Letter 22

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Comment 22-1

Commenter is concerned the guidance for analysis of cumulative impacts as proposed is not consistent with ARB's GHG planning work and will fail to meet a unified statewide plan. Under the current scheme, each lead agency is able to set its own GHG significance thresholds and its own definition of "cumulatively considerable" impacts, will fail to meet AB32's reduction goals.

Response 22-1

This comment raises two issues. First, the comment suggests that the CEQA Guidelines should expressly tie a CEQA analysis to the Air Resources Board's work establishing emissions inventories, regulations, targets and projections pursuant to AB32. Second, the comment criticizes the CEQA Guidelines for allowing lead agencies to establish their own thresholds for greenhouse gas emissions and to determine whether a project will have cumulatively considerable impacts. Each concern is addressed below.

First, AB32 and CEQA are separate and distinct statutory schemes. AB32 is designed to regulate only certain sectors. CEQA, on the other hand, applies to any project, as defined, that is not exempt. As provided in proposed new section 15064.4, a lead agency must evaluate all substantial evidence before it regarding the potential adverse impacts resulting from a project's greenhouse gas emissions. A project's compliance with existing regulatory requirements may be relevant in the analysis, but is not the sole determinant of significance for CEQA purposes. The Third District Court of Appeal, in *Communities for a Better Environment v. Resources Agency* (2002) 103 Cal.App. 4th 98, 110-114, concurred with a trial court observation that "a lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation." The court further explained, however, that lead agencies have a "duty under the fair argument approach to look at evidence beyond the regulatory standard" to any evidence that a project may have a significant effect on the environment. (*Id*. at 113.) The proposed amendments recognize this role for regulatory standards in proposed new Section 15064.4(b)(3), which provides that a lead agency should consider the extent to which a project complies with regulations addressing greenhouse gas emissions. Thus, to the extent the comment suggests that a project's emissions should be considered in light of emissions reductions mandated by AB32, the above explains how regulations implementing AB32 would be relevant in the analysis.

Second, CEQA currently requires lead agencies to determine whether a project's incremental contribution to a problem is cumulatively considerable, and encourages them to develop their own thresholds of significance. (Public Resources Code, § 21083(b)(2); State CEQA Guidelines, § 15064.7.) Nothing in SB97, requiring the adoption of guidelines addressing the analysis of greenhouse gas emissions, changed those rules. Moreover, neither SB97 nor AB32 suggest that CEQA is a tool to achieve AB32's emissions reductions goals.

Specific suggestions for revisions to the proposed amendments are addressed below.

Comment 22-2

Revise Sections 15064(h)(3), 15064.4(a), (a)(1), and 15183.5(b)(1) to be consistent with the Initial Statement of Reasons. Permissive language – "may, should, etc " in the Guidelines is not consistent with "must, require, necessary, etc" in the Initial Statement of Reasons.

Response 22-2

This comment raises two issues. First, it suggests that the proposed amendments should be revised to be mandatory, instead of using the word "should" or may." Second, it suggests that this change is necessary to be consistent with the Initial Statement of Reasons.

First, 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 comment points to several instances in the proposed amendments where the word "should" is used. 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. For example, section 15126.4(c), as revised, states that "lead agencies shall consider feasible means … of mitigating the significant effects of greenhouse gas emissions." This mandatory requirement mirrors the requirement in Public Resources Code section 21002.1(b) that "[e]ach public agency shall mitigate or avoid the significant effects on the environment that it carries out or approves whenever it is feasible to

do so." The proposed amendments use the word "should" when there is not direct authority requiring a certain action, but policies underlying CEQA justify the action absent compelling countervailing considerations. Thus, for example, in the proposed amendments to section 15064(h)(3), there is no statutory provision expressly requiring a lead agency to document how compliance with a plan reduces an impact to a less than significant level. 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 (i.e., the link is so obvious that making the demonstration would merely be repetitive). This same reasoning applies to the provisions in proposed section 15064.4 noted in the comment. Section 15183.5(b) has been revised to indicate that plan elements are not completely discretionary, but instead "should" contain the listed elements. Again, this guidance is based on policy considerations set out in the Initial Statement of Reasons.

