Case No. S172819

IN THE SUPREME COURT OF CALIFORNIA

DFI Funding, Inc.,

Petitioner,

v.

California Energy Commission,

Respondent.

Orange Grove Energy L.P. and J-Power USA Development Co., LTD,

Real Parties in Interest

REAL PARTIES IN INTEREST OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF, REQUEST FOR STAY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rules 8.208, 8.490(i))

The undersigned certifies that the below listed persons or entities have either (i) an ownership interest of 10 percent or more in Orange Grove Energy, L.P. (the real party in interest); or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(d)(2):

1. The owners of Orange Grove Energy, L.P. are J-POWER Orange Grove, L.P., a Delaware limited partnership (100% of the limited partnership interest) and J-POWER Orange Grove GP, LLC, a Delaware limited liability company (0% of the general partnership interest).

2. The owners of J-POWER Orange Grove, L.P. are J-POWER Orange Grove Consolidation, L.P. a Delaware limited partnership (100% of the limited partnership interest) and J-POWER Orange Grove GP, LLC (0% of the general partnership interest).

3. J-POWER Orange Grove GP, LLC is 100% owned by J-POWER Orange Grove Consolidation, L.P.

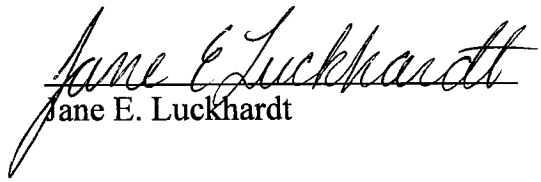
4. The owners of J-POWER Orange Grove Consolidation, L.P. are J-POWER USA Development Co., Ltd., a Delaware corporation (100% of the limited partnership interest) and J-POWER Orange Grove Consolidation GP, LLC, a Delaware limited liability company (0% of the general partnership interest).

5. J-POWER Orange Grove Consolidation GP, LLC is 100% owned by J-POWER USA Development Co., Ltd.

6. J-POWER USA Development Co., Ltd. is 100% owned by J-POWER North America Holdings Co., Ltd. (Delaware).

7. J-POWER North America Holdings Co., Ltd. is 100% owned by Electric Power Development Co., Ltd. (Japan).

Dated: May 18, 2009.



Jane E. Luckhardt

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INTRODUCTION AND SUMMARY OF POSITION

On May 8, 2009, DFI Funding, Inc. ("DFI") filed a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief and Memorandum of Points and Authorities ("DFI's Petition") with the California Supreme Court. DFI's Petition requests the court set aside the April 8, 2009 decision of the California Energy Commission ("CEC") approving the Application for Certification ("AFC") of the Orange Grove Energy power plant project (the "Project").

Pursuant to rule 8.487(a) of the California Rules of Court, the project owner and Real Party In Interest, Orange Grove Energy, L.P. ("Orange Grove") respectfully submits this Preliminary Statement In Opposition to the DFI Petition for Writ of Mandate and Points and Authorities In Support Thereof.

POINTS AND AUTHORITIES IN OPPOSITION

I. Factual and Procedural Background

On July 19, 2007, Orange Grove submitted an Application for a Small Power Plant Exemption ("SPPE") to the CEC to construct and operate the Project pursuant to Public Resources Code section 25541. (Real Parties In Interest Appendix ["RPIA"] 0373.) On September 24, 2007, the CEC conducted a public site visit and informational hearing regarding the Project. (RPIA 0373.) During the course of the SPPE proceedings, Orange Grove ran into obstacles concerning some of their linear facilities which ultimately led to the withdrawal of the SPPE application on April 24, 2008. (*Ibid.*) On April 28, 2008, the CEC terminated the SPPE proceedings in favor of Orange Grove's stated intention to re-file the same project as an AFC. (RPIA at 0373-0374.)

On June 19, 2008, Orange Grove submitted an AFC with the CEC to construct and operate the Project. (RPIA 0374.) The CEC then assigned a committee of two Commissioners ("Committee") to conduct the

proceedings. (*Ibid.*) On July 9, 2008, the CEC accepted the AFC as complete and assigned the same SPPE Committee to the AFC proceeding, which started the CEC's formal review of the Project under the AFC process. (*Ibid.*) The CEC held numerous workshops and meetings during the process of reviewing Orange Grove's AFC, which were announced on the CEC's website and were open to the public. (*Ibid.*)

On July 29, 2008, the Committee held an Informational Hearing, Issues Identification and Scheduling Conference. (RPIA 0374.) The Hearing was held in the city of Fallbrook. (*Ibid.*) Notice was mailed to members of the community who were known to be interested in the Project, including the owners of land adjacent to or in the vicinity of the Project. (*Ibid.*) The Committee Schedule contained a list of events that had to occur in order to complete the certification process on time. (*Ibid.*)

On November 6, 2008, CEC Staff issued its Staff Assessment. (RPIA 0374.) On that same date, the Committee issued a "Notice of Prehearing Conference, and Notice of Evidentiary Hearing." (*Ibid.*) This notice clearly stated that the time to petition to become a party in the proceeding was 9 a.m. on Monday, December 1, 2008. (RPIA 0134.) The Prehearing Conference was held on December 1, 2008 at the CEC in Sacramento. (RPIA 0374.) On December 11, 2008, CEC Staff issued an Amended Staff Assessment (the "Amended Staff Assessment"). DFI filed a Petition for Intervention in the Project proceedings on December 16, 2009, three days before the Evidentiary Hearing for the Project. The Evidentiary Hearing was held in Fallbrook, California on December 19, 2008. (*Ibid.*) Prior to opening the record on the Evidentiary Hearing, the Committee heard oral argument on DFI's Petition for Intervention. (RPIA 0154.) The Committee rejected DFI's argument that it was entitled to notice, and denied DFI's late-filed Petition for Intervention. (RPIA 0176.)

DFI filed a 16-page comment letter with the CEC on December 18, 2008. (See RPIA 0579.) This letter contained DFI's comments and concerns regarding the Project, largely relating to the Amended Staff Assessment. The CEC's Siting Committee for the Project ordered the parties to respond to DFI's comments. Orange Grove filed an extensive response to DFI's comments on January 29, 2009. (See RPIA 0619.) CEC Staff also filed a response to DFI's comments on the same date. (See RPIA 0597.) The CEC's responses to DFI's comments are incorporated throughout the Final Decision.

After reviewing the evidentiary record, including Intervenor testimony, public comment on the Staff Assessment and the Amended Staff Assessment (including those from DFI), and the Exhibits, the Committee published the Presiding Member's Proposed Decision ("PMPD") on February 25, 2009, and scheduled a Committee Conference to discuss comments on the PMPD for March 16, 2009. (RPIA 0375.) After the PMPD issued in February 2009, DFI filed another comment letter. This letter largely re-stated the comments from DFI's December 18, 2008 letter, although many of the concerns had already been fully addressed. On April 8, 2009, the CEC approved the Project's AFC and issued Orange Grove a certificate to construct and operate the Project. (RPIA 0367.) Thereafter, DFI filed its Petition for Writ of Mandate with this court, pursuant to Public Resources Code section 25531.

II. Standard of Review

The CEC's jurisdiction over power plant siting is nearly all-encompassing. The CEC has the exclusive authority to certify thermal power plant sites and related facilities in the state. (Pub. Resources Code § 25500.) The issuance of a certificate by the CEC is in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, and it

supersedes any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. (*Ibid.*) The CEC's decision on an AFC is subject to review by the California Supreme Court. (Pub. Resources Code § 25531, subd. (a).)

