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September 22, 2010

GHG CEQA Significance Thresholds Working Group
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Elimination of Maximum Emission Limit in the Proposed Tier IV Significance Threshold

Dear District Staff and Fellow Members of the Working Group:

This letter comments on an important matter to be considered by the Working Group, and is submitted on my behalf as a Working Group member, reflecting only my views and not necessarily the views of Latham & Watkins, its other attorneys, or its clients.

In advance of our next Working Group meeting scheduled for September 28, 2010, this letter recommends that the Maximum Emission Limit (MEL) of 25,000 metric tons per year of carbon dioxide equivalent (MTCO₂e/yr) be eliminated from the currently proposed California Environmental Quality Act (CEQA) greenhouse gas (GHG) significance threshold for the South Coast Air Quality Management District (SCAQMD or District). In particular, the MEL should be removed from Tier IV Options 1 (Reduction Target) and 2 (Efficiency Target), and a mass-based limit should only be used as a screening tool to make an initial determination of whether further CEQA review of GHG emissions is necessary.

Retention of the MEL in the significance threshold would have the effect of penalizing certain highly GHG-efficient development projects simply because they are larger than other development projects, thereby discouraging exactly the type of projects California needs in order to do its part in addressing global climate change. Further, retention of the MEL would encourage lead agencies and developers to “project split,” potentially obfuscating environmental impacts in contravention of CEQA’s mandates. Finally, recent guidance by other local air quality management districts and by the White House Council on Environmental Quality (CEQ) indicates that the MEL is: (1) at best, set at too low a level; and (2) at worst, vulnerable to a litigation challenge because it is unsupported by substantial evidence. A more effective and legally defensible approach is recommended below.

Additionally, it would be helpful if District Staff published a clear proposal in its entirety (i.e., including all of the tiers) for the Working Group’s consideration. The proposals circulated at the most recent Working Group meetings have focused only on parts of the proposed

significance threshold. It would be beneficial for the Working Group and the public at large to review an updated, comprehensive proposal so as to understand how the different tiers of the proposed threshold interact.

I. LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT THE MEL

Since our last Working Group meeting, the San Joaquin Valley Air Pollution Control District (SJVAPCD) adopted, on December 17, 2009, Guidance for Valley Land-use Agencies in Addressing GHG Emission Impacts for New Projects under CEQA.¹ In the course of developing this guidance, the SJVAPCD investigated whether mass-based numerical limits should be part of its GHG significance threshold. The SJVAPCD rejected such an approach due to a lack of scientific support for any particular numerical threshold:

District staff has reviewed the relevant scientific information and concludes that the existing science is inadequate to support quantification of the extent to which project specific GHG emissions would impact global climatic features such as average air temperature, average annual rainfall, or average annual snow pack. Thus, **District staff concludes that it is not feasible to scientifically establish a numerical threshold that supports a determination that GHG emissions from a specific project, of any size, would or would [not] have a significant impact on global climate change.** In other words, the District was not able to determine a specific quantitative level of GHG emissions increase, above which the project would have a significant impact on the environment, and below which would have an insignificant impact. District staff further concludes that impacts of project specific emissions on global climatic change are cumulative in nature, and the significance thereof should be examined in that context. This is readily understood when one considers that global climatic change is the result of the sum total of GHG emissions, both man made and natural that occurred in the past; that is occurring now; and will occur in the future.²

Even more relevant to our Working Group's efforts, the SJVAPCD received comments urging inclusion of a maximum emission limit in its threshold of significance, and responded as follows:

The Commenter then opines that a threshold of significance without an upper boundary of emissions cannot be supported. On the contrary, as discussed thoroughly in the staff report, **there is no**

¹ See http://www.valleyair.org/Programs/CCAP/CCAP_idx.htm (last visited 3/2/2010).

² SJVAPCD, Final Staff Report – Climate Change Action Plan: Addressing GHG Emissions Impacts under CEQA, pp. 53-54 (December 17, 2009) (emphasis added).

science available to establish a numerical threshold above which a project will have a significant impact on global climate and below which the project will have an insignificant impact.

