APPENDIX T6

California Natural Resources Agency Final Statement of Reasons for Regulatory Action

CALIFORNIA NATURAL RESOURCES AGENCY

FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97

December 2009

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CALIFORNIA NATURAL RESOURCES AGENCY
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

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INTRODUCTION

The California Natural Resources Agency ("the Resources Agency") has adopted certain amendments and additions to certain guidelines implementing the California Environmental Quality Act (Public Resources Code section 21000 *et seq*.) ("CEQA"). Specifically, these amendments implement the Legislature's directive in Public Resources Code section 21083.05 (enacted as part of SB97 (Chapter 185, Statutes 2007)). That section directs the Resources Agency to "certify and adopt guidelines prepared and developed by the Office of Planning and Research" "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions[.]" (Pub. Resources Code, § 21083.05(a)-(b).)

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the "Guidelines" or "State CEQA Guidelines"). Public agencies, project proponents, and third parties who wish to enforce the requirements of CEQA, rely on the Guidelines to provide a comprehensive guide on compliance with CEQA. Subdivision (f) of section 21083 requires the Resources Agency, in consultation with the Office of Planning and Research ("OPR"), to certify, adopt and amend the Guidelines at least once every two years.

Section 21083.05, as noted above, requires the promulgation of Guidelines specifically addressing analysis and mitigation of the effects of greenhouse gas emissions. The Resources Agency has adopted the following changes to the Guidelines ("Amendments") to implement that directive:

Add sections: 15064.4, 15183.5 and 15364.5.

Amend sections: 15064, 15064.7, 15065, 15086, 15093, 15125, 15126.2, 15126.4, 15130, 15150, 15183, Appendix F and Appendix G.

In addition to guidelines implementing SB97, some of the amendments listed above are non-substantive corrections.

The Resources Agency considered reasonable alternatives to the Amendments. The Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 and to update the Guidelines to reflect recent case law. Thus, the Amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's existing requirements. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in SB97. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to existing requirements of CEQA and not the Amendments.

The Resources Agency also initially determined that the Amendments would not have a significant adverse economic impact on business. The Resources Agency has determined that this action would have no impacts on project proponents. However, the Resources Agency is aware that certain of the statutory changes enacted by the Legislature and judicial decisions, described in greater detail below, that are reflected in the Amendments could have an economic impact on project proponents, including businesses. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with CEQA's requirement for analysis of greenhouse gas emissions. However, the Amendments to the Guidelines merely reflect these legislative and judicial requirements, and the Resources Agency knows of no less costly alternative. The Amendments clarify and update the Guidelines to be consistent with legislative enactments that have modified CEQA, and recent case law interpreting it, but does not impose any new requirements. Therefore, the Amendments would not have a significant, adverse economic impact on business.

Some comments were submitted during the public comment period and during the public hearings on the Proposed Amendments suggesting that the adverse economic impacts could result. For example, some suggested that the addition of forestry resources to the Appendix G checklist may increase the regulatory burden on the agricultural industry. Others suggested that application of the Guidelines to renewable energy projects or those implementing AB32 may be counterproductive. Despite those suggestions, no evidence was presented to the Resources Agency supporting those claims. Moreover, those comments did not provide any rationale challenging the Resources Agency's position that the Proposed Amendments implement existing requirements. Therefore, having considered all of the comments submitted on the Proposed Amendments, the Resources Agency concludes that its initial determination that the proposed action will not have a significant adverse economic impact remains correct.

The Amendments do not duplicate or conflict with any federal statutes or regulations. CEQA is similar in some respects to the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321-4343. Federal agencies are subject to NEPA, which

requires environmental review of federal actions. State and local agencies are subject to CEQA, which requires environmental review before state and local agencies may approve or decide to undertake discretionary actions and projects in California. Although both NEPA and CEQA require an analysis of environmental impacts, the substantive and procedural requirements of the two statutes differ. Most significantly, CEQA requirements for feasible mitigation of environmental impacts exceed NEPA's mitigation provisions. A state or local agency must complete a CEQA review even for those projects for which NEPA review is also applicable, although Guidelines sections 15220-15229 allow state, local and federal agencies to coordinate review when projects are subject to both CEQA and NEPA. Because state and local agencies are subject to CEQA unless exemptions apply, and because CEQA and NEPA are not identical, guidelines for CEQA are necessary to interpret and make specific provisions of SB97 and do not duplicate the Code of Federal Regulations.

FINAL STATEMENT OF REASONS

The Administrative Procedure Act requires that an agency prepare a final statement of reasons supporting its proposed regulation. The final statement of reasons updates the information contained in the initial statement of reasons, contains final determinations as to the economic impact of the regulations, and provides summaries and responses to all comments regarding the proposed action. The initial statement of reasons, as updated and revised, are contained in full in this final statement of reasons. The summaries and responses to comments are included in the Natural Resources Agency's file of this rulemaking proceeding.

Below is a brief background on the science relating to the effects of greenhouse gas emissions, as well as the various initiatives that California is implementing to reduce those emissions. Following that background, OPR's public engagement process and the Natural Resources Agency's rulemaking process is briefly described. Next, this Final Statement of Reasons explains the purpose and necessity of each proposed change to the Guidelines. Finally, Thematic Responses, addressing the major themes that were raised in public comments, are provided.

BACKGROUND ON THE EFFECTS OF GREENHOUSE GAS EMISSIONS AND CALIFORNIA'S EFFORTS TO REDUCE THOSE EMISSIONS

This section provides a brief background on the potential effects of greenhouse gas emissions and California's efforts to reduce those emissions.

What Are Greenhouse Gases?

Certain gases in Earth's atmosphere naturally trap solar energy to maintain global average temperatures within a range suitable for terrestrial life. Those gases – which primarily include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons,

perfluorocarbons and sulfur hexafluoride – act as a greenhouse on a global scale. (Health and Safety Code, § 38505(g).) Thus, those heat-trapping gases are known as greenhouse gases ("GHG").

The Legislature defined "greenhouse gases" to include the six gases mentioned above in California's Global Warming Solutions Act. (Health & Saf. Code, § 38500 et seq.) Similarly, the U.S. EPA has found that those same six gases could be regulated under the authority of the Clean Air Act. According to the U.S. EPA:

> (1) These six greenhouse gas share common properties regarding their climate effects; (2) these six greenhouse gases have been estimated to be the primary cause of human-induced climate change, are the best understood drivers of climate change, and are expected to remain the key driver of future climate change; (3) these six greenhouse gases are the common focus of climate change science research and policy analyses and discussions; [and] (4) using the combined mix of these gases as the definition (versus an individual gas-by-gas approach) is consistent with the science, because risks and impacts associated with greenhouse gas-induced climate change are not assessed on an individual gas approach….

(EPA, Endangerment Finding, 74 Fed. Reg. 66496, 66517 (December 15, 2009).) The United Nations Framework Convention on Climate Change also addresses these six gases. (*Id*. at p. 66519.)

What Causes Greenhouse Gas Emissions?

The incremental contributions of GHGs from innumerable direct and indirect sources result in elevated atmospheric GHG levels. (EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18904 (April 24, 2009) ("cumulative emissions are responsible for the cumulative change in the stock of concentrations in the atmosphere"); see also 74 Fed. Reg. 66496, 66538 (same in Final Endangerment Finding).) Some GHG emissions occur through natural processes such as plant decomposition and wildfires. One large source of GHG emissions, for example, is wildfire on forestlands and rangelands, which release carbon as a result of material being burned. (California Board of Forestry and Fire Protection, *2008 Strategic Plan and Report to the CARB on Meeting AB32 Forestry Sector Targets* (October, 2008), at p. 2.)

Human activities, such as motor vehicle use, energy production and land development, also result in both direct and indirect emissions that contribute to highly elevated concentrations of GHGs in the atmosphere. (California Energy Commission, *Inventory of California Emissions and Sinks: 1990 to 2004* (2006).)[1] Transportation

[1] Multiple statewide emission inventories covering the same period of time may vary. This is largely due to inventories characterizing an emission source by sectors (e.g. agriculture, cement, transportation, etc.) which may not be treated the same depending on the methodology used and access to information. Thus,

alone is estimated to account for nearly 40 percent of California's GHG emissions. (California Air Resources Board, *Climate Change Proposed Scoping Plan* (2008), at p. 11 ("Scoping Plan"); California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF ("2007 IEPR") at p. 18, Figure 1-2.) Emissions attributable to transportation result largely from development that increases, rather than decreases, vehicle miles traveled: low density, unbalanced land uses separating jobs and housing, and a focus on single-occupancy vehicle travel. (California Energy Commission, The Role of Land Use In Meeting California's Energy and Climate Change Goals. (2007) at p. 9.) In approaching regulation of GHG emissions in California, for example, the California Air Resources Board ("ARB") proposes to regulate various economic sectors that are known to emit GHGs, including electric power, transportation, industrial sources, landfills, commercial and residential sectors, agriculture and forestry. (Scoping Plan, Appendix F.) With a growing population and economy, California's total GHG emissions continue to increase. As explained below, this rapid rate of increase in GHG emissions is causing a change in the composition of atmospheric gases that may cause life threatening adverse environmental consequences.

What Effects May Result from Increased Greenhouse Gas Emissions?

Several measurable effects, including, among others, an increase in global average temperatures have been attributed to increases in GHG emissions resulting from human activity. (Intergovernmental Panel on Climate Change, *Working Group 1 Report: The Physical Science Basis* (2001), at p. 101.) Evidence further indicates that a warmer planet may in turn lead to changes in rainfall patterns, a retreat of polar icecaps, a rise in sea level, and changes in ecosystems supporting human, animal and plant life. (U.S. Environmental Protection Agency, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* April 17, 2009 ("Technical Support Document"), at pp. ES-1 to ES-3.) Climate change is not the only effect of increased GHG emissions. Impacts to human health and ocean acidification are also attributed to increasing concentrations of GHGs in the Earth's atmosphere. (*Id*. at p. 57.)

Globally elevated concentrations of GHGs have been observed to induce a range of associated effects. For example, the effects of atmospheric warming include, but are not limited to, increased likelihood of more frequent and intense natural disasters, increased drought, and harm to agriculture, wildlife, and ecological systems. (Technical Support Document at pp. ES-1, ES-6.) According to a report prepared for the California Climate Change Center:

> Climate change is likely to affect the abundance, production, distribution, and quality of ecosystem services throughout the State of California

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two statewide emissions inventories may be different depending on the agency that created them or its intended application. The CARB is in the process of updating its statewide data and methodologies to be consistent with international and national guidelines. The typical emissions inventory covers 1990 to 2004.

> including the delivery of abundant and clean water supplies to support human consumption and wildlife, climate stabilization through carbon sequestration, the supply of fish for commercial and recreational sport fishing. For example, as described in this report, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. The ability of the State's forests to sequester carbon and support climate stabilization could be hindered as productivity decreases and fires increase. And increased water temperatures in streams due to a decrease in provision of fresh water could seriously reduce salmon reproduction and subsequently reduce the number of salmon available for commercial and recreational harvest. Also, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. All of these ecosystem services have economic value and that value and its distribution is likely to changes under a changing climate.

(Rebecca Shaw, et al., for the California Climate Change Center, *The Impact of Climate Change on California's Ecosystem Services*, March 2009, CEC-500-2009-025-D, at p. 1.)

The effects of increased GHG concentrations are already being felt in California. For example, global atmospheric changes are causing sea levels to rise. An increase of approximately 8 inches has been recorded at the Golden Gate Bridge over the past 100 years. Such sea level rise threatens low coastal areas with inundation and increased erosion. (Scoping Plan, at p. 10.)

While sea levels continue to rise, the Sierra snowpack has been shrinking. Average annual runoff from spring snowmelt has decreased 10% in the last 100 years. Because snow in the Sierra acts as a reservoir, holding winter water for use later in the year, reduced snowpack creates greater potential for summer droughts and reduced hydroelectricity generation. (Office of Environmental Health and Hazard Assessment, April, 2009, Indicators of Climate Change in California, at p. 76.) Climate change is also thought to account for changes in the timing of California's major precipitation events. As explained in a report prepared for the California Climate Change Center:

> reservoirs were designed to store only a fraction of the state's entire yearly precipitation, under the assumption that the annual mountain snowpack would melt at roughly the same time every year. During anomalously high rain or snowmelt events, reservoirs must not only store water, but also discharge excess water to avoid flooding. Water must sometimes be discharged in anticipation of large events to reduce flood risk. The dual functions of storage and flood management require reservoir managers to carefully balance factors such as precipitation, snowmelt timing, reservoir storage capacity, and demand. Even if future precipitation remains

> unchanged, shifts in snowmelt timing can affect California's water supply during the warm season due to reservoir storage capacity constraints.

(Sarah Kapnick and Alex Hall, for the California Climate Change Center, *Observed Changes in the Sierra Nevada Snowpack: Potential Causes and Concerns*, March 2009, CEC-500-2009-016-D, at p. 1.)

Climate change is also expected to increase the number and intensity of forest fires. (Technical Support Document, at p. 91; *see also* Indicators of Climate Change (2009) at p. 131.) A generally warmer climate is associated with a longer summer season, which in turn dries vegetation and fuels making ignition easier and hastens wildfire spread. (*Ibid*; see also A. L. Westerling, for the California Climate Change Center*, Climate Change, Growth and California Wildfire*, March 2009, CEC-500-2009-046-D, at pp. 1-2.) Not only do wildfires release additional carbon and increase air pollutants, but they also cause indirect effects. For example, wildfires reduce vegetative cover leading to increased water runoff, which has affected watersheds and dampens the effectiveness of California's water works infrastructure. This will degrade California's water quality and challenge water treatment operations to provide safe drinking water. Adverse health impacts from heat-related illnesses are expected with hotter temperatures, and, due to poorer air quality, lung disease, asthma, and other respiratory and circulatory problems will be exacerbated. (California Climate Action Team, Executive Summary Report to Governor Schwarzenegger and the California Legislature (2006) at pp. xii to xiii, 27.); see also Technical Support Document, at pp. ES-4, 69-71.)

<u>Why is California Involved in Greenhouse Gas Regulation?</u>

California is vulnerable to the effects of global warming, and, despite its global nature, action to curb GHG emissions is needed on a statewide level. The legislative findings in Assembly Bill 32 (Chapter 448, Statutes 2006) ("AB32"), for example, state:

> … 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.
>
> … Global warming will have detrimental effects on some of California's largest industries, including agriculture, wine, tourism, skiing, recreational and commercial fishing, and forestry. It will also increase the strain on electricity supplies necessary to meet the demand for summer air-conditioning in the hottest parts of the state.

(Health & Safety Code, § 38501(a), (b).) The Legislature further declared: "action taken by California to reduce emissions of greenhouse gases will have far-reaching effects by encouraging other states, the federal government, and other countries to act." (*Id*. at subd. (d).) As the world's fifteenth largest emitter of GHGs from human activity and natural sources, California is uniquely positioned to act to reduce GHGs. (Scoping Plan, at pp. 11.)

Reducing greenhouse gas emissions is a necessary response to the threats posed by climate change. Efforts to reduce emissions may result in other significant benefits as well. Governor Schwarzenegger laid out the case for action to reduce greenhouse gas emissions in Executive Order S-3-05:

> … California-based companies and companies with significant activities in California have taken leadership roles by reducing greenhouse gas (GHG) emissions, including carbon dioxide, methane, nitrous oxide and hydrofluorocarbons, related to their operations and developing products that will reduce GHG emissions; …
>
> … [C]ompanies that have reduced GHG emissions by 25 percent to 70 percent have lowered operating costs and increased profits by billions of dollars; …
>
> … [T]echnologies that reduce greenhouse gas emissions are increasingly in demand in the worldwide marketplace, and California companies investing in these technologies are well-positioned to profit from this demand, thereby boosting California's economy, creating more jobs and providing increased tax revenue; …
>
> … [M]any of the technologies that reduce greenhouse gas emissions also generate operating cost savings to consumers who spend a portion of the savings across a variety of sectors of the economy; this increased spending creates jobs and an overall benefit to the statewide economy.

Thus, the Governor, Legislature and private sector have concluded that action to reduce greenhouse gas emissions is necessary and beneficial for the State.

<u>What is California Doing to Reduce its Greenhouse Gas Emissions?</u>

Action to curb greenhouse gas emissions is taking place on many fronts. As described above, the private sector has already taken important steps to increase efficiency and lower costs associated with such emissions. Many local governments have also adopted, or are currently developing, various plans and programs designed to reduce community-wide GHG emissions. (Office of Planning and Research, *The California Planner's Book of Lists* (January 2009) ("Book of Lists"), at pp. 92-100; see also Scoping Plan, at p. 26.) Due to its potential vulnerability to the effects of GHG

emissions, and the wide variety of GHG emissions sources within its borders, California has enacted several laws and programs designed to reduce the State's GHG emissions. Several major legislative initiatives are described below.

AB32 – The Global Warming Solutions Act

Assembly Bill 32 (Chapter 448, Statutes 2006) is a key piece of California's effort to reduce its GHG emissions. AB32 requires the California Air Resources Board ("ARB") to establish regulations designed to reduce California's GHG emissions to 1990 levels by 2020. (Health & Safety Code, § 38550.) On December 11, 2008, ARB adopted its Scoping Plan, setting forth a framework for future regulatory action on how California will achieve that goal through sector-by-sector regulation. (ARB, Resolution No. 08-47; see also Health & Safety Code, § 38561.) ARB must adopt, no later than January 1, 2012, rules and regulations to implement the GHG emissions reductions envisioned in the Scoping Plan. (Health & Safety Code, § 38562.)

The AB32 Scoping Plan outlines a set of actions designed to reduce overall GHG emissions in California to 1990 levels by 2020. The Scoping Plan presents GHG emission reduction strategies that combine regulatory approaches, voluntary measures, fees, policies, and programs. Reduction strategies are expected to evolve as technologies develop and progress toward the State's goal is monitored. Thus, the Scoping Plan sets forth the outline of California's strategy to reduce GHG emissions on a statewide basis.

SB375

As noted above, nearly 40 percent of California's GHG emissions come from the State's transportation sector. (Chapter 728, Statutes 2007, § 1(a).) Technology innovation and lower-carbon fuels alone will not reduce transportation-related emissions sufficiently for California to reach the reduction goals set out in AB32. (*Id*. at § 1(c).) Therefore, in SB375, California enacted several measures to reduce vehicular emissions through land-use planning.

Specifically, SB375 requires ARB to develop "greenhouse gas emission reduction targets for the automobile and light truck sector" for each metropolitan planning organization (MPO). (Gov. Code, § 65080(b)(2)(A).) Once that target is set, each MPO must develop a sustainable communities strategy (SCS), as part of its regional transportation plan, that will set forth a development pattern that will achieve the reduction target approved by the ARB. (*Id*. at subd. (b)(2)(B).) The MPO's transportation planning activities must be consistent with the adopted SCS. (*Id*. at subd. (b).) While an SCS does not supersede a local government's land use authority, SB375 created an exemption from CEQA for local transit-oriented residential projects that are consistent with the applicable SCS as an incentive. (*Id*. at subd. (b)(2)(J); Pub. Resources Code, § 21155.1.)

CEQA and SB97

While AB32 and SB375 target specific types of emissions from specific sectors, the California Environmental Quality Act ("CEQA") regulates nearly all governmental activities and approvals. CEQA generally requires that a lead agency analyze the potential adverse environmental impacts of their decisions, and, if those impacts are determined to be significant, to avoid those impacts through mitigation or project alternatives. As awareness of the causes and effects of GHG emissions has increased, those effects began to be addressed in environmental analyses on a project-level basis. Federal courts, moreover, have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Uncertainty developed, however, among public agencies regarding how GHG emissions should be analyzed in environmental documents prepared pursuant to CEQA.

To provide greater certainty to lead agencies, Governor Schwarzenegger signed Senate Bill 97 (Chapter 148, Statutes 2007). (Governor Schwarzenegger's Signing Message, SB 97.) That statute, among other things, constitutes the Legislature's recognition that GHG emissions and the effects of GHG emissions are appropriate subjects for CEQA analysis. Pursuant to SB97, OPR developed, and the Resources Agency will adopt, amendments to the State CEQA Guidelines to address analysis and mitigation of the potential effects of GHG emissions in CEQA documents and processes. As new information or criteria established by ARB in the AB 32 process becomes available, OPR and the Resources Agency will periodically update the CEQA Guidelines to account for that new information. This rulemaking package responds to the Legislature's directive in SB97.

Questions concerning the relationship between AB32, SB375 and CEQA were raised in public comments on the Proposed Amendments. The Resources Agency developed responses to those questions in the Responses to Comments, which are appended to this Final Statement of Reasons. Further discussion of the relationship between AB32, SB375 and CEQA is provided in the Thematic Responses at the end of this Final Statement of Reasons.

BACKGROUND ON THE DEVELOPMENT OF THE PROPOSED AMENDMENTS

OPR developed the Proposed Amendments pursuant to Public Resources Code section 21083.05, which states in part:

> On or before July 1, 2009, the Office of Planning and Research 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 this division, including, but not limited to, effects associated with transportation or energy consumption.

In developing the Proposed Amendments, OPR actively sought the input, advice, and assistance of numerous interested parties and stakeholder groups. (Letter from OPR Director, Cynthia Bryant, to Secretary for the Natural Resources Agency, Mike Chrisman, April 13, 2009.) Specifically, OPR met with representatives of numerous agencies and organizations to discuss the perspectives of the business community, the environmental community, local governments, non-governmental organizations, state agencies, public health officials, CEQA practitioners and legal experts. In addition, OPR took advantage of numerous regional and statewide conferences to raise awareness about CEQA and GHG emissions among diverse audiences and to seek their input. These activities satisfy the provisions of Government Code section 11346.45 which require early public involvement in complex proposals.

After publishing a preliminary draft, on January 8, 2009, OPR continued to conduct extensive public outreach, including two public workshops, to receive input on the Preliminary Amendments. Both public workshops were well attended, drawing over two hundred participants representing various California business interests, environmental organizations, local governments, attorneys and consultants. In addition to oral comments at its workshops, OPR received over eighty written comment letters.

Some comments suggested additional amendments to the CEQA Guidelines. Other comments sought clarification of the language in the preliminary amendments. OPR incorporated those suggestions and clarifications to the extent possible and appropriate into its April 13, 2009, submittal to the Resources Agency. Some suggestions were not appropriate for inclusion, however, due to conflict with existing statutory authority and/or case law. For example, some comments submitted to OPR during its public workshops indicated that the Guidelines should be addressed to "Climate Change" rather than just the effects of GHG emissions. The focus in the Guidelines on GHG emissions is appropriate for at least three reasons.

