Letter 60

Barbara Baird
District Counsel
South Coast AQMD

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Comment 60-1

The proposed amendments should include guidance on how to address out-of-state impacts and impose out-of-state mitigation measures.

Response 60-1

The CEQA Guidelines must apply broadly to all types of projects proposed by, or subject to approval by, all different types of lead agencies. (State CEQA Guidelines, § 15000 ("[t]hese Guidelines are binding on all public agencies in California").) Thus, the proposed amendments were necessarily drafted broadly enough to cover many types of projects. Indeed, the proposed amendments contain no geographic limitation. Also, as explained in the Initial Statement of Reasons, analysis and mitigation of greenhouse gas emissions is subject to the same CEQA rules as apply in other subject areas. The proposed amendments are intended to be read in conjunction with existing CEQA requirements. The Natural Resources Agency finds that the proposed amendments are broad enough to cover analysis of out of state impacts, and mitigation of those impacts, to the extent such analysis and mitigation is otherwise required. Therefore, the Natural Resources Agency declines to revise the proposed amendments as suggested in this comment.

Comment 60-2

Clarify how Section 15277 and an Attorney General Opinion on environmental impacts occurring outside the state's boundaries apply to the analysis and mitigation GHG emissions. Commenter suggests adding to the Guidelines or further explaining the issue in the Final Statement of Reason.

Response 60-2

As explained in Response 60-1, above, 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, the Natural Resources Agency finds that section 21080(b)(14) of the Public Resources Code and section 15277 of the State CEQA Guidelines speak for themselves. 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.

Those provisions, and the Opinion of the Attorney General cited in the comment, address whether projects located outside of California, in whole or in part, are subject to CEQA. The comment also raises the question of whether a project that is located completely inside of California, must consider project impacts that occur out of state. As explained above, the analysis and mitigation of greenhouse gas emissions are subject to the same CEQA rules that govern other topics. As noted in the Attorney General Opinion, 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. Notably, analysis of out-of-state impacts is limited by other existing CEQA rules. 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 is already governed by existing CEQA authorities, no further revisions to the proposed amendments are required in response to this comment.

Comment 60-3

Clarify whether a project proponent may mitigate in-state GHG emissions by obtaining offsets or carrying out a project outside California's borders. The commenter argues given the global nature of GHG emissions and climate change, any emission reduction in the world could serve to mitigate GHG emissions occurring in California.

Response 60-3

As explained in Response 60-1, above, the proposed amendments do not contain a geographic limitation. Proposed section 15126.4(c)(3) expressly recognizes that off-site measures, including offsets, may be used to mitigate a project's greenhouse gas emissions. Proposed section 15126.4(c) has been further revised in response to comments to clarify that any mitigation, including off-site measures, must be supported with substantial evidence and be subject to monitoring and reporting. Further, existing section 15126.4(a)(2) requires that any mitigation measures must be fully enforceable. Thus, out-of-state mitigation of greenhouse gas emissions is only appropriate if substantial evidence demonstrates

that the measure will actually mitigate greenhouse gas emissions and if the measure is fully enforceable and capable of monitoring or reporting. Therefore, no further revisions are required to provide guidance on out-of-state mitigation.

Comment 60-4

Clarify the amendment to Appendix F removing the term "lifecycle" as it could create more confusion and direct lead agencies to never consider a project's "lifecycle" emissions. This might be contrary to the Initial Statement of Reasons justification "…certainly where substantial evidence supports a fair argument that such "lifecycle" emissions are attributable to a project, the evidence must be considered."

Response 60-4

This comment, and others submitted by other organizations, indicate confusion based the Natural Resources Agency's explanation of the proposed amendments to Appendix F. The Final Statement of Reasons includes a revised discussion explaining the removal of the term "lifecycle" from Appendix F. That revised discussion explains that while an analysis of the vague concept of "lifecycle" emissions is not required, CEQA does require analysis of a project's direct and indirect emissions. As explained in the Initial Statement of Reasons, however, CEQA only requires analysis of impacts that result from implementation of the project under consideration. (State CEQA Guidelines, §§ 15064(d) (examine effects "caused by" the project), 15126.4(a)(4)(B) (mitigation must be "roughly proportional" to the effects of the project).) Because existing Guidelines already address the extent of an indirect analysis that may be required, no further revision to Appendix F is necessary.

Comment 60-5

The Natural Resources Agency could adopt a definition of "lifecycle" if the term is believed to be ambiguous.

