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Thank you for the opportunity to comment upon the Preliminary Draft Amendments to the Guidelines for the Implementation of the California Environmental Quality Act (CEQA)(Title 14, California Code of Regulations). The Amendments are proposed in order to implement Senate Bill 97 (Dutton), which directs the Governor's Office of Planning and Research (OPR) to develop guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions (Public Resources Code Section 21083.05).

As part of the California Code of Regulations, it is the function of the Guidelines to implement, interpret, or make specific the law as enacted by the California Legislature and to govern its procedure. As such, the Guidelines must hew closely to the law and judicial precedent interpreting that law.

In adopting the California Environmental Quality Act, the Legislature declared that it is the policy of California to take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state. In furtherance of that goal, CEQA requires government at all levels to consider environmental factors in its decision making and avoid significant effects on the environment whenever it is feasible to do so. It is through the environmental impact review process that information is developed regarding an action's potential impacts on the environment and the means available to avoid those impacts, informing both decision makers and the public generally

CEQA provides for public agencies to balance competing needs and values (Sections 21002, 21002.1). "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action... The [Environmental Impact Report] EIR process protects not only the environment but informed self-government" (*County of Amador v. El Dorado County Water Agency* (76 Cal.App.4th 933)). Thus, the Guidelines must not be utilized in furtherance of the extra-legislative preferences or values of the administration or even the planning community at large, however laudable those preferences or values may be, but must be directed toward providing the most comprehensive and useful information possible for public decision making.

After reviewing the Preliminary Draft Amendments, I urge that the Amendments not be adopted as currently drafted. The Preliminary Draft Amendments must be redrafted due to two fundamental flaws as discussed in more detail below:

- Failure to adequately address mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as directed under SB 97
- Preliminary Draft Amendments that are beyond the scope of SB 97, and could actually result in increased impacts on the environment.

By way of background, I am a professional planner with over twenty five years of experience in dealing with the California Environmental Quality Act (CEQA), working primarily for public agencies and environmental groups. In the past, I served on a local city council and on the Southern California Association of Governments Regional Council and currently serve on the boards of a number of environmental groups and a non-profit housing corporation.

The Preliminary Draft Amendment Must Be Revised to Address the EFFECTS of Greenhouse Gas Emissions

OPR has been directed to develop guidelines for the **mitigation of the effects of greenhouse gas emissions**. As stated in Assembly Bill 32, also known as the California Global Warming Solutions Act of 2006:

Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.

(California Health and Safety Code Section 38501(a))

The portion of the Preliminary Draft Amendment addressing mitigation is found in the new Section 15126.4(c). As currently drafted, the Amendment provides no guidance at all for mitigation of many of the effects of greenhouse gases recognized by the California Legislature in AB 32.

CEQA does not require the analysis of impacts that are merely speculative. However, not only have the above impacts been recognized by the Legislature, various State agencies have conducted a plethora of studies regarding those impacts, including:

- California Department of Water Resources (Managing An Uncertain Future, Climate Change Adaptation Strategies for California's Water, October 2008; Climate Change in California, June 2007)

- California Energy Commission (The Economic Cost of Climate Change Impact on California Water: A Scenario Analysis, September 2006; Climate Warming and Water Supply Management in California March 2006)
- California Coastal Commission (Overview of Sea Level Rise and Some Implications for Coastal California, June 2001)

Mitigation for the impacts of greenhouse gas emissions that must be addressed include:

- Measures to address rising sea level, including placement of structures to ensure safety from future storm surges, and minimization of development designs that will require future coastal armature with associated impacts on such factors as sand deposition and habitat
- Measures to address increased flood peaks, including placement of structures to avoid expanded flood hazard areas and retention of stormwater on-site to reduce runoff, also potentially increasing percolation to groundwater
- Measures to address reduced availability of water due to reduced snowpack
- Measures to address increased stress on habitat including reducing non-climate stressors on ecosystems, controlling opportunistic invasive species, and protecting coastal wetlands and accommodating sea level rise through provision of adequate buffers.

The Amendments Must Focus on Mitigation of the Effects of Greenhouse Gas Emissions

OPR has been directed to develop guidelines for the **mitigation of the effects of greenhouse gas emissions**. However, the Preliminary Draft Amendment includes many changes unrelated or only tangentially related to mitigation. For the most part, these should not be included in the amendment and in some cases are contrary to basic concept that CEQA should be interpreted “as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language” (*Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247).

