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Via Electronic and Regular Mail

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Re: Comments on CAPCOA's Conceptual Approaches Regarding Potential Significance Thresholds for Greenhouse Gas Emissions

Thank you for the opportunity to participate in the South Coast Air Quality Management District's ("SCAQMD") working group to establish thresholds of significance for greenhouse gas emissions under the California Environmental Quality Act ("CEQA"). The Center for Biological Diversity ("Center") is a non-profit conservation organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center's Climate, Air, and Energy Program works to reduce greenhouse gas emissions to protect biological diversity, our environment, and public health. We educate the public about the impacts of climate change on our world, including the animals and plants that live in it, and to build the political will to enact solutions. The Center has over 40,000 members throughout California and the western United States. The Center has authored a white paper on CEQA and global warming entitled *The California Environmental Quality Act: On the Front Lines of California's Fight Against Global Warming* (Sept. 2007), available at <http://www.biologicaldiversity.org/publications/papers/CBD-CEQA-white-paper.pdf>

The Center appreciates SCAQMD's leadership in working to establish thresholds of significance for greenhouse gases and looks forward to participating in the GHG Significance Threshold Working Group ("Working Group"). As a practical matter, significance thresholds are urgently needed to ensure that local governments consistently analyze the greenhouse gas impacts from their discretionary project approvals. While the absence of a threshold of significance does not relieve a lead agency of its obligation to determine the significance of a project impact, some lead agencies still continue to dismiss greenhouse gas impacts as "speculative" due to the lack of established significance thresholds.

In its white paper, *CEQA & Climate Change*, CAPCOA sets forth a helpful framework for the analysis and mitigation of greenhouse gases under CEQA. This letter responds to SCAQMD's request for comments prior to the first Working Group meeting on the approaches proposed by CAPCOA for establishing greenhouse gas significance thresholds.

While CAPCOA provides a range of conceptual approaches for establishing thresholds of significance for greenhouse gas emissions, many of these approaches have limited effectiveness in reducing greenhouse gas emissions. A valid significance threshold for greenhouse gases must reflect the severity of the climate crisis and comply with California's mandate to reduce emissions to 1990 levels by 2020 under the California Global Warming Solutions Act (AB 32) and to 80 percent below 1990 levels by 2050 under Executive Order S-3-05. Under CAPCOA's own analysis, the only two thresholds that are highly effective at reducing emissions and highly consistent with AB 32 and Executive Order S-3-05 are a threshold of zero [Threshold 2.1] and a quantitative threshold designed to capture 90 percent or more of likely future discretionary projects (a 900-ton CO₂ Eq threshold) [Threshold 2.2]. All other proposed thresholds are simply inadequate in light of the severe environmental threats posed by global warming and California's emissions reduction mandates.

The latest science on global warming must be considered in developing a significance threshold for greenhouse gas pollution. The impacts of global warming are now being felt with unexpected and alarming severity and speed. Indeed, leading scientists now conclude that even the ambitious emission reduction targets embodied in Executive Order S-3-05 are insufficient to avoid the worst consequences of global warming and that the atmospheric concentrations of greenhouse gases may already have passed a tipping point. As any additional sources of greenhouse gas pollution may frustrate achievement of the deep emissions cuts needed in the hope of stabilizing the climate, the Center believes that all new sources of emissions should be considered significant. Concerns that a zero significance threshold would require preparation of an EIR even for the smallest projects can be addressed were SCAQMD to develop and implement a mitigation fee and offset program for greenhouse gases in conjunction with the promulgation of a threshold of significance. With the implementation of a mitigation fee program, a project proponent would have a straightforward means of mitigating emissions to zero once all on-site mitigation measures were adopted. Thus, were greenhouse gas emissions a project's only significant impact, a mitigated negative declaration could be prepared in lieu of an EIR.

I. A Threshold of Significance for Greenhouse Gas Emissions Must Be Highly Effective at Reducing Emissions, Highly Compliant with the Emission Reduction Mandates Set Forth Under AB 32 and Executive Order S-3-05, and Reflect the Latest Scientific Understanding of the Threats Posed by Global Warming

Under CEQA, “[t]he determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible *on scientific and factual data.*” CEQA Guidelines § 15064(b) (emphasis added). Accordingly, a significance threshold for greenhouse gases must reflect the grave threats posed by the cumulative impact of additional new sources of emissions into an environment where deep reductions from existing emission levels are necessary to avert the worst consequences of global warming. *See Communities for Better Env't v. California Resources Agency*, 103 Cal. App. 4th 98, 120 (2002) (“the greater the existing environmental problems are, the lower the threshold for treating a project's contribution to cumulative impacts as significant.”); *see also Center for Biological Diversity v. National Highway Traffic Safety*

Administration, 508 F.3d 508, 550 (9th Cir. 2007) (“we cannot afford to ignore even modest contributions to global warming.”).

