



*via electronic mail*  
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**Re: Comments on the January 9, 2009 Preliminary Draft CEQA  
Guideline Amendments for Greenhouse Gas Emissions**

Dear Ms. Bryant and Ms. Roberts:

Thank you for the opportunity to comment on the Preliminary Draft Guideline Amendments for Greenhouse Gas Emissions (“Preliminary Draft”). These comments are submitted on behalf of the undersigned organizations. We strongly support several proposed changes to the Guidelines, including the recognition of impacts to forest resources and changes to transportation and traffic criteria in Appendix G of the Guidelines. We are however, deeply concerned with the Preliminary Draft’s treatment of

the analysis and mitigation of greenhouse gas emissions as well as the glaring failure of the Preliminary Draft to acknowledge that ongoing and foreseeable adverse changes to the environment as a result of global warming will necessarily affect the environmental analysis of project impacts under CEQA. We are hopeful that OPR will make the necessary changes to the Preliminary Draft to ensure that the Guidelines are consistent with science and law and serve to protect the health and safety of future generations of Californians.

As part of the informal scoping process on the development of CEQA Guidelines for greenhouse gas emissions, several of the undersigned proposed comprehensive guidelines to fully address the analysis and mitigation of global warming impacts under CEQA. Unfortunately, in what appears to be an inordinately narrow view of its authority under SB 97 and its general authority to routinely promulgate CEQA Guidelines under Public Resources Code § 21083(f), OPR did not adopt important suggestions that would provide needed guidance on the full range of issues raised by the consideration of global warming impacts under CEQA. We ask OPR to reconsider earlier proposals that were not incorporated into the Draft Guidelines. Although we continue to stand by our earlier submission, the comments below focus specifically on the Draft Guidelines put forth by OPR. Our comments are made in the order in which the proposed guidelines are presented in the Preliminary Draft.<sup>1</sup>

#### **I. Section 15064. Determining Significance of the Environmental Effects Caused by a Project**

We generally support the use of programmatic documents to address project-level greenhouse gas impacts provided that the relevant programmatic document ensures binding and effective mitigation that will substantially lessen the project's cumulative impact on global warming. However, several documents listed in additions to Section 15064(h)(3), such as climate action plans, do not yet exist or have defined criteria or requirements. Lack of clarity as to what may constitute a "climate action plan" for CEQA purposes may invite the misuse and improper application of such a document under this provision. Future guidance, perhaps in the form of a Technical Advisory, is needed on the characteristics and the extent of demonstrated emission reductions required of future programmatic documents that address greenhouse gas emissions in order to legitimately utilize this provision.

In the proposed changes to Section 15064(h)(3), the list of previously approved plans and mitigation programs is expanded to include regional blueprint plans, sustainable community strategies, climate action plans, and a statewide plan for mitigation for greenhouse gas emissions, among others. The expansion of this list may result in lead agencies incorrectly finding that a project's greenhouse gas emissions do

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<sup>1</sup> Our ability to comment on the Preliminary Draft was frustrated by the absence of explanations of the intent behind specific guideline proposals. While we have endeavored to discern the intent of particular provisions and propose specific changes to more clearly realize that intent, we reserve the right to amend our positions if we discover that a provision serves a purpose different than our initial interpretation.

not constitute a cumulatively significant impact. Section § 15064(h)(3) can be improved in the following manner:

1) Delete reference to regional blueprint plan

Regional blueprint plans (<http://Calblueprint.dot.ca.gov>) are non-binding “visioning” documents; though they are “approved” or “adopted” by a Council of Government, they only provide preferred growth options and do not carry the force of law. Accordingly, regional blueprint plans cannot fulfill the requirement under Section 15064(h)(3) that the plan or mitigation program be “specific in law or adopted by the public agency with jurisdiction over the affected resources.” While the preferred land-use designations set forth in a blueprint can and should be adopted by a local jurisdiction through incorporation into a general plan, it is the general plan that incorporates the blueprint, and not the blueprint itself that can potentially be invoked under Section 15064(h)(3). Because a blueprint plan cannot, by definition, meet the standards of Section 15064(h)(3), its inclusion is improper and causes needless confusion.

2) Delete reference to “sustainable community strategy”

The addition of “sustainable community strategy” is unnecessary because the extent of CEQA review afforded to projects that comply with the sustainable community strategy (“SCS”) is already defined under SB 375. Under the statutory terms of SB 375, projects that comply with an SCS that also meets specified transportation-related emission reduction targets, or with an alternative planning strategy (“APS”) if those emission reduction targets are not met in the SCS, are subject to varying degrees of exemptions from environmental review. Listing the SCS in Section 15064(h)(3) improperly suggests that a project that is compliant with an SCS is entitled to more CEQA relief than already authorized under SB 375. Accordingly, reference to the SCS in Section 15064(h)(3) should be deleted.

Reference to the SCS in Section 15064(h)(3) is not only unnecessary, but presents several additional concerns. For example, since a project’s incremental contribution to global warming is the sum total of the project’s emissions, and an SCS would only address transportation-related emissions, it is unclear if an SCS can be said to “avoid or substantially lessen the cumulative problem.” In addition, unlike a general plan, the land use designations in an SCS are non-binding. However, achievement of the emission reductions targeted in the SCS may depend on universal conformity with the SCS. For example, a project that opts to construct low-density singly family homes rather than dense mixed-use development as proposed under the SCS might undermine projected VMT reduction from adjacent developments. Since conformity is not required, an SCS may not be considered a document that ensures specific requirements are adhered to in order to substantially lessen the cumulative problem.

