Letter 99

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November 10, 2009

Comment 99-1

The proposed amendments grant lead agencies too much discretion in determining: significance thresholds, findings of significance, statements of overriding considerations, baseline conditions, mitigation, cumulative impacts, and tiering.

Response 99-1

As explained in the Initial Statement of Reasons, SB97 did not make any substantive changes to the CEQA statute. Therefore, the proposed amendments acknowledge, and are consistent with, the discretion that lead agencies have under existing CEQA rules. The concerns raised in commenter's first letter are addressed in Responses to Letter 65. Specific concerns regarding the revisions to the proposed amendments are addressed below.

Comment 99-2

Section 15064.4(a) would give an agency too much discretion in deciding whether to perform a quantitative or qualitative analysis and fails to provide any specific guidance or methodology for determining significance.

Response 99-2

Section 15064.4(a) was revised in order to clarify the informational standards that apply to an agency's determination of significance. In particular, the revision ensures consistency with the general rule stated in section 15064(b) of the State CEQA Guidelines that a determination of significance must be based, to the extent possible, on scientific and factual data.

The comment also states that by failing to provide specific guidance or methodologies, the proposed amendment provides lead agencies too much discretion. Again, the proposed amendments are consistent with the general rule stated in section 15064(b) of the State CEQA Guidelines that "ironclad definition of significant effect is not always possible[.]" (State CEQA Guidelines, § 15064(b); see also *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107 ("There is no 'gold standard' for determining whether a given impact may be significant").) Further,

section 15064.4(a) 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.) Therefore, the Natural Resources Agency disagrees that the proposed amendments provide too much discretion to lead agencies in determining the significance of a project's greenhouse gas emissions. No revisions are required in response to this comment.

Comment 99-3

The addition of the phrase "to the extent possible" in section 15064.4(a) is confusing and may inadvertently create a loophole allowing a lead agency to not avoid the existing CEQA standard that a significance determination should *always* be based on scientific and factual information.

Response 99-3

As explained in Response 99-2, above, section 15064.4(a) has been revised to parallel the guidance in existing section 15064(b), which states: the "determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." (Emphasis added.) Thus, section 15064.4(a) does not provide any loophole. Therefore, to the extent the comment suggests that the phrase "to the extent possible" should be deleted, the Natural Resources Agency rejects that suggestion.

Comment 99-4

The revision to section 15064.4(b), replacing "may" with "should" is insufficient. There is no reason to afford a lead agency discretion in whether to consider the factors listed in the subsection. The factors (b)(1), (b)(2), and (b)(3) should be mandatory steps in reaching a significance determination.

Response 99-4

Section 15005 of the State CEQA Guidelines 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" where a statutory provision or rule of case law mandates that an agency 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 provision in proposed section 15064.4 noted in the comment. This guidance is based on policy considerations set out in the Initial Statement of Reasons. There may be times, however, when consideration of all three factors is not appropriate. For example, if a lead agency determines that no threshold of significance appropriately addresses a particular type of project, then no purpose would be served in requiring consideration of an inapplicable threshold, and section 15064.4(b)(2) should not apply. Further, the Natural Resources Agency notes that the Guidelines do not dictate for any other potential impacts that an agency must consider any particular factors. Therefore, the Natural Resources Agency declines to revise section 15064.4 as suggested.

Comment 99-5

Revise Section 15093(a) to clarify that GHG emissions may have localized as well as regional and global environmental impacts. For example, greenhouse gas emissions can exacerbate localized air pollutant levels. Such impact must be considered and weighed in a statement of overriding considerations.

Response 99-5

Section 15093 of the State CEQA Guidelines addresses a Statement of Overriding Considerations, and specifies under what circumstances a project's benefits may be weighed against its significant and unavoidable adverse impacts. Subdivision (a) expressly requires that all significant and unavoidable impacts be weighed against the project's benefits, therefore, it is not necessary to specify localized impacts resulting from greenhouse gas emissions. (Revised State CEQA Guidelines, § 15093(a) ("If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposal project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered 'acceptable'"); existing State CEQA Guidelines, § 15358(a)(1) (effects include "Direct or primary effects which are caused by the project and occur at the

same time and place").) The Natural Resource Agency thus declines to revise section 15093(a) as suggested.