Public Resources Code section 25531 provides for exclusive Supreme Court jurisdiction over actions challenging a decision of the CEC on any application for certification of a site and related facility. (See Pub. Resources Code § 25531, subd. (a).) During this review, "[n]o new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it." (*Id.* at § 25531, subd. (b).) In addition, "[t]he review shall not be extended further than to determine whether the commission has regularly pursued its authority...." (*Ibid.*) This review includes "a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution." (*Ibid.*) The findings and conclusions of the CEC on questions of fact are final and not subject to review, except as otherwise provided. (*Ibid.*)

DFI notes that principles of judicial review developed under the California Environmental Quality Act ("CEQA") should apply in this case, as DFI claims that the CEC's AFC process is an "expedited CEQA proceeding." (DFI's Petition at 13.) The second part of this statement is incorrect. Pursuant to section 21080.5 of the Public Resources Code, the CEC's siting process has been determined by the Secretary of the California Resources Agency to be a certified regulatory program under CEQA. (See *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861 at 879.) As a result, the CEC is not required to prepare Environmental Impact Reports ("EIRs") or negative declarations in reviewing power plant proposals, but still must meet certain standards in CEQA that are intended to provide a functional equivalent.

(*Ibid.*) The CEC's process is therefore not an "expedited CEQA proceeding," but instead a CEQA-equivalent proceeding. (See Cal. Code Regs., tit. 14, § 15250.)

DFI also claims that "[w]here an equivalent document is produced in lieu of an EIR, the Public Resources Code requires the lead agency to avoid all significant environmental impacts as defined under CEQA." (DFI's Petition at 13.) This statement is also incorrect. The code section cited by DFI simply requires the document used by the regulatory program to contain a description of the proposed activity with alternatives to the activity, and mitigation measures to *minimize* any significant adverse effect on the environment of the activity. (Pub. Resources Code § 21080.5, subd. (d)(3)(A).)

CEQA case law has established that an agency's substantive judgments are entitled to strong deference. The Public Resource Code provides that "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." (Pub. Resources Code § 21168.) Courts have concluded that two main questions guide a court's review of a CEQA determination: (1) whether there is substantial evidence to support the agency decision; and (2) whether the agency failed to proceed in the manner required by law. (*Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559.) With regard to the first prong, "substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a); *see Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) With regard to the second prong, an agency abuses its discretion by failing to proceed in the manner required by law if its action or decision does not

substantially comply with the requirements of CEQA. (Pub. Resources Code §§ 21168, 21168.5; *Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at 392.) The essential question is not the correctness of the EIR's environmental conclusions, but only its sufficiency as an informative document. (*Laurel Heights Improvement Ass'n, supra*, 47 Cal.3d at 392.)

III. Discussion

A. DFI Lacks Standing to Bring a Petition for Writ of Mandate.

As a threshold matter, DFI lacks standing to request a writ of mandate from this court. The standing requirement applies to petitioners in a writ proceeding, and only parties with standing may pursue a mandamus action. (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1106-07.) The burden is on the petitioner to plead and prove facts showing standing. (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 349.)

1. DFI Does Not Have a Clear, Present And Beneficial Right to Performance by the Energy Commission Such That a Writ of Mandate Must Issue.

Petitioners seeking a writ of mandate are required to be "beneficially interested." (Code Civ. Proc. § 1086.[1]) In other words, a petitioner must show a "clear, present, and beneficial right" to performance of the duty that the agency allegedly failed to perform. (See *People ex rel Younger v. County of El Dorado* (1962) 5 Cal.3d 480, 491.) Such beneficial interest can be established by showing the petitioner has some "special interest to be served or some particular right to be preserved or protected" by the writ,

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[1] While administrative mandamus under Code of Civil Procedure section 1094.5 is the proper vehicle for review of action taken by an administrative agency like the one at issue here, it does not have a distinct legal personality from traditional mandamus under section 1086 and the two share the same "principles, requirements and limitations" including principles of standing. (*Lopez v. Civil Serv. Comm.* (1991) 232 Cal.App.3d 307, 314-15.)

over and above the interest held in common with the public at large.[2] (*Waste Mgmt. of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1232 [citing *Carsten v. Psychology Examining Comm.* (1980) 27 Cal.3d 793, 796].) This standard used for determining beneficial interest is equivalent to the federal "injury in fact" test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent. (*People ex rel. Dept. of Conservation v. County of El Dorado* (2005) 36 Cal.4th 971, 986.)

Here, DFI does not and cannot plead facts showing that it is beneficially interested because it has no clear, *present* right to performance of the duties it alleges the CEC failed to perform. Nor can DFI show that it will suffer a particularized harm over and above the public at large. The facts stated in DFI's moving papers clearly establish that DFI is no more than a lender, whose loan transactions are secured, in part, by real property in the vicinity of the Project. (DFI's Petition at 3.) Accordingly, DFI is not a landowner, citizen, nor local taxpayer. Its "interest" in the land near the Project site (and hence, its interest in the quality of the surrounding environment) is wholly speculative at this time and, in fact, may never materialize.[3] Given this, it cannot be said that DFI has a clear, present

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[2] A petitioner in a CEQA case has a beneficial interest under Cal. Code of Civil Procedure section 1086 if the petitioner will be adversely affected by the environmental impacts of the challenged project. (See *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 272.) The alleged environmental impacts must be over and above what would be experienced by the public at large if the petitioner is to be beneficially interested. (*Waste Management, supra,* 79 Cal.App.4th at 1233 [citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1085-1086]; *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 86.)

[3] Presumably, DFI's interest in the nearby parcels is contingent on the current fee owner defaulting on the loan, as well as a host of other factors;

interest in the issuance of the writ that is any different than the public at large. Viewed another way, under the federal "injury in fact" test, DFI does not have a legally protected interest that is both concrete and particularized, invasion of which is actual or imminent.

Because of this lack of a legally-protected interest, DFI's argument that the CEC's activities have impinged on its constitutional right to due process is similarly uncompelling, as discussed in section C of this Opposition.

2. DFI Also Does Not Have Standing Under the Citizen Suit Exception.

A recognized exception to the beneficial interest rule of standing is the "citizen suit" exception. Under that exception, a petitioner may be held to have standing despite the absence of a beneficial interest if the question is one of public right, the purpose of the proceeding is enforcement of a public duty, and the public interest would suffer if the agency is not compelled to perform. (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 439.) DFI does not qualify for this exception because it is a corporation, not a citizen, and it cannot meet the narrow requirements for corporate maintenance of a citizen suit.

A corporation may qualify to maintain a citizen suit only under particular circumstances. (*Waste Management*, *supra*, 79 Cal.App.4th at 1237-38.) Specifically, the following factors must be considered: (1) whether the corporation has demonstrated a continuing interest in or commitment to the subject matter of the public right being asserted; (2) Whether the entity is comprised of or represents individuals who would be beneficially interested in the action; (3) whether individual persons who are

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for instance, DFI's interest may even be subordinate to other lenders or, given the statewide decline in the real estate market, may be unsecured for all practical purposes.

beneficially interested in the action would find it difficult or impossible to seek vindication of their own rights; (4) whether prosecution of the action as a citizen's suit by a corporation would conflict with other competing legislative policies.[4] (*Id.* at 1238; *Environmental Protection & Information Ctr. v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479-81 (hereinafter "*EPIC*").)

Unlike the petitioners in *Waste Management* or *EPIC*, DFI Funding does not assert that it has demonstrated a continuing interest in or commitment to protection of the environment, nor that it is comprised of beneficially interested individuals. To the contrary, DFI allows that it is "a California Corporation engaged in the business of lending money . . . ." (DFI's Petition at 3.) As stated above, the burden is on the petitioner to plead and prove facts showing it is entitled to standing. (*California Aviation Council, supra,* 200 Cal.App.3d at 349.) DFI has failed to do so under either the beneficial interest standard or the citizen suit test, and consequently its petition for writ of mandate must be summarily denied on this basis alone.

B. The CEC Regularly Pursued Its Authority In Approving the Project.

DFI contends that the CEC failed to regularly pursue its authority in approving the Project. However, this opposition will demonstrate the CEC regularly pursued its authority in approving the Project, and that substantial evidence supports all of the CEC's findings in doing so. This opposition will further demonstrate this is essentially a case about an out-of-town lender, with only a contingent interest in property neighboring the Project

[4] These factors are similar to the factors required for an unincorporated association to maintain a citizen suit on behalf of its members. (See *Hunt v. Washington* (1977) 432 U.S. 333; *Brotherhood of Teamsters v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1522.)

site, who arrived unreasonably late to the Project proceedings and who seeks merely to delay and obstruct an otherwise valid project approval.

