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**March 14, 2016**

Manjeet Ranu, Acting Director  
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505 S. Vulcan Avenue  
Encinitas, CA 92024

**Via Electronic Mail**

*mranu@encinitasca.gov*  
*Athome@encinitasca.gov*

**Re: City of Encinitas Housing Element Update  
Climate Action Campaign Comments**

Dear Mr. Ranu:

Please accept the following comments on behalf of our client Climate Action Campaign (CAC) regarding the City of Encinitas (City) Housing Element Update (HEU or Project) Environmental Impact Report (EIR). CAC's aim is to make climate action a number one priority for policymakers everywhere until its mission of stopping climate change is achieved.

Though the HEU presents an opportunity for the City to show leadership on climate and reinforce its Climate Action Plan (CAP) with concrete, enforceable measures, the City's environmental review has fallen short in many respects. CAC therefore has serious concerns regarding the City's analysis of greenhouse gas (GHG) emissions associated with the HEU. As detailed below, the City's approach is inconsistent with the California Environmental Quality Act (CEQA), the City's own CAP, and relevant case law. Further, the City's GHG analysis is both internally inconsistent and unclear. The EIR's usefulness as an informative document is therefore questionable.

**A. The EIR Fails to Analyze Existing GHG Emissions and Assess the Extent to Which the Project May Increase GHG Emissions Compared to the Existing Environmental Setting**

The EIR provides various GHG emission inventories, including past statewide, regional and community-wide emissions, but fails to provide existing baseline emissions. Though the EIR details (presumably) increased GHG emissions attributable to the three housing strategies (in 2020), the EIR summarily dismisses the numeric increase as "not sufficiently informative or reliable" to indicate significance of GHG emissions. (EIR, pp. 4.6-15-16). However, such quantitative analysis is extremely informative. Indeed, in *Friends of Oroville*, the Court found that in order to assess a project's impacts based on an AB 32 threshold of significance, existing emissions must be calculated. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 842-843). Likewise, the CEQA Guidelines suggest an agency should consider the extent to which a project may increase or reduce GHG emissions "as compared to the existing environmental setting." (CEQA Guidelines §15064.4(b)(1)). The City cannot escape meaningful GHG analysis simply by labeling the impact significant. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1371 ["The EIR's approach of simply labeling the effect 'significant' without accompanying analysis of the project's impact...is inadequate to meet the environmental assessment requirements of CEQA."]).

Because existing emissions are not provided, the public and decision-makers are unable to accurately assess the increase in emissions attributable to the Project. The EIR could and should have provided these numbers. Further, as noted below in Section C, analysis of increased GHG emissions compared to the existing setting is necessary to evaluate the Project's consistency with the City's CAP.

## **B. The EIR Fails to Address the Project's GHG Impacts to the Horizon Year**

The HEU is intended to address the City's housing needs and objectives. To do so, the HEU provides various housing strategy maps for full buildout in the "horizon year" 2035. (See EIR, pp. S-31; 4.11-5, Footnote 1). Therefore, "[t]he analysis of impacts under the 2035 planning horizon is detailed and patterned after a 'full buildout' to provide maximum CEQA coverage for future projects. For 2035, the analysis is quantitative where appropriate and possible." (EIR, p. 3-56).

Notwithstanding the use of this 2035 horizon year in virtually all impact areas, the EIR's GHG analysis ends in 2020. (EIR, Appendix L, p. 6 ["for the purpose of this analysis, buildout for each strategy is projected to occur by 2020. (Buildout of the HEU based on market demand is not actually anticipated to occur until 2030 or beyond."], emphasis added). Not only does the EIR counterfactually assume buildout by 2020, it also assumes compliance with 2020 reduction targets would bring the Project "in line with achieving the 2030 and 2050 reduction goals." In making these unsupported assumptions, the EIR impermissibly fails to account for the increasingly stringent reduction targets beyond 2020.<sup>1</sup>

