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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. These comments are submitted on behalf of the Center on Race, Poverty and the Environment (“CRPE”). Although CRPE appreciates the fact that the Office of Planning and Research (“OPR”) is attempting to improve lead agencies’ understanding and implementation of CEQA as it applies to greenhouse gas emissions, we feel that the OPR’s treatment of the analysis and mitigation of greenhouse gas emissions has failed in this attempt. The proposed amendments will allow lead agencies to improperly avoid greenhouse gas emissions analysis in their EIRs. Many of the proposed amendments backslide on exiting CEQA law. Some provisions are redundant and should be deleted from the Guidelines, while others are confusing and should either be removed or rewritten.

- A. The Amendments Provide Lead Agencies with Unwarranted and Unreasonable Opportunities to Avoid Greenhouse Gas Emissions Analysis

The OPR's proposed amendments allow lead agencies to avoid meaningful analysis of greenhouse gas emissions, without providing sufficient safeguards to ensure that significant cumulative impacts resulting from greenhouse gas emissions are avoided or properly mitigated. The DPR does this in a variety of ways, including inserting provisions that allow lead agencies to avoid preparing an EIR by relying upon compliance with pre-existing regulations. This tactic violates the rule that, for CEQA purposes, a lead agency may not make a finding of no significant impact based on regulatory compliance.¹ The following sections highlight some of the provisions that improperly enable lead agencies to avoid analysis of greenhouse gas emissions.

1. Proposed Amendment Section 15064(h)(3)

Section 15064(h)(3) is a pseudo-tiering provision, which allows lead agencies to rely upon compliance with previously approved plans or mitigation programs to avoid preparing an EIR. The insufficiency of this provision is threefold: 1) It violates the rule established in *Communities for a Better Environment v. California Resources Agency* (2002), 103 Cal. App. 4th 98, 114, which held that a lead agency may not assume that a project has no significant environmental impacts based on regulatory compliance alone; 2) It does not condition a lead agency's reliance upon previously approved plans on a demonstration that those plans were accompanied by certified EIRs; and 3) Many of the plans falling under this category are overly general and do not contemplate specific projects or local impacts, divesting them of any probative value in a cumulative impacts analysis.

The CEQA Guidelines do not allow lead agencies to avoid preparation of an EIR based on regulatory compliance. OPR's proposed Guidelines allow exactly that, and therefore violate CEQA case law. In fact, regulatory compliance with previously approved plans or mitigation programs should not be considered at all when determining a project's incremental contribution to a cumulative effect. These plans are often times generalized, whereas the CEQA Guidelines direct agencies to consider projects on a case-by-case basis, with a focus on local impacts. A preferable provision would require a lead agency to analyze a project's incremental contribution to a cumulative effect by performing its own scientific analysis, taking into account past, ongoing, and reasonably foreseeable future projects.

2. Proposed Amendment Section 15064.4(a)(1)

According to Section 15064.4(a)(1), when a lead agency is assessing the significance of impacts from greenhouse gas emissions, it should consider the extent to which the project helps or hinders the attainment of the state's goals of reducing greenhouse gas emissions to 1990 levels by 2020. Reliance upon consistency with the Global Warming Solutions Act of 2006 (AB 32) is

¹ *Communities for a Better Environment v. California Resources Agency* (2002), 103 Cal. App. 4th 98, 114 (Finding that a lead agency has a duty to "look at evidence beyond the regulatory standard, or in contravention of the standard, in deciding whether an EIR must be prepared . . . any substantial evidence supporting a fair argument that a project may have a significant environmental effect would trigger the preparation of an EIR."); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004), 116 Cal. App. 4th 1099, 1109 ("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.").

misplaced, and once again allows lead agencies to avoid preparing an EIR and analyzing impacts from greenhouse gas emissions. It is inconsistent with CEQA's current requirement that, to the extent possible, significance must be determined based on scientific and factual data alone.² It is also inconsistent with the requirement that lead agencies may not rely upon regulatory compliance to avoid preparing an EIR.³

An analysis of a project's consistency with AB 32's statewide goals is, at best, irrelevant to an analysis of local impacts, and is, at worst, deceptive and confusing. Under CEQA, a significant effect on the environment "means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project . . .". AB 32, on the other hand, seeks statewide greenhouse gas emissions reductions that can be achieved through cap and trade, and purchase. Given AB 32's exemptions for some sectors and its statewide, rather than local focus, it is reasonable to expect a project to meet AB 32's goals at the same time that it adversely affects the physical conditions at or near the project site. For instance, AB 32's goals would be met by a scenario wherein exempted greenhouse-gas-producing industries were confined to one community. Even though these projects may meet requirements of AB 32, approval of those projects would not only negatively effect global climate change, they would also have a significant impact on or near project sites. Under the proposed amendments to the Guidelines, a lead agency could arguably avoid preparing an EIR for those greenhouse-gas-producing industries. This has the ultimate effect of exacerbating environmental injustice by encouraging major polluters to purchase emissions credits and develop polluting industries in environmental justice communities.