If OPR still believes there is a benefit to keeping a reference to the SCS in Section 15064(h)(3) to the extent it reminds and encourages project proponents and lead agencies to ensure that their project meets the standards of the SCS/APS, reference to any

applicable APS should also be included because there are no assurances under SB 375 that an SCS will meet specified emission reduction targets. In such a case, a project compliant with the SCS cannot legitimately be construed as avoiding or substantially lessening the cumulative problem as required under Section 15064(h)(3). Additional reference to the APS will help avoid any confusion or ambiguity on this issue. Accordingly, if Guideline § 15064(h)(3) is to refer to an SCS, “sustainable community strategy” should be expanded to state “CARB-certified sustainable community strategy and any applicable alternative planning strategy.”

- 3) Delete reference to “statewide plan of mitigation of greenhouse gas emissions”

The term “statewide plan for mitigation of greenhouse gas emissions” may encourage erroneous arguments that, once a state plan for greenhouse gas emission reduction is adopted, all projects may determine that the cumulative impact of their greenhouse gas emissions is less than significant simply by virtue of the project being located within the state, regardless of whether specific and comprehensive requirements apply directly to that project. For example, while some regulations ultimately promulgated under AB 32 may directly or indirectly reduce project emissions, they may not collectively be comprehensive enough to avoid or substantially lessen the cumulative impact from that project. To avoid improper reliance on any state plan that may be ultimately developed, “statewide plan of mitigation of greenhouse gas emissions” should be removed from the proposed text.

## **II. Section 15064.4. Determining the Significance of Impacts From Greenhouse Gas Emissions.**

### **A. Section 15064.4(a) is Deeply Flawed On Both Legal and Scientific Grounds and Subject to Legal Challenge**

As currently proposed, Preliminary Draft Guideline § 15064.4(a) is fatally flawed because it ignores the environmental problem posed by greenhouse gas emissions, exclusively focuses on short-term AB 32 regulatory targets that alone are insufficient to avoid dangerous climate change, and undermines the current work of the Air Resources Board and other lead agencies to develop thresholds of significance for greenhouse gas emissions. To correct these fatal deficiencies, Section 15064.4(a) should be revised as set forth below.

#### **1. Section 15064.4(a)(1)**

##### **a. First Sentence**

Under Section 15064(a)(1), the first listed consideration for a significance determination is “[t]he extent to which the project could help or hinder attainment of the state’s goals of reducing greenhouse gas emissions to 1990 levels by the year 2020 as stated in the Global Warming Solutions Act of 2006.” This criterion is contrary to both

science and law as it myopically focuses on a short-term regulatory target and ignores additional emission reductions critical for climate stabilization.

As ARB recognized in its October 24, 2008 draft “Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act” (“ARB Draft Thresholds”), the question of a threshold of significance for greenhouse gas emissions “can be answered only after considering the nature of the environmental problem.” (ARB Draft Thresholds at 4.) Yet, with the exception of stating the full title of AB 32, nowhere does the Preliminary Draft use the words “global warming” or “climate change.” Having failed to even once identify the environmental problem resulting from greenhouse gas emissions, it is unsurprising that the Preliminary Draft’s guidance on the question of significance is fundamentally flawed.

The development of a valid threshold of significance must be tied to the relevant environmental objective. The relevant environmental objective with regard to a project’s impact on global warming is stabilization of greenhouse gas concentrations in the atmosphere at a level that would avoid dangerous climate change. The concept of “dangerous climate change” is discussed in the ARB Draft Thresholds as well as the scientific literature. (ARB Draft Thresholds at 3 (referencing IPCC Reports).) Framing the question of a threshold of significance for greenhouse gases in the context of avoiding dangerous climate change is consistent with CEQA’s underlying purpose. Pub. Res. Code § 21000(d) (“The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.”).<sup>2</sup>

Dangerous anthropogenic interference with the climate system is a defined concept from which a threshold of significance under CEQA can be derived. As recognized in the ARB Draft Thresholds, while environmental impacts from global warming are already being experienced, dangerous anthropogenic interference has typically been defined as temperature increases above 2°C from pre-industrial levels, or a 450 ppm atmospheric concentration of CO<sub>2</sub> eq.<sup>3</sup> 2050 is the time frame set by scientists and the State of California in which to achieve the emission reductions necessary for climate stabilization. The emission reduction scenario set by AB 32 and Executive Order S-3-05, whereby emissions are reduced to 1990 levels by 2020 and then to 80% below 1990 levels by 2050, is consistent with a stabilization scenario in the +/- 450 ppm range.

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<sup>2</sup> Preventing dangerous climate change is also the objective adopted by the international community. As set forth in the United Nations Framework Convention on Climate Change, to which the United States is a party: “The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” United Nations Framework Convention on Climate Change (UNFCCC), art. 2, May 9, 1992, *available at* [http://unfccc.int/essential\\_background/convention/background/items/1349.php](http://unfccc.int/essential_background/convention/background/items/1349.php).

<sup>3</sup> ARB Draft Thresholds at 3; *see also* Union of Concerned Scientists, *How to Avoid Dangerous Climate Change: A Target for U.S. Emissions Reductions* (Sept. 2007), *available at* [http://www.ucsusa.org/global\\_warming/solutions/big\\_picture\\_solutions/a-target-for-us-emissions.html](http://www.ucsusa.org/global_warming/solutions/big_picture_solutions/a-target-for-us-emissions.html).

