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January 26, 2009

Via email: CEQA.GHG@opr.ca.gov

Cynthia Bryant, Director  
Governor's Office of Planning and Research  
P.O. Box 3022  
Sacramento, CA 95812

Re: Comments on Draft CEQA Guideline Amendments for Greenhouse Gas Emissions

Dear Director Bryant:

On behalf of California Unions for Reliable Energy ("CURE"), this letter provides initial comments on OPR's January 8, 2009, Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions ("draft Guidelines"). CURE is a coalition of unions whose express purpose is to help solve the State's energy problems by building, maintaining and operating conventional and renewable energy power plants. CURE seeks to ensure that projects promote sustainable development by meeting the highest environmental and economic standards. Genuine CEQA compliance is a significant component of achieving this goal.

CEQA is a full disclosure statute that requires lead agencies to inform decision makers and the public of the potential, significant environmental effects of proposed projects.<sup>1</sup> Equally important, CEQA requires lead agencies to avoid approving projects with significant adverse environmental impacts if there are feasible alternatives or mitigation measures that can substantially reduce or avoid those impacts.<sup>2</sup> Applying CEQA's dual mandates to analyzing proposed projects' greenhouse gas emissions should be no different. However, as shown below, in several significant respects, the draft Guidelines weaken CEQA's dual mandates.

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<sup>1</sup> CEQA Guidelines, § 15002(a)(1).

<sup>2</sup> *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4<sup>th</sup> 105.

## 1. Significance Determination of GHG Impacts

Proposed section 15064.4 of the draft Guidelines would allow lead agencies to assess the significance of project-specific GHG impacts by, among other things, evaluating a project's ability to help the state comply with AB 32's goal of reducing GHG emissions to 1990 levels by 2020.<sup>3</sup> First, while this option is consistent with CEQA in most cases, it is still highly subjective, and may be unnecessarily narrow if the subsequent federal and/or state legislation is enacted as promised, including new regulations under the Clean Air Act. Similarly, this option ignores AB 32's long-term 2050 emission reduction target set by Executive Order S-3-05. The target is crucial to climate stabilization.

Second, a lead agency's finding that a proposed project is consistent with an adopted statewide 2020 plan is contrary to OPR's commitment to require lead agencies to "identify and quantify the GHG emissions; assess the significance of the impact on climate change; and if the impact is found to be significant, identify alternatives and/or mitigation measures that will reduce the impact below significance."<sup>4</sup> Again, CEQA requires lead agencies to analyze and disclose in an EIR all feasible measures and/or alternatives that would mitigate significant project-specific environmental impacts, including GHG emissions.

Finally, CURE generally supports proposed section 15064.4(b)'s directive that lead agencies "calculate or estimate the amount of greenhouse gas emissions associated with a project, including emissions associated with energy consumption and vehicular traffic." However, the draft Guidelines then go on to significantly dilute the section by allowing lead agencies to rely on performance based standards for estimating GHG emissions. At the emission calculation stage, such reliance is inappropriate and contrary to established CEQA requirements that lead agencies *first* make a meaningful attempt to quantify emissions such as GHGs, then only if a "good faith reasoned analysis" reveals that such quantification is not practicable may a lead agency revert to a reliance on qualitative or other performance based standards to estimate the significance of GHG emissions.<sup>5</sup> This issue is particularly important concerning industrial projects such as power plants and refineries.

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<sup>3</sup> *Id.* at section 15064.4.

<sup>4</sup> Technical Advisory, CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act Review, Office of Planning and Research, at p. 5 (June 19, 2008).

<sup>5</sup> *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1371.

## **2. Thresholds of Significance**

The draft Guidelines acknowledged that OPR may be ill-equipped to establish a method for determining thresholds of significance for GHG emissions.<sup>6</sup> Accordingly, OPR requested technical guidance from the California Air Resources Board (“CARB”). CARB has already affirmed that any GHG emissions threshold “must be sufficiently stringent to make substantial contributions to reducing the State’s GHG emissions peak, to causing that peak to occur sooner, and to putting California on track to meet its interim (2020) and long-term (2050) emission reduction targets.” Likewise, existing CEQA Guidelines require that a threshold of significance be based on factual and scientific data related to relevant environmental impacts.<sup>7</sup> OPR must not now adopt confusing, vague or weak thresholds of significance for GHG emissions. Instead, OPR should wait until CARB adopts final thresholds and evaluate those before finalizing new Guidelines.