First, the Legislative authorization for the Proposed Amendments refers specifically to guidelines on the "mitigation of greenhouse gas emissions and the effects of greenhouse gas emissions." (Pub. Resources Code, § 21083.05.) Had the Legislature intended the Guidelines to address climate change or global warming specifically, it presumably would have so indicated. Second, the precise "effect" of GHG emissions from a project is a factual matter for the lead agency to determine. Such effects may include "climate change," "global warming" and other changes in the physical environment (increased ocean acidity or sea-level rise, for example). (EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886 (April 24, 2009), Technical Support Document, at pp. ES-2 to ES-3; see further discussion at pages 4-5, above.) Thus, rather than limit analysis to a particular effect, the proposed Guidelines on GHG emissions are consistent with the treatment of air pollutants in the existing Appendix G, which focus largely on the concentration of pollutants. (See, e.g., existing State CEQA Guidelines, Appendix G, III.d.) Third, the focus in a cumulative impacts analysis is "whether any additional effect caused by the proposed project should be considered significant given the existing cumulative effect." (*CBE*, *supra*, 103 Cal. App. 4th at 118.)

Thus, the Proposed Amendments appropriately focus on a project's potential incremental contribution of GHGs rather than on the potential effect itself (i.e., climate change). Notably, however, the Proposed Amendments expressly incorporate the fair argument standard. (See, e.g., proposed Section 15064.4(b)(3).) Thus, if there is any substantial evidence supporting a fair argument that a project's GHG emissions may result in any adverse impacts, including climate change, the lead agency must resolve that concern in an EIR.

THE NATURAL RESOURCES AGENCY'S RULEMAKING PROCESS

The Natural Resources Agency commenced the rulemaking process on the Amendments on July 3, 2009, by publishing its Notice of Proposed Action in the California Regulatory Notice Register. (2009 No. 27-Z.) In addition, the Notice of Proposed Action was mailed to over 640 interested parties, and notices were e-mailed to those parties that requested electronic notification. The Natural Resources Agency also posted the Notice, Proposed Text and Initial Statement of Reasons on its website, and invited public comments on the proposed amendments between July 3, 2009, and August 20, 2009. Public hearings were held on August 18, 2009, and August 20, 2009, in Los Angeles and Sacramento, respectively, at which verbal and written comments and presentations were accepted. To ensure that all interested parties were able to provide written comments if they so chose, the Natural Resources Agency extended the public comment period to August 27, 2009. The Natural Resources Agency received over 80 comment letters on the proposed amendments.

Following review of all public comments received during the public review period and at the public hearings, the Natural Resources Agency determined that further revisions to the proposed text were appropriate. It, therefore, mailed a Notice of Proposed Changes to all hearing attendees and all persons that requested notice. Electronic notices were e-mailed to those requesting such notification. The Notice of Proposed Changes, Revised Text of the proposed amendments, comment letters, and all prior rulemaking documents were posted on the Natural Resources Agency's website. Since all revisions to the proposed amendments were sufficiently related to the originally noticed text, public comment was invited between October 23, 2009, and November 10, 2009. The Natural Resources Agency received over 20 comment letters on the revisions to the proposed amendments.

Following the close of the second public comment period, the Natural Resources Agency reviewed and considered all written comments. The Secretary for Natural Resources determined that, other than two non-substantive, clarifying changes in sections 15126.2(a) and 15126.4(c), described below, no further revisions to the proposed amendments was necessary. Secretary Mike Chrisman adopted the amendments described in this Final Statement of Reasons in December 2009.

Throughout the rulemaking process, staff of the Natural Resources Agency met with all interested parties requesting in person meetings. It also attended and presented at various conferences hosted by, among others, the California Chapter of

the American Planning Association, the California State Bar's Environmental Law Conference, County Counsels Association of California, several county bar association meetings and local government forums to provide updates on the proposed amendments and to ensure widespread participation in the Natural Resources Agency's rulemaking process.

Copies of all relevant rulemaking documents, including hearing transcripts, notices, and agendas, are included in the record of proceedings.

ADOPTED AMENDMENTS

Analysis of GHG emissions in a CEQA document presents unique challenges to lead agencies. Such analysis must be consistent with existing CEQA principles, however. Therefore, the Amendments comprise relatively modest changes to various portions of the existing CEQA Guidelines. Modifications address those issues where analysis of GHG emissions may differ in some respects from more traditional CEQA analysis. Other modifications clarify existing law that may apply both to analysis of GHG emissions as well as more traditional CEQA analyses. The incremental approach in the Amendments is consistent with Public Resources Code section 21083(f), which directs OPR and the Resources Agency to regularly review the Guidelines and propose amendments as necessary.

The Legislature expressly left development of the Guidelines to the discretion of OPR and the Resources Agency. That discretion is governed by the Government Code, which requires that any administrative regulations be consistent, and not conflict, with existing statutory authority. (Gov. Code, § 11342.2.) Thus, the Resources Agency intends, as did OPR, the Amendments to incorporate existing law, and where necessary "to implement, interpret, make specific or otherwise carry out the provisions of the statute." (*Ibid*.) In addition, the Guidelines must be "reasonably necessary" to carry out a legislative directive. (*Ibid*.) Because the determination of "reasonable necessity" implicates an agency's expertise, courts will defer to an agency's findings of necessity unless the action is arbitrary, capricious or without reasonable basis. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109 ("*CBE*").)

The Amendments include changes to or additions of fourteen sections of the existing Guidelines, as well as changes to Appendices F (Energy Conservation) and G (Environmental Checklist Form). The Amendments are discussed below.

SECTION 15064. DETERMINING THE SIGNIFICANCE OF THE ENVIRONMENTAL EFFECTS CAUSED BY A PROJECT.

Specific Purposes of the Amendment

Amendments are proposed to two subdivisions of the existing section 15064. The first, to subdivision (f)(5), is a grammatical correction that qualifies as a "change without regulatory effect" pursuant to section 100(a)(4) of the Office of Administrative Law's regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).) The second set of amendments is to subdivision (h)(3). The latter amendments are described in detail below.

Cumulative Impacts

Existing subdivision (h)(3) allows an agency to find that a project's potential cumulative impacts are less than significant due to compliance with requirements in a plan or mitigation program. (*CBE, supra,* 103 Cal.App.4th at 111 ("a lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation").) In effect, that section creates a rebuttable presumption that compliance with certain plans and regulations reduces a project's potential incremental contribution to a cumulative effect to a level that is not cumulatively considerable.

The existing Guidelines text includes several criteria that define which plans or programs may create such a presumption. To satisfy those criteria, a plan or program must: (1) have been previously approved, (2) contain specific requirements that avoid or substantially lessen the cumulative problem within a defined geographic area, and (3) be either specified in law or approved by a public agency with jurisdiction over affected resources. These criteria ensure that the presumption applies only where plans or programs have undergone public scrutiny and include binding requirements to address a cumulative problem. The existing text lists three types of plans as examples that may be relied upon for a cumulative analysis. The word "e.g." in the existing text indicates, however, that the list is not exclusive. The Third District Court of Appeal upheld what is now section 15064(h)(3) in the *CBE* decision. (*CBE*, *supra*, 103 Cal.App.4th at 115-116.)

Use of Plans and Regulations in a Cumulative Impacts Analysis

The Proposed Amendments include two changes to subdivision (h)(3). First, the Amendments would add several plans and regulations to the list of examples. The Proposed Amendments would add "habitat conservation plan, natural community conservation plan, [and] plans or regulations for the reduction of greenhouse gas emissions" to the list of plans and programs that may be considered in a cumulative

impacts analysis. As explained below, the Resources Agency finds that the added plans and regulations satisfy the criteria in the existing text.

"Habitat conservation plans" are defined in the federal Endangered Species Act, and typically include specific requirements to protect listed species within a defined geographic area. (16 U.S.C. § 1539.) Though a habitat conservation plan ("HCP") may be prepared to address the impacts of one particular project, HCPs may also be, and often have been, prepared to address the impacts of cumulative development within a defined area. (Fish and Wildlife Service and National Marine Fisheries Service, Habitat Conservation Planning and Incidental Take Permit Processing Handbook (November 4, 1996), at pp. 1-6 to 1-7, 1-14 to 1-15.) Most HCPs, other than "low effect HCPs," will also likely need to undergo environmental review under the National Environmental Policy Act. (*Id*. at Ch. 5.) In such cases, an applicable HCP may appropriately be used in a cumulative impacts analysis as described in subdivision (h)(3).

"Natural community conservation plans" ("NCCPs") are defined in the California Natural Community Conservation Planning Act. (Fish & G. Code, §§ 2800 et seq.) The purpose of an NCCP is to conserve natural communities at the ecosystem scale while accommodating compatible land uses. An NCCP includes, among others, measures to avoid or minimize impacts to natural communities, conservation obligations, and compliance monitoring. An NCCP is adopted by the Department of Fish and Game as well as local agencies with land use authority in a defined area. As discretionary acts of public agencies, NCCPs must undergo environmental review pursuant to CEQA. Thus, NCCPs satisfy the criteria in existing subdivision (h)(3).

The Legislature recognized local GHG planning efforts in Health & Safety Code section 38561(c) by directing the California Air Resources Board (ARB) to consider such programs in developing its Scoping Plan. Greenhouse gas emission reduction plans are not currently specified in law. However, the ARB's Climate Change Scoping Plan includes a recommended reduction target for local governments and community-level emissions of 15 percent by 2020. (California Air Resources Board, *Climate Change Proposed Scoping Plan* (2008), at p. 27 ("Scoping Plan").) The Scoping Plan also recognized the important role local greenhouse gas reduction plans would play in achieving statewide reductions. The Scoping Plan itself suggests elements that such plans should include. (Scoping Plan, Appendix C, at p. C-49.)

Independent of the Scoping Plan, many local governments have adopted, or are currently developing, various plans and programs designed to curb GHG emissions. (Office of Planning and Research, *The California Planner's Book of Lists* (January 2009) ("Book of Lists"), at pp. 92-100; see also Scoping Plan, at p. 26.) Other public agencies, such as school districts and public universities, may also adopt greenhouse gas reduction plans to govern their own activities. Provided that such plans contain specific requirements with respect to resources that are within the agency's jurisdiction to avoid or substantially lessen the agency's contributions to GHG emissions, both from its own projects and from private projects it has approved or will approve, such plans may be appropriately relied on in a cumulative impacts analysis. Additional guidance regarding

the characteristics of greenhouse gas reduction plans that may be used in this context is provided in the proposed Section 15183.5, and is explained in greater detail below. Thus, greenhouse gas reduction plans satisfying such criteria would satisfy the criteria in existing subdivision (h)(3).

Finally, requirements addressing a cumulative problem may also take the form of regulations. AB 32, for example, requires ARB to adopt regulations that achieve the maximum technologically feasible and cost effective GHG reductions to reach the adopted state-wide emissions limit. (Health & Safety Code, § 38560.) Pursuant to Health and Safety Code section 38560(b), ARB will adopt a first set of regulations by January 1, 2010. Thus, a lead agency may consider whether ARB's GHG reduction regulations satisfy the criteria in existing subdivision (h)(3).

While section 15064(h)(3) creates a presumption that, where a plan, program or regulation governs a project's GHG emissions, and the project complies with those requirements, those emissions are not cumulatively considerable. That presumption is rebuttable, however. The Proposed Amendments do not alter the standard, reflected in the existing Guidelines, that if substantial evidence supports a fair argument that, despite compliance with the requirements in a plan or program, a project may have a significant effect on the environment, then an EIR must be prepared.

Demonstrating How the Plan, Program or Regulation Addresses Cumulative Impacts

In addition to augmenting the list of plans, programs and regulations that give rise to the presumption that a project's contribution is not cumulatively considerable, the Amendments also contain explanatory language designed to ensure that the plan or regulation relied on in a cumulative impacts analysis actually addresses the cumulative effect of concern for the particular project under consideration. This language is necessary to avoid misapplication of subdivision (h)(3). For example, shortly after ARB identified early action items, some lead agencies determined that a project's contribution of GHG emissions was not cumulatively considerable because the project was not inconsistent with the early action items. (See, e.g., Tentative Ruling, San Bernardino County Superior Court Case Nos. 810232, 800607 (ruling that consistency with CAT Strategies alone does not provide sufficient information about the potential impacts of a project); see also California Environmental Protection Agency, *Climate Action Team Report to Governor Schwarzenegger and the Legislature*, March 2006, at pp. 39-63.) Such an analysis, however, would fail to account for emissions that are not addressed by the early action items. Because those early action items largely addressed industrial-type emissions, consistency with the early action items would have little relevance for a residential subdivision project. Likewise, consistency with plans that are purely aspirational (i.e., those that include only unenforceable goals without mandatory reduction measures), and provide no assurance that emissions within the area governed by the plan will actually address the cumulative problem, may not achieve the level of protection necessary to give rise to this subdivision's presumption. Thus, by requiring that lead agencies draw a link between the project and the specific provisions of a binding plan or regulation, section 15064(h)(3) would ensure that

cumulative effects of the project are actually addressed by the plan or regulation in question.

Demonstrating that compliance with a plan addresses a cumulative problem is already impliedly required by CEQA. For example, an initial study must include sufficient information to support its conclusions. (State CEQA Guidelines, § 15063(d)(3).) Similarly, section 15128 requires a lead agency to explain briefly the reasons that an impact is determined to be less than significant and therefore was not analyzed in an EIR. The added sentence, therefore, reflects existing law and is necessary to ensure that plans are not misapplied in a CEQA analysis.

Policy Goals

Inclusion of additional plans and programs to the list of examples supports two policy goals. First, an expanded list promotes integration of various regulatory mechanisms to reduce duplication. (See, e.g., Pub. Resources Code, § 21003(a) (state policy is that "[l]ocal agencies integrate the requirements of [CEQA] with planning and environmental review procedures otherwise required by law or by local practice …"), (f) ("[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment").) Second, the addition of GHG emissions reduction plans and regulations for the reduction of GHG emissions reflects the view of both the OPR and the Resources Agency that the effects of GHG emissions resulting from individual projects are best addressed and mitigated at a programmatic level.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Guidelines must address the determination of whether the "possible effects of a project are individually limited but cumulatively considerable." (*Id*. at § 21083(b)(2).) Due to the global nature of GHG emissions and their potential effects, GHG emissions will typically be addressed in a cumulative impacts analysis. (See, e.g., EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18904 (April 24, 2009) ("cumulative emissions are responsible for the cumulative change in the stock of concentrations in the atmosphere"); California Air Pollution Control Officers Association, *CEQA and Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act* (January 2008) ("CAPCOA White Paper"), at p. 35 ("GHG impacts are exclusively cumulative impacts; there are no non-cumulative GHG emission impacts from a climate change perspective").) Existing section 15064(h) governs the analysis of cumulative effects in an initial study. The proposed amendments to section 15064(h)(3), on determining the significance of cumulative impacts in an initial study, are therefore necessary to carry out this legislative directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and that the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).)[2] Thus, the Amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

[2] Federal court decisions interpreting NEPA is persuasive authority in CEQA cases. (*Western Placer Citizens for an Ag. & Rur. Env. v. County of Placer* (2006) 144 Cal.App. 4th 890, 902.)

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15064.4. DETERMINING THE SIGNIFICANCE OF IMPACTS FROM GREENHOUSE GAS EMISSIONS

Specific Purposes of the Amendment

A key component of environmental analysis under CEQA is the determination of significance. (Pub. Resources Code § 21002; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106-07.) Guidelines on the analysis of GHG emissions must, therefore, include provisions on the determination of significance of those emissions.

New section 15064.4, on the determination of significance of GHG emissions, reflects the existing CEQA principle that there is no iron-clad definition of "significance." (State CEQA Guidelines, § 15064(b); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm*. (2001) 91 Cal.App.4th 1344, 1380-81 ("*Berkeley Jets*").) Accordingly, lead agencies must use their best efforts to investigate and disclose all that they reasonably can regarding a project's potential adverse impacts. (*Ibid*; *see also* State CEQA Guidelines, § 15144.) Section 15064.4 is designed to assist lead agencies in performing that required investigation. In particular, it provides that lead agencies should quantify GHG emissions where quantification is possible and will assist in the determination of significance, or perform a qualitative analysis, or both as appropriate in the context of the particular project, in order to determine the amount, types and sources of GHG emissions resulting from the project. Regardless of the type of analysis performed, the analysis must be based "to the extent possible on scientific and factual data." In addition, lead agencies should also consider several factors. The specific provisions of section 15064.4 are discussed below.

Quantitative Analysis

Subdivision (a) of section 15064.4 states that lead agencies should calculate or estimate the GHG emissions resulting from the proposed project. This directive reflects the holding in the *Berkeley Jets* case, which required a Port Commission to quantify emissions of toxic air contaminants even in the absence of a universally accepted methodology for doing so. (*Berkeley Jets*, *supra*, 91 Cal.App.4th at p. 1370 ("The fact that a single methodology does not currently exist that would provide the Port with a precise, or 'universally accepted,' quantification of the human health risk from TAC exposure does not excuse the preparation of any health risk assessment--it requires the Port to do the necessary work to educate itself about the different methodologies that are available") (emphasis in original).) That case also required quantitative analysis of single-event noise, even though the applicable thresholds were expressed as cumulative noise levels. (*Id*. at 1382.) Quantification was required in that context in order to identify existing noise levels, the number of additional flights, the frequency of those flights, the degree to which the increased flights would cause increased noise levels at a given location, and ultimately, the community's reaction to that noise. (*Ibid*.) In other words, quantification would assist the lead agency in determining whether the increased noise would be potentially significant. (*Ibid*. ("CEQA requires that the Port

and the inquiring public obtain the technical information needed to assess whether the ADP will merely inconvenience the Airport's nearby residents or damn them to a somnambulate-like existence"); see also *Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1109 ("in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect").)

With the foregoing principles in mind, the quantification called for in proposed section 15064.4(a)(1) is reasonably necessary to ensure an adequate analysis of GHG emissions using available data and tools, in accordance with Public Resources Code Section 21083.05. Even where a lead agency finds that no numeric threshold of significance applies to a proposed project, the holdings in the *Berkeley Jets* and *Protect the Historic Amador Waterways* cases, described above, require quantification of emissions if such quantification will assist in determining the significance of those emissions. OPR and the Resources Agency find that quantification will, in many cases, assist in the determination of significance, as explained below. (State CEQA Guidelines, § 15142 ("An EIR shall be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the consideration of qualitative as well as quantitative factors").)

First, quantification of GHG emissions is possible for a wide range of projects using currently available tools. Modeling capabilities have improved to allow quantification of emissions from various sources and at various geographic scales. (Office of Planning and Research, *CEQA and Climate Change: Addressing Climate Change Through the California Environmental Quality Act Review*, Attachment 2: Technical Resources/Modeling Tools to Estimate GHG Emissions (June 2008); CAPCOA White Paper, at pp. 59-78.) Moreover, one of the models that can be used in a GHG analysis, URBEMIS, is already widely used in CEQA air quality analyses. (CAPCOA White Paper, at p. 59.) Second, quantification informs the qualitative factors listed in proposed section 15064.4(b). Third, quantification indicates to the lead agency, and the public, whether emissions reductions are possible, and if so, from which sources. Thus, if quantification reveals that a substantial portion of a project's emissions result from energy use, a lead agency may consider whether design changes could reduce the project's energy demand.

Proposed section 15064.4(a)(1) also reflects existing case law that reserves for lead agencies the precise methodology to be used in a CEQA analysis. (*See*, *e.g.*, *Eureka Citizens for Responsible Gov't v. City of Eureka* (2007) 147 Cal.App.4th 357, 371-373.) As indicated above, a wide variety of models exist that could be used in a GHG analysis. (CAPCOA White Paper, at pp. 59-78.) Further, not every model will be appropriate for every project. For example, URBEMIS may be an appropriate tool to analyze a typical residential subdivision or commercial use project, but some public utilities projects, such as waste-water treatment plants, may require more specialized models to accurately estimate emissions. (*Id*. at pp. 60-65.) The requirement to

disclose any limitations in the model or methodology chosen also reflects the standard for adequacy of EIRs in existing State CEQA Guidelines section 15151.

Qualitative and Performance Standard Based Analysis

As explained in greater detail below in the Thematic Responses, CEQA does not require quantification of emissions in every instance. If the lead agency determines that quantification is not possible, would not yield information that would assist in analyzing the project's impacts and determining the significance of the GHG emissions, or is not appropriate in the context of the particular project, section 15064.4(a) would allow the lead agency to consider qualitative factors or performance standards. Consideration of qualitative factors is appropriate for several reasons. First, CEQA directs lead agencies to consider qualitative factors. (Pub. Resources Code, § 21001(g) (CEQA's purpose includes to: "require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment").) Second, existing section 15064.7 of the State CEQA Guidelines indicate that thresholds of significance may be qualitative, which implies that a determination of significance without a threshold could also evaluate qualitative factors. Third, the existing CEQA Guidelines state that the determination of significance requires a lead agency to use its judgment based on *all* relevant information. (State CEQA Guidelines, § 15064(b); see also *id*. at §§ 15064.7 (thresholds may be qualitative), 15142 (analysis should be interdisciplinary and both qualitative and quantitative).)

Subdivision (a) would also allow a lead agency to rely on performance-based standards to assist in the determination of significance. Just as with quantification, the purpose of engaging in a qualitative or performance standard based analysis is to develop information relevant to a significance determination. Several examples exist of the types of performance standards that might appropriately be used in determining the significance of greenhouse gas emissions. Proposed section 15183.5(b)(1)(D), for example, contemplates that a plan for the reduction of greenhouse gas emissions may contain performance based standards. Where such standards are developed as part of such a plan, a lead agency would have evidence indicating that compliance with such standards would indicate that the impact of greenhouse gas emissions would be less than significant. Further, in adopting SB375, the Legislature acknowledged that regional transportation plans, and the environmental impact reports prepared to analyze those plans, may contain performance standards that would apply to transit priority projects. (See, e.g., Public Resources Code, § 21155.2.) Other potential examples include the Bay Area Air Quality Management District's proposed Best Management Practices for Construction Greenhouse Gas Emissions (calling for use of alternative fuels, local building materials and recycling), and the California Public Utilities Commission's Performance Standard for Power Plans (requiring emissions no greater than a combined cycle gas turbine plant). Compliance with such standards may be relevant to the significance determination, when considered in conjunction with the

project's total projected emissions. Section 15064.4(a) was revised in response to comments to clarify that lead agencies may rely on quantitative or qualitative analyses, or both, in part to emphasize that qualitative analyses and performance standards may be useful supplements to a quantitative analysis.

Similar to use of a significance threshold, a lead agency must exercise care to ensure that performance standards do not replace a full analysis of all potential emissions. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1109 ("in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect").) For example, while a Platinum LEED® rating could assist a lead agency in determining whether emissions related to a building's energy use may be significant, that performance standard may not reveal sufficient information to evaluate transportation-related emissions associated with that proposed project.