However, based in part on the alarming and unpredicted rate of loss of Arctic sea ice and other recent climate change observations, some climate scientists, including NASA's premier climatologist, James Hansen, have now concluded that "[i]f humanity wishes to preserve a planet similar to that on which civilization developed, paleoclimate evidence and ongoing climate change suggest that CO<sub>2</sub> will need to be reduced from its current 385 ppm to at most 350 ppm." Hansen, J. et al., *Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim?*, 2 OPEN ATMOSPHERIC SCIENCE J. at 217-231 (2008). Therefore, the emission reduction pathways set by AB 32 and Executive Order S-3-05 may be insufficient to prevent dangerous anthropogenic interference with the climate.

In looking toward the environmental objective of avoiding dangerous climate change, ARB has determined that "any non-zero 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) emissions reduction targets." (ARB Draft Thresholds at 4.) In adopting its interim threshold for industrial sources, the South Coast Air Quality Management District (SCAQMD) also recognized that:

The overarching policy objective with regard to establishing a GHG significance threshold for the purposes of analyzing GHG impacts pursuant to CEQA is to establish a performance standard or target GHG reduction objective that will ultimate [sic] contribute to reducing GHG emissions to stabilize climate change. Full implementation of the Governor's Executive S-3-05 would reduce GHG emissions 80 percent below 1990 levels or 90 percent below current levels by 2050. It is anticipated that achieving the Executive Order's objective would contribute to worldwide efforts to cap GHG concentrations at 450 ppm, thus, stabilizing the climate.

(SCAQMD, Interim GHG Significance Threshold Staff Proposal (revised version) (Oct. 2008) at 3-2.) The long-term objective of avoiding dangerous climate change is also recognized in the AB 32 Scoping Plan. (ARB, Climate Change Proposed Scoping Plan (Oct. 2008) at ES-2 ("Getting to the 2020 goal is not the end of the State's effort. According to climate scientists, California and the rest of the developed world will have to cut emissions by 80 percent from today's levels to stabilize the amount of carbon dioxide in the atmosphere and prevent the most severe effects of global climate change. This long range goal is reflected in California Executive Order S-3-05 that requires an 80 percent reduction of greenhouse gases from 1990 levels by 2050."))

Counter to both the overwhelming weight of science and the findings of ARB and SCAQMD, the Draft Guidelines suggest that significance should be determined on the basis of whether or not a project may "help or hinder" attainment of AB 32's emission reduction goals. By omitting any reference to the long-term emission reductions necessary to stabilize the climate and exclusively focusing on compliance with AB 32, Proposed Guideline Section 15064.4(a)(1) is inconsistent with CEQA's requirement that significance is determined based on scientific and factual data. Guideline § 15064(b)

("[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment ... based to the extent possible on scientific and factual data.").

Proposed Guideline Section 15064.4(a)(1) also contravenes CEQA caselaw. Regulatory standards can serve as proxies for significance only to the extent that they accurately reflect the level at which an impact can be said to be less than significant. *See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004) ("an established regulatory standard [can] not be applied in a way that would foreclose the consideration of other substantial evidence showing that there might be a significant environmental effect from a project.") (*citing Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, 114 (2002)). Moreover, the omission of long-term environmental objectives in the Draft Guidelines is contrary to OPR's own statutory mandate. Under Public Resources Code § 21083(b)(1), Guidelines promulgated by OPR on significance criteria require a finding of significance where "[a] proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, *to the disadvantage of long-term, environmental goals.*" Pub. Res. Code § 21083(b)(1) (emphasis added).

#### **b. Second Sentence, Second Clause**

The second clause of the second sentence of Draft Guideline § 15064.4(a)(1) provides that "A project may be considered to help attainment of the state's goals by being consistent with . . . the plans, programs, and regulations adopted to implement the Global Warming Solutions Act of 2006." This provision is redundant and improperly weakens existing CEQA standards. The question of whether or not a project's incremental contribution to a cumulative effect is cumulatively considerable is addressed in Guideline § 15064(h)(3). Guideline § 15064(h)(3) provides certain safeguards to ensure that reliance on a plan or program mitigates the cumulative problem, including the ability to provide substantial evidence that an impact is still cumulatively considerable even if a project complies with a specified plan. Thus, not only is the proposed clause unnecessary because it reiterates language in Section 15064(h)(3), it also improperly creates a separate, lesser standard for determining the significance of project impacts based on AB 32 compliance.

#### **c. Recommended Changes to Section 15064.4(a)(1)**

As discussed above, in its current form, Proposed Guideline Section 15064.4(a)(1) is contrary to law and science and interferes with ARB's development of a threshold of significance and that of any other agency that properly seeks to tie a significance determination with attainment of the long-term environmental objective of avoiding dangerous climate change. To correct these multiple deficiencies, we propose the following language:

- (1) The extent to which the project could help or hinder attainment of the state's goals of reducing greenhouse gas emissions ~~to 1990 levels by the year 2020 as~~

~~stated in the Global Warming Solutions Act of 2006 and stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous climate change.~~ A project may be considered to help attainment of the state's goals by being consistent with state level emission reduction targets. ~~or the plans, programs, and regulations adopted to implement the Global Warming Solutions Act of 2006~~

## **2. Sections 15064.4(a)(2) & (a)(3)**

Sections (b) & (c) appear tangential and of limited value. A project's cumulative contribution to global warming is measured in large part by the total greenhouse gas emissions resulting from the project.<sup>4</sup> As OPR recognized in its technical guidance, a project's contribution to global warming is not limited to energy consumption and fossil fuel consumption. Because a project's greenhouse gas impacts are determined by the sum of its parts, it seems more appropriate to simply quantify the sources of a project's emissions and base a significance determination on this information, rather than make a separate determination on the extent to which a project would increase the consumption of fuel or result in energy efficiency in isolation of other factors that contribute to the project's total emissions. Accordingly, this provision is not necessary, may confuse the question of significance, and should be removed.

