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April 1, 2011

File No. 039610-0003

VIA FEDEX

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-9
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

Re: City of Palmdale Hybrid Power Plant Project: Docket No. 08-AFC-9

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, Sections 1209, 1209.5, and 1210, enclosed herewith for filing please find Applicant's Rebuttal Brief.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the attached proof of service list.

Very truly yours,

Paul E. Kihm
Senior Paralegal

Enclosure

cc: 08-AFC-9 Proof of Service List (w/encl., via e-mail and U.S. Mail)
Michael J. Carroll, Esq. (w/encl.)
Marc T. Campopiano, Esq. (w/encl.)

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:	)	Docket No. 08-AFC-9
	)	
APPLICATION FOR CERTIFICATION FOR THE PALMDALE HYBRID POWER PLANT PROJECT BY THE CITY OF PALMDALE	)	APPLICANT'S REBUTTAL BRIEF

On behalf of the City of Palmdale ("Applicant") for the Palmdale Hybrid Power Plant Project (08-AFC-9) ("Project"), we hereby provide Applicant's Rebuttal Brief. Applicant concurs with the analysis and conclusions contained in California Energy Commission ("CEC") Staff's Opening Brief. As demonstrated below, the Opening Brief filed by intervenor Center for Biological Diversity ("CBD"), in which Desert Citizens Against Pollution ("DCAP") joins ("CBD Brief"), consists of:

- statements, and in some cases misstatements, of law apparently intended to suggest that the Project fails to somehow comply with applicable requirements, but with little or no analysis or citations to the evidentiary record to support such suggestions;
- unsupported assertions that the Project and/or analysis thereof fails to comply with applicable requirements which are contrary to the evidence in the record; and
- discussion of matters that are irrelevant to the current proceedings.

I. **Structure of Brief**

To ensure a complete response to the CBD Brief, we address it on a paragraph by paragraph basis. We have therefore attached an annotated version of the CBD Brief, and respond below to each of the numbered paragraphs. In the absence of topical section headings, to aid the reader in locating discussion of specific topics in this Brief, we provide the following guide. Discussion of the following topics addressed in this Brief can be found in the indicated responses:

Topic	Response(s)
Adequacy of review of Project road paving proposal	Paragraphs 1; 7, 8 and 9
Adequacy of review of Project air quality impacts	Paragraph 2
Adequacy of review of interpollutant offset proposal	Paragraphs 7, 8 and 9
Appropriateness of significance thresholds used in Applicant and Staff analysis	Paragraph 10
Adequacy of review of PSD compliance	Paragraph 11
Adequacy of review of Project PM2.5 emissions	Paragraph 12
Adequacy of review of cumulative impacts	Paragraph 13
Sufficiency of proposed mitigation measures (Conditions of Certification)	Paragraph 14
Effectiveness of proposed road paving offset strategy	Paragraph 17
Adequacy of GHG analysis	Paragraphs 23 through 26
Adequacy of analysis of growth inducing impacts	Paragraph 29
Adequacy of alternatives analysis	Paragraphs 30 through 37
Discussion of necessary findings	Paragraphs 38, 39 and 40

II. **Paragraph by Paragraph Responses**

Paragraph 1

Applicant agrees that environmental impacts associated with the implementation of mitigation measures, including the proposed road paving, must be analyzed. However, Applicant disagrees with CBD's assertion that such analysis was not completed in this case. As set forth in detail in Section I of Applicant's Opening Brief, the analysis of Applicant's road paving proposal (the "Project Road Paving"[1]) completed by Applicant and Staff, and sponsored into the evidentiary record by their respective expert witnesses, satisfies all applicable legal requirements. That analysis concludes that the Project Road Paving will not result in any significant unmitigated environmental impacts. Support for the foregoing statements is contained in Applicant's Opening Brief, with appropriate citations to the evidentiary record, and is not repeated here.

