

Letter 61

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Comment 61-1

No apparent scientific basis links GHG emissions from one particular project to specific physical, localized environmental effects. Therefore, any analysis of GHG emissions is required to be evaluated in a larger context than most others under CEQA.

Response 61-1

The Initial Statement of Reasons summarized many sources of greenhouse gas emissions and the effects that those collective emissions are having and are expected to have in the future. (Initial Statement of Reasons, at pp. 4-6.) The Initial Statement of Reasons also recognizes that greenhouse gas emissions may result in cumulative impacts that are well suited for programmatic analysis and mitigation. (*Id.* at pp. 53-55.) While the Natural Resources Agency recognizes that greenhouse gas emissions present a unique challenge in CEQA analyses, it intends that the proposed amendments assist lead agencies in applying existing CEQA rules to that context. (Initial Statement of Reasons, at p. 10.) This comment does not call for any further changes to the proposed amendments.

Comment 61-2

Commenter supports the direction and flexibility of the amendments. An accurate analysis of an individual project's impacts on climate change must be viewed in the context of statewide regulations, such as those under AB32, and statewide, or at least sector wide GHG emissions.

Response 61-2

As explained above, while greenhouse gas emissions present a unique analytical challenge for CEQA lead agencies, existing CEQA rules apply to that analysis. Thus, 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.

The comment also suggests that a project’s emissions should be viewed in the context of sector-wide emissions. This comment appears to reflect the requirement that a lead agency consider cumulative impacts (i.e., the impacts resulting from a project’s emissions when added to other past, present and reasonably foreseeable future emissions). The proposed amendments originally contained a new subdivision (f) that would have been added to Section 15130 on cumulative impacts. That subdivision is no longer proposed for adoption because it merely restated the law that cumulative effects of a project must be analyzed. However, the remainder of the rulemaking package does contain several provisions addressing the analysis of greenhouse gas emissions as a cumulative effect. For example, Section 15064(h)(3) and 15130(d) would encourage lead agencies to use existing plans for the reduction of greenhouse gas emissions in cumulative impacts analysis. Additionally, Section 15130(b)(1)(B) is proposed for amendment to allow lead agencies to use projections of emissions contained in certain plans and models. Thus, the proposed amendments would allow a lead agency to consider a project in the context of other emissions resulting from the same or other sectors. Because the comment appears to support the proposed amendments, no further response is required.

Comment 61-3

Revise Sections 15064(h)(3) and 15064.4 to expand allowing a qualitative approach to analysis emphasizing whether a project will result in a net increase in energy efficiency or decrease in carbon intensity of the underlying economic activity or the state’s overall carbon footprint.

Response 61-3

As the comment notes, proposed new section 15064.4 recognizes a lead agency’s discretion to consider qualitative factors in determining the significance of a project’s greenhouse gas emissions. Section 21001(f) of the Public Resources Code provides that governmental agencies at all levels should “consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.” Proposed new Section 15064.4(b) lists several factors that a lead agency should consider in its analysis; however, the Natural Resources Agency further revised that section to clarify that it also

recognizes a lead agency's ability to consider other factors that may be relevant to a particular project or jurisdiction.

The Natural Resources Agency did not revise section 15064(h)(3) or section 15064.4 to include the specific suggestions in this comment for several reasons. First, section 15064(h)(3) addresses the use of plans and regulations in the analysis of cumulative impacts, but does not address qualitative factors generally. The proposed revisions would, therefore, not be appropriate in that section. Second, section 15064.4 addresses the determination of the significance of greenhouse gas emissions. The energy efficiency and carbon intensity associated with a project, standing alone, do not appear to provide information relating to the significance of the greenhouse gases emitted from any particular proposed project. Third, energy efficiency, and by implication carbon intensity, is already addressed in Appendix F of the CEQA Guidelines. Therefore, the Natural Resources Agency has determined that further revision of the CEQA Guidelines is not required in response to this comment. Fourth, a decrease in the state's overall carbon footprint could already be considered in proposed section 15064.4(b)(1), which allows a lead agency to consider the extent to which a project results in an increase or decrease in emissions compared to the existing environmental setting.

Notably, energy efficiency and carbon intensity could be appropriate considerations in the development of a plan for the reduction of greenhouse gas emissions. Such a plan could provide, for example, that in an effort to reach jurisdiction-wide emissions targets, new development must achieve certain specified energy efficiency standards. In that context, an individual project's energy efficiency would play a role in the determination of significance by demonstrating compliance with a plan addressing a cumulative problem as provided in section 15064(h)(3) and 15183.5(b).