Response 60-5

The Natural Resources Agency declines to adopt a definition of the term lifecycle because the CEQA statute does not require analysis of "lifecycle" emissions. What CEQA requires is analysis and mitigation of "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]" (Public Resources Code, § 21065.) The revisions to Appendix F were designed to ensure that only the analysis required by CEQA is addressed. No further revisions are required in response to this comment.

Comment 60-6

Commenter recommends establishing a priority order or hierarchy of mitigation. Section 21083.05 of the Public Resources Code requires the Natural Resources Agency to adopt "…guidelines for the mitigation of GHG emissions or the effects of GHG emissions…". The priority order can extend itself to provide for local co-benefits and satisfy the CEQA standard that mitigation is real, verifiable, and enforceable.

Response 60-6

CEQA's substantive mandate requires 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[.]" (Public Resources Code, § 21002.) The statute defines feasible to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Public Resources Code, § 21061.1.) The Legislature further provided that a lead agency may use its lawful discretion to mitigate significant impacts to the extent provided by other laws:

> In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law.

(Public Resources Code, § 21004.) Cities and counties may rely on their constitutional police powers, for example, while the ability of other agencies to require mitigation may be limited by the scope of their statutory authority. Mitigation is also subject to constitutional limitations; i.e., there must be a nexus between the mitigation measure and a legitimate public interest, and the mitigation must be roughly proportional to the impact of the project. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; State CEQA Guidelines, § 15126.4(a)(4).)

CEQA itself imposes very few limitations on a lead agency's discretion to impose mitigation. For example, agencies may not mitigate the effects of a housing project by reducing the proposed number of units if other feasible mitigation measures are available. (Public Resources Code, § 21159.26.) Similarly, the Legislature has prescribed specific types of mitigation in only very limited circumstances; i.e., impacts to archeological resources and oak woodlands. (Public Resources Code, §§ 21083.2, 21083.4.)

SB 97 specifically called on the Office and Planning and Research and Natural Resources Agency to develop guidelines addressing the mitigation of greenhouse gas emissions. In doing so, however, the Legislature did not alter a lead agency's discretion, authority or limitations on the imposition of mitigation where the impacts of a project's greenhouse gas emissions are significant. Thus, as explained

in the Initial Statement of Reasons, the existing CEQA rules apply to the mitigation of greenhouse gas emissions.

The efficacy of any proposed mitigation measure is a matter for the lead agency to determine based on the substantial evidence before it. Use of the word "feasible" in proposed Section 15126.4(c) requires the lead agency to find that any measure, including offsets, would be "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (State CEQA Guidelines, § 15364.)

Further, in response to comments expressing concern about the potential efficacy of offsets and other mitigation strategies listed in Section 15126.4(c), the Natural Resources Agency has revised that section to expressly require that any measures, in addition to being feasible, must be supported with substantial evidence and be capable of monitoring or reporting. (See Revised Section 15126.4(c) (October 23, 2009).) This addition reflects the requirements in Public Resources Code section 21081.5 that findings regarding mitigation be supported with substantial evidence and the monitoring or reporting requirement in section 21081.6.

Thus, the Natural Resources Agency finds that by expressly requiring that any mitigation measure be feasible, supported with substantial evidence, and capable of monitoring or reporting, section 15126.4(c) adequately addresses the concern stated in the comment that off-site measures, including offsets, may be difficult to enforce and verify.

Finally, CEQA does not grant lead agencies authority to mitigate a project's significant impacts; rather, the statute allows lead agencies to use the authority they already have pursuant to some other source of law for the purpose of mitigating significant impacts. Within the scope of a lead agency's existing authority, the CEQA Guidelines already contain provisions that recognize a lead agency's obligation to balance various factors in determining how or whether to carry out a project. (State CEQA Guidelines, § 15021(d).) Further, the Guidelines already require that "[w]here several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified." (State CEQA Guidelines, § 15126.4(a)(1)(B).) Additionally, public agencies are directed to adopt their own implementing procedures, consistent with CEQA and the State CEQA Guidelines, which could set forth the types of mitigation that a particular agency finds to be most appropriate for projects subject to its approval. (State CEQA Guidelines, § 15022.) The Natural Resources Agency cannot, however, state in the State CEQA Guidelines that all lead agencies have the authority to prioritize types of mitigation measures. Each lead agency must determine the scope of its own authority based on its own statutory or constitutional authorization. Because the Guidelines already state that a lead agency should balance various factors in deciding how to carry out a project, no further clarification is necessary. The Natural Resources Agency, therefore, rejects the suggestion to revise the Guidelines to include specific authorization to develop a priority of mitigation measures.