Letter 47

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Comment 47-1

Clarify that State and local agencies do not have authority to regulate aircraft emissions or activities associated with the operation of aircraft. As currently proposed, the Guidelines could result in confusion and leave airport-related projects vulnerable to burdensome and unnecessary CEQA litigation.

Response 47-1

The Natural Resources Agency declines to amend the CEQA Guidelines to specifically describe the authority of a lead agency to analyze and require mitigation for the effects of airport operations, or the limitations on the authority to analyze and mitigate the effects of aircraft. The proposed amendments are necessarily general because they will apply to all types of projects and agencies throughout the State of California. Potential preemption issues may arise in many different circumstances, and the precise extent of that preemption will depend on Congressional intent regarding the particular federal statute at issue. The existing CEQA Guidelines contain no provisions regarding the preemptive effect of other federal authorities, and the comment provides no basis to treat regulations addressing aircraft and flights differently. The existing text of the CEQA Guidelines already relieves lead agencies of any obligation to propose or analyze mitigation measures that cannot be legally imposed. (State CEQA Guidelines, § 15126.4(a)(5).) For the reasons described above, the Natural Resources Agency finds that the general provisions in the existing CEQA Guidelines described above are sufficient to address the concern raised in the comment.

The Natural Resources Agency notes further that the concern expressed in the comment, potential confusion regarding the extent of federal preemption related to aircraft operations, does not address the subject of this rulemaking package which is primarily limited to analysis and mitigation of greenhouse gas emissions. Indeed, the comment does not specify any of the proposed amendments that give rise to the stated concern. Thus, the comment exceeds the scope of this rulemaking package, and does not require any further response.

No revision of the proposed amendments is required in response to this comment.

Comment 47-2

Amend Guidelines to expressly state the limits of analysis for greenhouse gas emissions resulting from aircraft.

Response 47-2

Local regulation of aircraft and flights are pre-empted by federal laws; local regulation to mitigate the effects of airport operations are not, however, so long as the regulations do not directly affect aircraft or flights. (See, e.g., *City of Burbank v. Burbank-Pasadena-Glendale Airport Authority* (1999) 72 Cal.App.4th 366, 377-380.) Preemption will not be inferred; rather, it is the burden of the party claiming that preemption exists to prove it. (*Elsworth v. Beech Aircraft Corp*. (1984) 37 Cal. 3d 540, 548.) Nothing in the proposed amendments purports to allow any public agency to intrude into areas of exclusive federal regulation. Moreover, as explained in Response 47-1, above, the existing text of the CEQA Guidelines already relieves lead agencies of any obligation to propose or analyze mitigation measures that cannot be legally imposed. (State CEQA Guidelines, § 15126.4(a)(5).)

Even assuming that some mitigation measures related to aircrafts or flights are preempted by federal law, that limited preemption does not relieve the lead agency of its duty to analyze the effects of a project and to impose those measures that are feasible to mitigate any significant effects. (See, e.g., *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal. 4th 341.) The Legislature has, in fact, clearly stated its intent that CEQA apply to airport-related projects. (See, e.g., Public Resources Code, §§ 21080.35 ("For the purposes of Section 21069, the phrase "carrying out or approving a project" shall include the carrying out or approval of a plan for a project that expands or enlarges an existing publicly owned airport by any political subdivision, as described in Section 21661.6 of the Public Utilities Code"); 21091.5 ("the public review period for a draft environmental impact report prepared for a proposed project involving the expansion or enlargement of a publicly owned airport requiring the acquisition of any tide and submerged lands or other lands subject to the public trust for commerce, navigation, or fisheries, or any interest therein, shall be not less than 120 days").) A recent example of how a lead agency can mitigate the effects of greenhouse gas emissions resulting from airport operations in contained in a Memorandum of Understanding between the California Attorney General and the San Diego Regional Airport Authority regarding the San Diego International Airport Master Plan (May 2008) (retrievable online at http://ag.ca.gov/globalwarming/pdf/ San_Diego_Airport_Agreement.pdf),(copy attached).

