Letter 65

Stephen C. Volker
Counsel
North Coast Rivers Alliance

August 27, 2009

Comment 65-1

Revise Section 15364.5 to expand the definition to include all known greenhouse gases.

Response 65-1

As explained in the Initial Statement of Reasons, the definition of greenhouse gas emissions in the proposed amendments specifically includes each of the gases that are included in the definition of greenhouse gas emissions created by the Legislature in AB 32. (Initial Statement of Reasons, at p. 58.) Notably, the federal Environmental Protection Agency limited its proposed endangerment finding to those same six listed gases. It did so because the six gases are well studied, and have been the focus of climate change research. (Federal Register, v. 74, 18886, 18895 (April 24, 2009).) It is not necessary to list each of the known potential greenhouse gases because the proposed definition in section 15364.5 is written broadly, stating that the greenhouse gas emissions "are not limited to" the listed examples. As further explained in the Initial Statement of Reasons, 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." (Initial Statement of Reasons, at p. 58.) Because the CEQA Guidelines must be updated periodically to reflect developments relating to greenhouse gas emissions, the Natural Resources Agency may expand the definition of greenhouse gas emissions if necessary to reflect the most current science and practice. Thus, the Natural Resources Agency declines to incorporate the suggested change because it finds that the change is not necessary at this time.

Comment 65-2

Section 15064.4 should require lead agencies to consider each of the factors listed in subdivision (b).

Response 65-2

The Natural Resources Agency disagrees that proposed section 15064.4 is overly vague and imposes no real requirements on lead agencies. Rather, consistent with CEQA, it requires lead agencies to investigate a project's potential greenhouse gas emissions, and then to make a careful judgment based

on that information, and with the guidance of several factors, about whether those emissions are significant.

In response to this and similar comments, however, the Natural Resources Agency has revised section 15064.4(b) to state that lead agencies "should" consider each of the listed factors, among others. Section 15005 provides the following guidance on terminology:

> (a) "Must" or "shall" identifies a mandatory element which all public agencies are required to follow.
>
> (b) "Should" identifies guidance provided by the Secretary for Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations.
>
> (c) "May" identifies a permissive element which is left fully to the discretion of the public agencies involved.

The Office of Planning and Research and the Natural Resources Agency used the word "shall" or "must" in the proposed amendments where a statutory provision or rule of case law actually requires an agency to take a specific action. For example, section 15126.4(c), as revised, states that "lead agencies shall consider feasible means … of mitigating the significant effects of greenhouse gas emissions." This mandatory requirement mirrors the requirement in Public Resources Code section 21002.1(b) that "[e]ach public agency shall mitigate or avoid the significant effects on the environment that it carries out or approves whenever it is feasible to do so." The proposed amendments use the word "should" when there is not direct authority requiring a certain action, but policies underlying CEQA justify the action absent compelling countervailing considerations. Thus, for example, in the proposed amendments to section 15064(h)(3), there is no statutory provision expressly requiring a lead agency to document how compliance with a plan reduces an impact to a less than significant level. However, the policies underlying CEQA (i.e., informed decision-making and demonstrating that environmental considerations have been accounted for) indicate that lead agencies should do so unless there is a compelling reason not to (i.e., the link is so obvious that making the demonstration would merely be repetitive). This same reasoning applies to the provisions in proposed section 15064.4 noted in the comment. This guidance is based on policy considerations set out in the Initial Statement of Reasons. Therefore, while the Natural Resources Agency has revised proposed section 15064.4(b) to provide that lead agencies "should" consider the listed factors, it declines to state that lead agencies "shall" consider each factor in every instance.

Comment 65-3

Revise Section 15064.4 to ensure greater uniformity throughout environmental documents. Lead agencies are given too much discretion to determine which methodology to use to quantify GHG emissions.

