

## Letter 11

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### **Comment 11-1**

The commenter recommends replacing the word “should” in the second sentence of proposed section 15064.4(a) with the word “shall.” This proposed revision would make the description, calculation or estimation of greenhouse gas emissions a mandatory element of CEQA analysis.

### **Response 11-1**

Section 15064.4(a) states: “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, 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: (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 (2) Rely on a qualitative analysis or performance based standards.” This section has been further revised to clarify that regardless of which method the lead agency chooses to determine the significance of a project’s greenhouse gas emissions, the analysis must be based, “to the extent possible on scientific and factual data.”

The Natural Resources Agency believes proposed section 15064.4 reflects the existing CEQA principle that there is no iron-clad definition of “significance.” (State CEQA Guidelines, § 15064(b); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1380-81.) It further recognizes that calculation of emissions must inform a determination of significance, or such calculation is not legally required. It therefore leaves it to the discretion of a lead agency to determine when calculation helps establish the significance of greenhouse gas emissions associated with a project, and when a qualitative analysis is, instead, appropriate.

As to terminology, section 15005 defines certain terms used throughout the Guidelines to indicate whether a directive is mandatory, advisory, or permissive. According to that section:

- a) “Must” or “shall” identifies a mandatory element which all public agencies are required to follow
- b) “Should” identifies guidance provided by the Secretary for Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations.
- c) “May” identifies a permissive element which is left fully to the discretion of the public agencies involved.

The Office of Planning and Research and the Natural Resources Agency used the word “shall” or “must” where a statutory provision or rule of case law requires an agency to take a specific action. The proposed amendments use the word “should” where there is no direct authority requiring a certain action. Thus, for example, in the proposed amendments to section 15064.4, there is no statutory provision expressly requires a lead agency “to describe, calculate, or estimate that amount of greenhouse gas emissions resulting from a project.” However, the policies underlying CEQA (i.e., informed decision-making and demonstrating that environmental considerations have been accounted for) indicate that lead agencies should do so unless there is a compelling reason not to.

The Natural Resources Agency believes that as written, proposed section 15064.4 requires lead agencies to use their best efforts to investigate and disclose all that they reasonably can regarding a project’s potential adverse impacts. (*Ibid*; see also State CEQA Guidelines, § 15144.) Section 15064.4 is designed to assist lead agencies in performing that required investigation. In particular, it provides that lead agencies should quantify GHG emissions where quantification is possible and will assist in the determination of significance. For the reasons explained above, the Natural Resources Agency rejects this comment.

#### **Comment 11-2**

Proposed section 15064.4(b) is ambiguous. It states that lead agencies “may” consider the factors in subsections (b)(1) through (b)(3). However, that section could also be interpreted to mean that lead agencies need not consider those factors.

#### **Response 11-2**

The Natural Resources Agency has further refined Section 15064.4(b) in response to comments. The section now provides: “A lead agency should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment.” The previous language could have been interpreted to mean lead agencies had the option to consider whether to assess potentially significant environmental impacts caused by greenhouse gas emissions. It further suggested the list of factors was limited to those proscribed in subsection (b). This change clarifies that, in the absence of important countervailing considerations, a lead agency must consider, at a minimum,

the listed factors and determine the significance of any potentially significant impacts caused by greenhouse gas emissions from a proposed project.

**Comment 11-3**

Proposed section 15064.4(b) is also ambiguous because, if lead agencies need not consider subdivision (b)(3), it is unclear whether lead agencies must consider substantial evidence that a project's incremental contribution to a significant cumulative impact is cumulatively considerable.

**Response 11-3**

See response to 11-2. The Natural Resources Agency rejects this comment.

**Comment 11-4**

There is no scientifically accepted methodology for quantifying greenhouse gas emissions. Until a scientifically accepted methodology is available, proposed section 15064.4(b) may be used to delay projects and increase the cost of preparing an EIR.

**Response 11-4**

The Resources Agency believes proposed section 15064.4 reflects the existing CEQA principle that there is no iron-clad definition of "significance." (State CEQA Guidelines, § 15064(b); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1380-81 ("Berkeley Jets").) It further recognizes that calculation of emissions must inform a determination of significance, or such calculation is not legally required within the context of CEQA. Consequently, the Natural Resources Agency has intentionally left it to the discretion of a lead agency to determine when calculation helps establish the significance of greenhouse gas emissions associated with a project, and when a qualitative analysis is, instead, appropriate. It has also intentionally left it to the lead agency's discretion to determine what, if any, modeling is appropriate relative to this analysis. As further detailed in the Initial Statement of Reasons, quantification of greenhouse gas emissions is possible for a wide range of projects using currently available tools and modeling. (Initial Statement of Reasons at pg. 18.)

Finally, the Natural Resources Agency cautions that it is unlawful to misuse CEQA, and that the "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.) Therefore, the Natural Resources Agency rejects this comment.

**Comment 11-5**

The intent of proposed section 15093(d) is unclear. To clarify the intent, that section should be revised to state "...the agency may weigh the adverse local environmental effects against the region-wide or statewide environmental benefits."

**Response 11-5**

The Natural Resources Agency has further refined Section 15093 in response to comments. Specifically, it has added "region-wide or statewide environmental benefits" to the other benefits listed in section 15093(a), and deleted the proposed subdivision (d). The previously proposed subdivision (d) could have been interpreted to mean that lead agencies should consider region-wide and statewide environmental benefits in isolation. Listing region-wide and statewide environmental benefits among the other benefits enumerated in subdivision (a) placed those benefits within the proper context of the section governing statements of overriding considerations. This change clarifies that lead agencies must balance region-wide and statewide environmental benefits, just like the other listed benefits, against a project's significant adverse impacts in making a statement of overriding considerations. This change still advances the policy objective of encouraging lead agencies to consider benefits of a project that may extend beyond just a local jurisdiction.

**Comment 11-6**

Removal of the question from Appendix G regarding parking capacity does not eliminate the need to analyze the lack of parking as a potential impact. If the elimination of that question is intended to encourage pedestrian and transit-friendly design, the Guidelines should instead provide a CEQA exemption for such projects.

**Response 11-6**

Case law recognizes that parking impacts are not necessarily environmental impacts. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal. App. 4th 656, 697.) Therefore, the question related to parking is not relevant in the initial study checklist. However, if there is substantial evidence indicating a potential for adverse environmental impacts from a project related to parking capacity, such as for example attendant air quality issues that result from cars idling while searching for parking spots, the lead agency must address such potential impacts regardless of whether the checklist contains parking questions. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) Consequently, the Natural Resources Agency rejects this comment.

See the discussion of parking in the Thematic Responses for additional information.