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File No. 043493-0007

January 16, 2015

VIA ELECTRONIC MAIL
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Molly Pearson
Santa Barbara County Air Pollution Control District
260 N. San Antonio Road, Suite A
Santa Barbara, CA 93110
(805) 961-8838
ceqa@sbcapcd.org

Re: SBCAPCD Consideration of a California Environmental Quality Act Significance Threshold for Greenhouse Gas Emissions

Dear Ms. Pearson:

On behalf of Pacific Coast Energy Company, we respectfully offer recommendations to the Santa Barbara County Air Pollution Control District (District) in response to the District's solicitation of comments regarding its development of a California Environmental Quality Act (CEQA) significance threshold for greenhouse gas (GHG) emissions. We previously submitted a comment letter dated August 15, 2014 on this same topic and hereby incorporate it by reference in its entirety.

In connection with the District's ongoing consideration of revisions to its Environmental Review Guidelines to include guidance for evaluating the significance of the impacts of GHG emissions from new or modified stationary sources, four potential significance threshold options were presented at the Public Workshop held by the District on December 3, 2014:

1. Zero.

2. "Numeric Bright Line" of 10,000 metric tonnes (MT) of carbon dioxide equivalent emissions per year (CO_2e/yr).

3. Performance-Based Measures and Percent Reduction Consistent with Assembly Bill (AB) 32 Goals.

4. Percent Reduction from Business-As-Usual (BAU).

These significance threshold options fall into two general categories. The first two options are mass-based thresholds. Under Option 1 and Option 2, a CEQA project's GHG emissions alone would determine whether the District will conclude that the project has a significant effect on the environment – regardless of that project's carbon efficiency. The last two options are efficiency-based thresholds. Under Option 3 and Option 4, the District would determine the significance of a CEQA project's GHG emissions according to that project's relative carbon efficiency.

As explained in further detail in the attached, an efficiency-based threshold is more appropriate and supported by substantial evidence than a mass-based threshold. Of the options presented by the District thus far, Option 4 is the best choice, subject to further modification and improvement, as described in Attachment A. Between the two mass-based thresholds, Option 2 is the better option, as discussed in Attachment A.

We appreciate the opportunity to submit comments on the District's potential revisions to its Environmental Review Guidelines to include guidance for evaluating the significance of the impacts of GHG emissions. Accordingly, we respectfully offer the recommendations contained in this letter (including Attachment A hereto). We are available to further discuss our comments at your convenience.

Very truly yours,

Christopher H. Norton

Christopher H. Norton
of LATHAM & WATKINS LLP

cc: Dave Van Mullem, SBCAPCD
Greg Brown, PCEC

ATTACHMENT A

I. AN EFFICIENCY-BASED THRESHOLD IS MORE APPROPRIATE THAN A MASS-BASED THRESHOLD

As indicated in our comment letter to the District dated August 15, 2014 (the Prior Comment Letter), efficiency-based thresholds are better calibrated to address a cumulative impact like global climate change. The disclosure of a project's mass GHG emissions, while necessary for compliance with CEQA's information disclosure requirements, generally does not provide lead agencies with as much relevant data to permit informed decision-making. Given the global nature of climate change, adoption of a mass-based GHG emissions significance threshold, in particular a zero emissions threshold, could be vulnerable to litigation as speculative and not supported by substantial evidence. As population growth appears inevitable and economic growth is both likely and desirable, a comparison to "Business As Usual" (BAU) (or another efficiency-based metric) is a valuable tool for lead agencies to assess the relative carbon intensity and efficiency of a particular project. In particular, use of AB 32's GHG emissions reduction mandate provides a carefully crafted tool supported by substantial evidence[1] to assess the contribution to climate change of a particular project.

A. Option 4 Is Preferable To Option 3

Of the two efficiency-based thresholds proffered by the District, Option 4 is preferable, though it should be modified as discussed in greater detail below. There are a couple of issues with Option 3 that could make its adoption and application vulnerable. The foundation of Option 3 is reliance on Product Benchmarks developed by the Air Resources Board (ARB). However, as acknowledged in the District's "Supplemental Explanation of Performance-Based Measure Approach," these Product Benchmarks were not developed to serve the purpose envisioned by the District. Rather, the Product Benchmarks were developed and incorporated into the Cap-and-Trade Program to calibrate its free allocation of Cap-and-Trade Program allowances to certain industrial sectors. Inherent in this calibration was ARB's intention to provide an incentive for industrial facilities to become more carbon efficient. To that end, ARB did not use an industrial sector's production weighted average GHG emissions intensity as the Product Benchmark. Instead, ARB made the Product Benchmarks more stringent, "targeting the benchmark to allocate 90 percent of this level per unit product."[2]

