Letter 94

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Comment 94-1

Commenter generally supports the preservation of lead agency discretion and expresses the organization's position that these guidelines achieve the goal stated in the Governor's signing message.

Response 94-1

The Natural Resources Agency appreciates the general support noted in the comment. One of the policy goals underlying the proposed amendments is to provide public agencies with consistent guidance on the analysis of greenhouse gas emissions required by CEQA, and ways to mitigate those emissions if they are determined to be significant.

Comment 94-2

Prior comments are incorporated by reference. Those prior comments would improve the Guidelines by further clarifying their intent and application consistent with SB 97, AB 32, and SB 375.

Response 94-2

Responses to all previously submitted comments are contained in the Final Statement of Reasons. The Final Statement of Reasons has also been updated to include a more detailed discussion of the relationship between CEQA, SB375, and AB32.

Comment 94-3

Delete the phrase "among others" from section 15064.4(b). Lead agencies may interpret this section to always require consideration of *more* than the three factors provided in (b)(1), (b)(2), and (b)(3). The Guidelines do not intrude on the discretionary authority given to lead agencies when assessing significance elsewhere and that authority should be maintained here.

Response 94-3

Section 15064.4(b) lists factors that an agency should consider in determining the significance of a project's greenhouse gas emissions. The phrase "among others" is necessary to effectuate the requirement that a public agency determine if there is substantial evidence, "in light of the whole record before the lead agency," that a project may have a significant effect on the environment. (Public Resources Code, § 21080(d); see also, State CEQA Guidelines, § 15064(a)(1).) If the record before an agency contains substantial evidence unrelated to one of the listed factors in section 15064.4(b) but that indicates that the greenhouse gas emissions of a project may nevertheless be significant, section 21080(d) of the Public Resources Code would require the agency to prepare an EIR. The phrase "among others" also mirrors the guidance in section 15064(b) that an "ironclad definition of significant effect is not always possible[.]" Thus, an agency should not feel confined in its analysis of greenhouse gas emissions to just those factors that are listed in section 15064.4(b). For these reasons, the Natural Resources Agency declines to delete the phrase "among others" from section 15064.4(b).

Comment 94-4

Revise Section 15126.2(a) to state that an EIR should only consider *potentially significant* impacts. Unless revised, a lead agency may interpret that section as requiring an EIR to evaluate *all* impacts of locating development in certain hazardous areas.

Response 94-4

The last sentence in section 15126.2(a) could not be interpreted to require evaluation of impacts that are not potentially significant, for several reasons. First, as the comment notes, Public Resources Code section 21002.1(a) provides that the purpose of an EIR is to identify the "significant effects" of a project. Second, the added sentence serves merely as a further illustration of the existing requirement in section 15126.2(a) that an EIR "analyze any significant environmental effects the project might cause by bringing development and people into the area affected." Thus, it is clear from the added sentence's context that it addresses only the potentially significant effects of locating a project in a location that is susceptible to hazards.

Nevertheless, the Natural Resources Agency has further revised section 15126.2(a) in response to this comment, using substantially the same language as was suggested in the comment. Rather than stating that an "EIR should evaluate the <u>potentially significant</u> impacts, <u>if any</u>," of locating a project in an area susceptible to hazards, that section will state that and "EIR should evaluate <u>any potentially significant</u> impacts," of placing projects in such locations. As the comment notes, an EIR is only required for those impacts that are potentially significant. (Public Resources Code, § 21002.1(a).) Because this revision clarifies the last sentence in section 15126.2(a), consistent with the Public Resources Code, and does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally proposed text, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

Comment 94-5

Delete the revision to 15126.4(c) which adds the sentence "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision." Lead agencies may interpret the sentence to mean that the only GHG mitigation that is recognized under CEQA is that which is not otherwise required by current law. That interpretation would prevent existing environmental law and code requirements from being used as mitigation.