1. The CEC Fully And Adequately Addressed Potential Greenhouse Gas Emissions From The Project.

DFI alleges that the CEC failed to adequately address the potential direct and cumulative impacts from greenhouse gas ("GHG") emissions attributable to the Project. This is simply not the case. Potential GHG emissions, both direct and cumulative, were addressed in the AFC and in Appendix A of the Air Quality section of the Amended Staff Assessment, which was relied upon by, and incorporated by reference into, the Final Decision. (RPIA 0458.) Though DFI may disagree with the analysis or conclusions in Appendix A, this alone is not sufficient to support DFI's assertion that the CEC abused its discretion in approving the Project such that a writ of mandate should issue. Instead, the record contains substantial evidence supporting the CEC's determination that the project will not have substantial direct or cumulative impacts attributable to GHG emissions.

(i) The Analysis of Greenhouse Gas Emissions Was Adequate Under CEQA.

The CEC's power plant siting process is a certified regulatory program under CEQA, and thus it is required to assess the environmental impacts of any proposed power plant, and adopt available mitigation measures that would substantially lessen significant adverse effects on the environment. (Pub. Resources Code § 21080.5, subd. (d)(2)(A).) California's Global Warming Solutions Act of 2006 ("AB 32") (Health & Safety Code § 38560 et seq.), along with a host of other laws, regulations and policies, mandates swift and substantial reductions in the state's overall GHG emission levels. CEQA has been identified as one of the primary vehicles for implementing the goals of AB 32. Consequently, environmental review of proposed projects under CEQA must include an assessment of the project's GHG emissions, as well as mitigation where

those emissions are individually or cumulatively considerable. According to CEQA, mitigation measures are not required for effects which are not found to be significant. (Cal. Code Regs., tit. 20, § 1074, subd. (a); tit. 14, § 15126.4, subd. (a)(3)

Consistent with these mandates, the Amended Staff Assessment analyzed the potential GHG emissions associated with the Project. (RPIA 0071.) Staff's analysis and conclusions were set forth in Appendix A to the Air Quality section of the Amended Staff Assessment, and were incorporated into the PMPD, which was thereafter incorporated into the CEC's Final Decision issued April 8, 2009. (RPIA 0458.) Appendix A estimated and quantified the potential GHG emissions attributable to construction activities (803 metric tonnes) and annual operations (161,901 metric tonnes per year). (RPIA 0074-0075.) Construction emissions were broken down by activity, with construction of the main site quantified separately from construction of the gas line and from general grading and site preparation activities. (RPIA 0074 [GHG Table 1].) Annual operational emissions were conservatively calculated based on the maximum permitted operations; the report noted that if the calculations were to assume annual plant operations at 13.7% of permitted capacity, the level used for criteria pollutant mitigation, GHG emissions would be approximately 60,000 metric tonnes annually, and that long-term emissions were expected to be less than 22,000 metric tonnes annually as the plant operations decreased over time. (RPIA 0075-0076.) Appendix A determined that the Project, as a peaker facility, was not required to comply with the GHG Emission Performance Standard mandated by Public Utilities Code section 8340 (commonly, "SB 1368").

Appendix A also evaluated the cumulative GHG impacts of the Project. It concluded that there was not substantial evidence available supporting a finding that the Project would contribute to a net increase in

cumulative GHG emissions. (RPIA 0077-0078.) To the contrary, there was reason to believe that the Project would actually help reduce overall GHG emissions attributable to the energy industry by replacing older, less efficient peaking power sources. (*Ibid.*) Thus, the Project could actually contribute to the continued improvement of the overall Western Electricity Coordinating Council system GHG emission rate average, and thus statewide GHG reduction consistent with the goals of AB 32. It was further noted that the Project was consistent with the CEC's 2007 Integrated Energy Policy Report; as a natural gas-based facility, "[i]t fills the gap that cannot currently be served by renewable generation, provides system stability to integrate new renewable generation, and may ultimately be necessary to displace imported coal generation, which has much higher GHG emissions." (RPIA 0076.)

Based on the above, there is substantial evidence that the CEC's analysis of the Project's GHG emissions and approval of the Project was not only sufficient under existing laws, it would withstand scrutiny under foreseeable future regulations as well. Indeed, although the Governor's Office of Planning and Research ("OPR") is still in the early stages of adopting CEQA Guidelines[5] pertaining to GHG emissions, the Project would comply with the currently-proposed OPR regulations. Proposed CEQA Guidelines section 15064.4, "Determining the Significance of Impacts from Greenhouse Gas Emissions," provides that a lead agency may use either a qualitative or quantitative approach to assessing the GHG emissions from a project, and may also determine whether the emissions exceed any threshold of significance that the lead agency determines applies to the project. Here, the Amended Staff Assessment utilized both a

[5] The CEQA Guidelines, regulations promulgated by OPR to implement CEQA, can be found in Title 14 of the California Code of Regulations, starting at section 15000.

qualitative and quantitative approach in determining that the impacts from all phases of the Project were not significant, and also concluded that the Project did not meet threshold GHG Emission Performance Standard of SB 1368. (See generally RPIA 0071 et seq. [Amended Staff Assessment, Appendix A].)

(ii) DFI's Arguments Regarding Cumulative Impacts of Greenhouse Gases Misstate The Law and Misread The Facts.

DFI incorrectly asserts that "[u]nder CEQA, emissions associated with a proposed project must be analyzed for their cumulative impact, no matter how small the total emissions may be," citing *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692. (DFI's Petition at 19.) DFI then applies this precept to mean that the CEC should have calculated the GHG emissions of each component and phase of the Project. (*Ibid.*) In essence, DFI is advocating the "one molecule rule" for treatment of GHG emissions. There are several problems with DFI's approach. Apart from misstating the holding of *Kings County*, this argument ignores both the CEQA Guidelines and contrary case law. CEQA does not require per se a cumulative analysis of *any* emissions; rather the CEQA Guidelines provide that "the discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence . . . . The discussion should be guided by standards of practicality and reasonableness . . . ." (Cal. Code Regs., tit. 14, § 15130, subd. (b).)

In addition, to the extent that the language in *Kings County* perpetuated any confusion on this point, the case of *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, has subsequently provided clarification. The court there held that while it is appropriate to consider whether an additional amount of emissions from a project should be considered significant in the context of the existing cumulative effect, "[t]his does not mean, however, that *any*

additional effect in a nonattainment area for that effect *necessarily* creates a significant cumulative impact; the one additional molecule rule is not the law." (*Id.* at 120 [emphasis in original, internal quotations omitted].) Breaking down the Project's emission levels quantified in Appendix A even further, as suggested by DFI on pages 19-20 of its Petition, would serve no purpose given that the total GHG emissions for each phase are not individually nor cumulatively significant. The CEC's analysis of the individual and cumulative GHG impacts of the Project, including the conclusion that the Project may contribute to an overall net decrease in GHG emissions by replacing older, less efficient peaker power plants, was more than sufficient under the legal principles discussed above.

DFI also asserts that Condition of Certification GHG-1, requiring detailed annual reporting of GHG emissions from the facility until the facility comes under the ambit of future AB 32 regulations, somehow amounts to impermissible deferred mitigation. (DFI's Petition at 18.) This argument lacks merit. As noted above, mitigation is only required for adverse environmental impacts that have been determined to be significant. (Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(3).) Here, the CEC found, on the basis of substantial evidence in the record, that the Project would not have a significant effect on GHG emissions. (RPIA 0459-0460.) The reporting requirements in Condition of Certification GHG-1 are not intended to be mitigation for a significant impact; rather, they are properly viewed as a prudent stop-gap requirement until the regulations governing power plants under AB 32 can be formalized and adopted. Notably, the requirements in GHG-1 do not purport to lessen or minimize emissions, but amount to information gathering and reporting only. (See RPIA 0468-0469.)

