November 26, 2008

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

Re: **Comments of the California Building Industry Association and the California Business Properties Association on the Preliminary Draft Staff Proposal on Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under CEQA (October 24, 2008)**

Dear Madam Chair:

The California Building Industry Association (CBIA) and the California Business Properties Association (CBPA) appreciate the opportunity to comment on CARB's Preliminary Draft Staff Proposal entitled "Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under the California Environmental Quality Act" (CEQA). Developing workable and effective CEQA thresholds will be one of the critical steps in working to implement California's greenhouse gas reduction goals as set forth in the Global Warming Solutions Act of 2006 (AB 32).

CBIA is a statewide trade association representing over 6,500 member companies involved in residential and light commercial construction. CBIA member companies account for over 80% of all new homes sold in California each year. CBIA has been active in developing and implementing energy conservation standards that will help to achieve the greenhouse gas reductions sought by AB 32, and also worked at great length to develop the final version of Senate Bill 375, to coordinate transportation planning, land use planning, and greenhouse gas reduction goals. Many of the comments in this letter are directed at insuring that the proposed significance thresholds help to implement the goals of AB 32 and Senate Bill 375 in an effective and workable fashion.

CBPA is the statewide legislative and regulatory advocate for individual companies as well as the International Council of Shopping Centers (ICSC), the National Association of Industrial and Office Properties (NAIOP) California chapters, Institute of Real Estate Management (IREM), Building Owners and Managers Association (BOMA) California, California Downtown Association (CDA), and the Retail Industry Leaders Association (RILA), and CCIM of Northern California, making CBPA the recognized voice of the commercial, industrial, and retail real estate industries in California representing over 11,000 companies.

Although the staff proposal is a recommendation to the Office of Planning and Research, CARB must recognize the very critical role that the proposal will play in the CEQA process. Until more formal standards are adopted, lead agencies are likely to look to the recommended threshold proposal for guidance, even before new CEQA guidelines are adopted on greenhouse gases. This proposal will also be applied to the wide range of residential and other development projects in the wide range of jurisdictions in California, and it is important to develop a proposal that is workable in that wide range of contexts. Specifically, the proposal should be capable of being workably applied by rural county

staff who are evaluating applications for residential development projects, as well as city staff evaluating developments in a developed urban infill setting. The proposal also needs to be consistent with the existing CEQA process, recognizing that many smaller development projects will continue to be evaluated based upon negative declarations and mitigated negative declarations, and properly so.

The following letter begins with some general overview comments and then includes detailed comments on the CARB staff proposal.

I. OVERVIEW COMMENTS

First, it is very important to have clear and workable statewide CEQA significance threshold recommendations to provide guidance to the cities, counties and other agencies which will consider utilizing the recommended significance thresholds in evaluating residential development projects under CEQA. Clear and workable thresholds can help to provide predictability in what is currently an uncertain area of CEQA, and a level playing field for residential development.

With that said, it is also critical that the recommended significance thresholds do not attempt to "up the ante" for new development and set forth standards which go above and beyond those considered reasonable and appropriate regulations by other state agencies and ARB in other contexts. The preliminary draft staff proposal states that the State's scoping plan maps out achievement of regulatory, voluntary and market-based mechanisms beginning in 2012, resulting in the immediate need to use CEQA as a mechanism "that is independent of AB32 through which lead agencies can begin immediately to reduce the climate change-related impacts of the projects that come before them." In fact, multiple state agencies have already updated or are currently in the process of updating their regulations to implement the goals of AB 32. It should not be the role of CEQA to ratchet up these evolving AB 32 standards even further for new development.

The recommended CEQA thresholds must recognize the scientific, regulatory and legal consensus and standards that are contained within AB 32 and reflected in SB 375. As the state's comprehensive plan to reduce and stabilize the emission of atmospheric greenhouse gasses to a level that avoids or substantially lessens significant harm to the environment, AB 32 should provide the central guidance in helping to formulate CEQA significance thresholds, and those thresholds should be based upon workable performance standards that seek to achieve AB 32's goals. Given the scientific, legal and regulatory consensus and the policy directives that are reflected in AB 32, at this time it would be both inconsistent and inappropriate to develop CEQA thresholds that go beyond AB 32 standards.

CARB's recommendations also need to be consistent with CEQA terminology and practice. A number of the comments that follow are aimed at using CEQA's established terminology, and achieving greater consistency between CARB's recommended thresholds and existing CEQA legal standards.

Finally, we endorse the concept of performance standards as an integral part of ARB's guidance on GHG significance thresholds under CEQA. These performance thresholds should be established using the same standards that ARB applies to regulation for other sectors under AB 32. In the next few weeks, we will submit specific proposals to ARB for the various performance standards. In general, we

believe the performance standards must be based upon implementation of AB 32 goals and the consensus that was developed through the process of negotiating SB 375. Moreover, to the extent applicable, these performance standards should reflect those established by the California Building Standards Commission and codified in Title 24 of the California Code of Regulations. By law these building codes serve as the basis for the design and construction of buildings in California and their development reflects the Governor's policy directive to establish California as a leader in the efforts to reduce greenhouse gas emissions. In fact, the Governor acknowledged their contributions toward reducing GHG earlier this year when he stated "By adopting this first-in-the-nation statewide green building code, California is again leading the way to fight climate change and protect the environment. This is literally a groundbreaking move to ensure that when we break ground on all new buildings in the Golden State we are promoting green building and energy efficient new technologies." (July 17, 2008). We look forward to working with CARB on the refinement of performance standards under CEQA.

