

Letter 2

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Letter

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Comment 2-1

Revise and clarify Section 15064.4(b)(1) to allow lead agencies to consider a project's impact in combination with related past, present, or future projects and activities. This would allow for analysis of GHG emissions of new power plants in the context of the entire electric system. If not, 15064.4(b)(1) could be read to only allow for projects' emissions to be assessed on an incremental or project specific basis. Absent the systematic analysis, new power plants may be subject to unnecessary mitigation requirements. Ultimately, this would lead to continuing the use of less efficient plants and an unintended consequence of system-wide increases in GHG emissions.

Response 2-1

Section 15064.4(b)(1) states that agencies should consider the extent to which the project results in an increase or a decrease in greenhouse gas emissions compared to the existing environmental setting. This section reflects the existing CEQA rule in section 15125 of the State CEQA Guidelines that project impacts should normally be compared against the environment as it exists at the time that environmental review is performed. (Initial Statement of Reasons, at p. 20.) In performing this analysis, a lead agency would need to account for all project components, and both direct and indirect impacts. (State CEQA Guidelines, §§ 15358, 15378.) Thus, to the extent that a project would cause changes in greenhouse gas emissions in an existing system, and substantial evidence substantiates such changes, those changes may be considered pursuant to section 15064.4(b)(1).

The comment's suggested addition of the phrase "in combination with related past, present, or future projects and activities" to section 15064.4(b)(1) would unnecessarily conflate that section with section 15130 on the analysis of cumulative impacts. While the Natural Resources Agency agrees that greenhouse gas emissions are most appropriately analyzed in most cases as cumulative impacts, the Guidelines cannot suggest that lead agencies never need to consider project-specific impacts if substantial evidence suggests such an impact. Further, the Natural Resources Agency disagrees that section 15064.4(b)(1) "could be read to only allow for projects' emissions to be assessed on an incremental or project specific basis." Section 15064.4 would have to be read in connection with sections 15064(h), 15130, and 15355, which require that a project's incremental contribution be considered together with the contributions of other past, present, and reasonably foreseeable probable future projects. In either a project-specific or cumulative impact analysis, a lead agency would consider

the extent to which a project increases or decreases emissions compared to the existing environmental setting. Thus, the Natural Resources Agency declines to revise section 15064.4(b)(1) as suggested.

Comment 2-2

Lead agencies will misinform the public of what the environmental impacts of new power plants are and ignore the State's energy policy and regulatory environment if they, as section 15064.4 may suggest, erroneously assume new power plants will incrementally increase GHG emissions rather than result in an overall system-wide reduction in emissions. This would risk violating one of CEQA's fundamental purposes of informing the public, which may result in unnecessary legal challenges.

Response 2-2

To the extent this comment suggests that the CEQA Guidelines should contain language that addresses a specific industry or type of project, the Natural Resources Agency declines to revise the proposed amendments as suggested. The proposed amendments must be broad enough to encompass all types of projects that may be proposed. The concepts expressed in the proposed amendments should apply broadly enough to allow the California Energy Commission or local lead agencies to evaluate unique power generation projects. For example, section 15064.4, on the determination of significance of greenhouse gas emissions, states that the determination of significance "calls for a careful judgment by the lead agency," and "in the context of the particular project," after making "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." Further, the existing CEQA Guidelines already provide that an impact analysis must account for all project phases, including construction and operation, as well as indirect and cumulative impacts. (State CEQA Guidelines, §§ 15063(a) ("[a]ll phases of project planning, implementation, and operation must be considered in the initial study..."), 15064(h) (addressing cumulative impacts), 15126 ("[a]ll phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation"), 15358(a)(2) (defining "effects" to include indirect effects .)

The analysis of a new power plant's effect on the electricity system as a whole will necessarily depend on the substantial evidence that is in the record of the individual lead agency. The Natural Resources Agency cannot in the CEQA Guidelines instruct lead agencies regarding any assumptions that may or may not be appropriate for power plant projects.

No further revisions are necessary in response to this comment.

Comment 2-3

Amendments may be counterproductive and frustrate the State's Renewable Portfolio Standard. Some dispatchable generating units are needed to "firm" renewable energy supplies, such as solar and wind

power, and to provide system reliability. Such dispatchable generating units may also displace less efficient peaking units. Absent a system-wide context, a lead agency may unnecessarily require mitigation from projects that may have significant environmental benefits.

Response 2-3

The comment argues that requiring analysis and mitigation of greenhouse gas emissions associated with certain new power generation facilities may discourage new energy development. It points to two potential benefits of new power facilities: (1) supporting the use of renewable power by providing system reliability, and (2) displacing less efficient power generators from the power system.