Response 65-3

The Natural Resources Agency declines to restrict lead agencies' discretion in determining which methodology to use in quantifying greenhouse gas emissions because such limitation would be contrary to existing CEQA rules. As explained in the Initial Statement of Reasons:

> Proposed section 15064.4(a)(1) … reflects existing case law that reserves for lead agencies the precise methodology to be used in a CEQA analysis. (See, e.g., *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) … [A] wide variety of models exist that could be used in a GHG analysis. (CAPCOA White Paper, at pp. 59-78.) Further, not every model will be appropriate for every project. For example, URBEMIS may be an appropriate tool to analyze a typical residential subdivision or commercial use project, but some public utilities projects, such as waste-water treatment plants, may require more specialized models to accurately estimate emissions. (*Id*. at pp. 60-65.) The requirement to disclose any limitations in the model or methodology chosen also reflects the standard for adequacy of EIRs in existing State CEQA Guidelines section 15151.

No further revisions are required in response to this comment.

Comment 65-4

Section 15064.7 leaves lead agencies too much discretion to choose thresholds of significance.

Response 65-4

The Natural Resources Agency respectfully disagrees that proposed section 15064.7(c) gives lead agencies too much discretion. On the contrary, that subdivision is consistent with existing CEQA law. As explained in a recent decision of the Third District Court of Appeal, "[p]ublic agencies are … encouraged to develop thresholds of significance for use in determining whether a project may have significant environmental effects." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108.) Nothing in CEQA requires that thresholds be developed by experts or expert agencies; however, "thresholds can be drawn from existing environmental standards, such as other statutes or regulations." (*Id*. at p. 1107.) Regardless of who develops the threshold, if an agency adopts a threshold, it must be supported with substantial evidence. (State CEQA Guidelines, § 15064.7(b).) Additionally, "thresholds cannot be used to determine automatically whether a given effect will or will not be significant[;]" "[i]nstead, thresholds of significance can be used only as a measure of whether a

certain environmental effect "will *normally* be determined to be significant" or "*normally* will be determined to be less than significant" by the agency. (Guidelines, § 15064.7, subd. (a), italics added.)" (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at pp. 1108-1109.) Proposed subdivision (c) of section 15064.7 recognizes the principles described above by expressly recognizing that experts and expert agencies may be developing thresholds that other public agencies may find useful in their own CEQA analyses, but requiring, as a safeguard, that any such threshold be supported with substantial evidence. No further revisions are required in response to this comment.

Comment 65-5

Revise Section 15064.7 to require lead agencies to choose the most stringent measurable threshold that comports with AB 32 and SB 97.

Response 65-5

As explained in Response 65-4, above, CEQA encourages each public agency to develop its own thresholds. (State CEQA Guideline, § 15064.7(a).) While CEQA does not address the "stringency" of any particular threshold, it does require that any chosen threshold be supported with substantial evidence. Further, thresholds only represent that point at which impacts are normally significant or less than significant, and cannot be used to foreclose consideration of substantial evidence supporting a fair argument that an impact is significant despite compliance with a threshold. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at pp. 1108-1109.) Proposed section 15064.7(c) is consistent with these principles. Thus, the suggested revision is rejected as unnecessary.

Comment 65-6

Revise Section 15064.4(b)(2) to either specify a threshold or require an agency to choose the most stringent threshold available.

Response 65-6

Proposed section 15064.4(b)(2) recognizes that a threshold of significance may be used in the determination of significance, even where a public agency has not formally adopted such thresholds. Thus, the phrase "that the lead agency determines applies to the project" ensures that section 15064.4(b)(2) can be used in cases where a public agency has adopted such formal thresholds, and where the public agency has not adopted any formal threshold. That phrase also recognizes that certain agencies may adopt thresholds that are specific to their region or jurisdiction. (See, e.g., Bay Area Air Quality Management District. (October 2009). Revised Draft Options and Justification Report: California Environmental Quality Act Thresholds of Significance. San Francisco, California (threshold based in part on the number of types of development expected to occur within the Bay Area region).) Thus, a public agency located outside that region may need to determine whether the chosen threshold is appropriate

for the particular project. Section 15064.4(b)(2) does not provide "too much discretion" to lead agencies because use of a threshold is subject to the fair argument standard, as explained in the *Protect the Historic Amador Waterways* decision. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at pp. 1108-1109.)

