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Via Electronic Mail

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Re: Comments Following the June 2008 Meeting SCAQMD Greenhouse Gas Significance Threshold Working Group

This letter provides additional comments from the Center for Biological Diversity (“the Center”) on issues raised during the July and August meetings of the SCAQMD Greenhouse Gas Significance Threshold Working Group (“Working Group”) as well as the latest proposed Draft Staff CEQA Greenhouse Gas Significance Threshold.

The Center appreciates SCAQMD’s efforts in working toward the development of a threshold of significance. The Center hopes that the Working Group process will result in a workable and legally defensible threshold of significance that will assist lead agencies in determining the significance of the global warming impacts of proposed projects. To that end, the Center would like to use this opportunity to articulate two sources of concern: 1) the failure to link the proposed threshold of significance with the attainment of an environmental objective; and 2) the proposed Tier 4 performance standards.

I. A Legally Defensible Threshold of Significance Must Be Informed by the Relevant Environmental Objective

The development of a valid threshold of significance must be tied to the relevant environmental objective. For example, with respect to air quality impacts, Appendix G of the CEQA Guidelines asks whether the project would “[c]onflict with or obstruct implementation of the applicable air quality plan” or “[v]iolate any air quality standard or contribute substantially to an existing or projected air quality violation.” (CEQA Guidelines, App. G, § III.) To date, SCAQMD has not linked proposed thresholds with the achievement of an environmental objective. Instead, SCAQMD has attempted to develop a threshold of significance based exclusively on administrative objectives. Rather than ask whether a proposed threshold would achieve a defined environmental objective, SCAQMD has asked whether a proposed threshold would increase agency

workload by resulting in an increase in EIR preparation.¹ While administrative concerns may be a factor in structuring a tiered threshold of significance, provided that the structure as a whole achieves its environmental purpose, designing a threshold purely on administrative concerns is in direct contravention of CEQA's mandate that a threshold of significance be based on "scientific and factual data" related to environmental impacts. CEQA Guidelines § 15064(b). To properly develop a threshold of significance for greenhouse gas emissions, SCAQMD must first articulate the environmental objective to be achieved by the threshold and then ensure that the proposed threshold meets that objective.

The relevant environmental objective with regard to a project's impact on global warming is stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference (DAI) with the climate system. Framing the objective of a threshold of significance in the context of preventing DAI with the climate system is consistent with the policy of CEQA. As set forth in Public Resources Code Section 21000(d), "The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached." With regard to climate change, the prevention of DAI is the critical threshold to protect the health and safety of the people of California. The prevention of DAI with the climate is also the objective adopted by the international community. As set forth in the United Nations Framework Convention on Climate Change, to which the United States is a party: "The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."²

Dangerous anthropogenic interference with the climate system is a defined concept from which a threshold of significance under CEQA can be derived. While environmental impacts from global warming are already being experienced, dangerous anthropogenic interference has typically been defined at temperature increases above 2°C from pre-industrial levels, or a 450 ppm atmospheric concentration of CO₂ eq.³ 2050 is the time frame commonly set by scientists in which to achieve the emission reductions necessary for climate stabilization. The emission reduction scenario set by AB 32 and

¹ Not only is this an inappropriate criteria from which to base a threshold of significance, but with offsite mitigation adopted after all feasible on-site mitigation is implemented, a project that would otherwise prepare a negative declaration if not for global warming impacts could still prepare a mitigated negative declaration in lieu of an EIR. Accordingly, even if administrability could be a factor in the development of a significance threshold, a low threshold of significance need not result in the preparation of additional EIRs.

² United Nations Framework Convention on Climate Change (UNFCCC), art. 2, May 9, 1992, *available at* http://unfccc.int/essential_background/convention/background/items/1349.php.

³ *See, e.g.*, Union of Concerned Scientists, How to Avoid Dangerous Climate Change: A Target for U.S. Emissions Reductions (Sept. 2007), *available at* http://www.ucsusa.org/global_warming/solutions/big_picture_solutions/a-target-for-us-emissions.html.