The Commenter does not provide any evidence that would lead one to conclude otherwise. As the District also discusses in the staff report and in responses to previous comments, GHG impacts are accepted as cumulative in nature. The District is requiring the same percentage reduction from a small project as a large project. This is the appropriate way to address such cumulative changes, and in fact, is the only way the District has been able to identify, given the lack of ability to establish a numerical threshold.³

Retention of the MEL would increase the litigation risk to the proposed threshold. Rather than set an arbitrary upper bound on GHG emissions unsupported by science, the MEL should be eliminated from the District's proposed GHG significance threshold.

II. EFFICIENCY-BASED THRESHOLDS ARE PREFERABLE TO THE MASS-BASED THRESHOLDS

Efficiency-based significance thresholds are preferable to mass-based thresholds because they do not unnecessarily discriminate against larger projects. The core of the current Tier IV Options 1 and 2 (i.e., excluding the MEL) are efficiency metrics. Option 1, the Reduction Target option, indirectly measures a project's GHG efficiency by evaluating the emission reductions associated with a project's GHG-reduction features/measures. As its name suggests, Option 2, the Efficiency Target option, directly measures a project's GHG efficiency. These options would be more informative, effective, and legally defensible without the MEL.

On June 2, 2010, the Bay Area Air Quality Management District (BAAQMD) unanimously adopted GHG significance thresholds very similar, but not identical, to the District's Tier IV Option 2.⁴ Notably, the BAAQMD's thresholds are "based on [Assembly Bill] AB 32 GHG emission reduction goals while taking into consideration [i.e., taking credit for] emission reduction strategies outlined in [the California Air Resources Board] ARB's Scoping Plan."⁵ Those thresholds do not include a maximum emissions limit or any upper boundary on GHG emissions.⁶ The BAAQMD recognized that a pure efficiency-based threshold properly

³ Id. at 295 (responding to comment by Center for Biological Diversity) (emphasis added).

⁴ The BAAQMD's Adopted GHG Significance Thresholds are available at <http://www.baaqmd.gov/Divisions/Planning-and-Research/CEQA-GUIDELINES.aspx> (last visited 9/18/2010).

⁵ BAAQMD, CEQA Guidelines Update – Thresholds of Significance, p. D-13 (June 2, 2010).

⁶ Notably, the California Attorney General's Office is supportive of the BAAQMD's efforts. See Letter from Janill L. Richards, Deputy Attorney General to Gregory Tholen, Principal

allows larger projects to demonstrate their consistency with California's efforts to address climate change:

GHG efficiency metrics can also be utilized as thresholds to assess the GHG efficiency of a project on a per capita basis (residential only projects) or on a "service population" basis (the sum of the number of jobs and the number of residents provided by a project) such that the project will allow for consistency with the goals of AB 32 (i.e., 1990 GHG emissions levels by 2020). ... **This method allows highly efficient projects with higher mass emissions to meet the overall reduction goals of AB 32.**⁷

The BAAQMD considered and addressed concerns about large projects, but notably did not graft any sort of maximum emissions limit onto the proposed efficiency threshold – likely because climate change science does not support any particular limit. The BAAQMD initially suggested that lead agencies might wish to consider whether a project's GHG emissions are high enough that "the insignificance presumption afforded to a project that meets an efficiency-based GHG threshold would be overcome."⁸ However, the BAAQMD ultimately deleted this language, signaling the agency's conviction that GHG emissions from large projects are adequately addressed by an efficiency-based significance threshold.