The Natural Resources Agency declines to adopt one threshold that would apply statewide because, as explained in Responses 65-4 and 65-5, above, CEQA leaves the determination of significance, and the establishment of thresholds of significance, to individual public agencies while recognizing their ability to rely on thresholds developed by others. No further revision is required in response to this comment.

Comment 65-7

Absent a specific threshold, lead agencies will be more likely to continue with a "business as usual" approach, thus ignoring the significant cumulative effects of GHG emissions and will be inconsistent with AB 32 and SB 97 which require GHG reductions. Thus, it is logical to treat AB 32 and SB 97 as thresholds for all projects and agencies and should be incorporated as such into the Guidelines.

Response 65-7

This comment contains several components. It suggests that (1) the Guidelines should impose a requirement on agencies to benefit the environment, (2) without a statewide threshold, agencies will ignore the requirement to analyze the greenhouse gas emissions of their projects, (3) the absence of a threshold is contrary to AB32 and SB97, both of which require reductions of greenhouse gas emissions, and (4) AB32 and SB97 should be the threshold identified in the Guidelines. Each point is addressed below.

The proposed amendments, as administrative regulations, cannot impose any requirements that are not set forth in the CEQA statute or recognized in case law interpreting the statute. As explained in Responses 65-4 through 65-6, above, CEQA leaves to lead agencies the task of determining significance of their projects' impacts, and allows them to develop their own thresholds of significance. Proposed section 15064.7(c) reflects the discretion currently provided to lead agencies, as well as the limits to that discretion. The proposed amendments cannot, however, impose new requirements that are not already found in the statute. Therefore, the Natural Resources Agency declines the suggestion to impose new requirements related to thresholds of significance for greenhouse gas emissions.

The Natural Resources Agency disagrees that lead agencies will ignore the requirement to analyze greenhouse gas emissions if a statewide threshold is not developed. As explained in the Initial Statement of Reasons:

> A key component of environmental analysis under CEQA is the determination of significance. (Pub. Resources Code § 21002; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106-07.) Guidelines on the analysis of GHG emissions must, therefore, include provisions on the determination of

> significance of those emissions. [¶] The proposed section 15064.4, on the determination of significance of GHG emissions, reflects the existing CEQA principle that there is no iron-clad definition of "significance." (State CEQA Guidelines, § 15064(b); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1380-81 ("*Berkeley Jets*").) Accordingly, lead agencies must use their best efforts to investigate and disclose all that they reasonably can regarding a project's potential adverse impacts. (*Ibid*; see also State CEQA Guidelines, § 15144.) Section 15064.4 is designed to assist lead agencies in performing that required investigation.

(Initial Statement of Reasons, at p. 17.) Because determining the significance of a project's impacts is a required element of a CEQA analysis, and because proposed section 15064.4 was developed to assist lead agencies in ensuring that analysis of greenhouse gas emissions in fact occurs, public agencies will not ignore greenhouse gas emissions, even if there is no statewide threshold of significance.

While AB 32 requires the reduction of greenhouse gas emissions from the State of California, as a whole, AB 32 did not alter CEQA in any way. The Natural Resources Agency, moreover, disagrees with the comment's interpretation of SB 97; that statute did not require reductions of greenhouse gas emissions. Neither AB 32 nor SB 97 required the establishment of a statewide CEQA threshold of significance. Therefore, the absence of a specific threshold from the proposed amendments does not conflict with either statute.