Executive Order S-3-05, issued in 2005, committed the State to reducing its GHG emissions to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050. Consistent with the objective of the Executive Order, the Legislature followed with the Global Warming Solutions Act of 2006, commonly known as AB 32. (Health & Saf. Code, §§ 38500, *et seq.*). AB 32 requires emission levels be reduced to 1990 levels by 2020. (Health & Saf. Code, § 38550). Recently adopted Executive Order B-30-15 also sets an interim reduction goal of 40 percent below 1990 levels by 2030. (See, EIR, p. 4.6-7). Thus, between 2020 and 2030, GHG emissions must be reduced an additional 40 percent.

The AB 32 Scoping Plan acknowledges the 2020 goal itself is an interim step towards the further reductions set out in the Executive Order. As noted in the First Update to the Scoping Plan:

Progressing toward California's long-term climate goals will require that GHG reduction rates be significantly accelerated. Emissions from 2020 to 2050 will have to decline at more than twice the rate of that which is needed to reach the 2020 statewide emissions limit. (First Update Scoping Plan, May 2015, p. 5, emphasis added).

The California Supreme Court recently reaffirmed the need to address the more stringent longer term targets during CEQA review. In *Center for Biological Diversity v. Department of Fish & Wildlife*, (2015) 62 Cal. 4th 204 ("Newhall Ranch"), the California Supreme Court reviewed the Department of Fish and Wildlife's ("DFW") EIR for a large development project (Newhall Ranch).

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<sup>1</sup> "Argument, speculation, unsubstantiated opinion or narrative" does not constitute substantial evidence. (CEQA Guideline § 15384(a)). Rather, substantial evidence includes facts, reasonable assumptions predicated on facts, and expert opinion supported by facts. (CEQA Guideline § 15384(b)). Substantial evidence (including the City's own CAP) has shown that unless the City implements additional GHG reduction measures necessary to put the City on the trajectory to meet the 2020 and 2050 targets, significant impacts will result.

(*Newhall Ranch*, 62 Cal. 4th at 213-214). The Supreme Court noted “consistency with year 2020 goals will become a less definitive guide, especially for long-term projects that will not begin operations for several years. An EIR taking a goal-consistency approach to CEQA significance may in the near future need to consider the project’s effects on meeting longer term emissions reduction targets.” (*Newhall Ranch*, 62 Cal. 4th. at 223).

The future articulated in *Newhall Ranch* is now. Because Project build-out is not expected until 2035, the City must assess the Project’s compliance with Executive Order B-30-15’s interim and more stringent reduction target. Moreover, the Supreme Court’s emphasis on assessment of longer term emission reduction targets is particularly relevant in the context of programmatic CEQA review for a long-term housing plan.

The City’s purported assessment of compliance with Executive Orders S-3-05 and B-30-15 through evaluation of consistency with the AB 32 Scoping Plan strategies does not meet this requirement. (EIR, pp. 4.6-21-25). In light of the Scoping Plan’s limited application beyond 2020, and the Scoping Plan Update’s acknowledgment that reduction rates must be significantly accelerated beyond 2020, the HEU must instead be evaluated for compliance with B-30-15 by assessing whether Project emissions enable the City to meet the 40 percent *emission reduction target*.

### **C. The City Failed to Assess Compliance with its CAP**

After the EIR impermissibly discounts a quantitative analysis of the Project’s GHG emissions (See EIR, p. 4.6-13), it assess the HEU’s GHG impacts by evaluating its compliance with various plans and policies. (EIR, p. 4.6-14). Surprisingly, the EIR fails to assess the Project’s compliance with the City’s own CAP. (*Id.*; see also, p. 4.6-5 [referencing City CAP]). The Encinitas CAP indicates the City’s 2005 baseline emissions were approximately 548,993 metric tons of carbon dioxide equivalent (MTCO<sub>2</sub>e) or 8.78 metric tons per capita. (CAP, p. ii). The City’s 2020 reduction target is 12 percent from the 2005 baseline. (CAP, p. 21). The EIR, however, completely fails to address this goal or put the HEU in context when compared to the CAP.<sup>2</sup>