It is unacceptable for OPR to keep this language in the Guidelines. OPR should remove this provision from the Guidelines and require agencies to assess whether projects will cause significant impacts from greenhouse gas emissions based on scientific analysis alone.

3. Proposed Amendment Section 15126.4(c)(3)

Proposed amendment Section 15126.4(c)(3) misapplies the CEQA requirement that a lead agency must implement mitigation measures when it finds that a proposed project may cause significant adverse impacts on the environment. Section 15126.4(c)(3) allows projects to mitigate significant effects from greenhouse gas emissions by complying with the requirements of a previously approved plan or mitigation program, if that plan or program provides specific requirements that will avoid or substantially lessen the potential impacts from greenhouse gas emissions.

Under CEQA, mitigation measures are to be considered, discussed, and ultimately required when it has been established through an EIR that a project will cause significant adverse impacts on the environment. A previously approved plan or mitigation program that itself contains mitigation measures for impacts from greenhouse gas emissions will be properly accounted for in the EIR when the lead agency calculates project impacts. If the project will have significant adverse impacts from greenhouse gas emissions, there are two ways in which this approach may violate CEQA: either the previously adopted plan has enforceable mitigation measures that are

² CEQA Guidelines § 15064(b).

³ *Communities for a Better Environment v. California Resources Agency* (2002), 103 Cal. App. 4th 98, 114.

insufficient to mitigate impacts from the project to a less than significant level, or the mitigation measures in the previously adopted plan are unenforceable, and therefore may not be considered as mitigation in the EIR. If the lead agency wishes to rely upon mitigation measures in a previously adopted plan or mitigation program to mitigate impacts to a less than significant level, it must require those measures as an enforceable provision of the permit being issued.⁴ Currently, Section 15126.4(c)(3) does not require that those mitigation measures be enforceable by the lead agency.

The lead agency preparing the EIR and issuing a new permit is inherently allowed to look at other agencies' mitigation plans, and to borrow from them when an EIR exposes the need for mitigation measures. What the proposed Section 15126.4(c)(3) does is confuse this with a right to avoid implementing mitigation measures entirely by relying on other agencies' mitigation plans. This violates CEQA.

B. The Amendments Weaken Existing CEQA Law

The Office of Planning and Research has used the amendments to the Guidelines to weaken existing CEQA law by providing fewer assurances of adequate project impact analysis and mitigation. This thwarts the purpose of the amendments, which is to ensure that the guidelines provide for "the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions."⁵ The following sections highlight a few of the proposed amendments that would result in a weakening of CEQA law.

1. Proposed Amendment Section 15064.4(b)

Proposed amendment Section 15064.4(b) lays out the methods by which a lead agency may assess the amount of greenhouse gas emissions associated with a proposed project. The agency has full discretion to decide whether to utilize a model or methodology that quantifies emissions, or a qualitative or other performance-based standard. The second option, allowing a lead agency to qualitatively estimate the significance of greenhouse gas emissions, is an unacceptable backsliding provision. Accordingly to the current CEQA Guidelines, a quantitative methodology for assessing the significance of impacts associated with a project is required unless such a methodology is unavailable. The proposed amendments weaken current CEQA requirements that, "[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based *to the extent possible* on scientific and factual data."⁶

In addition, under the proposed amendment, the lead agency that chooses a quantitative approach has unfettered discretion to choose which of any available model or methodology to use to quantify greenhouse gas emissions. There is no requirement that the agency use the most precise methodology, or that it refrain from using faulty, inaccurate, or unsuitable methodologies. OPR should specify a particular model that agencies should use. If that is

⁴ See *Federation of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000), 83 Cal. App. 4th 1252, 1260 (mitigation measures must "actually be implemented as a condition of development").

⁵ Public Resources Code § 21083.05.

⁶ CEQA Guidelines § 15064.4(b).

impossible at this time, OPR should at least insert a rule that prohibits the use of out-dated, faulty, or less accurate models. In the absence of such a standard, OPR is granting public agencies too great an opportunity for backsliding.

2. Proposed Amendment Section 15126.4(c)(1)

Proposed amendment Section 15126.4(c)(1) directs lead agencies to consider all feasible means of mitigating greenhouse gas emissions, including emissions associated with energy consumption. This section does not take proper account of the fact that mitigation for greenhouse gas emissions is particularly likely to cause one or more significant effects in addition to those being mitigated. Section 15126.4(a)(1)(D) stresses the importance of discussing and mitigating additional significant impacts that may result from mitigation measures. That requirement should be repeated in Section 15126.4(c)(1), making it clear that the requirement applies equally, if not more forcefully, to mitigation measures related to greenhouse gas emissions. In addition to the requirement that additional impacts must be addressed, that section should require lead agencies to implement mitigation measures that avoid adverse unintended impacts and maximize co-benefits, whenever it is feasible to do so.

