Letter 102

Stephen Kelly
Policy Director
Independent Energy Producers' Association

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Comment 102-1

This comment is general in nature and expressing the Association's view of the revisions to the proposed amendments. The Association expresses support in some areas of the Guidelines while disagreeing with others.

Response 102-1

Responses to specific provisions of the revisions to the proposed amendments are provided below.

Comment 102-2

The commenter supports revisions to Section 15064.4.

Response 102-2

The Natural Resources Agency appreciates the support for the revisions to section 15064.4. No further revisions are required in response to this comment.

Comment 102-3

The commenter notes that the existing language in Section 15125 is broad enough to consider the relevant area in the context of electrical generation and transmission facilities and that the lead agency retains discretion to define the environmental setting, but still prefers the use of the term "existing facilities" to "existing environmental setting".

Response 102-3

Section 15064.4(b)(1) advises lead agencies to consider the extent to which a project would increase or decrease greenhouse gas emissions compared to the existing environmental setting. The "setting" to be described 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 power generation, to the extent that a project may cause changes in greenhouse gas emissions in an existing power system, and substantial evidence substantiates such changes, those changes may be considered pursuant to section 15064.4(b)(1). Thus, section 15064.4(b)(1) does guide decision-makers to ensure the public will be fully informed of a project's potential impacts related to greenhouse gas emissions.

Use of the phrase "existing facilities" would not be appropriate because the Guidelines must be broad enough to encompass all types of projects in many different locations, not just those that involve facilities. Therefore, to the extent this comment suggests replacing the term "existing environmental setting" with the phrase "existing facilities" that suggestion is rejected. No further revisions are required in response to this comment.

Comment 102-4

Revise section 15064.4(b)(3) to include "programs" in addition to plans that a lead agency should consider. Similarly, add "federal plans or programs" to the list.

Response 102-4

This comment does not address the revisions to the proposed amendments that were the subject of the Notice of Proposed Changes; therefore, no response to this comment is required. Nevertheless, the Natural Resources Agency notes that the subject of the first sentence in section 15064.4(b)(3) is "regulations or requirements." The phrase "statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions" need not be interpreted to only include requirements derived from a document that includes the word "plan" in its title. Rather, section 15064.4(b)(3) should be read in the context of the decision in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, which is included among the reference authorities for section 15064.4. The court in that case agreed 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." (*Id*. at p. 111.) Thus, because in this context the word plan can be used synonymously with the word program, revision to add the word program is not necessary.

Further, to date, no federal regulations or requirements exist that are intended to reduce or mitigate greenhouse gas emissions, so the inclusion of the phrase "federal plans or programs" would not be appropriate at this time. Notably, the CEQA Guidelines will be updated periodically to address new

information about greenhouse gas emissions and efforts to reduce such emissions. (Public Resources Code, § 21083.05(c).) Thus, the Natural Resources Agency can reassess whether the suggested text is necessary once the federal government implements federal plans or programs to reduce greenhouse gas emissions. At this time, however, the suggested revision is rejected.

Comment 102-5

Commenter generally supports the revisions to Section 15126.4(c) but recommends deleting the sentence "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision."

Response 102-5

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 that are not otherwise required, 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 102-6

Section 15126.4(c), last sentence may be interpreted to read to foreclose mitigation under CEQA for measures that *are* required by other laws. This may not be the intent as no other CEQA provision or judicial interpretation that invalidates a mitigation measure because the measure is also required by another law.

Response 102-6

That sentence was proposed in order to address reductions in emissions that do not have a causal connection to the project. It was not intended to preclude a lead agency from adopting as a mitigation measure a requirement that the project under consideration comply with other laws. The comment cites to existing section 15126.4(a)(1) and *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180 as support for the position that a lead agency may rely on a measure so long as substantial evidence indicates that the measure will reduce a significant effect. While it is true that substantial evidence must support a lead agency's determination that a measure will reduce an identified significant effect, those authorities do not state that there is no other limitation on mitigation. For example, in addition to being supported with substantial evidence, a mitigation measure must be fully enforceable. (State CEQA Guidelines, § 15126.4(a)(2).) A measure must also satisfy the requirements in the authorities noted in Response 102-5, above. Because the Natural Resources Agency revised section 15126.4(c)(3) to clarify that the phrase "that are not otherwise required" applies only to offsets, no further revision is required in response to this comment.