Finally, SB 97 required the Office of Planning and Research to develop, and the Natural Resources Agency to adopt, guidelines on the analysis and mitigation of greenhouse gas emissions. That statute did not establish a level at which the impacts of greenhouse gas emissions will normally be significant or less than significant, so by itself, SB 97 cannot be used as a threshold for any projects. Similarly, while AB 32 requires the state as a whole to reduce its emissions to 1990 levels by 2020, the statute itself did not establish any CEQA thresholds. As explained in the Initial Statement of Reasons, "[o]nce … regulations [implementing AB 32] are adopted and being implemented, they may, where appropriate, be used to assist in the determination of significance, similar to the current use of air quality, water quality and other similar environmental regulations. (*CBE*, *supra*, 103 Cal. App. 4th at 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").)" (Initial Statement of Reasons, at p. 23.) In particular, sections 15064(h)(3) and 15064.4(b)(3) of the proposed amendments both recognize a lead agency's ability to rely on compliance with existing regulatory requirements in determining significance. Because, for the reasons described above, the Natural Resources Agency cannot prescribe a single statewide threshold of significance, the suggestion to do so is rejected. No further revision is required in response to this comment.

Comment 65-8

Section 15065 fails to meet the directive of AB 32 and SB 97 and should mandate that any increase in, or source of, greenhouse gas emissions should require a finding of significance.

Response 65-8

As explained in 65-7, above, nothing in either AB 32 or SB 97 require a finding of significance for any increase in greenhouse gas emissions. AB 32, and regulations implementing that statute, will require reductions in emissions from certain sectors in the economy, but it does not preclude any new emissions. Moreover, as explained in the Initial Statement of Reasons, the proposed amendments do not establish a zero emissions threshold of significance because "there is no 'one molecule rule' in CEQA. (*CBE*, *supra*, 103 Cal.App.4th at 120.)" (Initial Statement of Reasons, at p. 20.) The mandatory findings of significance in section 15065 derive directly from section 21083(b) of the Public Resources Code. SB 97 did not alter that section or otherwise direct a mandatory finding of significance for increases in greenhouse gas emissions; therefore, the Natural Resources Agency declines to revise the proposed amendments as suggested.

While climate change may potentially result in the circumstances described in section 15065, a lead agency would have to determine whether any substantial evidence in the record before it supports a fair argument that the project being analyzed would cause, directly, indirectly or cumulatively, such impacts to occur. No revision is required in response to this comment, however.

Comment 65-9

Revise Section 15093(d) to specifically require any unavoidable increase in GHG emissions to trigger preparation of a statement of overriding considerations. Absent a requirement to make a finding of significance and actual significance thresholds, lead agencies can avoid adopting mitigation measures or alternatives.

Response 65-9

As explained in Response 65-7, above, lead agencies will have to analyze greenhouse gas emissions and mitigate those emissions if they are determined to be significant, even if the proposed amendments do not contain a threshold of significance. As explained in Response 65-8, above, there is no "one-molecule rule" in CEQA. Therefore, an increase in greenhouse gas emissions, by itself, does not require a finding of significance. A statement of overriding considerations is only required if a lead agency decides to proceed with a project despite its significant and unavoidable adverse environmental impacts. (Public Resources Code, § 21081(b); State CEQA Guidelines, § 15093.) No revision is required in response to this comment.

Comment 65-10

Proposed section 15093(d) is vague and weakens the overall effectiveness of the use of statement of overriding considerations by allowing agencies to downplay adverse environmental effects and point to environmental benefits.

Response 65-10

Subdivision (d) of section 15093 was proposed for several reasons, including reminding lead agencies that even beneficial projects may have adverse environmental impacts, and encouraging lead agencies to consider broader region-wide and statewide benefits that may result from some projects. (Initial Statement of Reasons, at pp. 31-32.) The proposed addition was not intended to signal the importance of regional or statewide concerns relative to local concerns or to minimize any adverse environmental effects of a project.

To avoid such interpretation, the Natural Resources Agency has further refined Section 15093. Specifically, it has added "region-wide or statewide environmental benefits" to the other benefits listed in section 15093(a), and deleted the proposed subdivision (d). Listing region-wide and statewide environmental benefits among the other benefits enumerated in subdivision (a) places those benefits within the proper context of the section governing statements of overriding considerations. This change clarifies that lead agencies must balance region-wide and statewide environmental benefits, just like the other listed benefits, against a project's significant adverse impacts in making a statement of overriding considerations. This change still advances the policy objective of encouraging lead agencies to consider benefits of a project that may extend beyond just a local jurisdiction. No further revision is required in response to this comment.