As to potential inconsistencies between the Initial Statement of Reasons and the text of the proposed amendments, the latter should control. The Initial Statement of Reasons is a document required to be prepared as part of the rulemaking process to explain an agency's reasoning and rationale underlying regulatory action. (Government Code, § 11346.2(b).) While the Initial Statement of Reasons may serve a function similar to legislative history, only the text of the proposed amendments have a binding effect. Nevertheless, the statements from the Initial Statement of Reasons noted in this comment have been revised in the Final Statement of Reasons to ensure consistency with the regulatory text. Beyond this clarification in the Final Statement of Reasons, however, no further revisions to the proposed amendments are necessary in response to this comment.

Comment 22-3

Revise Section 15130, to site Section 15065(a)(3), not 15065(c).

Response 22-3

The Natural Resources Agency appreciates the comment noting this error in the existing CEQA Guidelines. The cross-reference to section 15065(a)(3) has been correct in the revised text.

Comment 22-4

Clarify Section 15130(b)(1)(B) to identify an appropriate means or method for determining what is cumulatively considerable. AB32 defined the scope of the cumulative problem associated with greenhouse gas emissions. Therefore, the Guidelines should define "cumulatively considerable" in a way that ties directly to AB32 implementation.

Response 22-4

As explained in Response 22-1, above, CEQA and AB32 are separate and distinct statutory schemes. SB375 included specific changes to CEQA so that it could support AB32's goals; however, the general rule remains the same where provisions were not changed. (Statutes 2008, Ch. 728, § 1(f) ("[n]ew provisions of CEQA should be enacted so that the statute encourages … local governments to make land use decisions that will help the state achieve its climate goals under AB 32").) Because SB97 did not indicate any intent to directly tie a cumulative impacts analysis to AB32 implementation, the Natural Resources Agency cannot do so in the proposed amendments. However, the existing CEQA Guidelines contain guidance on how regulatory requirements may assist in the determination of significance. (See, State CEQA Guidelines, § 15064(h)(3).) The proposed amendments built on that guidance to include regulations for the reduction of greenhouse gas emissions in section 15064(h)(3). Proposed section 15064.4(b)(3) has also been modeled on that existing framework. Indeed, the reference to regulations to implement a "statewide plan" could encompass regulations implementing AB32 and ARB's Scoping Plan.

The Natural Resources Agency disagrees that the plans listed in section 15130(b)(1)(B) would not address the full scope of the cumulative problem because greenhouse gas emissions are global. As explained in the Initial Statement of Reasons, the listed plans would be expected to yield information such as inventories of existing emissions and projections of future emissions. (Initial Statement of Reasons, at p. 44.) Nothing in the comment suggests that the listed plans would not contain information on global emissions levels. The listed plans may also contain information about statewide, regional and/or local emissions inventories and projections. For example, the amendments to section 15130(b)(1)(B) would add regional transportation plans and plans for the reduction of greenhouse gas emissions to the types of plans that may be considered in a cumulative impacts analysis. Pursuant to SB375, regional transportation plans for certain urban areas must contain a sustainable communities strategy, which would be designed to achieve regional emissions targets for emissions from cars and light duty trucks. Additionally, plans complying with proposed new section 15183.5 would contain both inventories and projections that could be used as provided in section 15130(b)(1)(B). (See, proposed State CEQA Guidelines § 15183.5(b)(1)(A).)

Finally, previously proposed section 15130(f) has been proposed for deletion, since it merely restates the law governing cumulative impacts.

For the reasons described above, the Natural Resources Agency declines the suggestion to expressly link the analysis of cumulative greenhouse gas emissions to AB32.

Comment 22-5

Revise Section 15183.5(b)(1)(D) to specify how an emissions level is determined.