## **3. Section 15064.4(a)(4)**

A determination of significance based on exceeding an applicable threshold of significance is a standard that applies to all types of impacts. Here, the focus appears to shift from whether a project exceeds a threshold to the degree to which a project could violate a threshold and still be considered insignificant. Accordingly, this provision is not necessary and should be removed.

## **4. Section 15064.4(a)**

Section 15064.4(a) provides that “[a] lead agency should consider the following, where applicable, in assessing the significance of impacts from greenhouse gas emissions, if any, on the environment.” This phrasing improperly suggests that the list to follow is exhaustive.

### **B. Section 15064.4(b)**

Proposed section 15064.4(b) contradicts OPR's June 17, 2008 Technical Advisory because it provides a more limited list of the types of project GHG sources that should be quantified. At a minimum, this section should be modified to clarify that energy consumption and vehicular traffic do not represent an inclusive list of the sources

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<sup>4</sup> The environmental impact of concern is global warming, not greenhouse gases. While greenhouse gas emissions are the primary cause of global warming – a well accepted fact the Draft Guidelines do not acknowledge – other potential project effects, such as adverse changes to albedo and the release of warming aerosols, also contribute to global warming.

of emissions that should be quantified and that lead agencies should quantify the multiple emission sources that comprise a project’s carbon footprint. A more extensive list will also serve as an important reminder to lead agencies of the types of sources they should consider when quantifying project impacts. Accordingly, we propose the following modifications:

(b) A lead agency should make a good-faith effort, based on available information, to describe, calculate, or estimate the amount of greenhouse gas emissions associated with a project, including, but not limited to, emissions associated with energy consumption, ~~and~~ vehicular traffic, water consumption, waste disposal, construction activities, and land conversion. Because the methodologies for performing this assessment are anticipated to evolve over time, a lead agency shall have discretion to determine, in the context of a particular project, whether to:

Importantly, the proposed “but not limited to” language is consistent with OPR’s statutory mandate under SB 97. *See* Pub. Res. Code § 21083.05(a) (OPR “shall prepare, develop, and transmit to the Resources Agency guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by the division, including, *but not limited to*, effects associated with transportation or energy consumption.”) (emphasis added). Addition of this language into Draft Guideline § 15064.4(b) will ensure consistency with SB 97.

#### **1. Section 15064.4(b)(2)**

As this section is nested within text on the quantification of impacts, the intent seems to be that a lead agency may look to qualitative and performance based means of describing or estimating a source of a project’s greenhouse gas emission where that emission source cannot be quantified. However, the intent of this provision does not appear to be clearly executed in the regulatory text. The phrase “estimating the significance,” suggests a determination of significance rather than the initial estimation of a project’s greenhouse gas contribution. To unambiguously realize the presumed intent of this section, (b)(2) should read:

(2) Rely on qualitative or other performance based standards for estimating the ~~significance of~~ greenhouse gas emissions for those parts of the project which cannot be quantified based on available models or methodologies.

#### **C. General Comment on Section 15064.4**

Because quantification of emissions from a particular project necessarily precedes the determination of significance, it seems more logical to place section (b) before section (a).

### **III. Section 15064.7. Thresholds of Significance**

Proposed Section 15604.7(c) does not add value and should be eliminated from the Draft Guidelines. Applied to thresholds for greenhouse gas emissions, this provision would seem to unnecessarily encourage the cherry-picking of weaker thresholds that may have already been adopted by another public agency or put forward by some “other” entity. As a globally mixed pollutant, this patchwork result is contrary to science and frustrates the goal of the application of a consistent statewide threshold.

Moreover, the drafting of this section injects needless confusion and ambiguity. Encouraging lead agencies to rely on “the recommendations of others” in developing a threshold seems counter-productive and would seem to encourage all manner of stakeholders to lobby for a particular threshold, further frustrating any effort at uniformity. In addition, the final phrase “including expert opinion based on facts” adds additional and unnecessary ambiguity because it extracts only one part of the definition of “substantial evidence” provided under Guideline § 15384. Not only is it unclear what constitutes an “expert” on greenhouse gas emissions, by citing only to “expert opinion based on facts” can be interpreted to suggest that expert opinion is entitled to greater weight than other types of information included within the definition of substantial evidence.

Finally, lead agencies are already free to consider the work and evidence developed by other agencies in developing their own threshold of significance. For example, lead agencies already routinely adopt thresholds for air quality pollutants recommended by their local air district. As an unnecessary and confusing provision that discourages the adoption of a uniform greenhouse gas threshold, proposed Guideline § 15604.7(c) should be removed from the Draft Guidelines.