The BAAQMD also emphasized the beneficial flexibility afforded by a pure efficiency-based GHG significance threshold. The BAAQMD recognized that inclusion of a maximum emissions limit would discourage precisely the type of developments that California needs to address global climate change:

If a project is designed to implement greenhouse gas mitigation measures that achieve a level of reductions consistent with what is required from all new land use projects to achieve the land use sector "budget" – i.e., ... ensuring that project efficiency is better than 4.6 MT CO₂e/service population – then it will be implementing its share of the mitigation measures necessary to alleviate the cumulative impact, as shown in the analyses set forth above. It is also worth noting that this "fair share" approach is flexible and will allow a project's significance to be determined by how well it is designed from a greenhouse-gas efficiency standpoint, and not just by the project's size. For example, a large

Environmental Planner, Planning and Research, BAAQMD (December 2, 2009) (referring favorably to the pure efficiency-based GHG threshold as an "innovative recommendation").

⁷ BAAQMD, CEQA Guidelines Update – Thresholds of Significance, p. D-22 (June 2, 2010) (emphasis added).

⁸ BAAQMD, CEQA Guidelines Update – Proposed Thresholds of Significance, p. 7 (December 7, 2009).

high-density infill project ... would not become significant for greenhouse gas purposes ... simply because it happened to be a large project. Projects such as this hypothetical development with low greenhouse-gas emissions per service population are what California will need in the future in order to do its part in achieving a solution to the problem of global climate change.⁹

Accordingly, the MEL should be eliminated from the District's proposed GHG significance threshold to afford agencies the flexibility to approve larger, highly GHG-efficient development projects.

Importantly, the District should not adopt the BAAQMD's "service population" concept as-is because it has the potential to penalize beneficial components of mixed-use developments. In particular, the inclusion of local serving retail in a mixed-use development will make it very difficult to achieve an efficiency-based significance threshold because the BAAQMD's definition of "service population" is asymmetrical. Customers of local serving retail will generate trips that must be included in a project's GHG emission inventory, but the customers of said retail are not included in the service population. If the BAAQMD's service population concept were to be adopted without modification by the District, developers of mixed use projects would be encouraged to scrap local serving retail from their proposed projects. This would be an unfortunate outcome because local serving retail is widely acknowledged as a key component in reducing transportation-related GHG emissions. In sum, the District should be careful not to create an incentive that runs contrary to smart growth principles.

III. EVEN IF THE MEL IS RETAINED, NEPA GUIDANCE INDICATES IT IS TOO LOW

In the event District Staff and/or our Working Group decide to retain the MEL, recently released National Environmental Policy Act (NEPA) guidance indicates that 25,000 MTCO₂e/yr is too low. On February 18, 2010, the White House CEQ released draft NEPA guidance on climate change and GHG emissions.¹⁰ Notably, the CEQ did not propose a significance threshold, but rather an analysis threshold of 25,000 MTCO₂e/yr of direct GHG emissions: "if a proposed [federal] action would be reasonably anticipated to cause **direct** emissions of 25,000 metric tons or more of CO₂-equivalent GHG emissions on an annual basis, agencies should consider this an indicator that a quantitative and qualitative assessment may be meaningful to decision makers and the public."¹¹ In other words, if a project's direct GHG emissions are

⁹ BAAQMD, CEQA Guidelines Update – Thresholds of Significance, p. D-28 – D-29 (June 2, 2010).

¹⁰ Memorandum from Nancy H. Sutley, Chair, Council on Environmental Quality to Heads of Federal Departments and Agencies (February 18, 2010) (available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/neap>) (last visited 3/2/2010).

¹¹ *Id.* at 1 (emphasis added).

25,000 MTCO₂e/yr or more, then federal agencies should address that project's GHG emissions in a NEPA document.

There are two important messages for our Working Group in this newly proposed NEPA guidance. First, the CEQ, buttressed by U.S. Environmental Protection Agency analysis, considers emissions below 25,000 MTCO₂e/yr to be so low that such a project may not even warrant a quantitative and qualitative assessment, much less be considered significant. Second, the CEQ's proposed analysis threshold applies only to *direct* GHG emissions, not indirect emissions. As we have discussed in our prior Working Group meetings, the vast majority of GHG emissions that the District's proposal would deem to be the result of development projects and would have to be quantified for any project's GHG assessment are *indirect* emissions (e.g., vehicular emissions of residents and customers, power plant emissions attributable to on-site energy use, etc.). Accordingly, the District's proposed GHG significance threshold is extremely conservative compared to the authoritative guidance of the CEQ, making the proposed MEL all the more unsupportable.