II. DETAILED COMMENTS

The comments below are presented in the same order as the draft staff proposal for your convenience in evaluating these comments.

A. Comments on the Introduction

1. Not all projects generate greenhouse gas emissions or potentially significant climate change effects. Currently, the second paragraph in the introduction states that lead agencies are obligated to determine whether a project's climate change related effects may be significant—thus presuming the existence of such effects. This should be modified to indicate that, when a project generates greenhouse gas emissions or climate change-related effects, lead agencies must determine whether those effects may be significant.

2. The text accompanying footnote 7 refers to CEQA Guidelines addressing greenhouse gas emissions. SB 97 specifically directed OPR to develop guidelines for the *mitigation* of greenhouse gas emissions, and the text here could be clarified to reflect that.

B. Comments on the Background Section.

1. The statement that the incremental effect of a project can be significant when it is cumulatively considerable is correct, but the following discussion in the first paragraph of this section should more closely follow the CEQA Guideline language regarding cumulative impacts. A project effect does not become cumulatively considerable and significant simply by being added to the impact of past, present and reasonably foreseeable future projects, irrespective of extent. Under CEQA Guideline 15355 and 15064(h), if such combination of project impacts and related impacts produces a collectively significant cumulative impact and the incremental effect of the project compounds or increases that collective effect in a meaningful way, then the project contribution is treated as "cumulatively considerable," or significant." Small incremental contributions often are not cumulative considerable under the Guideline definition.

2. The discussion regarding CEQA thresholds focuses primarily on Guideline 15064.7, the guideline that encourages public agencies to develop and publish thresholds of significance, and requires such thresholds to be adopted by ordinance resolution, rule or regulation, and to be supported by substantial evidence. Some lead agencies do formally adopt significance thresholds in this manner, but the vast majority of lead agencies do not. This discussion (as well as the references in CARB's proposed threshold to presumptions of impact), should generally be revised to reflect the fact that most agencies will be applying the recommendations to determine significance, but the agencies will not be formally adopting these standards by ordinance or regulation as Guideline 15064.7 envisions. Instead, most lead agencies will apply this recommendation in the same manner that recommendations from other resource agencies, or standards set forth in an agency's general plan, are applied. In such cases, the lead agency must support its significance determinations with substantial evidence, and the standards for evaluating such significance determinations in both EIRs and negative declarations are well established in CEQA law and practice.

C. Comments on the Recommended Thresholds – Conceptual Approach

1. It is proper and important for the recommended threshold proposal to recognize the existence of CEQA's existing statutory and categorical exemptions, but the references to the exemptions need to be revised to be consistent with CEQA. First, with respect to statutory exemptions, projects that are statutorily exempt from CEQA are entirely exempt; there is no basis for application of any significance thresholds.

2. Second, projects that are categorically exempt are also entirely exempt from environmental analysis, with the very limited exception that the use of a categorical exemption can be defeated by the application of several exceptions of the categorical exemptions. In particular, Guideline 15300.2(c) sets forth an exception that applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Importantly, the factual predicate for application of this exception is some showing of "unusual circumstances," so it is inappropriate to suggest in the staff proposal that categorical exemptions should routinely be subject to some threshold determination for climate change. Whether a categorically exempt project contributes to climate change should be evaluated only when there has been some threshold showing that there is an unusual circumstance leading to a claimed impact relating to climate change. Given the very limited number of situations in which such unusual circumstance claims arise, the Attachment B chart should indicate that "no further action" is required when a project is exempt pursuant to either a statutory or a categorical exemption.

3. With respect to the final question on page 6, CBIA and CBPA disagree with the suggestion that some projects that meet greenhouse gas performance standards may, under some circumstances, still be considered to have cumulatively considerable impacts. Essentially, CARB's proposal posits that larger projects that implement greenhouse gas performance standards should at some point be determined to generate a cumulatively considerable significant impact. This would be inconsistent, however, with the legal framework that California has adopted to reduce greenhouse gas emissions, in both AB 32 and SB 375. If a larger project (for example, 4000 housing units) meets greenhouse gas emission reduction standards tied to AB 32 , that project

should be determined to have mitigated its greenhouse gas emission impacts to the same proportional extent as a smaller project (for example, 40 or 400 units). In fact, the larger project would move us more quickly towards meeting California's greenhouse gas emission reduction goal by achieving AB 32 compliance for a larger number of units and also by more likely accommodating mixed uses and jobs-housing connections. In addition, requiring a determination that "larger" projects have significant greenhouse gas emission impacts would impose a special burden on large projects that comply with SB 375 and further its goal of tying land use and transportation planning to achieve greenhouse gas reduction. CARB's proposal thus imposes a processing burden on the very type of projects which are needed to help implement AB 32 and SB 375, and frustrates—rather than helps to implement—those statutes. The staff proposal should be revised to focus on performance standards tied to AB 32 and AB 32 goals, and eliminate any numeric criteria beyond those performance standards.