DFI's argument is also confusing and contradictory at times. For instance, at the top of page 17, DFI states "[w]hile the Final Decision

includes a cursory analysis of GHG impacts, it fails to quantify the Project's direct and cumulative contribution to GHGs, or the components of that contribution." Later, on page 20, DFI allows that "the Staff Assessment and Final Decision quantify the Orange Grove Project's cumulative contribution . . . ." Nowhere does DFI specify in any cogent manner how it believes the analysis in Appendix A to be deficient (other than the general assertion that the record failed to calculate the GHG emissions for each specific component of the project, which is without merit, as discussed above). Were the writ to be granted, it is entirely unclear how the CEC could revise the report in any meaningful way to allay DFI's concerns. In sum, it is DFI's argument, not the CEC's discussion of GHG emissions, that is cursory and uncompelling.

(iii) The CEC's Findings Regarding Greenhouse Gas Emissions Should be Accorded Great Deference.

It should be noted that the CEC is not an inexperienced entity when it comes to the assessment and reduction of GHG emissions. The CEC's recent and current activities in this area include: serving on the State's Climate Action Team and leading the Land Use and Local Government subgroup; conducting scientific research on climate change through the Public Interest Energy Research Program and the California Climate Change Center; developing a Climate Research, Development, Demonstration and Deployment "Road Map" with the Air Resources Board ("ARB") and other state agencies to achieve GHG emission reduction goals; providing technical support to the California Climate Action Registry in developing GHG emission protocols; qualifying third party organizations to provide technical assistance and certification of emissions and inventories and supporting ARB with its statewide GHG emissions inventory; participating in the Western Climate Initiative to identify, evaluate and implement ways to reduce GHGs in the West; and, most

notably, studying and investigating the impacts of GHG emissions from power plants. (See RPIA 0833-0834.) The CEC, in conjunction with the California Public Utilities Commission ("CPUC"), recently released its Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies, a set of interrelated recommendations to ARB regarding GHG regulations for the electricity sector, premised on the requirements of AB 32 and ARB's own Scoping Plan. (RPIA 0843-0846.)

Contrary to DFI's argument, this is not a case where a lead agency failed to proceed in the manner required by law, such that its findings should not be given due deference. (See *e.g. National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1353.) In approving the Project, the CEC undertook an appropriate and measured analysis of the GHG emissions attributable to the Project. Its findings of fact in this area must be accorded deference under both CEQA and the Warren-Alquist Act[6] (Pub. Resources Code §§ 21168, 21168.5, 25531), and this is particularly appropriate in light of the CEC's weighty expertise in the area of GHG reduction. (See *generally Citizens of Goleta Valley v. Bd. Of Supervisors* (1990) 52 Cal.3d 553, 564 ["The wisdom of approving [a] project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the [] officials . . . who are responsible for such decisions. The law as [courts] interpret and apply it simply requires that those decisions be informed . . . ."]; *Laurel Heights Improvement Assn. of San Francisco v. The Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 393 ["A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is

[6] Indeed, under the Warren-Alquist Act, the CEC's findings of fact are not merely accorded deference, they are final and not subject to review except as otherwise provided in the Act. (Pub. Resources Code § 25531, subd. (b).)

whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor the scientific expertise to engage in such analysis . . . ."].)

2. The Water Supply Analysis for the Project Is More Than Sufficient to Support the CEC's Decision.

DFI inaccurately characterizes the CEC's treatment of the Project's impacts on water resources as unsupported and unsubstantiated. DFI's allegations are: (1) the Project will "waste" potable water on a "not absolutely necessary" process when recycled water could be used; (2) the CEC failed to analyze the impacts of the Project's water delivery method; and (3) the CEC has not defined how the Project's recycled water will be treated. (DFI's Petition at 20-21.) However, the CEC's administrative record clearly and thoroughly addresses all of these questions and amply demonstrates that the CEC's environmental review complies with CEQA. Therefore, the CEC has regularly pursued its authority and the court should deny DFI's Petition.

(i) The Project's Use of Potable Water Will Not Cause a Significant Environmental Impact.

First, the record exhaustively shows that the Project's use of potable water will not cause a significant environmental impact and complies with state water policies. DFI fails to specify that the 62 acre feet per year (AFY) figure is the *maximum* permitted potable water usage rate permitted by design. The Project's expected water usage rate is 21.1 AFY of potable water. (RPIA 0513.) With the institution of a condition requiring the use of recycled water during drought conditions (taken from Orange Grove's Potable Water Option Agreement with Fallbrook Public Utility District[7] ["FPUD"]), the CEC and Staff determined the Project's potable water use would likely not create a significant adverse impact on water resources.

[7] See Staff's reference to Section 5 of the covenants to the Potable Water Agreement at RPIA 0106.

(RPIA 0513, 0095, 0106.) Furthermore, the record confirms that the Project's water source, FPUD, has sufficient capacity within existing infrastructure to supply both existing and forecasted water customers, as well as the Project. (RPIA 0026-0027.)

DFI's water policy argument is based on an incorrect understanding of the Project. DFI does accurately characterize the State policy of encouraging the use of recycled water, rather than potable water, for power plant cooling. (State Water Resources Control Board Policy 75-58; Cal. Water Code § 13550(a); see also RPIA 0512, 0694, 0089.) Contrary to DFI's assertions, the Project is wholly consistent with this policy: all of the Project's power plant cooling needs will be met with recycled water. (RPIA 0694, 0510.) The Project will use potable water only for other needs, including the facility demineralizer system, as well as the non-turbine water requirements for fire protection, sanitary system uses and landscape watering. (RPIA 0513.)

DFI claims that the CEC has not properly considered the use of recycled water for all of the Project's "industrial processes" also misses the mark. (DFI's Petition at 21.) The record repeatedly concludes that because the Project will only use a projected average of 21.1 AFY of potable water, not 62 AFY as claimed by DFI, and only for non-cooling purposes, it will not result in a significant adverse impact upon water resources due to the existence of backup water supply options discussed below. (RPIA 0512-0514, 0105-0107.) Because there will be no significant environmental impact, the CEC was not "required [to] identify and require mitigation measures" calling for the use of only recycled water. (DFI's Petition at 21.)

The CEC considered the possibility that provision of potable water to the Project during drought conditions may impact local water supplies and as mitigation required Orange Grove to use only recycled water in place of potable water if the need arose. (RPIA 0514-0516, 0107-0108.)

(ii) The Impacts of the Project's Water Delivery Method Were Extensively Analyzed.

DFI's second argument questions the CEC's lack of analysis of the "wide ranging impacts" arising from trucking water to the Project. (DFI's Petition at 21-22.) As explained in the Traffic, Land Use and GHG discussions of this Opposition, the CEC and Orange Grove have provided ample analysis to support the finding that no significant unmitigated impacts will occur as a result of the proposed water delivery method.

Moreover, the Alternatives discussions from the AFC, the Amended Staff Assessment, the PMPD and the Final Decision all carefully analyzed the data and found that trucking water to the Project site was the most practicable and only feasible option for water delivery. (See RPIA 0003-0004, 0130, 0397-0401.) This data was provided by Orange Grove during the AFC proceeding and was scrutinized by the CEC and its Staff. (See RPIA 0398-0401, 0130, 0003-0005.) The record shows that Orange Grove and the CEC extensively pursued a water pipeline alternative but deemed it infeasible due to land access issues and Rainbow Municipal Water District ("RMWD") policies. (RPIA 0523, 0690, 0634.) In fact, Orange Grove notes that the landowner refusing permission to construct the water pipeline is associated with DFI; his property is secured by DFI's loan. DFI's assertion is vague and conclusory, and fails to address the considerable analysis of water supply alternatives and environmental impacts of the proposed water delivery method. Moreover, DFI cannot both demand the use of entirely recycled water (see below) *and* a potable water pipeline. If the Project were to use only recycled water, it would have to be delivered by truck because there is no nearby recycled water supply. (RPIA 0507.) Just because the proposed water delivery method is unique does not mean its impacts have not been fully analyzed.