CEQA requires analysis and mitigation of a project's significant adverse environmental impacts, even if that project may be considered environmentally beneficial overall. As the Third District Court of Appeal recently explained:

“[I]t cannot be assumed that activities intended to protect or preserve the environment are immune from environmental review. [Citations.]” There may be environmental costs to an environmentally beneficial project, which must be considered and assessed.

(*Cal. Farm Bureau Fed. v. Cal. Wildlife Cons. Bd.* (2006) 143 Cal. App. 4th 173, 196.) Nothing in SB97 altered this rule. Thus, lead agencies must consider whether the greenhouse gas emissions resulting from new power generation facilities may be significant, and if so, whether any feasible measures exist to mitigate those emissions. If such emissions are found to be significant and unavoidable, proposed amendments to section 15093 would expressly allow lead agencies to consider the region-wide and statewide environmental benefits of a project in determining whether project benefits outweigh its adverse environmental impacts.

As explained in Response 2-1, above, to the extent that a project would cause changes in greenhouse gas emissions in an existing system, and substantial evidence substantiates such changes, those changes may be considered pursuant to section 15064.4(b)(1).

Comment 2-4

Amendments may make siting new power plants more difficult if they are seen as incrementally contributing GHG emissions, jeopardizing the reliability of the electric grid and undermining the State's renewable energy goals.

Response 2-4

As explained in the Initial Statement of Reasons, the requirement to analyze and mitigate a project's environmental impacts arises from the CEQA statute. Similarly, the requirement to analyze and mitigate a project's greenhouse gas emissions does not arise from the proposed amendments to the CEQA Guidelines; rather, SB97 recognized that CEQA already requires such analysis, so the CEQA Guidelines

should be amended to provide guidance on how such analysis may be performed. Pursuant to the Administrative Procedure Act, the Guidelines must be consistent with statutory authority. Thus, to the extent that power generators experience difficulty in siting new facilities, the Guidelines would not create that difficulty.

This comment raises policy considerations supporting the development of new power generation facilities. However, for the reasons described above, the Legislature is the proper venue to raise such considerations.

Comment 2-5

Analysis of new power plants must be in the context of the entire electric system, accommodating lead agencies to analyze GHG emissions on a systematic, non-incremental basis.

Response 2-5

As explained in Response 2-1, above, section 15064.4(b)(1) advises lead agencies to consider the extent to which a project would increase or decrease greenhouse gas emissions compared to the existing environmental setting. The “setting” to be described varies depending on the project and the potential environmental resources that it may affect. In *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, for example, the lead agency failed to adequately describe the environmental setting by limiting its discussion primarily to the southern portions of its water system. Framing the setting narrowly resulted in impacts to the northern portion of the water system being ignored. Finding that section 15125 is to be construed broadly to ensure the fullest protection to the environment, the court in that case held that the lead agency was required to disclose that increased use of the southern portion of the water system would require greater diversions from the northern portion, and to analyze the impacts on species in the northern portion of the system. (*Id.* at pp. 873-875.) In the context of power generation, to the extent that a project may cause changes in greenhouse gas emissions in an existing power system, and substantial evidence substantiates such changes, those changes may be considered pursuant to section 15064.4(b)(1). Thus, section 15064.4(b)(1) does ensure that decision-makers and the public will be fully informed of a project’s potential impacts related to greenhouse gas emissions.

Responses to specific suggestions for changes to the text of the proposed amendments are provided below.

Comment 2-6

Add language to section 15064.4(a) stating that a lead agency has discretion “to consider all relevant factors and has broad discretion to” determine how to analyze greenhouse gas emissions.

Response 2-6

The comment's suggested text contains two components. The first would provide that a lead agency should consider "all relevant factors," but does not indicate what factors may be considered relevant. The second would state that lead agencies have "broad discretion" in determining how to analyze greenhouse gas emissions. The Natural Resources Agency declines to incorporate the suggested text for the reasons described below.

The first component of the suggestion is unnecessary. Section 15064.4(a) already provides that in determining how to analyze a project's greenhouse gas emissions, a lead agency has discretion to consider "the context of a particular project". That phrase would encompass both the project's characteristics and setting. (State CEQA Guidelines, §§ 15063(a)(1) (analyze all project components and phases), 16064(b) (significance may vary with the project's setting), 15064(d) (consider direct and indirect effects).) The addition of the phrase "relevant factors," therefore, is not required to achieve SB97's purpose of ensuring analysis of a project's greenhouse gas emissions.