Comment 102-7

The last sentence of Section 15126.4(c) may have the unintended consequence of limiting mitigation and is impractical given the global nature of GHG emissions and climate change. The commenter and other agencies, including the California Energy Commission and California Public Utilities Commission, recognize that greenhouse gas emissions are best addressed through programmatic measures, notably the AB 32 Scoping Plan. This revision may impede efforts to develop programmatic approaches, such as the renewable portfolio and energy efficiency standards.

Response 102-7

The measures described in the comment all seem to be appropriate considerations for the determination of the existing environmental setting and projections of emissions for use in a cumulative impacts analysis. Moreover, several provisions in the proposed amendments expressly support programmatic planning for the reduction of greenhouse gas emissions. (See, e.g., proposed section 15183.5.) Because the Natural Resources Agency revised section 15126.4(c)(3) to clarify that the phrase "that are not otherwise required" applies only to offsets, no further revision is required in response to this comment.

Comment 102-8

If a lead agency determines that substantial evidence supports the conclusion that programmatic reductions will reduce a potential significant environmental effect, compliance with AB 32 can, and should, constitute mitigation under CEQA.

Response 102-8

This comment appears to conflate the requirement that a lead agency consider cumulative impacts (i.e., the impacts resulting from a project's emissions when added to other past, present and reasonably foreseeable future emissions) with the requirement that a lead agency mitigate the significant effects of a project. The proposed amendments 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.

To the extent the comment suggests that reductions in emissions resulting from implementation of AB32 elsewhere can mitigate the significant effects of a separate project under CEQA, the Natural Resources Agency disagrees. As explained in Response 102-5, above, CEQA requires that a project be changed in order to reduce or avoid a significant effect. Reductions in emissions that are not tied in any way to the project causing the significant effect would not constitute mitigation pursuant to those

existing authorities. Because the Natural Resources Agency revised section 15126.4(c)(3) to clarify that the phrase "that are not otherwise required" applies only to offsets, no further revision is required in response to this comment.

Comment 102-9

Commenter supports the revision to include the word "significant" in two sections. This clarifies mitigation is only required if an impact is cumulatively considerable.

Response 102-9

The Natural Resources Agency appreciates the support of the addition of the word significant where appropriate in the proposed amendments. Two clarifications are warranted in light of this comment, however. First, the Natural Resources Agency has not added the word "significant" to section 15130. It appears that the comment intends to refer instead to the revision in section 15126.4(c) which clarifies that mitigation of greenhouse gas emissions is required only if such emissions are determined to be significant. Second, the comment indicates that mitigation would only be required if an impact is determined to be cumulatively considerable. The Natural Resources Agency disagrees. If a lead agency determined that a particular project's emissions would cause a significant direct impact in addition to cumulative impacts, both the direct and cumulative impacts would need to be mitigated. No further revision is required in response to this comment.

Comment 102-10

Revise Appendix G, "Evaluation of Environmental Impacts" subparagraph 2 to state: "All answers must take account of <u>the impacts or benefits of</u> the whole action…" Commenter notes this would add clarity and will encourage an analysis of the overall context of a project.

Response 102-10

The Natural Resources Agency declines to incorporate the suggested text for several reasons. First, as the comment notes, the Evaluation of Environmental Impacts section already exists in the Appendix G, and the Natural Resources Agency proposes no changes to that section. Rather, it circulated that section with the other revisions on October 23, 2009, to clarify that its inadvertent omission of that section from the original publication on July 3, 2009, was not intended to signal deletion of that section. Second, the reference to project benefits in the Initial Study checklist is not appropriate; the focus instead should be on potential adverse environmental impacts. Project benefits are generally only proper in a CEQA analysis as part of a statement of overriding considerations pursuant to State CEQA Guidelines section 15093.

Comment 102-11

Revise Appendix G: Section VII: Greenhouse Gas Emissions. Commenter suggests the question should ask whether the project under review adds considerable GHG emissions to background greenhouse gas level. "[would the project] generate GHG emissions, either directly or indirectly, that may be cumulatively considerable."

Response 102-11

The Natural Resources Agency declines to incorporate the suggested revision. The suggested revision would imply that only the cumulative effects of greenhouse gas emissions need to be analyzed. SB97 did not, however, limit the CEQA analysis of greenhouse gas emissions to cumulative impacts. Therefore, the proposed amendments cannot foreclose the possibility that a lead agency may need to address the direct effects of a project's greenhouse gas emissions if substantial evidence supports a fair argument that such emissions would cause adverse impacts.