Response 22-5

As explained in the Initial Statement of Reasons, proposed section 15183.5(b) is designed to assist lead agencies in determining whether a plan for the reduction of greenhouse gas emissions may be used in a cumulative impacts analysis as provided in sections 15064(h)(3) and 15130(d). (Initial Statement of Reasons, at pp. 54-55.) That section was drafted broadly so that it may address plans prepared by local governments, school districts and other special districts, public universities, state agencies, and other public agencies. The determination of what level of emissions may be considered to not be cumulatively considerable necessarily depends on many factors, including the activities to be covered by the plan, the time period covered by the plan, etc. Notably, SB375 specified many factors that may be considered in establishing regional emissions targets, "including, but not limited to, data needs, modeling techniques, growth forecasts, the impacts of regional jobs-housing balance on interregional travel and greenhouse gas emissions, economic and demographic trends, the magnitude of greenhouse gas reduction benefits from a variety of land use and transportation strategies, and appropriate methods to describe regional targets and to monitor performance in attaining those targets." (Gov. Code, § 65080(b)(2)(A)(i).) Moreover, while the Air Resources Board's Scoping Plan recognizes the role of local plans for the reduction of greenhouse gas emissions and suggests elements that such plans could contain, the Scoping Plan does not indicate precisely how emissions targets should be set. Leaving the precise determination of a target level to the lead agency is consistent with CEQA's existing rule that lead agencies must determine whether a particular incremental contribution is cumulatively considerable. (Public Resources Code, § 21083(b)(2).) For the reasons described above, the Natural Resources Agency declines to revise section 15183.5(b)(1)(D) to specify precisely how an emissions target should be set.

Comment 22-6

Section 15183.5(b)(1)(D) is ineffective because setting a target level is a permissive element and because the proposed amendments allow a lead agency to define the meaning of the phrase "not cumulatively considerable."

Response 22-6

The Natural Resources Agency has revised proposed section 15183.5(b)(1) to provide that a plan for the reduction of greenhouse gas emissions "should" include the enumerated elements, instead of leaving the content of such plans completely to the discretion of lead agencies. The reason for the change is that, in most case, each of the listed elements would be needed for a plan to satisfy the criteria in sections 15064(h)(3) and 15130(d). This revision is, therefore, based on the policies underlying CEQA. Since there is no statute or rule recognized in case law requiring that such plans include each element, that section cannot use mandatory language such as "shall" or "must". Moreover, the CEQA statute leaves to lead agencies the determination of whether a particular project's incremental contribution is cumulatively considerable. (Public Resources Code, § 21083(b)(2).) Thus, proposed section 15183.5(b)(1)(D) is consistent with the statute. For the reasons stated above, the Natural Resources

Agency disagrees that section 15183.5(b)(1)(D) is ineffective, and declines to make any further revisions in response to this comment.

Comment 22-7

Proposed amendments are incapable of ensuring that the cumulative impacts of GHG Reduction Plans, on a statewide basis, do not exceed AB32 goals. The only way to not frustrate the state's GHG goals is to tie every GHG Reduction Plan to statewide planning by ARB.

Response 22-7

As explained in Responses 22-1 and 22-4, above, CEQA and AB32 are separate statutes. While CEQA encourages "[l]ocal agencies [to] integrate the requirements of [CEQA] with planning and environmental review procedures otherwise required by law or by local practice," the purpose of a plan for the reduction of greenhouse gas emissions is not necessarily to ensure compliance with AB32. (Public Resources Code, § 21003.) Rather, such a plan would be used to demonstrate that a particular project's incremental contribution to a problem is not cumulatively considerable.

The comment also refers to the cumulative impacts of various plans for the reduction of greenhouse gas emissions being implemented throughout the state. Notably, proposed section 15183.5(b)(1)(F) would require that such plans be adopted following environmental review. Thus, to the extent there is evidence of such plans resulting in cumulative impacts, such impacts would be addressed in that environmental review. No further revisions are required in response to this comment.