Response 94-5

The CEQA statute requires lead agencies to mitigate or avoid the significant effects of proposed projects where it is feasible to do so. (Public Resources Code, § 21002.) While the CEQA statute does not define mitigation, the State CEQA Guidelines define mitigation to include:

> (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
>
> (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (e) Compensating for the impact by replacing or providing substitute resources or environments.

(State CEQA Guidelines, § 15370.) As subdivision (e) implies, off-site measures may constitute mitigation under CEQA, and such measures have been upheld as adequate mitigation in CEQA case law. (See, e.g., *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 619-626.)

To be considered mitigation, a measure must be tied to impacts resulting from the project. Section 21002 of the Public Resources Code, the source of the requirement to mitigate, states 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[.]" Similarly, section 21081(a)(1) specifies a finding by the lead agency in adopting a project that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." Both statutory provisions expressly link the changes to be made (i.e., the "mitigation measures") to the significant effects of the project. Courts have similarly required a link between the mitigation measure and the adverse impacts of the project. (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 128-131 (EIR must discuss "the history of water pumping on [the off-site mitigation] property and its feasibility for providing an actual offset for increased pumping on the [project] property").) The text of sections 21002 and 21081, and

case law requiring a "nexus" between a measure and a project impact, together indicate that "but for" causation is a necessary element of mitigation. In other words, mitigation should normally be an activity that occurs in order to minimize a particular significant effect. Or, stated another way and in the context of greenhouse gas emissions, emissions reductions that would occur with or without a project would not normally qualify as mitigation.

Notably, this interpretation of the CEQA statute and case law is also consistent with the Legislature's directive in AB32 that reductions relied on as part of a market-based compliance mechanism must be "in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." (Health and Safety Code, § 38562(d)(2).)

The Natural Resources Agency received comments on its originally proposed amendments expressing concern that some agencies and project proponents may attempt to rely on reductions of greenhouse gas emissions that were already required to address a separate project's impacts. (See, e.g., Letter from Center for Biological Diversity, et. al., August 27, 2009, Comments 71-13 through 71-16.) In light of the above, and in response to concerns raised during public review, the Natural Resources Agency proposed to revise section 15126.4(c) to state the following: "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision." That addition was intended to be read in conjunction with the statutory mandate in Public Resources Code sections 21002 and 21081 that mitigation be tied to the effects of a project. It was also intended to harmonize the "offset" concept in section 15126.4(c)(3) with the requirement in AB32 that offsets used in the cap and trade program be the result of voluntary reductions. (See, e.g., Initial Statement of Reasons, at p. 38.)

Provisions in the CEQA Guidelines must be read in conjunction with existing rules recognized in cases interpreting the CEQA statute. As the comment points out, existing case law recognizes that changes in a project that are made pursuant to existing environmental regulations may be considered mitigation. (*Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337; *Sundstrom v. County of Medocino* (1988) 202 Cal.App.3d 296.) This rule is reflected in subdivisions (c)(1) and (c)(5), for example, which address measures identified in a plan or incorporated into a plan. Similarly, subdivision (c)(2) refers to changes in a project. Thus, the added sentence could not be interpreted, as the comment suggests, to mean that lead agencies could not recognize a project's compliance with existing regulations as project mitigation. Rather, the proper interpretation of that sentence would be that reductions in emissions that are completely unrelated to the project (i.e., reductions that would occur with or without any change in the project) would not constitute mitigation.

The Natural Resources Agency acknowledges, however, the confusion that the added sentence could cause. Therefore, the Natural Resources Agency has further refined section 15126.4(c) to clarify that the "not otherwise required" limitation applies in the context offsets. Specifically, the added sentence has been deleted, and subdivision (c)(3) has been revised to state that mitigation includes: "Off-site measures, including offsets <u>that are not otherwise required</u>, to mitigate a project's emissions[.]"