As indicated above, even a qualitative analysis must be based to the extent possible on scientific and factual data. Further, the type of analysis that is required will depend on the context of a particular project. Given the multitude of different project types and sizes, and different agencies subject to CEQA, the CEQA Guidelines, which are general by necessity, cannot specify precisely when a quantitative analysis may be required or a qualitative analysis may be appropriate. The following hypothetical examples may illustrate, however, how section 15064.4(a) could operate:

> **Project 1**: a small habitat restoration project is proposed in a remote part of California. Workers would drive to the site where they would camp for the duration of the project. Some gas-powered tools and machinery may be required. Cleared brush would either be burned or would decay naturally.
>
> **Project 2**: a large commercial development is proposed in an suburban context. Heavy-duty machinery would be required in various construction phases spanning many months. Following construction, the development would rely on electricity, water and wastewater services from the local utilities. Natural gas burners would be used on site. The development would employ several hundred workers and attract thousands of customers daily. A traffic study has been prepared for the project. The local air quality management district's guidance document recommends that projects of similar size and character should use of URBEMIS, or another similar model, to estimate the air quality impacts of the development.

In the context of Project 2 a quantitative analysis would likely be appropriate. The URBEMIS model, which would likely be used to analyze other emissions, could also be used to estimate emissions from both project-related transportation and on-site indirect emissions (landscaping, hot-water heaters, etc.) Modeling is typically done for projects of like size and character. Other models are readily available to estimate emissions associated with utility use. In the context of Project 2, a lead agency may

find it difficult to demonstrate a good faith effort through a purely qualitative analysis. (See, e.g., *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm*. (2001) 91 Cal.App.4th 1344, 1370.)

In the context of Project 1, however, a qualitative analysis would likely be appropriate. Project 1's emissions are not easily modeled, and the Project is small in scale. While it may be technically possible, quantification of the emissions may not reveal any additional information that indicates the significance of those emissions or how they may be reduced that could not be provided in a qualitative assessment of emissions sources. (See, e.g., Public Resources Code, § 21003(f) ("public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment").)

Factors Potentially Indicating Significance

The qualitative factors listed in the proposed section 15064.4(b) are intended to assist lead agencies in collecting and considering information relevant to a project's incremental contribution of GHG emissions and the overall context of such emissions. Notably, while subdivision (b) provides a list of factors that should be considered by public agencies in determining the significance of a project's GHG emissions, other factors can and should be considered as appropriate.

Determine Whether Emissions Will Increase or Decrease

The first factor in subdivision (b), for example, asks lead agencies to consider whether the project will result in an increase or decrease in different types of GHG emissions relative to the existing environmental setting. All project components, including construction and operation, equipment and energy use, and development phases must be considered in this analysis. (State CEQA Guidelines, § 15378 (project includes "the whole of the action").) For example, a mass transit project may involve GHG emissions during its construction phase, but substantial evidence may also indicate that it will cause existing commuters to switch from single-occupant vehicles to mass transit use. Operation of such a project may ultimately result in a decrease in GHG emissions. Such analysis, provided that it is supported with substantial evidence and fully accounts for all project emissions, may support a lead agency's determination that GHG emissions associated with a project are not cumulatively considerable.

This section's reference to the "existing environmental setting" reflects existing law requiring that impacts be compared to the environment as it currently exists. (State CEQA Guidelines, § 15125.) This clarification is necessary to avoid a comparison of the project against a "business as usual" scenario as defined by ARB in the Scoping Plan. Such an approach would confuse "business as usual" projections used in ARB's Scoping Plan with CEQA's separate requirement of analyzing project effects in

comparison to the environmental baseline. (*Compare* Scoping Plan, at p. 9 ("The foundation of the Proposed Scoping Plan's strategy is a set of measures that will cut greenhouse gas emissions by nearly 30 percent by the year 2020 as compared to business as usual") *with Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278 (existing environmental conditions normally constitute the baseline for environmental analysis); see also *Center for Bio. Diversity v. City of Desert Hot Springs*, Riverside Sup. Ct. Case No. RIC464585 (August 6, 2008) (rejecting argument that a large subdivision project would have a "beneficial impact on CO2 emissions" because the homes would be more energy efficient and located near relatively uncongested freeways).) Business as usual may be relevant, however, in the discussion of the "no project alternative" in an EIR. (State CEQA Guidelines, § 15126.6(e)(2) (no project alternative should describe what would reasonably be expected to occur in the future in the absence of the project).)

Notably, section 15064.4(b)(1) is not intended to imply a zero net emissions threshold of significance. As case law makes clear, there is no "one molecule rule" in CEQA. (CBE, *supra*, 103 Cal.App.4th at 120.)

Thresholds of Significance

The second factor in subdivision (b) asks whether a project exceeds a threshold of significance for GHG emissions. Section 21000(d) of the Public Resources Code expressly directs public agencies to identify whether there are any critical thresholds for health and safety to identify those areas where the capacity of the environment is limited. A threshold is an "identifiable quantitative, qualitative or performance level" at which impacts are normally less than significant. (State CEQA Guidelines, § 15064.7(a); *see also Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1107.) Lead agencies may rely on thresholds developed by other agencies that have particular expertise in the subject matter under consideration. (*See*, *e.g.*, State CEQA Guidelines, Appendix G, Sample Question III ("[w]here available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make" a significance determination).) For example, a lead agency may look to standards included in a Basin Plan to assist in the determination of whether water quality impacts are significant. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1107 ("[s]uch thresholds can be drawn from existing environmental standards, such as other statutes or regulations").)

Several agencies have developed, or are in the process of developing, thresholds of significance for GHG emissions.[3] For example, thresholds are currently being developed, or have already been adopted by the Bay Area Air Quality Management District for operations and construction,[4] the City of Davis for residential

[3] Reference to these thresholds and proposed thresholds does not reflect an endorsement of those thresholds; rather, they are cited solely for the purpose of demonstrating that agencies are developing such thresholds.

[4] BAAQMD CEQA Guidelines Update: work in progress - http://www.baaqmd.gov/pln/ ceqa/index.htm.

developments,[5] and the South Coast Air Quality Management District for industrial projects.[6] Regardless of the threshold chosen, however, this section does not alter the pre-existing rule under CEQA that if substantial evidence supports a fair argument that a project may result in significant impacts, despite compliance with a threshold, an EIR must be prepared. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.) Further, "in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect." (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1109.)

Consistent with the above, if relying on a threshold developed by another agency, lead agencies must exercise caution in selecting a threshold to ensure that the threshold is appropriately applied. For CEQA purposes, a threshold identifies a level below which an environmental impact will normally be less than significant. (State CEQA Guidelines, § 15064.7(a).) Some agencies have adopted "thresholds" pursuant to other laws that may not be applicable in the CEQA context. ARB has adopted several thresholds pursuant to AB32, for example, to address specific purposes that are unrelated to CEQA. For example, the *de minimis* threshold governs the level at which emissions will be regulated by ARB's AB32 regulations. (Health & Safety Code, § 38561(e); Scoping Plan, at pp. 96-97.) CEQA does not permit use of a *de minimis* threshold, however. (*CBE*, *supra*, 103 Cal.App.4th at p. 121.) Additionally, the Reporting Threshold is the level at which emissions from large industrial sources are required to be reported. (Scoping Plan, at pp. 108-109; *see also* CARB Board Resolution 07-54 (2007).) Again, this reporting threshold reflects a policy decision regarding regulation by the ARB, but does not address the level at which environmental harm may occur, and does not satisfy a lead agency's duties under CEQA related to review of projects which may result in significant adverse environmental impacts.

Consistency with a Plan or Regulation

Finally, the third factor in subdivision (b) directs consideration of the extent to which a project complies with a plan or regulation to reduce GHG emissions. That section further states, however, that to be used for the purpose of determining significance, a plan must contain specific requirements that result in reductions of GHG emissions to a less than significant level. This clarification is necessary because of the wide variety of climate action plans and GHG reduction plans that are currently being adopted by public agencies. ARB, for example, recently adopted its statewide Scoping Plan. That plan may not be appropriate for use in determining the significance of individual projects, however, because it is conceptual at this stage and relies on the future development of regulations to implement the strategies identified in the Scoping

[5] City of Davis (2009) Greenhouse Gas Emission Threshold and Standards for New Residential Development; Accessed 5/27/09, http://cityofdavis.org/pgs/sustainability/pdfs/15_4.21.09_GHG%20Standards.pdf

[6] SCAQMD (2008) Interim CEQA GHG Significance Threshold for Stationary Sources, Rules and Plans, Accessed 5/27/09 http://www.aqmd.gov/hb/2008/December/081231a.htm.

Plan. (Scoping Plan, at p. 9.) Regulations that will require actual reductions of GHG emissions may not be adopted until 2012. (*Ibid*.) Once those regulations are adopted and being implemented, they may, if appropriate, be used to assist in the determination of significance, similar to the current use of air quality, water quality and other similar environmental regulations. (*CBE*, *supra*, 103 Cal. App. 4th at 111 ("a lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation").)

In addition to the regulations that will be developed to implement the Scoping Plan, this factor would also allow lead agencies to consider plans that are developed to reduce GHG emissions on a regional or local level. (Scoping Plan, at p. 26.) The proposed section 15064.4(b)(3) is intended to be read in conjunction with the section 15064(h)(3), as proposed to be amended, and proposed section 15183.5. Those sections each indicate that local and regional plans may be developed to reduce GHG emissions. If such plans reduce community-wide emissions to a level that is less than significant, a later project that complies with the requirements in such a plan may be found to have a less than significant impact.

Notably, CEQA does not provide a specific definition of "comply" in the context of determining a project's consistency with a particular plan. Some guidance may be gleaned, however, from case law interpreting the requirement that a local government's activities be consistent with its General Plan. In that context, a "zoning ordinance [for example] is consistent with the city's general plan where, considering all of its aspects, the ordinance furthers the objectives and policies of the general plan and does not obstruct their attainment." (*City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal. App. 4th 868, 879.) Reading section 15064.4 together with 15064(h)(3), however, to demonstrate consistency with an existing GHG reduction plan, a lead agency would have to show that the plan actually addresses the emissions that would result from the project. Thus, for example, a subdivision project could not demonstrate "consistency" with the ARB's Early Action Measures because those measures do not address emissions resulting from a typical housing subdivision. (ARB, Expanded List of Early Action Measures to Reduce Greenhouse Gas Emissions in California Recommended for Board Consideration, October 2007; see also State CEQA Guidelines, §§ 15063(d)(3) (initial study must be supported with information to support conclusions), 15128 (determination in an EIR that an impact is less than significant must be briefly explained).)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) A key component of environmental analysis under CEQA is the determination of significance. (*Id*. at § 21002; *Protect the Historic Amador Waterways, supra,* 116 Cal.App.4th at

1106-07.) The new section 15064.4, on determining the significance of impacts of GHG emissions, is therefore necessary to carry out this legislative directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the Amendments were proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).)[7] Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

[7] Federal court decisions interpreting NEPA is persuasive authority in CEQA cases. (*Western Placer Citizens for an Ag. & Rur. Env. v. County of Placer* (2006) 144 Cal.App. 4th 890, 902.)

SECTION 15064.7. THRESHOLDS OF SIGNIFICANCE

Specific Purposes of the Amendment

Proposed subdivision (c) of section 15064.7 would allow a lead agency to adopt a threshold developed by another agency, or recommended by experts, provided that such threshold is supported with substantial evidence. This proposed regulation is reasonably necessary because many lead agencies perform general governmental functions, and may lack the specific expertise necessary to develop their own thresholds of significance for GHG emissions. Such agencies may rely on thresholds developed by other agencies with specialized expertise (such as an air quality management district) in conducting their CEQA analyses. (OPR, Thresholds of Significance: Criteria for Defining Environmental Significance, September 1994, at p. 7.) In fact, Appendix G of the State CEQA Guidelines expressly encourages lead agencies to rely on thresholds established by local air quality management districts. (State CEQA Guidelines, Appendix G, Question III.)

Several local and regional air districts are in the process of developing thresholds for GHG emissions. As noted above, for example, thresholds are currently being developed, or have already been adopted by the Bay Area Air Quality Management District for operations and construction, the City of Davis for residential developments, and the South Coast Air Quality Management District for industrial projects. Lead agencies within the jurisdiction of an air district, or other agency, that adopts a GHG emissions threshold may adopt such a threshold as its own. In adopting any threshold of significance, including one developed by an expert or agency with specialized expertise, the lead agency must support the threshold with substantial evidence in the administrative record. (State CEQA Guidelines, § 15064.7(b).)

Independent experts may also develop such thresholds for use by public agencies. For example, the California Air Pollution Control Officers Association has published a White Paper on developing thresholds of significance for GHG emissions. (CAPCOA White Paper, at pp. 31-58.) A lead agency could potentially use CAPCOA's suggestions in developing its own thresholds. Because any threshold must be supported with substantial evidence, and must be adopted through a public process, any threshold recommended by an expert that is ultimately adopted will undergo sufficient scrutiny to ensure its legitimacy. (State CEQA Guidelines, § 15064.7(b).)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) Defining "significance" is a critical step in the lead agency's impact analysis and therefore needs to be addressed as part of the Proposed Action. Section 21000(d) of the Public Resources Code encourages the development of thresholds. These sections together

require OPR and the Resources Agency to develop and adopt regulations governing the adoption of thresholds of significance for GHG emissions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for determining the significance of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15065. MANDATORY FINDINGS OF SIGNIFICANCE

Specific Purposes of the Amendment

The amendment to section 15065(b)(1) would change the word "preliminary" to "public." The purpose of this amendment is to make section 15065 consistent with section 21064.5 of the Public Resources Code. The latter provision defines a mitigated negative declaration to be a negative declaration where mitigation measures are added to a project "before the proposed negative declaration and initial study are released for *public* review[.]" (State CEQA Guidelines, § 15070(b)(1).) In contrast, existing CEQA Guidelines section 15065(b)(1), dealing with mandatory findings of significance, would require a commitment to mitigation prior to "preliminary" review. "Preliminary Review," as that term is used in section 15060, refers to a period following receipt of an application during which a lead agency determines whether an exemption applies to the project or whether an EIR would clearly be prepared. Read literally, existing section 15065 would require a commitment to mitigation before an initial study is even conducted. Because the statutory definition of mitigated negative declaration contemplates that mitigation measures may be developed during the preparation of the initial study prior to public review, the change in 15065 from "preliminary" to "public" is appropriate.

Necessity

Section 21083 of the Public Resources Code directs OPR to develop, and the Resources Agency to adopt, guidelines on the implementation of CEQA. The Amendment is necessary to ensure that those guidelines are consistent with relevant statutory definitions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendmentswould make the existing Guidelines easier to follow as a result of greater internal consistency. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific existing statutory CEQA provisions and/or case law interpreting CEQA. Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, by providing greater consistency within the Guidelines, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15086. CONSULTATION CONCERNING DRAFT EIR

The revision to this section is a non-substantive correction to this section's reference to the California Air Resources Board. This revision, therefore, qualifies as a "change without regulatory effect" pursuant to section 100(a)(4) of the Office of Administrative Law's regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).)

SECTION 15093. STATEMENT OF OVERRIDING CONSIDERATIONS

Specific Purposes of the Amendment

Section 21081(b) of the Public Resources Code provides that a lead agency may approve or carry out a project with significant and unavoidable impacts only after the lead agency makes a finding that "specific overriding economic, legal, social, technical or other benefits of the project outweigh the significant effects on the environment." The State CEQA Guidelines describes the factors that a lead agency must weigh in determining whether to approve a project with adverse environmental effects:

> CEQA recognizes that in determining whether and how a project should be approved, a public agency has an obligation to balance a variety of public objectives, including economic, environmental, and social factors and in particular the goal of providing a decent home and satisfying living environment for every Californian. An agency shall prepare a statement of overriding considerations as described in Section 15093 to reflect the ultimate balancing of competing public objectives when the agency decides to approve a project that will cause one or more significant effects on the environment.

(State CEQA Guidelines, § 15021(d).) The California Supreme Court has further observed that "an agency's decision that the specific benefits a project offers outweigh any environmental effects that cannot feasibly be mitigated … lies at the core of the lead agency's discretionary responsibility under CEQA…." (*City of Marina v. Board of Trustees of Cal. State Univ* (2006) 39 Cal.4th 341, 368.)

In the context of GHG emissions, some projects may cause adverse environmental impacts but still provide an overall benefit of reducing GHG emissions on a statewide or regional level. For example, a city may make a policy choice to allow increased housing density within a jobs-rich region in order to reduce region-wide GHG emissions from vehicles and transportation. (See, e.g., 2007 IEPR, at p. 210.) Though the introduction of new housing within the jurisdiction may result in near-term or local adverse impacts related to GHG emissions, doing so may assist the region as a whole in meeting region-wide reduction targets. Thus, subdivision (a) of section 15093 was revised to expressly allow a lead agency to consider this type of environmental benefit of a project in making a statement of overriding considerations.

The revision to section 15093(a) accomplishes two objectives. First, it reminds lead agencies and the public that even a project that appears environmentally beneficial may itself cause adverse environmental impacts, and such impacts must undergo full CEQA review, and, if applicable, a statement of overriding considerations. Second, it discourages purely local interests from dominating consideration of a project by expressly allowing a lead agency to consider region- and statewide benefits of a project. Further, "economic, legal, social, technical and other benefits" could be interpreted to refer to local benefits. This addition would ensure that lead agencies may consider

regional and statewide benefits in considering a project's adverse impacts. Finally, the proposed addition makes clear, consistent with section 15021(d) of the existing State CEQA Guidelines, that the lead agency may consider environmental benefits to balance a project's significant adverse environmental effects that remain even after the adoption of all available feasible mitigation measures.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) If a lead agency determines that a project's GHG emissions will result in significant and unavoidable impacts, a lead agency may only approve the project if it makes specified findings. (*Id*. at § 21081(b).) This amendment is necessary to ensure that a lead agency considers state-wide and regional benefits of a project in addition to purely local benefits. Because consideration of state-wide and region-wide benefits may also apply to impacts unrelated to GHG emissions, the amendment was worded broadly to address any significant environmental impact.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and/or make specific statutory CEQA provisions and case law interpreting CEQA for making statements of overriding considerations. Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California.

SECTION 15125. ENVIRONMENTAL SETTING

Specific Purposes of the Amendment

Section 15125 reflects existing law requiring examination of project impacts in relation to the existing environment. Subsection (d) states that lead agencies should consider whether the proposed project is inconsistent with applicable local and regional plans. That subsection provides a non-exclusive list of plans for potential consideration. The Amendments would add specific plans, regional blueprint plans and greenhouse gas reduction plans to subdivision (d). The added plans are necessary to ensure that GHG emissions analyses in such plans are addressed.

Specific Plans

Specific Plans address a defined geographic area within the area covered by a General Plan. (Gov. Code, § 65450 ("After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan").) Specific Plans must contain "[s]tandards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable." (*Id*. at § 65451(a)(3).) Thus, given that so many local governments are addressing GHG emissions in their policy documents, and that Specific Plans must contain standards and criteria, it is likely that Specific Plans may address GHG emissions, and consistency with adopted Specific Plans should be considered in EIRs.

Regional Blueprint Plans

Regional Blueprint Plans are being developed in many of California's Metropolitan Planning Organizations through grants provided by the California Department of Transportation. While originally designed to address transportation efficiencies, Regional Blueprint Plans typically involve smart growth planning with an aim to reducing vehicle miles traveled at a regional level. As a result, Regional Blueprint Plans can provide information regarding the region's existing transportation setting and identify methods to reduce region-wide transportation-related impacts. (Scoping Plan, Appendix C, at pp. C-74-C-84.) Land use decisions impact many sectors responsible for GHG emissions, including transportation, electricity, water, waste, and others. However, the primary impact of land use development on GHG emissions relates to vehicle use. (Land Use Subcommittee of the Climate Action Team, *LUSCAT Submission to CARB Scoping Plan on Local Government, Land Use, and Transportation* (2008), at p. 13.) Blueprint Plans highlight this relationship between land use and transportation and how this relationship may impact a local community's and region's GHG emissions. Analysis of GHG reduction is not required by Blueprint grants but it is recommended. Therefore, Blueprint Plans provide an indication of the GHG emissions potentially created or reduced by the plan. (LUSCAT (2009), at p. 30.) Given the large percentage of GHG emissions that result from transportation in

California, a project's consistency with a Regional Blueprint Plan can provide information indicating whether the project could have significant environmental impacts related to GHG emissions. (*Ibid*.) Regional Blueprint Plans may, therefore, provide evidence to assist the lead agency in determining whether a project may tend to increase or decrease GHG emissions relative to the existing baseline. Thus, where such a plan has been developed and adopted by an MPO, lead agencies may find it useful to evaluate the project's consistency with that Blueprint Plan.

Plans for the Reduction of Greenhouse Gas Emissions

The Amendments would add plans for the reduction of greenhouse gas emissions to the list of plans in section 15125(d). Many local and regional plans now include policies relating to, and analyses of, GHG emissions. (OPR, Book of Lists, at pp. 92-100; Scoping Plan, at p. 26.) Many such plans include detailed information on the jurisdiction's inventory of GHG emissions and measures to reduce such emissions. (*Ibid*.) Such plans may also include prescriptions for specific mitigation measures to address GHG emissions. (Scoping Plan, Appendix C, at p. C-49.) Where such a plan has been developed and adopted within the relevant jurisdiction, a project's inconsistency with that plan could be an indication of potential adverse environmental impacts.

Notably, while section 15125(d) requires an EIR to discuss any inconsistencies of a project with the listed plans, it does not mandate a finding of significance resulting from any identified inconsistencies. The plans simply provide information regarding the project's existing setting and inconsistency may be an indication of potentially significant impacts. The determination of significance is to be made by the lead agency.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines addressing the mitigation of GHG emissions and the effects of the GHG emissions. (Pub. Resources Code, § 21083.05.) As indicated above, one potential indicator of a project's potential GHG emissions impacts is whether the project is consistent with applicable plans that have addressed that impact. Thus, the addition of plans that may address GHG emissions to the list of plans in the existing section 15125 is reasonably necessary to ensure that such analysis occurs.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to

implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analyzing the effects of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental information where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15126.2. CONSIDERATION AND DISCUSSION OF SIGNIFICANT ENVIRONMENTAL EFFECTS.

Amendments are proposed to two subdivisions of the existing section 15126.2. The first, to subdivision (c), adds a cross-reference to the Public Resources Code and another section of the State CEQA Guidelines. This revision, therefore, qualifies as a "change without regulatory effect" pursuant to section 100(a)(4) of the Office of Administrative Law's regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).) The second change, made in response to public comments, adds a sentence to the end of existing subdivision (a). That change is described in greater detail below.

Specific Purposes of the Amendment

Several comments submitted as part of the Natural Resources Agency's SB97 rulemaking process urged it to develop guidance addressing the analysis of the impacts of climate change on a project. These comments similarly suggested that such guidance was appropriate in light of the release of the draft California Climate Adaptation Strategy (Adaptation Strategy), developed pursuant to Executive Order S-13-2008. In considering such comments, it is important to understand several key differences between the Adaptation Strategy and the California Environmental Quality Act. First, the Adaptation Strategy is a policy statement that contains recommendations; it is not a binding regulatory document. Second, the Adaptation Strategy focuses on how the State can plan for the effects of climate change. CEQA's focus, on the other hand, is the analysis of a particular project's greenhouse gas emissions on the environment, and mitigation of those emissions if impacts from those emissions are significant. Given these differences, CEQA should not be viewed as the tool to implement the Adaptation Strategy; rather, as indicated in the Strategy's key recommendations, advanced programmatic planning is the primary method to implement the Adaptation Strategies.