Comment 65-11

Revise Section 15125 to require lead agencies to conduct a greenhouse gas emission analysis consistent with existing CEQA standard Section 15125(a), which requires a discussion of the environmental setting in the vicinity of the project. Current practice appears to be to compare a project's GHG emissions to California's overall emissions.

Response 65-11

The "setting" to be described pursuant to section 15125 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 increase 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 greenhouse gas emissions, to the extent that a project may cause changes in greenhouse gas emissions in an area, and substantial evidence substantiates such changes, those changes may be considered pursuant to proposed section 15064.4(b)(1). A lead agency may determine, based on the particular context of the project, that the "environmental setting" includes the entire state. A more detailed discussion of local emissions may also be appropriate, for example, if a regional or local jurisdiction has developed a plan for the reduction of greenhouse gas emissions. Thus, proposed section 15064.4(b)(1) would ensure that decision-makers and the public will be fully informed of a project's potential impacts related to greenhouse gas emissions. No further revisions are required in response to this comment.

Comment 65-12

Clarify Section 15125 so that lead agencies do not determine that a new project's greenhouse gas emissions will not have significant impacts because the project will be more efficient or will have comparatively have fewer emissions than an existing, outdated facility.

Response 65-12

To the extent that the comment suggests that the proposed amendments should require existing facilities to undergo CEQA review regarding the greenhouse gas emissions from those facilities, the Natural Resources Agency rejects the suggestion. CEQA requires new analysis of existing projects only when a new discretionary action is required of an agency, and even then only when the circumstances in section 21166 of the Public Resources Code exist.

To the extent that the comment seeks to prevent a comparative analysis between a new proposed project and an existing project as part of the determination of significance, the proposed amendments do not advocate such an approach. Some comments suggested that agencies should be able to consider a project's energy efficiency or carbon intensity in determining the significance of such projects' greenhouse gas emissions. (See, e.g., Letter 61 from the Western States Petroleum Association.) As explained in response to those comments, 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. Further, 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.

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). Absent such a plan, however, a project's energy efficiency may not indicate the significance of its greenhouse gas emissions.

Comment 65-13

Revise Section 15125(d) to require lead agencies to discuss inconsistencies with AB 32 and SB 97.

Response 65-13

SB 97 required the Office of Planning and Research to develop, and the Natural Resources Agency to adopt, guidelines on the analysis and mitigation of greenhouse gas emissions. That statute did not set out any requirements for individual projects, so there would be no basis to determine whether an individual project is consistent with SB 97.

Similarly, while AB 32 requires the state as a whole to reduce its emissions to 1990 levels by 2020, that goal will primarily be implemented through the promulgation of regulations. As explained in the Initial Statement of Reasons, "[o]nce … regulations [implementing AB 32] are adopted and being implemented, they may, where appropriate, be used to assist in the determination of significance, similar to the current use of air quality, water quality and other similar environmental regulations. (*CBE*, *supra*, 103 Cal. App. 4th at 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").)" (Initial Statement of Reasons, at p. 23.) In particular, sections 15064(h)(3) and 15064.4(b)(3) of the proposed amendments both recognize a lead agency's ability to rely on compliance with existing regulatory requirements in determining significance. No further revision is required in response to this comment.

Comment 65-14

Revise section 15126.2(c) to include a specific reference to greenhouse gas emissions since climate change is irreversible.

Response 65-14

The comment provides no evidence to support its conclusion that climate change caused by greenhouse gas emissions is irreversible. If a public agency has substantial evidence before it that its project will cause significant irreversible environmental changes due to a project's greenhouse gas emissions, section 15126.2(c) is already broad enough to allow consideration of such changes without any revision. Therefore, the suggested revision is rejected as unnecessary.