The second component would be a potentially misleading statement of law. The discretion recognized in section 15064.4 is not unfettered. A lead agency's analysis, whether quantitative or qualitative, would be governed by the standards in the first portion of section 15064.4(a). The first sentence of that section applies to the context of greenhouse gas emissions the general CEQA rule that the determination of significance calls for a careful judgment by the lead agency. (Proposed § 15064.4(a) ("[t]he determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064".)) The second sentence sets forth the requirement that the lead agency make a good-faith effort to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. That sentence has been further revised to provide that the description, calculation or estimation is to be based "to the extent possible on scientific and factual data." The third sentence, as explained above, advises that the exercise of discretion must be made "in the context of a particular project." In other words, regardless of the methodology used, the analysis must demonstrate a good-faith effort to disclose the amount and significance of greenhouse gas emissions resulting from a project. Because the discretion of a lead agency is already defined in law, the Natural Resources Agency declines to further describe the breadth of that discretion in section 15064.4(a).

Comment 2-7

Add "methodology" in section 15064.4(a)(1) to be consistent with the remainder of the section.

Response 2-7

The Natural Resources Agency has revised the text of 15064.4(a)(1) to add the word "methodology" as suggested in this comment.

Comment 2-8

Section 15046.4(b) should include more inclusive language to allow a lead agency to consider all relevant factors in determining whether a project's impacts are significant.

Response 2-8

This comment suggests two additions to section 15064.4(b). The first would add the phrase "may include", which would make consideration of the listed factors completely discretionary. The second would add the word "considerations."

The Natural Resources Agency has revised the text of section 15064.4(b) to clarify that a lead agency should consider at least the factors listed in that section, as well as others if appropriate. Though the comment suggests that a lead agency's discretion to consider such factors should not be limited, the language of the factors indicates that they should be part of the lead agency's analysis. For example, (b)(2) asks whether "the project emissions exceed a threshold of significance that the lead agency determines applies to the project." A threshold is defined as a level at which impacts are normally less than significant. (State CEQA Guidelines, § 15064.7(a).) If a lead agency determines that the threshold applies to the project, it should consider whether a project's emissions exceed that threshold because that would indicate the significance of those emissions. Similarly, (b)(3) asks whether a project complies with regulations and requirements designed to reduce greenhouse gas emissions. Case law recognizes that compliance with environmental regulations is relevant to the determination of significance, so compliance with requirements should also be a part of a lead agency's significance determination. (*Comm. for a Better Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 111 ("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".)) Finally, since the accumulation of greenhouse gas emissions in the atmosphere may lead to environmental harm, a project's potential incremental contribution to that problem should be considered. Thus, because consideration of each of the listed factors plays a key role in the determination of significance of a project's greenhouse gas emissions, the Natural Resources Agency concluded that the word "should" is more appropriate than the word "may" in section 15064.4(b).

As noted in the Initial Statement of Reasons, however, "while subdivision (b) provides a list of factors that may assist public agencies to consider all relevant information, other factors can and should be considered as appropriate." (Initial Statement of Reasons, at p. 20.) To clarify that lead agencies may consider additional factors if appropriate, the Natural Resources Agency added the phrase "factors, among others" to section 15064.4(b). The addition of the word "factors" is responsive to the comment's suggested addition of the word "considerations."

For the reasons described above, however, the Natural Resources Agency declines to incorporate the precise language suggested in this comment.

Comment 2-9

Revise section 15064.4(b)(1) to add the phrase “in light of related past, present, or future projects and activities.” The analysis of determining if a cumulative effect is overall cumulatively considerable must be in the context of the incremental impact.

Response 2-9

As explained in Response 2-1, above, section 15064.4 was drafted to allow its use in considering both project-specific and cumulative effects of a project. The suggested addition would confine a lead agency’s analysis to just cumulative impacts, which would imply that project-specific impacts never need to be considered. Analysis of a particular project depends on the evidence before the agency regarding its potential impacts. Therefore, the Natural Resources Agency declines to incorporate the suggested text into section 15064.4(b)(1).

Comment 2-10

Add the phrase “or the significance of such emissions” to section 15064.4(b)(3). The purpose of this addition would be to allow a lead agency to rely on regulations implementing the ARB Scoping Plan. This would allow consideration of system-wide GHG emissions.

Response 2-10

The Natural Resources Agency finds that the suggested phrase is not necessary to effectuate the purpose of SB97. As currently drafted, section 15064.4(b)(3) would allow consideration of a project’s consistency with regulations implementing AB32 and the Air Resources Board’s Scoping Plan. Further, mitigation measures avoid or reduce significant effects, so a plan that mitigates greenhouse gas emissions necessarily reduces the significance of those emissions. Response 2-1, above, explains the circumstances in which a system-wide approach may be appropriate. Thus, the Natural Resources Agency declines to incorporate the suggested text.

Comment 2-11

Add subsection 15064.4(b)(4) to encourage and support a lead agency’s decision to rely on thresholds or guidance documents adopted by other agencies.

Response 2-11

The Natural Resources Agency declines to incorporate the text suggested in this comment. The addition would duplicate subdivision (b)(2), which already allows a lead agency to consider thresholds of significance. It also duplicates proposed section 15064.7(c), which allows a lead agency to formally adopt a threshold established by another agency or recommended by experts.