There is some overlap between CEQA and the Adaptation Strategy, however. As explained in both the Initial Statement of Reasons and in the Adaptation Strategy, section 15126.2 may require the analysis of the effects of a changing climate under certain circumstances. (Initial Statement of Reasons, at pp. 68-69.) In particular, Section 15126.2 already requires an analysis of placing a project in a potentially hazardous location. Further, several questions in the Appendix G checklist already ask about wildfire and flooding risks. Many comments on the proposed amendments asked for additional guidance, however.

Having reviewed all of the comments addressing the effects of climate change, the Natural Resources Agency revised the proposed amendments to include a new sentence in Section 15126.2 clarifying the type of analysis that would be required. Existing section 15126.2(a) provides an example of a potential hazard requiring analysis: placing a subdivision on a fault line. The new sentence adds further examples, as follows:

> Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

According to the Office of Planning and Research, at least sixty lead agencies already require this type of analysis. (California Governor's Office of Planning and Research, State Clearinghouse, The California Planners' Book of Lists (January, 2009), at p. 109.) This addition is reasonably necessary to guide lead agencies as to the scope of analysis of a changing climate that is appropriate under CEQA.

As revised, section 15126.2 would provide that a lead agency should analyze the effects of bringing development to an area that is susceptible to hazards such as flooding and wildfire, both as such hazards currently exist or may occur in the future. Several limitations apply to the analysis of future hazards, however. For example, such an analysis may not be relevant if the potential hazard would likely occur sometime after the projected life of the project (i.e., if sea-level projections only project changes 50 years in the future, a five-year project may not be affected by such changes). Additionally, the degree of analysis should correspond to the probability of the potential hazard. (State CEQA Guidelines, § 15143 ("significant effects should be discussed with emphasis in proportion to their severity and probability of occurrence").) Thus, for example, where there is a great degree of certainty that sea-levels may rise between 3 and 6 feet at a specific location within 30 years, and the project would involve placing a wastewater treatment plant with a 50 year life at 2 feet above current sea level, the potential effects that may result from inundation of that plant should be addressed. On the other extreme, while there may be consensus that temperatures may rise, but the magnitude of the increase is not known with any degree of certainty, effects associated with temperature rise would not need to be examined. (State CEQA Guidelines, § 15145 ("If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate the discussion of the impact").) Lead agencies are not required to generate their own original research on potential future changes; however, where specific information is currently available, the analysis should address that information. (State CEQA Guidelines, § 15144 (environmental analysis "necessarily involves some degree of forecasting. While seeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can").)

The decision in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, does not preclude this analysis. In that case, the First District Court of Appeal held that a county was not required to prepare an EIR due solely to pre-existing soil contamination that the project would not change in any way. (Id. at 1468.) No evidence supported the petitioner's claim that the project would "expose or exacerbate" the pre-existing contamination, which was located several hundred to several thousand feet from the project site. (Id. at n. 1.) Moreover, the project would have no other significant effects on the environment, and other statutes exist to protect residents from contaminated soils. Thus, the question confronting that court was whether pre-existing contamination near the project was, by itself, enough to require preparation of an EIR. It held that, in those circumstances, an EIR was not required. That court also acknowledged, however, that where there is a potential for ultimately changing the environment, an EIR could be required. (Id. at p. 1469.) Thus, unlike the circumstances in the *Baird* case, the analysis required in section 15126.2(a) would occur if an EIR was otherwise required. Similarly, the addition to that section contemplates hazards which the presence of a project could exacerbate (i.e., potential upset of hazardous materials in a flood, increased need for firefighting services, etc.).

This revision was described in the Natural Resources Agency's Notice of Proposed Changes and the public was invited to present comments on that change. The Natural Resources Agency determined that the change was sufficiently related to the original proposal described in the Notice of Proposed Action, so a fifteen day comment period was appropriate. It is sufficiently related because the Notice of Proposed Action explained that the rulemaking activity was intended to address the directive in SB97 to provide guidelines on the analysis of the "effects of greenhouse gas emissions." As explained in the Initial Statement of Reasons, the Natural Resources Agency initially chose not to provide specific guidance on the analysis of the effects of placing development in an area subject to the effects of climate change because the Agency interpreted existing section 15126.2(a) to already require that analysis under certain circumstances. As indicated above, however, many comments on the proposed amendments suggested revisions to section 15126.2(a) to provide additional guidance. The areas susceptible to hazards include those that may result from a changing climate. Thus, the change is sufficiently related that a reasonable person would be put on notice that such a change could occur as a result of the rulemaking activity described in the Notice of Proposed Action.

Finally, following review of comments on this revision, the Natural Resources Agency clarified that this analysis applies only to "potentially significant" effects of locating developing in areas susceptible to hazards. Because this revision clarifies the last sentence in section 15126.2(a), consistent with the Public Resources Code, and does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally proposed text, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines addressing the analysis of the effects of GHG emissions. (Pub. Resources Code, § 21083.05.) As explained above, the effects of GHG emissions include flooding, sea-level rise and wildfires. Thus, the addition of a clarifying sentence to existing section 15126.2(a), requiring analysis of the effects of placing developing in hazardous locations, is reasonably necessary to ensure that such analysis occurs with respect to areas subject to potential hazards resulting from climate change.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analyzing the effects of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to

investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the analysis that may be required of the potential effects of climate change on a project, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15126.4. CONSIDERATION AND DISCUSSION OF MITIGATION MEASURES PROPOSED TO MINIMIZE SIGNIFICANT EFFECTS.

Specific Purposes of the Amendment

Section 21083.05 of the Public Resources Code expressly requires OPR and the Resources Agency to develop regulations on the "mitigation of greenhouse gas emissions." The goals of this legislative mandate are to (1) reduce GHG emissions and (2) to provide consistency in the development of GHG emissions reduction measures. There is no indication, however, that the Legislature intended to alter any existing laws governing mitigation under CEQA. The Amendments, therefore, interpret and make specific existing CEQA law and regulations for mitigation of significant impacts resulting from GHG emissions.

Existing section 15126.4 provides guidance on CEQA's general mitigation requirements. To emphasize that mitigation of GHG emissions is subject to those existing CEQA requirements, OPR and the Natural Resources Agency added a new subdivision (c) to the existing section 15126.4. The Amendments identify five general methods of mitigation that may be tailored to the specific circumstances surrounding a specific project. In response to public comments, the Natural Resources Agency provided additional guidance, described below, in the lead-in sentences introducing those five broad categories of mitigation.

Mitigation of Greenhouse Gas Emissions

Comments submitted on the Amendments indicated general concerns that mitigation for GHG emissions may not be effective or reliable. To further clarify the existing mitigation requirements that would apply to measures to reduce greenhouse gas emissions, the Natural Resources Agency revised the lead-in sentences in subdivision (c). Specifically, the Natural Resources Agency added that all mitigation must be supported with substantial evidence and be capable of monitoring or reporting. This addition reflects the requirement in Public Resources Code that a lead agency's findings on mitigation be supported with substantial evidence and that it must adopt a mitigation monitoring and reporting program along with the project if mitigation measures are required. (Public Resources Code, §§ 21081(a)(1), 21081.6.)

In response to comments, the Natural Resources Agency had originally also proposed to add a sentence indicating that only emissions reductions that were not required by some other law or contract could qualify as mitigation. In response to comments on that proposed revision, that sentence is no longer proposed to be added to the lead-in section; rather, subdivision (c)(3) will be clarified, as described below.

Mitigation Identified in an Existing Plan

The first type of mitigation of GHG emissions that may be considered includes measures identified in an existing plan. As indicated above, many agencies are

beginning to address GHG emissions at a planning level. (OPR, Book of Lists, at pp. 92-100.) Some of those GHG reduction plans include specific measures that may be applied on a project-by-project basis. (*Ibid*; *see also* Scoping Plan, Appendix C, at p. C-49.) Proposed subdivision (c)(1), therefore, would encourage lead agencies to look to adopted plans for sources of mitigation measures that could be applied to specific projects.

Project Design Features

The second type of measure that a lead agency should consider is project design features that will reduce project emissions. Various project design features could be used to reduce GHG emissions from a wide variety of projects. The CAPCOA White Paper provides examples of various project design features that may reduce emissions from commercial and residential buildings. (CAPCOA White Paper, at pp. B-13 to B-18.) For example, according to the California Energy Commission, "[r]esearch shows that increasing a community's density and its accessibility to jobs centers are the two most significant factors for reducing vehicle miles traveled," which is an important component of reducing statewide emissions. (California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF ("2007 IEPR"), at p. 12; see also CEC, *The Role of Land Use in Meeting California's Energy and Climate Goals* (2007) at p. 20.) This subdivision also refers specifically to measures identified in Appendix F, which include a variety of measures designed to reduce energy use. By encouraging lead agencies to consider changes to the project itself, this subdivision further encourages the realization of co-benefits such as reduced energy costs for project occupants, increased amenities for non-vehicular transportation, and others. Thus, project design can reduce GHG emissions directly through efficiency and indirectly through resource conservation and recycling. (Green Building Sector Subgroup of the Climate Action Team, Scoping Plan Measure Development and Cost Analysis (2008) at p. 6 to 9.)

Off-Site Measures

The third type of measures addressing GHG emissions is off-site measures including offsets. Proposed subdivision (c)(3) recognizes the availability of various off-site mitigation measures. Such measures could include, among others, the purchase of carbon offsets, community energy conservation projects, and off-site forestry projects. (*See*, *e.g.*, South Coast Air Quality Management District, SoCal Climate Solutions Exchange (June 2008), at pp.1; Rodeo Refinery Settlement Agreement, BAAQMD Carbon Offset Fund; Recommendations of the ETAAC, Final Report (February 2008) at pp. 9-5; ARB, Staff Report: Proposed Adoption of California Climate Action Registry Forestry Greenhouse Gas Protocols for Voluntary Purposes (October 17, 2007), at p. 15 ("[t]he three protocols together – the sector, project, and certification protocols – are a cohesive and comprehensive set of methodologies for forest carbon accounting, and furthermore contain all the elements necessary to generate high quality carbon credits"); see also Scoping Plan, Appendix C, at pp. C-21 to C-23.) Off-site mitigation may be appropriate under various circumstances. For example, such mitigation may be

appropriate where a project is incapable of design modifications that would sufficiently reduce GHG emissions within the project boundaries. In that case, a lead agency could consider whether emissions reductions may be achieved through such measures as energy-efficiency upgrades within the community or reforestation programs.

The reference to "offsets" in subdivision(c)(3) generated several comments during the public review period. The offsets concept is familiar in other aspects of air quality regulation. The Federal Clean Air Act, for example, provides that increases in emissions from new or modified sources in a nonattainment area must be offset by reductions in existing emissions within the nonattainment area. (See, e.g., 42 U.S.C. § 7503(a)(1)(A).) California laws also apply to offsets and emissions credits. (See, e.g., Health & Saf. Code, § 39607.5.) Those other laws generally require that emissions offsets must be "surplus" or "additional". Comments on the proposed amendments suggested that to be used for CEQA mitigation purposes, offsets should also be "additional." Thus, the Natural Resources Agency further refined the revisions it publicized on October 23, 2009, by deleting the lead-in sentence stating that "Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision," and amending subdivision (c)(3) to state that mitigation may include "Off-site measures, including offsets <u>that are not otherwise required</u>, to mitigate a project's emissions[.]"

Moving this concept from the general provisions on mitigation of greenhouse gas emissions to the provision on offsets does not materially alter the rights or conditions in the originally proposed text because the "not otherwise required" concept would only make sense in the context of offsets. Because this revision clarifies section 15126.4(c)(3), consistent with the Public Resources Code and cases interpreting it, and does not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally proposed text, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

<u>Sequestration</u>

The fourth type of GHG emissions mitigation measure is sequestration. Indeed, one way to reduce a project's GHG emissions is to sequester project-related GHG emissions and thereby prevent them from being released into the atmosphere. At present, the most readily available, and accountable, way to sequester GHGs is forest management. California forests have a "unique capacity to remove [carbon dioxide, a GHG,] from the air and store it long-term as carbon." (Scoping Plan, Appendix C, at p. C-165.) Forest sequestration functions are, therefore, a key part of the ARB's Scoping Plan and reduction effort. (Scoping Plan, at pp. 64-65.)

The California Climate Action Team has also identified several forest-related sequestration strategies, including, reforestation, conservation forest management, conservation (i.e., avoided development), urban forestry, and fuels management and biomass. (ARB, Staff Report: Proposed Adoption of California Climate Action Registry

Forestry Greenhouse Gas Protocols for Voluntary Purposes (October 17, 2007), at pp. 6-7.) ARB has adopted Forest Protocols for large forestry projects. (ARB, Resolution 07-44 (adopting California Climate Action Registry Forestry Sector Protocol (September 2007), Forest Project Protocol (September 2007) and Forest Verification Protocol (May 2007).) ARB has also adopted Urban Forest Protocols for urban forestry projects. (California Climate Action Registry, Urban Forest Project Reporting Protocol and Verification Protocol (August 2008) (ARB adopted on September 25, 2008).) Such projects could be located on the project site or off-site. (Urban Forest Project Reporting Protocol, at pp. 4-5.) The protocols include methods of measuring the ability of various forestry projects to store capture and store carbon.

Consistent with section 15126.4(a), a lead agency must support its choice of, and its determination of the effectiveness of, any reduction measures with substantial evidence. Substantial evidence in the record must demonstrate that any mitigation program or measure is will result in actual emissions reductions. As a practical matter, where a mitigation program or measure is consistent with protocols adopted or approved by an agency with regulatory authority to develop such a program, a lead agency will more easily be able to demonstrate that off-site mitigation will actually result in emissions reductions. Examples of such protocols include the forestry protocols described above. Where a mitigation proposal cannot be verified with an existing protocol, a greater evidentiary showing may be required.

Measures to be Implemented on a Project-by-Project Basis

Finally, the fifth type of measure that could reduce GHG emissions at a planning level is the development of binding measures to be implemented on a project-specific basis. As explained in greater detail in the discussion of proposed section 15183.5, below, ARB's Scoping Plan strongly encourages local agencies to develop plans to reduce GHG emissions throughout the community. In addition, the CEC's Power Plant Siting Committee is assessing the impacts of GHG emission from proposed new power plants and how they can be mitigated. Comments received during the CEC's informational proceedings warranted a lengthy discussion on the practical application of a programmatic approach to mitigating GHG emissions from new power plants. (CEC, *Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications* (2009) at p. 26 to 28.) Existing State CEQA Guidelines sections 15168(b)(4) and 15168(c)(3) recognize that programmatic documents provide an opportunity to develop mitigation plans that will apply on a project-specific basis. Proposed subdivision (c)(5) recognizes that, for a planning level decision, appropriate mitigation of GHG emissions may include the development of a program to be implemented on a project-by-project basis. (State CEQA Guidelines, § 15126.4(a)(2) ("[i]n the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation or project design").)

This type of mitigation is subject to the limits of existing law, however. Thus, proposed subdivision (c)(5) should not be interpreted to allow deferral of mitigation.

Rather, it is subject to the rule in existing section 15126.4(a)(1)(B) that such measures "may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." (*See also San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 670-71.)

Suggestions Rejected

During its public involvement process, OPR received comments on its preliminary draft of the proposed amendments related to mitigation. Some comments suggested provisions that were not included in these Proposed Amendments. Several comments, for example, suggested that the Guidelines provide a specific "hierarchy" of mitigation requiring lead agencies to mitigate GHG emissions on-site where possible, and to allow consideration and use of off-site mitigation only if on-site mitigation is impossible or insufficient. OPR and the Resources Agency recognize that there may be circumstances in which requiring on-site mitigation may result in various co-benefits for the project and local community, and that monitoring the implementation of such measures may be easier. However, CEQA leaves the determination of the precise method of mitigation to the discretion of lead agencies. (State CEQA Guidelines, § 15126.4(a)(1)(B); *see also San Franciscans Upholding the Downtown Plan v. City & Co. of San Francisco* (2002) 102 Cal. App. 4th 656, 697.)

Several comments also suggested that mitigation for GHG emissions must be "real, permanent, quantifiable, verifiable, and enforceable." The Proposed Amendments do not include such standards, however, for several reasons. The proposed standard appears to have been derived from section 38562(d) of the Health and Safety Code, which prescribes requirements for regulations to be promulgated to implement AB32. AB32 is a separate statutory scheme, and, as noted above, there is no indication that the legislature intended to alter standards for mitigation under CEQA. Similarly, standards for mitigation under CEQA already exist and are set out in section 15126.4(a). Specifically, mitigation must be fully enforceable, which implies that the measure is also real and verifiable. Additionally, substantial evidence in the record must support an agency's conclusion that mitigation will be effective, and in the context of an EIR, courts will defer to an agency's determination of a measure's effectiveness. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 147 Cal.App.4th 1018, 1041 (mitigation ratio is supportable even at less than 1:1 given the project's circumstances); *Ass'n of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1398 (lead agency has discretion to resolve dispute regarding the effectiveness of an EIR's mitigation measures).) No existing law requires CEQA mitigation to be quantifiable. Rather, mitigation need only be "roughly proportional" to the impact being mitigated. (State CEQA Guidelines, § 15126.4(a)(4)(B); see also id. at § 15142.)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the mitigation of GHG emissions. (Pub. Resources Code, § 21083.05.) The proposed subdivision (c) sets out types of mitigation of GHG emissions that a lead agency may consider. Thus, that subdivision is reasonably necessary to implement the Legislature's directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the proposed action and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the proposed action. This conclusion is based on the Resources Agency's determination that the proposed action is necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The proposed action interprets and makes specific statutory CEQA provisions and/or case law interpreting CEQA for mitigating the impacts of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th

Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the proposed action does not add any substantive requirements, it will not result in an adverse impact on businesses in California. On the contrary, by providing greater certainty to lead agencies regarding the determination of significance of GHG emissions, the cost of environmental analysis, and potential litigation, may be reduced.

SECTION 15130. DISCUSSION OF CUMULATIVE IMPACTS

Specific Purposes of the Amendment

The Proposed Amendments include two revisions to the existing section 15130 of the State CEQA Guidelines. The two proposed amendments are described below.

Section 15130(b)(1)(B)

Section 21083(b) of the Public Resources Code requires that an EIR be prepared if the "possible effects of a project are individually limited but cumulatively considerable." That section further defines "cumulatively considerable" to mean that "the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

In determining whether a project may have significant cumulative impacts, a lead agency must engage in a two-step process. First, it must determine the extent of the cumulative problem. To do so, a lead agency must examine the "effects of past projects, the effects of other current projects, and the effects of probable future projects." Once it does so, the lead agency then determines whether the project's incremental contribution to that problem is cumulatively considerable. Section 21100(e) further provides that "[p]reviously approved land use documents, including but not limited to, general plans, specific plans, and local coastal plans, may be used in a cumulative impact analysis."

The existing Guideline section 15130(b) addresses the first step of the process. It offers two options for estimating the effects resulting from past, present and reasonably foreseeable projects. A lead agency may either rely on a list of such projects, or a summary of projections to estimate cumulative impacts. Existing section 15130(b)(1)(B) allows a lead agency to rely on projections in a land use document or certified environmental document that addresses the cumulative impact under consideration.

The proposed amendments would clarify that plans providing such projections need not be limited to land use plans, so long as the plan evaluates the relevant cumulative effect. The proposed amendments would also allow a lead agency to rely on information provided in regional modeling programs. The best projections of the cumulative effect of GHG emissions may be available in up-to-date models such as the International Council for Local Environmental Initiative's Local Government GHG Protocol[8] and the California Climate Action Reserve's Registry general,[9] industry[10] and

[8] ICLEI (2008) Local Government Operations Protocol; Accessed 6/08/09, http://www.icleiusa.org/action-center/tools/lgo-protocol-1

[9] California Climate Action Registry (2009) General Reporting Protocol: Accessed 6/08/09, http://www.climateregistry.org/resources/docs/protocols/grp/GRP_3.1_January2009.pdf

project type protocols.[11] Such projections may also be supplied in plans that are not strictly "land use" plans. For example, regional transportation plans in certain areas will ultimately include sustainable community strategies which will include projections a region's GHG emissions and related cumulative effects. (Gov Code, § 65080(b)(2).) Finally, some agencies are beginning to develop GHG reduction plans or climate action plans that may also include such projections. (ARB, Scoping Plan, Appendix C, at p. C-49; OPR, Book of Lists, at pp. 92-100.)

The proposed amendments are consistent with section 21083 of the Public Resources Code and CEQA case law. Section 21083 requires consideration of "the effects of past projects, the effects of other current projects, and the effects of probable future projects." Projections in the listed types of plans and models may include inventories of existing emissions and projected future emissions. Section 21100 of the Public Resources Code provides that land use plans "may" be used in a cumulative impacts analysis, but that section does not purport to limit the types of plans that can be used in a cumulative impacts analysis to land use plans. Finally, case law has supported reliance on projections provided by industry, for example, to satisfy the requirement for a discussion of impacts caused by closely related projects. (*Ass'n of Irritated Residents*, *supra*, 107 Cal. App. 4th at 1404.)

While models may provide the most up to date information, lead agencies should still look first to information provided in adopted or certified environmental documents. First, such information has already gone through a public and agency review process. Second, to the extent the model provides information that is not provided in the prior environmental document, the relationship of the model and applicable plans must be explained, along with any changes in circumstances.

Section 15130(d)

The Office of Planning and Research had originally proposed the addition of certain plans to section 15130(d). That section states that previously approved land use plans may be used in a cumulative impacts analysis. Those additions were inadvertently excluded from the proposed amendments that were made available for public review on July 3, 2009. Therefore, the revisions were added to revisions that were made publicly available on October 23, 2009.

The added plans include regional transportation plans and plans for the reduction of greenhouse gas emissions. This change is sufficiently related to the proposal that was originally published. Those plans were proposed for addition to other sections of the proposed amendments, for example, and comments were submitted regarding the use of such plans in cumulative impacts analysis. Plans for the reduction of greenhouse gas emissions were described under section 15064(h)(3), above. Regional

[10] California Climate Action Registry (2005) Industry Specific Protocols: Accessed 06/08/09, http://www.climateregistry.org/tools/protocols/industry-specific-protocols.html
[11] California Climate Action Registry (2007) Project Protocols: Accessed 06/08/09, http://www.climateregistry.org/tools/protocols/project-protocols.html

transportation plans may contain information regarding transportation-related greenhouse gas emissions that may be useful in a cumulative impacts analysis. As explained above, regional transportation plans in certain areas will ultimately include sustainable community strategies which will include projections a region's GHG emissions and related cumulative effects. (Gov Code, § 65080(b)(2).) Thus, these additions are reasonably necessary to ensure that public agencies perform a cumulative impacts analysis of greenhouse gas emissions as required by Public Resources Code section 21083.05. The additions are also consistent with Public Resources Code section 21100(e) which provides that previously adopted land use plans may be used in a cumulative impacts analysis.