Accordingly, even if District Staff and/or our Working Group decide to retain the MEL, which I strongly urge against, it is clear that the MEL must be either: (1) raised to account for a typical direct/indirect GHG emissions ratio; or (2) applied solely to a development project's direct GHG emissions.

IV. MASS-BASED LIMITS MAY BE USED AS A SCREENING TOOL

As an alternative to the currently proposed MEL-based significance threshold, a mass-based limit may be used instead as a screening tool in a two-step method to determine whether further CEQA analysis of a project's GHG emissions is required. This approach would avoid the detrimental results associated with applying a bright-line quantitative significance threshold while maintaining the use of mass-based criteria as part of the overall significance threshold methodology.

Recent guidance released by the City of San Diego (San Diego), based on approaches described by the California Air Pollution Control Officers Association (CAPCOA) in August 2010, provides a useful framework for utilizing a mass-based number as an initial screening threshold in the CEQA process.¹² Based on the CAPCOA report entitled "CEQA and Climate Change," San Diego will apply a screening threshold of 900 MTCO₂e/yr in order to determine whether analysis of a project's GHG emissions is necessary.¹³ A similar mass-based screening threshold could be used here to determine whether full CEQA analysis of a project's GHG emissions should be required for projects under SCAQMD's jurisdiction. If a project exceeds the screening threshold, the project would be required to provide a full analysis of the GHG

¹² A copy of the August 18, 2010 City of San Diego Memorandum Re: Addressing Greenhouse Gas Emissions from Projects Subject to CEQA is attached hereto as Exhibit A.

¹³ The January 2008 version of the CAPCOA report, "CEQA & Climate Change", is available at <http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf>.

emissions, including, but not limited to, the five primary sources of GHG emissions: vehicular traffic; generation of electricity; natural gas consumption/combustion; solid waste generation; and water usage.

After the screening process, the results of the full GHG CEQA analysis would be evaluated against a pure efficiency-based significance threshold to determine whether a project's GHG impacts are significant. As noted above, the core of the current Tier IV Options 1 and 2 (i.e., excluding the MEL) provide good examples of such efficiency metrics and could be easily incorporated as the final step in this process. In addition, adopting such an efficiency-based threshold would allow for analysis of GHG efficiency of a project on a per-capita or service-population basis which, as noted by the BAAQMD, more effectively accommodates larger, highly GHG-efficient development projects. CAPCOA has recently released a very detailed report entitled: "Quantifying Greenhouse Gas Mitigation Measures: A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures" August, 2010. While the methodologies described in that document may not be appropriate for every project analyzed under CEQA, that CAPCOA report provides a detailed approach for applying an efficiency-based threshold.

V. THE CUMULATIVE SIGNIFICANCE OF GHG EMISSIONS SHOULD BE BASED ON CONSISTENCY WITH AB32 AND ARB'S SCOPING PLAN, WITHOUT REFERENCE TO AN MEL

I recommend that the District include as a Tier IV option a significance threshold that is based on AB32's emission reduction goals, takes credits for the emission reduction strategies outlined in ARB's Scoping Plan, and excludes a maximum emission limit. One such threshold would be achieving a 28 percent break from Business-as-Usual (BAU).¹⁴

Projects with GHG emissions in conformance with such a threshold would not be considered significant for purposes of CEQA because:

[T]hey would be helping to solve the cumulative problem [of global climate change] as a part of the AB 32 process. California's response to the problem of global climate change is to reduce greenhouse gas emissions to 1990 levels by 2020 under AB 32 as a near-term measure and ultimately to 80 percent below 1990 levels by 2050 as the long-term solution to stabilizing greenhouse gas

