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STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of:

The Application for Certification for the
AVENAL ENERGY PROJECT

Docket No. 08-AFC-1

**OPENING BRIEF OF INTERVENOR**
**CENTER ON RACE, POVERTY & THE ENVIRONMENT**

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The Avenal Energy Plant ("Project") cannot be certified in accordance with applicable law. The Final Staff Assessment ("FSA") prepared by Commission Staff does not meet the requirements of the California Environmental Quality Act ("CEQA"). The Project's significant environmental impacts have not been properly disclosed, analyzed, or mitigated, and feasible alternatives to the Project have not been adequately explored. In light of these fundamental conflicts with CEQA, the Commission cannot find the Project is consistent with all applicable laws, ordinances, regulations, and standards ("LORS").

This Project also epitomizes the kind of environmental injustice that state and local governments have spent many years promising to avoid. People living in the communities surrounding this Project—more than 90 percent of whom are minorities—are already living with both substandard air quality and significant respiratory health problems. The Central Valley, including Kings County, has worse air quality than any other region in the Nation. Yet the

Project's air quality and climate change impacts have not been adequately disclosed or mitigated, and alternative sites situated in areas with better air quality were cursorily dismissed without adequate analysis or exploration.

There are more prudent, feasible, equitable, and environmentally responsible ways to satisfy the Central Valley's electricity needs. The Commission has for many years led California agencies in planning an energy future predicated on conservation, demand reduction, greater efficiency, and renewable generation. There are concrete, achievable, and feasible strategies available that, taken together, would more than outweigh this Project's relatively minor contribution to the electricity supply. Under these circumstances, the Commission cannot make the findings required under the Warren-Alquist Act and CEQA to "override" both the Project's inconsistency with LORS and its significant, unmitigated environmental impacts.

Given the public health crisis facing the Central Valley—and the broader threat that global climate change poses to people far beyond the communities affected by this Project—public convenience and necessity demand that the region's energy demand be satisfied in a way that does not exacerbate existing air quality problems or further increase greenhouse gas emissions. Denial of certification for this Project is not only required by law, but also consistent with the Commission's vision for California's energy future. The Center on Race, Poverty & the Environment ("CRPE") believes that the time to set a new direction in California energy policy, and to confirm the state's environmental justice commitment, is now.

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**STANDARD OF REVIEW AND BURDEN OF PROOF**

The Commission has exclusive power to certify sites and related facilities for thermal power plants in California. Pub. Res. Code § 25500. A certificate issued by the Commission operates in lieu of any other permit and supersedes otherwise applicable ordinances, statutes, and regulations. *Id.* Accordingly, the Commission itself must determine whether the Project complies with public safety standards, air and water quality standards, and "other applicable local, regional, state, and federal standards, ordinances, or laws." Pub. Res. Code § 25523(d); *see also* 20 CCR § 1752(a). The Commission may not certify any project that does not comply with applicable LORS unless the Commission finds both (1) that the project "is required for public convenience and necessity" and (2) that "there are not more prudent and feasible means of achieving public convenience and necessity." Pub. Res. Code § 25525; 20 CCR § 1752(k).

The Commission also serves as lead agency for purposes of CEQA. Pub. Res. Code § 25519(c). Under CEQA, the Commission may not certify the Project unless it specifically finds either (1) that changes or alterations have been incorporated into the Project that "mitigate or avoid" any significant effect on the environment, or (2) that mitigation measures or alternatives to lessen these impacts are infeasible, and specific overriding benefits of the Project outweigh its significant environmental effects. Pub. Res. Code § 21081; 20 CCR § 1755. These findings must be supported by substantial evidence in the record. Pub. Res. Code § 21081.5; CEQA Guidelines §§ 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23. The Applicant bears the burden of providing substantial evidence to support each of the findings and conclusions required for certification of the Project. 20 CCR § 1748(d).

## ARGUMENT

## I. APPROVAL OF THE PROJECT WOULD VIOLATE THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. *See* Pub. Res. Code § 21080.5; CEQA Guidelines § 15251(j). This certification permits the agency to submit a plan or other written document ("functional equivalent document") in lieu of an environmental impact report. Pub. Res. Code § 21080.5. Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. Pub. Res. Code §§ 21000, 21002; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Mountain Lion Foundation v. Fish & Game* (1997) 16 Cal.4th 105; *Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68. Like environmental impact reports, functional equivalent documents *must* include a description of alternatives to the proposed activity as well as mitigation measures to minimize any significant adverse effect that the activity will have on the environment. Pub. Res. Code § 21080.5(d)(3)(A).

