Letter 17

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Comment 17-1

The lack of a numerical threshold is problematic and will result in continual inconsistencies, especially when responsible agencies act and use an environmental document, to determine significance of projects throughout the state.

Response 17-1

The Natural Resources Agency acknowledges the commenter's discomfort with the lack of numeric thresholds. The proposed amendments recognize a lead agency's ability to apply such thresholds where available and appropriate, but also recognize that a qualitative analysis may also be appropriate for a given project. (See, e.g., proposed Section 15064.4(a).)

No state agency has developed a statewide greenhouse gas emissions threshold, nor is one necessarily desirable. First, given the development of the proposed amendments and thresholds in several regional air districts, the California Air Resources Board has placed its CEQA threshold effort on hold. Second, requiring application of a particular threshold in the CEQA Guidelines would represent a major departure from CEQA. CEQA leaves the determination of significance to the lead agency. (State CEQA Guidelines, § 15064.) The precise methodology used to determine significance is also left to lead agencies. (*Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) Nothing in SB97 indicated that the legislature intended to change these existing CEQA concepts.

Moreover, different thresholds of significance are applied throughout the state for different impact categories. For example, different air districts have different threshold levels of different pollutants. Thus, when acting as responsible agency for projects in different parts of the state, the commenter likely confronts environmental documents that use different thresholds. While greenhouse gases are global pollutants, local jurisdictions or regional agencies may determine that they have limited capacity for all greenhouse gas emissions within their own jurisdictions, for example, based on existing levels of emissions and projected growth, and so may decide that thresholds in their area should reflect that limitation. This circumstance is consistent with existing Guidelines section 15064(b), which acknowledges that the determination of significance may vary with a project's setting.

Comment 17-2

Use of the word "consider" in the proposed amendment to Appendix F (I)(3), is unclear and may allow for additional analysis and unnecessary mitigation for power usage at the discretion of the lead agency. Similarly, the standard for "adequate" is unclear and could be interpreted as "significant" if lead agency determines a previously prepared environmental document on a project is not sufficiently analyzed or mitigated the effects of energy production.

Response 17-2

The added sentence in Appendix F(I) is intended to allow lead agencies to avoid double-counting impacts and mitigation. Such consideration must be consistent with existing CEQA rules, however, and the addition is not to be read as a new requirement or as a relaxation of any existing requirement. If a power plant has already been reviewed under CEQA, the analysis of that plant's impacts may be incorporated by reference, if appropriate, into documents analyzing projects that would rely on that energy source. Section 15152 addresses whether an impact is "adequately addressed". No revision is required in response to this comment.

Comment 17-3

The relationship between CEQA exemptions and GHG emissions is unclear. A numeric threshold would provide a direction regarding when Section 15300.2(b) – Exceptions, apply to a project's review.

Response 17-3

The application of CEQA exemptions remains unchanged. Pursuant to section 21084 of the Public Resources Code, the Secretary for Natural Resources has designated classes of projects that do not have a significant effect on the environment, and are therefore exempt from CEQA. Those categorical exemptions are described in sections 15301 to 15333 of the State CEQA Guidelines. All categorical exemptions are subject to the exception described in section 15300.2(b). That section states: "[a]ll exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant."

Case law has clarified that agencies may rely on the finding made by the Secretary for Natural Resources that a project falling within a categorical exemption will not have a significant effect on the environment, unless substantial evidence indicates that an exception makes the exemption inapplicable. Regarding the exception in section 15300.2(b), substantial evidence would need to demonstrate that successive projects (1) of the same type (2) in the same place, and (3) over time, cause a significant effect. Moreover, to trigger the exception, that evidence would have to consist of facts, reasonable assumptions based on facts, or expert opinion based on facts. "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (State CEQA Guidelines, § 15384.)

Statutory exemptions, including those listed in Article 18 of the CEQA Guidelines, are not subject to the exceptions listed in section 15300.2.

Notably, because a threshold of significance represents a level at which impacts are normally not significant, even a numeric threshold for greenhouse gas emissions would not relieve a lead agency of its duty to consider substantial evidence indicating significance despite compliance with a threshold. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, 1108-1109.)

In light of the above, no revision to the proposed amendments is required.

Comment 17-4

Climate change effects (sea level rise, flooding, coastal erosion, etc.) should be addressed and included when information is reasonably available, pursuant to Sections 15144 (Forecasting) and 15145 (Speculation).

Response 17-4

Several comments submitted as part of the Natural Resources Agency's SB97 rulemaking process urged it to address climate change effects. As explained in the Initial Statement of Reasons, 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 the effects of placing projects in areas that are 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 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 in response to this comment.