Comment 61-4

Commenter supports reliance on a being consistent with a previously approved plan or mitigation program but the amendments should specifically recognize the importance of the AB32 Scoping Plan.

Response 61-4

Reliance on compliance with a plan to demonstrate that a project's incremental contribution to a cumulative problem will not be cumulatively considerable, as provided in section 15064(h)(3) and section 15064.4(b)(3), requires that the plan include binding requirements that will actually improve the cumulative condition. As explained in the Initial Statement of Reasons, the Scoping Plan "is conceptual at this stage and relies on the future development of regulations to implement the strategies identified in the Scoping Plan." (Initial Statement of Reasons, at p. 21.) The Scoping Plan may provide a summary of statewide projections that could be used in a cumulative impacts analysis as provided in section 15130(b)(1)(B). Given the above, the Natural Resources Agency has determined that no further revisions to the CEQA Guidelines is necessary to recognize the Scoping Plan.

Comment 61-5

Commenter asserts that projects should be able to rely on measures referenced in the Scoping Plan in determining the significance of a project's GHG emissions.

Response 61-5

As explained in Response 61-4, above, and in the Initial Statement of Reasons, at page 21, once adopted by the California Air Resources Board, regulations implementing the Scoping Plan may be relevant in an analysis of a project's greenhouse gas emissions, as provided in sections 15064(h)(3) and 15064.4(b)(3). No further revision of the Guidelines is necessary to respond to this comment.

Comment 61-6

Commenter acknowledges the advantage of Section 15093(d) but the section should specifically recognize a lead agency does not have the discretion to burden individual projects with mitigation measures to achieve reductions greater than what is legally required.

Response 61-6

Proposed subdivision (d) of section 15093 has been removed. Instead, the Natural Resources Agency has proposed to revise Section 15093(a) to include "region-wide and statewide environmental benefits" among the other benefits that may be balanced against a project's adverse environmental impacts. The proposed revision maintains the policy objective of encouraging lead agencies to consider broader benefits of a project in the context of its potential adverse impacts.

The proposed new subdivision (c) to section 15126.4, regarding mitigation of the effects of greenhouse gas emissions, includes a specific reference to subdivision (a) of that section, which governs mitigation generally. The purpose of that cross-reference is to ensure that mitigation for greenhouse gas emissions is treated consistently with existing CEQA rules. Section 15126.4(a)(4) addresses the legal limits of mitigation. Therefore, the text of 15126.4(c) as proposed already encompasses the legal limitations on the imposition of mitigation.

Additionally, the Natural Resources Agency has proposed a further revision to that subdivision to clarify that mitigation measures must be supported with substantial evidence. Given the above, no further revision of that subdivision is necessary to respond to this comment.

Comment 61-7

The Guidelines should allow lead agencies to evaluate reductions in GHG emissions achieved by complying with non-AB32 state and federal mandates.

Response 61-7

The proposed amendments to the CEQA Guidelines are not tied specifically to AB32. As explained in Responses 61-2, 61-4 and 61-5, above, regulations implementing AB32 may be relevant in the analysis of the significance of a project's greenhouse gas emissions as provided in sections 15064(h)(3) and 15064.4(b)(3). Those sections are not limited to AB32, however; so long as a regulation meets the criteria established in those sections, a lead agency may consider how compliance with that regulation affects the amount and the significance of a project's emissions. While no federal statutes or regulations have yet been adopted, if such requirements are established in the future, a lead agency may consider whether they satisfy the criteria in section 15064(h)(3). Given the flexibility in the amendments and existing Guidelines, no further revision is required in response to this comment.

Comment 61-8

Guidelines should allow lead agencies to evaluate overall GHG emission reductions from equipment upgrades in the context of statewide, or at least sector-wide, even if the upgrade results in slight emissions increase.

Response 61-8

This comment is capable of different interpretations. To the extent the comment suggests that a lead agency should be able to consider whether a project results in an overall increase or decrease in greenhouse gas emissions, the proposed section 15064.4(b)(1) already allows such consideration. Specifically, it states that a lead agency may consider the "extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting[.]" Thus, no further revision of the proposed amendments would be necessary to respond to this comment.

If the comment suggests that a lead agency should consider reductions resulting from other projects or sectors in determining the significance of increases from the proposed project, such consideration may be appropriate under section 15130(b)(1)(B). For example, a summary of projections that accounts for sector-wide reductions mandated by binding regulations may be used to determine whether a proposed project's increase (i.e., its incremental contribution) is cumulative considerable. Assuming this interpretation of the comment, no further revision to the CEQA Guidelines would be required.