The functional equivalent document for the proposed Avenal Power Plant violates CEQA because it fails to properly analyze and mitigate project impacts, fails to properly inform the public of the project's impacts, and fails to assess a reasonable range of project alternatives. The California Energy Commission must revise and recirculate the FED before approving this project.

### A. The CEC Does Not Adequately Identify, Analyze and Mitigate the Project's Air Quality Impacts.

The San Joaquin Valley ("Valley") Air Basin, in which Avenal is located, is one of the most polluted in the Nation. The EPA has designated the Valley as a serious nonattainment area for the federal eight-hour ozone standard. FSA 4.1-8. The EPA has also designated the Valley as a nonattainment area for PM2.5. *Id.* The California Air Resources Board ("CARB") has designated the Valley as a nonattainment area for the state ozone, PM2.5, and PM10 ambient air quality standards. *Id.*

Under its certified regulatory program, the Commission must identify all potential air quality impacts, analyze their significance, and adopt mitigation measures that could feasibly avoid those impacts. 20 CCR § 1742.5(a); *see also Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134-35. Moreover, the CEC's conclusions regarding the effectiveness of mitigation measures must be supported by substantial evidence. *See*, *e.g.*, *Gray v. County of Madera* (Oct. 24, 2008) __ Cal.App.4th __, 2008 WL 4682664 at pp. *11-12.)

While the CEC identified the *amount* of nonattainment criteria pollutants that will be emitted by the project, it failed to identify the *impact* emissions of these pollutants would have on nearby communities. The CEC also failed to demonstrate that the CEC's primary mitigation measure—emission reduction credits (ERCs)—will actually reduce air quality impacts to a level of insignificance.

### 1. CEC Failed to Analyze and Mitigate the Project's Local Air Quality Impacts.

The CEC discloses that the project will emit 1,752,911 pounds of criteria and precursor pollutants annually.[1] FSA 4.1-27. However, the CEC does not analyze the local impacts of any of these criteria pollutants on public health or the environment. FSA 4.1-21 (Explaining that the determination of impact is limited to assessing whether the project's emissions would cause or contribute to a violation of a district-wide ambient air quality standard.) The CEC's focus on district-wide impacts ignores the local impacts of these emissions. Moreover, the CEC only mitigates emissions that contribute to non-attainment of district-wide standards. FSA 4.1-33. (requiring only that the project offset its emissions to ensure "no net increase" in emissions from stationary sources in the region, where region refers to local air district.) The CEC does not require the applicant to mitigate the impacts of local emissions on communities closest to the project site.

The CEC cannot simply find that emissions exceed numerical significance thresholds, find the impacts significant, and do nothing more. The FSA must provide an analysis of the impact. The failure to do so violates CEQA by withholding information from the public and decision-makers. *See Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220 (failure to correlate air quality impacts to resulting public health impacts violated CEQA); *Berkeley Keep Jets Over the Bay Comm. v. Board of Port*

[1]NOx – 288,610 lbs/yr; VOC – 69,222 lbs/yr; PM – 161,550 lbs/yr; CO – 1,200,000 lbs/yr; SOx – 33,521 lbs/yr. FSA 4.1-27.

*Commissioners* (2001) 91 Cal.App.4th 1344, 1370 (a significance finding without analysis "allows the lead agency to travel the impermissible easy road to CEQA compliance").

CEC staff acknowledge that "[a]s development and growth occurs throughout the region, some communities may experience local emission increases while other communities experience the reductions." FSA 4.1-37. Additionally, while the FSA states "emission reductions from any location in the basin provide some benefit" CEC staff have not demonstrated that the basin-wide benefit is sufficient to offset local air quality impacts from the increase in emissions at the project site. *Id.* The CEC's failure to assess and mitigate the local impact of increased air emissions in the nearby communities of Avenal, Kettleman City and Huron is a violation of CEQA.

**2. The CEC Failed to Demonstrate that ERCs will Mitigate the Project's Air Impacts.**

The major mitigation measure for the project's air quality impacts in the FSA is the application of Emission Reduction Credits (ERCs). FSA 4.1-27; 4.1-44. However, the CEC does not provide sufficient information on the ERCs for decision-makers and the public to judge their adequacy as mitigation. Nor does the CEC provide support for its findings that the use of emission offsets from distant areas will mitigate the project's air quality impacts in Avenal and other surrounding communities.

