

Letter 80

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Comment 80-1

Commenter expresses support for the following provisions of the proposed amendments:

- Section 15064.4(a), recognizing lead agency discretion in determining the method for assessing the significance of a project's GHG impacts
- Section 15064.4(b), directing lead agencies to consider the extent to which a project complies with regulations and control measures implementing GHG emission reduction plans when assessing the significance of GHG emissions
- Section 15064.7(c), encouraging lead agencies to consider thresholds of significance for GHG emissions previously adopted by other public agencies or recommended experts
- Section 15093(d), recognizing a lead agency's ability to consider region-wide or statewide benefits in a statement of overriding considerations
- Section 15126.4(c), describing feasible means for mitigating GHG emissions to include off-site measures and offsets and not mandating a mitigation hierarchy
- Section 15183.5 adding a section for tiering and streamlining the analysis of GHG emissions
- Appendix F, advising lead agencies to avoid double-counting GHG emissions associated with energy consumption

Response 80-1

The Natural Resources Agency appreciates the support of the specified provisions of the proposed amendments. Several of those provisions have been further revised to provide greater clarity; however, the policy objectives noted in the comment are still achieved in the revised text of those sections.

Comment 80-2

Commenter recommends further guidance to support a clear path for AB 32 driven projects in the CEQA review process.

Response 80-2

The proposed amendments are designed to provide guidance on the analysis and mitigation of greenhouse gas emissions for all projects, including those projects that are driven by AB32. SB97 included a very narrow limitation on lawsuits against certain transportation projects on the basis of failure to adequately analyze greenhouse gas emissions. (Public Resources Code, § 21097.) Other than that very limited provision, SB97 did not express any intent to treat projects driven by AB32 any differently than any other type of project. The Natural Resources Agency, therefore, finds that the proposed amendments do provide a clear path for analysis and mitigation of greenhouse gas emissions for all projects pursuant to CEQA. Specific suggestions for further amendments are addressed below.

Comment 80-3

Commenter recommends revising the Statement of Reasons to discuss statutory options for improving the permitting process for projects will net GHG emission-reduction effects.

Response 80-3

The Natural Resources Agency is only required to respond to comments concerning the proposed action (i.e., the text of the proposed amendments) or to the procedures followed in proposing or adopting the proposed action. (Government Code, § 11346.9(a)(3).) Comments on the content of the Initial Statement of Reasons are neither directed at the text of the regulations nor at the Natural Resources Agency's process for adopting those regulations. Though responses to comments on the Initial Statement of Reasons are not required, the Natural Resources Agency provides the following responses.

The purpose of the Initial Statement of Reasons is to set forth "the specific purpose of [the regulatory action] and the rationale for the determination by the agency that [the regulatory action] is reasonably necessary to carry out the purpose for which it is proposed." (Government Code, § 11346.2(b)(1).) A discussion of potential statutory changes relating to the permitting of certain types of projects is beyond the scope of the contents necessary for an Initial Statement of Reasons. The Natural Resources Agency, therefore, declines to revise the Initial Statement of Reasons to provide such a discussion.

Comment 80-4

Commenter recommends that proposed section 15064.4 expressly identify ARB's AB 32 Scoping Plan as a plan to be used in the determination of a project's significance.

Response 80-4

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.

In order for consistency with a plan to demonstrate that a project's incremental contribution to a cumulative problem will not be cumulatively considerable, as provided in section 15064.4(b)(3), the plan must 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), however. Given the above, the Natural Resources Agency has determined that no further revision to the CEQA Guidelines is necessary to recognize the Scoping Plan.

Comment 80-5

Commenter recommends the Guidelines be revised to deem participation in the AB 32 cap-and-trade program to be adequate mitigation for CEQA purposes.

Response 80-5

Proposed section 15183.5(b) is intended to assist lead agencies in determining which types of plans for the reduction of greenhouse gases would reduce an individual project's incremental contribution to a

less than cumulatively considerable level. The Air Resources Board's Preliminary Draft Regulation for a California Cap-and-Trade Program was just released on November 24, 2009. Because it is a preliminary draft only, the Natural Resources Agency's proposed amendments cannot at this point specifically address whether that program would have any application in the CEQA process. Public Resources Code section 21083.05(c) requires that the CEQA Guidelines be periodically updated "to incorporate new information or criteria established by the State Air Resources Board" pursuant to AB32. Thus, if necessary, guidance on mitigation can be update after formulation of the Cap and Trade Program is complete. Please also note that proposed section 15126.4(c)(3) expressly recognizes a lead agency's ability to mitigate a project's greenhouse gas emissions using offsets. For the reasons explained above, no further revision is required in response to this comment.

Comment 80-6

Commenter recommends the Guidelines be revised to acknowledge GHG emissions associated with infrastructure projects necessary to implement an AB 32 strategy should be considered in the context of AB 32's strategy and not viewed in isolation.