#### **IV. Section 15093. Statement of Overriding Considerations**

Proposed Section 15093(d) could have significant negative impacts on the implementation of CEQA. This provision has broad applicability beyond greenhouse gas mitigation and should be removed from the Draft Guidelines. Section 15093(d) encourages lead agencies to consider region-wide and statewide benefits as criteria for overriding “local adverse environmental effects.” This has considerable environmental justice implications because it adds legitimacy to the determination by local agencies to override the adverse environmental impacts that by definition disproportionately affect environmental justice communities. The Environmental Justice Policy of the California Resource Agency defines environmental justice communities as follows:

Environmental justice communities are commonly identified as those where residents are predominantly minorities or low-income; where residents have been excluded from the environmental policy setting or decision-making process; where they are subject to disproportionate impact from one or more environmental hazards; and where residents experience disparate implementation of environmental regulations, requirements, practices and activities in their communities.

Section 15093(d) is designed to add weight to regional and state-wide concerns and to lessen the weight of local adverse environmental effects, which disproportionately occur in environmental justice communities. Accordingly, this proposed subsection is contrary to the Environmental Justice Policy of the California Resource Agency, which is intended to ensure that implementation of Resource Agency policies do not discriminate against, treat unfairly, or cause minority and low income populations to experience disproportionately high and adverse human health and environmental effects from environmental decisions.

In addition, Section 15093(a) is already sufficiently broad to include the type of issues that this provision is designed to address. Section 15093(a) provides specific criteria that an agency must consider when determining whether to adopt a Statement of Overriding Considerations. It allows the lead agency “to balance, as applicable, the economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project.” This could include regional or state-wide benefits. Section 15093(d) may even create a conflict with Section 15093(a) because it ensconces in the guidelines a policy decision about how a lead agency should balance the specific criteria in Section 15093(a). Furthermore, it is unclear how this provision effectuates the statutory requirements of SB 97. There are many instances where a perceived region-wide or statewide benefit would have nothing to do with mitigation of greenhouse gases. For example, a port expansion, which would result in significant increases in air pollution from increased ship and truck traffic, as well as increased greenhouse gas emissions, could be justified under Section 15093(d) on the grounds that the project would benefit the region by adding jobs to the economy.

While the intent of this provision may be to encourage infill development that may have localized traffic impacts but contribute to overall reductions in per capita VMT, it seems that Section 15093(a), coupled with positive changes OPR has proposed to the Transportation/Traffic criteria in Appendix G better address this objective without the significant environmental justice implications of proposed Section 15093(c).

## **V. Section 15125. Environmental Setting**

For the reasons set forth in comments on Draft Guideline § 15064, proposed changes to Section 15125(d) should be modified to also include any applicable alternative planning strategy. The following change is recommended:

(d) The EIR shall discuss . . . regional housing allocation plans, regional blueprint plans, sustainable community strategies and any applicable alternative planning strategy, climate action plans, habitat conservation plans . . .

## **VI. Section 15126.4. Mitigation**

The Draft Guidelines on mitigation measures related to greenhouse gas emissions are of marginal value. Mitigation of greenhouse gas emissions presents unique issues for which specific guidance is needed. For example, unlike the mitigation of other impacts, proposed mitigation measures for greenhouse gas emissions can be potentially global in reach, cross sectors (e.g. tree planting as purported mitigation for direct industrial emissions), present environmental justice concerns such as treatment of co-pollutants often associated with the release of greenhouse gas emissions, and raise heightened risks that proposed mitigation activities will not ultimately result in claimed emission reductions. Rather than meet the intent of SB 97 and provide helpful direction to lead agencies on how to grapple with the novel challenges posed by greenhouse gas mitigation, the Draft Guidelines set forth a poorly-defined list of possible measures without safeguards against potential abuse.

While we are mindful of OPR's concern that mitigation guidelines not impinge upon lead agency discretion, changes can nonetheless be made to provide more helpful guidance on greenhouse gas mitigation and better fulfill the intent of SB 97. To more effectively assist lead agencies, guidance on the mitigation of greenhouse gas emissions should more fully describe the types of greenhouse gas mitigation available to lead agencies and set forth considerations in their application in a manner that is consistent with existing CEQA requirements yet tailored to the unique concerns posed by greenhouse gases. We first propose and explain specific modifications to Section 15126.4(c) and then provide a full proposed textual revision of this section.

1) Expand on examples of possible greenhouse gas mitigation

OPR would better fulfill its mandate to provide guidance on the mitigation of greenhouse gas emissions if the range of potential mitigation measures were more fully described in a non-exclusive manner. While there are many possible ways to accomplish this objective, proposed language set forth below is largely derived from potential measures listed in guidance provided in SCAQMD's Interim GHG Significance Threshold Staff Proposal. (SCAQMD, Interim GHG Significance Threshold Staff Proposal (revised version) (Oct. 2008) at 3-16 to 3-17.)

2) Remove Section (c)(3)

Proposed section (c)(3) appears intended to track Guideline § 15064(h)(3). The problem with essentially reiterating Section 15064(h)(3) in section (c)(3) is that Section 15064(h)(3) already provides a separate process from which a project can assert that its incremental contribution to a cumulative problem is fully mitigated. If a project fulfills the requirements of Section 15064(h)(3), then the impact is considered mitigated and therefore, a lead agency would not need to look to Section 15126.4 for additional guidance on how to mitigate that impact. While section (c)(3) includes language regarding sequestration, use of this type of mitigation is already addressed in proposed section (c)(4). In addition, sequestration does not appear to be the type of action for which a programmatic document would be prepared and even if it were, as viable sequestration technology does not yet exist, development of a sequestration plan or program is unlikely to exist for some time.

