



AB 32 Implementation Group



Working Toward Greenhouse Gas Emission Reductions
And Enhancing California's Competitiveness

November 26, 2008

Hon. Mary D. Nichols
Chairman, California Air
Resources Board
1001 I Street
Sacramento, CA 95812

RE: Comments on Preliminary Draft Staff Proposal on Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under CEQA (Oct. 24, 2008)

Dear Chairman Nichols:

The AB 32 Implementation Group (AB 32 IG) appreciates the opportunity to comment on the Air Resources Board (CARB) Preliminary Draft Staff Proposal on Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases (GHG) under the California Environmental Quality Act (CEQA), issued October 24, 2008, and discussed at the CARB Workshop on the subject on October 27th. As explained by ARB staff at the October 27th Workshop, the Preliminary Draft Staff Proposal is being prepared as a recommendation to the Office of Planning and Research (OPR) to guide that office in formulating revisions to Title 14 Code of California Regulation, Section 15000 et seq. (CEQA Guidelines), as mandated by SB 97. SB 97, among other things, requires that on or before July 1, 2009, OPR shall prepare, develop, and transmit to the Resources Agency guidelines for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions as required by this division, including, but not limited to, effects associated with transportation or energy consumption. The guidelines must be adopted by January 1, 2010.

The AB 32 IG is a coalition of more than 150 businesses and industry associations established to address the process of implementing AB 32 (The Global Warming Solutions Act), seeking to ensure that the greenhouse gas emission reductions required under AB 32 are achieved while maintaining the competitiveness of California businesses and protecting the interests of consumers and workers. The AB 32 IG seeks regulatory certainty, policies that keep jobs in California, sound scientific methods of review, cost-effective and technologically feasible regulations, innovation and market-based strategies, and the fair allocation of compliance costs. To this end, the IG strongly supports the development of a

uniform statewide approach to determining GHG Significance Threshold as opposed to the ad hoc, patchwork of CEQA GHG significance determinations and mitigation scheme that is currently emerging throughout the state. Accordingly, because CARB was given primary authority under AB 32 to regulate GHGs in California, it is incumbent on CARB to develop a reasonable, balanced and equitable approach to harmonizing the requirements of CEQA, AB 32, and SB 375 which will ensure that businesses in California can continue to operate in an economically and environmentally sound manner.

Unfortunately, for the reasons discussed below in detail, the IG has serious concerns that the CARB staff's proposed CEQA numeric GHG threshold, combined with proposed regulatory performance standards, will undermine the development of a reasonable, balanced and equitable approach to harmonizing the requirements of CEQA, AB 32, and SB 375 and jeopardize projects moving forward prior to promulgation of the final AB 32 regulations.

The Flaw of Setting a Numeric Significance Threshold

The AB 32 IG was disappointed with the Preliminary Draft Staff Proposal presented on October 27th, particularly its fundamental reliance upon a *quantitative* threshold of significance for projects, not only for industrial projects, but also, to be determined, for residential and commercial projects, as well as its reliance on various regulatory *performance standards*. The recommendation, and potential adoption, of a strict numerical GHG threshold of significance of CO₂e/yr for such projects effectively nullifies any constructive consideration by lead agencies of important *qualitative* criteria that may otherwise effectively demonstrate that a project's GHG emissions impacts are not significant for CEQA purposes.

This issue is critical to the survival of industry and commerce in California. Governor Schwarzenegger not only committed himself to improvements in California's environmental quality, but also to robust business health during a challenging economic period. The guidelines that OPR ultimately promulgates pursuant to SB 97 will be in effect during the interim period before CARB adopts its GHG regulatory standards for various covered entities under the Scoping Plan, set to take effect in 2012, and thus, the OPR guidelines will be especially critical to the economic growth of the state. A strict numerical GHG significance threshold as the basis for CEQA significance determinations and potential mitigation is highly likely to impose a regulatory straight-jacket on lead agencies and substitute non-

discretionary standards for discretionary evaluations.¹ The consequence of such an action in this interim period will be that California business simply cannot grow, improve, or survive economically. Most importantly, strict GHG significance thresholds in the interim period will thwart projects designed to improve energy efficiency and to reduce the state's carbon footprint in the long run. Numeric GHG significance thresholds also are somewhat arbitrary and arguably not supported by substantial evidence as witnessed by the various different numeric GHG significance thresholds proposed by air districts throughout the state based on differing rationales.