Executive Order S-3-05, whereby emissions are reduced to 1990 levels by 2020 and then to 80% below 1990 levels by 2050, is consistent with a stabilization scenario in the +/- 450 ppm range.⁴ However, some climate scientists, including NASA's premier climatologist, James Hansen, now believe that reductions need to be greater than those intended to cap atmospheric emissions at 450 ppm in order to avoid dangerous climate change based in part on the alarming and unpredicted rate of loss of Arctic sea ice and other recent climate change observations.⁵ Therefore, the emission reduction pathways set by AB 32 and Executive Order S-3-05 would appear to represent bare minimum reductions and, as our scientific understanding progresses, may ultimately be determined to be insufficient to stabilize the climate. In developing a threshold of significance for greenhouse gas emissions, SCAQMD should consider whether allowing emissions that fall under the proposed threshold of significance would interfere with attainment of emission reduction targets that meet or exceed those set by Executive Order S-3-05.

The more new emissions are added to the atmosphere, the more difficult it will be to attain the emission reduction targets required for climate stabilization. For example, as noted in the CAPCOA White Paper, a 50 percent reduction from business-as-usual will preclude attainment of Executive Order S-3-05 emissions targets even if existing emissions are 100 percent controlled. (CAPCOA White Paper at 33-34). In its analysis of the effectiveness of a variety of possible thresholds of significance, CAPCOA determined that a zero or 900-ton threshold are highly effective at reducing greenhouse gas emissions and meeting both AB 32 and Executive Order S-3-05 emission reduction targets. Other possible thresholds, such as a 28-33% business-as-usual (BAU) emission reduction were rated as having "low" emission reduction effectiveness.⁶ Absent any supplemental analysis regarding what levels of additional emissions will still permit the reductions necessary to prevent DAI with the climate, SCAQMD should look to the CAPCOA analysis for guidance in ensuring that a proposed threshold does not interfere with efforts to stabilize the climate.

⁴ While the emission reduction targets embodied in AB 32 and Executive Order S-3-05 can inform a determination of significance thresholds, this is because they reflect scientific data on needed emissions reductions. Under CEQA, regulatory standards can serve as proxies for significance only to the extent that they accurately reflect the level at which an impact can be said to be less than significant. *See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004).

⁵ Hansen, J. et al., *Target Atmospheric CO₂: Where Should Humanity Aim?* (April 2008) available at <http://www.columbia.edu/~jeh1>. In *Target Atmospheric CO₂: Where Should Humanity Aim?*, Hansen concludes that "[i]f humanity wishes to preserve a planet similar to that on which civilization developed, paleoclimate evidence and ongoing climate change suggest that CO₂ will need to be reduced from its current 385 ppm to at most 350 ppm." An emissions pathway whereby developed countries would reduce emissions to 80% below 1990 levels as envisioned under Executive Order S-3-05 would cap atmospheric concentrations of CO₂ at approximately 450 ppm. *See, e.g., Union of Concerned Scientists, supra* note 3.

⁶ Not only will a threshold with low effectiveness fail to meet the environmental objective of climate stabilization, but it will also be of little assistance to lead agencies, as a project relying on this threshold could be challenged under the fair argument standard. *See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004) ("an 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.").

