

Letter 13

Pete Parkinson, AICP
Vice President, Policy and Legislation
American Planning Association, Cal Chapter

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Comment 13-1

The CEQA Guidelines should address adaptation to climate change. Commenter does not find the explanation given in the Initial Statement of Reasons to be convincing given the California Natural Resources Agency, on August 3, 2009, released the California Climate Adaptation Strategy.

Response 13-1

Several comments submitted as part of the Natural Resources Agency's SB97 rulemaking process urged it to incorporate the draft California Climate Adaptation Strategy ("Adaptation Strategy") into the CEQA Guidelines. In considering such comments, it is important to understand several key differences between the Adaptation Strategy and the California Environmental Quality Act. First, the Adaptation Strategy is a policy statement that contains recommendations; it is not a binding regulatory document. Second, the focus of the Adaptation Strategy is on how we can change in response to climate change. CEQA's focus, on the other hand, is the analysis of greenhouse gas emissions from a particular project, and mitigation of those emissions if they are significant. Given these differences, CEQA should not be viewed as the tool to implement the Adaptation Strategy; rather, as indicated in the Strategy's key recommendations, advanced programmatic planning is the primary method to implement the Adaptation Strategies.

There is some overlap between CEQA and the Adaptation Strategy, however. As explained in both the Initial Statement of Reasons and in the draft Adaptation Strategy, section 15126.2 may require the analysis of the effects of a changing climate under certain circumstances. Having reviewed all of the comments addressing the effects of climate change, the Natural Resources Agency revised the proposed amendments to include a new sentence in Section 15126.2 clarifying the type of analysis that would be required.

Specifically, the new sentence calls for analysis of placing projects in areas susceptible to hazards, such as floodplains, coastlines, and wildfire risk areas. Such analysis would be appropriate where the risk is identified in authoritative maps, risk assessments or land use plans. According to the Office of Planning and Research, at least sixty lead agencies already require this type of analysis. (California Governor's Office of Planning and Research. (January, 2009). The California Planners' Book of Lists 2009. State Clearinghouse. Sacramento, California, at p. 109.) This addition is reasonably necessary to guide lead agencies as to the scope of analysis of a changing climate that is appropriate under CEQA.

As revised, section 15126.2 would provide that a lead agency should analyze the effects of bringing development to an area that is susceptible to hazards such as flooding and wildfire (i.e., potential upset of hazardous materials in a flood, increased need for firefighting services, etc.), both as such hazards currently exist or may occur in the future. Several limitations on the analysis of future hazards, however, should apply. For example, such an analysis may not be relevant if the potential hazard would likely occur sometime after the projected life of the project (i.e., if sea-level projections only project changes 50 years in the future, a five-year project may not be affected by such changes). Additionally, the degree of analysis should correspond to the probability of the potential hazard. (State CEQA Guidelines, § 15143 (“significant effects should be discussed with emphasis in proportion to their severity and probability of occurrence”).) Thus, for example, where there is a great degree of certainty that sea-levels may rise between 3 and 6 feet at a specific location within 30 years, and the project would involve placing a wastewater treatment plant with a 50 year life at 2 feet above current sea level, the potential effects that may result from inundation of that plant should be addressed. On the other extreme, while there may be consensus that temperatures may rise, but the magnitude of the increase is not known with any degree of certainty, effects associated with temperature rise would not need to be examined. (State CEQA Guidelines, § 15145 (“If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate the discussion of the impact”).) Lead agencies are not required to generate their own original research on potential future changes; however, where specific information is currently available, the analysis should address that information. (State CEQA Guidelines, § 15144 (environmental analysis “necessarily involves some degree of forecasting. While seeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can”) (emphasis added).)

The revision in section 15126.2 is consistent with the general objective of the Adaptation Strategy and is consistent with the limits of CEQA. Not all issues addressed in the Adaptation Strategy are necessarily appropriate in a CEQA analysis, however. Thus, the revision in section 15126.2 should not be read as implementation of the entire Adaptation Strategy. Unlike hazards that can be mapped, for example, other effects associated with climate change, such as the health risks associated with higher temperatures, may not allow a link between a project and an ultimate impact. Habitat modification and changes in agriculture and forestry resulting from climate change similarly do not appear to be issues that can be addressed on a project-by-project basis in CEQA documents. Water supply variability is an issue that has already been addressed in depth in recent CEQA cases. (See, e.g., *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434-435 (“If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.”).) Further, legislation has been developed to ensure that lead agencies identify adequate water supplies to serve projects many years in the future under variable water conditions. (See, e.g., Water Code, § 10910 et seq.; Government Code, § 66473.7.) The Natural

Resources Agency finds that the revised text of section 15126.2 provides the guidance suggested in this comment. No further changes to the text are required to respond to this comment.

Comment 13-2

Revise Appendix G to include the recommendations made by the Adaptation Strategy to local agencies to analyze and adapt climate impacts.

Response 13-2

The Natural Resources Agency declines to revise Appendix G to address adaptation specifically. Several questions in Appendix G already ask about flooding and wildfire risks. Further, as explained above, section 15126.2 has been revised to provide specific guidance on when such analysis should occur.