This revision responds to the concern in the comment because it does not imply that changes in a project that are made pursuant to environmental regulations cannot be considered mitigation. Offsets by their nature occur as part of some other action. Moving this concept from the general provisions on mitigation of greenhouse gas emissions to the provision on offsets does not materially alter the rights or conditions in the originally proposed text because the "not otherwise required" concept would only make sense in the context of offsets. Because this revision clarifies section 15126.4(c)(3), consistent with the Public Resources Code and cases interpreting it, and does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally proposed text, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

The Natural Resources Agency therefore, finds that the revision described above responds to the concern raised in this comment.

Comment 94-6

The sentence, "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision," in section 15126.4(c) could also be construed to mean a measure cannot be considered mitigation for greenhouse gas emissions if it is required to mitigate other impacts. This is contrary to existing CEQA practice and the use of "co-benefits".

Response 94-6

As explained above in Response 94-5, that sentence has been deleted in favor of a revision to section 15126.4(c)(3). While the phrase "not otherwise required" would appear in that subdivision, it could not be interpreted as suggested in the comment. Nothing in the text suggests that a measure developed to mitigate one of a project's impact might not also mitigate that project's other impacts. Rather, the word "otherwise" refers to some action that is not connected to the project. No further revision is required in response to this comment.

Comment 94-7

The word "may" in the second sentence of section 15126.4(c) suggests that a measure could only considered valid mitigation if it were "not otherwise required". Lead agencies might misinterpret the revision's intent and give rise to claims against projects, based on types of mitigation, that have been previously used in CEQA practice and case law.

Response 94-7

As explained in Response 94-5, above, the second sentence in section 15126.4(c) has been deleted and the provision in subdivision (c)(3) has been revised. These revisions clarify the intent that the "not

otherwise required" language apply in the context of offsets. The remainder of the concerns raised in the comment were addressed in Responses 94-5 and 94-6, above. No further revision is required in response to this comment.

Comment 94-8

The sentence "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision" in section 15126.4(c) is inconsistent with many efforts at the state, regional, and local levels to adopt greenhouse gas emission reduction plans and energy conservation standards. The sentence may have the unintended effect of penalizing projects that comply with government adopted plans or standards by claims that the project must be further redesigned or denied in order to further reduce greenhouse gas emissions.

Response 94-8

As described above in Response 94-5, the second sentence in section 15126.4(c) has been deleted and the provision in subdivision (c)(3) has been revised.

Notably, this provision would not limit the ability of a lead agency to create, or rely on the creation of, a mechanism, such as an offset bank, created prospectively in anticipation of future projects that will later rely on offsets created by those emissions reductions. The Initial Statement of Reasons referred, for example, to community energy conservation projects. (Initial Statement of Reasons, at p. 38.) Such a program could, for example, identify voluntary energy efficiency retrofits that would not occur absent implementation of the program, and then fund the retrofits through the sale of offsets that would occur as a result of the retrofit. Thus, this provision would encourage the types of innovations and enhancements described in the comment. Emissions reductions that occur as a result of a regulation requiring such reduction, on the other hand, would not constitute mitigation. No further revision is required in response to this comment.

Comment 94-9

Section 15125(d) which requires a discussion of consistency with certain plans, should recognize Public Resources Code Section 21159.28 and Government Code Section 65080(b)(2)(H)(v) Those statutes state that consistency with an alternative planning strategy is not an environmental impact, and certain projects that are consistent with either an Alternative Planning Scenario or Sustainable Communities Strategy may be exempt . Accordingly, for treatment of global warming issues in the CEQA context, the two plans are interchangeable.

Response 94-9

A Sustainable Communities Strategy and an Alternative Planning Strategy are not interchangeable for CEQA purposes. The commenter correctly notes that an Alternative Planning Strategy is not a land use plan with which land use consistency should be analyzed under CEQA. (Government Code, § 65080(b)(2)(H)(v).) For that reason, the Natural Resources Agency deliberately did not propose to add "Alternative Planning Strategy" to the list of plans to be considered in an environmental setting pursuant to section 15125. There is no similar statement precluding analysis of consistency with a Sustainable Communities Strategy, however. Thus, the reference to a "regional transportation plan" which would contain a Sustainable Communities Strategy in the existing section 15125(d) remains appropriate. The Initial Statement of Reasons explained that the reference to "plans for the reduction of greenhouse gas emissions" is intended to cover a broad range of plans that may be adopted by state and local agencies. The specific statutory provisions governing an Alternative Planning Strategy or Sustainable Communities Strategy would, however, control. The Natural Resources Agency, therefore, rejects the suggested addition to Section 15125(d) because it is unnecessary and would not be consistent with existing law.