In order to satisfy CEQA requirements, the CEC has an affirmative duty to provide public agencies and the public with detailed information on impacts a project is likely to have on the environment. Pub. Res. Code §§ 21002, 21002.1, 21061; 14 Cal. Code Regs. § 15362; *see also* CEQA Guidelines 15151 (The FSA "must be prepared with a sufficient degree of analysis to provide decision-makers with information needed to make informed decisions concerning

project's environmental consequences."). Because the ERCs must be spatially, temporally, and qualitatively equivalent to the project's actual emissions, information on the location and type of each emission reduction claimed is required to demonstrate their application adequately mitigates the project's air quality impacts. Therefore, the FSA must provide information about the type and location of each ERC claimed. This the CEC failed to do.

The majority of the ERCs listed in the FSA are not identified by location or type. For example, the four largest sources of NOx and VOC reductions are labeled in the FSA as either "Unknown, (Previously Pastoria Energy Facility)" or "Unknown, Southern." FSA 4.1-28, 4.1-29. Together, these "unknown" sources represent more than half of the NOx reductions claimed by the applicant and 90 percent of its VOC offset holdings.

Moreover, the FSA provides no information on the type of any of the ERCs being claimed to offset the project's air impacts, so the CEC can make no demonstration that the ERCs are qualitatively equivalent to the air emissions emitted by the project. Instead the only information provided about the offsets are the name of the offset, and, if known, its general location. FSA 4.1-29. Because specific data must be presented when it is necessary for a meaningful analysis of a significant impact and reasonably feasible to do so, (*Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs* (2001) 91 Cal. App. 4th 1344, 1381), the CEC's failure to provide relevant information on the location and type of emission reduction violates CEQA.

The FSA also provides insufficient support for its findings that ERCs located outside the local area and as far away as Stockton fully mitigate the project's local air quality impacts. FSA 4.1-28, 4.1-29, 4.1-30. Many of this Project's air quality impacts will occur locally—at the residences, schools, and businesses in Avenal, Kettleman City, and Huron. Yet the CEC does

not demonstrate how non-local emission reductions, located over a hundred miles away, will mitigate impacts from the localized emissions.

While the CEC requires that ERCs located 15 miles from a project location use a ratio of 1.5 to 1 to offset emissions, the CEC does not increase that ratio for ERCs located more than 15 miles from the project site. The CEC has no support that ERCs located 15 miles from the project will have the same mitigation value as ERCs located 150 miles away. Here, many of the ERCs are located in Stockton, more than 150 miles from the project site. The closest ERCs are in Fresno, over 60 miles away. The FSA does not contain substantial evidence supporting Staff's conclusion that the mitigation strategy adopted in condition AQ-SC7 will actually and effectively mitigate the Project's air emissions to a less than significant level.

### 3. Interpollutant Trading Ratios Not Supported By Evidence in the Record.

The Project proposes to meet 98% of its PM10 offset requirements from SOx offsets at a one-to-one ratio. FSA 4.1-30. Even if interpollutant trading is valid under CEQA, the CEC's finding that the proposed ratio of 1:1 between SOx and PM fully mitigates particulate emissions is unsupported by evidence in the record. There is no evidence in the record analyzing the difference in health effects caused by exposure to PM as compared to SOx; no analysis of the difference in dispersal rates of SOx as compared to PM; and no evidence that removing one ton/year of SOx will, in fact, prevent one ton/year of PM particles from being created. Additionally, by allowing this mitigation, the CEC will violate local air district rules which requires any interpollutant trading to be supported with "the appropriate scientific demonstration of an adequate trading ratio." SJVUAPCD Rule 2201.

While the record is bereft of evidence to support the 1:1 ratio, the record does contain evidence suggesting that the ratio is insufficient to mitigate PM pollution. After studying the issue, even the project applicant concluded that 1.4 tons of SOx reductions would be needed to offset each new ton of PM10 emissions. AFC Table 6.2-39. The FSA reports that "staff raised concerns because the one-to-one interpollutant trading ration is lower than what has historically required by the District on similar past power plant cases" and cited the ratio of 1.867:1 used by the nearby Panoche Energy Center in western Fresno County. The FSA also acknowledges that "[i]n rules issued by the U.S. EPA in 2008 related to P.M NSR, the U.S. EPA's 'nationwide preferred ratio' would be 40-to-1 for SO2 to PM2.5." FSA 4.1-35; 73 FR 28339. In fact, CEC staff acknowledged the likelihood that the U.S. EPA's review of the District's 2008 PM2.5 Plan would lead to a rejection of the 1:1 interpollutant trading ratio used by the SJVAPCD. FSA 4.1-35.