Section 15064 (h)(3)

This Preliminary Draft Amendment is beyond the cope of SB 97 and would add to the list of examples of previously approved plans or mitigation programs which may be relied upon when evaluating the potential significance of a cumulative impact to include a city or county general plan or specific plan, regional housing allocation plan, habitat conservation plan (HCP), natural community conservation plan (NCCP), climate action plan, regional transportation plan, regional blueprint plan, sustainable community strategy, statewide plan of mitigation for greenhouse gas emissions. It is not clear what the intent of the proposed change would be inasmuch as the existing list is in no way represented as exhaustive or exclusive. While a general plan or HCP would indeed be useful, it is not necessary to list such plans specifically, since in practice such plans are already utilized in the manner suggested.

The plans listed in the currently adopted Section 15064 are clearly subject to specific authorities, such as a city adopting a local general plan or an air quality management district adopting an air quality management plan. For some additions to the list which are not specified in law, including the climate action plan, the agency having jurisdiction is not clear. Would that agency be whichever

opted to adopt a plan first? Or is this intended to mean the California Air Resources Board planning effort prescribed in AB 32?

Some of the proposed plans are not subject environmental review or any requirement for mitigation or examination of alternatives. These include the regional housing allocation plan, which is exempt from the requirements of CEQA pursuant to Government Code Section 65584(f). Thus, reliance on such a plan provides no guarantee that impacts would be addressed and increases the likelihood that impacts would, indeed, occur.

There are also no commonly accepted criteria for content or adoption procedures for certain plans such as a “climate action plan”. Even a community starting out with lofty intentions to develop a “climate action plan” or “green action plan” may, at the end of the process, end up with little more than a commitment to implementing AB 2020 and Title 24.

If the list is indeed intended to be exhaustive, why does the list not include congestion management programs prepared and implemented pursuant to Government Code Section 65089 et seq? The requirement for congestion management was a key factor in the June 1990 passage of Proposition 111, which also provided certain revenue increases and re-allocations. The omission of congestion management programs from the expanded list is also peculiar in that congestion can lead to increased vehicular emissions, as vehicles idle.

The Preliminary Draft Amendment to Section 15064 should not be adopted.

Section 15064.4

SB 97 directs that OPR develop guidelines for mitigation of the effects of greenhouse gases. No mandate was given for OPR to develop significance standards or methodologies. In fact, to the extent any such direction has been given by the Legislature, it would seem to be the responsibility of the California Air Resources Board to do so.

Standards of significance and study methodology for all other environmental factors have been based on local decision making, and evaluation of “fair arguments” that an impact would occur by local decision makers (*Communities For A Better Environment Et Al v. California Resources Agency*, 126 Cal. Rptr. 2d. 441, Cal.App.3 Dist., 2002). The proposed Section 15064.4 represents a departure from this principle and could set a precedent for other, similar changes, coming dangerously close to the approach rejected by the court in CBE.

Even if one agreed that the SB 97 mandate to develop mitigation guidelines implied direction to also provide guidance regarding assessment of impacts, this section is lacking in that it completely neglects the effects of greenhouse gases discussed above.

The technology does not exist to determine an individual project’s contribution to sea level rise, changes in snowpack or other greenhouse gas effects. However, a reasonable range for the expected rise in sea level, for example, has been developed and environmental analyses must take that into account. Likewise, analyses required pursuant to SB 221 (Kuehl, 2001) and SB 610 (Costa, 2001) must take into consideration state estimates regarding future reduction in snowpack.

The Preliminary Draft Amendment creating Section 15064.4 must be revised to address the specific effects of greenhouse gases.

Section 15064.7

The proposed revision reflects what is currently common practice. However, the following alternate wording is suggested:

When adopting thresholds of significance, a lead agency may consider thresholds of significance adopted by other public agencies having primary jurisdiction over the matter in question ~~and recommendations of others~~, provided such thresholds or recommendations are supported by substantial evidence, ~~including expert opinion based on facts~~.

Where a local agency defers to an agency exercising primary jurisdiction over a given issue, such as an air quality management district in matters of air quality or a water quality control boards in matters of water quality, it makes sense to utilize the expertise of such agencies. At the same time, such situations would likely be covered under the existing, adopted Section 15125 (d), rendering the proposed change superfluous.