The Traffic and Transportation, Land Use, GHG, Soil and Water Resources and Alternatives sections of the Amended Staff Assessment and the Final Decision all include in-depth analysis of the "wide ranging impacts" of the Project's water delivery method. (See discussions of those sections above and below.) There is no need for revision to either document.

(iii) The Treatment System Used for Recycled Water Used By the Project Was Sufficiently Explained.

In its third argument, DFI claims that the CEC and Orange Grove have failed to sufficiently explain what it means for the recycled water to have undergone "tertiary treatment," citing exhaustive comments provided by Archie McPhee, an intervenor in the CEC proceeding. (DFI's Petition at 22.) But the record contains an extensive discussion of the level of treatment. (See RPIA 0684-0688, 0225-0226, 0573-0576, 0514.) As explained in Orange Grove's Supplemental Reply Testimony on Soil and Water Resources, the term "tertiary-treated recycled water" is equivalent to "recycled water" which is defined in the California Water Code at Section 13050(n). (RPIA 0573.) The Supplemental Reply Testimony further states that neither fresh nor recycled water is suitable for direct, untreated injection into the turbines. (RPIA 0574.) Water from either of these sources will be treated onsite using a demineralizer which reduces the total dissolved solids. (*Ibid.*) The water is then passed through a polisher which further purifies the water on its way to the turbine. (*Ibid.*) Orange Grove's witness, Joseph Stenger, repeated this thorough description of the Project's recycled water treatment process during the Evidentiary Hearing. (RPIA 0225-0226.) Orange Grove also notes that disinfected tertiary-treated recycled water that does not go through this process will be used in the small cooling tower. (RPIA 0018, 0519.) This explanation is clean and comprehensive, and satisfies any requirement to fully inform the public.

The CEC has adequately addressed all three of DFI's "issues" regarding water resources during this AFC proceeding. This becomes clear upon review of the numerous portions of the record that DFI neglected to include in its Petition. The Amended Staff Assessment and the Final Decision are not "misleading or imprecise" environmental documents as DFI would have the court believe. Instead, they are proof that the CEC has regularly pursued its authority in its analysis of the Project's impacts on water resources. Therefore, neither document requires revision.

3. The Traffic Analysis for the Project Is More Than Sufficient to Support the CEC's Decision.

DFI's arguments regarding the analysis of traffic impacts conducted during the CEC's site certification process are not new, and they have been sufficiently addressed by the CEC. DFI first contends that the CEC abused its discretion in relying on the Amended Staff Assessment and the Final Decision. DFI claims that these documents failed to adequately analyze the Project's traffic impacts. (DFI's Petition at 23.)

DFI asserts that "the CEC failed to adequately analyze the unique nature of [State Route 76 ("SR-76")]," claiming that this road is dangerous and creates a high number of accidents, and that the Final Decision downplays the impacts that the project's "large, unwieldy" water trucks will have on SR-76. (DFI's Petition at 23.) This issue was extensively addressed in responses to DFI's December 18, 2008 comment letter by Orange Grove (RPIA 0644-0645) and CEC Staff (RPIA 0610-0611). In contrast to DFI's claims, a great amount of evidence supports the CEC's finding that the Project will not have significant impacts on SR-76. CEC Staff analyzed statistics on a state and national level, and also developed a localized transportation risk assessment model, which allowed Staff to calculate the risk of an accident on a rural two-lane highway such as SR-76. (RPIA 0499.) This model was developed to be extremely conservative, and

it still revealed that the risk of a transportation accident along roads such as SR-76 is insignificant. (*Ibid.*) The Final Decision contains a segment-by-segment analysis of the features along the water delivery route, and it contains a substantial amount of evidence demonstrating that the Project's new, Class 9 water trucks are not "unwieldy" and will be able to blend in with existing traffic. (RPIA 0560.)

Furthermore, the Final Decision contains a Condition of Certification which requires the project owner demonstrate to the Compliance Project Manager ("CPM") that fully laden water trucks pose no impediment to traffic flow on the delivery route. (RPIA 0561.) Orange Grove's experts testified the water trucks will have no effect on the level of service ("LOS") on SR-76. (RPIA 0286-0294.) The CEC stated in its Decision it was "satisfied that the record contains extensive analysis of the particular features of the subject roads and Condition of Certification TRANS-4 adequately addresses truck safety on these roads." (RPIA 0563 [citations omitted].) The analysis of the Project's impacts to traffic and transportation is exhaustive, and it fully satisfies the requirements of the Warren-Alquist Act (codified at Public Resources Code § 25500 et seq.) and CEQA.

Next, DFI claims that the CEC failed to analyze the Project's construction impacts to traffic flow along SR-76. DFI claims that simply because the CEC found that construction of the Project would not degrade the LOS on Interstate 15 ("I-15") or SR-76, this finding is equivalent to a finding that "precisely the same numbers of cars, trucks, and heavy machinery would travel to and from the Orange Grove Project site" during construction. (DFI's Petition at 24.) DFI appears to have a mistaken understanding of the concept of LOS. The record explains that "[LOS] is a qualitative measure describing operational conditions within a traffic stream. The LOS is a term used to describe and quantify the congestion

level on a particular roadway or intersection, and generally describes these conditions in terms of such factors as speed, travel time, and delay." (RPIA 0127.) The addition of vehicles to a road in itself does not necessarily impact the level of service. The record demonstrates that the total increase in construction-related traffic will be between 0.15 percent and 0.16 percent, which will not substantially degrade the level of service on SR-76. (RPIA 0563.) Therefore, the record contains sufficient substantial evidence to support the CEC's finding that the Project will create no significant traffic impacts.

4. The Land Use Analysis for the Project Is More Than Sufficient to Support the CEC's Decision.

DFI claims the CEC's approval of the Project violates sections 1752 and 1755 of Title 20 of the California Code of Regulations. DFI claims these sections prevent the CEC from approving a project that violates local laws, rules, or regulations. (DFI's Petition at 24.) The Project site is zoned for General Agricultural use. (RPIA 0538.) However, section 2725 of the San Diego County ("County") Zoning Ordinance allows "Major Impact Services and Utilities" (such as power plants) in the General Agricultural zone with approval of a Major Use Permit. (RPIA 0542.) The County would have been responsible for making the MUP findings necessary for Project approval but for the CEC's exclusive jurisdiction as lead agency (discussed above). (*Ibid.*) The County Zoning Ordinance requires certain findings for the issuance of a Major Use Permit, and DFI claims that these findings cannot be made because the Project's water arrangement cannot provide public utilities required for these findings. (DFI's Petition at 24-25.) DFI's argument is misguided, and as discussed below, the CEC properly made findings to support the issuance of a Major Use Permit.

(i) The Project Is In Full Compliance With Applicable State, Local, and Regional Laws, Ordinances, Regulations, and Standards.

DFI's argument with regard to the applicable land use laws is convoluted and fraught with misunderstanding. First, DFI has misinterpreted sections 1752 and 1755 of the Title 20 regulations. These sections do not "prohibit the CEC from approving a power plant siting application that violates local laws, rules, or regulations." (DFI's Petition at 24.) Indeed, subject to certain requirements, the CEC has the authority to approve projects which are not in full compliance with an applicable state, local, or regional law, ordinance, regulation or standard ("LORS"). (Cal. Code Regs., tit. 20, § 1752, subd. (k).)

In this case, however, the Project as approved by the CEC is in full compliance with all applicable LORS. DFI's ground for its contention that the CEC could not properly make Major Use Permit findings is that the Project site is beyond the service area of any water district or potable water purveyor, and that as a result, utility services are not available to serve the Project site. (DFI's Petition at 25.) Again, DFI's misleading statements should be given no weight. The Project site is within the service area of RMWD. (RPIA 0546.) The CEC has assured the safety and reliability of the Project's water supply, which will be provided by the Fallbrook Public Utility District ("FPUD") for reasons discussed below. (See RPIA 0409.) Therefore, the CEC properly found that the Project will have sufficient available public facilities, services, and utilities.