## **3. Mitigation Measures to Minimize the Significant Effects of GHG Emissions**

Proposed section 15126.4(c)(3) overly emphasizes generic offsite mitigation and, as discussed above, inappropriately encourages reliance on prior plans or programs. First, the Guidelines must be clear that on-site mitigation will be required wherever feasible. Offsite mitigation must only be allowed where a lead agency can show that such measures constitute real, surplus and quantifiable mitigation. Second, CEQA requires lead agencies to adopt project-specific mitigation to the full extent feasible. The Guidelines must make clear that all feasible mitigation must be adopted before a lead agency relies on compliance with previously adopted plans and programs of general applicability.

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<sup>6</sup> Draft Guidelines preamble at p. 2.

<sup>7</sup> CEQA Guidelines § 15064(b).

#### **4. Determining the Significance of a Project's Cumulative Environmental Effects**

The draft Guidelines weaken existing section 15064 regarding the determination of project-specific cumulative effects by encouraging lead agencies to focus on compliance with prior, programmatic- or master planning-type documents rather than requiring lead agencies to conduct project-specific cumulative effects analyses. By expanding the types of plans lead agencies might consult, the draft Guidelines promote lead agency reliance on often vague large scale planning documents which will likely result in agencies squeezing a proposed project into an existing plan in order to make a finding that a given project complies with the requirements of a “previously approved plan or mitigation program.”<sup>8</sup> The reality is the examples specified in section 15064(h)(3) rarely if ever provide the required “specific requirements that will avoid or substantially lessen the cumulative problem.”<sup>9</sup> Indeed, the purpose of such plans is to provide a broad overview of a variety of potential projects for planning purposes only, leaving detailed mitigation measures to future, specific proposals. In this way, it is not clear how a lead agency's reliance on such plans would allow it to make a determination that project specific impacts would be less than significant.

Proposed section 15130(f) contains confusing language inconsistent with the existing Guidelines and the statute itself. Specifically, according to subsection (f), an EIR should evaluate cumulative GHG emissions if, in connection with past, other current or probable future projects, the effects “may result in a cumulatively considerable impact to the environment that cannot be mitigated to a level of less than significant.” CEQA requires full analysis and disclosure of all cumulative impacts if, based on substantial evidence, there is a fair argument that the impacts may be significant.<sup>10</sup> The proposed language appears to adopt a new two pronged test where a proposed project must fail both prongs before a lead agency need analyze and disclose cumulative impacts in an EIR, *i.e.*, impacts must be cumulatively considerable and cannot be mitigated to a less than significant level before CEQA review would be required. This section must be revised in order to comply with CEQA's existing statutory scheme.

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<sup>8</sup> Draft Guidelines section 15064(h)(3).

<sup>9</sup> *Id.*

<sup>10</sup> *No Oil, Inc. v City of Los Angeles* (1974) 13 Cal. 3d 68, 75.

## 5. Tiering

Tiering is a process by which agencies may adopt programs, plans or ordinances through EIRs that focused on “big picture” matters. For subsequent individual projects, the agency can then streamline the CEQA review for any individual projects consistent with the first tier review.<sup>11</sup> The proposed Guidelines for tiering take the practice past the breaking point by precluding project-level GHG emission analysis and mitigation measures if the project is consistent with an applicable regional plan that “adequately” addressed GHG emissions, and the plan is connected to a certified EIR.<sup>12</sup> A finding of adequate treatment in a prior plan has no bearing on whether a particular subsequent project may emit significant quantities of GHG requiring analyses of alternatives and feasible mitigation. At a minimum, a project-level CEQA document must disclose how the alternatives or mitigation analysis in the earlier plan will in fact reduce the proposed project’s GHG impacts to a less than significant level.

## Conclusion

In broad terms, the draft Guidelines place entirely too much emphasis on lead agencies relying upon previously adopted plans and programs of general applicability rather than conducting the project specific analyses that have been the cornerstone of CEQA for more than 30 years. Certified EIRs for these types of planning documents will not offer enough specificity to allow lead agencies to fully analyze, disclose and propose feasible measures and alternatives to fully mitigate project-specific GHG impacts. In addition, it is imperative that OPR adopt thresholds of significance sufficiently stringent to make substantial reductions in GHG emissions. Finally, OPR must adopt a determination of significance of GHG impacts that requires lead agencies to assess each project’s impacts in light of available scientific and factual data.

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<sup>11</sup> *Koster v. County of San Joaquin* (1996) 47 Cal.App.4<sup>th</sup> 29, 36.

<sup>12</sup> Draft Guidelines section 15152(7)(i).

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Thank you for the opportunity to participate in this critical rulemaking proceeding.

Sincerely,

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Gloria D. Smith

GDS:bh