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Honorable Lianne M. Randolph, Chair
Members of the Air Resources Board
Clerks' Office, California Air Resources Board
1001 I Street, Sacramento, California 95814
Electronic submittal: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Re: Comments on Draft 2022 Scoping Plan

Dear Chair Randolph and Members of the Board:

The law firm of Chatten-Brown, Carstens & Minter hereby submits the following comments on the Draft 2022 Scoping Plan for attaining California's climate goals. Chatten-Brown, Carstens & Minter is a private, public interest-oriented law firm that regularly represents environmental, environmental justice, neighborhood, and other groups in environmental and other public interest litigation. We have a deep and abiding interest in the environment of California and the health and welfare of all its residents. We fully support and join in the comments of 73 environmental, environmental justice, and other organizations that have sent a letter of objection to CARB on June 2, 2022.

(https://earthjustice.org/sites/default/files/files/73_orgs_letter_-_a_just_and_ambitious_scoping_plan.pdf.) We also support and join the comments of 128 academic professionals and scientists dated June 14, 2022. (<https://caleja.org/wp-content/uploads/2022/06/Academics-Scoping-Plan-Letter-6.14.22-.pdf>.)

We focus our comments on Appendix D to the Draft Scoping Plan.

A. The Climate Change Situation is Dire, and Demands Bold and Comprehensive Action Now.

CARB has issued its draft 2022 Scoping Plan shortly after the International Panel on Climate Change (IPCC) issued its report titled "Climate Change 2022: Impacts, Adaptation and Vulnerability."¹ In its Summary for Policymakers, that report portrayed with "high confidence" a short-term future (2021-2040) in which human-accelerated climate change will produce sea level rise that will impinge on coastal cities and infrastructure, more extreme weather events, and greater reduction in biodiversity. (IPCC Report Summary, p. 15.) In the mid-term (2041-2100), the IPCC predicts significant loss of biodiversity and extinction of species, increased "[r]isks in

¹ Available at <https://www.ipcc.ch/report/ar6/wg2/>; visited 6/21/22.

physical water availability and water-related hazards . . . in all assessed regions, with greater risk at higher global warming levels (high confidence)”, and increased food security in many regions of the world. (*Ibid.*, p. 16.) In California, we are seeing huge increases in risk of and damage from wildfires, and critical decreases in water supply. As Appendix D to the draft Scoping Plan recognizes, “[w]ith increasing severity and occurrence of droughts and wildfires, the window for action is urgent.” (Appdx. D, p. 2.)

Appendix D also states that “roughly 35 percent of California’s GHG reduction potential is from activities that local governments have authority or important influence over.” (Appdx. D, p.1.) The avowed purpose of Appendix D is to detail methods by which local governments can reduce GHG emissions in California. (*Ibid.*) While we agree with the urgent necessity for local governments to greatly ratchet up their control over GHG emissions, Appendix D is a severely flawed tool to encourage this. California Environmental Quality Act (CEQA”) is California’s premier environmental law and has been described by Byron Sher as a “bill of rights for an environmental democracy.” Overall, significant flaws of Appendix D are that it (1) denigrates and attacks CEQA--even though it recognizes that only about 3% of projects are ever litigated under CEQA-- while simultaneously relying on examples of net-zero carbon emissions projects whose GHG reductions have been the result of actual or threatened CEQA litigation, (2) encourages the use of GHG offsets from carbon registries that are unregulated, (3) endorses the use of off-shored GHG offsets, (4) fails to address GHG emissions from wildfires, and (5) never directly grapples with the urgent need for local governments to curb sprawl development. The Appendix should be substantially revised. We discuss several significant problems below.

B. Passive Conformity with the Scoping Plan Does Not Suffice to Support a Finding of No Significant Impact From a Project.

It is of critical importance both that the Scoping Plan be clear about the role of local governments in reducing GHG emissions, and that it define with particularity what types of local actions are and are not consistent/compliant with the Scoping Plan. CARB and other state agencies, such as the Office of Planning and Research, should provide greater incentives and guidance to localities to adopt local Climate Action Plans (CAPs), and to make them as strong as possible. Appendix D observes that “[w]hile [climate action plans] have become an important avenue for climate action at the local level, 47 percent of California cities and counties have no known [climate action plan].” (Appdx. D, p. 3.) Even when local governments do adopt CAPs, those CAPs are not necessarily adequate. A draft report prepared by the University of California at San Diego’s School of Global Policy and Strategy² examined all CAPs in San Diego County, and found that even if the current CAPs were all carried out to the letter and worked as intended, they would reduce GHGs over the state/federal reductions by only about an additional 2 MMTCO₂e per year by 2035. This woefully inadequate reduction demonstrates the limits of current CAPs to meet California’s climate goals.