(ii) The Project's Water Supply Arrangement Is In Full Compliance with RMWD Regulations.

DFI questions the CEC's treatment of the Project's land use impacts related to the proposed water supply arrangement. DFI vaguely asserts that the water trucking arrangement violates "RMWD rules and regulations regarding the sale of water within its service area" and "applicable local

water district regulations." (DFI's Petition at 24.) This is an argument that has already been thoroughly reviewed and answered by both Orange Grove and the CEC. (See RPIA 0634-0635, 0574-0576, 0400, 0130.) However, as before, DFI fails to cite to any specific RMWD regulation supporting these contentions.

DFI cannot provide a citation to the pertinent regulations because no RMWD regulations exist that restrict the use of water obtained from other districts on property within RMWD's service area. Orange Grove's review of the RMWD Policy Manual (the 1994 Adopted version, the 1998 Proposed Draft and the 2006 Proposed Draft)[8] reveals only that an applicant for RMWD water service must agree the water will only be used on the property described in the application. (RPIA 0722, 0750 [policy # 8040.10].) A proposed 2006 revision to the Policy Manual limited the use or delivery of RMWD water outside of the boundaries of RMWD. (RPIA 0801 [policy # 8120.08].) These provisions in no way regulate the sale or use of "foreign" water *within* RMWD boundaries. They only restrict the sale or use of RMWD water *outside of* RMWD boundaries. Moreover, as part of its mission statement, RMWD asserts that it "neither determines nor intends to determine or participate in land use decisions or the accomplishment of any plan of development of various owners of undeveloped property within the District [RMWD]."[9] (RPIA 0740 [policy

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[8] Orange Grove notes that despite the statement on the 1998 draft declaring that it was "Adopted by the Board of Directors on March 9, 1998," consultation with Brian Lee at RMWD reveals that neither the 1998 draft nor the 2006 draft were ever *officially* adopted by RMWD. The most recent officially adopted Water Policy Manual and the one currently in effect is the 1994 version.

[9] Section 8010.10 of the 1994 Adopted RMWD Water Policy Manual employs slightly different wording: "[t]he District, subject to such land use decisions by others and subject to all provisions of law including, but not

8010.10].) RMWD has no policy or regulation pertaining to the sale of outside water within its service area and states that its purpose is not to opine on land use decisions. Therefore, DFI has no basis for its claim that the Project's proposed water delivery method violates "applicable local water district regulations."

As stated above, DFI asserts that the Project's proposed water delivery method "violates applicable local water district regulations." (DFI's Petition at 25.) Orange Grove understands this comment to refer to DFI's assertion, discussed above, that "RMWD regulations prohibit the permanent use of water on a parcel other than where the water is purchased." (DFI's Petition at 24.) This assertion is misleading. RMWD stated that it is unable to provide water for trucking to the Project site. (See RPIA 1014.) However, RMWD did not say that in all cases its regulations prevent other water districts from providing water for trucking to the Project site. (*Ibid.*) RMWD explained that it holds a "neutral position to the water purchase agreements between FPUD and Orange Grove Energy," assuming that they are considered an interim agreement. (*Ibid.*) RMWD representatives, including RMWD's general manager and director, appeared at the evidentiary hearing and had an opportunity to participate. (RPIA 0400.) However, these representatives made no comments on the record and did not challenge the Project's water arrangement. (*Ibid.*)

(iii) The Project Has Valid Reasons For Obtaining Its Water Supply By Truck From Fallbrook Public Utility District.

DFI claims the Project's water supply arrangement with FPUD is a "sidestep" of a "problem" with the RMWD regulations, and this arrangement violates applicable water district regulations. (DFI's Petition

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limited to, [CEQA], will exert all reasonable efforts to have facilities available to provide service . . . ."

at 24-25.) These statements are completely untrue. Orange Grove extensively pursued the construction of a pipeline to access RMWD's water supply, the nearest access point being several miles from the main Project site. (RPIA 0400-0401.) However, the inability to secure an easement prevented the construction of such a pipeline. (RPIA 0400.) In addition, RMWD indicated that it would not support trucking of water to the Project site. (RPIA 0399 [Alternatives Table 3].) Furthermore, RMWD policies do not allow for the issuance of will-serve letters or any guarantee to any user for delivery of water for an extended period of time. (RPIA 0399.) Such a will-serve letter is required by the CEC's regulations. (See RPIA 0825 [subdivision (g)(14)(c)(v)].) Furthermore, assurance of a long-term water supply is fundamental to basic Project feasibility for a project with such a large capital commitment. (RPIA 0575.) RMWD is unable to provide any guarantee of long-term water supply to the Project. (RPIA 0008.)

Also, RMWD does not offer recycled water. (RPIA 0507.) This was problematic for the Project because state water policy strongly discourages the use of potable water for power plant cooling. (RPIA 0512.) Indeed, the CEC's established water source and use policy will only approve the use of fresh water for cooling purposes by power plants when alternative water supply sources are shown to be environmentally undesirable or economically unsound. (*Ibid.*)

FPUD is able to meet both the potable and recycled water needs of the Project. (RPIA 0512.) Based on the undeniably valid reasons discussed above for trucking water to the Project, Orange Grove decided to contract with FPUD for the provision of water. This arrangement was made entirely pursuant to all applicable LORS, and it was more than sufficiently analyzed by the CEC to provide substantial evidence to support the finding of availability of public facilities, services, and utilities required for a Major

Use Permit. (See San Diego County Zoning Ordinance § 7358.) Therefore, the CEC regularly pursued its authority in making the findings required for a Major Use Permit and in approving the AFC for the Project.

C. The CEC Satisfied All Due Process Requirements In Approving the Project.

DFI's due process argument has two components. First, DFI claims that the CEC violated DFI's due process rights by failing to provide DFI with notice of the proceedings. (DFI's Petition at 26.) Second, DFI claims that the CEC violated its due process rights by refusing to allow DFI to intervene in the CEC's proceedings. (DFI's Petition at 26.) However, as discussed below, DFI's claims lack merit, and the CEC regularly pursued its authority in providing notice to nearby landowners as required by law and in denying DFI's late petition to intervene.

1. The Due Process Clauses of the California and United States Constitutions Did Not Require the CEC to Directly Notify DFI.

DFI argues that by failing to notify DFI of the Project proceedings, and then denying DFI the right to intervene in those proceedings, the CEC denied DFI and its partners their right to procedural due process as guaranteed by the California and United States constitutions. (DFI's Petition at 26.) Both the Fourteenth Amendment to the United States Constitution and Section 7 of Article I of the California Constitution contain procedural due process guarantees.

In the federal context, a violation of procedural due process under the Fourteenth Amendment requires a deprivation of a life, liberty, or property interest, which was effectuated without adequate procedural safeguards. The adequacy of the procedural safeguards will depend on the nature of the property interest at stake, the strength of any government interests at stake, and the risk that the procedures employed will result in erroneous deprivations. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 335.)

In the state context, Article I, section 7 of the California Constitution provides that "a person may not be deprived of life, liberty, or property without due process of law...." This section is identical in purpose and scope to the due process clause of the Fourteenth Amendment. (*Russell v. Carleson* (1973) 36 Cal. App. 3d 334; *Gray v. Whitmore* (1971) 17 Cal. App. 3d 1.) Consequently, federal due process jurisprudence is applicable to an action for a due process violation brought under state law.