Indeed, the EIR also fails to assess the feasibility of reducing GHG emissions through an enforceable CAP. As stated in the CAP,

Residential buildings offer opportunities for emissions reductions in new development as well as existing structures. Generally, residential building strategies focus on site specific design and innovation and technological improvements that increase energy efficiency and provide renewable energy generation. Because residential property owners, and potentially their respective tenants, have different needs and demands, reduction strategies consist of a mixture of regulatory mandates and incentives to improve building performance. (CAP, p. 24).

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<sup>2</sup> Oddly, EIR Appendix L claims “[e]ach housing strategy was evaluated relative to the reduction thresholds established in the City’s CAP (25 percent reduction from 2020 business-as-usual emissions, or a 12 percent reduction from 2005 baseline emissions). To evaluate each housing strategy’s GHG emissions relative to BAU, emissions were quantified and projected to the year 2020 for both a BAU scenario and actual buildout of the housing strategies.” (EIR, Appendix L, p. 5). This analysis was not included in the EIR or the Appendix. Further, translating the numeric analysis in the EIR to that of Appendix L is difficult, hindering such an assessment. These inconsistencies must be addressed.

The City should therefore explore additional reduction strategies tied to residential development and incorporate them into a meaningful, enforceable CAP. (Pub. Res. Code §§21002.1(a), 21061).

In that regard, the few mitigation measures included in the EIR are woefully inadequate. Many of the measures are simply record keeping functions already anticipated in the current regulatory context (i.e. GHG-1 to provide the revised land use plan to SANGAG and GHG-2 to demonstrate compliance with CalGreen Tier II standards). Further, the EIR fails to quantify any anticipated reductions which would result from these five mitigation measures.<sup>3</sup> (EIR, pp. 4.6-20-21). “Mitigating conditions are not mere expressions of hope.” (*Lincoln Place Tenants Assn. v. City of Los Angeles*, (2005) 130 Cal. App. 4th 1491, 1508). Likewise, “the difficulties caused by evolving technologies and scientific protocols do not justify a lead agency’s failure to meet its responsibilities under CEQA by not even attempting to formulate a legally adequate mitigation plan.” (*Communities for a Better Environment v. City of Richmond*, (2010) 184 Cal. App. 4th 70, 96, citing Remy et al., Guide to CEQA (11th ed. 2007) p. 552).

At this programmatic stage, the City must therefore analyze additional mitigation measures which will result in the reductions necessary to comply with the State’s reduction goals, such as increased use of solar, community choice aggregation, citywide composting, greater commitment to public transit at SANDAG, and expansion of City bike lanes.

#### **D. Conclusion**

The EIR must be updated to include an estimate of existing emissions, a forecast of emissions to the horizon year, and an analysis of the HEU’s compliance with both the CAP and the State’s more stringent reduction targets beyond 2020. Further, to address the need for additional mitigation measures, the City must update its CAP to include enforceable measures. In light of the City’s goal to tier from the EIR for future, specific developments, enforceable mitigation measures must be incorporated into the approval process.

CAC believes the law requires the City as a local entity with land-use authority to reduce GHG emissions and update its CAP to achieve meaningful reductions beyond 2020. Unless the City updates its EIR with the aforementioned analysis and incorporates adequate mitigation measures, the Project’s CEQA analysis will not withstand judicial scrutiny.

Thank you in advance for your consideration of our comments.

Sincerely,

**COAST LAW GROUP LLP**

  
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<sup>3</sup> The EIR’s mitigation measure GHG-5 which requires a 25 percent reduction in outdoor water use must be tied to a baseline from which such reductions are measured and a mechanism to enforce reductions such as an outdoor landscaping ordinance or Climate Action Plan update.