Comment 13-3

Revise Section 15126.2(a) so that when EIR is prepared, the lead agency is directed to evaluate how the project's environmental setting may be modified or impacted in the future by climate change.

Response 13-3

Section 15126.2 has been revised in response to this and similar comments. The revision is substantially similar to the text suggested in this comment. The revised text focuses on areas that are susceptible to hazards, but does not specifically focus on changes that may result from climate change. The word "susceptible" is used to signal that hazards existing today and those that are reasonably expected to occur in the future should be included in the analysis. Such hazards may include hazards that result from the effects of climate change or other causes. The appropriate focus in this section, however, is on the potential interaction between the project and the hazard, and not the cause of the hazard. Because the revised text addresses the concerns raised by the commenter, the Natural Resources Agency declines to further revise the text in response to this comment.

Comment 13-4

Revise Section 15126.4(c)(5) to express a preference for on-site mitigation and ensure offsite measures and offsets be effective, verifiable, and enforceable.

Response 13-4

CEQA does not grant lead agencies authority to mitigate a project's significant impacts; rather, the statute allows lead agencies to use the authority they already have pursuant to some other source of law for the purpose of mitigating significant impacts. (Public Resources Code, § 21004.) With certain

limited exceptions, CEQA has not limited the discretion of a lead agency to choose the most appropriate mitigation for a particular project. The existing CEQA Guidelines do already contain provisions that recognize a lead agency's obligation to balance various factors in determining how or whether to carry out a project. (State CEQA Guidelines, § 15021(d).) Further, the Guidelines already require that "[w]here several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified." (State CEQA Guidelines, § 15126.4(a)(1)(B).) The Natural Resources Agency cannot, however, state in the Guidelines that all lead agencies have the authority to prioritize types of mitigation measures. Each lead agency must determine the scope of its own authority based on its own statutory or constitutional authorization. Because the Guidelines already state that a lead agency should balance various factors in deciding how to carry out a project, no further clarification is necessary. The Natural Resources Agency, therefore, rejects the suggestion to revise the Guidelines to express a preference for on-site mitigation measures.

The comment further asks that the Guidelines require that off-site mitigation be effective, verifiable, and enforceable. The text of section 15126.4(c) already requires that lead agencies consider "feasible" means of mitigating greenhouse gas emissions. Use of the word "feasible" requires the lead agency to find that any measure, including offsets, would be "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (State CEQA Guidelines, § 15364.) The text of section 15126.4(c) has been further revised in response to comments to clarify that mitigation must be "supported by substantial evidence and subject to monitoring or reporting[.]" This revision addresses the commenter's concern regarding verifiability. Finally, all mitigation must be enforceable as stated in existing section 15126.4(a)(2). Therefore, it is not necessary to further state that off-site measures must be "enforceable." For the reasons stated above, the Natural Resources Agency finds that the concerns raised in this comment are addressed by the proposed revisions and the existing language in the Guidelines.

Comment 13-5

Revise the CEQA Guidelines to include the reasoning given in the Initial Statement of Reasons for preferring on-site mitigation. This would add language to remind lead agencies that all mitigation measures must be effective and enforceable, encompassing offsite measures, offsets, and credits.

Response 13-5

This comment raises two issues. First, on-site measures may be preferable because they are easier to enforce. As explained in Response 13-4, above, existing section 15021(d) allows lead agencies to consider a variety of factors in determining how to carry out a project. Further, section 15126.4(a)(1)(B) recognizes a lead agency's ability to choose between mitigation measures. Thus, existing authority already allows a lead agency, within the scope of its authority, to consider enforceability issues.

Second, the comment suggests that language regarding enforceability should be specifically added to the subdivision recognizing off-site mitigation. The Natural Resources Agency declines that suggestion for several reasons. Adding that language only to the section on off-site could mistakenly signal that on-site mitigation need not be enforceable. Further, a principle of drafting regulatory text is to only use necessary words. If all mitigation must be enforceable, it is not necessary to state again that off-site mitigation must also be enforceable. Thus, this suggestion is rejected.

Comment 13-6

Revise Section 15130(b)(1)(B) to be more specific in identifying information from regional modeling programs.

Response 13-6

The Natural Resources Agency finds that adding the phrase “information from” would be redundant because the sentence already states that “additional information” may be used in determining a summary of projections for a cumulative impacts analysis. Thus, this suggestion is rejected.

Comment 13-7

Revise Section 15183.5(c) to be more specific in identifying “CEQA documents” for a finding of consistency with certain projects.

Response 13-7

The Natural Resources Agency has revised the text of section 15183.5(c) with substantially similar language. It refers to “environmental documents” because that term is defined in section 15361, and is more inclusive than the phrase “CEQA document”.

Comment 13-8

Revise Appendix F (II)(D)(4) to emphasize the use of renewable fuels as mitigation.

Response 13-8

The Natural Resources Agency appreciates the suggested addition, but finds that it would be redundant of both the first parenthetical in the subject sentence and the Introduction to Appendix F which already states the goal of “increasing reliance on renewable energy sources.” Thus, this suggestion is not adopted.