¹⁴ CAPCOA recently has provided guidance on calculating BAU for CEQA projects, likely in response to concerns expressed by the California Attorney General that certain projects might be conflating the concepts of BAU and a CEQA baseline. CAPCOA suggested a calculation based on the methodology utilized by ARB in its Scoping Plan (e.g., average GHG emissions from 2002-2004, inclusive). Notably, CAPCOA explains that BAU and a project's CEQA baseline are distinct. See CAPCOA, *Quantifying Greenhouse Gas Mitigation Measures: A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures*, at 25-27 (August, 2010).

concentrations in the atmosphere at a level that will not cause unacceptable climate change impacts. To implement this solution, the Air Resources Board has adopted a Scoping Plan and budgeted emissions reductions that will be needed from all sectors of society in order to reach the interim 2020 target.¹⁵

In order “to meet the requirements set forth in AB 32 (i.e., achieve California’s 1990-equivalent GHG emissions levels by 2020) California would need to achieve an approximate 28 percent reduction in emissions across all sectors of the GHG emissions inventory compared with 2020 projections.”¹⁶ In other words, ARB has calculated that AB32 requires California as a whole to reduce GHG emissions by 28 percent compared to BAU. In fact, the BAAQMD determined that the land use sector’s obligation, or “budget,” is less than 28%: “staff determined that California would need to achieve an approximate 26 percent reduction in GHG emissions from these land use-driven sectors by 2020 to return to 1990 land use emission levels.”¹⁷

Accordingly, use of the 28 percent break from BAU significance threshold recommended here would ensure that a land use project contributes its fair share toward meeting AB32’s emission reduction goals.¹⁸ “If a project is designed to implement greenhouse gas mitigation measures that achieve a level of reductions consistent with what is required from all new land use projects to achieve the land use sector ‘budget’ ... then it will be implementing its share of the mitigation measures necessary to alleviate the cumulative impact....”¹⁹ Use of the significance threshold recommended here is “supported by CEQA Guidelines Section 15030(a)(3), which provides that a project’s contribution to a cumulative problem can be less than cumulatively considerable ‘if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact.’”²⁰

Such a threshold will reduce GHG emissions from new development projects in substantial and quantifiable ways compared to ARB’s calculated BAU scenario, and also will enable lead agencies to be able to proceed with reduced uncertainty and risk. Further, such a significance threshold would be consistent with the approaches followed by many other jurisdictions, such as BAAQMD, SJVAPCD, and the City of San Diego, and with many lead agencies statewide that have grappled with the issue. As lead agencies are responsible for setting

¹⁵ BAAQMD, CEQA Guidelines Update – Thresholds of Significance, p. D-28 (June 2, 2010).

¹⁶ *Id.* at D-16 (citing ARB’s Scoping Plan).

¹⁷ *Id.* (internal citations omitted).

¹⁸ *Id.* at D-28 (“In the case of greenhouse gas emissions associated with land use projects, achieving the amount of emission reductions below BAU that will be required to achieve the AB 32 goals is the project’s ‘fair share’ of the overall emission reductions needed under ARB’s scoping plan to reach the overall statewide AB 32 emissions levels for 2020.”).

¹⁹ *Id.* at D-28.

²⁰ *Id.*

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significance thresholds for projects under their jurisdiction, many lead agencies have already used efficiency-based significance thresholds based on implementing AB32's statewide GHG goals without use of an MEL. It is important that the District avoid creating confusion by imposing an MEL concept that could make some question the efficiency-based, AB32-driven thresholds that already are widely in use.

Thank you very much for your attention to this important matter. I look forward to discussing this with you at our next Working Group meeting.

Very truly yours,

A handwritten signature in black ink, appearing to read "James L. Arnone". The signature is fluid and cursive, with a long horizontal stroke at the end.

James L. Arnone
of LATHAM & WATKINS LLP