² “San Diego Regional Decarbonization Framework,” Available at <https://www.sandiegocounty.gov/content/dam/sdc/lueg/regional-decarb-frameworkfiles/RDF%20First%20Draft%20CompleteOct28.pdf>; last visited 6/22/22. The study report is marked Draft, Not for Citation, so individual page numbers are not provided here.

Nor is the existence or absence of local CAPs the only problem. Some local governments attempt to use partial “consistency” with the Scoping Plan for adequate GHG impact mitigation. Our firm sees many CEQA documents that interpret CEQA Guidelines section 15064.4, subdivision (b)(3)’s provision that consistency with “a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions” may support a finding that a proposed local development project will have no significant impact on climate change to claim that projects will have no significant climate impacts because they are supposedly “consistent” with the statewide Scoping Plan. In making such findings, we regularly see EIRs that regard passive “compliance” with such Scoping Plan provisions as the state vehicle emissions standards and the Cap and Trade program – regulations and programs over which no local development project has any control and which no local development project can legally violate - as satisfying CEQA Guidelines section 15064.4. Under this reasoning, virtually *any* local development project could be asserted to have no significant adverse impact on climate change, and we see that claim made for many projects that will emit large amounts of GHGs over their useful lives.

The California Supreme Court addressed this problem to some extent in *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 225, where our high court found that consistency of a project’s GHG emissions percentage reductions over business as usual with the percentage of GHG emissions reductions required by the then-current Scoping plan was not sufficient to show no significant impact by the Newhall Ranch project on climate change. However, the arguments currently being made are different, and require a different response. The Appendix does state that “it would not be appropriate to rely upon the State’s Cap-and-Trade Regulation as a reason not to provide appropriate GHG analysis and, if needed, mitigation, for local development projects” (Appdx. D, p. 19). However, CARB should go farther, and should state clearly that mere involuntary, passive compliance with state programs relied on in the Scoping Plan is *not* sufficient. A project must show that a project would have no significant impact on GHG emissions and the state’s climate goals through full analysis of local emissions, comparison to any local climate action plan, and assessment of the project’s impact on state climate goals and its contribution to cumulative climate change impacts. Mitigation must be required where there is a significant impact.

C. GHG Offsets From Unregulated Private Registries Do Not Meet Applicable Standards for Enforceability.

As counsel for the Sierra Club, a co-plaintiff in *Golden Door, et al. v. County of San Diego* (2020) 50 Cal.App.5th 467, cited at page 18, note 56 of Appendix D, we find the Appendix’s treatment of carbon offset registries deeply disturbing. The Appendix states that use of voluntary GHG offsets from “reputable” offset registries “may be appropriate” when on-site and other off-site GHG reductions have already been required. (Appdx. D, p. 17.) While the Appendix notes the *Golden Door* court’s analysis that the offsets claimed by the project in that case were not shown to be real, additional, quantifiable, permanent, verifiable and enforceable when evaluated “using the requirements for offsets under the State’s Cap-and-Trade Program as a proxy for evaluating enforceability under CEQA” (Appdx. D, note 56), the Appendix does not propose any method of ensuring that private registry credits not issued by CARB are fully

enforceable.³ The Appendix should note that registries – including reputable ones - are not subject to regulation by CARB outside of their participation in the Cap and Trade program or, as far as we are aware, by any other governmental agency. Rather, use of these registries outside the Cap and Trade program seems to rely on the honor system; their offsets cannot be presumed to be real, additional, quantifiable, permanent, verifiable and enforceable, per the *Golden Door* analysis. The Appendix should forthrightly acknowledge and address this critical problem.