On the other hand, short-staffed cities all too often take a “what are the other kids doing?” approach, merely adopting whatever the city next door adopted, lacking the resources to do much investigation or analysis on their own. Often the original framer of the “standard” becomes regarded as the “expert”, regardless of technical background or potential conflict of interest.

In this manner a threshold becomes the “standard” whether or not support by dubious “evidence” or originally intended for a different purpose, such as a shade and shadow standard originally designed to address impacts on use of solar energy becoming the sine qua non of aesthetic, horticultural, and basic quality of life evaluations of shadow impacts. Once these “standards” are widespread, it is exceedingly difficult to change the tide, even when substantial evidence shows that a change is in order.

Section 15065(b)(1)

This proposed amendment, while outside the scope of AB 97, reflects a common sense approach to administrative procedures and what is common practice whereby applicants informally consult with agency staff in pre-application meetings.

Section 15093

This change suggests that a local agency consider region-wide or state-wide benefits as a part of over-riding considerations. As currently adopted, Section 15093 directly echoes Public Resources Code Section 21081 (b), and provides administrative direction as to maintaining the public record. The Section is silent as to consideration of region-wide of state-wide benefits as is the Act itself.

The Preliminary Draft Amendment to Section 15093 goes beyond the scope of SB 97 and of CEQA itself and therefore should not be adopted.

Section 15125

The Preliminary Draft Amendment to Section 15125 would add specific plans, regional blueprint plans, sustainable community strategies, and climate action plans, to the list of plans to be addressed for consistency in an environmental impact report (EIR). Once again, there is no need to add additional specific elements to a list that is not intended to be exhaustive, and in fact is qualified by the words “but are not limited to”.

If there is a desire to needlessly expand the list, it might make sense to include specific plans in Section 15125, inasmuch as specific legal requirements exist for the content and adoption process for specific plans. Similarly, sustainable community strategies are a required portion of the regional transportation plan prepared by the Metropolitan Planning Organization, subject to specific requirements for public review; though a separate listing for the strategies may be redundant. Oddly, once again, state mandated congestion management programs have been left out.

That is not the case for the remaining items, i.e. regional blueprint plans, and climate action plans. While the general purpose of “regional blueprint plans” is spelled out in both the Health and Safety Code and the Government Code, specifics are lacking as to content and procedures for adoption. State law does not address climate action plans. Is this intended to mean the scoping plan addressed in AB 32?

As currently adopted, this section adequately provides for examination of ALL relevant plans. Expanding the list in a manner that may appear exhaustive, but is actually not, may increase the likelihood that relevant plans, such as a CMP, will be ignored.

The Preliminary Draft Amendment to Section 15125 should not be adopted.

Section 15364.5

It is suggested that the definition of greenhouse gas be changed 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. (Reference: Health and Safety Code Section 38505(g).)

Appendices

The introductory note at the beginning of the checklist in Appendix G helps to reduce confusion as to the status of the checklist. Despite the fact that the checklist in Appendix G is clearly labeled “Sample Question”, the checklist is often represented as a list of state mandated

thresholds. Thus, it is helpful to have this clarified at the beginning of the checklist in the manner proposed. The material in Section II. Agricultural and Forest Resources appears to reflect State law and is also helpful, as is the material in Appendix F regarding energy conservation.

I strongly urge, however, that the proposed changes in Section XVI. Transportation/Traffic be rejected. The key factor in traffic analysis is not how much traffic will be generated, but what roadway capacity exists to accommodate that additional traffic. Use of LOS is industry standard for transportation planning. Simply looking at raw volumes of traffic to be generated without considering roadway capacity makes no more sense than simply calculating future water demand without considering water supplies available to meet that demand.

Proposition 111 (Government Code 65089 et seq) requires transportation planning to include level of service standards (GC 65089(b)(1)). It is astounding that a proposed Amendment which goes to such great pains to create exhaustive lists of plans to be considered in EIRs would actually *delete* consideration of *any* State mandated plan, such as the CMP, let alone a program **mandated by the voters of the State of California**. Not only is deletion of LOS and CMP standards misguided, it betrays contempt for the will of the people.

One may reasonably consider the threat of climate change so critical that the thousands of hours wasted in congested traffic is irrelevant and that the \$19,000,000,000 (nineteen billion dollars) per year (as estimated by the Milken Institute) in lost time, wasted fuel and other costs due to traffic congestion is a trivial cost. It is not appropriate for the Guidelines themselves to balance such competing values. Rather, such balancing of values is to be carried out by the individual public agency as part of its decision making process, pursuant to Public Resources Code Sections 21002, 21002.1 and 21081.

