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VIA E-MAIL & U.S. MAIL

Dave Warner
Director of Permit Services
San Joaquin Valley Air Pollution Control District
1990 East Gettysburg Ave.
Fresno, CA 93726-0244

RE: Final Draft Staff Report on Greenhouse Gas Emissions Under CEQA

Dear Mr. Warner:

We have reviewed the San Joaquin Valley Air Pollution Control District's September 17, 2009, Final Draft Staff Report on "Addressing Greenhouse Gas Emissions Under the California Environmental Quality Act."¹ We appreciate the Air District's extensive efforts and leadership in this area.² We are concerned, however, that the approaches suggested in the Staff Report will not withstand legal scrutiny and may result in significant lost opportunities for the Air District and local governments to require mitigation of greenhouse gas (GHG) emissions.

The Staff Report sets out a proposed threshold of significance for GHG emissions for stationary source projects under the Air District's permitting authority. A threshold of significance is, in effect, a working definition of significance to be applied on a project-by-project basis that can help a lead agency determine which projects normally will be determined to be less than significant, and which normally will be determined to be significant.³ In the context of GHG emissions, the relevant question is whether the project's emissions, when considered in conjunction with the emissions of past, current, and probable future projects, are

¹ The Attorney General submits these comments pursuant to his independent power and duty to protect the natural resources of the State. (See Cal. Const., art. V., § 13; Cal. Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.)

² The Staff Report states that "[n]o state agency has provided substantial and helpful guidance on how to adequately address GHG emissions under CEQA, nor has there been guidance on how to determine if such impacts are significant." (Report at p. 2.) In fact, there are numerous sources of guidance, including information on the Attorney General's website (<http://ag.ca.gov/globalwarming/ceqa.php>), a Technical Advisory issued by the Governor's Office of Planning and Research (<http://opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf>); and the Resources Agency's proposed CEQA Guidelines amendments (<http://ceres.ca.gov/ceqa/guidelines/>), which is accompanied by a detailed, 78-page Initial Statement of Reasons (http://ceres.ca.gov/ceqa/docs/Initial_Statement_of_Reasons.pdf).

³ Cal. Code Regs., tit. 14, § 15064.7, subd. (a).

cumulatively considerable.⁴ Thresholds can be a useful interim tool until cities and counties have in place programmatic approaches, e.g., Climate Action Plans, which allow local government to consider a wide variety of mitigation opportunities and can substantially streamline the CEQA process for individual projects.⁵ Staff's proposed stationary source GHG threshold relies on implementation of GHG emission control technologies. Under this proposal, projects that implement currently unspecified GHG Best Performance Standards ("BPS") would be deemed to not have significant impacts, regardless of the total amount of GHGs emitted.

The Staff Report also recommends a threshold of significance for cities and counties to use in determining whether a development or transportation project's GHG emissions are significant under CEQA. Like the stationary source threshold, this threshold would also rely on performance measures that are not currently identified. BPS for these projects would be any combination of identified GHG reduction measures that reduce project-specific GHG emission by at least 29 percent as compared to "business as usual," as calculated based on a point system to be developed in the future by the Air District.

The Staff Report contains a useful analysis of possible GHG mitigation measures for a variety of stationary sources and for development and transportation projects. This discussion will certainly assist lead agencies and project proponents in considering what mitigation measures currently are available and should be considered. It is not clear to us, however, how much additional analysis the Air District plans to do to support the proposed CEQA thresholds of significance recommended in the Staff Report. A public agency proposing to adopt a CEQA threshold of significance should be able to answer at least the following questions about its proposed approach:

What defined, relevant environmental objective is the threshold designed to meet, and what evidence supports selection of that objective?

The Staff Report does not discuss a particular environmental objective that would be achieved by implementing the proposed thresholds, such as meeting a GHG emissions reduction trajectory consistent with that set forth in AB 32 and Executive Order S-03-05 within the Air District's jurisdiction.⁶ It appears that the Air District has not yet determined what amount of

⁴ Cal. Code Regs., tit. 14, § 15064, subd. (h)(1); see also Initial Statement of Reasons at p. 17 ("Due to the global nature of GHG emissions and their potential effects, GHG emissions will typically be addressed in a cumulative impacts analysis.")

⁵ See Proposed Cal. Code Regs., tit. 14, § 15183.5, subd. (b) (describing tiering and streamlining available under "Plans for the Reduction of Greenhouse Gas Emissions"), available at

http://ceres.ca.gov/ceqa/docs/FINAL_Text_of_Proposed_Amendments.pdf; Draft Initial Statement of Reasons (discussing proposed § 15183.5), available at

http://ceres.ca.gov/ceqa/docs/Initial_Statement_of_Reasons.pdf#page=56; see also See Attorney General's General Plan/CEQA Frequently Asked Questions, available at http://ag.ca.gov/globalwarming/pdf/CEQA_GP_FAQs.pdf.

⁶ Pursuant to these mandates, California is committed to reducing GHG emissions to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050. These objectives are consistent with the underlying environmental objective of stabilizing atmospheric concentrations of greenhouse gases at a level that will substantially reduce the risk of dangerous climate change. (See AB 32 Scoping Plan at p. 4 ["The 2020 goal was established to be an aggressive,

GHG reduction it is aiming to achieve. Setting a relevant environmental objective is an essential step in establishing any legally defensible threshold of significance; without it, there is nothing against which to gauge the success of the threshold in operation.