Despite this record evidence, the CEC ultimately adopted the SJVUAPCD's 1:1 SOx to PM ratio. In so doing, CEC has a duty to meet its own responsibilities as lead agency to demonstrate that it has mitigated all potentially significant air quality impacts from the project; it cannot merely rely on another public agency or process as a substitute for its work as lead agency. 14 CCR §§ 15020, 15126.4(a)(2). The CEC is unable to demonstrate with evidence in the record that a 1:1 ratio properly offsets the localized air quality impacts to nearby communities.

Additionally, in adopting the SJVUAPCD's method for determining offset requirements, the CEC must explain its basis for rejecting the ratios used by the EPA and the applicant and support its decision with relevant data. *Berkeley Keep Jets Over the Bay*, 91 Cal. App. 4th 1344,

1371. The CEC's conclusory statements on the sufficiency of a 1:1 ratio are wholly unsupported by evidence in the record, and therefore are insufficient under CEQA. CEQA Guidelines § 15088(c).

#### 4. The CEC Does Not Present Substantial Evidence that Construction-Related Impacts Will Be Mitigated to a Less Than Significant Level.

The project's construction emissions would contribute to violations of the ozone, PM10 and PM2.5 ambient air quality standards. FSA 4.1-20. The CEC considers this a significant impact that must be mitigated and states that it will mitigate these construction-related impacts to the "maximum extent feasible." FSA 4.1-20. However, to comply with CEQA, the CEC must demonstrate that it has mitigated construction emissions to a level of insignificance. If the CEC adopts mitigation to control construction emissions to the maximum extent feasible and emissions are still significant, then the CEC can not approve the project without also adopting a statement of overriding considerations demonstrating that the benefits of the project outweigh its significant environmental effects. Pub. Res. Code § 21081; 20 CCR § 1755. These findings must be supported by substantial evidence in the record. Pub. Res. Code § 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23. Moreover, since the purchase of additional ERCs for construction-related emissions is a feasible mitigation measure, the CEC cannot conclude that it mitigated construction-related impacts to the "maximum extent feasible" and therefore is unable to rely on a statement of overriding considerations.

The CEC calculated the total emissions associated with construction of the project, but decides to take a "qualitative approach to mitigation." FSA 4.1-23. However, a mitigation

measure is legally inadequate if it is not sufficiently defined so as to gauge its effectiveness. *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal. App. 3d 61, 79; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 727. Because the CEC fails to calculate the amount of reductions associated with any of its mitigation of construction emissions, the CEC does not have sufficient evidence to demonstrate that it reduced construction impacts to a level of insignificance.

**B. The CEC Failed to Properly Analyze the Project's Cumulative Impacts.**

CEQA requires the County to discover, analyze, and mitigate the project's significant impacts. Pub. Res. Code §§ 21002; 21002.1(b); 21100(b)(1). Here, the County failed to analyze the project's cumulative impacts by ignoring large scale projects in the vicinity, including the Kettleman Hills hazardous waste and PCB disposal facility, and a sludge "farm" which will receive 900,000 tons of sewage and agriculture waste trucked in from Los Angeles. By failing to adequately consider cumulative impacts, the County unlawfully precluded "a meaningful assessment of the potentially significant environmental impacts of the Project." *Napa Citizens for Honest Gov't v. Napa County Bd.,* 91 Cal.App. 4th 342, 374 (2001).

CEQA mandates a finding of significance for impacts that are cumulatively considerable. CEQA 15064(I)(1); Pub. Res. Code § 21083(b). Cumulatively considerable impacts are those that exacerbate an existing environmental condition that is significantly degraded. The incremental effects on an individual project are considerable when viewed in connection with the effects of past projects, effects of other current projects, and the effects of probable future projects." CEQA Guidelines §§ 15064(I)(1), 15065(c); Pub. Res. Code § 21083(b).

The CEC failed to consider impacts of the Kettleman Hills Facility (KHF) which is one of only three facilities permitted to receive hazardous waste in the state of California. It is also only one of a handful of facilities that is permitted to dispose of and store PCBs in the United States. The facility receives up to 1,400 tons of hazardous and non-hazardous wastes a day. The KHF is currently in the process of expanding its capacity and is attempting to renew its PCB permit.

The Kettleman Hills Facility impacts the local area's air quality, traffic, and water quality, and poses a significant public health risk from exposure to hazardous waste. The proposed Avenal power plant will exacerbate many of these problems. The CEC must analyze the impacts of the power plant in conjunction with the KHF.