Applicant also takes exception to CBD's reference to, and characterization of the holding in, *California Unions for Reliable Energy et al. v. Mojave Desert Air Quality Management District*, 178 Cal. App. 4th 1225 (2009). CBD states that the "decision unequivocally required the Air District to conduct environmental review of any scheme to offset particulate matter via road paving before it issues any such ERCs." (Emphasis added.) In addition to not making clear that the "Air District" referred to in the parenthetical is not the air district with jurisdiction over this Project, CBD grossly misstates the holding in the case. What the court actually held was "that there was insufficient evidence to support the District's finding that the adoption of Rule 1406 was within the Class 8 categorical exemption." (*Id*. at 1247.) The Court went on to state: "we do not mean to preclude the District from finding that the adoption of Rule 1406 is within the Class 8 categorical exemption or otherwise exempt, as long as it does so in compliance with

[1] As discussed in Applicant's Opening Brief at 2, Applicant proposed to offset Project emissions of particulate matter less than 10 microns in diameter ("PM10") by paving roads to create bankable emission reduction credits ("ERCs") in compliance with the AVAQMD Rules and Regulations (hereinafter, "Project Road Paving"). (Ex. 6, at 5.2-80; Ex. 56, at AQ-11; Ex. 76, at A-2 to A-4; Evidentiary Hearing, at 49:8-10.)

CEQA." (*Id*. at 1248.) Thus, contrary to the statement contained in CBD's Brief, the court did not require the Air District to conduct an environmental review. Instead it stated that the District might very well find that adoption of the rule was exempt from environmental review under CEQA; it just need to better support its finding. As Applicant explained in its January 26, 2011 rebuttal to the opening testimony of CBD, neither the AVAQMD nor the Applicant is relying on MDAQMD Rule 1406, which was the subject of the above-referenced case, as the authority for generating or using road paving offsets in connection with the Project. Therefore, the case is entirely irrelevant to the matter at hand. Furthermore, as stated above, we do not disagree that review of the environmental impacts associated with proposed mitigation measures is necessary. We nevertheless draw the Committee's attention to this misstatement of law in the opening sentences of the CBD Brief because it is illustrative of the deficiencies to be found in the remainder of the document.

Paragraph 2

CBD makes several general and unsupported assertions regarding Project impacts and compliance with applicable LORS. This introductory paragraph is indicative of the remainder of CBD's Brief in which CBD consistently fails to back its claims with supportable evidence. In contrast, Staff's and the Applicant's analysis is informed by, and based upon, a wealth of data, modeling and analysis in the evidentiary record. (*See, e.g.*, Exs. 6, 35, 56, 76, 300, 301 and 307.) Notably, CBD's lone expert in these proceedings, Mr. Gregory Tholen, testified that he did not disagree with the Air Quality analysis or conclusions. (Transcript for the Project Evidentiary Hearing on March 2, 2011, Docket 08-AFC-9 (hereinafter, "Evidentiary Hearing"), at page 105, line 17 (*i.e.*, "105:17").) CBD never addresses the inconsistency of its assertions with its own expert's opinion.

Staff's detailed analysis of potential Project Air Quality impacts easily passes muster under the California Environmental Quality Act (Public Resources Code § 21000 *et seq*.) (CEQA). (Ex. 300, at 4.1-1 *et seq*.) CEQA requires a project that may result in a significant environmental impact to prepare an Environmental Impact Report ("EIR"), or equivalent,[2] with sufficient analysis to provide decision-makers with the information needed to intelligently consider the environmental consequences of the action. (Title 14, California Code of Regulations, § 15000 *et seq*., (CEQA Guidelines) § 15151.) The EIR need not be exhaustive. (*Id*.) Rather, an EIR may rely on informed estimates and reasonable assumptions by the experts who prepared it. (CEQA Guidelines § 15384.) Disagreements between experts do not make an EIR inadequate. (CEQA Guidelines § 15151.) Ultimately, an EIR's conclusions are upheld if based on substantial evidence. (Public Resources Code § 21168.5; *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990).)

Substantial evidence is defined as "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." (CEQA Guidelines § 15384(a).) Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (CEQA Guidelines § 15384(b).)

For the Project, the evidentiary record is replete with data and analysis upon which Staff based its conclusions, including, but not limited to, the Applicant's AFC and detailed modeling

[2] The Energy Commission's AFC process has been certified by the Secretary of Natural Resources as a certified regulatory program under CEQA. (CEQA Guidelines § 15251(j).)

files (Ex. 6 and 35), Applicant's responses to applicable data requests (*see* Exs. 46, 56, and 76), the FSA (Ex. 300), and the Final Determination of Compliance (Ex. 302).[3] The AVAQMD issued the FDOC on May 13, 2010, concluding that the Project would comply with all applicable AVAQMD Rules and Regulations. (*See* Ex. 302, at 20.)