3) Delete “substantially” from (c)(2)

The word “substantially” in the phrase “substantially reduce energy consumption” in proposed section (c)(2) appears to originate from Public Resources Code § 20002, which provides that public agencies should not approve projects where there are “feasible mitigation measures available which would substantially lessen the significant environment effects” of a project. The problem with attaching “substantially” to “reduce energy consumption” is that energy consumption is only one component of a project’s greenhouse gas emissions. In the case of greenhouse gas mitigation measures, it is often the case that a suite of measures, which individually may not amount to a significant reduction, collectively result in a substantial reduction to the total emissions generated by the project. By associating “substantially” with only one component of a project’s emission, (c)(2) supports arguments by a project proponent that individual measures aimed at energy consumption may be rejected because, when viewed in isolation, do not result in a “substantial” decrease in project emissions.

4) Include language recognizing the lead agency’s authority to prioritize mitigation measures

On-site mitigation of a project’s greenhouse gas emissions is preferable to off-site mitigation or offsets for a number of reasons, including environmental justice concerns, local co-benefits, ease of monitoring, and the heightened ability to verify and guarantee on-site reductions. Judging from the text of the Draft Guidelines, OPR appears resistant to expressing a preference toward on-site mitigation. We urge OPR to reconsider this decision and recognize that the certainty and verifiability of on-site mitigation support prioritizing this type of mitigation over other types of greenhouse gas mitigation where the achievement of actual, permanent reductions is not as assured. Assurances of effective mitigation is not only consistent with CEQA, but state law under AB 32, which identifies five requisite elements needing to be satisfied when adopting regulations establishing a market-based approach: the greenhouse gas emission reductions must be “real, permanent, quantifiable, verifiable, and enforceable” and must be “in addition to any greenhouse gas emission reduction otherwise required by law or regulation, or any other greenhouse gas emission reduction that otherwise would occur.” In addition, AB 32 calls for measures to maximize additional environmental and economic co-benefits for California and complement the state’s efforts to improve air quality.

At a minimum, OPR can affirm the existing authority of a lead agency to exercise its discretion to determine which mitigation measures a project should implement. *See, e.g.,* Guidelines §§ 15040, 15141 (“A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment. . .”), 15126.4(a)(1)(B) (“Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified.”). In doing so, OPR can support the work of lead agencies, such as SCAQMD, who have set forth a preference toward on-site mitigation of greenhouse gas emissions and mitigation that also results in co-benefits. *See* SCAQMD, Interim GHG Significance Threshold Staff Proposal (revised

version) (Oct. 2008) at 3-16 to 3-17. This language would also support the decision by a lead agency to exercise its authority and require additional on-site or local mitigation where a project proponent initially proposed to mitigate greenhouse gas impacts entirely through carbon offsets.

While language recognizing a lead agency's authority to prioritize mitigation could be inserted into the general section on mitigation (such as in § 15126.4(a)(1)(B)), given the uniquely wide range of mitigation options for greenhouse gas emissions, it seems more appropriate to insert this language into the greenhouse gas mitigation section of the Guidelines to serve as a reminder to lead agencies and project proponents developing greenhouse gas mitigation.

5) Clarify Section (c)(5)

As proposed Section(c)(5) is ambiguous and unhelpful because the language is lifted from case law without context. In *Anderson First Coalition v. City of Anderson*, 140 Cal. App. 4th 1173, 1187-88 (2005), the court held that a "fair-share" cumulative impact mitigation fee to fund roadway improvements could constitute adequate mitigation where it was "based on a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." Thus, *Anderson* provides guidance on the minimum standards for the implementation of a mitigation fee program by the relevant agency. To accurately conform with CEQA, section (c)(5) should be limited to these circumstances. Specifying that section (c)(5) refers to the use of mitigation fees is consistent with caselaw and also serves to clarify to lead agencies that mitigation fees for greenhouse gas emissions may be imposed provided there is a reasonable plan to use the fees to achieve actual emissions reductions. Reference to carbon offsets should be deleted here because, unlike *Anderson*, offsets are often executed by a third party, not a lead or responsible agency.

6) Ensure that greenhouse gas mitigation is effective

CEQA already requires that mitigation measures contain guarantees of implementation and effectiveness. *See, e.g.*, Guideline § 15126.4(a)(1)(B) ("[f]ormulation of mitigation measures should not be deferred until some future time"); Guideline § 15126.4(a)(1)(2) ("[m]itigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments"); *Federation of Hillside & Canyon Ass'ns v. City of Los Angeles*, 83 Cal. App. 4th 1252, 1260 (2000) (mitigation measures must "actually be implemented as a condition of development"). It is appropriate to reiterate these guarantees in the unique context of greenhouse gas emissions given the particular risks of limited effectiveness associated with certain types of greenhouse gas mitigation. Language ensuring that greenhouse gas mitigation is real, permanent, quantifiable, verifiable, and enforceable does not create a heightened standard for greenhouse gas mitigation, but merely tailors CEQA's existing mitigation requirements in a manner that addresses unique concerns related to greenhouse gas emissions.