Section 15130(f)

The Natural Resources Agency originally proposed to add subdivision (f) to section 15130 to clarify that sections 21083 and 21083.05 of the Public Resources Code do not require a detailed analysis of GHG emissions solely due to the emissions of other projects. (State CEQA Guidelines, § 15130(a)(1); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799.) Rather, proposed subdivision (f) would have provided that a detailed analysis is required when evidence shows that the incremental contribution of the project's GHG emissions is cumulatively considerable when added to other cumulative projects. (*CBE*, *supra*, 103 Cal.App.4th at 119-120.) In essence, the proposed addition would be a restatement of law as applied to GHG emissions. Analysis of GHG emissions as a cumulative impact is consistent with case law arising under the National Environmental Policy Act. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Other portions of these proposed Guidelines address how lead agencies may determine whether a project's emissions are cumulatively considerable. (See, e.g., Proposed Sections 1506(h)(3) and 15064.4.)

Public comments noted, however, that the new subdivision merely restated the law, and was capable of misinterpretation. The Natural Resources Agency, therefore, determined that because other provisions of the Amendments address the analysis of greenhouse gas emissions as a cumulative impact, and because the reasoning of those is fully explained in the Initial Statement of Reasons, subdivision (f) should not be added to the CEQA Guidelines. The deletion was reflected in the revisions that were made available for further public review and comment on October 23, 2009.

Necessity

Sections 21083 and 21083.05 of the Public Resources Code respectively require that an EIR analyze cumulative impacts and that the effects of GHG emissions be analyzed in CEQA documents. The Amendments include guidance to assist lead agencies to evaluate the cumulative impacts of GHG emissions where an EIR is required. Thus, the Amendments are reasonably necessary to implement the Legislature's directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the

amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15150. INCORPORATION BY REFERENCE

Specific Purposes of the Amendment

The existing CEQA Guidelines allow lead agencies to incorporate information from other documents by reference. (State CEQA Guidelines, § 15150.) Doing so permits a lead agency to avoid repetitious analysis of general matters and to reduce paperwork. (Pub. Resources Code § 21003 (it is state policy that "persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment").) Existing Guidelines section 15150(f) provides that "[i]ncorporation by reference is most appropriate for including long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis of the problem at hand."

The key requirements for documents that may be incorporation by reference are set forth in the statutory definition of "EIR." (Pub. Resources Code, § 21061.) Those requirements include:

- The incorporated information is a matter of public record or is generally available to the public; and
- The incorporated information is reasonably available for inspection at a public place or public building.

Descriptions of global, statewide and regional GHG emissions are particularly well-suited to incorporation by reference. Such descriptions can be technical and lengthy. (Public Policy Institute of California, Climate Policy at the Local Level: A Survey of California's Cities and Counties (November 2008), at pp. 24-32 (describing barriers and constraints to adoption of climate action plans and policies).) General descriptions may also remain current enough to be used in several successive environmental documents. In fact, OPR has found that many agencies are addressing GHG emissions in programmatic documents that could be incorporated by reference into later documents. (OPR, Book of Lists, at pp. 92-100.) Thus, the Resources Agency and OPR find that addition of subdivision (e)(4) is reasonably necessary to effectuate the legislative directive that public agencies conduct environmental review in the most efficient manner possible.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Legislature has further directed that resources be conserved wherever possible in the analysis of environment impacts. (*Id*. at § 21003.) Thus, the amendment to add GHG

analyses to the list of documents that may be incorporated by reference is reasonably necessary to implement the Legislature's directive.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the proposed action adds no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15183. PROJECTS CONSISTENT WITH A COMMUNITY PLAN OR ZONING

Specific Purposes of the Amendment

Section 21083.3 of the Public Resources Code provides that projects that are consistent with a General Plan, Community Plan or Zoning may not need to analyze cumulative effects that have already been analyzed in an EIR on the prior planning or zoning action. The exemption may apply, for example, where "uniformly applied development policies or standards" will substantially mitigate a cumulative effect. (Pub. Resources Code, § 21083.3(d).) The statute does not define what types of development policies or standards may be used in this context. It does provide, however, that such standards or policies must have been adopted by the lead agency with a finding, supported with substantial evidence, that the policy or standard will substantially mitigate the environmental effect under consideration. (*Ibid*.) Existing Guidelines section 15183 provides several non-exclusive examples of policies and standards that might apply in the context of section 21083.3, including grading ordinances and floodplain protection ordinances.

The inclusion of "[r]equirements for reducing greenhouse gas emissions, as set forth in adopted land use plans, policies or regulations" among the list of examples of "uniformly applied development policies or standards" is consistent with the direction in section 21083.3. First, the text provides that such requirements would be "adopted" by the lead agency. Second, they would be "development policies or standards" because the requirements would be contained in an adopted "land use plan, policy or regulation." Finally, such requirements could substantially mitigate the effects of GHG emissions by "reducing greenhouse gas emissions" in the adopting jurisdiction. (Proposed Section 15183.5(b) would provide elements that may be included in a GHG emissions reduction plan that might be used in the context of section 15183.)

One comment submitted during OPR's public involvement process questioned whether such requirements relating to reductions in GHG emissions would be kept current. (See, e.g., Letter from Joyce Dillard to OPR, January 26, 2009.) Section 21083.3 specifically provides, however, that such requirements would not apply in this context if "substantial new information shows that the policies or standards will not substantially mitigate the environmental effect." (Pub. Resources Code, § 21083.3(d).) Therefore, lead agencies have an incentive to ensure that their policies remain current.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The addition to section 15183 is reasonably necessary to carry out the legislature's intent that projects that are consistent with General Plans, Community Plans and Zoning benefit from streamlined CEQA review. Several jurisdictions are beginning to include requirements for reducing GHG emissions in their general plans. (OPR, Book of Lists,

at pp. 92-100; Scoping Plan, Appendix C, at p. C-49.) The addition is also reasonably necessary to effectuate the legislature's intent that OPR and the Resources Agency provide guidance on how to analyze GHG emissions.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Resources Agency rejected the no action alternative because it would not achieve the objectives of the proposed revisions. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to

SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15183.5. TIERING AND STREAMLINING THE ANALYSIS OF GREENHOUSE GAS EMISSIONS

Specific Purposes of the Amendment

In adopting SB375, the Legislature found that "[n]ew provisions of CEQA should be enacted so that the statute encourages … local governments to make land use decisions that will help the state achieve its climate goals under AB 32[.]" (Statutes 2008, Ch. 728, § 1(f).) ARB's Scoping Plan similarly recognizes the important role that local governments play in reducing the State's GHG emissions. (ARB, Scoping Plan, at p. 26.) In particular, local government "[d]ecisions on how land is used will have large impacts on the GHG emissions that will result from the transportation, housing, industry, forestry, water, agriculture, electricity, and natural gas sectors." (*Ibid*.) Decision-making on urban growth and land use planning begins with local general plans. (Gov. Code, § 65030.1 ("The Legislature … finds that decisions involving the future growth of the state, most of which are made and will continue to be made at the local level, should be guided by an effective planning process, including the local general plan, and should proceed within the framework of officially approved statewide goals and policies directed to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors").)

GHG emissions may be best analyzed and mitigated at a programmatic level. "For local government lead agencies, adoption of general plan policies and certification of general plan EIRs that analyze broad jurisdiction-wide impacts of GHG emissions can be part of an effective strategy for addressing cumulative impacts and for streamlining later project-specific CEQA reviews." (OPR, Technical Advisory: CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review, June 19, 2008, at p. 8.) Other lead agencies may also address GHG emissions programmatically in long range development plans, facilities master plans, and other long-range planning documents.

This emphasis on long-range planning is consistent with state policy expressed in CEQA. The Legislature has clearly stated its preference that lead agencies tier environmental documents wherever feasible. (Pub. Resources Code, § 21093(b).) Specifically:

> The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in successive environmental impact reports, and (3) ensuring that environmental impact reports prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and

> declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.

(Pub. Resources Code, § 21093(a).) The Amendments, therefore, include the addition of a new section 15183.5 to address both tiering and streamlining of GHG analyses, as well as the proper use of GHG reduction plans in CEQA analyses. Explanation of the rationale of each new subdivision is provided below.

Existing Methods of Streamlining and Tiering

Because GHG emissions raise a cumulative concern, analysis of such emissions in a long-range planning document lends itself to tiering and use in later project-specific environmental review. (Pub. Resources Code, § 21093.) The Legislature has created several tiering and streamlining methods, reflected in various provisions of the existing State CEQA Guidelines, that can reduce duplication in the analysis of GHG emissions. Subdivision (a) clarifies that existing provisions in the State CEQA Guidelines regarding tiering and streamlining may be applied to the analysis of GHG emissions.

Greenhouse Gas Emissions Reduction Plans

Many jurisdictions are beginning to address GHG emissions reductions in "climate action plans" and "gas emissions reduction plans." (OPR, Book of Lists, at pp. 92-100; see also, Scoping Plan, Appendix C, at p. C-49.) ARB's Scoping Plan specifically encourages local governments to develop such plans, and has created a local government operations protocol to assist in that effort. (Scoping Plan, at p. 26.) A community-wide emissions protocol is also under development.

Some comments raised during OPR's public involvement process expressed concern that due to a lack of legislative criteria for such plans, existing provisions in the CEQA Guidelines regarding cumulative impacts may be misused. (See, e.g., Letter from Center for Biological Diversity, et al., to OPR, February 2, 2009, at p. 2.) For example, without specific guidance, a lead agency could erroneously rely on a plan with purely aspirational intent to determine that a later project's cumulative impact is less than significant pursuant to section 15064(h)(3). The proposed subdivision (b) provides criteria to assist lead agencies in determining whether an existing greenhouse gas reduction plan is an appropriate document to use in a cumulative impacts analysis under CEQA.

The existing CEQA Guidelines allow lead agencies to rely on plans for cumulative analysis where the plan has been adopted in a public review process and contains specific requirements to avoid or substantially lessen a cumulative problem. (State CEQA Guidelines, § 15064(h)(3).) The criteria set out in proposed subdivision (b)(1) are designed to ensure that a greenhouse gas reduction plan would satisfy the

requirements described in sections 15064(h)(3) and 15130(d), for the reasons described below.

Criteria (A) and (C) are necessary to define the scope of GHG emissions within the defined geographic area and the incremental contribution of activities that will occur within that area to those emissions. (State CEQA Guidelines, § 15064(h)(3) (plan addresses cumulative impacts "within the geographic area in which the project is located").) Criterion (B) establishes a benchmark to assist the lead agency in determining whether the plan provisions will avoid or substantially lessen cumulative effects of the area's GHG emissions. (*Ibid*. (plan "provides specific requirements that will avoid or substantially lessen the cumulative problem").) Criteria (D) and (E) are necessary to demonstrate that the plan will actually avoid or substantially lessen the cumulative effects of those emissions. (*Ibid*.) Finally, criterion (F) reflects the requirement in sections 15064(h)(3) and 15130(d) that the plan be adopted through a public review process, as well as case law requiring that mitigation plans themselves undergo environmental review. (*California Native Plant Society v. County of El Dorado* (2009) 170 Cal. App. 4th 1026, 1053 (mitigation "programs may offer the best solution to environmental planning challenges, by providing some certainty to developers while adequately protecting the environment" but "in order to provide a lawful substitute for the 'traditional' method of mitigating CEQA impacts, that is, a project-by-project analysis, the fee program must be evaluated under CEQA").) Notably, the criteria provided in subdivision (b) are largely consistent with the elements that ARB recommends be included in a greenhouse gas reduction plan. (ARB, Scoping Plan, Appendix C, at p. C-49.)

Subdivision (b)(2) describes the uses and limitations of plans for the reduction of greenhouse gas emissions in a cumulative impacts analysis for later projects. Specifically, it provides a safeguard to ensure that the later activity was actually addressed in the plan for the reduction of greenhouse gas emissions, and that any applicable requirements of the plan are incorporated into the later project. This requirement is similar the requirement in case law that a lead agency determine that a particular threshold appropriately addresses the impact of concern. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1109 ("in preparing an EIR, the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect").) Finally, subdivision (b)(2) makes specific the requirement that, while the existence of an applicable plan for the reduction of greenhouse gas emissions may create a presumption that compliance with that plan will reduce the incremental contribution of later activities to a less than cumulatively considerable level, the existence of substantial evidence supporting a fair argument to the contrary may still require preparation of an EIR.

<u>Special Situations</u>

Subdivision (c) provides necessary clarification of the partial exemption provided in sections 21155.2 and 21159.28 of the Public Resources Code, enacted as part of SB375 (see description above). The limitation on analysis of global warming applies only to the effects caused by GHG emissions from cars and light duty trucks. That limitation should be read in conjunction with section 21083.05 of the Public Resources Code and State CEQA Guideline sections 15064.4 and 15126.4 which require analysis of all sources of GHG emissions and mitigation if those emissions are significant. Thus, projects that qualify for the limitation in sections 21155.2 and 21159.28 must still analyze emissions resulting from, as applicable, energy use, land conversion, and other direct and indirect sources of emissions. This clarification is reasonably necessary to effectuate the legislative directive in section 21083.3 that OPR and Resources develop guidelines on the analysis of GHG emissions and to avoid confusion regarding the streamlining provisions provided by SB375.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) The Legislature has also directed that EIRs be tiered wherever possible, and that duplication be minimized. (*Id*. at §§ 21003, 21093, 21094.) Section 15183.5, which provides guidance on tiering and streamlining of GHG emissions analyses, is therefore reasonably necessary to carry out these directives.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Natural Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the Amendments are proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Natural Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent

of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the Amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the amendments to this section are intended to reduce the costs of environmental review on lead agencies and project applicants by encouraging the use of existing environmental analysis where available. (Pub. Resources Code, § 21003(d) (use information in existing EIRs in order to reduce duplication), (f) (environmental review should proceed in the most efficient manner possible).)

SECTION 15364.5. GREENHOUSE GAS

Specific Purposes of the Amendment

The Legislature has not included a definition of "greenhouse gases" in CEQA, though it did include a definition in AB32. (Health & Saf. Code, § 38505(g).) Thus, new section 15364.5 adds a definition of greenhouse gases. The specified gases are consistent with existing law as they are defined to include those identified by the Legislature in section 38505(g) of the Health and Safety Code.

Notably, the definition in AB32 states that GHG "includes all of the following…." In so stating, the Legislature implies that other gases may also be considered GHGs. The ARB's Scoping Plan also acknowledges that other gases contribute to climate change. (Scoping Plan, at p. 11.) In fact, the EPA's Endangerment Finding explained that several other gases share attributes with GHGs but would not be appropriate for regulation under the Clean Air Act at this time. (EPA Endangerment Finding, at pp. 18896-98.) Therefore, similar to the statutory definition of GHGs in AB32, the definition in the Amendments is not exclusive to the six primary GHGs. The purpose of a more expansive definition is to ensure that lead agencies do not exclude from consideration GHGs that are not listed, so long as substantial evidence indicates that such non-listed gases may result in significant adverse effects. This approach is consistent with the Supreme Court's directive that CEQA be interpreted to provide the fullest possible protection to the environment. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 390.)

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) Section 15364.5 is necessary to make specific the instruction to analyze GHG emissions because it states which gases are considered to be "greenhouse gases" and should be included in the analysis.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Natural Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Natural Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Natural Resources Agency rejected the no action

alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

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Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the addition of this section is intended to reduce the costs of environmental review on lead agencies and project applicants by assisting lead agencies in determining which gases should be included in an analysis.

APPENDIX F. ENERGY CONSERVATION

Specific Purposes of the Amendment

CEQA's requirement to analyze and mitigate energy impacts of a project is substantive, and is not merely procedural. (*People v. County of Kern* (1976) 62 Cal.App.3d 761, 774.) Despite the requirement, lead agencies have not consistently included such analysis in their EIRs. (Remy et al., Guide to CEQA, 11th Ed. 2007, at pp. 1007-1008, n. 34.) The following revisions to Appendix F are, therefore, reasonably necessary to ensure that lead agencies comply with the substantive directive in section 21100(b)(3).

Introduction

The revisions to the introduction section include a cross-reference to section 21100(b)(3) of the Public Resources Code to direct lead agencies to the statutory directive underlying Appendix F. This section also includes an addition to make clear that energy impacts that have already been analyzed may not need to be repeated in later EIRs. This sentence is consistent with the Legislative intent in CEQA that information in existing environmental review be used to "reduce delay and duplication in preparation of subsequent environmental impact reports." (Pub. Resources Code, § 21003(d).)

EIR Contents

The amendments to Appendix F revise the section on EIR Contents to clarify that lead agencies "shall" analyze energy conservation in their EIRs. The word "shall" indicates that the duty is mandatory, and makes Appendix F consistent with Public Resources Code section 21100(b)(3). While Appendix F is revised to make clear that an energy analysis is mandatory, the amendments to this section would also make clear that the energy analysis is limited to effects that are applicable to the project.

"Lifecycle"

The amendments to Appendix F remove the term "lifecycle." No existing regulatory definition of "lifecycle" exists. In fact, comments received during OPR's public workshop process indicate a wide variety of interpretations of that term. (Letter from Terry Rivasplata et al. to OPR, February 2, 2009, at pp. 5, 12 and Attachment; Letter from Center for Biological Diversity et al. to OPR, February 2, 2009, at pp. 17.) Thus, retention of the term "lifecycle" in Appendix F could create confusion among lead agencies regarding what Appendix F requires.

Moreover, even if a standard definition of the term "lifecycle" existed, requiring such an analysis may not be consistent with CEQA. As a general matter, the term could refer to emissions beyond those that could be considered "indirect effects" of a project as that term is defined in section 15358 of the State CEQA Guidelines.

Depending on the circumstances of a particular project, an example of such emissions could be those resulting from the manufacture of building materials. (CAPCOA White Paper, at pp. 50-51.) CEQA only requires analysis of impacts that are directly or indirectly attributable to the project under consideration. (State CEQA Guidelines, § 15064(d).) In some instances, materials may be manufactured for many different projects as a result of general market demand, regardless of whether one particular project proceeds. Thus, such emissions may not be "caused by" the project under consideration. Similarly, in this scenario, a lead agency may not be able to require mitigation for emissions that result from the manufacturing process. Mitigation can only be required for emissions that are actually caused by the project. (State CEQA Guidelines, § 15126.4(a)(4).) Conversely, other projects may spur the manufacture of certain materials, and in such cases, consideration of the indirect effects of a project resulting from the manufacture of its components may be appropriate. A lead agency must determine whether certain effects are indirect effects of a project, and where substantial evidence supports a fair argument that such effects are attributable to a project, that evidence must be considered. However, to avoid potential confusion regarding the scope of indirect effects that must be analyzed, the term "lifecycle" has been removed from Appendix F.

Types of Energy Use

The amendments to Appendix F clarify that project design may achieve energy savings through measures related to water use and solid waste disposal. (California Energy Commission, Water Supply-Related Electricity Demand in California, CEC 500-2007-114 (November 2007), at p. 3 (reporting that water related energy use, including water movement, treatment and heating, annually accounts for approximately 20 percent of California's electricity consumption); Scoping Plan, Appendix C, at pp. C-158 to C-160.) The addition of these potential sources of energy reductions is consistent with the direction in section 21100(b)(3) to identify mitigation measures to reduce inefficient consumption of energy.

Grammar and Syntax

Finally, several minor revisions to Appendix F were made to improve grammar and syntax. Such revisions qualify as a "change without regulatory effect" pursuant to section 100(a)(4) of the Office of Administrative Law's regulations governing the rulemaking process. (Cal. Code Regs., tit. 1, § 100(a)(4).)

Necessity

The Legislature directed OPR and the Natural Resources Agency to develop guidelines on the analysis and mitigation of GHG emissions. (Pub. Resources Code, § 21083.05.) Since a significant source of GHG emissions results from energy use (consumption), these Amendments appropriately addressed energy use and conservation as a subject for CEQA analysis. Additionally, the legislature requires that lead agencies analyze energy use in their EIRs. (*Id*. at § 21100(b)(3).) The

amendments to Appendix F are, therefore, necessary to ensure that lead agencies implement these directives.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Natural Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Natural Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA's requirements for analysis and mitigation of energy use. Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California.

APPENDIX G. INITIAL STUDY CHECKLIST

Specific Purposes of the Amendment

The Amendments include revisions to several portions of Appendix G, which contains a sample environmental checklist that lead agencies may use to satisfy the requirement to prepare an initial study. The amendments and their necessity are described below.

Note Regarding Use of the Checklist

The amendments would add a note to the beginning of Appendix G to clarify the checklist contained therein is only a sample that may be modified as necessary to suit the lead agency and to address the particular circumstances of the project under consideration. The addition is necessary for two reasons. First, several lead agencies have expressed concern that the checklist does not reflect the circumstances existing in that particular agency. (See, e.g., Letter from Napa County – Department of Conservation, Development, and Planning to OPR, January 26, 2009; Letter from County of San Bernardino - Land Use Services Department to OPR, February 2, 2009.) Second, the Third District Court of Appeal recently issued an opinion that clarified that all substantial evidence regarding potential impacts of a project must be considered, even if the particular potential impact is not listed in Appendix G. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at 1109.) Thus, the note emphasizes that Appendix G does not mandate a particular form that must be used for an Initial Study; rather, it provides merely an example.

Forest Resources

The amendments would add several questions addressing forest resources in the section on Agricultural Resources. Forestry questions are appropriately addressed in the Appendix G checklist for several reasons. First, forests and forest resources are directly linked to both GHG emissions and efforts to reduce those emissions. For example, conversion of forests to non-forest uses may result in direct emissions of GHG emissions. (See, e.g., California Energy Commission Baseline GHG Emissions for Forest, Range, and Agricultural Lands in California (March, 2004) at p. 19.) Such conversion would also remove existing carbon stock (i.e., carbon stored in vegetation), as well as a significant carbon sink (i.e., rather than emitting GHGs, forests remove GHGs from the atmosphere). (Scoping Plan, Appendix C, at p. C-168.) Thus, such conversions are an indication of potential GHG emissions. Changes in forest land or timberland zoning may also ultimately lead to conversions, which could result in GHG emissions, aesthetic impacts, impacts to biological resources and water quality impacts, among others. Thus, these additions are reasonably necessary to ensure that lead agencies consider the full range of potential impacts in their initial studies. In the same way that an EIR must address conversion of prime agricultural land or wetlands as part of a project (addressing the whole of the action requires analyzing land clearance in advance of project development), so should it analyze forest removal.