II. Proposed Tier 4 Performance Standards Are Unworkable and Should be Removed from the Decision Tree

A. Option 1: Uniform BAU Reduction

As set forth in the Center's July 9, 2008 letter, BAU reductions are an inherently flawed approach to determining significance that would lead to gamesmanship, the fabrication of straw projects from which a hypothetical reduction would be measured, and little in the way of real emissions reductions. In addition, Option 1 would seem to allow any project, no matter how large, to be deemed less than significant provided it meets a BAU reduction. Thus, in the case of a recently proposed expansion of the Chevron refinery in Richmond, which would generate over 1.7 million tons of CO₂ eq emissions,⁷ under the approach currently proposed, the project would have a less than significant impact if it reduced its emissions by 30% to approximately 1.2 million tons. Permitting a less than significant finding for emissions of this magnitude has several obvious flaws. First, CEQA recognizes that with regard to virtually all other impacts, large projects with large impacts are deemed significant even where a project may have taken all feasible measures to reduce this impact. SCAQMD has offered no basis to treat GHG impacts differently, or for that matter, the rationale for setting a screening level of 6,500 tons for Tier 3 and then allow under Tier 4 a project to reduce its emissions from 1.7 million tons to 1.2 million tons to also be deemed as having a less than significant impact. Second, this type of threshold will interfere with real progress on emissions reductions. In the case of the Chevron refinery project, the project proponent agreed to mitigate emissions from this project to zero. If the SCAQMD approach were adopted, this project might have only been required to reduce emissions to 1.2 million tons, and a critical opportunity to achieve 1.2 million tons of additional reductions would have been lost. As BAU is a clearly unworkable metric for determining significance that would undermine existing progress in reducing GHG emissions, it should not be part of the proposed decision tree.

B. Option 2: Early Implementation of AB 32 Scoping Measures

While SCAQMD has not yet articulated what it means by Option #2, this approach also appears flawed. First, because attainment of AB 32 emission reduction targets are only an interim step toward avoiding dangerous anthropogenic interference with the climate, early implementation of AB 32 Scoping Plan measures does not necessarily meet the environmental objective of a threshold of significance for greenhouse gas emissions. Second, even assuming this short-term target was appropriate, CEQA has specific requirements for when an approved plan or mitigation program can be relied on to determine that a project's cumulative impacts are less-than-significant. *See* Guideline § 15064(h)(3). A lead agency can only rely on a plan that "is specified in law or adopted by the public agency" with "specific requirements that will avoid or substantially lessen the cumulative problem," not unadopted proposals with limited specificity. To the extent SCAQMD is suggesting that Option #2 would allow a project

⁷ Information on the Chevron Energy and Hydrogen Project is available at <http://www.ci.richmond.ca.us/index.asp?nid=832>.

proponent to rely on a plan that does not meet the requirements of Guideline § 15064(h)(3), then this is contrary to CEQA because it is creating some lesser standard for the mitigation of cumulative impacts. To the extent SCAQMD is suggesting that reliance on the Scoping Plan would require compliance with the standards set forth in § 15064(h)(3), then such a declaration is premature. We do not yet know what the scoping plan for a particular sector will look like and whether it will be comprehensive enough to allow for the tiering of impacts under CEQA. Moreover, even in the event a comprehensive sector-wide approach is developed under AB 32, it is more appropriate to look at an EIR's reliance on this plan in the context of Tier 2 rather than Tier 4. However, even when viewed in the context of Guideline § 15064(h)(3), because AB 32 is not an end point to climate stabilization, "there may be substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding that the project complies with the [Scoping Plan]." Guidelines § 15064(h)(3).

C. Option 3: Achieve Sector-Based Standard (e.g., pounds per person, pounds per square foot, etc.)

Option 3 of the Tier 4 performance standards proposes a sector-based standard from which to determine significance. This approach may have some appeal, but the assignment of the sector-based efficiency standards necessary to ensure a low-carbon future and prevent DAI with the climate is a sophisticated analysis that would not appear to be available prior to the conclusion of the Working Group. A lack of information and analysis, coupled by our limited timeframe, suggests that Option 3 should be eliminated from the proposed decision tree at this time.

As set forth above, the proposed Tier 4 performance standards do not appear to be a workable solution to developing a greenhouse gas emissions threshold. Numerical thresholds that are consistent with the environmental objective of avoiding DAI with the climate are a more straightforward solution.

Thank you for your consideration. The Center looks forward to further discussing the critical role of CEQA in reducing greenhouse gas emissions in the Working Group. Please do not hesitate to contact Matthew Vespa at (415) 436-9682 x.309 mvespa@biologicaldiversity.org if you have any questions or concerns.

Sincerely,



Matthew Vespa
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