The Director of OPR has publicly stated that a strict "threshold of significance is not required to make a significance determination," that it need not be a zero threshold, and that OPR is "not mandated to set a threshold of significance." (OPR Presentation April 4, 2008; see also OPR's Technical Advisory entitled "CEQA AND CLIMATE CHANGE: Addressing Climate Change Through California Environmental Quality Act (CEQA) Review (June 19, 2008) (OPR Technical Advisory).) She has further stated a lead agency ought to be able to evaluate whether a project will help or hinder the state's ability to meet its AB 32 goals. (See also (OPR Technical Advisory.) These observations point to a recognition that the evaluation of key *qualitative* factors should play a fundamental role in the lead agency's evaluation of a project's impacts on climate change with particular attention given to a project's energy efficiency and overall reduction of the state's or region's carbon footprint.

To remedy the problems discussed above, the AB 32 IG offers the following language that should apply in the interim before AB 32 regulatory GHG compliance standards are adopted by CARB. Consistent with the OPR Director's statements and the OPR Technical Advisory, the AB 32 IG believes the following language will allow lead agencies to evaluate key *qualitative* factors when determining the potential GHG project impacts of a project.

If greenhouse gas (GHG) emission standards are not in effect, for those projects that the Lead Agency anticipates will be subject to regulations promulgated by CARB under AB 32 for the reduction of GHG, then the lead agency may evaluate whether the project will result in a net increase in energy efficiency or decrease in the carbon

¹ The Preliminary Draft Staff Proposal actually has it backwards. It says: "Staff is proposing the use of a quantitative significance threshold at least until such time that performance standards, such as AB 32 regulatory requirements, are in place to ensure mitigation of significant impacts of GHG emissions from projects in the industrial sector." (Proposal, p. 9.) As such, it is suggesting to OPR to impose a strict regulatory threshold *before* ARB does.

intensity of the underlying economic activity or the state's overall carbon footprint. If such a project results in a net improvement in energy efficiency or a net decrease in carbon intensity of the underlying economic activity or the state or region's overall carbon footprint, then a lead agency may determine that a project does not have a significant impact on climate.

From the AB 32 IG's perspective, a default rule based preemptively on a project's overall emissions increase in numeric terms could have the counterproductive effect of driving highly desirable projects outside of California, with the further unintended effect of causing global GHG emissions to rise as the distance between energy supply and consumption increases. An imbalance between energy supply and consumption increases GHG emissions due to transmission losses (in the electricity sector) and increased transportation costs (in the fuels sector).

A strict numerical GHG significance threshold approach, as suggested by CARB's Preliminary Draft Staff Proposal, would chill development of important state projects by adding costly mitigation that may be unnecessary and unjustified. Additionally, costly mitigation of projects that are desirable from an energy-efficiency perspective will unduly increase project costs, with a regressive impact, including a public health detriment, impact on education, significant job losses and chilling the building of affordable housing.

Including Mitigation in Determining Threshold of Significance

The AB 32 IG also suggests the CARB recommend to OPR that the GHG threshold of significance concept contained in the guidelines it will promulgate pursuant to SB 97 include a reasonable consideration of the inclusion of GHG reduction strategies as part of a project's design prior to any determination of significance. Under CEQA Guidelines 15063(c)(2) ("Initial Study"), lead agencies should be able to incorporate into the project's design GHG reduction strategies that reduce the project's GHG emissions to a level that enables the project to qualify for an exemption or Negative Declaration. Such a pre-threshold-of-significance approach should include the same factors outlined above, including whether project design changes or other measures will result in a net increase in energy efficiency or will decrease in the carbon intensity of the underlying economic activity or the state or region's overall carbon footprint.