D. <u>Comments on Attachment B</u>

1. Consistent with our prior comments regarding CEQA exemptions, if a project is exempt from CEQA under an existing statutory or categorical exemption, the chart should indicate that "no further action" is required.

2. Generally, when an agency is determining whether or not an impact is significant, it is concluding either that there is a potentially significant impact or the impact is less than significant, or mitigated to a less than significant level. The potential conclusions that can be reached, as set forth in Attachment B, should be revised to reflect this. If a project meets the requirements in either Box 2 or Box 3, the conclusion should be "less than significant impact/impact mitigated to a less than significant level."

3. If the project does not meet the criteria set forth in Box 2 or Box 3, the determination should simply be "potentially significant impact related to climate change." The conclusion should not refer to a presumption.

4. Similarly, Box 4 does not need to state or characterize CEQA's requirements that would apply once a project is determined to have a potentially significant impact. Those concepts are well established in CEQA law and practice and any short characterization here risks creating confusion and inconsistencies with existing CEQA law. Box 4 should be revised to read simply "project may have potentially significant GHG impacts."

5. Box 2 on the chart appropriately refers to Guideline 15064(h)(3) and its "compliance with plan" approach to cumulative environmental problems. To be consistent with Guideline 15064, however, most of the following bullets should be deleted as they go beyond CEQA's "compliance with plan" requirements. In particular, there is no CEQA basis for requiring compliance with every single one of the bullet points.

   (a) One of the potential bases for a "compliance with plan" finding should be meeting a community level greenhouse gas target or plan that is consistent with the statewide emissions limits in AB 32. This allows local agencies that have developed or are

developing greenhouse gas reduction plans to apply those plans in determining significance, and this is appropriate.

(b) Compliance with a Sustainable Communities Strategy (SCS) or Alternative Planning Scenario (APS) pursuant to SB 375 (and the implicit obligation to comply with Title 24 green building standards) should also be a basis for a determination of insignificance under CEQA, and should be included here as a stand-alone threshold, and not combined with other obligations.

(c) The remaining bullets should be deleted. Although many agencies are preparing greenhouse gas inventories as part of preparing plans, preparation of such an inventory is not a necessary predicate to a plan that meets state emissions reduction targets. Similarly, mechanisms to allow plans to be revised are not required to meet AB 32, and that reference should be deleted.

(d) Finally, the reference to CEQA Guideline 15152(f) should be deleted. There is no requirement in Guideline 15064 that impact reducing plans must have CEQA documents. CEQA Guideline 15152 is a tiering provision which simply does not have any application here.

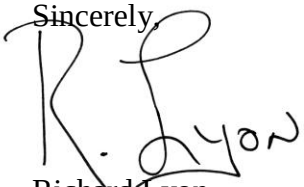
6. Within Box 3, it is generally appropriate to use performance standards to evaluate significance and also allow local agencies to include equivalent mitigation measures. This box should also indicate that there can be tradeoffs between the various performance standards, so that an agency can choose its own mix of performance standards based upon local and regional conditions. For example, if local conditions create some obstacle to meeting a water use performance standard, the deficiency in that water use performance standard could be "made up" with greater reductions or greater efficiencies in one of the other areas governed by performance standards (energy use, waste, or transportation).

7. As previously stated, there is no basis for imposing some numeric limitation in addition to the performance standards, so the overall aggregate emissions limit under Box 3(b) should be deleted. In fact, the application of a performance standard AND a numeric standard as currently proposed would allow for the perverse outcome of two projects with *exactly the same total emissions* being treated differently. Emissions from the project that incorporated performance standards would be deemed insignificant, while emissions from the other project without performance standards would be deemed significant. Not only does CEQA not allow this distinction, but the addition of a numeric standard in this setting is inappropriate because it amounts to a direct regulation. Moreover, as contemplated by SB 375, a mix of housing sizes and configurations is consistent with good regional planning and the achievement of California's GHG reduction goals. In fact, large scale projects involving many housing units and related amenities together in one location are a critical part of this mix, and therefore critical to the achievement of the state's GHG goals. The addition of a numeric standard here would serve as a substantial road block to such projects and is therefore not appropriate.

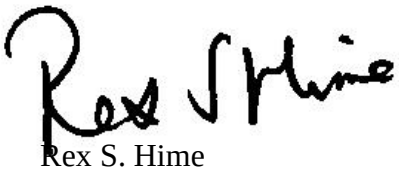
8. As previously stated, in the next few weeks we will be submitting specific proposals to CARB for the various performance standards. We look forward to working with CARB to evaluate the various performance standards proposals as we go forward.

CBIA and CBPA very much appreciate the opportunity to provide these comments.

Sincerely,



Richard Lyon
Senior Legislative Advocate, CBIA



Rex S. Hime
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