Even so, eliminating Level of Service (LOS) and volume to capacity ratios as criteria for traffic impacts is counterproductive if reduction of greenhouse gas emissions is truly the goal. Air quality analyses in numerous EIRs show **greater emissions for more congested traffic**. Not only will hot spots be created at congested intersections as vehicles idle, but a given volume of traffic moving from A to B will produce more emissions in a stop and go situation than at free flow. Public agencies routinely cite reduction in air emissions due to reduced congestion as an overriding consideration when approving roadway projects that may lead to other impacts.

Granted, at upper speeds under a free flow condition emissions may increase. However, standard traffic analyses and CMPs, by law, are geared toward differences between LOS D, LOS E, and LOS F, none of which are free flow and are defined as follows:

LOS D-Highway movement approaching unstable flow. Speed tolerable but subject to sudden and considerable variation. Less maneuverability. Average speed 40 mph.

At intersections delays to approaching vehicles may be substantial during short peaks within the peak period, but enough cycles with lower demand occur to permit periodic clearance of developing queues.

LOS E-Highway flow unstable with rapidly fluctuating speeds and flow rates. Short headways, low maneuverability. Average speed 35 mph.

At intersections there may be long queues of vehicles waiting upstream of the intersection and delays may be great (up to several signal cycles).

LOS F-Highway flow forced. Speed and flow may drop to zero. Average speed less than 20 mph.

At intersections conditions are jammed, with traffic exceeding capacity. Back-ups from locations downstream or on the cross street may restrict or prevent movement of vehicles out of the approach under consideration.

Is it really the position of the framers of the Preliminary Draft Amendments that gridlock is now somehow OK?? And that the fuel wasted and the emissions created by vehicles just idling in LOS F traffic jams are OK???

Failure to address parking could result not only on impacts on local neighborhoods but increased emissions due to people cruising a neighborhood looking for parking places, idling at the ends of parking aisles waiting for parking, etc..

Optimistic thinking may be that increased congestion and lack of parking would result in greater use of commuter transit resulting in emissions reductions over the long term, but mass transit is not a practical alternative in many, if not most, areas of the state. Further, a recent MTA study found that commuting via Metro-link versus automobile-only commuting **increased** emissions of NOx and particulate matter.

If concerns exist that alternate means of transportation have been given short shrift in environmental analyses as compared to vehicular traffic, then the checklist should be augmented. Suggested items include:

- Would the project result in impairment of pedestrian circulation?
- Would the project result in impairment of bicycle circulation?
- Would the project interfere with any transit route?

The objective should be a win/win, not a lose/lose, situation.

The Preliminary Draft Amendments in Section XVI. Transportation/Traffic must be rejected.

Additional items addressing the affects of global warming should also be considered as follows:

The need for additional buffers in coastal areas to provide areas for habitat retreat as sea levels rise should be addressed as follows in Section IV. Biological Resources:

- c) Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, elimination of buffer areas available for habitat retreat necessitated by rising sea level, or other means?

Changes in sand deposition/beach replenishment, rising sea level, and flood hazard due to increased peak flood levels must be addressed in Section IX. Hydrology and Water Quality or other section as appropriate with the addition of the following items:

- Substantially alter sand transport in a manner which would affect beach replenishment, taking into account rising sea levels?
- Place homes or others structures in an area that would likely be inundated by rising sea levels within the next fifty years?
- Necessitate the construction of a coastal protection device to protect proposed structures either currently or with the next fifty years, taking into account current predictions as to rising sea levels?
- Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, taking into account changing patterns of precipitation and climate change?
- Place structures within a 100-year flood hazard area which would impede or redirect flood flows taking into account changing patterns of precipitation and climate change?
- Expose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam, taking into account changing patterns of precipitation and climate change?

Changes in water supply due to reduced snowpack/climate change must be addressed in Section XVII Utilities and Service Systems:

- d) Have sufficient water supplies available to serve the project from existing entitlements and resources, or are new or expanded entitlements needed, taking into account changing patterns of precipitation and climate change? (Climate change may already be addressed in the applicable urban water master plans.)

Conclusion

Thank you for the opportunity to comment on the Preliminary Draft Amendments. The Preliminary Draft Amendments should **NOT** be adopted as currently drafted.

Please notify me of other such opportunities in the future. Thank you.

Yours Truly,

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