This stringency typically results in the majority of facilities in a certain industry being less carbon efficient than the pertinent Product Benchmark. Indeed, the example provided in the District's "Supplemental Explanation of Performance-Based Measure Approach" shows that 16 of the 20 heavy crude extraction facilities have carbon emissions intensities higher than the Product Benchmark. Likewise: "In … evaluating the benchmark values, [ARB] staff found that the [90 percent] stringency approach … worked for many sectors but, in some cases, would set

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1 For example, studies and analyses relied on by the Air Resources Board in the adoption of the Climate Change Scoping Plan.

2 California Air Resources Board, Appendix B: *Development of Product Benchmarks for Allowance Allocation*, at 3 (July 2011)(available at http://www.arb.ca.gov/regact/2010/capandtrade10/candtappb.pdf).

the benchmark at a level that was more stringent than the current emissions intensity of any existing Californian facility."[3] In short, the Product Benchmarks developed by ARB for use in the Cap-and-Trade Program do not represent BAU levels of GHG emissions intensity, rendering the Product Benchmarks an inappropriate foundation for a GHG significance threshold like Option 3.

Another issue with Option 3 is that it would apply a percent reduction on top of the Product Benchmark of either 15.3% or 35%, which the option notes "would be consistent with AB 32 Scoping Plan goals." But that is incorrect and inconsistent with ARB's calculation in the Climate Change Scoping Plan of the percent reductions necessary to meet AB 32's mandates. As explained in more detail in our Prior Comment Letter, forecasting the amount of emissions that would occur in 2020 if no actions are taken was necessary to assess the scope of the reductions California has to make to return to the 1990 emissions level by 2020 as required by AB 32. The no-action scenario is known as BAU. ARB originally defined the BAU scenario as emissions in the absence of any GHG emission reduction measures discussed in the Climate Change Scoping Plan. ARB has been refining the BAU scenario as new GHG emissions inventory data and economic modeling becomes available, and as certain GHG emissions reduction measures are implemented. Most recently, on May 22, 2014, ARB approved the First Update to the Climate Change Scoping Plan (First Update), which indicates that ARB will propose to revise both the 2020 BAU emissions inventory (to 509 million $MTCO_2e$) and 2020 emissions limit (to 431 million $MTCO_2e$) to account for updates to calculations of Global Warming Potential (GWP).[4] If ARB were to revise said inventory and limit as proposed, a 15.3% reduction below the estimated BAU levels would be necessary to return to 1990 levels.

Therefore, use of a 15.3% reduction as part of a determination of significance is inextricably tied to ARB's concept of BAU. Without a grounding in ARB's analysis and GHG emissions inventory calculations, use of a 15.3% reduction (and, by extension, a 35% reduction for years post-2020) is arbitrary. In sum, requiring the additional percentage reductions below the Product Benchmarks is not supportable as those reductions are untethered from ARB's reasoned analysis in the Climate Change Scoping Plan and updates thereto.

B. Refining Option 4

We recommend further refining Option 4 to make it more consistent with ARB's concept of BAU (and thus further supported by substantial evidence). When describing Option 4, the

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3 *Id.* (emphasis added).

4 California Air Resources Board, First Update to the Climate Change Scoping Plan, at 92-93 (May, 2014) (http://www.arb.ca.gov/cc/scopingplan/2013_update/first_update_climate_change_scoping_plan.pdf) ("[M]ost national and international climate change organizations are moving to the IPCC's Fourth Assessment Report, which updated the global warming potential of GHGs, especially methane and HFCs. ARB is proposing to update the number for the 2020 limit, weighting the 1990 emissions with 100-year GWPs from the IPCC's Fourth Assessment Report. The new 2020 statewide limit is 431 $MMTCO_2e$—an approximately 1-percent increase from the 427 $MMTCO_2e$ limit adopted by the Board in 2007. In addition, to assess progress toward the limit in a consistent manner, ARB is using GWPs from the Fourth Assessment Report to update projections of the emission reductions that adopted and anticipated Scoping Plan measures will achieve.").