3. Proposed Amendment Section 15126.4(c)(5)

Proposed amendment Section 15126.4(c)(5) allows lead agencies to mitigate greenhouse gas emissions through off-site measures or the purchase of carbon offsets, and requires that off-site mitigation measures be part of a reasonable plan of mitigation that the relevant agency commits to implementing. This rule is too lenient and allows agencies to “mitigate” greenhouse gas emissions in ways that would otherwise be prohibited under CEQA. As a rule, emission reductions must be quantifiable, surplus, enforceable, permanent and real. Instead of requiring that purchased carbon offsets meet that standard, this provision leaves the determination of which offsets are “reasonable” to the full discretion of the lead agency. This invites lead agencies to allow project proponents to purchase offsets that are not quantifiable, surplus, enforceable, permanent or real.

Section 15126.4(c)(5) claims to ensure that offsets will be “reasonable” rather than ensuring that they will be consistent with the law. The claim is false and the approach violates CEQA. The only reasonable mitigation measures are those that are enforceable by the lead agency. The lead agency preparing an EIR cannot commit itself to ensuring that off-site measures will be implemented, thus making their use as mitigation unreasonable. The provision relies on the good faith efforts of outside agencies in charge of the offsite program to enforce the program’s offset requirements.

Additionally, Section 15126.4(c)(5) should specifically prioritize on-site mitigation measures, and only allow off-site mitigation when on-site mitigation is infeasible. This is the only way that the lead agency can ensure that mitigation measures are enforceable, along with being quantifiable, surplus, permanent and real. If off-site mitigation is necessary, the CEQA Guidelines should require that off-site mitigation measures do not increase local impacts.

4. Proposed Amendment Section 15130(f)

The language in proposed Amendment Section 15130(f) is confusing, and does not appear to accomplish what it intends to accomplish. Under Section 15130(f), OPR seems to imply that an EIR should evaluate greenhouse gas emissions associated with a proposed project only when it has already established that those emissions may result in a cumulatively considerable impact that cannot be mitigated to a less than significant level. This language confuses the normal order in which scientific analyses are conducted, and may be impossible to satisfy. Generally, a lead agency will assess whether a project will result in cumulatively considerable impacts. All cumulatively considerable impacts should be evaluated in the EIR, which should then, “examine reasonable options for mitigating or avoiding any significant cumulative effects of a proposed project.”⁷ Section 15130(f) seems to unreasonably expect lead agencies to determine whether cumulative impacts can be mitigated before it determines whether cumulative impacts are anticipated, or are likely to be considerable, and limits the evaluation of cumulative impacts to those that cannot be mitigated. OPR should clarify its meaning, and either re-write or remove this provision from the Guidelines.

C. The Amendments are Redundant

Some of the draft amendments to the Guidelines are redundant of the existing CEQA Guidelines. The CEQA Guidelines already set many standards and regulations that apply generally, including to greenhouse gas emissions. In some cases, it is nonetheless helpful to set out separate standards for the treatment of greenhouse gases and their effects. In other cases, including a separate provision in the Guidelines that applies only to greenhouse gas emissions is redundant. Redundant provisions should be removed, not only because they are unnecessary, but because they open up the possibility that lead agencies will interpret the new provisions inconsistently with pre-existing CEQA law. This increases the likelihood of backsliding.

1. Proposed Amendment Section 15064.7(c)

Proposed amendment Section 15064.7(c) purports to allow lead agencies adopting thresholds of significance to consider thresholds of significance and recommendations that have been adopted by other public agencies. Lead agencies already have authority to adopt thresholds of significance, and may consider other agencies’ thresholds when adopting them. Reiterating this in the new Guidelines only obscures a law that is already established and clear. The provision continues, requiring that an adopted threshold is supported by substantial evidence, which includes expert opinion based on facts. Expert opinion based on facts is already considered one of the acceptable forms of substantial evidence in the CEQA Guidelines. Restating only that one type of substantial evidence creates the false impression that lawmakers prefer the substantial evidence standard to be met by relying upon expert opinion based on fact. Additionally, it is simply confusing to restate that substantial evidence includes expert opinion based on facts.

CONCLUSION

In the Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions, the OPR fails to provide sufficient information to allow the public to evaluate its intent or the true

⁷ *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029.

meaning behind the proposed amendments. As has been demonstrated above, the most that can be discerned is a general desire to weaken the CEQA protections given to the public. The OPR must redraft the amendments for greenhouse gas emissions to fulfill its mission to establish meaningful and effective guidelines that provide for the most effective mitigation of greenhouse gas emissions and their effects.

Sincerely,

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