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February 2, 2009

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

Re: Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions

Dear Ms. Roberts:

Thank you for the opportunity to submit comments to the Governor's Office of Planning and Research ("OPR") on the draft guidelines amendments to the California Environmental Quality Act ("CEQA") for greenhouse gas ("GHG") emissions.

The law firm of Alston & Bird is a full service, nationwide firm with offices in Palo Alto, Los Angeles, and Westlake Village, California. Alston & Bird's environmental, land use, real estate, and construction practices provide comprehensive legal services related to California's development and construction industries. Our clients include local and national industrial, commercial, office park, and residential development companies, hotel and extended-stay lodging companies, major telecommunication companies, several national chains, a national university, and national and regional banks. We assist our clients in obtaining land use entitlements and regulatory permits for new and existing projects and facilities. We work closely with cities and counties throughout California, as well as with federal, state and local entities such as the California Coastal Commission, the California Department of Fish and Game, the U.S. Army Corps of Engineers, the U.S. Fish & Wildlife Service, and State and Regional Water Quality Control Boards, among others. In addition, we provide extensive client services relevant to project compliance with CEQA and the CEQA Guidelines.

Representatives of Alston & Bird attended and participated in OPR's Los Angeles workshop on January 22, 2009, and Sacramento workshop on January 26, 2009. On behalf of Alston & Bird and its clients, we submit these comments for OPR's consideration:

15064. Determining the Significance of Environmental Effects Caused by a Project.

We support OPR's decision to include a sample list of plans upon which a lead agency may rely in performing a threshold cumulative impact analysis. The proposed language should also include adopted regional or local GHG reduction plans – both here and in similar sample plan lists throughout the Guidelines.

15064.4. Determining the Significance of Impacts from Greenhouse Gas Emissions

We support the broad concept of giving guidance to lead agencies on factors to consider in determining whether a project's GHG emissions are significant, thereby triggering the preparation of an EIR. However, OPR should also explicitly acknowledge and cross-reference lead agency discretion established under Guideline section 15064.7 (lead agency development and adoption of significance thresholds).

In addition, subsection (a)(1) requires a lead agency to consider a project's consistency with an adopted statewide GHG emissions plan. To be consistent with 15064(h)(3), lead agencies should also be able to fulfill this requirement by considering project consistency with an adopted regional plan.

Subsection (a)(4) requires a lead agency to consider "[t]he extent to which the project impacts or emissions exceed any threshold of significance that applies to the project." The use of the word "any" in this context could be misconstrued. The only thresholds that "apply" are those adopted by the lead agency itself. Thresholds developed by other agencies may provide guidance, but they do not "apply." This distinction should be made clear.

15064.7. Thresholds of Significance.

Newly added subsection (c) states a lead agency may consider thresholds of significance adopted by other public agencies when adopting its own thresholds. We agree. Consistent with Guideline 15150, this provision should also allow a lead agency to incorporate by reference the substantial evidence supporting the other public agency's adopted thresholds. To avoid litigation, OPR should also consider language stating that lead agency use or adoption of another agency's thresholds does not reopen the prior-adopted thresholds to renewed litigation if the applicable statute of limitations periods have expired.

15065. Mandatory Findings of Significance

We support the revision to subsection (b)(1). We also suggest that OPR clarify the language, "preliminary review," to include an Initial Study or its equivalent as decided by the lead agency.

15086. Consultation Concerning Draft EIR

In the context of GHG emissions, and because such emissions are generally considered to be of regional and statewide importance, it should be made clear that any project resulting in GHG emissions is not, *per se*, one of "statewide, regional, or areawide significance." [*See* subsection (a)(5).]

In the same vein, OPR should also make clear in Guideline section 15086(a)(2) that the California Air Resources Board is not now a "trustee" agency for every project that emits GHGs under Guideline Section 15086(a)(2). [*See* Pub. Resources Code Section 21070 ("Trustee agency" is "a state agency that has jurisdiction by law over natural resources affected by a project, that are held in trust for the people of the State of California").]

15093. Statement of Overriding Considerations

We support the proposed amendment to subsection (d) and OPR's continued emphasis on lead agency discretion in deciding issues of local importance. Lead agencies should continue to have the discretion to adopt statements of overriding considerations for beneficial projects. However, the language in subsection (d) only allows this balancing to work in one direction (e.g., local adverse impacts balanced against regional benefits). The language should be revised to allow for a balance in both directions.

15125. Environmental Setting

Subsection (d) expands the list of plans that an EIR must consider when conducting an analysis of a project's environmental setting. This guideline should also specify that the only relevant plans are plans that are actually adopted. The list of plans should also be consistent with similar lists throughout OPR's amendments and include alternative community strategies consistent with the recently adopted Senate Bill 375.

15126.4. Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects

Subsection (c) requires a lead agency to consider all feasible mitigation "associated" with a project's energy consumption. This language is overbroad. A lead

agency's duty to impose feasible mitigation should relate only to project-generated GHG emissions. As written, the draft language implies that lead agencies should also consider the GHG impacts "associated" in any way with a project, no matter how far-reaching (e.g., the GHG emissions from the power plant that supplies energy to the project; or, the GHG emissions of an industrial supplier of materials to the project). This obviously creates the potential for endless GHG analyses, and for resulting "double-mitigation" to be imposed on both suppliers and consumers. Such requirements are not imposed on any other resource. We therefore propose the following revision:

> (1) Lead agencies should consider all feasible means of mitigating the project's greenhouse gas emissions including but not limited to emissions associated with the project's ~~energy consumption, including~~ fossil fuel consumption.