Comment 65-15

Revise section 15126.2(d) to require consideration of a project's growth-inducing impacts on climate change.

Response 65-15

To the extent the comment suggests that any growth will lead to greenhouse gas emissions, and any increase in greenhouse gas emissions would be significant, the Natural Resources Agency disagrees for the reasons described in Response 65-8, above. The "one-molecule rule" is not consistent with CEQA. To the extent the comment suggests that, once an agency determines that a project may induce growth, it should also analyze the greenhouse gas emissions associated with that growth, no revision is to the proposed amendments is necessary. The proposed amendments include the addition to the Appendix G checklist a question that would ask whether a project would "[g]enerate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?" The definition of indirect effects in existing State CEQA Guidelines section 15358(a)(2) already includes "growth inducing effects." No further revision is required in response to this comment.

Comment 65-16

Revise section 15126.2(d) to limit a lead agency's ability to determine that any growth-inducement is beneficial to the environment. Given the connection between growth-induced impacts and climate change, these impacts should always be considered environmentally detrimental.

Response 65-16

The Public Resources Code requires that an environmental impact report include a discussion of the growth-inducing impact of a project, but it does not presume that such impacts are significant. (Public Resources Code, § 21100(b)(5).) Where the Legislature wanted certain impacts to be determined to be significant, it has enacted statutory language to that effect. (*Id*. at § 21083(b).) Nothing in the statute or case law indicates that growth inducing impacts must be presumed to be significant. Therefore, the Natural Resources Agency declines to revise the CEQA Guidelines to state that growth inducement is always detrimental to the environment.

Comment 65-17

Revise the CEQA Guidelines to reflect a preference for in-fill development in urban areas over sprawl with the goal of decreasing greenhouse gas emissions throughout the state.

Response 65-17

The Natural Resources Agency declines to state a preference in the CEQA Guidelines for one type of growth because the purpose of the CEQA Guidelines is to interpret the CEQA statute, and nothing in the CEQA statute expresses a preference for in-fill growth. For policy reasons, the legislature has developed certain statutory exemptions for certain types of in-fill growth. (See, e.g., Public Resources Code, § 21159.24.) The Natural Resources Agency has also already developed a categorical exemption for in-fill projects after finding that such projects do not result in significant adverse environmental impacts. (State CEQA Guidelines, § 15332.) Those exemptions apply to the extent allowed by their statutory and regulatory provisions. No further revision is necessary in response to this comment.

Comment 65-18

Revise Section 15126.4(c) to require projects to implement each of the mitigation measures for greenhouse gas emissions listed in that section. The Guidelines should also require implementation of the mitigation measures in Appendix F. Finally, the Guidelines should require the use of renewable energy sources. The existing section 15126.4 and the proposed amendments are too permissive and broad to be effective.

Response 65-18

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. Absent statutory authority to require specific mitigation measures, the CEQA Guidelines can only provide advisory guidance on the different types of mitigation that are available. The suggested revision is, therefore, rejected.

Comment 65-19

Revise Section 15130 to require that any increase of greenhouse gas emissions be considered cumulatively significant.

Response 65-19

The Natural Resources Agency declines to revise the CEQA Guidelines to state that any increase in greenhouse gas emissions is cumulatively considerable because, as explained in Response 65-8 above, there is no "one-molecule rule" in CEQA. As explained in the Initial Statement of Reasons, in performing a cumulative impacts analysis, an agency must first determine whether a cumulative problem exists, and if so, whether the incremental contribution of the project is cumulatively considerable when added to the incremental contributions of other past, present, and reasonably foreseeable future projects. (Initial Statement of Reasons, at p. 43.) Because there is no statutory basis for relieving lead agencies of the duty to consider a project's incremental effect, the Natural Resources Agency declines to incorporate the suggested revision.

Comment 65-20

Revise Section 15130(b). The phrase "likelihood of occurrence" can presumably allow a lead agency to undermine the severity of climate change.