Comment 2-12

Add paragraph 15064.4(c) to support a lead agency's determination to consider region-wide or statewide environmental benefits in light of local adverse environmental effects. This would replicate proposed amendment to 15093(d).

Response 2-12

The Natural Resources Agency declines to incorporate the text suggested in this comment. Balancing project benefits against its impacts is not appropriate in the initial determination of significance. As explained in Response 2-3, above, even environmentally beneficial projects may have adverse impacts that must be analyzed and mitigated. CEQA provides that the balancing of project benefits against its adverse impacts should not be included in environmental documents, but rather should appear in a statement of overriding considerations. (Public Resources Code, § 21081(b); State CEQA Guidelines, § 15093.)

Comment 2-13

Clarify Section 15126.4(c) to add the word "significant" to avoid implying a zero threshold is required.

Response 2-13

The Natural Resources Agency has revised section 15126.4(c) to clarify that mitigation is only required for significant impacts. This is consistent with section 15126.4(a)(3) which states that mitigation is not required for impacts that are not significant.

Further, the Initial Statement of Reasons already explained the Natural Resources Agency's position that CEQA does not require a "zero net emissions" threshold. (Initial Statement of Reasons, at p. 21.)

Comment 2-14

Clarify Section 15126.4(c)(1) to add offset in addition to reduction and broaden measures in an existing plan or mitigation program to include those of other agencies. This would expand what a lead agency may consider for mitigating GHG emissions with the intended purpose of allowing for reference to a system-wide approach to determining significance and mitigation.

Response 2-14

The comment suggests two additions to section 15126.4(c)(1). The first would add the word offsets to the section on measures identified in existing plans. The Natural Resources Agency rejects that proposed addition because it is not necessary. Subdivision (c)(3) already recognizes that offsets may be used to reduce greenhouse gas emissions.

The second addition would state that reductions could be required either by the lead agency or “another agency.” This addition might imply that reductions in emissions that are completely unrelated to the project may be considered mitigation for that project. Section 21002 of the Public Resources Code, the source of the requirement to mitigate, states that “public agencies should not approve projects as proposed if there are ... feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]” Similarly, section 21081(a)(1) specifies a finding by the lead agency in adopting a project that “[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.” Both statutory provisions expressly link the changes to be made (i.e., the “mitigation measures”) to the significant effects of the project. Courts have similarly required a link between the mitigation measure and the adverse impacts of the project. (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 128-131 (EIR must discuss “the history of water pumping on [the off-site mitigation] property and its feasibility for providing an actual offset for increased pumping on the [project] property”).) The text of sections 21002 and 21081, and case law requiring a “nexus” between a measure and a project impact, together indicate that “but for” causation is a necessary element of mitigation. In other words, mitigation should normally be an activity that occurs in order to minimize a particular significant effect. Or, stated another way and in the context of greenhouse gas emissions, emissions reductions that would occur with or without a project would not normally qualify as mitigation.

The actions of other agencies with regard to a particular project may be considered, however, when an agency makes findings regarding the project’s impacts. Section 21081(a)(2) allows a lead agency to find that “changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.” Thus, the proposed addition is not necessary.

Comment 2-15

Clarify Section 15126.4(c)(2) to specify that other “project measures” must be related to GHG emission.

Response 2-15

The Natural Resources Agency declines to add the phrase “related to greenhouse gas emissions” because that phrase is not necessary. The title and introductory sentences in section 15126.4(c) clearly state that the entire subdivision relates to greenhouse gas emissions. The commenter’s concern regarding a “system-wide” analysis is addressed in Response 2-1, above.

Comment 2-16

Delete proposed amendment and replace Section 15130 (f). Suggested language would tighten the requirements of an EIR to require lead agencies to analyze GHG emissions when they *are* determined to be cumulatively considerable, as opposed to when they *may* be cumulatively considerable.

Response 2-16

In response to this and other similar comments, the Natural Resources Agency has deleted proposed subdivision (f) because that subdivision merely restates applicable law. The Natural Resources Agency declines to add the suggested text for the same reason.

Comment 2-17

Clarify Section 15183.5 to specify a lead agency may analyze and mitigate GHG emissions at the programmatic level when they are significant. This would avoid an assumption that a zero threshold may apply.

Response 2-17

The Natural Resources Agency has revised section 15183.5 as suggested by the comment.

Comment 2-18

Clarify Section 15183.5(b)(2) to specify if mitigation is required only when emissions are determined to be significant.

Response 2-18

The Natural Resources Agency declines to incorporate the suggested text because it is unnecessary. Section 15126.4(a)(3) already states that mitigation is only required where impacts are determined to be significant.