Letter 93

Matt Vespa
Senior Attorney
Center for Biological Diversity

November 10, 2009

Comment 93-1

Commenter appreciates and supports the Natural Resources Agency's revisions to Section 15093 and Appendix G, Section XVI: Transportation/Traffic. However, the commenter has three concerns: amendments specific to the quantification of GHG emissions, the analysis of the effects of climate change, and revisions to 15126.4(c) are believed to be ambiguous.

Response 93-1

The Natural Resources Agency appreciates the support for revisions made to section 15093 and Appendix G related to transportation. Specific concerns regarding the remainder of the revisions are addressed below.

Comment 93-2

Section 15064.4(a) conflicts with existing CEQA provisions requiring a lead agency to make a "good-faith effort" to analyze potential impacts. The determination of what constitutes a "good-faith effort" is a question of law that does not require deference to the lead agency. This section improperly suggests otherwise. In cases where a lead agency only uses a qualitative assessment, where a good-faith effort would otherwise require a quantitative analysis, the lead agency might inappropriately rely on this section.

Response 93-2

Nothing in section 15064.4(a) purports to alter the standard of review a court would apply to agency determinations. Rather, 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.)

The comment fails to distinguish between the determination of significance and the informational standards governing the preparation of environmental documents. The purpose of section 15064.4 is to assist the lead agency in determining whether a project's greenhouse gas emissions may be significant, which would require preparation of an EIR, and if an EIR is prepared, to determine whether such

emissions are significant, which would require the imposition of feasible mitigation or alternatives. The existing CEQA Guidelines contain several other provisions governing the informational standards that apply to various environmental documents. Conclusions in an initial study, for example, must be "briefly explained to indicate that there is some evidence to support" the conclusion. (State CEQA Guidelines, § 15063(d) (emphasis added).) Similarly, if an EIR is prepared, a determination that an impact is not significant must be explained in a "statement briefly indicating the reasons that various possible significant effects of a project" are in fact not significant. (State CEQA Guidelines, § 15128 (emphasis added).) If the impact is determined to be significant, the impact "should be discussed with emphasis in proportion to their severity and probability of occurrence." (State CEQA Guidelines, § 15143.) The explanation of significance in an EIR must be "prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences" and must demonstrate "adequacy, completeness, and a good faith effort at full disclosure." (State CEQA Guidelines, § 15151.) In sum, while proposed section 15064.4(a) reflects the requirement that a lead agency base its significance determination on substantial evidence, whether quantitative, qualitative or both, it does not, as the commenter appears to fear, alter the rules governing the sufficiency of information in an environmental document.

Moreover, the discretion recognized in section 15064.4 is not unfettered. A lead agency's analysis, whether quantitative or qualitative, or both, would be governed by the standards in the first portion of section 15064.4. The first sentence applies to the context of greenhouse gas emissions the general CEQA rule that the determination of significance calls for a careful judgment by the lead agency. (Proposed § 15064.4(a) ("[t]he determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064").) The second sentence sets forth the requirement that the lead agency make a good-faith effort to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. That sentence has been further revised to provide that the description, calculation or estimation is to be based "to the extent possible on scientific and factual data." The third sentence advises that the exercise of discretion must be made "in the context of a particular project." Thus, as provided in existing section 15146, the degree of specificity required in the analysis will correspond to the degree of specificity involved in the underlying project. In other words, even a qualitative analysis must demonstrate a good-faith effort to disclose the amount and significance of greenhouse gas emissions resulting from a project.

Finally, the discretion recognized in proposed section 15064.4 would not enable a lead agency to ignore evidence submitted to it as part of the environmental review process. For example, if a lead agency proposes to adopt a negative declaration based on a qualitative analysis of the project's greenhouse gas emissions, and a quantitative analysis is submitted to that lead agency supporting a fair argument that the project's emissions may be significant, an EIR would have to be prepared. The same holds true if a lead agency proposes to adopt a negative declaration based on a quantitative analysis, and qualitative evidence supports a fair argument that the project's emissions may be significant. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm*. (2001) 91 Cal.App.4th 1344, 1382; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 881-882 (citizens' personal observations about the significance of noise impacts on their community constituted substantial evidence that the impact may

be significant and should be assessed in an EIR, even though the noise levels did not exceed general planning standards).) Similarly, even if an EIR is prepared, a lead agency would have to "consider and resolve conflicts in the evidence before it. (State CEQA Guidelines, § 15151; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.)

In sum, the proposed section 15064.4(a) appropriately reflects the standards in CEQA governing the determination of significance and the discretion CEQA leaves to lead agencies to determine how to analyze impacts. Thus, the Natural Resources Agency disagrees that section 15064.4(a) is inconsistent with CEQA.

Comment 93-3

Section 15064.4(a) could allow misplaced conclusions regarding CEQA's requirements. For example, a lead agency might presume that project impacts are less than significant based solely on compliance with efficiency-based GHG thresholds. Numerical information on emissions may be necessary to support a fair argument of a significant impact. Further, it is never defensible for a large project to rely on performance standards or a qualitative analysis to determine significance.