The CEC failed to conduct any research to determine whether residents have already experienced health effects from the cumulative effects of multiple polluting sources. The CEC did not perform a health survey and did not talk to the community about health concerns or possible disproportionate health impacts. The CEC therefore does not have sufficient information to determine potential cumulative health impacts from locating a power plant so close to an existing hazardous waste and PCB storage and disposal facility.

The CEC has also ignored LA County's proposal to truck their sewage sludge to a 14,000 acre "farm" two miles west of Kettleman City. Kettleman City will soon start receiving over half a million tons per year of sewage sludge which includes heavy metals, pathogens, and industrial wastes that thousands of companies allow to drain into the sewer system. This project will have an impact on ground water quality, air quality, traffic, and public health. These impacts must be analyzed in conjunction with the proposed power plant. Trucks delivering waste to these two

projects will also have significant air quality impacts that must be analyzed in conjunction with the air quality impacts from the proposed power plant.

The CEC must not approve the project until these cumulative impacts can be assessed and mitigated.

### C. The CEC Failed to Analyze the Growth Inducing Impacts of the Power Plant.

CEQA requires that a lead agency examine whether a project will lead to economic or population growth or encourage development or other activities that could affect the environment. Pub. Res. Code § 21100(b)(5); CEQA Guidelines § 15126.2(d). An EIR must discuss "the ways" in which the project could directly or indirectly foster economic or population growth or the construction of new housing. CEQA Guidelines § 15126.2(d). The discussion should also describe growth-accommodating features of the project that may remove obstacles to population growth. The CEQA Guidelines explicitly includes growth-accommodating infrastructure projects, such as power plants, within the context of this requirement. *Id.*

Here, the CEC fails to include any analysis of how increasing energy capacity in the State of California may have a growth inducing effect. CEQA requires this analysis, even if the agency cannot mitigate those impacts.

The addition of a 600 Megawatt energy plant will provide sufficient energy for many new homes, businesses or other development. However, the CEC only analyzed growth in the immediately surrounding areas. CEQA does not limit the growth-inducing analysis in this fashion. Additionally, because the project is a utility system, it is possible to develop a reasonable forecast based on historic averages or other data of the amount of new development

that could be accommodated by the expanded capacity. The CEC must include such an analysis to comply with CEQA.

### D. The CEC Failed to Adequately Analyze and Mitigate Greenhouse Gas Emissions.

The proposed project would be permitted to emit over 1,700,000 metric tonnes of CO2 equivalent per year. FSA 4.1-77. However, the FSA does not consider these emissions to be a significant impact. The CEC's conclusions are flawed because the FSA fails to provide sufficient support for its assumptions that new power plants will displace energy produced at less-efficient power plants; fails to use the correct baseline to determine project impacts; fails to include enforceable mitigation measures; fails to account for the growth-inducing impacts of new power plants; and fails to mitigate construction-related greenhouse gas emissions. CEQA demands—and both the Commission and the public deserve—a good faith analysis of these impacts grounded in detailed, quantitative evidence, not mere speculation.

To comply with CEQA, Commission staff must revise the FSA's deficient greenhouse gas discussion, conclude that the Project's impacts are significant in light of California's greenhouse gas reduction goals, propose mitigation, and recirculate the document for additional agency review and public comment. *See Joy Road Area Forest & Watershed Assn. v. Cal. Dept. Of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 671-72 (applying CEQA's notice and recirculation requirements to certified regulatory program.)

#### 1. The CEC Fails to Support Its Assumption That Project Will Displace Less-Efficient Energy Production.

The CEC characterizes the impact of greenhouse gases emitted from this natural gas-fired facility by considering how the power plant would impact the overall electricity system. FSA

4.1-78. Staff surmises that the Project will have no significant effect because it will "curtail or displace one or more less efficient or less competitive existing sources." FSA 4.1-75.) Yet Staff never identifies any "less efficient" or "less competitive" source that the Project would replace, much less quantifies any reduction in emissions.

The CEC takes credit for the so-called "displacement" as an indirect impact from the project. A speculative indirect impact is not reasonably foreseeable. CEQA Guidelines § 15064(d)(3). The FSA's assumption about offsetting less efficient power production is nothing more than pure speculation. The County has cited no substantial evidence that shows that the start-up of electricity generation will permanently replace the $CO_2$ emissions produced elsewhere. The power plant will produce electricity, and $CO_2$ emissions, without any legal constraint on its emissions even though the project is *increasing* the aggregate combustion of fuel to produce electricity. Stated differently, the Avenal Power Plant will increase the supply of electricity (and the methane and $CO_2$ produced as a result).

