

Letter 59

Patrick Griffith
California Wastewater Climate Change Group

August 27, 2009

Comment 59-1

Revise CEQA Guidelines to distinguish between anthropogenic and biogenic emissions

Response 59-1

The comment seems to suggest allowing a “net” analysis of GHG emissions. Nothing in section 15064.4 precludes a “net” analysis where such analysis complies with the provision of section 15064, and where speculation would not be needed to support the ultimate conclusions and findings. However, since a “net” analysis may only be appropriate or possible in limited cases, the Natural Resources Agency deliberately chose to make the language of 15064.4 broad so that lead agencies retain discretion to determine the most appropriate scope of review relative to a particular project. In many situations, analysis of a “net” emission cycle may not be feasible or scientifically possible, and the Natural Resources Agency believes lead agencies are best suited to make this determination. Since these guidelines impact all public entities that seek to approve projects within California, flexibility in this regard is preferable.

To clarify, the Natural Resources Agency deliberately relied on existing law in the Health and Safety Code to define appropriate greenhouse gases for review under CEQA. This was done to ensure consistency with AB 32 a complimentary and comprehensive statutory scheme regulating greenhouse gas emissions in California. The Legislature has not included a definition of “greenhouse gases” in CEQA, though it did include a definition in AB32. (Health & Safety Code § 38505(g).) Thus, proposed new section 15364.5 adds a definition of greenhouse gases. The specified gases are consistent with existing law as they are defined to include those identified by the Legislature in section 38505(g) of the Health and Safety Code.

Notably, the definition in AB32 states that GHG “includes all of the following...” In so stating, the Legislature implies that other gases may also be considered GHGs. The ARB’s Scoping Plan also acknowledges that other gases contribute to climate change. (Scoping Plan, at p. 11.) In fact, the EPA’s Endangerment Finding explained that several other gases share attributes with GHGs but would not be appropriate for regulation under the Clean Air Act at this time. (EPA Endangerment Finding, at pp. 18896-98.) Therefore, similar to the statutory definition of GHGs in AB32, the proposed definition in the Proposed Amendments is not exclusive to the six primary GHGs. The purpose of a more expansive definition is to ensure that lead agencies do not exclude from consideration GHGs that are not listed, so long as substantial evidence indicates that such non-listed gases may result in significant adverse effects.

This approach is consistent with the Supreme Court's directive that CEQA be interpreted to provide the fullest possible protection to the environment. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 390.)

Comment 59-2

Commenter suggests any significance threshold should distinguish between fossil-fuel based and other anthropogenic emissions from biogenic emissions.

Response 59-2

Public Resources Code section 21000, subdivision (d) expressly directs public agencies to identify whether there are any critical thresholds for health and safety to identify those areas where the capacity of the environment is limited. A threshold is a numeric or qualitative level at which impacts are normally less than significant. (State CEQA Guidelines, § 15064.7(a); see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107.) With respect to greenhouse gas emissions, the Natural Resources Agency has intentionally maintained a lead agency's discretion to determine the appropriate threshold of significance for a proposed project. Since these guidelines impact all public entities that seek to approve projects within California, flexibility in this regard is preferable.

Furthermore, Appendix F provides a vehicle for agencies to consider a project's potential significant energy implications, impacts, and provides guidance on mitigating the environmental effects associated with energy consumption. The proposed revisions to Appendix F clarify that lead agencies must consider such impacts and identifies factors that should be considered, such as fuel types. Within the context of a CEQA review, the appropriate use of renewable fuels and other non-fossil fuel energies in an analysis is cited in numerous instances. For example, as a matter of mitigation, the use of renewable fuels is in fact strongly encouraged. (Appendix F, Section D(4).)

No further revision to the text is required to respond to this comment.

Comment 59-3

Commenter suggests that the Guidelines as proposed would advise a lead agency to consider biogenic emissions and anthropogenic emissions, which might trigger exceeding a threshold, particularly for renewable and non-fossil fuel carbon for energy. In turn, CEQA might discourage the use of renewable and carbon-free energies.

Response 59-3

The Natural Resources Agency respectfully disagrees. As explained above, Appendix F, Energy Conservation, provides specific guidance to lead agencies with respect to energy related impacts. This

includes expressly stated goals of “... (2) Decreasing reliance on [fossil fuels such as coal,] natural gas and oil, and (3) Increasing reliance on renewable energy sources” as considerations in a CEQA review. (Appendix F, Section I.) Section II elaborates on the content, discussion, and details required in an EIR which specifically calls for distinguishing “[2] Total energy requirements of the project by fuel type and end use.” Furthermore, subsection (D) provides that “alternative fuels (particularly renewable ones)” are appropriate for mitigation.

Please also note that 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 beneficial projects 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.

Comment 59-4

Commenter suggests that the Guidelines be revised to advise lead agencies that biogenic emissions exert no net adverse impact on the environment. This could take shape in not considering biogenic emissions in any “bright line” threshold or any performance standard under CEQA.

Response 59-4

The Natural Resources Agency notes that SB97 did not distinguish between the sources of greenhouse gas emissions. Thus, it would not be appropriate for the Natural Resources Agency to treat the different categories of emissions differently absent a legislative intent that the Guidelines do so. Moreover, no evidence in the rulemaking record suggests that biogenic emissions would never have an adverse environmental effect. Notably, neither AB32 nor the Air Resources Board’s Scoping Plan distinguishes between biogenic and anthropogenic sources of greenhouse gas emissions. On the contrary, the Scoping Plan identifies methane from, among other sources, organic wastes decomposing in landfills as a source of emissions that should be controlled. (Scoping Plan, at pp. 62-63.)

No revision is required in response to this comment.