June 9, 2022

Advocates for the Environment

A non-profit public-interest law firm
and environmental advocacy organization

California Air Resources Board
P.O. Box 2815
Sacramento, CA 95812

Via U.S. Mail and online submission

re: CARB Draft 2022 Scoping Plan, Appendix D

Dear CARB:

I write to comment on Appendix D to the Draft 2022 Scoping Plan. It concerns Local Actions, i.e. actions that cities and counties can take to reduce GHG emissions.

I agree that local action is important. As a CEQA attorney who frequently litigates GHG-emissions issues, I often see Environmental Impact Reports (**EIR**s) and Mitigated Negative Declarations (**MND**s) that do not take greenhouse-gas (**GHG**) reduction efforts seriously. Project proponents create analyses showing their projects' GHG emissions are not significant, so they don't need to be mitigation. Often, such analyses state, in essence, that the State of California's climate regulations are expected to be so effective that changes in the project are not needed in order for the State to meet its climate goals. Local governments usually do not push back against such claims, allowing projects with significant GHG emissions to go forward with little or no mitigation.

Importance of CEQA as a Tool to Fight Climate Change

Appendix D, in a section titled "Net Zero May be Appropriate for Some Projects" (p. 12), touts Newhall Ranch and Tejon Ranch's Centennial project as prime examples of net-zero GHG reduction. CEQA litigation achieved both of these results. In both cases, courts found substantial legal deficiencies in the EIRs' GHG analyses: EIRs in both cases declared that the respective projects' GHG emissions were insignificant under CEQA. This finding made no sense for two of the largest mixed-use development projects in California, both including approximately 20,000 homes. After courts invalidated the EIRs based on these analyses, the project developers settled with the environmental community, and the settlements resulted in the projects becoming net-zero.

I have litigated several other CEQA cases that resulted in substantial improvements in the GHG mitigation required. CEQA is a very important tool in California's fight against global heating.

Appendix D Should Advocate Stricter CEQA Compliance from Local Governments

My legal practice focuses on CEQA analysis of GHG impacts. I review dozens of MNDs and EIRs every year, and 90% of them do not comply with CEQA. They contrive to wrongly find that the project's GHG emissions are not significant, or, where they admit that impacts are significant, they require much less mitigation than the fair share that CEQA requires. Most of these CEQA documents are prepared by consultants working for developers, and developers want to save money by minimizing GHG mitigation. But these documents are approved by the local agencies (cities and counties) and supposedly reflect the independent judgment of those agencies.

Appendix D should suggest that cities and counties should be more vigilant in requiring GHG analysis that meets CEQA's requirements, and that local governments should push for more GHG mitigation where they have the legal authority to do so. This could result in significant GHG emissions reductions statewide.

Appendix D discusses Climate Action Plans (**CAP**s) prepared by local governments on pages 3-5. These CAPs can have either positive or negative effects. If they are too lenient, they can make it easy for local development projects to evade CEQA's requirements for reducing GHG emissions because EIRs can use consistency with the local CAP as the single threshold of significance under CEQA. It happens fairly frequently that MNDs and EIRs use compliance with a CAP checklist as the basis for a determination that a Project does not have significant GHG emissions. This is fine if the checklist is sufficiently rigorous, but many times it gives a pass to projects whose emissions are really significant.

I therefore request that Appendix D be modified to recommend that CAPs have stringent requirements not only for the local agencies adopting them, but also for projects that are approved based on their requirements.

The Gratuitous Housing-Based CEQA Bashing Should be Removed

According to the recent IPCC Working Group III Report,[1] buildings account for 21% of global GHG emissions. (p. 9-4.) Title 24 building standards are the State's primary vehicle for

[1] https://www.ipcc.ch/report/sixth-assessment-report-working-group-3

improving GHG efficiency of buildings; local requirements provide the other main vehicle, and CEQA is the law that pushes developers and local governments to reduce their climate impacts.

As Appendix D admits, only about 3% of land-use entitlements are litigated under CEQA. Opponents of CEQA frequently argue that it is a major impediment to the production of new housing in California. Appendix D contains a lot of anti-CEQA rhetoric, which is inappropriate in a document focused on reducing GHG emissions.