Comment 22-8

Revise Section 15183.5(b) to require any programmatic analysis of GHG emissions to demonstrate its consistency with ARB publications such as emissions inventories, GHG reduction measures, regional vehicle targets. Specifically replace section 15183.5(b) with the following:

> The GHG emissions limit for a programmatic analysis of greenhouse gases must be demonstrated to be derived from ARB publications, including emissions inventories, adopted or proposed GHG emissions reduction measures, and regional passenger vehicle GHG targets. Regions may allocate their regional passenger vehicle GHG targets between sub-regions in a publicly reviewed allocation plan.

Response 22-8

The Natural Resources Agency declines to incorporate the text suggested in this comment. First, the suggested text would not provide guidance to lead agencies regarding the elements that should be included in a plan for the reduction of greenhouse gas emissions. As explained in the Initial Statement of Reasons, providing guidance on the use of such plans is a policy objective supporting the new section.

(Initial Statement of Reasons, at pp. 54-55.) Second, the Agency is unaware of any statutory provision or rule of case law that would authorize the CEQA Guidelines to require that a greenhouse gas emissions target be derived from ARB's inventories and other work related to AB32. As a practical matter, agencies are likely to want to use as much existing and reliable data as possible.

Comment 22-9

Removing "life cycle" from Appendix F is counterproductive and will distort and disrupt energy analysis.

Response 22-9

The Natural Resources Agency disagrees that removing the term "lifecycle" from Appendix F is counterproductive. As explained in the Initial Statement of Reasons, the term "lifecycle" has been interpreted in various ways, including some that extend far beyond the indirect effects analysis that is required by CEQA. (Initial Statement of Reasons, at pp. 60-61.) Thus, that term was removed from Appendix F to avoid further confusion in its application.

Notably, the statutory underpinning for Appendix F is Public Resources Code section 21100(b)(3), which states that an environmental impact report must contain: "Mitigation measures proposed to minimize significant effects on the environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy." That section does not refer to "lifecycle" at all; therefore, removal of that word from Appendix F will not be counterproductive.

Comment 22-10

Removal of "lifetime" in Appendix F created an inconsistency that energy efficiency and initial dollar cost cannot be compared in terms of cost-effectiveness.

Response 22-10

The Natural Resources Agency disagrees that the removal of the word "lifetime" results in a meaningless sentence in the introduction to Appendix F. As amended, the sentence would state: "For many projects, cost effectiveness may be determined more by energy efficiency than by initial dollar costs." The only change is to replace the phrase "lifetime costs" with the phrase "cost effectiveness". Both phrases address the ultimate cost of a project, but the latter avoids the confusion associated with the term "lifecycle." Thus, as explained in the Initial Statement of Reasons, and Response 22-10, above, the Natural Resources Agency declines to retain the phrase "lifetime costs" in Appendix F.

Comment 22-11

Clarify amendments to Appendix F (II)(A)(4). Changes completely shift the purpose of the section from considering initial costs to identifying energy supplies. Commenter suggests using the term "lifetime" – consistent with Section II(H) – to preserve the sentence's original meaning.

Response 22-11

Appendix F(II)(A)(4) is included among several items that a lead agency may, at its discretion, include in a project description. That sentence asks both about energy costs and energy supplies. Focusing that sentence on the source of energy supplies simplifies the sentence. It does not remove energy cost from consideration, as sentences (A)(2) and (A)(3) both go to energy use and energy conservation. The Natural Resources Agency rejects the suggested text because it would not address the question of energy supply. No further revision is required in response to this comment.

Comment 22-12

Clarify amendments to Appendix F (II)(C)(3). Adding water conservation and solid waste reduction serves no purposes in this section. Peak energy demand is not an issue in water conservation or solid waste reduction. Comment suggests modifying section to encompass "energy savings" as a result of water conservation and solid waste reduction. Add (II)(C)(4) instead of modifying (II)(C)(3).

Response 22-12

The Natural Resources Agency appreciates the comment raising this issue. The addition of water conservation and solid-waste reduction to Appendix (II)(C)(3) was an inadvertent error. Appendix F has been further revised to remove water conservation and solid-waste reduction from that section and add it to section (II)(D)(2) regarding mitigation as originally intended. No further revision is required in response to this comment.