Response 65-20

The Natural Resources Agency declines to revise section 15130(b) as suggested. As explained in above, the Legislature did not indicate in SB 97 that analysis of greenhouse gas emissions should be different than other impacts under CEQA. Therefore, it would not be appropriate to treat greenhouse gas emissions differently than other cumulative impacts in the CEQA Guidelines.

Comment 65-21

Proposed Section 15130(b)(3) fails to address impacts of GHG emissions in the proper, global context. An EIR should discuss the global impacts of climate change.

Response 65-21

The comment suggests that existing section 15130(b)(3) is problematic for analysis of greenhouse gas emissions. First, the Natural Resources Agency has not proposed to amend that section as part of the proposed amendments, so the comment exceeds the scope of this regulatory action. Second, the existing language in that section is broad enough to accommodate the effects of greenhouse gas emissions. It states: "[l]ead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used." Nothing in that section precludes a lead agency from defining the geographic scope to include the entire globe. Further, existing section 15130(b) states that the discussion of cumulative impacts "should be guided by the standards of practicality and reasonableness[.]" Thus, a generalized discussion of the global nature of greenhouse gas emissions may be appropriate given the state of the science at this point. For the reasons described above, however, no revision to the existing CEQA Guidelines is required in response to this comment.

Comment 65-22

Revise Section 15130(e) to require lead agencies to consider additional new information and technology that might apply to a specific project even if it is consistent with a previously adopted community plan, general plan, or zoning for which EIR analyzed GHG emissions. Each project should be required to independently analyze and mitigate its greenhouse gas emissions.

Response 65-22

The Natural Resources Agency declines to revise existing section 15130(e) for two reasons. First, that section is not part of the proposed amendments, and so the comment exceeds the scope of this regulatory action.

Second, requiring each individual project to independently analyze and mitigate impacts, regardless of its consistency with an adopted general plan, community plan, or zoning, is contrary to the express

provisions in Public Resources Code section 21083.3, on which section 15130(e) of the State CEQA Guidelines is based. Section 21083.3 generally provides that once an impact has been analyzed in an EIR for a General Plan, Community Plan or Zoning action, the lead agency need not re-analyze the same impact for projects that are consistent with the earlier planning or zoning action. The comment, in essence, suggests that those provisions are inappropriate as applied to the effects of greenhouse gas emissions.

The Natural Resources Agency finds no limitation in the text of section 21083.3 on the type of impact to which it applies. Rather, the Legislature determined that environmental review for projects that are consistent with a density or general plan designation shall be limited to only those effects that are (1) peculiar to the project site or project and which were not previously addressed as significant effects, or (2) will be more significant than previously analyzed. (Public Resources Code, § 21083.3(a)-(b).) Given the breadth of the statutory text in Section 21083.3, the Natural Resources Agency cannot limit the applicability of that statutory streamlining provision in the greenhouse gas emissions context.

Many jurisdictions have adopted policies addressing greenhouse gas emissions and climate change in their general plans. (Office of Planning and Research, The California Planner's Book of Lists (January 2009) ("Book of Lists"), at pp. 92-100; see also Scoping Plan, at p. 26.) Further, the California Air Pollution Control Officers Association recently released model general plan policies that can be used to address the effects of greenhouse gas emissions. (California Air Pollution Control Officers' Association, *Model Policies for Greenhouse Gases in General Plans: A Resource for Local Government to Incorporate General Plan Policies to Reduce Greenhouse Gas Emissions*, June 2009.) Thus, the Natural Resources Agency disagrees that lead agencies should not be able to address greenhouse gas emissions at a programmatic level as provided in sections 15130(e) and 15183.

Thus, for all of the reasons described above, the Natural Resources Agency rejects the suggestion in this comment.

Comment 65-23

Proposed Section 15183.5(a) is problematic. A lead agency may inappropriately rely on a previously approved EIR to tier and/or incorporate by reference a GHG analysis and therefore forego any project specific analysis.