What is the evidence that adopting the threshold will meet this objective?

Because the BPS discussed in the Staff Report are described as “illustrative” only, it is not possible at this time to determine whether the BPS ultimately adopted will reduce GHG emissions in the San Joaquin Valley and, if so, by how much. There is no stated commitment to tie BPS proposed in the future to regional GHG reduction objectives.

How does the threshold take into account the presumptive need for new development to be more GHG-efficient than existing development?

The Staff Report seems to assume that if new development projects reduce emissions by 29 percent compared to “business as usual,” the 2020 statewide target of 29 percent below “business as usual” will also be achieved, but it does not supply evidence of this. Indeed, it seems that new development must be more GHG-efficient than this average, given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit.⁷

Will the threshold routinely require new projects to consider mitigation beyond what is already required by law?

Because “business as usual” for a development project is defined by the Staff Report as what was typically done in similar projects in the 2002-2004 timeframe, and requirements affecting GHG emissions have advanced substantially since that date, it appears that the Air District’s proposal would award emission reduction “points” for undertaking mitigation measures that are already required by local or state law.⁸

Similarly, we are concerned that project proponents could “game” the system. Under the current proposal, each project will be considered against a hypothetical project that could have been built on the site in the 2002-2004 time period. It is not clear why the project should be compared against a hypothetical project if that hypothetical project could not legally be built

but achievable, mid-term target, and the 2050 greenhouse gas emissions reduction goal represents the level scientists believe is necessary to reach levels that will stabilize climate.”)]

⁷ We note that CAPCOA expressly found that an approach that would rely on 28 to 33 percent reductions from BAU would have a “low” GHG emissions reduction effectiveness. CAPCOA, CEQA and Climate Change (Jan. 2008) at p. 56, available at <http://www.capcoa.org/CEQA/CAPCOA%20White%20Paper.pdf>.

⁸ To take one important example, Title 24 has undergone two updates since 2002-2004 – in 2005 and 2008. The 2008 Title 24 standards are approximately 15 percent more stringent than the 2005 version. In addition, a significant number of local governments have adopted green building ordinances that go beyond Title 24 in just the past few years, and many more are considering adopting such ordinances as part of their Climate Action Plans. See http://ag.ca.gov/globalwarming/pdf/green_building.pdf.

today,⁹ and the approach would appear to offer an incentive to project proponents to artificially inflate the hypothetical project to show that the proposed project is, by comparison, GHG-efficient.¹⁰

Will operation of the threshold allow projects with large total GHG emissions to avoid environmental review? What evidence supports such a result?

It appears that any project employing certain, as of yet unidentified, mitigation measures would be considered to not be significant, regardless of the project's total GHG emissions, which could be very large. For instance, under the Air District's proposal, it would appear that even a new development on the scale of a small city would be considered to not have a significant GHG impact and would not have to undertake further mitigation, provided it employs the specified energy efficiency and transportation measures. This would be true even if the new development emitted hundreds of thousands of tons of GHG each year, and even though other feasible measures might exist to reduce those impacts.¹¹ The Staff Report has not supplied scientific or quantitative support for the conclusion that such a large-emitting project, even if it earned 29 "points," would not have a significant effect on the environment.

Will the threshold benefit lead agencies in their determinations of significance?

For the reasons set forth above, we fear that the recommended approach in its current form may unnecessarily subject lead agencies that follow them to CEQA litigation. This would be detrimental not only to the lead agencies, but to the many project proponents who may face unnecessary delay and legal uncertainty.¹²

⁹ The appropriate baseline under CEQA is not a hypothetical future project, but rather existing physical conditions. (Cal. Code Regs., tit. 14, § 15126.2, subd. (a).)

¹⁰ A detailed analysis of the proposed amendments to Rule 2301 (emissions reduction credit banking) is beyond the scope of this letter. It is important, however, that any such plan comply with CEQA's requirements for additionality. As the most recent draft of the proposed CEQA Guidelines notes, only "[r]eductions in emissions that are not otherwise required may constitute mitigation pursuant to this subdivision." Proposed Cal. Code Regs., tit. 14, § 15126.4, subd. (c), available at http://ceres.ca.gov/ceqa/docs/Text_of_Proposed_Changes.pdf.

¹¹ In the advance of a programmatic approach to addressing GHG emissions, lead agencies must examine even GHG-efficient projects with some scrutiny where total emissions are large. Once a programmatic approach is in place, the lead agency will be able to determine whether even a larger-emitting project is, or is not, consistent with the lead agency's overall strategy for reducing GHG emissions. If it is, the lead agency may be able to determine that its incremental contribution to climate change is not cumulatively considerable.

¹² The Staff Report states that "[l]ocal land-use agencies are facing increasing difficulties in addressing GHG emissions in their efforts to comply with CEQA." (Report at p. 2.) We strongly believe that this experience is not universal. In fact, many cities and counties are actively taking up their role as "essential partners" in addressing climate change (see AB 32 Scoping Plan at p. 26) by making commitments to develop local Climate Action Plans.

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We support staff's continued work in this area. However, before formally endorsing or adopting any particular threshold, we recommend that the Air District consider the issues that we have raised in this letter; if warranted, evaluate the approaches currently under consideration by other districts; and, if possible, work with those districts to devise approaches that are complementary and serve CEQA's objectives.

Sincerely,

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