The Appendix recommends that local agencies emphasize GHG reduction measures that are “additional”, i.e., not required by any other law, regulation, or program. (Appdx. D, p.19.) While this approach is promising, there is no reason to think, nor does the Appendix attempt to show, that such credits will or could be sufficient to allow all projects with significant potential to emit significant GHGs to get to net-zero, as the Appendix advocates. Alternatively, CARB or another agency should undertake to ensure the integrity of private GHG offsets, either by regulating carbon offset registries or some other equally reliable method. The climate change situation is too dire to do otherwise.

We are also very concerned that the Appendix appears to indirectly endorse the use of offsets developed and occurring outside the United States. (Appdx. D, pp. 15, 20.) Although the Appendix makes clear the superiority of local offsets that can also reduce conventional pollutants and generate local jobs, it appears to condone the use of “international offsets.” (Appdx. D, p., 15.) As difficult as it is to verify the full enforceability of offsets within California and within the United States, we do not see, nor does the Appendix identify, any existing mechanisms that could ensure such enforceability outside the U.S. We urge CARB to make this clear, and to make clear that it is not endorsing international offsets unless clearly proven to meet the test of being real, additional, quantifiable, permanent, verifiable and enforceable.

D. CEQA and the CEQA Process Are Not Responsible for Blocking Urban Infill Housing, and the Draft Scoping Plan Should Remove Language Suggesting That They Are.

We object strongly to the Appendix’s attempt to characterize CEQA and the CEQA process as blocking increased infill housing density, at pages 12-13. Blaming CEQA’s requirements for California’s housing shortage crisis is inaccurate and factually unsupported. Further, it is not clear why CARB chose to use the term “abusive litigation” in Appendix D, while simultaneously admitting that only about 3% of projects studied in the two reports cited by Appendix D were subject to CEQA challenges; the numbers show that such litigation is rare.⁴

The Appendix appears to base conclusions that CEQA and the consideration of GHG issues under CEQA are a significant and unwarranted barrier to the construction of new housing on research done for CARB that studied barriers to infill housing. This research does not support

³ See discussion of registries at <https://ww2.arb.ca.gov/news/air-resources-board-sets-stage-carbon-offset-projects>; visited 6/23/22.

⁴ Even more rare is the number of projects litigated under CEQA that were litigated on GHG or VMT issues, which was only 2% of the total (2/3 of the 3% of litigated projects [Appdx. D at p. 7]).

blaming CEQA for blocking infill housing development. The “Final Report: Examining Entitlement in California to Inform Policy and Process”⁵ (“O’Neill 2022”)⁶ examined data for four cities in the greater Los Angeles area. (O’Neill 2022, Exec. Summary.) The study states in its Results section that “Our work suggests that the chief regulatory contributor to California’s housing crisis is local governments hindering dense housing via zoning and development approval processes”, not CEQA requirements or litigation. (O’Neill 2022, p. 10.) Further, as the Appendix concedes, the O’Neill work found that only about 3% of projects in the cities studied were subject to CEQA suits (*Ibid.*, p. 10); the Appendix also concedes that two thirds of those suits, i.e., only 2% of the projects in the studied area, raised GHG or VMT issues (Appdx. D, p. 7), hardly a flood of litigation.⁷ The O’Neill 2022 paper also states that there was “no meaningful difference between rates of litigation for urban or exurban development” (O’Neill 2022, p. 10), putting the lie to any claim that CEQA suits are disproportionately aimed at blocking urban infill housing. The paper also examined whether litigation focused solely on CEQA claims or also involved other alleged illegalities; it concluded that “when litigation occurs, CEQA claims are common—but that most lawsuits (almost 3 out of 4) could proceed even if the plaintiff or petitioner could not bring a claim under CEQA.” (*Ibid.*, p. 82.) This reduces almost to vanishing point the percentage of cases that rely solely on CEQA claims.