The case of *Horn v. County of Ventura* (1979) 24 Cal.3d 605 (hereinafter "*Horn*") examined a due process claim based on lack of notice in the context of a land use approval. DFI cites this case in support of the proposition that DFI was entitled to receive notice of the CEC's proceedings. (DFI's Petition at 30.) In *Horn*, the court held that notice provided by the county's CEQA regulations violated due process principles because the requirements were limited to the posting of environmental documents at central public buildings and mailings of notice to only those persons who specifically requested it. (*Horn* at 617-618.) However, contrary to DFI's claims, the *Horn* court did *not* hold that a local government or agency must directly notify a mere lienholder of a proposed project. The court in *Horn* specifically held that "whenever approval of a tentative subdivision map will constitute a *substantial or significant deprivation of the property rights of other landowners*, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs." (*Horn* at 616 [italics added].) DFI has made no showing whatsoever that it is a landowner, or even that the construction of the Project would constitute a "substantial or significant deprivation" of its property rights. Indeed, DFI had no property rights during the CEC proceeding with regard to the parcels neighboring the Project site.

Furthermore, with regard to actual landowners, the court left the specific formula detailing the nature, content, and timing of the requisite

notice to the affected local governments. (*Horn* at 618.) The court noted that depending on the circumstances, acceptable techniques of notice "might include notice by mail to the owners of record of property situate within a designated radius of the subject property, or by the posting of notice at or near the project site, or both." (*Horn* at 618.) Nothing in *Horn* would remotely suggest that the CEC's notification process (discussed below) would in any way violate the principles expressed in *Horn*, or the due process clause of either the federal or California constitution. *Horn* is entirely distinguishable from the case at bar, in which DFI is not a nearby property owner and had no interest in the property near the Project site other than a speculative pecuniary one.

2. The CEC Provided Timely Notice of the Project's Proceedings As Required By Law.

It is essentially undisputed in this proceeding that the CEC complied with all statutory notice requirements. (See RPIA 0673-0675.) DFI has failed to cite a single specific notice requirement that was not satisfied by the CEC. The reason why DFI did not receive direct, official notice from the CEC itself is simple: DFI is not, and has not been at any point relevant to the Project's CEC proceedings, a neighboring land owner. Despite DFI's claims of having a "substantial interest in property located immediately adjacent to the Orange Grove Project site," DFI is in reality a mere lienholder located in northern California. DFI's connection to the area surrounding the Project site is purely financial and tenuous at best, and the applicable notice requirements recognize this by only requiring direct notice to neighboring land *owners*.

The Title 20 regulations require the CEC to provide notice of the first informational presentation for a power plant project to all owners of land adjacent to the proposed power plant site. (Cal. Code Regs., tit. 20, § 1709.7.) The CEC satisfied this requirement in full. (RPIA 0674.) The

CEC was also obligated to issue a Notice of Receipt of Application for Certification, which is mailed to all property owners located adjacent to the Project site or any of the Project-related facilities. (*Ibid.*) The CEC also satisfied this requirement in full. (*Ibid.*)

In fact, the Project resulted in twice the usual amount of notice to the public because the Project's application was originally filed under the CEC's SPPE process. Notice of the project was provided to nearby landowners pursuant to the SPPE process, not only by the CEC, but also by the County of San Diego. (RPIA 0669.) The County also posted a sign announcing Orange Grove's application for a Major Use Permit at the Project site. (See RPIA 0992 [photograph of sign posted at the Project site].) This sign was posted on September 13, 2007, and it remained in place at least until May of 2008. (See RPIA 0854.) This application was later withdrawn, and re-filed pursuant to the CEC's AFC process, resulting in the additional notice described above.

DFI complains that it did not receive notice, while other lenders with an interest in property near the Project site were included on the service list (including Countrywide Home Loans). (DFI's Petition at 27.) DFI brought up this point during the CEC proceedings, and it has already been informed that Countrywide Home Loans was included on the service list because it is an owner of record of a parcel within 1000 feet from the Project site. (See RPIA 0048.) DFI has never indicated that it was an owner of record of any of the parcels listed in its Petition, and at all times relevant to the CEC's proceedings for the Project, DFI has never held an ownership interest in any of these properties. Therefore, DFI was not entitled to direct notice by mail under the CEC's regulations.

3. DFI Had Actual Knowledge of the Project and a Reasonable Opportunity to Participate in the CEC's AFC Proceedings.

While DFI may not have received notice as part of the CEC's formal notification process, DFI did in fact have actual knowledge of the Project. In December 2007, Ray Gray of Prominence Partners[10] sent an e-mail to Steve Thome, Orange Grove's Vice President of Development, and copied to steve@dfifunding.com (an address listed on DFI's website as belonging to Steve Anderson). This email's subject line was "power plants," and the email asked whether there was any feedback on Ray Gray's "350 acre project in Pala," which is the size of the parcels listed in the Petition. (See RPIA 1003; 1012 [letter from Angie Wolf of Gray Investment Group to San Diego Gas & Electric ("SDG&E") offering to sell "350 acres" comprising the four parcels listed in the Petition].) Therefore, Prominence Partners provided DFI, its lender, with notice of the proposed power plant.

Additionally, the other owner of record of the parcels described in the Petition, Tesla Gray, also had notice of the Project. On April 17, 2008, Angie Wolf of Gray Investment Group sent a letter to SDG&E offering to sell all of the parcels in which DFI holds a lending interest to SDG&E. (See RPIA 1012.) This letter expressly mentioned that "Jpower [sic] is proposing two 49 megawatt peaker power plants" on property which is "located immediately adjacent to our property." (*Ibid.*) Based on this letter and the email described above, it is therefore, readily apparent that both the owners of record and DFI were well aware of the Project as early as December 2007.

Despite this widespread awareness of the Project by the owners of record and by DFI, DFI nevertheless claims that it did not have constructive

[10] At the time the AFC was filed, Prominence Partners was the owner of record of at least one of the adjacent parcels described in DFI's Petition. (See RPIA 0048.)

notice of the Project. (DFI's Petition at 5.) However, a lender is often made aware of events potentially affecting the encumbered land by the borrower, pursuant to an express covenant in the deed of trust. This helps lenders keep abreast of developments that the property owner alone would otherwise have occasion to know about. The deeds of trust for parcels 110-072-05, 110-072-13 and 110-072-14 each contain a covenant requiring the borrower to "promptly communicate to Lender" any "notices or demands" from "governmental agencies, utilities..., contractors, subcontractors or suppliers." (See RPIA 0935, 0975 [at covenant 7(q)].) Therefore, Prominence Partners may have been obligated under the terms of these agreements to notify DFI of any notice received from the CEC. Prominence Partners did provide DFI with some level of notice of the Project, as described above, by copying DFI on some of its communications with Orange Grove.

4. The CEC Properly Denied DFI's Petition for Intervention in the CEC's AFC Proceedings.

DFI filed its Petition for Intervention seeking to intervene in the Project's AFC proceedings on December 16, 2008. Pursuant to the California Code of Regulations, a Petition for Intervention must be filed no later than the Prehearing Conference or 30 days prior to the first hearing held pursuant to sections 1725, 1748, or 1944 of Title 20 of the California Code of Regulations, whichever is earlier. (Cal. Code Regs., tit. 20, § 1207, subd. (b).) The regulations provide that the presiding member may grant a Petition for Intervention filed after this deadline "only upon a showing of good cause by the petitioner." Cal. Code Regs., tit. 20, § 1207, subd. (c).)

In this case, the deadline to file a Petition for Intervention fell on December 1, 2008. In its Petition for Intervention, DFI argued that it had good cause to support a late intervention, since it claimed it was not

provided notice of the proceedings. (See RPIA 0848.) The CEC denied DFI's Petition for Intervention, noting that the petition was untimely and that adequate notice was provided (as discussed above). (RPIA 0176-0177.) After DFI appealed the CEC's denial of its Petition for Intervention, the CEC properly sustained this denial. (See RPIA 0678.)

5. DFI Actively Participated in the CEC's AFC Proceedings, and the CEC Fully Considered the Comments Submitted by DFI.

As discussed above, DFI has entirely failed to demonstrate that any of the CEC's actions denied DFI of any due process right required by law. In fact, despite the fact that DFI was not granted intervenor status by the CEC, DFI was able to, and did, actively participate in the CEC's AFC proceedings. DFI's representatives appeared at the evidentiary hearing on December 19, 2009, and participated in that proceeding. (See RPIA 0149-0150.)

