hazardous conditions caused or exacerbated by the effects of climate change, as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

III. Changes to Section 15126.4(c) Should be Revised to Remove Unnecessary Ambiguity

We appreciate the changes to Section 15126.4(c), which appear to be an effort to incorporate the well-accepted and commonsense principle that emission reductions that would otherwise be required with or without the project does not constitute legitimate mitigation under CEQA. Just as a project proponent could not point to an established national park as mitigation for a project's biological resource impacts, pointing to greenhouse gas reductions that occur as a result of legal or other requirements do not function to mitigate project impacts. Indeed, the requirement that greenhouse gas reductions be additional is fundamental to both compliance-based and voluntary carbon credit markets. The Kyoto Protocol requires offset projects under the Clean Development Mechanism to demonstrate additionality.[1] AB 32 similarly requires that reductions—both for purposes of compliance and for early voluntary reduction credits—be "in addition to any greenhouse gas reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." Health & Saf. Code § 38562(d)(2). The leading standard governing creation and trading of

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[1] Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 12, § 5(c) (requiring "[r]eductions in emissions that are additional to any that would occur in the absence of the certified project activity").

voluntary carbon credits on the private market similarly requires additionality.[2] Experts and researchers interviewed by the GAO for its recent report to Congress overwhelmingly identified additionality as the most important characteristic of a credible offset.[3] However, the proposed Guideline that attempts to capture the principle that greenhouse gas mitigation must be additional is unnecessarily ambiguous. As currently drafted, the proposed revision to Section 15126.4(c) states:

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

The negative implication of this statement is that reductions that *are* otherwise required *may not* constitute mitigation. Nonetheless, one could argue that as drafted, the Guideline does not limit a project proponent from pointing to emission reductions that are otherwise required as mitigation for project impacts. To remove any ambiguity, the text should be revised to state:

> Only reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision.
>
> or
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> Reductions in emissions that are ~~not~~ otherwise required may not constitute mitigation pursuant to this subdivision.

Thank you for considering these comments. If you have any questions, please contact Matt Vespa at mvespa@biologicaldiversity.org or (415) 436-9682 x309.

Sincerely,

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[2] Voluntary Carbon Standard Program Guidelines (Nov. 18, 2008) at 4; Voluntary Carbon Standard 2007.1 (Nov. 18, 2008) at 16.

[3] [3]U.S. Gov't Accountability Office, Carbon Offsets: The U.S. Voluntary Market is Growing, but Quality Assurance Poses Challenges for Market Participants, No. GAO-08-1048 (Aug. 2008) at 52.

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