The failure to immediately and significantly reduce emissions from existing levels will result in devastating consequences for the economy, public health, natural resources, and the environment. Based on the scientific and factual data, thresholds that are not highly effective at reducing emissions are inadequate in the face of the profound threats posed by global warming. Moreover, CEQA requires that a lead agency must “still consider any fair argument that a certain environmental effect may be significant” even where a project complies with a regulatory threshold. *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004). Because there is a fair argument that application of a threshold with limited effectiveness at reducing emissions would still result in environmental effects, reliance on a threshold that is not highly effective at reducing greenhouse gas emissions or is inconsistent with mandated emission reductions leaves projects open to legal challenge under the fair argument standard. Accordingly, these thresholds [1.1, 1.2, 1.3, 1.4, 2.3, 2.4, 2.5, 2.6] should not be adopted.

Under CAPCOA’s own analysis, the only two thresholds that are highly effective at reducing emissions and highly consistent with AB 32 and Executive Order S-3-05 are a threshold of zero [Threshold 2.1] or a quantitative threshold designed to capture 90 percent or more of likely future discretionary projects (a 900-ton CO₂ Eq threshold) [Threshold 2.2].¹ According to CAPCOA, 900 tons is roughly the equivalent of the emissions generated by 50 homes or 30,000 square feet of commercial space.² While the emissions from these projects might ordinarily seem minor enough to ignore, the challenges posed by climate change are far from ordinary. Given the recent extreme losses in arctic sea ice, scientists at the National Snow and Ice Data Center have concluded that “the observed changes in the arctic indicate that this feedback loop is now starting to take hold.”³ Even the ambitious emissions reduction targets set by Executive Order S-3-05 in 2005, which were consistent with contemporaneous science indicating that reductions of 80% below 1990 levels by developed countries were sufficient to stabilize the climate,⁴ are now believed to be insufficient. Based on the alarming and unpredicted rate of loss of Arctic sea ice and other recent climate change observations, leading scientists now state that “humanity must aim for an even lower level of GHGs.”⁵ As our current scientific understanding

¹ CAPCOA, *CEQA & Climate Change* at 56-57 (Jan. 2008).

² CAPCOA, *CEQA & Climate Change* at 43.

³ National Snow & Ice Data Center, *Arctic Sea Shrinks as Temperatures Rise*, Oct. 3, 2006 available at http://nsidc.org/news/press/2006_seaiceminimum/20061003_pressrelease.html Loss of sea ice is subject to a tipping point because, as sea ice melts in response to rising temperatures, it creates a positive feedback loop: melting ice means more of the dark ocean is exposed, allowing it to absorb more of the sun’s energy, further increasing air temperatures, ocean temperatures, and ice melt.

⁴ Cal. EPA, *Climate Action Team Report to Governor Schwarzenegger and the Legislature* (Mar. 2006) at 18.

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?*, James Hansen, the premier NASA climatologist, now 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., UNDP, *Human Development Report 2007/2008*,

now calls for even greater reductions and indicates that we already may have passed a climactic tipping point, the Center supports a threshold of zero in order to ensure that new projects do not have a cumulatively significant impact on global warming.

II. SCAQMD Should Implement a Greenhouse Gas Mitigation Fee To Facilitate Real and Verifiable Offsets for Projects Once All Feasible Measures Have Been Taken to Avoid and Reduce On-Site Emissions

The assessment of a fee is an appropriate form of mitigation when it is linked to a specific mitigation program. *See, e.g., Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors*, 87 Cal. App. 4th 99, 140 (2001); CEQA Guidelines 15130(a)(3). As recognized by CAPCOA:

Where the impact cannot be mitigated on-site, off-site mitigation is often and effectively implemented in several resource areas, either in the form of offsetting the same impact or preserving the resource elsewhere in the region. Frequently, mitigation fee programs or funds are established, where the proponent pays into the program and fees collected throughout the region or state are used to implement projects that, in turn, proportionately offset the impacts of the projects to the given resources.⁶

Accordingly, development of a numerical significance threshold should go hand-in-hand with the development of a mitigation fee program to be implemented by SCAQMD. Once all feasible on-site mitigation has been adopted, a mitigation fee will allow a project proponent to reduce the impact of the project's contribution to global warming to a less than significant level and thereby fully mitigate the impacts from project emissions. By enabling the full mitigation of greenhouse gas impacts, a mitigation fee would allow for the preparation of a mitigated negative declaration where greenhouse gas emissions are a project's only significant impact.

In designing a project under CEQA, "the preferred practice is first to avoid, then to minimize, and finally to compensate for impacts."⁷ An off-site mitigation fee program is highly effective in reducing greenhouse gas emissions, as well as technologically and logistically feasible, if the program ensures real and quantified results and emissions reductions.⁸ An appropriate fee is one that achieves real and verifiable emission reductions of a comparable amount of greenhouse gas emissions and includes the administrative costs associated with the offset program. While SCAQMD can determine the most effective use of mitigation fees, one possible use of mitigation fees suggested by CAPCOA is to incentivize energy efficiency audits and retrofits of existing building stock. As noted by CAPCOA, "[a]voiding emissions that would otherwise continue to occur at existing development would be a unique opportunity for mitigation of GHG emissions."⁹

Fighting climate change: Human solidarity in a divided world (2007) at 46-50 available at <http://hdr.undp.org/en/reports/global/hdr2007-2008/chapters/>

⁶ CAPCOA, *CEQA & Climate Change* at 79-80.