We would also refer CARB to the study done by The Rose Foundation for Community and the Environment, CEQA: California’s Living Environmental Law - CEQA’s Role in Housing, Environmental Justice & Climate Change” (2021 [“CEQA: California’s Living Environmental Law Report”]).⁸ This study painstakingly examined CEQA litigation in various cities and counties around California, compiled data on rates of CEQA litigation and on numbers of projects in these jurisdictions, and concluded that the rate of litigation challenging projects on CEQA grounds during the period 2013 to 2019 was only 2%. (CEQA: California’s Living Environmental Law Report at pp. 20-22.) The study also examines the data in the two O’Neill studies relied on in Appendix D, pointing out that:

The key finding of the Berkeley Law Working Papers is that while streamlined CEQA review is often used for housing projects, each city also relies on other mechanisms and regulations for its review of discretionary land use entitlements, and that these non-CEQA review processes largely determine the time frame for project approvals. The researchers thus find that different, non-CEQA land use entitlement processes across the cities—or sometimes uneven interpretations of the same regulation, such as design

⁵ Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956250; visited 6/22/22.

⁶ Appendix D cites to two O’Neill, et al, papers; we cite to the final report.

⁷ Confirming the O’Neill et al. conclusions, the study noted that “a 2016 report from BAE Economics, found low rates of ; last visited 6/24/22litigation and infrequent use of EIRs.” (*Ibid.*, p. 33.)

⁸ Available at https://rosefdn.org/wp-content/uploads/CEQA-California_s-Living-Environmental-Law-10-25-21.pdf; last visited 6/24/22.

review, within a city—are the main cause of project delay. Accordingly, the study concludes that CEQA review is not a primary obstacle to project approvals.

(CEQA: California’s Living Environmental Law Report, p. 25.) The study also examined several other surveys of CEQA litigation that found very low rates of CEQA litigation. (*Ibid*, pp. 23-25.)⁹

In addition, the Appendix recognizes the ability of the CEQA process – including, at times, litigation – to produce excellent results for the environment. Such results include the examples of net-zero GHG emissions commitments cited by the Appendix that were the direct or indirect result of CEQA litigation, including the Newhall Ranch settlement and Tejon Ranch’s Centennial Specific Plan. (Appdx. D, pp. 12-13.) These net-zero projects are now urged by Appendix D as models that other projects can emulate. The litigation that resulted in their design was clearly not “abusive,” and it is irresponsible for CARB to use such unwarranted, unsupported, and inflammatory language. Similarly, use of the derogatory term “NIMBY” (Appdx. D, p. 8) is both unprofessional and unbecoming of a state agency. We urge CARB to reexamine Appendix D’s terminology and its implicit view about CEQA.

E. Appendix D Does Not Address Curbing GHG Emissions Caused by Wildfires

CARB has reported in “Wildfire Emissions Estimates for 2020”¹⁰, its estimate that 106.7 million metric tonnes of carbon dioxide (MMTCO₂) were released into the atmosphere during California wildfires in 2020 (a very high fire year). Despite the huge amounts of carbon dioxide released during wildfires, and despite the frightening increase in wildfires over the last decade, Appendix D does not address the subject of wildfire-caused GHG emissions and their impacts. Since the Environmental Assessment (EA) for the draft Scoping Plan recognizes that local agencies have the responsibility for requiring project-level wildfire-avoidance and mitigation measures (Appdx. B, p. 229), the Draft Scoping Plan must set out and discuss methods by which local agencies can most effectively discharge that responsibility. Such methods should include the use of local planning and zoning powers to control human intrusion into wild areas and requirements for property management and upkeep that minimize the likelihood of fires beginning. We believe that restricting or avoiding sprawl into identified and potential wildfire high-risk areas should be included in the minimum measures that are compatible with the Scoping Plan.

F. Zero Emissions Vehicles (ZEVs) Alone Cannot Achieve California’s Climate Goals.

The EA relies heavily on the use of EVs to achieve state GHG goals (Appdx. B, Table 4-12, p. 124 Transportation sector), despite the fact that the phase-in of restrictions on sales of non-ZEVs is not planned to reach 100% till 2035. (<https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/advanced-clean-cars-ii>; visited 6/20/22.) Even assuming that this program is fully successful, and that all new cars sold in CA in 2035 are ZEVs, there will still be millions of older, non-ZEV cars on the roads, in addition to cars meeting federal standards. Further, new trucks sold in California are not scheduled to be all ZEVs until

⁹ “CEQA: California’s Living Environmental Law” characterizes the Holland and Knight papers and their attacks on CEQA as “extreme outliers” in the literature on this subject. (*op. cit.*, p. 27.)

¹⁰ At p. 1. Report available at <https://ww2.arb.ca.gov/wildfire-emissions>; visited 6/22/22.