Moreover, the Project's greenhouse gas emissions rate—the figure Staff cites in concluding that the Project's impacts are less than significant—is actually *higher* than the California systemwide average. Preliminary Staff Assessment (PSA) 4.1-71. Contrary to Staff's conclusions, therefore, the Project might actually displace *more* efficient generation. The mere "possibility" that the Project "could" replace unspecified electricity that "may" result in higher emissions is not substantial evidence. See CEQA Guidelines § 15384. It is mere speculation, and cannot support a finding that the Project's impacts are less than significant.

**2. The CEC Used an Incorrect Baseline to Determine Greenhouse Gas Impacts.**

The CEC concluded that the project, despite emitting nearly 2 million metric tonnes of CO2 equivalent per year, actually has a greenhouse gas benefit. FSA 4.1-71. The CEC reasons that the Avenal Power Plant will eventually displace more polluting facilities and therefore the applicant can subtract those emissions from the project and end up with a positive impact. *Id.* This novel approach violates the straight-forward approach for determining the extent of a project's impacts.

In general, the "environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." CEQA Guidelines § 15125 (a). Although determination of what constitutes existing physical conditions will vary with the facts of each case, the baseline should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; *see also Woodward Park Homeowner's Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09. Accordingly, the most important comparison here is between existing physical conditions—no plant—and the anticipated emissions from the Project. Therefore, the impacts should have been measured as an addition of 2 million tonnes of CO2 equivalent per year to that baseline.

In any event, an agency must clearly and conspicuously identify the assumptions guiding its choice of a baseline, and must support that choice with substantial evidence. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278. The FSA never identifies the baseline against which the significance of greenhouse gas emissions is measured, let alone identify its basis. This

is a violation of CEQA.

### 3. The CEC Fails to Adopt Enforceable Mitigation.

Mitigation measures must be enforceable through conditions of approval, contracts or other means that are legally binding. Pub. Res. Code 21081.6(b); CEQA Guidelines 15126.4(a)(2). Here, the CEC bases its determination that the project will not have a significant impact on greenhouse gas emissions on the displacement of less-efficient electricity generating plants. FSA 4.1-71. However, because the replacement of these older, more polluting facilities is entirely speculative and unenforceable, the CEC can not count those emissions as offsetting the nearly 2 million tonnes of pollutants that will be emitted annually from this project. Nor can the CEC take credit for aging power plants that are already scheduled to close. *See, e.g.* FSA 4.1-83.

### 4. The CEC's Assumptions Fail to Account for Growth Inducing Impacts of Power Plant Construction.

The CEC's assumptions that the proposed project would merely displace less efficient generation fails to account for the growth inducing impacts of power plant construction, described more in depth in Section I.C. If power plant construction encourages growth, then any displacement of less efficient generation will be offset by increased energy demands.

### 5. The CEC Fails to Mitigate Construction-Related Greenhouse Gas Emissions.

CEC staff determined that "concentrated on-site activities result in short-term, unavoidable increases in vehicle and equipment emissions that include greenhouse gases." FSA 4.1-76. However, staff concludes that GHG emission increases from construction activities would not be significant. FSA 4.1-79. Not only has the CEC failed to disclose the threshold of significance upon which this determination is based, the CEC's conclusion also ignores the

cumulative impact of greenhouse gas emissions. In light of the daunting task California faces in meeting its greenhouse gas reduction goals, *any* increase in greenhouse gas emissions should be found significant for CEQA purposes. If the CEC is unable to mitigate these construction related GHG emissions, then CEC cannot approve the project without also adopting a statement of overriding considerations demonstrating that the benefits of the project outweigh its significant environmental effects. Pub. Res. Code § 21081; 20 CCR § 1755. These findings must be supported by substantial evidence in the record. Pub. Res. Code § 21081.5; CEQA Guidelines § 15091(b), 15093; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222-23.

**E. CEC Failed to Adequately Analyze Impacts to Public Health.**

The FSA did not adequately assess the significance of the Project's public health impacts. Using adopted ambient air quality standards and default cancer risk assumptions as thresholds of significance, the FSA concludes that public health impacts will not be significant after mitigation. Established thresholds, however, are not conclusive as to the significance of an impact, and they "cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109. There is substantial evidence that the Project's public health impacts are significant.

First, the FSA did not adequately model off-site exposure to construction-related diesel particulate matter ("DPM"). Second, the FSA did not adequately consider the severity of existing health problems—birth defect clusters and asthma in particular—in Avenal, Kettleman City or Huron. This Project, moreover, would exacerbate existing violations of air quality

standards involving pollutants (PM10, PM2.5, and ozone) that are known either to cause or to exacerbate respiratory health problems. During both construction and operation, this Project will contribute additional PM2.5 to an area already suffering from concentrations in excess of state standards.