If the comment suggests simply pointing to reductions occurring elsewhere, without going through a complete cumulative analysis, that would not be consistent with CEQA. The Guidelines could not endorse an analysis that is not supportable under CEQA, so no change to the Guidelines could be made to that effect.

Comment 61-9

Revise Section 15064(h)(3) to add state and/or federal mandates, and specifically AB32 to the list of plans a lead agency may rely on. Also add text allowing lead agencies to evaluate a project's emissions in light of a net increase in energy efficiency or decrease in carbon intensity of the underlying economic activity or the state's overall carbon footprint.

Response 61-9

The Natural Resources Agency will not incorporate the suggested text into section 15064(h)(3). The suggested text appears to assume that the cumulative problem that would be addressed by state and federal mandates is energy inefficiency or carbon intensity. As explained in Response 61-3, above, energy efficiency and carbon intensity, standing alone, do not address the effects of greenhouse gas emissions as a whole. Further, energy efficiency considerations play a part in the analysis required in Appendix F. Finally, the text of section 15064(h)(3) already encompasses the concept of "mandates ... that when implemented result in ... a decrease in ... the state's overall carbon footprint" by allowing consideration of "regulations for the reduction of greenhouse gas emissions." Thus, no further revision to section 15064(h)(3) is necessary.

Comment 61-10

Revise Section 15064(h)(3) by deleting the last sentence. This would remove a statement that if substantial evidence suggests the effects of project are still cumulatively considerable, notwithstanding compliance with a plan or mitigation program, an EIR must be prepared.

Response 61-10

The comment suggests deletion of existing text in section 15064(h)(3). The last sentence in Section 15064(h)(3) is consistent with the holding in the *CBE* case, described in Response 61-2, requiring incorporation of the fair argument standard into a lead agency's consideration of the effect of a project's consistency with regulations. (*CBE, supra*, 103 Cal.App.4th at 115-116.) The proposed deletion would be inconsistent with controlling CEQA case law, and is, therefore, rejected.

Comment 61-11

Revise Section 15064.4(b)(3) by adding state and/or federal mandates, specifically AB32 to the list of plans a lead agency may rely on. Add additional language on allowing lead agencies to evaluate a project's emissions in light of a net increase in energy efficiency or decrease in carbon intensity of the underlying economic activity or the state's overall carbon footprint.

Response 61-11

The Natural Resources Agency will not incorporate the suggested text into section 15064.4(b)(3). The suggested text appears to the effects of greenhouse gas emissions addressed by state and federal mandates relate solely to energy inefficiency or carbon intensity. As explained in Response 61-3, above, energy efficiency and carbon intensity, standing alone, do not address the effects of greenhouse gas emissions as a whole. Further, energy efficiency considerations play a part in the analysis required in Appendix F. Finally, the text of section 15064.4(b)(3) already encompasses the concept of “mandates ... that when implemented result in ... a decrease in ... the state’s overall carbon footprint” by allowing consideration of “regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.” To date, no federal regulations or requirements exist that are intended to reduce or mitigate greenhouse gas emissions. Thus, no further revision to section 15064(h)(3) is necessary.

Comment 61-12

Revise Section 15064.4(b)(3) by deleting the last sentence. This would remove a statement that if substantial evidence suggests the effects of project are still cumulatively considerable, notwithstanding adopted regulations or requirements, an EIR must be prepared.

Response 61-12

The last sentence in Section 15064.4(b)(3) is necessary to implement the holding in the *CBE* case, described in Response 61-2, above, requiring incorporation of the fair argument standard into a lead agency’s consideration of the effect of a project’s consistency with regulations. (*CBE, supra*, 103 Cal.App.4th at 115-116.) While CEQA leaves to a lead agency’s discretion the most appropriate methodology to analyze a project’s potential impacts, CEQA also requires that an EIR be prepared whenever there is substantial evidence supporting a fair argument of potential impacts. Section 15064.4 incorporates both rules into the determination of the significance of greenhouse gas emissions. The Natural Resources Agency, therefore, rejects the commenter’s suggestion to delete the last sentence in Section 15064(h)(3).

Comment 61-13

Lead agencies should be required to evaluate what constitutes feasible mitigation for a project’s GHG emissions by a set of criteria. This criteria should include the totality of circumstances related to a project’s or facility’s or the State’s overall increase in energy efficiency, or decrease in carbon intensity of the underlying economic activity or the state’s overall carbon footprint.