Comment 94-10

The amendments conflict with provisions provided in SB 375. Section 15130(b)(1)(B) must recognize that if a project complies with either the Sustainable Communities Strategy or Alternative Planning Strategy, then the CEQA document "shall not be required to reference, describe or discuss (1) growth inducing impacts; or (2) any project specific or cumulative impacts from cars and light-duty truck trips generated by the project on global warming or the regional transportation network." Accordingly, section 15130(b)(1)(B) should contain a reference to Public Resources Code Section 21159.28(a).

Response 94-10

Section 21159.28 of the Public Resources Code contains a specific limitation on the analysis of cars and light duty trucks on global warming and the regional transportation network and growth inducing impacts for certain types of residential projects that are consistent with a Sustainable Communities Strategy or an Alternative Planning Strategy. The proposed amendments recognize that specific limitation in proposed new Section 15183.5(c). As indicated in that section, cumulative impacts resulting from other sources of greenhouse gas emissions should still be analyzed. Section 15130(b)(1)(B), addressing cumulative impacts analysis in general, must be read in conjunction with the proposed new Section 15183.5(c). Therefore, reference to projections of emissions would still be appropriate for a cumulative impacts analysis of sources of emissions other than cars and light duty trucks. The revision suggested in this comment is, therefore, rejected as unnecessary.

Comment 94-11

Revise question (b) of Appendix G, Section VII: Greenhouse Gas Emissions to specifically state that an Alternative Planning Strategy shall not be considered in determining whether a project may have an environmental effect pursuant to Government Code 65050(b)(2)(H)(v).

Response 94-11

The Appendix G question referenced in the comment asks whether a project would: "Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?" (Emphasis added.) That question was revised specifically to replace the word "any" with the word "an" in order to clarify that only a plan determined to be applicable by the lead agency, and not any plan developed by any person or entity, should be considered in determining whether a project would result in a significant impact relating to greenhouse gas emissions. The comment correctly notes that Government Code Section 65080(b)(2)(H)(v) states: an "alternative planning strategy shall not constitute a land use plan, policy, or regulation, and the inconsistency of a project with an alternative planning strategy shall not be a consideration in determining whether a project may have an environmental effect" for CEQA purposes. By operation of that Government Code Section 65080(b)(2)(H)(v), an alternative planning strategy would not constitute "an applicable plan" for purposes of the Appendix G question. Notably, as explained in the Initial Statement of Reasons, the Appendix G checklist is meant to provide a sample checklist of questions designed to provoke thoughtful consideration of general environmental concerns. (Initial Statement of Reasons, at p. 63.) Because it is provided as a sample only, the Office of Planning and Research and the Natural Resources Agency found that it would not be possible to identify with specificity each plan that or may not apply to a particular jurisdiction or project.

Lead agencies, however, have discretion to revise the checklist in a way that is most appropriate for their own jurisdiction. If an individual agency in a region where an APS was prepared finds it necessary or desirable to restate Government Code Section 65080(b)(2)(H)(v) in its own checklist, it may do so. Further, while inconsistency with an APS is not, by itself, an indication of a potentially significant impact, other project characteristics would need to be considered as indicated in Section 15064.4 and other provisions of the CEQA Guidelines. Because Government Code Section 65080(b)(2)(H)(v) already provides that an APS is not a land use plan for CEQA purposes, and the Appendix G question asks only about "an applicable plan," the question need not specify an exception for an APS. The proposed addition is, therefore, rejected.