During OPR's public involvement process, some commenters suggested that conversion of forest or timber lands to agricultural uses should not be addressed in the Initial Study checklist. (Letter from California Farm Bureau Federation to OPR, February 2, 2009; Letter from County of Napa, Conservation, Development and Planning Department, to OPR, January 26, 2009.) As explained above, the purpose of the Amendments is to implement the Legislative directive to develop Guidelines on the analysis and mitigation of GHG emissions. Although some agricultural uses also provide carbon sequestration values, most agricultural uses do not provide as much sequestration as forest resources. (Climate Action Team, *Carbon Sequestration* (2009), Chapter 3.3.8 at p. 3.21; California Energy Commission, *Baseline GHG Emissions for Forest, Range, and Agricultural Lands in California* (2004), at p. 2.) Therefore, such a project could result in a net increase in GHG emissions, among other potential impacts. Thus, such potential impacts are appropriately addressed in the Initial Study checklist. See the Thematic Responses, below, for additional discussion of this issue.

Greenhouse Gas Emissions

The additions also include two questions related to GHG emissions. These questions are necessary to satisfy the Legislative directive in section 21083.05 that the effects of GHG emissions be analyzed under CEQA. The questions are intended to provoke a full analysis of such emissions where appropriate. More detailed guidance on the context of such an analysis is provided in other sections throughout the Guidelines. Despite the detailed provisions in the Guidelines themselves, questions related to GHG emissions should also appear in the checklist because some lead agencies will not seriously consider an environmental issue unless it is specifically mentioned in the checklist. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal. App. 4th at 1110.)

Transportation

The Amendments make four primary changes to the questions involving transportation and traffic.

First, question (a) changes the focus from an increase in traffic at a given location to the effect of a project on the overall circulation system in the project area. This change is appropriate because an increase in traffic, by itself, is not necessarily an indicator of a potentially significant *environmental* impact. (Ronald Miliam, AICP, *Transportation Impact Analysis Gets a Failing Grade When it Comes to Climate Change and Smart Growth*; *see also* Land Use Subcommittee of the Climate Action Team LUSCAT Submission to CARB Scoping Plan on Local Government, Land Use, and Transportation Report (May, 2008) at pp. 31, 36.) Similarly, even if some projects may result in a deterioration of vehicular level of service – that is, delay experienced by drivers – the overall effectiveness of the circulation system as a whole may be improved. (*Ibid*.) Such projects could include restriping to provide bicycle lanes or creating dedicated bus lanes. Even in such cases, however, any potential adverse air

quality or other impacts would still have to be addressed as provided in other sections of the checklist. Finally, the change to question (a) also recognizes that the lead agency has discretion to choose its own metric of analysis of impacts to intersections, streets, highways and freeways. (Pub. Resources Code, § 21081.2(e); *Eureka Citizens for Responsible Gov't v. City of Eureka, supra,* 147 Cal.App.4th at 371-373 (lead agency has discretion to choose its methodology).) Thus, "level of service" may or may not be the applicable measure of effectiveness of the circulation system.

Second, the revision to question (b) clarifies the role of a congestion management program in a CEQA analysis. Specifically, it clarifies that a congestion management program contains many elements in addition to a level of service designation. (Gov. Code § 65088 et seq.) The clarification is also necessary to address any projects within an "in-fill opportunity zone" that may be exempted from level of service requirements. (*Id*. at § 65088.4.)

Third, the amendments eliminate the existing question (f) regarding parking capacity. Case law recognizes that parking impacts are not necessarily environmental impacts. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, supra,* 102 Cal.App.4th at 697.) The focus of the Initial Study checklist should be on direct impacts of a project. Therefore, the question related to parking is not relevant in the initial study checklist. As noted above, however, if there is substantial evidence indicating adverse indirect environmental impacts from a project related to parking capacity, the lead agency must address such potential impacts regardless of whether the checklist contains parking questions. (*Ibid*.) Additional discussion of this issue is included in the Thematic Responses, below.

Finally, the amendments revise existing question (g), now question (f), to address the performance and safety of certain modes of alternative transportation. These revisions were made in response to comments received on the Amendments. While the primary objective of the Amendments is to provide guidance on the analysis and mitigation of greenhouse gas emissions, this revision was determined to be necessary to support the use of alternative transportation.

Necessity

The Legislature directed OPR and the Resources Agency to develop guidelines on the analysis of GHG emissions. (Pub. Resources Code, § 21083.05.) An initial study may be used to assist in the determination of whether a project may have a significant effect on the environment. (*Protect the Historic Amador Waterways*, *supra*, 116 Cal. App. 4th at 1110.) Appendix G of the State CEQA Guidelines is intended to provide a sample of an initial study that lead agencies may use. (*Ibid*.) Amendment of Appendix G to include questions that will assist a lead agency in determining whether a project may result in significant impacts related to GHG emissions is, therefore, necessary to carry out the Legislature's directive in section 21083.05 of the Public Resources Code.

Reasonable Alternatives to the Regulation, Including Alternatives that Would Lessen Any Adverse Impact on Small Business, and the Resources Agency's Reasons for Rejecting Those Alternatives

The Natural Resources Agency considered reasonable alternatives to the Amendments and determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Natural Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 in a manner consistent with existing statutes and case law, and the Amendments add no new substantive requirements. The Natural Resources Agency rejected the no action alternative because it would not achieve the objectives of the Amendments. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts would result from the implementation of existing law.

Evidence Supporting an Initial Determination That the Action Will Not Have a Significant Adverse Economic Impact on Business

The Amendments interpret and make specific statutory CEQA provisions and/or case law interpreting CEQA for analysis and mitigation of GHG emissions that may result from proposed projects. Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating GHG emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al.*, Riverside Co. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans*., Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (*See*, *e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad*., 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Because the Amendments do not add any substantive requirements, they will not result in an adverse impact on businesses in California. On the contrary, the

amendments to Appendix G are intended to reduce the costs of environmental review on lead agencies and project applicants by assisting lead agencies in determining which topics should be addressed in an Initial Study.

NON-SUBSTANTIAL CHANGES

On October 23, 2009, the Natural Resources Agency made available for public review certain changes to its originally proposed amendments. Those changes were described in the Notice of Proposed Changes. In response to comments on those changes, the Natural Resources Agency has made two non-substantial changes. Because those changes clarify the text that was made available for public review, and do not alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the originally proposed text, the revisions are nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.) Those revisions are described below.

Section 15126.2(a)

As explained in the Notice of Proposed Changes, the revisions to the proposed text included a clarifying sentence in section 15126.2 indicating that an environmental impact report should analyze the effect of placing a project in areas susceptible to hazardous conditions. That revision specifically lists types of areas (including floodplains, coastlines and wildfire risk areas) that may be most impacted by the effects of a changing climate. The revision would also clarify that analysis of such hazards is appropriate where such areas are specified in authoritative hazard maps, risk assessments or land use plans.

The Natural Resources Agency further revised section 15126.2(a) in response to comments. That section was revised as follows:

> Similarly, the EIR should evaluate ~~**the**~~ **any potentially significant** impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

This change does not alter the rights, responsibilities, conditions, or prescriptions contained in the originally proposed text because the Public Resources Code already provides that an EIR is only required for those impacts that are potentially significant. (Public Resources Code, § 21002.1(a).) Because this revision clarifies the last sentence in section 15126.2(a), consistent with the Public Resources Code, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

Section 15126.4(c)

The Natural Resources Agency also further revised text related to mitigation that was made publicly available as described in the October 23, 2009, Notice of Proposed Changes in response to comments on that text. The revision clarifies that the qualification that measures to mitigate greenhouse gas emissions must not otherwise be required applies in the context of offsets and is not intended to contradict case law recognizing that changes in a project that are required to comply with existing environmental standards may qualify as mitigation. Thus, section 15126.4(c) was revised as follows:

> (c) Mitigation Measures Related to Greenhouse Gas Emissions.
>
> Consistent with section 15126.4(a), lead agencies shall consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of greenhouse gas emissions**. ~~Reductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision.~~** Measures to mitigate the significant effects of greenhouse gas emissions may include, among others:
>
> (1) Measures in an existing plan or mitigation program for the reduction of emissions that are required as part of the lead agency's decision;
>
> (2) Reductions in emissions resulting from a project through implementation of project features, project design, or other measures, such as those described in Appendix F;
>
> (3) Off-site measures, including offsets **that are not otherwise required**, to mitigate a project's emissions;
>
> (4) Measures that sequester greenhouse gases;
>
> (5) In the case of the adoption of a plan, such as a general plan, long range development plan, or plans for the reduction of greenhouse gas emissions, mitigation may include the identification of specific measures that may be implemented on a project-by-project basis. Mitigation may also include the incorporation of specific measures or policies found in an adopted ordinance or regulation that reduces the cumulative effect of emissions.

This change does not alter the rights, responsibilities, conditions, or prescriptions contained in the originally proposed text because the Public Resources Code already provides that to be considered mitigation, a measure must be tied to impacts resulting from the project. Section 21002 of the Public Resources Code, the source of the

requirement to mitigate, states that "public agencies should not approve projects as proposed if there are … feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" Similarly, section 21081(a)(1) specifies a finding by the lead agency in adopting a project that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." Both statutory provisions expressly link the changes to be made (i.e., the "mitigation measures") to the significant effects of the project. Because this revision clarifies section 15126.4(c), consistent with the Public Resources Code, this revision is nonsubstantial and need not be circulated for additional public review. (Government Code, § 11346.8(c); Cal. Code Regs., tit. 1, § 40.)

THEMATIC RESPONSES

Several themes emerged in the comments submitted on the Natural Resources Agency's proposed amendments to the CEQA Guidelines addressing greenhouse gas emissions. While the Natural Resources Agency has responded individually to each comment it received, the following provides general responses to several issues that were raised repeated in the comments.

Quantitative versus Qualitative Analysis

Many comments focused on section 15064.4's recognition of lead agency discretion in determining whether to analyze a project's greenhouse gas emissions using either qualitative or quantitative methods, or both. Some comments suggested that a qualitative analysis would not satisfy CEQA's informational mandates. Other comments indicated that qualitative analysis is consistent with CEQA, and may be particularly appropriate in the context of a negative declaration. Other comments asked for examples of how performance standards could be used in such an analysis. As explained in the Initial Statement of Reasons, the Natural Resources Agency finds that CEQA leaves to lead agencies the choice of the most appropriate methodology to analyze a project's impacts, and that rule should continue to apply in the context of greenhouse gas emissions. The reasoning supporting this determination is set forth below.

First, nothing in CEQA prohibits use of a qualitative analysis or requires the use of a quantitative analysis. As explained in the Initial Statement of Reasons, CEQA directs lead agencies to consider qualitative factors. (Initial Statement of Reasons, at p. 19; Public Resources Code, § 21001(f).) Further, the existing CEQA Guidelines recognize that thresholds of significance, which are used in the determination of significance, may be expressed as quantitative, qualitative or performance-based standards. (State CEQA Guidelines, § 15064.7.) Moreover, even where quantification is technically or theoretically possible, "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors." (State CEQA Guidelines, § 15204(a); see also *Ass'n of*

Irritated Residents v. County of Madera (2003) 107 Cal.App.4th 1383, 1396-1398; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 27 Cal.App.4th 713, 728.)[12]

Second, the comments do not appropriately distinguish between the determination of significance and the informational standards governing the preparation of environmental documents. The purpose of section 15064.4 is to assist the lead agency in determining whether a project's greenhouse gas emissions may be significant, which would require preparation of an EIR, and if an EIR is prepared, to determine whether such emissions are significant, which would require the imposition of feasible mitigation or alternatives. The existing CEQA Guidelines contain several provisions governing the informational standards that apply to various environmental documents. Conclusions in an initial study, for example, must be "briefly explained to indicate that there is some evidence to support" the conclusion. (State CEQA Guidelines, § 15063(d) (emphasis added).) Similarly, if an EIR is prepared, a determination that an impact is not significant must be explained in a "statement briefly indicating the reasons that various possible significant effects of a project" are in fact not significant. (State CEQA Guidelines, § 15128 (emphasis added).) If the impact is determined to be significant, the impact "should be discussed with emphasis in proportion to their severity and probability of occurrence." (State CEQA Guidelines, § 15143.) The explanation of significance in an EIR must be "prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences" and must demonstrate "adequacy, completeness, and a good faith effort at full disclosure." (State CEQA Guidelines, § 15151.) In sum, while proposed section 15064.4(a) reflects the requirement that a lead agency base its significance determination on substantial evidence, whether quantitative, qualitative or both, it does not, as some comments appear to fear, alter the rules governing the sufficiency of information in an environmental document.

Third, the discretion recognized in section 15064.4 is not unfettered. A lead agency's analysis, whether quantitative or qualitative, would be governed by the standards in the first portion of section 15064.4. The first sentence applies to the context of greenhouse gas emissions the general CEQA rule that the determination of significance calls for a careful judgment by the lead agency. (Proposed § 15064.4(a) ("[t]he determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064").) The second sentence sets forth the requirement that the lead agency make a good-faith effort to describe, calculate or estimate the amount of greenhouse gas emissions

[12] Notably, as administrative regulations, the development of the proposed regulations is governed by the Administrative Procedures Act. Government Code section 11340.1(a) states the Legislature's intent that administrative regulations substitute "performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process." Thus, absent authority in CEQA that would prohibit a qualitative analysis, section 15064.4 appropriately recognizes a lead agency's discretion to determine what type of analysis is most appropriate to determine the significance of a project's greenhouse gas emissions.

resulting from a project. That sentence has been further revised, as explained in greater detail below, to provide that the description, calculation or estimation is to be based "to the extent possible on scientific and factual data." The third sentence advises that the exercise of discretion must be made "in the context of a particular project." Thus, as provided in existing section 15146, the degree of specificity required in the analysis will correspond to the degree of specificity involved in the underlying project. In other words, even a qualitative analysis must demonstrate a good-faith effort to disclose the amount and significance of greenhouse gas emissions resulting from a project.

Fourth, the discretion recognized in proposed section 15064.4 would not enable a lead agency to ignore evidence submitted to it as part of the environmental review process. For example, if a lead agency proposes to adopt a negative declaration based on a qualitative analysis of the project's greenhouse gas emissions, and a quantitative analysis is submitted to that lead agency supporting a fair argument that the project's emissions may be significant, an EIR would have to be prepared. The same holds true if a lead agency proposes to adopt a negative declaration based on a quantitative analysis, and qualitative evidence supports a fair argument that the project's emissions may be significant. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm*. (2001) 91 Cal.App.4th 1344, 1382; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 881-882 (citizens' personal observations about the significance of noise impacts on their community constituted substantial evidence that the impact may be significant and should be assessed in an EIR, even though the noise levels did not exceed general planning standards).) Similarly, even if an EIR is prepared, a lead agency would have to consider and resolve conflicts in the evidence in the record. (State CEQA Guidelines, § 15151 ("EIR should summarize the main points of disagreement among the experts"); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.)

Finally, regarding performance standards, several examples exist of the types of performance standards that might appropriately be used in determining the significance of greenhouse gas emissions. Proposed section 15183.5(b)(1)(D), for example, contemplates that a plan for the reduction of greenhouse gas emissions may contain performance based standards. Where such standards are developed as part of such a plan, a lead agency would have evidence indicating that compliance with such standards would indicate that the impact of greenhouse gas emissions would be less than significant. Further, in adopting SB375, the Legislature acknowledged that regional transportation plans, and the environmental impact reports prepared to analyze those plans, may contain performance standards that would apply to transit priority projects. (See, e.g., Public Resources Code, § 21155.2.) Other potential examples[13] include the Bay Area Air Quality Management District's proposed Best Management Practices for Construction Greenhouse Gas Emissions (calling for use of alternative fuels, local building materials and recycling), and the California Public Utilities Commission's Performance Standard for Power Plans (requiring emissions no greater

[13] The Natural Resources Agency does not necessarily endorse the use of these performance standards. Lead agencies must determine whether a particular standard is appropriate based on the substantial evidence supporting it and the context of the particular project.

than a combined cycle gas turbine plant). As with either a qualitative or quantitative analysis, reliance on performance standards must be supported with "scientific or factual data" indicating that compliance with the standard will ensure that impacts of greenhouse gas emissions are less than significant.

In sum, the proposed section 15064.4(a) appropriately reflects the standards in CEQA governing the determination of significance and the discretion CEQA leaves to lead agencies to determine how to analyze impacts. Mandating that lead agencies must quantify emissions whenever quantification is possible would be a departure from the CEQA statute.

Existing Environmental Setting

Several comments focused on the phrase "existing environmental setting" in section 15064.4(b)(1). Some comments urged, for example, that only "net" emissions should be considered. Comments from energy producers suggested that the phrase "existing environmental system" should encompass the entire energy system, which extends beyond California's borders. Some comments suggested that section 15064.4 should include a lifecycle analysis.

Section 15064.4(b)(1) advises lead agencies to consider the extent to which a project would increase or decrease greenhouse gas emissions compared to the existing environmental setting. In performing this analysis, a lead agency must account for all project phases, including construction and operation, as well as indirect and cumulative impacts. (State CEQA Guidelines, §§ 15063(a) ("[a]ll phases of project planning, implementation, and operation must be considered in the initial study…"), 15064(h) (addressing cumulative impacts), 15126 ("[a]ll phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation"), 15358(a)(2) (defining "effects" to include indirect effects), 15378.) The "setting" to be described varies depending on the project and the potential environmental resources that it may affect. In *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, for example, the lead agency failed to adequately describe the environmental setting by limiting its discussion primarily to the southern portions of its water system. Framing the setting narrowly resulted in impacts to the northern portion of the water system being ignored. Finding that section 15125 is to be construed broadly to ensure the fullest protection to the environment, the court in that case held that the lead agency was required to disclose that increased use of the southern portion of the water system would require greater diversions from the northern portion, and to analyze the impacts on species in the northern portion of the system. (*Id*. at pp. 873-875.) In the context of power generation, to the extent that a project may cause changes in greenhouse gas emissions in an existing power system, and substantial evidence substantiates such changes, those changes may be considered pursuant to section 15064.4(b)(1).

Similarly, if an agency has performed an analysis that demonstrates that a particular process for waste treatment does not result in an increase in greenhouse gas emissions compared to biogenic emissions that already occurs in the atmosphere, that evidence may support a conclusion that the project would not cause an increase in greenhouse gas emissions. Thus, to the extent a lead agency does not consider biogenic emissions to be new emissions, and its analysis is supported with substantial evidence, the text in section 15064.4(b)(1) would be broad enough to encompass those emissions, subject to the limitation that such analysis could not be used in a way that would mask the effects of emissions associated with the project. For example, if the emissions occurring in the short-term will have impacts that differ from emissions occurring in the future, those differences may need to be analyzed.

Finally, some comments suggested that the Guidelines should authorize a "net" or "lifecycle" analysis for projects that operate within a closed system. Nothing in section 15064.4 precludes such analysis where such analysis complies with the provision of section 15064, and where substantial evidence supports the ultimate conclusions and findings. However, since a "net" analysis may only be appropriate or possible in limited cases, the Natural Resources Agency deliberately chose to draft section 15064.4 broadly. Additionally, in some situations, a true "net" analysis may not be technically feasible or scientifically possible, and determination of an appropriate baseline for determining a "net" effect may be difficult.

As explained below, the Natural Resources Agency has deliberately avoided the term "lifecycle," however, to the extent an agency equates "lifecycle" with what occurs in the existing environmental setting, section 15064.4 authorizes lead agencies to consider such evidence.

Thresholds of Significance

Some comments expressed concern that the proposed amendments did not establish a statewide threshold of significance. Others suggested that most lead agencies are not qualified to establish their own thresholds, and if they do adopt thresholds, they should be required to adopt the most stringent threshold possible.

The CEQA Guidelines do not establish thresholds of significance for other potential environmental impacts, and SB97 did not authorize the development of a statewide threshold as part of this CEQA Guidelines update. Rather, the proposed amendments recognize a lead agency's existing authority to develop, adopt and apply their own thresholds of significance or those developed by other agencies or experts. As set forth in the existing section 15064.7, a threshold is "an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." Because a threshold would be used in the determination of significance,

the threshold would need to be supported with substantial evidence. (State CEQA Guidelines, § 15064.7(b).)

As explained in a recent decision of the Third District Court of Appeal, "[p]ublic agencies are … encouraged to develop thresholds of significance for use in determining whether a project may have significant environmental effects." (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108.) Nothing in CEQA requires that thresholds be developed by experts or expert agencies; however, "thresholds can be drawn from existing environmental standards, such as other statutes or regulations." (*Id*. at p. 1107.) Regardless of who develops the threshold, if an agency adopts a threshold, it must be supported with substantial evidence. (State CEQA Guidelines, § 15064.7(b).) Additionally, "thresholds cannot be used to determine automatically whether a given effect will or will not be significant[;]" "[i]nstead, thresholds of significance can be used only as a measure of whether a certain environmental effect "will *normally* be determined to be significant" or "*normally* will be determined to be less than significant" by the agency. (Guidelines, § 15064.7, subd. (a), italics added.)" (*Protect the Historic Amador Waterways*, *supra*, 116 Cal.App.4th at pp. 1108-1109.) Proposed subdivision (c) of section 15064.7 recognizes the principles described above by expressly recognizing that experts and expert agencies may be developing thresholds that other public agencies may find useful in their own CEQA analyses, but requiring, as a safeguard, that any such threshold be supported with substantial evidence.

Notably, nothing in either AB32 or SB97 requires a finding of significance for any particular level of increase in greenhouse gas emissions. AB32, and regulations implementing that statute, will require reductions in emissions from certain sectors in the economy, but do not preclude new emissions. Moreover, as explained in the Initial Statement of Reasons, the proposed amendments do not establish a zero emissions threshold of significance because "there is no 'one molecule rule' in CEQA. (*CBE*, *supra*, 103 Cal.App.4th at 120.)" (Initial Statement of Reasons, at p. 20.)

Some comments suggested that any numeric thresholds that are developed should not be set at such a low level that adverse economic impacts would result. While economic issues are appropriate in the determination of feasibility of mitigation and alternatives, it is not appropriate in the determination of significance (see, e.g., Public Resources Code, § 21002), so a threshold should not be designed with economic impacts in mind. Moreover, even a "high" threshold would not relieve agencies of the requirement to consider any evidence indicating that a project may have a significant effect despite falling below a threshold. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109; *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.)

Mitigation Hierarchy

CEQA's substantive mandate requires that "public agencies should not approve projects as proposed if there are … feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" (Public Resources Code, § 21002.) The statute defines feasible to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Public Resources Code, § 21061.1.) The Legislature further provided that a lead agency may use its lawful discretion to mitigate significant impacts to the extent provided by other laws:

> In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law.

(Public Resources Code, § 21004.) Cities and counties may rely on their constitutional police powers, for example, while the ability of other agencies to require mitigation may be limited by the scope of their statutory authority. Mitigation is also subject to constitutional limitations; i.e., there must be a nexus between the mitigation measure and the impact it addresses, and the mitigation must be roughly proportional to the impact of the project. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; State CEQA Guidelines, § 15126.4(a)(4).)

CEQA itself imposes very few limitations on a lead agency's discretion to impose mitigation. For example, agencies may not mitigate the effects of a housing project by reducing the proposed number of units if other feasible mitigation measures are available. (Public Resources Code, § 21159.26.) Similarly, the Legislature has prescribed specific types of mitigation in only very limited circumstances; i.e., impacts to archeological resources and oak woodlands. (Public Resources Code, §§ 21083.2, 21083.4.)