District's presentation indicates: "The BAU emissions scenario should equate to the project GHG emissions as proposed in the permit application." This formulation of BAU is inconsistent with ARB's concept of BAU. Similar to Option 3, Option 4 would apply a percent reduction on top of "BAU" of either 15.3% or 35%. As discussed above, use of these percent reductions as part of a determination of significance is inextricably tied to ARB's concept of BAU. Use of a 15.3% reduction (and, by extension, a 35% reduction for years post-2020) should be grounded in ARB's analysis and GHG emissions inventory calculations.

As explained in more detail in our Prior Comment Letter, ARB originally defined the BAU scenario as emissions in the absence of any GHG emission reduction measures discussed in the Climate Change Scoping Plan. ARB generated the BAU scenario because forecasting the amount of GHG emissions that would occur in 2020 if no actions were taken to reduce emissions was necessary to assess the scope of the reductions California would have to make to achieve the emission levels required by AB 32. In other words, only after identifying the scope of the challenge could ARB craft responsive GHG emission reduction measures. ARB has been refining the BAU scenario as new GHG emissions inventory data and economic modeling becomes available, and as certain GHG early action emissions reduction measures are fully implemented. However, the central characteristic of BAU is that it does not continually ratchet down as technology and efficiency practices improve. Instead, BAU is linked to a particular point in time and/or set of circumstances with concomitant implications for carbon efficiencies. BAU is a touchstone for measuring progress or compliance; if it is not reasonably static, then it loses its efficacy. The notion of BAU reflected in the current iteration of Option 4 would be a moving target as permit applications reflect the latest technology and efficiency practices. Accordingly, Option 4 should be modified to adhere to ARB's definition of BAU, thereby improving and supporting the use of Option 4 as a tool to assess the significance of GHG emissions.

C. Option 2 Is Preferable To Option 1

Although, as explained above, an efficiency-based threshold is more appropriate than a mass-based threshold, if the District were to adopt a mass-based threshold, Option 2 is preferable to Option 1. A zero threshold would impose a substantial administrative burden on the District without a corresponding climate benefit. Virtually all CEQA projects where the District functions as the lead agency would be deemed significant, requiring the preparation of full Environmental Impact Reports. In other words, the District would likely no longer be able to prepare Negative Declarations for small projects. Accordingly, we urge the District to reject the zero threshold should it choose to adopt a mass-based threshold.

II. GENERAL COMMENTS ON ALL THRESHOLD OPTIONS

The following comments apply to all of the threshold options identified by the District.

A. Application Of A Threshold Must Address All GHG Emissions, Not Only Those From Stationary Sources

Based both on Slide 40 of the presentation[5] made at the December 3, 2014 Public Workshop and comments made by District Staff at that Workshop, we understand that the District is not contemplating applying the adopted significance threshold or otherwise addressing indirect sources of GHG emissions. However, CEQA requires the consideration of indirect effects,[6] and it is now common practice for CEQA documents to include inventories of GHG emissions that cover both direct (e.g., from stationary sources) and indirect (e.g., from motor vehicles, electricity generation, water conveyance and treatment) sources. Accordingly, we recommend that the District clarify that its adopted significance threshold would apply to all of the GHG emissions associated with CEQA projects.

B. Role Of Cap-And-Trade Program

As explained in more detail in our Prior Comment Letter, a project's GHG emissions subject to the Cap-and-Trade Program should neither count against a project when assessing its significance under CEQA nor require further mitigation. We were encouraged that the District's flow charts ("Mechanics of Threshold Application") for Option 4 acknowledge that a project's compliance with the Cap-and-Trade Program renders those GHG emissions less than significant. We also were encouraged that the District's "Examples of Potential Mitigation Scenarios" for all of the Options acknowledge that a project's compliance with the Cap-and-Trade Program counts as CEQA mitigation. However, we urge full adherence to CEQA Guidelines Section 15064(h)(3), which allows a lead agency to make a finding of non-significance for GHG emissions if a project complies with the Cap-and-Trade Program or other regulatory scheme to reduce GHG emissions.

Further, we note that Slide 40 of the presentation[7] made at the December 3, 2014 Public Workshop could suggest that offsets purchased to comply with the Cap-and-Trade Program would not count as mitigation. If this indeed is the District's position, we urge reconsideration

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5 Slide 40 is titled Notes on Mitigation and provides in pertinent part: "If APCD is the lead agency (e.g. permit for new boiler), sources may not be required to mitigate indirect source emissions (i.e. emissions from electricity use and motor vehicles)."