Applicant's and Staff's modeling was very conservative because it assumed worst-case meteorological conditions would occur at the same time as worst-case emissions, which has a very low probability of actually happening. (Evidentiary Hearing, at 39:21-25.) Under CEQA, when uncertain future events could lead to a range of possible outcomes, an EIR may base its analysis on a reasonable worst-case scenario. (*Planning & Conserv. League v. Castaic Lake Water Agency*, 180 Cal. App. 4th 210, 244 (2009).)

To help evaluate whether the Project would have Air Quality impacts, Applicant and Staff compared the conservatively estimated emissions against applicable Ambient Air Quality Standards (AAQS). AAQS are health-based standards conservatively designed to protect even the most sensitive individuals, including children, people with asthma, and the elderly. (Ex. 300, at 4.1-21; Ex. 6, at 5.3-1; Evidentiary Hearing, at 43:6-8.) AAQS establish the maximum amount of a pollutant that can be present in outdoor air without harm to the public's health while providing an adequate margin of safety. (*See* Ex. 300, at 4.1-21; Evidentiary Hearing, at 65:21.)

Applicant's and Staff's analysis and reliance on AAQS to help determine the significance of Project emissions is an approach commonly applied by lead agencies and the Energy Commission, and is recognized by the courts. (Evidentiary Hearing, at 38:4-7, 38:17-18; *see Cadiz Land Co. v. Rail Cycle, L.P.* (2000) 83 Cal. App. 4th 74, 106 (impacts found to be less than significant based on compliance with the EPA's National AAQS).) Under CEQA, standards of significance used in an EIR can be developed by the experts preparing the EIR based on their assessment of the technical evidence, and the lead agency has discretion to accept the expert's opinion regarding the appropriateness of the significance standard. (*See Napa Citizens for Honest Gov't v. Napa County Bd. Of Supervisors*, 91 Cal. App. 4th 342, 362 (2001) (significance standard for traffic impacts developed by drafters of EIR).) Lead agencies can use standards adopted by other regulatory agencies as thresholds of significance. (*Cadiz Land Co., supra*, 83 Cal. App. 4th at 106.)

Where it deemed necessary, Staff proposed Conditions of Certification (COCs) to mitigate potential Air Quality impacts. (Ex. 300, at 4.1-53.) The COCs are specifically tailored to address impacts and are supported by substantial evidence, including, but not limited to, Staff's expert opinion. (*See* Title 20, California Code of Regulations, § 1742(b) (Staff must assess the effectiveness of Applicant's proposed mitigation measures and determine "whether additional or more effective mitigation measures are reasonably necessary, feasible, and available.") In particular, Staff proposed COCs AQ-SC18 and AQ-SC19 to require offsets for the Project's NOx, VOCs and PM10 emissions. (Ex. 300, at 4.1-61 to 4.1-62.) Staff concluded that, with mitigation, the Project would not cause a significant Air Quality impact for construction or operations. (Ex. 300, at 4.1-52 to 4.1-53.) Even CBD's expert did not disagree with the conclusions reached by the Air Quality analysis. (Evidentiary Hearing, at 105:14-17.)

[3] The AVAQMD must perform a "review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance." (Title 20, California Code of Regulations, § 1744.5(b).)

Even assuming worst-case conditions, the modeling demonstrated that the Project would not cause an incremental or cumulative exceedance of the PM2.5 AAQS for Project construction or operation. (Ex. 301, at 4.1-22, 4.1-26, and 4.1-40; Ex. 307, at 19-20; Evidentiary Hearing, at 115:2.) Because impacts are less than significant, no additional mitigation is required. (*See* Evidentiary Hearing, at 38:22; Ex. 6 at 5.2-82 to 5.2-83.)

Staff also carefully evaluated the Project's consistency with applicable LORS. (Ex. 300, at 4.1-40 to 4.1-50; *see also* Title 20, California Code of Regulations, § 1744(b).) As part of its review, Staff considered the AFC and FDOC, which found compliance with applicable rules and regulations. (*See* Ex. 302, at 20.) Based on its review, Staff determined that additional COCs were required to ensure LORS compliance, which it proposed in the FSA. (*See* Ex. 300, at 4.1-53.) Based on the weight of the evidence, Staff determined that the Project, with the COCs, complied with all applicable Air Quality LORS. (Ex. 300, at 4.1-52 to 4.1-53.)