⁷ CAPCOA, *CEQA & Climate Change* at 79.

⁸ *See* MM M-1: Off- Site Mitigation Fee Program, CAPCOA, *CEQA & Climate Change* at B-33.

⁹ CAPCOA, *CEQA & Climate Change* at 80.

III. Additional Concerns with Other CAPCOA Approaches

In addition to their limited effectiveness, with the exception of Thresholds 2.1 and 2.2, other thresholds proposed by CAPCOA are conceptually problematic. For example, the development of a threshold that is based on the reduction of emissions from a “business-as-usual” target creates more problems than it solves. This approach encourages proponents to concentrate on describing hypothetical worst-case scenarios rather than focus on the real opportunities for reducing the greenhouse gas emissions from proposed projects. Reductions from hypothetical business-as-usual targets calls into question the true extent of greenhouse gas reductions, offers less certainty and clarity for project proponents, and is highly susceptible to manipulation. A specific numerical threshold, such as zero or 900, rather than a reduction from an unknown and easily manipulated hypothetical target, provides certainty and less potential for abuse.

With regard to Threshold Number 2.5, there does not appear to be any valid basis to differentiate a market capture method based on the type of discretionary project. The impact of greenhouse gas emissions on global warming is independent of whether the source of these emissions is from a commercial or residential development. Consequently, a significance threshold should depend on the quantity of greenhouse gases generated by a project, not on the source of these emissions. Creating variable thresholds based on the source of greenhouse gas pollution is contrary to science and logic and should be flatly rejected.

Proposed thresholds that rely heavily on prospective command and control regulations to achieve emissions reductions, such as Thresholds 1.1, 1.3, 1.4, 2.3, 2.4, 2.6, run counter to the urgency with which greenhouse gas emissions must be reduced. Sharp reductions from business-as-usual are needed today. Less than ten more years of business-as-usual emissions may make it virtually impossible to keep temperature increases within the range necessary to avoid large scale climactic feedbacks. *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 312-14, 316 (D. Vt. 2007) (summarizing expert testimony of Dr. James Hansen).¹⁰ Not only is the efficacy of prospective regulations relied on by Thresholds 1.1, 1.3, 1.4, 2.3, 2.4, and 2.6 unknown, but regulatory action will take years to implement and may be subject to further delays from legal challenges. For example, implementation of the Pavley Bill, aimed at reducing automobile emissions, has been derailed due to EPA’s denial of California’s request for a waiver under the Clean Air Act. Significance thresholds that defer to prospective and uncertain future regulation are insufficient to meet the immediate challenge of the climate crisis facing California and the world.

CAPCOA’s Climate Change Significance Flow Chart assumes that a general plan that complies with AB 32 emission reduction mandates would not have a significant impact.¹¹ General plans developed today have a time horizon well beyond 2020. Accordingly, to have a less than significant impact, a General Plan with a time horizon beyond 2020 must show that it is on track to meet the reduction mandates set for 2050 under Executive Order S-3-05. Using AB

¹⁰ See also Hansen, J., et al. 2007. *Climate change and trace gases*. *Phil. Trans. R. Soc.* 365:1925-1954 available at http://pubs.giss.nasa.gov/docs/2007/2007_Hansen_et_al_2.pdf

¹¹ CAPCOA, *CEQA & Climate Change* at 38.

32 as a significance threshold for a general plan update intended for use past 2020 ignores the additional and substantial emission reductions required under Executive Order S-3-05.

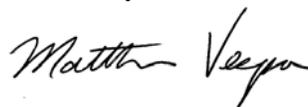
Finally, the “Regulated Emissions Inventory Capture” methodology essentially tries to fit a square peg into a round hole by attempting to analogize to thresholds established under the Clean Air Act that are linked to compliance with statutory deadlines of ozone classifications rather than targeted emissions reductions or inventories. Under the Clean Air Act, thresholds are initially tied to the nonattainment classification of a given region and may become more stringent even where total emissions are declining because sufficient reductions were not achieved by a particular statutory deadline. Because thresholds for NO_x/VOC criteria pollutants are largely independent of the emissions inventory for these pollutants, the ratio of the NO_x/VOC threshold to NO_x/VOC inventory used under the Regulated Emissions Inventory Capture method yields a meaningless result that cannot legitimately be used to determine a threshold of significance for greenhouse gas emissions.

Conclusion

CEQA provides an opportunity and a legal mandate to limit greenhouse gas emissions from new development. Making the deep and necessary emission reductions from existing emission levels in order to avert the worst impacts of global warming will be all the more difficult if new projects continue to release additional greenhouse gas pollution into an oversaturated atmosphere. A highly effective significance threshold coupled with a mitigation fee will ensure that future development does not exacerbate the climate crisis facing California and the world and will allow California to focus on the critical task of making significant reductions to its existing emissions levels.

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 or mvespa@biologicaldiversity.org if you have any questions or concerns.

Sincerely,



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