As lead agency under CEQA, the Commission must address this evidence and make its own determination as to whether these impacts are significant, and if so, whether it is feasible to mitigate those impacts to a less than significant level. As written, the FSA fails to provide an adequate analysis of this evidence.

### F. CEC Failed to Conduct Water Assessment Required Under Water Code Section 10910.

The California legislature, in recognizing the importance of informed water management throughout the state, passed Senate Bill 610, which requires cities and counties, during the CEQA process, to identify and assess impacts to any groundwater basin or basin from which the proposed project will be supplied, regardless of withdrawal amount. Cal. Water Code 10910(f). The Water Code requires lead agencies to prepare a water assessment after consulting with any entity serving domestic water supplies whose service area includes the project site, the local agency formation commission, and any public water system adjacent to the project site. Cal. Water Code 10910(b).

This statute applies to any project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project. Cal. Water Code 10912(a)(7). The CEC has failed to determine whether the project's water usage is equivalent to the amount required by a 500 dwelling unit project. If the usage is equivalent, the CEC has failed

to conduct the required water assessment.

### G. The County Failed to Analyze Feasible Alternatives.

The requirement to set forth project alternatives in the EIR "is crucial to CEQA's substantive mandate that avoidable significant environmental damage be substantially lessened or avoided where feasible." Michael H. Remy, et. al, Guide to the California Environmental Quality Act 431 (10th ed. 1999) (citations omitted). Under CEQA, a lead agency may not approve a project if there are feasible alternatives that would avoid or lessen its significant environmental effects. Pub. Res. Code §§ 21002, 21002.1(b). To this end, an EIR is required to consider a range of potentially feasible alternatives to a project, or to the location of a project, that would feasibly attain most of the project's basic objectives while avoiding or substantially lessening any of the project's significant environmental impacts. *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456. The discussion of alternatives must be sufficiently detailed to foster informed decision-making and public participation, not simply vague and conclusory. *Id.* at 1456, 1460. The same requirements apply to an environmental document, like an FSA, prepared as part of a certified regulatory program. *See Sierra Club v. Bd. of Forestry*, 7 Cal.4th at 1228-29.

The FSA identified a number of potentially significant environmental impacts, and accordingly must analyze potentially feasible alternatives that would avoid or lessen those impacts. Here, as discussed in detail above, the Project's significant impacts include contributions to existing violations of air quality standards, public health and global warming, as well as impacts to biological resources and agriculture. The CEC can only eliminate alternatives from detailed consideration in the EIR for "(i) failure to meet most of the basic project

objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts." CEQA Guidelines § 15126.6(c). "If the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion." *Marin Municipal Water District v. KG Land Cal. Corp.*, 235 Cal. App. 3d 1652, 1664 (1991).

The CEC eliminated alternative technologies such as solar and wind from detailed consideration because these facilities would take up more acreage than a conventional gas-fired power plant. In finding alternative technologies infeasible, the CEC relied upon the mistaken assumption that an alternative project must have the same capacity or output as the proposed project. However, a 600 megawatt capacity is not included in the project objectives and, therefore, the CEC cannot eliminate alternative energy projects solely because the energy output would be reduced. This action precluded a reasonable range of alternatives from being analyzed and considered. The CEC must, therefore, consider the feasibility of a smaller capacity solar or wind facility at the proposed location.

Neither the Applicant nor Staff has demonstrated that the other alternatives identified in the FSA are infeasible. The FSA briefly discussed five site alternatives—two sites proposed by the applicant near the proposed site; two sites identified by CEC staff outside the San Joaquin area, and a reduced capacity alternative. The two sites proposed by the Applicant fail to reduce the Project's significant impacts, and Staff rejected the remaining sites for conclusory and unsupported reasons.

The CEC found that the alternative sites would not reduce or eliminate environmental effects of the proposed project. However, under CEQA the CEC is required to describe a reasonable range of alternatives to the proposed project, or to its location, **that would reduce or**

**avoid its significant effects**. 20 Cal. Code Reg. § 1765. The alternatives discussed in a CEQA document should be ones that offer substantial environmental alternatives over the proposed project. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553. Therefore, the CEC can not analyze inferior projects in order to determine that the proposed project is the environmentally superior project.