(c) Mitigation Measures Related to Greenhouse Gas Emissions

- (1) Lead agencies should consider all feasible means of mitigating greenhouse gas emissions resulting from the project including but not limited to emissions associated with the project's energy consumption, including fossil fuel consumption. Mitigation measures for greenhouse gas emissions may include, but are not limited to:
  - (a) ~~Mitigation measures may include~~ Project features, project design, or other measures which are incorporated into the project to substantially reduce energy consumption or greenhouse gas emissions, e.g., increase in a building's energy efficiency, use of on-site renewable energy, etc.
  - (b) On-site measures that provide direct greenhouse gas emission reductions, e.g. replace on-site combustion equipment (boilers, heaters, steam generators, etc.) with more efficient combustion equipment, replace existing high global warming potential refrigerants with low global warming refrigerants, eliminate or minimize fugitive emissions, etc.
  - (c) Off-site measures to reduce emissions from existing structures, e.g., incentives for installing solar power, increasing energy efficiency, increasing building insulation, replacing old inefficient refrigerators with efficient refrigerators using low global warming potential refrigerants, etc.
  - (d) Measures that reduce vehicle miles traveled (VMT), e.g., transit improvements, parking charges, mix of uses, etc.
  - (e) ~~Mitigation measures may include~~ Measures that sequester carbon or carbon-equivalent emissions.
- (2) ~~Where mitigation measures are proposed for reduction of greenhouse gas emissions through~~ Off-site measures or purchase of carbon offsets funded by the project proponent within the jurisdiction of the lead agency and/or local air basin must be ~~part of~~ based on a reasonable plan of actual mitigation that the relevant agency commits itself to implementing.
- (3) ~~Mitigation measures may include, where relevant, compliance with the requirements in a previously approved plan or mitigation program for the reduction or sequestration of greenhouse gas emission, which plan or program provides specific requirements that will avoid or substantially lessen the potential impacts of the project.~~

- (3) Where several measures are available to mitigate greenhouse gas emissions, the lead agency has the authority to determine which measures are more appropriate or prioritize certain types of mitigation over others, including those measures that would provide co-benefits to the local community.
- (4) Mitigation must result in actual, verifiable and permanent emissions reductions that persist throughout the useful life of the project. Emissions reductions that would occur whether or not the project is approved, do not constitute mitigation for purposes of this paragraph.

## **VII. Section 15130. Discussion of Cumulative Impacts**

Concerns raised in Section I of this letter regarding use of the terms regional blueprint plans, climate action plans, and sustainable communities strategies apply equally here.

The second clause of proposed Section 15130(f) establishes an incorrect order for analysis of greenhouse gas emissions in the CEQA review process. Typically, a cumulative effect is identified and if found to be significant, then the significance finding triggers an analysis of mitigations. The last clause of this subsection implies that a determination should be made regarding whether emissions could or could not be mitigated to a level of insignificance before determining whether a project will contribute to a cumulatively considerable impact. In addition to its ambiguity, Section 15130(f) does not appear to add value and should be deleted.

## **VIII. Section 15152. Tiering**

The existing language on tiering under Guideline § 15152 already sufficiently addresses the use of tiering to address a project's greenhouse gas impacts. Accordingly, proposed subsection (i) does is unnecessary.

If § 15152(i) is to remain in the Draft Guidelines, proposed language should be consistent with § 15152(f)(1) to ensure that tiering of impacts from a project's greenhouse gas emissions is treated the same as any other impact and does not create an inconsistent standard. Accordingly, proposed section § 15152(i) should be modified state:

Where a regional or local plan adequately addressed the cumulative effects of greenhouse gas emissions as set forth in subsection (f)(3)(B), and a project complies with any site specific revisions, conditions, or other means of mitigation set forth in the regional or local plan, the greenhouse gas-related effects of the project are not treated as significant for purposes of the project-level CEQA document, and need not be discussed in detail.

## **IX. Section 15364.5. Greenhouse Gas Definition**

The proposed definition is scientifically inaccurate and unnecessarily exclusive because there are a number of gases with a high global warming potential that are not included within the proposed definition. See Forester, P., et al., 2007: Changes in Atmospheric Constituents and in Radiative Forcing. In: *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* at 212-213, available at <http://ipcc-wg1.ucar.edu/wg1/wg1-report.html>. Accordingly, Section 15364.5 should be revised as follows:

“Greenhouse gas” or “greenhouse gases” includes, but is not limited to, all of the following gases: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

## **X. Appendix F**

We support the proposed changes to Appendix F. Regrettably, Appendix F has largely been ignored throughout its 30+ year history due to its permissive language. The proposed language strengthening this section dovetails with the greenhouse gas emissions analysis now required under CEQA and will help ensure energy conservation measures are more fully considered as part of environmental review.

## **XI. Appendix G**

### **A. Recognition of Impacts to Forest Resources**

We strongly supports the explicit inclusion of forest resources in section II of the Appendix G environmental checklist. Our forests provide a host of critical environmental values, from clean water and wildlife habitat to biodiversity and sustainable forest products. A key value for OPR’s update of the CEQA guidelines is the role of forests in climate change. Forests release significant amounts of carbon dioxide (CO<sub>2</sub>) when converted to non-forest use, and, alternatively, can absorb and store CO<sub>2</sub> for long periods of time when restored, protected, and sustainably managed. The addition of environmental impacts to forestland, including forest loss, conversion to non-forest use, and zoning changes, is a crucial step forward for appropriately assessing the climate value of forestland and ensuring adequate mitigation. It is also consistent with the California Air Resources Board Scoping Plan for AB 32, which recognizes the significant effect of forest conversion on climate, and identifies CEQA as a main mechanism for assessing and mitigating impacts.<sup>5</sup>

### **B. Greenhouse Gases**

#### **1. Subsection (a): Delete “based on applicable threshold of significance”**

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<sup>5</sup> CARB Climate Change Proposed Scoping Plan Appendices, Volume I, page C-166.