Response 80-6

As explained in Response 80-2, above, SB 97 did not indicate that projects providing the infrastructure for AB32 implementation should receive any different treatment under CEQA than any other project. Therefore, the proposed amendments provide guidance on the analysis and mitigation of greenhouse gas emissions for all projects. Response 80-4, above, explains how lead agencies may analyze projects that are consistent with regulatory requirements. No further revision is required in response to this comment.

Comment 80-7

Commenter recommends the Guidelines be revised to acknowledge that projects required by regulations, measures, or programs identified in the AB 32 Scoping Plan should be considered less than significant by virtue of their contribution to the State's overarching plan for reducing GHG emissions.

Response 80-7

The comment does not provide any examples of projects that would be required by regulations, measures, or programs identified in the AB32 Scoping Plan. Regulations to implement the Scoping Plan are currently under development. As a general matter, however, 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 projects implementing AB 32 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.

Notably, CEQA only applies to discretionary projects. Thus, to the extent that a regulation “requires” a project such that implementation is a ministerial duty, CEQA would not apply. (State CEQA Guidelines, § 15268.)

Finally, to the extent a project would result in actual reductions in greenhouse gas emissions compared to the existing environmental setting, and substantial evidence demonstrates that reduction, proposed section 15064.4(b)(1) would allow a lead agency to consider that decrease in determining whether the project’s emissions are significant.

No further revision is required in response to this comment.

Comment 80-8

Commenter recommends revising the Guidelines to expressly recognize that the AB 32 Scoping Plan as an overarching context for the review of GHG emissions.

Response 80-8

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. That evaluation cannot be limited to AB32 or the California Air Resources Board’s Scoping Plan. 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.

To the extent the comment also suggests that a project's emissions should be viewed in the context of sector-wide emissions, other emissions reductions mandated by AB32 would be appropriately addressed as part of a cumulative impacts analysis (i.e., the impacts resulting from a project's emissions when added to other past, present and reasonably foreseeable future emissions). The Natural Resources Agency originally proposed the addition of a new subdivision (f) that would have been added to Section 15130 on cumulative impacts. That subdivision is no longer proposed for adoption, however, because it merely restated the law that cumulative effects of a project must be analyzed. 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. No further revisions appear to be required in response to this comment.

Comment 80-9

Commenter recommends revising the Guidelines to clearly recognize that participation in a cap-and-trade program satisfies the mitigation requirements of CEQA.

Response 80-9

As explained in Response 80-5, above, the Cap-and-Trade Program is currently under development, so the Natural Resources Agency cannot issue guidance at this point on whether participation in that program would be adequate mitigation for CEQA purposes. Proposed section 15126.4(c)(3) does contemplate that a lead agency may use offsets to mitigate a project's greenhouse gas emissions. If necessary, after adoption of the Cap-and-Trade Program, section 21083.05(c) of the Public Resources Code provides that the CEQA Guidelines may be updated. No revisions are required in response to this comment.

Comment 80-10

Commenter recommends revising the Guidelines to clarify that a project in compliance with adopted regulations or requirements includes the infrastructure necessary to implement the type of projects described in the AB 32 Scoping Plan and otherwise controlled under AB 32 regulations, measures or programs, and additional mitigation is not required for such infrastructure.

Response 80-10

As explained in Response 80-6, above, SB 97 did not indicate that projects providing the infrastructure for AB32 implementation should receive any different treatment under CEQA than any other project. Therefore, the proposed amendments provide guidance on the analysis and mitigation of greenhouse gas emissions for all projects. Response 80-10, above, explains how lead agencies may analyze projects that are consistent with regulatory requirements. No further revision is required in response to this comment.

Comment 80-11

Commenter recommends revising the Guidelines to recognize that greenhouse gas emissions from projects required by AB 32 should be considered less than significant.

Response 80-11

As explained in Response 80-7, above, SB 97 did not alter existing CEQA rules as they relate to the analysis and mitigation of greenhouse gas emissions. CEQA otherwise requires that lead agencies determine whether impacts associated with a project may be significant. Therefore, the proposed amendments cannot require that lead agencies determine that emissions associated with AB32-related projects are less than significant. No revision is required in response to this comment.

Comment 80-12

Commenter recommends revising the Initial Statement of Reasons to include a discussion of how policy objectives of CEQA and AB 32 differ, describe AB 32's agenda and timeline, identify possible statutory improvements to CEQA to remove, or at least reduce, uncertainties in the analysis of greenhouse gas impacts, especially those driven by AB 32.

Response 80-12

As explained in Response 80-3, above, the purpose and contents in an Initial Statement of Reasons are set forth in the Government Code. The Initial Statement of Reasons is not a vehicle for proposing amendments to legislation. Given various comments on the relationship between CEQA, AB32 and SB375, however, the Final Statement of Reasons will include a general discussion of those three

statutes. No further revision of the Initial Statement of Reasons is required in response to this comment.

Comment 80-13

Commenter recommends the Legislature consider an amendment to CEQA that identifies projects for which greenhouse gas impact analysis is unnecessary.

Response 80-13

This comment exceeds the scope of the regulatory action contemplated in the proposed amendments. Specific proposals for statutory amendments should be directed to the Legislature.