The CEC acknowledges that the reduced capacity alternative would cut the Project's air quality impacts by half while not increasing any other environmental impact. Therefore the CEC, by its own analysis, has determined that the reduced capacity alternative is a feasible alternative that avoids or lessens the project's significant effects. Additionally, the reduced capacity alternative meets all of the project objectives. The CEC may not approve the proposed project because reducing its capacity is feasible, meets project objectives and reduces the project's significant effects. Pub. Res. Code §§ 21002, 21002.1(b).

### H. CEC Violated CEQA's Public Participation Requirements.

"Public Participation is an essential part of the CEQA process." CEQA Guidelines § 15201. However, the CEC has made the FSA inaccessible to the public by neglecting to translate any portion of the document into a language that can be understood by the communities most affected by this project.

Avenal, Kettleman City, and Huron are over 90% Latino, and many residents are monolingual Spanish speakers. By failing to translate the Draft SEIR into Spanish, the CEC made it impossible for these residents to make an independent, reasoned judgment about the environmental documentation relied upon, and as a result, denied the public its statutory right under CEQA to comment meaningfully upon its conclusions. *Emmington v. Solano County*

*Redevelopment Agency,* 195 Cal.App.3d 491 (1987).

California courts have interpreted CEQA's "plain language" requirements to ensure that the public has access to EIR documents. "The message of this regulatory scheme is clear: an EIR in this state must be written and presented in such a way that its message can be understood by governmental decisionmakers and members of the public who have reason to be concerned with the impacts which the document studies." *San Franciscans for Reasonable Growth v. City and County of San Francisco,* 193 Cal.App.3d 1544, 1549 (1987). To ensure the public has an adequate opportunity to understand the consequences of the project and provide comment, the CEC must translate the FSA and restart the comment period before approving the power plant. This requirement is even more important since one of the project objectives is community acceptance. FSA 3-1. The CEC will be unable to determine if the project meets this objective unless and until it does more to reach out to residents in the affected communities of Avenal, Kettleman City, and Huron by translating the document into a language the surrounding community can understand.

## II. The CEC's Environmental Justice Assessment Violates Executive Order 12898.

Executive Order 12898 requires state agencies receiving federal funds, such as the California Energy Commission, to identify and address any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and/or low income populations. FSA 1-3. California law defines environmental justice as "the fair treatment of people of all races, cultures and income with respect to the development, adoption, implementation and enforcement of environmental laws, regulations and policies." Gov. Code § 65040.12(e).

The CEC staff "determined that the project would not cause significant adverse direct, indirect or cumulative socioeconomic impacts . . . and therefore staff concludes that there are no Environmental Justice Impacts for this project." FSA 1-4. This determination is flawed for numerous reasons. Under Staff's approach, an environmental justice issue arises only where an unmitigated significant environmental impact affects a high-minority or low income population. This approach renders the concept of environmental *justice*—as opposed to mere environmental impact—all but meaningless. CEQA requires that all significant environmental impacts be mitigated or avoided where it is feasible to do so. Environmental justice, in contrast, requires special attention to equitable distribution of environmental benefits and burdens, whatever their significance for CEQA purposes. In addition to requiring analysis of environmental impacts, environmental justice principles stress the importance of fairness and equitable distribution of environmental burdens. For example, disparities in nutrition, access to health care, and housing must be considered in analyzing a specific project's effects on a particular population.

The CEC's exclusion of potential health impacts in its EJ assessment is inexcusable. The increase in localized air emissions alone constitutes a critical health impact for three low-income communities of color: Avenal, Kettleman City, and Huron. The CEC's failure to acknowledge the localized environmental impacts of adding many hundreds of tons of air emissions is in itself a violation of Executive Order 12898. These health impacts themselves have an economic impact on communities as well, and should, therefore, have been factored into the CEC's socioeconomic analysis for the EJ Assessment.

The EJ assessment must consider the cumulative impacts from the proposed project as well as existing and proposed projects. The CEC's failure to consider cumulative impacts

associated with the existing hazardous waste facility, the pending hazardous waste expansion, the pending PCB permit, the nearby interstate highways, the diesel transfer station, and the pending sludge farm also is a violation of Executive Order 12898 and demonstrates the CEC's failure to comprehend basic environmental justice principles.

The "significance" of any environmental impact represents a policy judgment on the part of a lead agency. Where, as here, a minority community is already bearing a disproportionate environmental burden, any project that exacerbates or even simply maintains that burden should be considered to have significant impacts on that community. Under these circumstances, both the Applicant and the Commission should do everything in their power to find a feasible alternative site for the Project.

## III. Conclusion

For the foregoing reasons, the Commission should deny the application for certification.

Dated: August 12, 2009

Respectfully Submitted,

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