Measures taken to reduce a project's GHG potential impacts through project design changes should include off-site measures, including green buildings, urban forestry, energy conservation activities, building and equipment retrofits that reduce energy use, building and using renewable energy sources, and other land use and transportation activities and policies that reduce the overall project GHG impacts otherwise expected from the project. The lead agency should have broad discretion to determine whether project design changes that reduce a project's potential GHG impacts from the existing baseline at the immediate project site or from a wider geographic area. Given the global nature of GHG, the lead agency ought to be able to place these measures in a broader context, unlike the consideration given to localized particulate matter or other criteria or toxic pollutants.

Expanding Mitigation Obligations Beyond the Project

In addition to the recommendation of a numeric GHG significance threshold, which has serious flaws as discussed above, CARB's Preliminary Draft Staff Proposal also proposes that a project proponent mitigate the transportation, construction, and the electricity usage of a project. This poses numerous challenges that will be difficult if not impossible to overcome. For instance, it is impossible to determine the exact source of electrons consumed by any economic activity. Moreover, the electricity sector is being regulated under AB 32 under a declining cap. How would a project proponent determine which electrons it is using, the source of them and then mitigate for the economic activity of an electricity provider?

To remedy these concerns, the AB 32 IG offers the following criteria that, at a minimum, would establish criteria for feasible mitigation under CEQA per SB 97:

In determining what is feasible mitigation for the effects of greenhouse gas emissions of a proposed project, a Lead Agency may consider as mitigation any combination of reducing emissions, providing carbon off-sets, and making net improvements in energy efficiency or the overall reduction of the state's carbon footprint, without requiring a complete elimination or total reduction of emissions. Given the global nature of greenhouse gas effects, mitigation measures need not be limited to local programs, methods, off-sets, credits or reductions.

It should be noted the greenhouse gas emissions from transportation are being achieved through the implementation of a low carbon fuel standard, the implementation of AB 1493 (Pavley) and as well as the implementation of SB 375 (Steinberg). A project proponent

should not be responsible for GHG emissions otherwise being reduced through a variety of regulatory programs.

By their nature, significance thresholds and mitigation measures apply to project-specific impacts. It is the project-specific nature of CEQA review that is difficult to reconcile with, or fit into the parameters of, the mandates of AB 32, AB 1493, and SB 375. Rather than requiring emission reductions from individual projects or project sponsors, AB 32, AB 1493, and SB 375 require GHG emissions reduction by sectors, which include multiple sources and projects. While it is anticipated that the accumulated emission reductions will result in environmental improvement, the targeted reductions will be made on a sector-wide basis, not on a facility-specific or project-specific basis.

It should be clear, however, that compliance with provisions of AB 32, AB 1493, and SB 375 will result in a reduction in sector GHG emissions resulting in an environmental benefit. And, it follows that any project that results in net GHG reductions or a reduction in GHG intensity, must by definition result in environmental improvement over the existing baseline, and therefore, not require additional mitigation under CEQA.

Post Implementation of AB 32 Regulations

We appreciate that CARB staff seems to acknowledge that once the regulatory program under AB 32 is in place then a project for a source within a sector subject to a cap will not trigger the GHG significance threshold. While this is implicit in the CARB guidance, it needs to be clarified.

We also believe that once the AB 32 Scoping Plan is adopted that it can be used to inform the CEQA process. The Scoping Plan provides a blueprint for how the state will achieve the GHG reductions needed to meet the AB 32 mandate. Therefore, projects for sources within sectors covered by GHG measures and reductions referenced in the Scoping Plan should be able to reference those mandated measures and reductions when determining whether the projects are significant for CEQA purposes.

Sincerely,

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