Appendix D complains that CEQA is an impediment, used to "slow or stop projects without advancing legitimate environmental goals." (p. 6.) The CEQA process may be abused sometimes but, as discussed above, CEQA litigation frequently results in GHG reductions for local development projects. Appendix D states that two-thirds of CEQA lawsuits involve GHG or VMT-related claims. One reason for this is that attorneys usually include all colorable CEQA claims in their lawsuits because it increases their chances of winning. Even cases where the main issues are biological (e.g. harm to an endangered species) are likely to include a GHG claim, if such a claim is viable. And VMT claims are not GHG claims; deficiencies in a CEQA VMT analysis may or may not be the basis for a claim that GHG analysis is inadequate. So, even if two-thirds of CEQA lawsuits contain GHG and VMT claims, a much smaller subset of them is won based on GHG claims. Such wins serve an important purpose: to remind local governments and developers of their responsibility for reducing GHG emissions as much as possible.

Appendix D is supposed to be focused on reducing GHG emissions, not on how to produce more housing in California. After all, producing more housing increases GHG emissions; slow growth is generally beneficial for the environment, and the population of the state is declining, so perhaps it doesn't need as much housing as it has planned for. CARB should not be advocating the reduction of CEQA oversight for housing, and the language bashing CEQA for its role in making it more difficult to produce housing should be removed. The language about displacement and gentrification on pages 8 and 9 is also out of place in this report. There is too much discussion of housing and too little discussion of other types of GHG-intensive projects in this document.

Project Attributes that Reduce GHGs

The section on Project Attributes that Reduce GHGs, on pages 10-12, does identify attributes that reduce GHG emissions from housing projects. I take exception with the statement that projects with these attributes would not present significant GHG impacts under CEQA. There may be project-specific circumstances where projects with these attributes have significant climate impacts. For example, the third bullet point would allow redevelopment of previously developed, underutilized land presently served by existing utilities and essential public services, but that requirement would not preclude a sprawl project that would greatly

increase VMT. And most infill projects with these characteristics are already exempt from CEQA under Guidelines § 15332.

Air District-Adopted Thresholds

I have reviewed many MNDs and EIRs that have used Air District-Adopted Threshold of Significance for GHG emissions, but there is usually a significant flaw: the air districts typically adopt CEQA significance thresholds for their own use when they are the lead agency on projects. When they adopt a single, numeric threshold, such as 3,000 MTCO2e/year, the basis for that figure is often that it will result in EIRs for projects causing 90% of the GHG emissions, i.e. the bigger projects. This is an example of the so-called 80/20 rule, where 20% of the projects are responsible for 80% of the emissions. The problem is that the types of projects for which air district are lead agency—their own rulemaking, or permits awarded by the air district—are very different from the mix of projects subject to approval by local governments. Air districts could use the same approach to develop CEQA GHG thresholds to be used for development projects in their districts, for which they would not be the lead agency, but they would need to examine the mix of projects and the spectrum of GHG emissions levels to develop a numeric threshold that would capture a certain percentage of the projects, requiring an EIR, and excuse the remainder of the projects as being below their numeric threshold. The Air District-Adopted Threshold of Significance section of Appendix D should be updated to propose this methodology, and to deprecate the use of inappropriate air-district standards in non air-district EIRs and MNDs.

Warehouse Projects

There are thousands of large warehousing being constructed in this state, and the GHG emissions that can be attributed to them are huge. Proper management of GHG emissions from warehouses may be as important to reaching the State's climate goals as proper management of GHG emissions from housing projects.

A section on warehouse projects should be added to Appendix D, along with recommendations for how local governments can work to reduce their GHG impacts.

GHG Mitigation Hierarchy

I commend you for the GHG Mitigation Hierarchy section, which counsels local governments to prioritize on-site mitigation, then local project mitigation, before purchasing offsets.

But my experience in negotiating GHG reductions from large development projects shows that even large developers with substantial resources balk at undertaking local projects,

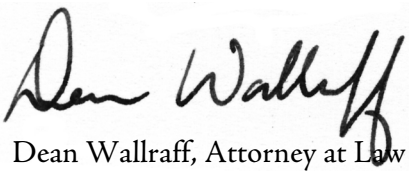
such as retrofitting buildings and urban forestry, as GHG mitigation. Such projects have a lot of overhead, in planning and running the projects; and ensuring they meet all the appropriate mitigation requirements is burdensome. The best way is to ensure quality projects is to require that they comply with a CARB-approved protocol, but there may be no applicable existing protocol for certain types of viable projects. To get a new protocol approved can require a lot of work and expense.

I suggest that CARB facilitate the use of local GHG-reduction projects by making it easier for developers to mitigate their GHG emissions this way. CARB could maintain a list of already approved GHG mitigation projects, and could facilitate the growth of third-party companies that undertake such projects under contract to developers and ensure compliance with appropriate protocols.

Conclusion

Appendix D to the 2022 CARB Draft Scoping Plan contains much good information about how local government can engage to fight global heating. With the changes suggested in this letter, it can be better still.

Sincerely,



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