Response 61-13

As explained in Response 61-7, above, the proposed new subdivision (c) to section 15126.4, regarding mitigation of the effects of greenhouse gas emissions, includes a specific reference to subdivision (a) of that section, which governs mitigation generally. The purpose of that cross-reference is to ensure that mitigation for greenhouse gas emissions is treated consistently with existing CEQA rules. For example, mitigation can only be required for significant impacts and must undergo its own environmental review. (State CEQA Guidelines, § 15126.4(a)(1) and § 15126.4(a)(1)(D).) Measures to increase energy efficiency must be considered where relevant. (State CEQA Guidelines, § 15126.4(a)(1)(C).) See Response 61-15, below, for additional information. No revision of section 15126.4(c) is required in response to this comment.

Comment 61-14

Revise Section 15126.4(c)(2) to recognize the amendments do not imply that a project that includes features or measures to reduce GHG emissions to be considered significant by default. The opposite should be presumed.

Response 61-14

As provided in existing section 15126.4(a), mitigation is only required for impacts that are determined to be significant. Thus, changes in project features or design would only be required if the analysis under proposed section 15064.4 determines that the project as proposed would have significant effects. On the other hand, changes made to the project voluntarily by the proponent (and likely before the environmental analysis) that serve to reduce greenhouse gas emissions would be beneficial and would not likely by themselves result in a determination of significance as to the project's greenhouse gas emissions. The Natural Resources Agency disagrees that the text in section 15126.4(c)(2) creates a presumption that any project that incorporates greenhouse gas reducing features automatically has a significant effect. On the contrary, that section is consistent with existing section 15126.4(a)(1)(A) which recognizes that project proponents may propose and may incorporate their own mitigation measures.

Moreover, incorporation of measures to reduce energy consumption or greenhouse gas emissions does not create a presumption that the impact of a project is less than significant, absent the analysis called for in section 15064.4. Significantly, that section has been revised to clarify that the analysis must be supported with scientific and factual data. Further, substantial evidence must support a lead agency's conclusion that any measures incorporated into a project reduce potential impacts related to its greenhouse gas emissions to a less than significant level. Section 15126.4(c) has been revised to clarify that requirement.

No further revision to section 15126.4(c)(2) is necessary in response to this comment.

Comment 61-15

Revise Section 15126.4(c) to allow lead agencies for purposes of mitigation measures related to GHG emissions to rely on compliance with plans that result in a net increase in energy efficiency or decrease in carbon intensity of the underlying economic activity or the state's overall carbon footprint. In addition, projects that include project features, design, or other measures are not presumed to have a significant environmental effect.

Response 61-15

The comment proposes two changes. The first, to subdivision (c)(1) is not appropriate. Compliance with regulations may be relevant to the initial determination of the significance of a project's greenhouse gas emissions, but mitigation should be tied specifically to the proposed project. The role of regulations in determining the significance of greenhouse gas emissions is discussed in Response 61-2, above. The second proposed change is not necessary, as explained in Response 61-14, above. Thus, the proposed changes are rejected.

Comment 61-16

Appendix G question VII(a) should not ask whether a project is consistent with "any" applicable threshold of significance, as that may undermine a lead agency's ability to rely on qualitative factors to determine significance.

Response 61-16

The comment appears to be referring to the Office of Planning and Research's Preliminary Draft (January 8, 2009) of its proposed amendments to the CEQA Guidelines. That text is not included in the Natural Resources Agency's proposed amendments. While proposed section 15064.4(b)(2) provides that a lead agency should consider the extent to which a project complies with an applicable threshold of significance, that section clarifies that the threshold must be one that "the lead agency determines applies to the project." Further, section 15064.4(a)(2) would expressly allow a lead agency to consider a qualitative analysis, and the lead agency must also consider whether other evidence in the record before it supports a fair argument that the project would result in significant effects. Therefore, the concerns addressed in this comment are already incorporated into section 15064.4, and no further revisions to the text are required.

Comment 61-17

Revise Appendix G: GHG emissions (a) to: "Result in a net increase in energy efficiency or decrease in carbon intensity of the underlying economic activity or the state's overall carbon footprint."

Response 61-17

The Natural Resources Agency declines to revise Appendix G as suggested. The potential role of energy efficiency and carbon intensity in the determination of significance are explained in Response 61-3, above. Proposed section 15064.4, moreover, would allow lead agencies to consider additional factors where appropriate. Finally, as explained in the Note preceding Appendix G, the checklist is a sample only. Lead agencies may devise their own checklist as appropriate for their own jurisdiction.