DFI also filed a 16-page comment letter with the CEC on December 18, 2008. This letter contained DFI's comments and concerns regarding the Project, largely relating to the Staff Assessment. Many of the arguments contained in the Petition were originally raised in this comment letter. The CEC's Siting Committee for the Project ordered the parties to respond to DFI's comments. Orange Grove filed an extensive response to DFI's comments on January 29, 2009. (RPIA 0619.) CEC Staff also filed a response to DFI's comments on the same date. (RPIA 0597.) The CEC's responses to comments are incorporated throughout the Final Decision. After the PMPD issued in February 2009, DFI filed another comment letter. This letter largely re-stated the comments from DFI's December 18, 2008 letter, although many of the concerns from DFI's December 18, 2008 letter had already been fully addressed and explained in previous responses to DFI's comments from Orange Grove and the CEC.

6. The CEC's Approval of the Project Did Not Deprive DFI Of Its Right to Substantive Due Process.

DFI claims that the CEC's approval of the Project deprived DFI of its right to substantive due process under the California and United States constitutions. (DFI's Petition at 16.) DFI supports this substantive due process contention with only a single citation. This citation states generally that in order to establish a violation of substantive due process, a petitioner is required to prove that the government action was clearly arbitrary and unreasonable. (See *ibid.*)

Not only has DFI entirely failed to prove that the CEC's action was "clearly arbitrary and unreasonable," but DFI overlooks the fact that the protections of substantive due process have traditionally been limited to matters relating to marriage, family, procreation, and the right to bodily integrity. (*Albright v. Oliver* (1994) 510 U.S. 266, 271-273.) As a result, much of substantive due process jurisprudence refers to "fundamental rights." Even if DFI demonstrated that it has a clear, present interest in properties neighboring the Project site (which it has not), substantive due process is not the appropriate mechanism to protect such an interest. Furthermore, DFI has entirely failed to demonstrate how the CEC's approval of the Project would compromise DFI's interest in the neighboring properties. Therefore, DFI's claim that the CEC's approval of the Project deprived DFI of substantive due process rights lacks merit.

D. DFI Failed to Properly Request a Temporary Stay.

DFI purports to request a temporary stay of the construction of the Project in its Petition. (See DFI Petition at 9.) Rule 8.486(a)(7) of the California Rules of Court governs requests for a temporary stay during a writ proceeding before the Supreme Court. This rule provides that if a petition requests a temporary stay, it must comply with certain

requirements, or the reviewing court may decline to consider the request for a temporary stay. These requirements include the following:

(A) The petition must explain the urgency.

(B) The cover of the petition must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed....

(California Rules of Court, rule 8.486(a)(7).) DFI has satisfied neither of these requirements. DFI has explained no urgency in requesting its stay. Nor does the cover of the Petition prominently display the notice "STAY REQUESTED." Therefore, DFI has failed to properly request a temporary stay, and the court should decline to consider DFI's request.

IV. Conclusion

The court should deny the Petition for five reasons.

First, DFI lacks standing to seek a writ of mandate from this court.

Second, the CEC regularly pursued its authority in approving the Project's AFC, as the CEC based its findings on substantial evidence and proceeded in the manner required by law.

Third, the CEC provided timely notice of the AFC proceedings as required by law.

Fourth, DFI had actual knowledge of the Project and a reasonable opportunity to participate in the CEC's AFC proceedings.

Fifth, DFI actively participated in the CEC's AFC proceedings and the CEC fully considered the comments submitted by DFI.

RELIEF REQUESTED

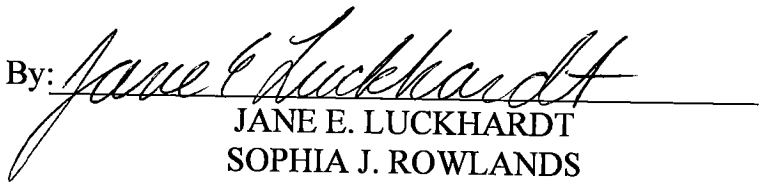
1. Orange Grove Energy, L.P. respectfully requests the immediate denial of the Petition and the Request for Stay.

2. Orange Grove Energy, L.P. respectfully requests such other and

further relief at law or in equity as the court may deem appropriate, including but not limited to attorney fees and reasonable costs.

DATED: May 18, 2009

DOWNEY BRAND LLP

By: 

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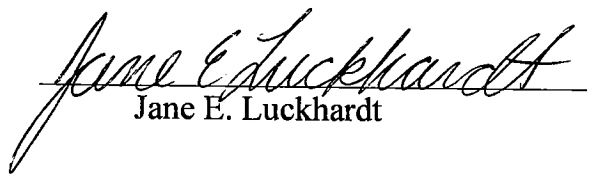
CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c), I certify that the text of this brief consists of 13,519 words, not including tables, as counted by Microsoft Word processing program used to generate it.

Dated: May 18, 2009



Jane E. Luckhardt

APPENDIX CHRONOLOGICAL INDEX

VOL.	EXHIBIT	PAGE	DATE	DOCUMENT
2	8	RPIA 0596	1/29/09	California Energy Commission Staff Brief In Response to DFI Funding, Inc.'s Comments
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2	24	RPIA 0993	11/23/08	Archie McPhee Letter to California Energy Commission (dated November 23, 2008)
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2	19	RPIA 0851	12/19/08	Orange Grove Energy, L.P.'s Opposition to DFI Funding, Inc.'s Petition for Intervention
2	7	RPIA 0577	12/18/08	DFI Letter to California Energy Commission Regarding Orange Grove Project
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1	2	RPIA 0070	12/11/08	Amended Staff Assessment, Section 4.1 Air Quality, Air Appendix A; Section 4.9 Soil and Water Resources; Section 4.10 Traffic and Transportation, page 4.10-3; Section 6 Alternatives, pages 6-9 and 6-10
1	3	RPIA 0131	11/6/08	Notice of Prehearing Conference and Notice of Evidentiary Hearing
2	25	RPIA 1002	12/5/07	Correspondence Between Ray Gray and Steve Thome Regarding Power Plants (dated December 5, 2007)
2	22	RPIA 0931	10/5/05	DFI Funding, Inc. Construction Deed of Trust, Security Agreement, and Assignment of Rents
2	17	RPIA 0836	10/08	Joint CEC and CPUC Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies (Cover, Table of Contents, pp. 1-5)
2	27	RPIA 1006	10/1/07	Correspondence between Joe Stenger (Consultant to Orange Grove) and Angie Wolf (of Gray Investment Group) Regarding Permission to Access Prominence Partners and Tesla Gray Properties
2	6	RPIA 0571	12/1/08	Orange Grove Supplemental Reply Testimony of Richard Jones and Joseph Stenger on Soil and Water Resources
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2	13	RPIA 0737	1998	Rainbow Municipal Water District Policy Manual (1998 Draft)

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Case Name: DFI Funding, Inc., Petitioner vs. California Energy Commission, Respondent; Orange Grove Energy, L.P. and J-Power USA Development Co. LTD, Real Parties in Interest

Case No.: S157627

Court: California Supreme Court

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814. On May 18, 2009, I served the following:

Real Parties in Interest Opposition to Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief, Request for Stay

By placing a true copy thereof enclosed in addressed, sealed envelopes, by method indicated, on the parties below:

Best Best & Krieger, LLP Cyndy Day-Wilson (Bar No. 135045) Melissa Woo (Bar No. 192056) G. Andre Monette (Bar No. 248245) 655 West Broadway, 15th Floor San Diego, CA 92101	Attorneys for Petitioner DFI Funding, Inc. (Via Federal Express)
California Energy Commission Attn: Bill Chamberlain General Counsel 1516 Ninth Street Sacramento, CA 95814	By Hand Delivery

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 18, 2009, at Sacramento, California.

Lois Navarrot