Response 93-3

The comment appears to assume that a qualitative analysis of greenhouse gas emissions could never be adequate. Nothing in CEQA prohibits use of a qualitative analysis or requires the use of a quantitative analysis. As explained in the Initial Statement of Reasons, CEQA directs lead agencies to consider qualitative factors. (Initial Statement of Reasons, at p. 19; Public Resources Code, § 21001(g).) Further, the existing CEQA Guidelines recognize that thresholds of significance, which are used in the determination of significance, may be qualitative or performance standards. (State CEQA Guidelines, § 15064.7.) Moreover, even where quantification is technically or theoretically possible, "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." (State CEQA Guidelines, § 15204(a); see also *Ass'n of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1396-1398; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 27 Cal.App.4th 713, 728.) Thus, section 15064.4(a) is not inconsistent with CEQA.

The Natural Resources Agency cannot prevent individual lead agencies from misapplying CEQA's requirements. As explained above, a qualitative analysis must reveal sufficient information about a project's emissions to enable to the lead agency to make a determination regarding significance. To ensure that such information is developed, that section has been revised to clarify that the analysis must be based "to the extent possible on scientific and factual data." While the comment raises a concern about data sufficient to support a fair argument, the Natural Resources Agency notes that a lack of evidence itself may support a fair argument. (See, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311 ("If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually

enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences").) Section 15064.4(a), however, calls on lead agencies to make a good faith effort to determine the emissions associated with a project using an analysis that is based on scientific and factual data that is proper for the context of the particular project. Thus, it will not, as the comment suggests, induce lead agencies to prepare an inadequate analysis.

Finally, the Natural Resources Agency disagrees that the size of a project necessarily determines what type of analysis is appropriate. While size may be one factor relevant to the "context of a particular project," it is not the only factor. In the case of performance standards, the appropriateness of a project's reliance on such standards would depend on the particular limitations of the standard itself. The Initial Statement of Reasons explained, for example, that performance standards for energy use would not necessarily provide information about transportation-related emissions. Similarly, particular performance standards may have been developed for only certain types of projects. Just as with thresholds of significance, a lead agency must determine whether a particular standard is appropriate for a particular project.

Comment 93-4

Delete subdivisions (a)(1) and (a)(2) from section 15064.4. Section 15064.4(a) bolsters the misplaced argument that readily available quantitative data on project emissions need not be considered if a lead agency is only required to provide quantitative *or* qualitative information to comply with CEQA.

Response 93-4

As explained in Response 93-2 and 93-3, above, section 15064.4(a) reflects CEQA's existing requirement that a lead agency develop information regarding a project's potential impacts, but that the choice of methodology of performing that analysis is left to a lead agency's discretion. Further, as explained in the Initial Statement of Reasons, subdivisions (a)(1) and (a)(2) are reasonably necessary to provide guidance on the analysis of the effects of greenhouse gas emissions, as required by Public Resources Code section 21083.05. (Initial Statement of Reasons, at pp. 17-19.) The comment itself provides further evidence of the necessity for the guidance in section 15064.4(a). Absent that guidance, lead agencies may be urged to perform a quantitative analysis for every project, regardless of its context. Forcing quantification, where such quantification would not reveal any more useful information than a qualitative analysis, is contrary to the Legislature's intent that "[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment." (Public Resources Code, § 21003(f).) Therefore, for the reasons described above, the Natural Resources Agency rejects the suggestion to delete subdivisions (a)(1) and (a)(2) from section 15064.4.

Comment 93-5

Revise Section 15126.2(a) to explicitly refer to an "analysis of the potential impacts of climate change." Commenter is concerned, that without a specific reference to "climate change" in this section, lead agencies will unlikely consider the consequences of placing a project in an area vulnerable to sea level rise, wildfire risk, etc.

Response 93-5

The revised text of section 15126.2(a) focuses on areas that are susceptible to hazards. The word "susceptible" is used to signal that both hazards existing today and those that are reasonably expected to occur in the future should be analyzed. Such hazards may include hazards that result from the effects of climate change or other causes. The appropriate focus in this section, however, is on the potential interaction between the project and the hazard, and not the cause of the hazard. Further, not all effects of climate change are necessarily appropriately analyzed in this section. Unlike hazards that can be mapped, for example, other effects associated with climate change, such as the health risks associated with higher temperatures, may not allow a link between a project and an ultimate impact. Habitat modification and changes in agriculture and forestry resulting from climate change similarly do not appear to be issues that can be addressed on a project-by-project basis in CEQA documents. Water supply variability is an issue that has already been addressed in depth in recent CEQA cases. (See, e.g., *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434-435 ("If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.").) Further, legislation has been developed to ensure that lead agencies identify adequate water supplies to serve projects many years in the future under variable water conditions. (See, e.g., Water Code, § 10910 et seq.,; Government Code, § 66473.7.) The Natural Resources Agency declines to further revise the text in response to this comment.

Comment 93-6

Section 15126.4(c) creates ambiguity. Commenter understands the intent and agrees with the Natural Resources Agency reasoning for the revision. Commenter suggests two revisions: "Only reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision" or "Reduction in emissions that are otherwise required may *not* constitute mitigation pursuant to this subdivision."

Response 93-6

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 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.