SB 97 specifically called for guidelines addressing the mitigation of greenhouse gas emissions. In doing so, however, the Legislature did not alter a lead agency's discretion, authority or limitations on the imposition of mitigation where the impacts of a project's greenhouse gas emissions are significant. Thus, as explained in the Initial Statement of Reasons, the existing CEQA rules apply to the mitigation of greenhouse gas emissions.

Within the scope of a lead agency's existing authority, the CEQA Guidelines already contain provisions that recognize a lead agency's obligation to balance various factors in determining how or whether to carry out a project. (State CEQA Guidelines, § 15021(d).) Further, the Guidelines already require that "[w]here several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified." (State CEQA Guidelines, § 15126.4(a)(1)(B).)

Additionally, public agencies are directed to adopt their own implementing procedures, consistent with CEQA and the State CEQA Guidelines, which could set forth the types of mitigation that a particular agency finds to be most appropriate for projects subject to its approval. (State CEQA Guidelines, § 15022.) The Natural Resources Agency cannot, however, state in the State CEQA Guidelines that all lead agencies have the authority to prioritize types of mitigation measures, or to establish any particular priority order for them. Each lead agency must determine the scope of its own authority based on its own statutory or constitutional authorization.

Reliability and Effectiveness of Mitigation

Some comments expressed concern about the reliability and efficacy of some mitigation strategies. In response to such comments, the Natural Resources Agency further revised section 15126.4(c) to expressly require that any measures, in addition to being feasible, must be supported with substantial evidence and be capable of monitoring or reporting. (See Revised Section 15126.4(c) (October 23, 2009).) This addition reflects the requirements in Public Resources Code section 21081.5 that findings regarding mitigation be supported with substantial evidence and the monitoring or reporting requirement in section 21081.6.

The text of proposed section 15126.4(c), addressing mitigation of greenhouse gas emissions, also requires that mitigation measures be effective. The first sentence of that section requires that mitigation be "feasible." Further, the statue defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Public Resources Code, § 21061.1 (emphasis added); see also State CEQA Guidelines § 15364 (adding "legal" factors to the definition of feasibility.) A recent decision of the Third District Court of Appeal confronting questions regarding the effectiveness of a mitigation measure explained: "concerns about whether a specific mitigation measure 'will actually work as advertised,' whether it 'can … be carried out,' and whether its 'success … is uncertain' go to the feasibility of the mitigation measure[.]" (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 622-623.) Thus, by requiring that lead agencies consider feasible mitigation of greenhouse gas emissions, section 15126.4(c) already requires that such measures be effective.

Off-site Mitigation and Offsets

Relatively little authority addresses the question of how close of a causal connection must exist between off-site emissions reductions and project implementation in order to be adequate mitigation under CEQA. CEQA requires lead agencies to mitigate or avoid the significant effects of proposed projects where it is feasible to do so. While the CEQA statute does not define mitigation, the State CEQA Guidelines define mitigation to include:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

(State CEQA Guidelines, § 15370.) As subdivision (e) implies, off-site measures may constitute mitigation under CEQA, and such measures have been upheld as adequate mitigation in CEQA case law. (See, e.g., *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 619-626.)

Whether on-site or off-site, to be considered mitigation, the measure must be tied to impacts resulting from the project. Section 21002 of the Public Resources Code, the source of the requirement to mitigate, states that "public agencies should not approve projects as proposed if there are … feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" Similarly, section 21081(a)(1) specifies a finding by the lead agency in adopting a project that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." Both statutory provisions expressly link the changes to be made (i.e., the "mitigation measures") to the significant effects of the project. Courts have similarly required a link between the mitigation measure and the adverse impacts of the project. (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 128-131 (EIR must discuss "the history of water pumping on [the off-site mitigation] property and its feasibility for providing an actual offset for increased pumping on the [project] property").) The text of sections 21002 and 21081, and case law requiring a "nexus" between a measure and a project impact, together indicate that "but for" causation is a necessary element of mitigation. In other words, mitigation should normally be an activity that occurs in order to minimize a particular significant effect. Or, stated another way and in the context of greenhouse gas emissions, emissions reductions that would occur without a project would not normally qualify as mitigation.

Notably, this interpretation of the CEQA statute and case law is consistent with the Legislature's directive in AB32 that reductions relied on as part of a market-based compliance mechanism must be "in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission

reduction that otherwise would occur." (Health and Safety Code, § 38562(d)(2).) While AB32 and CEQA are separate statutes, the additionality concept may be applied analytically in the latter as follows: greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the existing baseline. Pursuant to section 15064.4(b)(1), a new project's emissions should be compared against that existing baseline.

Thus, in light of the above, and in response to concerns raised in the comments, the Natural Resources Agency has revised section 15126.4(c)(3) to state that mitigation includes: "Off-site measures, including offsets that are not otherwise required, to mitigate a project's emissions[.]" This provision is intended to be read in conjunction with the statutory mandate in Public Resources Code sections 21002 and 21081 that mitigation be tied to the effects of a project.

This provision would not limit the ability of a lead agency to create, or rely on the creation of, a mechanism, such as an offset bank, created prospectively in anticipation of future projects that will later rely on offsets created by those emissions reductions. The Initial Statement of Reasons referred, for example, to community energy conservation projects. (Initial Statement of Reasons, at p. 38.) Such a program could, for example, identify voluntary energy efficiency retrofits that would not occur absent implementation of the program, and then fund the retrofits through the sale of offsets that would occur as a result of the retrofit. Emissions reductions that occur as a result of a regulation requiring such reduction, on the other hand, would not constitute mitigation.

Some comments opined that offsets are highly uncertain and of questionable legitimacy. The Initial Statement of Reasons, however, cites several sources discussing examples of offsets being used in a CEQA context. Further, the ARB Scoping Plan describes offsets as way to "provide regulated entities a source of low-cost emission reductions, and … encourage the spread of clean, efficient technology within and outside California." (Scoping Plan, Appendix C, at p. C-21.) The Natural Resources Agency finds that the offset concept is consistent with the existing CEQA Guidelines' definition of "mitigation," which includes "[r]ectifying the impact by repairing, rehabilitating, or restoring the impacted environment" and "[c]ompensating for the impact by replacing or providing substitute resources or environments." (State CEQA Guidelines, §§ 15370(c), (e).)

While the proposed amendments recognize offsets as a potential mitigation strategy, they do not imply that offsets are appropriate in every instance. The efficacy of any proposed mitigation measure is a matter for the lead agency to determine based on the substantial evidence before it. Use of the word "feasible" in proposed Section 15126.4(c) requires the lead agency to find that any measure, including offsets, would be "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (State CEQA Guidelines, § 15364.)

Thus, the Natural Resources Agency finds that by expressly requiring that any mitigation measure be feasible, supported with substantial evidence, and capable of monitoring or reporting, section 15126.4(c) adequately addresses the concern stated in the comment that offsets may be of questionable legitimacy.

Use of Plans for the Reduction of Greenhouse Gas Emissions in a Cumulative Impacts Analysis

Section 15183.5 was developed to address tiering and streamlining the analysis of greenhouse gas emissions. Subdivision (a) highlights existing tiering and streamlining mechanisms in CEQA that may be used to address the analysis and mitigation of greenhouse gas emissions. Those mechanisms are often used for general plans and other long range planning documents. Subdivision (a) therefore recognizes that lead agencies may choose to include a programmatic analysis of greenhouse gas emissions in those long range plans. That subdivision did not create any new tiering or streamlining provisions; rather, it cross-references existing mechanisms. Each mechanism has its own benefits and drawbacks, and the use of any analysis of greenhouse gas emissions contained in such a document would be governed by the specific provisions cited in subdivision (a).

Subdivision (b), on the other hand, acknowledges that, in addition to the long range documents mentioned in subdivision (a), some agencies are voluntarily developing stand-alone plans focused specifically on the reduction of greenhouse gas emissions. Subdivision (b) is not a tiering mechanism. Tiering is governed by section 15152 of the existing CEQA Guidelines. The purpose of section 15183.5(b) is much narrower. Because climate action plans and greenhouse gas reduction plans are voluntary, and not subject to any legislative criteria or requirements, subdivision (b) was developed "to assist lead agencies in determining whether an existing greenhouse gas reduction plan is an appropriate document to use in a cumulative impacts analysis under CEQA." (Initial Statement of Reasons, at p. 54.) Specifically, a project that is consistent with a plan that satisfies the criteria in subdivision (b) may benefit from the presumption created in sections 15064(h)(3) and 15130(d) that the project's cumulative impacts are less than significant due to compliance with the plan. Subdivision (b) does not create or authorize any plans; rather, it provides a tool to determine whether a plan for the reduction of greenhouse gas emissions may be used in a cumulative impacts analysis as provided in section 15064(h)(3) or 15130(d). Section 15183.5(b) does not require that public agencies develop plans for the reduction of greenhouse gas emissions, nor does it prohibit public agencies from developing individual ordinances and regulations to address individual sources of greenhouse gas emissions.

As an example, if a general plan EIR analyzed and mitigated greenhouse gas emissions, a lead agency would likely use the specific streamlining provision applicable to general plan EIRs in section 15183, and not the more general provision in 15183.5(b). A stand alone "climate action plan" that was not analyzed in a program EIR, master EIR, or other mechanism identified in 15183.5(a) may still be used in a

cumulative impacts analysis pursuant to sections 15064(h)(3) or 15130(d), but only if that climate action plan contains the elements listed in section 15183.5(b)(1).

Some comments suggested that section 15183.5(b) should identify specific types of plans to which it would apply. That section was developed precisely because plans for the reduction of greenhouse gas emissions are not specified in law and are so varied. They have been variously titled “climate action plans”, “sustainability plans”, “greenhouse gas reduction plans”, etc. Contents of such plans also vary widely. Thus, the Natural Resources Agency cannot specifically identify which plans satisfy the criteria in subdivision (b). That determination must be made by the individual lead agency based on whether the specific plan under consideration satisfies each of the criteria in subdivision (b)(1).

Notably, public agencies are required to develop their own procedures to implement CEQA. (State CEQA Guidelines, § 15022.) If a lead agency determines that it does not have a plan for the reduction of greenhouse gas emissions that contains the criteria set forth in section 15183.5(b), but its collective policies, ordinances and other requirements nevertheless ensure that the incremental contribution of individual projects is not cumulatively considerable, and substantial evidence supports that determination, it could include such an explanation and support in its own implementing procedures.

Some comments questioned how a Sustainable Communities Strategy or Alternative Planning Strategy should be treated in light of section 15183.5. SB375 encourages programmatic analysis and planning for greenhouse gas emissions from cars and light-duty trucks, and provides specific CEQA streamlining benefits for certain types of projects that are consistent with a Sustainable Communities Strategy (SCS) or an Alternative Planning Strategy (APS). Given the specificity of those statutory provisions, sections 21155 through 21155.3 and 21159.28 of the Public Resources Code in particular, the Office of Planning and Research and the Natural Resources Agency did not find that additional guidance on those provisions was necessary at this time. Proposed section 15183.5(c), however, clarifies that while certain projects consistent with an SCS or APS may not need to analyze greenhouse gas emissions from cars and light-duty trucks, emissions from other sources still may require analysis and mitigation. As SB97 requires the CEQA Guidelines to be updated every two years to incorporate new information, additional guidance regarding the relationship between CEQA and SB375 may be developed as necessary. (See also the discussion of AB32, SB375 and CEQA, above.)

Definition of Greenhouse Gas Emissions

Several comments objected to the definition of greenhouse gas emissions in the Guidelines. Some suggested that it should be strictly limited to the gases identified in AB32. Other thought it should include all potential greenhouse gas emissions. Still others wanted to exclude biogenic emissions from the definition.

As explained in the Initial Statement of Reasons, the definition of greenhouse gases in AB32 states that GHG "includes all of the following…." (Health and Safety Code, § 38505(g).) The Legislature thus implied that other gases may also be considered GHGs. Further, the ARB Scoping Plan also acknowledged that other gases contribute to climate change. (Scoping Plan, at p. 11.) Consistent with the definition in the Health and Safety Code, the proposed definition in the Proposed Amendments is not exclusive to the six primary GHGs. The purpose of a more expansive definition is to ensure that lead agencies do not exclude from consideration GHGs that are not listed, so long as substantial evidence indicates that such non-listed gases may result in significant adverse effects. This approach is consistent with the Supreme Court's directive that CEQA be interpreted to provide the fullest possible protection to the environment. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 390.)

While the definition could not be strictly limited to the six gases identified in AB32, the Natural Resources Agency concluded that specific mention of other potential greenhouse gases was also not appropriate. Notably, the federal Environmental Protection Agency limited its proposed endangerment finding to those same six listed gases. It did so because the six gases are well studied, and have been the focus of climate change research. (Federal Register, v. 74, 18886, 18895 (April 24, 2009).) It is not necessary to list each of the known potential greenhouse gases because the proposed definition in section 15364.5 is written broadly, stating that the greenhouse gas emissions "are not limited to" the listed examples. As further explained in the Initial Statement of Reasons, the "purpose of a more expansive definition is to ensure that lead agencies do not exclude from consideration GHGs that are not listed, so long as substantial evidence indicates that such non-listed gases may result in significant adverse effects." (Initial Statement of Reasons, at p. 58.) Because the CEQA Guidelines must be updated periodically to reflect developments relating to greenhouse gas emissions, the Natural Resources Agency may expand the definition of greenhouse gas emissions if necessary to reflect the most current science and practice.

The Natural Resources Agency also concluded that the definition of greenhouse gas emissions should not differentiate between biogenic and anthropogenic emissions. SB97 does not distinguish between the sources of greenhouse gas emissions. Notably, neither AB32 nor the Air Resources Board's Scoping Plan distinguishes between biogenic and anthropogenic sources of greenhouse gas emissions. On the contrary, the Scoping Plan identifies methane from, among other sources, organic wastes decomposing in landfills as a source of emissions that should be controlled. (Scoping Plan, at pp. 62-63.)

Forestry

Some comments objected to the inclusion of questions related to forest resources in the Appendix G questions in the section on agricultural resources.

SB97 called for guidance on the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions. (Public Resources Code, § 21083.05.) As explained in the Initial Statement of Reasons, forest conversions may result in direct greenhouse gas emissions. Further, such conversions remove existing forest stock and the potential for further carbon sequestration. (Initial Statement of Reasons, at p. 63.) Sequestration is recognized as a key mitigation strategy in the Air Resources Board's Scoping Plan. (Scoping Plan, Appendix C, at p. C-168.)

The addition of questions related to forestry does not target the establishment of agricultural operations. The questions ask about *any* conversion of forests, not just conversions to other agricultural operations. Moreover, analysis of impacts to forestry resources is already required. The Legislature has declared that "forest resources and timberlands of the state are among the most valuable of the natural resources of the state" and that such resources "furnish high-quality timber, recreational opportunities, and aesthetic enjoyment while providing watershed protection and maintaining fisheries and wildlife." (Public Resources Code, § 4512(a)-(b).) Because CEQA defines "environment" to include "land, air, water, minerals, flora, fauna, noise, [and] objects of historic or aesthetic significance" (Public Resources Code, section 21060.5), and because forest resources have been declared to be "the most valuable of the natural resources of the state," projects affecting such resources must be analyzed, whether or not specific questions relating to forestry resources appear in Appendix G. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) In effect, suggestions that the Appendix G questions be limited to conversions to "non-agricultural uses" ask the Natural Resources Agency to adopt changes that are inconsistent with CEQA, which it cannot do.

Questions related to greenhouse gas emissions in Appendix G are not sufficient to address impacts related to forestry resources. As explained in the Initial Statement of Reasons, not only do forest conversions result in greenhouse gas emissions, but may also "remove existing carbon stock (i.e., carbon stored in vegetation), as well as a significant carbon sink (i.e., rather than emitting GHGs, forests remove GHGs from the atmosphere)." (Initial Statement of Reasons, at p. 63.) Further, conversions may lead to "aesthetic impacts, impacts to biological resources and water quality impacts, among others." The questions related to greenhouse gas emissions would not address such impacts. Thus, the addition of forestry questions to Appendix G is appropriate both pursuant to SB97 and the Natural Resources Agency's general authority to update the CEQA Guidelines pursuant to Public Resources Code section 21083(f).

"Level of Service" and Transportation Impact Analysis

The Natural Resources Agency acknowledges the concern expressed by some comments that the use of level of service metrics in CEQA analysis has led to an auto-centric focus. The Office of Planning and Research and the Natural Resources Agency have participated in extensive outreach with stakeholder groups to revise question (a) in the transportation section of Appendix G to accomplish the following goals:

- Assess traffic impacts on intersections, streets, highways and freeways as well as impacts to pedestrian, non-vehicular and mass-transit circulation

- Recognize a lead agency's discretion to choose methodology, including LOS, to assess traffic impacts

- Harmonize existing requirements in congestion management programs, general plans, ordinances, and elsewhere

In response to public comments submitted on proposed amendments, the Natural Resources Agency further refined question (a) to shift the focus from the capacity of the circulation system to consistency with applicable plans, policies that establish objective measures of effectiveness.

Some comments advocated leaving the existing text in question (a) of the transportation section of Appendix G intact. As explained in the Initial Statement of Reasons,

> [Q]uestion (a) changes the focus from an increase in traffic at a given location to the effect of a project on the overall circulation system in the project area. This change is appropriate because an increase in traffic, by itself, is not necessarily an indicator of a potentially significant environmental impact. (Ronald Miliam, AICP, Transportation Impact Analysis Gets a Failing Grade When it Comes to Climate Change and Smart Growth; see also Land Use Subcommittee of the Climate Action Team LUSCAT Submission to CARB Scoping Plan on Local Government, Land Use, and Transportation Report (May, 2008) at pp. 31, 36.) Similarly, even if some projects may result in a deterioration of vehicular level of service – that is, delay experienced by drivers – the overall effectiveness of the circulation system as a whole may be improved. (*Ibid*.) Such projects could include restriping to provide bicycle lanes or creating dedicated bus lanes. Even in such cases, however, any potential adverse air quality or other impacts would still have to be addressed as provided in other sections of the checklist. Finally, the change to question (a) also recognizes that the lead agency has discretion to choose its own metric of analysis of impacts to intersections, streets, highways and freeways. (Pub. Resources Code, § 21081.2(e); *Eureka Citizens for Responsible Gov't v. City of Eureka*, *supra*, 147 Cal.App.4th at 371-373 (lead agency has discretion to choose its methodology).) Thus, "level of service" may or may not be the applicable measure of effectiveness of the circulation system.

(Initial Statement of Reasons, at pp. 64-65.) Further, evidence presented to the Natural Resources Agency indicates that "mitigation" of traffic congestion may lead to even greater environmental impacts than might result from congestion itself. (See, e.g.,

Cervero, Robert. (July, 2001). *Road Expansion, Urban Growth, and Induced Travel: A Path Analysis*. Journal of the American Planning Association, Vol. 69 No. 2. American Planning Association (confirming "induced demand" phenomenon associated with capacity improvements).)

While the terms "volume to capacity ratio" and "congestion at intersections" no longer appear in question (a), nothing precludes a lead agency from including such measures of effectiveness in its own general plan or policies addressing its circulation system. Though the Office of Planning and Research originally recommended specifying "vehicle miles traveled" as a question in Appendix G, it later revised its recommendation to allow lead agencies to choose their own measures of effectiveness. (Letter from OPR Director, Cynthia Bryant, to Secretary for the Natural Resources Agency, Mike Chrisman, April 13, 2009.) Thus, as revised, question (a) accommodates lead agency selection of methodology, including, as appropriate, vehicle miles traveled, levels of service, or other measures of effectiveness.

Other comments objected to any mention of the phrase "level of service" in question (b) of the transportation section of the Appendix G checklist. That question, as revised, would ask whether a project would conflict with the provisions of a congestion management program. The Government Code, beginning at section 65088, requires Congestion Management Agencies, in urbanized areas, to adopt Congestion Management Programs covering that agency's cities and county, and in consultation with local governments, transportation planning agencies, and air quality management districts. A CMP must, pursuant to statute, contain level of service standards for certain designated roadways. A CMP must also include a land use analysis program to assess the impact of land use decisions on the regional transportation system. A CMA may require that land use analysis to occur through the CEQA process. Thus, level of service standards cannot be deleted from the Appendix G checklist altogether. The proposed amendments did, however, amend question (b) to put level of service standards in the broader context of the entire CMP, which should also contain travel demand measures and other standards affecting the circulation system as a whole. Beyond this amendment, however, the Natural Resources Agency cannot remove level of service standards entirely from the Appendix G checklist.

Notably, the primary purpose of the proposed amendments is to update the CEQA Guidelines on the analysis and mitigation of greenhouse gas emissions. While certain changes to Appendix G were proposed pursuant to the Natural Resources Agency's general authority to update the CEQA Guidelines, those changes were modest and were intended to address certain misapplications of CEQA in a way that hinders the type of development necessary to reduction of greenhouse gas emissions. Transportation planning and impact analysis continues to evolve, as new multimodal methods of analysis and guidelines on the integration of all modes of transportation and users into the circulation system are being developed. Additional updates to Appendix G may be appropriate in the future to address those developments.

Parking

As explained in the Initial Statement of Reasons, the Natural Resources Agency concluded that the question related to parking adequacy should be deleted from the Appendix G checklist in part as a result of the decision in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656. The court in that case distinguished the social impact of inadequate parking from actual adverse environmental impacts. In particular, that court explained:

> [T]here is no statutory or case authority requiring an EIR to identify specific measures to provide additional parking spaces in order to meet an anticipated shortfall in parking availability. The social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scarce parking on traffic and air quality *is*. Under CEQA, a project's social impacts need not be treated as significant impacts on the environment. An EIR need only address the *secondary physical* impacts that could be triggered by a social impact.

(*Id*. at p. 698 (emphasis in original).) The Natural Resources Agency is aware of no authority requiring an analysis of parking adequacy as part of a project's environmental review. Rather, the Agency concurs with the court in the *San Franciscans* case that inadequate parking is a social impact that may, depending on the project and its setting, result in secondary effects. Consistent with existing CEQA Guidelines section 15131(a), deletion of the parking adequacy question from Appendix G checklist will ensure that the "focus of the analysis shall be on the physical changes." Specifically, the Appendix G checklist contains questions asking about possible project impacts to air quality and traffic.