6 *See* 14 Cal. Code Regs. § 15126.2(a)("Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects."); 14 Cal. Code Regs. § 15358(a)(2)("Indirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect or secondary effects may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems.").

7 Slide 40 is titled Notes on Mitigation and provides in pertinent part: "Under all options, allowances purchased under Cap and Trade would apply towards mitigation."

because offsets are "compliance instruments" under the Cap-and-Trade Program and their surrender is an accepted method of compliance. Each offset credit issued by ARB can be used by companies and facilities to comply with the Cap-and-Trade Program for up to eight percent (8%) of each covered entity's compliance obligation. In this sense, offsets are the equivalent of a California carbon allowance and, like those compliance instruments, can also be freely sold or traded.

To meet the rigorous requirements of the Cap-and-Trade Program, every offset credit must be *additional*, that is, over and above any reductions already required by law or regulation. Offsets must also be real, verifiable, quantifiable, enforceable and permanent. ARB approves protocols (methods of accounting to measure the number of tons of GHG emissions reductions achieved) for offset projects. To date, ARB has adopted five Compliance Offset Protocols that may be used to generate ARB offset credits:

- U.S. Forest Projects Compliance Offset Protocol
- Urban Forest Projects Compliance Offset Protocol
- Livestock Projects Compliance Offset Protocol
- Ozone Depleting Substances (ODS) Projects Compliance Offset Protocol
- Mine Methane Capture (MMC) Projects Compliance Offset Protocol.

The Cap-and-Trade Regulation also requires a third-party verification of all GHG emission reductions or removal enhancements before any ARB offset credits may be issued. Only ARB-accredited offset verification bodies and offset verifiers may provide offset verification services under the Compliance Offset Program.[8] Accordingly, offsets purchased to comply with the Cap-and-Trade Program should count as mitigation just as allowances would.

Finally, we note that the District's "Examples of Potential Mitigation Scenarios" for all of the Options seem to indicate that only purchased allowances, and not allowances received via free allocation from ARB, qualify as mitigation. We request that the District clarify that both purchased allowances and allowances allocated by ARB qualify as mitigation, as allowances allocated are no different vis-à-vis environmental benefits than those purchased. Indeed, allowances purchased by an entity for compliance originally may have been freely allocated to another entity as way of industrial assistance. The allowance market intentionally was designed by ARB to be liquid. As such, there is no difference between allowances: (i) sold directly by ARB at the quarterly auctions; (ii) allocated to investor-owned and publicly-owned utilities and then consigned to the quarterly auctions, with sales revenue flowing to the utilities for use in various programs; or (iii) bought and sold on the so-called secondary market.

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8 More information about offsets may be found on ARB's Compliance Offset Program web page: http://www.arb.ca.gov/cc/capandtrade/offsets/offsets.htm (last visited December 30, 2014).

III. RELEVANT DEVELOPMENTS ARE PENDING

Finally, we respectfully suggest that the District consider the potential benefits of waiting for certain relevant developments to play out before adopting a significance threshold. There are two developments in particular which warrant attention.

First, as discussed in more detail in our Prior Comment Letter, the California Supreme Court on July 9, 2014 granted a petition for review of *Center for Biological Diversity v. California Department of Fish and Wildlife*, 224 Cal. App. 4th 1105 (Cal. App. 2d Dist. 2014, Case No. B245131)(*CBD v. CDFW*). The appellate court's strongly worded opinion in *CBD v. CDFW* confirmed that analyzing a project's GHG emissions under CEQA via a significance threshold derived from California's GHG emissions reduction goals is appropriate. As such, the California Supreme Court soon may provide guidance on the selection of a methodology by a lead agency for determining the significance of GHG emissions under CEQA. The California Supreme Court's final decision, generally expected in the Summer of 2015, would be particularly informative for the District's adoption of one of the proffered Options.

Second, Senate Bill (SB) 32 was introduced by Senator Fran Pavley on December 1, 2014. SB 32 would amend AB 32 to *require* ARB to set a 2050 GHG emissions limit for the state and also would *authorize*, but not require, ARB to establish interim targets for 2030 and 2040. Larger percentage reductions below BAU post-2020 may be needed. If enacted, SB 32 would lead to a clarification of what those percentage reductions should be.