Comment 22-13

Clarify whether a regional transportation plan should be considered under CEQA Guidelines Section 15126.6(e)(3)(A) or 15126.6(e)(3)(B). Commenter requests guidance to resolve an issue of the role of a regional transportation plan (RTP) and when a "no project alternative" is appropriate.

Response 22-13

The Natural Resources Agency does not propose to amend section 15126.6 regarding the "No Project Alternative." Therefore, this comment goes beyond the scope of the proposed action. The proposed amendments address how an agency should analyze and mitigate its project's greenhouse gas

emissions, and so would apply to environmental review of regional transportation plans. No further revisions are required in response to this comment.

Comment 22-14

Clarify Section 15125(d) using the term "regional blueprint plans" considering the statutory terms used in SB 375. It is unclear if the subtleties of SB 375 require that the alternative planning strategy be added to this section.

Response 22-14

The Natural Resources Agency proposes to recognize "regional blueprint plans" in section 15125(d) for the reasons described in the Initial Statement of Reasons. (Initial Statement of Reasons, at pp. 33-34.) While SB375 requires the development of sustainable communities strategies under certain circumstances, such strategies will not be finalized for several years. Therefore, even if regional blueprint plans are ultimately supplanted by sustainable communities strategies in the future, adding the term serves an immediate, interim purpose. The existing text of section 15125(d) already refers to regional transportation plans, so once a metropolitan planning organization adopts a sustainable communities strategy, that strategy would be considered.

Alternative planning strategies should not be added to section 15125(d). Government Code section 65085(b)(2)(H)(v) states: "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." No further revisions are required in response to this comment.

Comment 22-15

Clarify Section 15125(d) using regional plans in the plural. Typically, regions only have one specific type of plan: transportation, housing, blueprint, etc.

Response 22-15

The plans in existing section 15125(d) are referred to in the plural form. While a region may have only one regional transportation plan, for example, a particular project could be located in more than one region. In that case, reference to multiple regional plans would be required. No revisions are required in response to this comment.

Comment 22-16

Clarify the purpose of Section 15126.4(c)(1). Section might be unnecessarily restrictive and redundant by mistakenly referring to mitigations that have already been identified through the EIR process.

Response 22-16

The phrase "that are required as part of the lead agency's decision" is necessary to ensure that, if a project is to rely on measures identified in a plan or mitigation program to mitigate its greenhouse gas emissions, those measures are actually required to be implemented as part of the project. This phrase is consistent with the existing text in section 15126.4(a)(2), which requires that mitigation measures be fully enforceable. No revision is required in response to this comment.

Comment 22-17

Revise Section 15126.4(c)(2) to focus on project elements rather than "other measures" which could be interpreted to mean non-project related measures.

Response 22-17

The Natural Resources Agency declines to incorporate the suggested text into section 15126.4(c)(2). The phrase "other measures" signals that emissions reductions need not be limited to those resulting from project features, project design or measures specified in Appendix F. That phrase does not refer to reductions that are not associated with the project; rather, as written, that section applies to "[r]eductions in emissions resulting from a project[.]" No further revision is required in response to this comment.

Comment 22-18

Revise Section 15126.4(c)(5) to clarify why measures that are already adopted need to be further "incorporated" into a plan.

Response 22-18

Section 15126.4(c)(5) addresses mitigation when the project being analyzed is a plan. Existing section 15126.4(a)(2) states: "In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." Thus, the phrase "incorporation of" in section (c)(5) parallels the existing requirement in (a)(2) by requiring that the requirements in an adopted ordinance or regulation be included in the plan under consideration. The Natural Resources Agency, therefore, declines to incorporate the suggested text.

Comment 22-19

Section 15126.4(c)(5), “reduce” should be plural.

Response 22-19

The word “reduces” in proposed section (c)(5) was already plural. No further revision is required in response to this comment.

Comment 22-20

Commenter supports the changes made to Appendix G: Transportation/Traffic which will facilitate the proper analysis of infill projects in the context of climate change.

Response 22-20

The Natural Resources Agency appreciates the support for the changes to Appendix G. No further revisions are required in response to this comment.