Some comments pointed to examples of potential adverse impacts that could result from parking shortages, such as double-parking and slower circulation speeds, and referred specifically to a study of "cruising" behavior by Donald Shoup that noted that cruising could result in emissions of carbon dioxide. The relationship between parking adequacy and air quality is not as clear or direct as some comments imply. Mr. Shoup, for example, submitted comments to the Natural Resources Agency supporting the deletion of the parking question. (See, Letter from Donald Shoup, Professor of Urban Planning, University of California, Los Angeles, October 26, 2009.) In those comments, Mr. Shoup opines that cruising results not from the number of parking spaces associated with a project, but rather from the price associated with those parking spaces. (*Ibid*.) The Natural Resources Agency also has evidence before it demonstrating that providing parking actually causes greater emissions due to induced demand. The California Air Pollution Control Officers Association CEQA White Paper, for example, suggests reducing available parking as a way to reduce greenhouse gas emissions. (Greg Tholen, et al. (January, 2008). CEQA & Climate Change: Evaluating and Addressing Greenhouse Gas Emissions from Projects Subject to the California Environmental Quality Act. California Air Pollution Control Officers Association, at Appendix B, pp. 8-9.)

Moreover, parking analyses do not typically address either air quality or traffic impacts; rather, such analyses often focus on the number of parking spaces necessary to satisfy peak demand, which is often established by a local agency as a parking ratio (i.e., one space per 250 square feet of office space). (See, e.g., Shoup, Donald. (1999). In Lieu of Required Parking. Journal of Planning Education and Research, Vol. 18 No. 4. Association of Collegiate Schools of Planning, at p. 309.) Thus, the question in Appendix G related to parking adequacy does not necessarily lead to the development of information addressing actual environmental impacts.

In sum, nothing in the CEQA statute, or cases interpreting that statute, require an analysis of parking demand. Further, parking supply is not a reasonable proxy for direct physical impacts associated with a project because parking supply may in some circumstances adversely affect air quality and traffic while in other circumstances, it may create air quality and traffic benefits. Thus, maintaining the parking question in the general Appendix G checklist is not necessary to effectuate the purposes of the CEQA statute.

The Natural Resources Agency acknowledges, however, that parking supply may lead to social impacts that agencies may wish to regulate. Cities and counties can, and do, include parking related policies in their municipal ordinances and general plans. (See, e.g., Office of Planning and Research, General Plan Guidelines, at pp. 59-60.) To the extent an agency has developed parking related policies in a general plan, zoning ordinance, or other regulation, consistency with those policies could be analyzed as a potential land use impact. Public agencies must, moreover, develop their own procedures to implement CEQA, and so may include parking-related questions in their own checklist if appropriate in their own circumstances. (State CEQA Guidelines, §§ 15022, 15063(f).)

AB32, SB375 and CEQA

Many comments suggested various links between CEQA, AB32 and SB375. While there is some overlap between the statutes, each contains its own requirements and serves its own purposes. While recognizing the role of regulatory programs in addressing cumulative impacts analysis in CEQA, the Proposed Amendments deliberately avoided linking the determination of significance under CEQA to compliance with AB32. The following addresses the CEQA effect of compliance with AB32 and SB375.

<u>The Effect of Consistency with the Scoping Plan and the Regulations Implementing AB32</u>

The Initial Statement of Reasons explained that the Scoping Plan "may not be appropriate for use in determining the significance of individual projects … because it is conceptual at this stage and relies on the future development of regulations to

implement the strategies identified in the Scoping Plan." (Initial Statement of Reasons, at p. 14.) Compliance with the regulations implementing the Scoping Plan, on the other hand, might be relevant in determining the significance of a project's emissions, if the particular regulation or regulations specifically addresses the emissions from the project. (*Ibid*.) Compliance with regulations is specifically addressed in section 15064(h)(3) and 15064.4(b)(3).

Specifically, both sections provide that a lead agency may consider compliance with such regulations, and if relying on regulations to determine that an impact is less than significant, the lead agency must explain how that particular regulation addresses the impact of the project. Both sections also recognize that a lead agency must still consider whether any evidence supports a fair argument that a project may still have a significant impact despite compliance with the regulation.

<u>The Effect of Consistency with Plans for the Reduction of Greenhouse Gas Emissions, Sustainable Communities Strategies and Alternative Planning Strategies.</u>

Several comments questioned whether the references in the Proposed Amendments to "greenhouse gas reduction plans" were intended to include a Sustainable Communities Strategy (SCS) or Alternative Planning Strategy (APS).

SB375 created both the SCS and APS as strategies to be adopted by metropolitan planning organizations for the purpose of achieving greenhouse gas emissions reductions targets established by the California Air Resources Board. SB375 inserted specific provisions into CEQA governing the review of projects that are consistent with an APS or SCS. (See, e.g., Public Resources Code, §§ 21155-21155.3, 21159.28.) Because of the specificity of those provisions, the Office of Planning and Research and the Natural Resources Agency determined that no further guidance was needed in the Proposed Amendments to address the use of an SCS or APS.

As explained in the Initial Statement of Reasons, however, OPR and the Natural Resources Agency observed that many jurisdictions were adopting plans specifically for the purpose of addressing and reducing greenhouse gas emissions. (Initial Statement of Reasons, at pp. 12-13.) Those plans may be titled Climate Action Plans, Greenhouse Gas Reduction Plans, Sustainability Plans, etc. While recognizing the great variety of such plans, as well as the lack of legislative or other direction regarding the content of such plans, OPR and the Natural Resources Agency proposed the addition of a new Guidelines section 15183.5(b) to establish criteria for those plans if they are to be used in a CEQA cumulative impacts analysis as provided in sections 15064(h)(3) and 15130(d). The proposed amendments to section 15064(h)(3) and addition of section 15183.5(b) were not intended to limit or affect the use of an APS or SCS as provided in the Public Resources Code.

SB375 included provisions that would exempt certain types of projects from CEQA, and would apply the substantial evidence standard of review to other types of projects reviewed under a Sustainable Communities Environmental Assessment. Some

comments raised concerns that the proposed amendments, and section 15064(h)(3) in particular, may conflict with those provisions of SB375. The last sentence of Section 15064(h)(3), which acknowledges the application of the fair argument standard in the determination of whether to prepare an EIR, complies with existing law. (*CBE*, *supra*, 103 Cal.App.4th at 115-116.) SB375's specific statutory provisions, and not section 15064(h)(3), would control for a project that satisfies the conditions in those provisions. Thus, there is no conflict between the existing language in Section 15064(h)(3) and SB375.

Comments were also raised about the application of section 15125(d), which requires a discussion of a project's consistency with applicable regional plans, to an APS or SCS. One comment suggested that, for CEQA purposes, an SCS and APS are interchangeable. The Natural Resources Agency disagrees. An Alternative Planning Strategy is not a land use plan with which land use consistency should be analyzed under CEQA. (Government Code, § 65080(b)(2)(H)(v).) For that reason, the Natural Resources Agency deliberately did not propose to add "Alternative Planning Strategy" to the list of plans to be considered in an environmental setting pursuant to section 15125. There is no similar statement precluding analysis of consistency with a Sustainable Communities Strategy, however. Thus, the reference to a "regional transportation plan" in the existing section 15125(d) remains appropriate. As explained above, and the Initial Statement of Reasons, the reference to "plans for the reduction of greenhouse gas emissions" is intended to cover a broad range of plans that may be adopted by state and local agencies. The specific statutory provisions governing an Alternative Planning Strategy or Sustainable Communities Strategy would, however, control.

Similarly, some comments expressed concern regarding the application of the new Appendix G question asking about a project's consistency with applicable plans for the reduction of greenhouse gas emissions. That Appendix G question, as revised, asks whether a project would: "Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?" (Emphasis added.) In response to comments, the Natural Resources Agency replaced the word "any" with the word "an" to clarify that only a plan determined to be applicable by the lead agency, and not any plan developed by any person or entity, should be considered in determining whether a project would result in a significant impact relating to greenhouse gas emissions. Government Code section 65080(b)(2)(H)(v) states: an "alternative planning strategy shall not constitute a land use plan, policy, or regulation, and the inconsistency of a project with an alternative planning strategy shall not be a consideration in determining whether a project may have an environmental effect" for CEQA purposes. By operation of that Government Code Section 65080(b)(2)(H)(v), an alternative planning strategy would not constitute "an applicable plan" for purposes of the Appendix G question. Notably, as explained in the Initial Statement of Reasons, the Appendix G checklist is meant to provide a sample checklist of questions designed to provoke thoughtful consideration of general environmental concerns. (Initial Statement of Reasons, at p. 63.) Because it is provided as a sample only, the Office of Planning and Research and the Natural Resources Agency found that it would not be possible to

identify with specificity each plan that or may not apply to a particular jurisdiction or project.

Lead agencies, however, have discretion to revise the checklist in a way that is most appropriate for their own jurisdiction. If an individual agency in a region where an APS was prepared finds it necessary or desirable to restate Government Code Section 65080(b)(2)(H)(v) in its own checklist, it may do so. Further, while inconsistency with an APS is not, by itself, an indication of a potentially significant impact, other project characteristics would need to be considered as indicated in Section 15064.4 and other provisions of the CEQA Guidelines. Because Government Code Section 65080(b)(2)(H)(v) already provides that an APS is not a land use plan for CEQA purposes, and the Appendix G question asks only about "an applicable plan," the question need not specify an exception for an APS.

The Effect of Compliance with Regulations Implementing AB32 or Other Laws Intended to Reduce Greenhouse Gas Emissions

Some comments urged that lead agencies should be able to rely on sector-wide reductions in emissions that may result from implementation of AB32 and other regulations in mitigating an individual project's impacts. Those comments appeared to conflate the requirement that a lead agency consider cumulative impacts (i.e., the impacts resulting from a project's emissions when added to other past, present and reasonably foreseeable future emissions) with the requirement that a lead agency mitigate the significant effects of a project. The proposed amendments contain several provisions addressing the analysis of greenhouse gas emissions as a cumulative effect. For example, Section 15064(h)(3) and 15130(d) would encourage lead agencies to use existing plans for the reduction of greenhouse gas emissions in cumulative impacts analysis. Additionally, Section 15130(b)(1)(B) is proposed for amendment to allow lead agencies to use projections of emissions contained in certain plans and models. Thus, the proposed amendments would allow a lead agency to consider a project in the context of other emissions resulting from the same or other sectors.

To the extent comments suggested that reductions in emissions resulting from implementation of AB32 elsewhere can mitigate the significant effects of a separate project under CEQA, the Natural Resources Agency disagrees. (See discussion below on off-site mitigation.)

A project's compliance with regulations or requirements implementing AB32 or other laws and policies is not irrelevant. Section 15064.4(b)(3) would allow a lead agency to consider compliance with requirements and regulations in the determination of significance of a project's greenhouse gas emissions. Lead agencies should note, however, that compliance with one requirement, affecting only one source of a project's emissions, may not necessarily support a conclusion that all of the project's emissions are less than significant.

Projects That Implement AB32 or Otherwise Assist in Achieving the State's Emissions Reductions Goals

Finally, some comments noted that projects implementing AB32, or that would somehow assist the State in achieving a low-carbon future, should not be considered significant under CEQA, and that requiring such projects to mitigate their emissions would frustrate implementation of AB32. CEQA requires analysis and mitigation of a project's significant adverse environmental impacts, even if that project may be considered environmentally beneficial overall. As the Third District Court of Appeal recently explained:

> "[I]t cannot be assumed that activities intended to protect or preserve the environment are immune from environmental review. [Citations.]" …. There may be environmental costs to an environmentally beneficial project, which must be considered and assessed.

(*Cal. Farm Bureau Fed. v. Cal. Wildlife Cons. Bd.* (2006) 143 Cal. App. 4th 173, 196.) Nothing in SB97 altered this rule. Thus, lead agencies must consider whether the greenhouse gas emissions resulting from beneficial projects may be significant, and if so, whether any feasible measures exist to mitigate those emissions. If such emissions are found to be significant and unavoidable, proposed amendments to section 15093 would expressly allow lead agencies to consider the region-wide and statewide environmental benefits of a project in determining whether project benefits outweigh its adverse environmental impacts.

"Adaptation" and Analysis of the Effects of Climate Change on a Project

Several comments submitted as part of the Natural Resources Agency's SB97 rulemaking process urged it to incorporate the California Climate Adaptation Strategy (Adaptation Strategy) into the CEQA Guidelines. In considering such comments, it is important to understand several key differences between the Adaptation Strategy and the California Environmental Quality Act. First, the Adaptation Strategy is a policy statement that contains recommendations; it is not a binding regulatory document. Second, the Adaptation Strategy focuses on how the State can plan for the effects of climate change. CEQA's focus, on the other hand, is the analysis of a particular project's greenhouse gas emissions on the environment, and mitigation of those emissions if impacts from those emissions are significant. Given these differences, CEQA should not be viewed as the tool to implement the Adaptation Strategy; rather, as indicated in the Strategy's key recommendations, advanced programmatic planning is the primary method to implement the Adaptation Strategies.

There is some overlap between CEQA and the Adaptation Strategy, however. As explained in both the Initial Statement of Reasons and in the Adaptation Strategy, section 15126.2 may require the analysis of the effects of a changing climate under certain circumstances. (Initial Statement of Reasons, at pp. 68-69.) In particular,

Section 15126.2 already requires an analysis of placing a project in a potentially hazardous location. Further, several questions in the Appendix G checklist already ask about wildfire and flooding risks. Many comments on the proposed amendments asked for additional guidance, however.

Having reviewed all of the comments addressing the effects of climate change, the Natural Resources Agency revised the proposed amendments to include a new sentence in Section 15126.2 clarifying the type of analysis that would be required. Existing section 15126.2(a) provides an example of a potential hazard requiring analysis: placing a subdivision on a fault line. The new sentence adds further examples, as follows:

> Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

According to the Office of Planning and Research, at least sixty lead agencies already require this type of analysis. (California Governor's Office of Planning and Research, State Clearinghouse, The California Planners' Book of Lists (January, 2009), at p. 109.) This addition is reasonably necessary to guide lead agencies as to the scope of analysis of a changing climate that is appropriate under CEQA.

As revised, section 15126.2 would provide that a lead agency should analyze the effects of bringing development to an area that is susceptible to hazards such as flooding and wildfire, both as such hazards currently exist or may occur in the future. Several limitations apply to the analysis of future hazards, however. For example, such an analysis may not be relevant if the potential hazard would likely occur sometime after the projected life of the project (i.e., if sea-level projections only project changes 50 years in the future, a five-year project may not be affected by such changes). Additionally, the degree of analysis should correspond to the probability of the potential hazard. (State CEQA Guidelines, § 15143 ("significant effects should be discussed with emphasis in proportion to their severity and probability of occurrence").) Thus, for example, where there is a great degree of certainty that sea-levels may rise between 3 and 6 feet at a specific location within 30 years, and the project would involve placing a wastewater treatment plant with a 50 year life at 2 feet above current sea level, the potential effects that may result from inundation of that plant should be addressed. On the other extreme, while there may be consensus that temperatures may rise, but the magnitude of the increase is not known with any degree of certainty, effects associated with temperature rise would not need to be examined. (State CEQA Guidelines, § 15145 ("If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate the discussion of the impact").) Lead agencies are not required to generate their own original research on potential future changes; however, where specific information is currently available, the analysis should address that information. (State CEQA

Guidelines, § 15144 (environmental analysis "necessarily involves some degree of forecasting. While seeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can").)

The decision in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, does not preclude this analysis. In that case, the First District Court of Appeal held that a county was not required to prepare an EIR due solely to pre-existing soil contamination that the project would not change in any way. (*Id*. at 1468.) No evidence supported the petitioner's claim that the project would "expose or exacerbate" the pre-existing contamination, which was located several hundred to several thousand feet from the project site. (*Id*. at n. 1.) Moreover, the project would have no other significant effects on the environment, and other statutes exist to protect residents from contaminated soils. Thus, the question confronting that court was whether pre-existing contamination near the project was, by itself, enough to require preparation of an EIR. It held that, in those circumstances, an EIR was not required. That court also acknowledged, however, that where there is a potential for ultimately changing the environment, an EIR could be required. (*Id*. at p. 1469.) Thus, unlike the circumstances in the *Baird* case, the analysis required in section 15126.2(a) would occur if an EIR was otherwise required. Similarly, the addition to that section contemplates hazards which the presence of a project could exacerbate (i.e., potential upset of hazardous materials in a flood, increased need for firefighting services, etc.).

Finally, while the revision in section 15126.2 is consistent with the general objective of the Adaptation Strategy and is consistent with the limits of CEQA, not all issues addressed in the Adaptation Strategy are necessarily appropriate in a CEQA analysis. Thus, the revision in section 15126.2 should not be read as implementation of the entire Adaptation Strategy. Unlike hazards that can be mapped, other issues in the Adaptation Strategy, such as the health risks associated with higher temperatures, are not capable of an analysis that links a project to an ultimate impact. Habitat modification and changes in agriculture and forestry resulting from climate change similarly do not appear to be issues that can be addressed on a project-by-project basis in CEQA documents. Water supply variability is an issue that has already been addressed in depth in recent CEQA cases. (*See*, *e.g.*, *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434-435 ("If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.").) Further, legislation has been developed to ensure that lead agencies identify adequate water supplies to serve projects many years in the future under variable water conditions. (See, e.g., Water Code, § 10910 *et seq*.; Government Code, § 66473.7.) Thus, the analysis called for in section 15126.2(a) should be directed primarily at hazards, and not all aspects of the Adaptation Strategy.

Additional Changes

Several comments suggested revisions or requested clarification of issues that were not addressed in this rulemaking package. The Initial Statement of Reasons explained:

> [T]he Proposed Amendments suggest relatively modest changes to various portions of the existing CEQA Guidelines. Modifications address those issues where analysis of GHG emissions may differ in some respects from more traditional CEQA analysis. Other modifications are suggested to clarify existing law that may apply both to analysis of GHG emissions as well as more traditional CEQA analyses. The incremental approach in the Proposed Amendments is consistent with Public Resources Code section 21083(f), which directs OPR and the Resources Agency to regularly review the Guidelines and propose amendments as necessary.

(Initial Statement of Reasons, at p. 9.) Additionally, Public Resources Code section 21083.05(c) requires that the CEQA Guidelines be updated periodically "to incorporate new information or criteria established by the State Air Resources Board pursuant to" AB32. Therefore, the CEQA Guidelines will continually be updated to reflect evolving information and practice and to address developments regarding analysis of greenhouse gas emissions in the courts.

Determination Regarding Impacts on Local Government and School Districts

The Natural Resources Agency has determined that the Amendments to the State CEQA Guidelines do not impose additional requirements or costs on local government or school districts. Among other things, Public Resources Code section 21083.05 (reflected in amendments to State CEQA Guidelines sections 15064.4, 15064.7(c), 15126.4(c), 15130, 15183.5, 15364.5, and Appendix G) clarifies that CEQA requires analysis of a project's greenhouse gas emissions. Public Resources Code sections 21002 and 21004 (reflected in State CEQA Guidelines section 15126.4) require a lead agency to impose feasible mitigation where a project will cause significant adverse environmental impacts. Public Resources Code sections 21003 and 21093 (reflected in the amendments to State CEQA Guidelines sections 15064, 15125, 15130, 15150 and 15183, and new State CEQA Guidelines sections 15064.4 and 15183.5) encourage lead agencies to tier environmental impact reports wherever possible and to use existing analyses to reduce duplication and expense. The decision in Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm. (2001) 91 Cal.App.4th 1344, 1370, 1382 (reflected in proposed State CEQA Guidelines section 15064.4), requires that potential adverse impacts be quantified where it is possible to do so and quantification will assist in the determination of significance of the impact.

The Amendments to the State CEQA Guidelines described above merely reflect existing legislative requirements and judicial decision interpreting those requirements. Therefore, this rulemaking activity does not itself impose any costs on local government or school districts.

Determination Regarding Potential Economic Impacts Directly Affecting Business

The Natural Resources Agency has determined that the Amendments will not have a significant, statewide adverse economic impact directly affecting business. The guidelines required by sections 21083 and 21083.05 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the "State CEQA Guidelines"). The Natural Resources Agency has determined that most of the amendments will have no impacts on business.

CEQA applies to activities of public agencies, including projects that are funded, proposed, or approved by public agencies. Thus, the amendments to the State CEQA Guidelines would apply to public agencies, and not directly to businesses. The Natural Resources Agency is aware, however, that certain requirements reflected in the amendments that have been enacted by the Legislature and developed in case law interpreting CEQA could have an indirect economic impact on business. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with the requirement to quantify greenhouse gas emissions, if possible, as part of an analysis of the effects of such emissions. Project proponents may also incur costs in implementing mitigation measures to reduce such emissions. However, the amendments to the Guidelines merely reflect existing requirements. (See, e.g., Pub. Resources Code, §§ 21004 ("a public agency may use discretionary powers … for the purpose of mitigating or avoiding a significant effect on the environment"), 21083.05 (requiring the development of guidelines on the analysis and mitigation of greenhouse gas emissions "as required by this division"); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm*. (2001) 91 Cal.App.4th 1344, 1370, 1382 (potential hazardous emissions and noise impacts must be quantified where it is possible to do so and quantification will assist in the determination of significance of the impact).)

Many lead agencies, and some trial courts, have already determined that CEQA requires analysis and mitigation of GHG emissions independent of the SB97 CEQA Guidelines amendments. The Office of Planning and Research, for example, has cataloged over 1,000 examples of CEQA documents, prepared between July 2006 and June 2009, analyzing and mitigating greenhouse gas emissions. (Office of Planning and Research, Environmental Assessment Documents Containing a Discussion of Climate Change (Revised June 1, 2009).) Further, several trial courts have found that existing CEQA law requires analysis and mitigation of GHG emissions. (See, e.g., *Muriettans for Smart Growth v. City of Murrieta et al., Riverside Co*. Sup. Ct. Case No. RIC463320 (November 21, 2007); *Env. Council of Sac. et al v. Cal. Dept. of Trans.*, Sacramento Sup. Ct. Case No. 07CS00967 (July 15, 2008) (citing *Berkeley Keep Jets Over the Bay Committee v. Board of Commissions* (2001) 91 Cal.App. 4th 1344, 1370-

1371 and State CEQA Guidelines section 15144 as requiring a lead agency to "meaningfully attempt to quantify the Project's potential impacts on GHG emissions and determine their significance" or at least to explain what steps were undertaken to investigate the issue before concluding that the impact would be speculative).) Finally, federal courts have interpreted the National Environmental Policy Act ("NEPA") to require an analysis of potential impacts of GHG emissions. (See, e.g., *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Ad.*, 538 F.3d 1172, 1215-1217 (9th Cir. 2008).) Thus, the amendments to the CEQA Guidelines developed pursuant to SB97 do not create new requirements; rather, they interpret and clarify existing CEQA law.

Additionally, some of amendments included in this rulemaking activity may tend to reduce costs associated with environmental analysis of greenhouse gas emissions. For example, the amendments to the Guidelines encourage tiering and streamlining of existing environmental analyses to the extent possible in order to reduce duplication. Such tiering and streamlining mechanisms are also consistent with existing law. (See, e.g., Pub. Resources Code, § 21093 (lead agencies shall tier environmental impact reports wherever possible).)

The amendments update the State CEQA Guidelines to be consistent with legislative enactments and judicial decisions that have modified CEQA, but do not themselves impose any new requirements. Therefore, the amendments do not have a significant, adverse economic impact directly affecting business.

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