As explained in Response 47-1, above, the proposed amendments are necessarily broadly drafted to apply to all types of projects and agencies throughout the state. Preemption issues may arise not only in projects involving aircraft, but also certain projects involving power generation and transmission, telecommunications, and other areas. It would not be appropriate for the CEQA Guidelines to attempt to describe the limits of each public agency's authority to analyze and mitigate environmental effects. Notably, public agencies that regularly confront preemption issues may choose to address those limitations in their own procedures implementing CEQA. (State CEQA Guidelines, § 15022.)

There is no express conflict between the proposed amendments and federal law, and it is not necessary to expressly define the limitations of analysis and mitigation of aircraft operation in order to effectuate the purpose of SB97. For the reasons stated above, the Natural Resources Agency declines to revise the proposed amendments as suggested in this comment.

Comment 47-3

Commenter is concerned lead agencies will attempt to identify GHG emissions from aircraft as part of an analysis of an airport project.

Response 47-3

As the comment notes, CEQA requires analysis and disclosure of the impacts of a project. As explained above in Response 47-1, existing section 15126.4(a)(5) relieves lead agencies of any obligation to propose or analyze mitigation measures that cannot be legally imposed. If, after analysis of a significant impact, a lead agency determines that it has no legal authority to impose mitigation, it may find that mitigation is infeasible, and adopt a statement of overriding considerations if it decides to proceed with the project. No revision is required in response to this comment.

Comment 47-4

Commenter is concerned that if the Guidelines do not specifically limit the analysis, lead agencies will unnecessarily include emissions in an analysis and consideration of mitigation that exceeds the scope of their authority to regulate.

Response 47-4

The comment appears to mix two distinct requirements in CEQA: (1) the duty to analyze and determine the significance of impacts and (2) the duty to mitigate significant impacts where feasible. Assuming that lead agencies for airport projects have limited authority to mitigate the emissions that result from aircraft does not support a conclusion that the *effects* of a project need not be analyzed. Cases addressing extraterritorial impacts provide a useful analogy.

The California Supreme Court recently addressed the analysis and mitigation of extraterritorial impacts in a case involving the expansion of a university campus. The Court explained:

> To illustrate the point, if campus expansion requires that roads or sewers be improved, the Trustees may do the work themselves on campus, but they have no authority to build roads or sewers off campus on land that belongs to others. Yet the Trustees are not thereby excused from the duty to mitigate or avoid [the university's] off-campus effects on traffic or wastewater management, because CEQA requires a public agency to mitigate or avoid its projects' significant effects not just on the agency's own property

> but "*on the environment*" (Pub. Resources Code, § 21002.1, subd. (b), italics added), with "environment" defined for these purposes as "the physical conditions which exist *within the area which will be affected by a proposed project*" (id., § 21060.5, italics added). Thus, if the Trustees cannot adequately mitigate or avoid [university's] off-campus environmental effects by performing acts on campus (as by reducing sufficiently the use of automobiles or the volume of sewage), then to pay a third party … to perform the necessary acts off campus may well represent a feasible alternative.

(*City of Marina, supra,* 39 Cal. 4th at 359-360; see also *American Canyon Community United for Responsible Growth v. City of American Canyon (2006) 145 Cal. App. 4th 1062, 1082-1083.*) Thus, consideration of impacts resulting in from a project that are within another agency's authority is required, as is consideration of any feasible alternatives. While a lead agency may determine that mitigation of impacts occurring within another jurisdiction are not feasible, the agency is not relieved of the duty to analyze and disclose such impacts. (See, e.g., *Tracy First v. City of Tracy* (2009) 177 Cal. App. 4th 912.)

Further, as explained in Response 47-2, above, the CEQA Guidelines are necessarily general, so the Natural Resources Agency declines to describe specific limitations on authority that apply only to a narrow class of projects.

Comment 47-5

Mitigation measures designed to directly or indirectly address greenhouse gas emissions related to aircraft operations are beyond the power of local agencies to impose. Revise the Guidelines to acknowledge California's limited authority to act under CEQA in areas where the federal government has already preempted the field.