Response 65-23

As explained in the Initial Statement of Reasons, the Legislature has clearly expressed its preference that lead agencies tier environmental analyses wherever possible. Section 21093(a) of the Public Resources Code states:

> The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same

> issues in successive environmental impact reports, and (3) ensuring that environmental impact reports prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.

Nothing in SB 97 indicated any intent to treat greenhouse gas emissions differently than other analyses under CEQA. Thus, the purpose of proposed section 15183.5(a) is to effectuate the Legislature's intent as described in Public Resources Code section 21093.

Notably, however, section 15183.5(a) does not alter any existing tiering or streamlining provisions. Thus, the scope and limitations of any of those listed provisions would apply equally to the tiering and streamlining of the analysis of greenhouse gas emissions.

Comment 65-24

Section 15183.5(b) is problematic. A planning document relied upon for a greenhouse gas emissions analysis may be fatally flawed or outdated. That section also allows lead agencies to defer analysis and mitigation. The Guidelines should require lead agencies to conduct their own independent review of greenhouse gas emissions and related impacts.

Response 65-24

The comment suggests that section 15183.5(b) is inappropriate because it could be interpreted to allow a lead agency to forego an analysis of greenhouse gas emissions based on a flawed or outdated plan. As explained in the Initial Statement of Reasons, that section was drafted in order to assist lead agencies in determining which plans may provide an appropriate basis for determining that the impacts of a project will be less than significant. It provides specific guidance for when a plan for the reduction of greenhouse gas emissions may be used in the context of existing sections 15064(h)(3) and 15130(d) of the State CEQA Guidelines. As explained above, nothing in SB97 expressed any intent to treat greenhouse gas emissions differently than other impacts under CEQA. Therefore, it would be inappropriate for the Natural Resources Agency to preclude lead agencies from relying on existing sections 15064(h)(3) and 15130(d) in the context of greenhouse gas emissions. As to the concern that lead agencies may rely on flawed or outdated plans, proposed section 15183.5(b)(2), consistent with existing CEQA rules, incorporates the fair argument rule. Thus, if substantial evidence indicates that a project may have significant impacts despite compliance with a plan for the reduction of greenhouse gas emissions, an EIR must be prepared.

Section 15183.5(b) does not allow lead agencies to defer mitigation or analysis. Rather, it encourages agencies to perform as much up-front analysis as possible. Moreover, proposed section 15183.5(b)(1)(F) would require that, to be used in the context of sections 15064(h)(3) or 15130(d), a plan for the reduction of greenhouse gas emissions should undergo environmental review. Existing section 15126.4(a)(1)(B) already provides that "[f]ormulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." Further, existing section 15126.4(a)(2) states: "In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." Thus, proposed section 15183.5(b) is consistent with existing CEQA principles and would not allow deferral of mitigation.

For the reasons described above, the Natural Resources Agency rejects the suggestion in this comment.

Comment 65-25

Section 15183.5(b)(1)(B)gives agencies too much discretion to determine an appropriate level at which greenhouse gas emissions would not be substantial or cumulatively considerable.

Response 65-25

As explained in the Initial Statement of Reasons, proposed section 15183.5(b)(1)(B) reflects the requirement in existing section 15064(h)(3) that in relying on consistency with a plan to demonstrate that a project's incremental contribution to a cumulative problem is not cumulatively considerable, that plan must include "specific requirements that will avoid or substantially lessen the cumulative problem". Specifically, establishing a level at which emissions resulting from a plan activity will be less than cumulatively considerable is necessary to provide a benchmark for the plans usefulness in addressing the cumulative problem. Notably, this provision is also consistent with existing section 15168(b)(2) which expressly provides that a programmatic EIR may have the advantage of ensuring "consideration of cumulative impacts that might be slighted in a case-by-case analysis[.]" Thus, the Natural Resources Agency disagrees that this provision would allow lead agencies to avoid a cumulative impacts analysis. No revision is required in response to this comment.