For the Project Road Paving, Staff determined the COCs adequately mitigated construction emissions to less than significant levels. (Evidentiary Hearing, at 116:4-9; Ex. 300, at 4.1-23 to 4.1-24; Ex. 300, at 4.1-53 to 4.1-58.) Even CBD's expert agreed that the COCs would adequately mitigate construction emissions. (Evidentiary Hearing, at 107:22-25.) Applicant also performed an analysis of air emissions from road paving activities. (Applicant's Opening Brief, at 10). The relatively minor construction emissions from Project Road Paving would be comparable to less-than-significant emissions associated with constructing the Project's water or wastewater pipelines. (*See* Ex. 300, at 4.1-16; Evidentiary Hearing, at 58:16-18.) Construction emissions from the Project Road Paving would only represent a small fraction of the total construction emissions. (Evidentiary Hearing, at 59:11-13.)

In summary, the weight of the evidence overwhelmingly supports determinations that the Project would not cause a significant impact to Air Quality, and that the Project would comply with all applicable LORS.

Paragraphs 3 and 4

CBD paraphrases various provisions of the Warren-Alquist Act and regulations promulgated pursuant thereto. While Applicant does not necessarily agree with CBD's paraphrasing in all respects, the Committee is well versed in these provisions, and specific responses are unnecessary.

Paragraph 5

CBD makes various statements of law, coupled with a general one-sentence assertion that the environmental review conducted in connection with the Project was deficient. No specific examples of how the review is deficient are provided, and the assertion is unsupported by any analysis in the CBD Brief itself or any citation to the evidentiary record. Therefore, no more detailed response is possible or necessary.

Paragraph 6

CBD makes various statements of law, with case citations (which Applicant has not verified). While the suggestion is that the environmental review of the Project falls short of the identified requirements, there is no analysis in support of this proposition.

Paragraphs 7, 8 and 9

CBD restates past assertions regarding the adequacy of review of the proposed PM10 emission offset strategies for the Project. Much of this has already been covered in Applicant's Opening Brief. A summary of Applicant's responses to these claims is provided below.

The analysis completed by Applicant and Staff and now contained in the evidentiary record addresses impacts associated with the Project Road Paving.

Applicant's Opening Brief provides a point-by-point analysis of the substantial evidence in the record, based on the analysis completed by Applicant and Staff, which supports a finding that the Project Road Paving will not result in unmitigated significant adverse impacts to the environment or public health. Staff evaluated the Project Road Paving by environmental topic area and determined it would comply with all applicable LORS and would not result in a significant environmental impact. (Ex. 301; Evidentiary Hearing, at 52:8-13.) Staff's expert conclusions were based on, and supported by, ample data and facts which are now part of the evidentiary record. (*See, e.g.,* Exs. 1-35, 56, 76, 300, 301 and 307.) We respectfully request the reader to refer to Applicant's Opening Brief at pages 3-11 for this discussion. (*See also* Staff's Opening Brief (rejecting CBD's arguments about the adequacy of Staff's analysis of the Project Road Paving).)

The analysis completed by Applicant and Staff and now contained in the evidentiary record was completed on a timely basis.

CBD's Brief repeatedly asserts that Staff "attempted to backfill" information related to the Project Road Paving. (*See, e.g.,* CBD Brief, at 1, 3, 8.) The implication is that the Staff analysis was not timely. This argument lacks merit.

Staff's analysis of the Project Road Paving complies with the Warren-Alquist Act, Energy Commission regulations and CEQA. (Ex. 301; Evidentiary Hearing, at 52:8-13; Applicant's Opening Brief, at 3-11.) Energy Commission regulations require Staff to publish its environmental assessment at least 14 days prior to the start of evidentiary hearings. (Title 20, California Code of Regulations, § 1747.) Staff published its analysis of the Project Road Paving on January 21, 2011, forty (40) days before the Evidentiary Hearing held on March 2, 2011. (Ex. 301.) The analysis incorporated general Project information and applicable Conditions of Certification (COCs) from the FSA, which was published on December 22, 2010, seventy (70) days before the Evidentiary Hearing. (*See* Exs. 300 and 301; Evidentiary Hearing, at 49:23-52:2.)