Comment 99-6

Revise Section 15126.4(c) to *require* the listed methods of mitigating GHG emissions.

Response 99-6

CEQA's substantive mandate requires that "public agencies should not approve projects as proposed if there are … feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" (Public Resources Code, § 21002.) The statute defines feasible to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Public Resources Code, § 21061.1.) The Legislature further provided that a lead agency may use its lawful discretion to mitigate significant impacts to the extent provided by other laws:

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

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

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

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

emissions. 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 Natural Resources Agency also notes that Appendix F already specifies several energy-related mitigation measures. The suggested revision is, therefore, rejected.

Comment 99-7

Commenter disagrees with the revision deleting Section 15130(f), while the original amendment restates the law, it is equally important that the amendments clarify the law. The original amendment should remain.

Response 99-7

As explained in the Notice of Proposed Changes, several comments submitted on the proposed amendments indicated confusion about how then proposed section 15130(f) would be interpreted. The Natural Resources Agency has determined that subdivision (f) of section 15130 is not necessary for several reasons. First, subdivision (a) of section 15130 already states that an "EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable[.]" Second, as explained in the Initial Statement of Reasons, greenhouse gas emissions should not generally be treated any differently than any other category of impact. Thus, the proposed amendments were intended to only address those areas where separate treatment of greenhouse gas emissions was appropriate. Subdivision (f) was originally thought appropriate as a signal that the effects of greenhouse gas emissions will generally be cumulative in nature; however, other provisions in the proposed amendments and the Initial Statement of Reasons make that point clear. Therefore, it is not necessary to specifically state that greenhouse gas emissions should be addressed in a cumulative impacts analysis. The comment has provided no further justification for retaining that subdivision. To eliminate confusion, and minimize unnecessary changes to the CEQA Guidelines, the Natural Resources Agency declines to retain subdivision (f) of section 15130.

Comment 99-8

Commenter observes that typically, if a lead agency determines that an individual project's GHG emissions are not significant on a project-specific basis, the cumulative impacts will also be less than significant. Absent the originally proposed amendment to include Section 15130(f), this pattern will likely continue.

Response 99-8

The Natural Resources Agency disagrees that formerly proposed subdivision (f) is necessary to ensure that lead agencies consider the potential cumulative effects of an individual project's greenhouse gas emissions. First, subdivision (f) would have only stated that the cumulative effects must be analyzed if a

project's incremental contribution of greenhouse gas emissions may be cumulatively considerable. Thus, even as proposed, that subdivision would not have prevented some agencies from mistakenly assuming that a less that significant direct impact means that the project will not have any cumulative impacts. Second, the existing CEQA Guidelines already advise that "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time[.]" (State CEQA Guidelines, § 15355(b).) Thus, to eliminate confusion, and minimize unnecessary changes to the CEQA Guidelines, the Natural Resources Agency declines to retain subdivision (f) of section 15130.

Comment 99-9

The revisions to the proposed amendments fail to remedy the deficiencies noted in prior comments (Letter 65), and thus fail to uphold the purpose and intent of CEQA and fail to reduce greenhouse gas emissions.

Response 99-9

The Natural Resources Agency disagrees that the proposed amendments fail to uphold the purpose and intent of CEQA. As explained above in Responses 99-1 through 99-8, and Responses to Letter 65, the proposed amendments are consistent with CEQA. The proposed amendments do provide guidance enabling public agencies to consider whether a project's greenhouse gas emissions may potentially be significant, and if determined to be significant, impose feasible measures to mitigate those emissions. While CEQA requires analysis and imposition of mitigation where feasible, it does not require, as the comment implies, an absolute reduction in greenhouse gas emissions. No further revisions are required in response to this comment.