2040 (<https://ww2.arb.ca.gov/resources/documents/path-zero-emission-trucks-faq>; visited 6/20/22), with “the goal of achieving a zero-emission truck and bus California fleet by 2045 *everywhere feasible*[.]” (<https://ww2.arb.ca.gov/our-work/programs/advanced-clean-fleets>; visited 6/20/22, emphasis added.) California will not have a fully ZEV passenger car or truck fleet until decades from now, if ever. Appendix E to the Draft Scoping Plan states:

Even with Executive Order N-79-20 phasing out the sale of internal combustion engine (ICE) vehicles by 2035, *30 percent* of light-duty vehicles on the road in 2045 will be older and still burn fuel.

(Appdx. E, p. 5, emphasis added.) Given the decades-long turnover time for the vehicle fleet, VMT reduction will be needed for many years or decades after the 2022 Scoping Plan is adopted, even if CARB’s programs are fully successful. Appendix E to the draft Scoping Plan shows that “future per capita daily driving . . . must decline from 24.6 miles in 2019 to no more than 19.0 miles by no later than 2045 to support California’s climate goals.” (Appdx. E, p. 5.) However, California is now on track to increase average per capita daily driving to over 28 miles per day by 2045, roughly 50% more than is compatible with California’s climate goals. (*Ibid.*, Fig. W. ¹¹) Appendix D briefly recognizes that ZEVs alone cannot meet climate goals (Appdx. D, p. 2-3), but it must do more to make clear how much local agencies need to do now and for the foreseeable future to control and reduce VMT.

In its Table 1, Priority GHG Reduction Strategies for Local Government Climate Action (Appdx. D, p. 5), Appendix D does not mention controlling or avoiding sprawl development. It does list changing zoning and plans to increase density in infill areas, and preserving natural and working lands to avoid losing their carbon sequestration. However, in cities and counties encompassing rural, lightly populated areas without extensive transit, sprawl may present the greatest danger of increased VMT through increased driving to reach more urbanized areas with their jobs and amenities. The Appendix should present evidence-based strategies that local government can use to contain such sprawl, and discuss why it is necessary to contain sprawl. California cannot electrify its way out of the need for substantial VMT reductions.

G. More Aggressive Decarbonization Measures Are Available and Should be Recommended.

Appendix D describes some decarbonization measures that local governments can utilize to decrease their GHG emissions, including local forestry projects, creating EV charging stations, and energy retrofits of existing buildings. (Appdx. D, pp. 2-3 and 16-17.) However, the UC San Diego Decarbonization Framework study cited earlier studied building decarbonization closely. The building decarbonization measures it recommends, such a widespread deployment of rooftop solar and large-scale use of electric heating to replace natural gas, can produce much larger GHG reductions than a project-by-project approach. The study points out that, in San Diego County, 80% of the buildings that will exist in 2050 are already built. Therefore, while

¹¹ Appendix E states that this is a mathematical modeling projection, “for illustrative purposes only.” (Appdx. E, p. 5, note 2.) Even with this qualification, the VMT reductions needed are still daunting.

tightened and energy “reach” building codes are essential to produce future buildings that will use far less energy, adoption of retrofit requirements for existing buildings are just as, or even more, vital in order to reduce the energy use of the 80% of buildings that will still be here in 2050.¹² While data for other areas in California will be different from the data for the San Diego area, they are likely to be similar, and the San Diego study’s recommendations are likely to be apt. The study contains a section on legal authority for local governments to carry out the measures it recommends.

Conclusion

While Appendix D is a good beginning, it is not adequate to advise and encourage local governments to carry their fair share of the responsibility to meet the state’s climate goals. We urge CARB to revise and expand it in accordance with the recommendations we have made herein.

Sincerely,



Douglas P. Carstens

Susan L. Durbin

¹² We also note that many EIRs we see rely on an *unadopted* GHG threshold from SCAQMD that would limit GHG reduction measures for residential and commercial development projects to the same 30-year lifespan that SCAQMD assumes for the industrial-type projects for which it grants permits. Not only is reliance on unadopted regulations of dubious legality, the San Diego data show that as to buildings, the supposed 30-year lifespan lacks the evidentiary support CEQA demands. See, e.g., CEQA Guidelines section 15126.4 subd. (c).