Response 47-5

The determination of whether a particular measure is feasible is to be made by the individual public agency in the first instance. (Public Resources Code, § 21081(a)(3).) An agency's determination that a particular measure is legally infeasible is subject to de novo review by the courts. (*City of Marina, supra,* 39 Cal.4th at 355.) The existing text of the CEQA Guidelines already relieves lead agencies of any obligation to propose or analyze mitigation measures that cannot be legally imposed. (State CEQA Guidelines, § 15126.4(a)(5).) Thus, it is not necessary for the text of the Guidelines to specify which particular mitigation measures may be legally infeasible. The suggestion in this comment is therefore declined.

Comment 47-6

Out of state emissions are beyond the authority of the state to regulate under CEQA.

Response 47-6

The concern expressed in the comment, disagreement regarding the extent of analysis of out of state impacts, does not address the subject of this rulemaking package which is primarily limited to analysis and mitigation of greenhouse gas emissions. Thus, the comment exceeds the scope of this rulemaking package, and does not require any further response.

The Natural Resources Agency notes, however, the proposed amendments do not contain any geographic limitation, and are intended to apply to the extent that CEQA otherwise applies. Regarding out of state impacts in particular, the Natural Resources Agency finds that section 21080(b)(14) of the Public Resources Code and section 15277 of the State CEQA Guidelines already address such impacts to a degree. Those provisions create a limited exemption from CEQA where a project, or a portion of a project, is located in another state and will be subject to the National Environmental Policy Act or the other state's equivalent statute. Conversely, if NEPA or the other state's law would not apply, CEQA may apply. Further, those provisions state that "[a]ny emissions … that would have a significant effect on the environment in this state are subject to" CEQA, where "a California public agency has authority over the emissions …." (Public Resources Code, § 21080(b)(14); State CEQA Guidelines, § 15277.) Thus, where a California public agency has authority over greenhouse gas emissions of a project, all or a portion of which may be located out of state, that agency would need to consider whether those emissions may have a significant effect on the environment in California.

CEQA defines "environment" to include "the physical conditions that exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, or objects of historic or aesthetic significance." (Public Resources Code, § 21060.5 (emphasis added).) That definition includes no geographic limitation; rather, the only limitation is the whether the project will affect an area's physical conditions. Sections 15144 through 15145 of the State CEQA Guidelines provide that the analysis of impacts must be proportional to the severity of the impact, and while some reasonable forecasting may be expected, pure speculation about such impacts is not required.

Because the out-of-state impacts of greenhouse gas emissions are already governed by existing CEQA authorities, no revisions to the proposed amendments are required in response to this comment.

Comment 47-7

Commenter suggests regulating aviation GHG emissions at the local level is bad policy. Emissions generated by aircraft departing or arriving in California may occur anywhere on the globe, thus may be subject to other regulatory regimes.

Response 47-7

The concern expressed in the comment, the policy wisdom of regulating aircraft emissions on a local level, does not address the subject of this rulemaking package which is primarily limited to, analysis and

mitigation of greenhouse gas emissions under CEQA. Thus, the comment exceeds the scope of this rulemaking package, and does not require any further response.

Further, as explained in Response 47-2, above, even if public agencies cannot mitigate emissions from aircraft, they are obligated to analyze and mitigate the effects of airport operations. The proposed amendments apply to the extent that CEQA otherwise applies. Because the existing CEQA Guidelines already relieve lead agencies of any obligation to propose or analyze mitigation measures that cannot be legally imposed (State CEQA Guidelines, § 15126.4(a)(5)), and because the proposed amendments must necessarily be general, no revision to the proposed amendments is required in response to this comment.

Comment 47-8

Clarify the scope of aircraft-related GHG emissions. Commenter recommends emissions associated with aviation operations not be regulated through CEQA either directly or indirectly.

Response 47-8

As explained above in Response 47-4, even if a particular type of mitigation may be legally infeasible, a public agency is not excused of the requirement to analyze the effects of the whole of its project. Further, as explained in Response 47-2, above, the CEQA Guidelines are necessarily general, so the Natural Resources Agency declines to describe specific limitations on authority that apply only to a narrow class of projects.