As currently drafted, subsection (a) improperly suggests that an applicable threshold of significance is necessary to reach a significance determination regarding greenhouse gas impacts. As OPR properly determined in its Technical Advisory, “[e]ven in the absence of clearly defined thresholds for GHG emissions, the law requires that such emission from CEQA projects be disclosed and mitigated to the extent feasible whenever the lead agency determines the project contributes to a significant cumulative climate change impact.” (OPR Technical Advisory on CEQA and Climate Change at 4; *see also* CAPCOA, CEQA & Climate Change (2008) at 23 (“[t]he absence of a threshold does not in any way relieve agencies of their obligations to address GHG emissions from projects under CEQA.”).) As EIRs have frequently failed to reach a significance determination on the grounds that thresholds of significance for GHGs are unavailable, is it critical that OPR does not perpetuate the misconception that thresholds are a prerequisite to a significance determination. Accordingly, to avoid any further confusion, subsection (a) must be revised as follows:

- a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment, ~~based on any applicable threshold of significance?~~

## **2. The Draft Guidelines Must Account For The Effects of Climate Change on Project Impacts and Human Safety**

Although OPR’s statutory mandate under SB 97 includes providing guidance on “the effects of greenhouse gas emissions,” this guidance is notably absent from the Draft Guidelines. The effects of greenhouse gas emissions are the host of environmental impacts associated with global warming that are currently being observed and projected to worsen in the future. *See, e.g.*, Executive Order S-13-08 (finding that California’s efforts to reduce greenhouse gas emissions “coupled with others around the world, will slow, but not stop all long-term climate impacts to California” and that “global sea level rise for the next century is projected to rise faster than historical levels.”). The continued environmental effects of elevated atmospheric concentrations of greenhouse gas emissions will place additional demands on resources already affected by the project and create significant future hazards to the public in the proposed project area. Simply put, we can no longer presume that the future will look like the past. It is incumbent upon OPR to acknowledge the present and future consequences of a changing climate in the Draft Guidelines.

The failure of the Draft Guidelines to include any language that acknowledges the existence of global warming and the need to address projected global warming impacts as part of the environmental planning process directly contradicts Executive Order S-13-08. As recognized in Executive Order S-13-08, “the longer California delays planning and adapting to sea level rise the more expensive and difficult adaptation will be.” Indeed, although the Executive Order directs OPR to “provide state land-use planning guidance related to sea level rise and other climate change impacts” by May 30, 2009, *prior to* its deadline for transmitting CEQA greenhouse gas guidelines to the Resources Agency.

Accordingly, there is no legitimate excuse for OPR's failure to incorporate guidance on sea level rise and other climate change impacts in this revision of the CEQA Guidelines.

If OPR fails to provide guidance on the effects of greenhouse gas emissions, there may be devastating real world consequences. "The EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected." Guidelines § 15003. Nonetheless, under the Draft Guidelines, a project could bring development to an area projected to be inundated by sea-level rise or an area projected to experience a dramatic increase in wildfires without any acknowledgement of these dangerous environmental conditions in the EIR. Accordingly, CEQA's "environmental alarm bell" will not have been rung and a project that may not have been approved had full information been made available will be sited in an area that poses significant undisclosed hazards to the public.

OPR should not assume that a lead agency is already aware that CEQA already requires an assessment of project impacts in the context of future projected changes to the environment as a result of global warming. The current Guideline update is the opportunity for OPR to address the range of issues associated with greenhouse gas emissions. Its failure to acknowledge the effects of greenhouse gas emissions on the climate will, rightly or not, be read as tacit permission that an environmental document need not address these issues.

For all of the above reasons, we urge OPR to revisit proposals submitted during the scoping process to provide guidance on the analysis of the interactivity of project impacts over the project's lifetime with the projected impacts of global warming. In the alternative, we proposed the following additional language to the greenhouse gas emission section of Appendix G:

VII. GREENHOUSE GAS EMISSIONS – Would the project:

c) Place substantial additional demands on resources that are projected to be adversely affected by climate change?

d) Bring development into areas that are projected to be adversely affected by climate change, creating a significant hazard to the public?

**C. Transportation/Traffic**

We support the changes to Appendix G section XVI on transportation/traffic, which more appropriately balance the broad range of transportation modalities with environmental considerations. These changes should help promote compact and walkable development. We encourage OPR to work closely with lead agencies across California to ensure that they are well-equipped to conduct the transportation analysis necessary to promote positive environmental outcomes, achieve mobility and health goals, and avoid environmental justice issues. We also hope that OPR conducts sufficient

research, analysis and public engagement to assess the effects of these proposed changes and makes any necessary adjustments.

Thank you for considering these comments. If you have any questions, please contact Matt Vespa, [mvespa@biologicaldiversity.org](mailto:mvespa@biologicaldiversity.org), (415) 436-9682 x309.

Sincerely,

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