15130. Discussion of Cumulative Impacts

Subdivisions (b)(1)(B) and subdivision (d) are too limiting – examples of sample plans should include all of the sample plans listed in Guidelines section 15064, subdivision (h)(3).

Newly drafted subsection (f) creates a singular focus on GHG cumulative emissions analysis that is superfluous and inherently uncertain. The methodology for cumulative impact analysis is already set forth in the current Guideline. Guideline section 15130 already requires a lead agency to consider and analyze all potentially significant cumulative impacts associated with a project, including GHG emissions. Moreover, the issue of cumulative impacts has been widely litigated, and GHG emissions should be analyzed consistent with existing law. The proposed language is potentially inconsistent with the current guidelines in that it omits lead agency consideration of an "incremental contribution" to a cumulative effect. By setting a different standard for GHG emissions analysis, the stage is set for expensive and time consuming litigation for both lead agencies and project applicants. [*See* CEQA Guidelines §15130(a); *Communities for a Better Environment v. Cal. Resource Agency* 103 Cal. App. 4th 98, 120 (2002).]

If subdivision (f) is not deleted altogether, it should be redrafted to be consistent with existing law. It also appears to require mitigation to less than significant for the entire cumulatively considerable impact, rather than for the project's incremental contribution.

15152. Tiering

Consistent with CEQA, subsection (i) allows for a project-level CEQA document to "tier off" of an applicable regional or local GHG emissions plan and its

certified EIR. We agree with OPR's approach. We also request that OPR state that reliance on a previously certified EIR does not re-open the certified EIR to additional judicial review following the expiration of applicable statutes of limitation. [Pub. Resource Code, § 21167.2 (mandating that unchallenged and certified EIR be presumed valid).]

Appendix G Environmental Checklist Form

We support the revisions to Appendix G, with the following comments:

Section II (Agriculture and Forest Resources). Subsection (d) would require lead agencies to consider whether a project would "result in the loss of forest land or conversion of forest land to non-forest use." Please clarify whether OPR intends this section to apply to indirect project impacts, such as the use of forest products in project construction.

Section VII (Greenhouse Gas Emissions). Subsection (a) would require lead agencies to consider whether the project would generate greenhouse gas emissions that may, either directly or indirectly, have a significant impact on the environment, based on any applicable threshold of significance. As noted above, "applicable" thresholds of significance are limited to those that are adopted by the lead agency itself or set forth in an adopted local or regional GHG emissions plan. This should be made clear to avoid confusion regarding the role of thresholds developed as guidance by agencies such as the California Air Resources Board.

Section XVI (Transportation/Traffic). Subsection (a) currently recommends that a lead agency consider whether a proposed project would

> ...cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume to capacity ratio on the roads, or congestion at intersections)?

OPR's proposed revision is as follows:

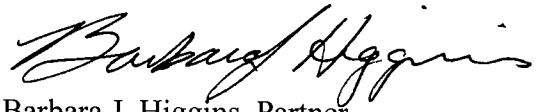
> ...~~cause and increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., r~~Result in a substantial increase in ~~either~~ the number of vehicle trips~~, the volume to capacity ratio on the roads, or congestion at intersections)~~ roadway vehicle volume or vehicle miles traveled?

It appears this amendment is intended to emphasize the concept of "vehicle miles traveled" ("VMT") as promoted in Senate Bill 375. However, this is an instance where "less is not more." By eliminating quantifiable standards, this revision may trigger unnecessary EIRs based on the appearance of a "substantial increase" in vehicle trips when, in fact, the increase is quite nominal.[1] This revision will also encourage additional litigation against lead agencies based on an overbroad interpretation by project opponents as to what constitutes a "substantial increase." The proposed revision also eliminates the use of well-established local thresholds and the objective quantification of project impacts in relation to existing traffic loads and street system capacity.

In considering OPR's proposed revision, we consulted Mr. Ron Hirsch (Principal, Hirsch/Green Transportation Consulting, Inc., Sherman Oaks, CA), who shares our concerns. We therefore request that OPR reconsider this revision and eliminate the amendment from Appendix G. The analytic emphasis on VMT may then occur in the actual traffic study itself once it is established at the threshold level – by quantifiable standards – that additional review is warranted.

Thank you for this opportunity to comment on the draft amendments. We look forward to OPR's response.

Sincerely,



Barbara J. Higgins, Partner
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BJH:cfg

cc: Jocelyn D. Thompson, Esq.
Rebecca S. Harrington, Esq.

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[1] For example, if a street has a baseline roadway volume of one car per hour, and a project would increase roadway volume to two cars per hour – the increase would appear to be "substantial" in that roadway volume has increased by 100 percent. In reality, however, the existing street capacity could be 100 cars per hour, and a project increase of one additional car per hour would be minimal.