CBD and other members of the public had ample time to comment on Staff's analysis of the Project Road Paving, which was produced 40 days before the Evidentiary Hearing. (Ex. 301.) CBD had sufficient time to review the record and even had multiple opportunities to question and receive information directly from Staff. Two workshops were scheduled after Staff released its analysis of the Project Road Paving (on February 7, 2011 and February 14, 2011). CBD was an active participant in both workshops, where it received substantial feedback and information from Staff based on its questions and comments. CBD also had the opportunity to cross-examine the entire panel of Staff experts at the Evidentiary Hearing regarding the Project Road Paving.

Evidence in the record adequately describes the existing setting associated with the Project road paving.

CEQA requires that an EIR describe the environmental setting to establish the baseline for the lead agency to use in determining whether project impacts are significant. (CEQA Guidelines § 15125.) While the description of the environmental setting must include "a description of the physical environmental conditions in the vicinity of the project," it "shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives." (*Id*.; *see also California Oak Foundation v. Regents of Univ. of Cal.*, 188 Cal. App. 4th 227, 263-266 (2010).)

CBD asserts that the analysis of Project road paving does not adequately describe the existing setting. CBD cites to CEQA case law that prohibits the existing setting from being based on "hypothetical situations." (CBD Brief, at 3.) This argument is misplaced. The California Supreme Court recently clarified that a CEQA baseline cannot rely on hypothetical future scenarios. (See *Communities For A Better Environment v. South Coast Air Quality Management District*, 48 Cal. 4th 310, 322 (2010) (court overturned EIR that relied on maximum permitted emissions of refinery boilers as the baseline for comparing emissions associated with retrofitting boilers).) The Court held that "an approach using hypothetical allowable conditions as the baseline results in illusory comparisons that can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts, a result at direct odds with CEQA's intent." (*Id*. (internal quotations omitted).) The Court expressly recognized, however, that "an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." (*Id*., at 328.)

Unlike the case in *Communities For A Better Environment*, Staff did not base the existing setting on "hypothetical" future conditions that would have the effect of creating "illusory comparisons" that would "mislead the public as to the reality of the impacts." Staff did not rely on hypothetical permit emissions or other planned conditions to distort its analysis of the proposed road paving. In contrast, the existing setting was based on information from the AFC, Applicant's data responses, general information in the FSA, Staff's surveys and research related to the Project Road Paving, and Applicant's additional surveys. (*See* Exs. 56, 76, 300, 301; Evidentiary Hearing, at 54:16-19.)

Applicant provided substantial information about the road paving segments associated with the Project Road Paving as part of its responses to Staff's Data Requests. (*See* Ex. 56, at AQ-10 to AQ-15 (identifying details about road paving and modeling factors to estimate PM10 and PM2.5 emission reductions); Ex. 76, at A-2 to A-4 (providing information about road segments, traffic flow and potential emission reductions from road paving).)

Staff reviewed the Project Road Paving by analyzing potential impacts for each potential environmental topic. (*See* Ex. 301.) Staff experts incorporated applicable data in the AFC, data responses and general information in the FSA to prepare its review of each topic area. As necessary, Staff provided additional details about the environmental setting associated with the Project Road Paving. (Ex. 301.) To inform its analysis, Biological Resources Staff evaluated aerial photographs of the road segments and conducted multiple field surveys to confirm its findings and the appropriateness of the COCs. (Evidentiary Hearing, at 276:17-18, 282:23-25,

284:23-285:1.) In some cases, Staff relied on worst case assumptions for its analysis of potential impacts. For example, Biological Resources Staff estimated the impact area for construction based on a worst-case scenario. (Evidentiary Hearing, at 301:7-8.) Under CEQA, when uncertain future events could lead to a range of possible outcomes, an EIR may base its analysis on a reasonable worst-case scenario. (*Planning & Conserv. League, supra*, 180 Cal. App. 4th at 244.) Staff's analysis rests well within its discretion recognized by *Communities For A Better Environment* to describe the existing setting.

Applicant conducted additional field surveys to confirm the background conditions related to the Project Road Paving. (Evidentiary Hearing, at 220-222.) Applicant further provided expert testimony on this issue from Assistant City Manager Laurie Lile, who testified that she is very familiar with the background conditions. (Evidentiary Hearing, at 246:19.)

Staff provided expert testimony regarding the proposed use of interpollutant trading.

Contrary to assertions contained in paragraph 8 of the CBD Brief, Staff's expert witness, Mr. Steve Radis, did provide uncontroverted expert testimony regarding the proposed use of interpollutant trading to offset Project PM10 emissions. Mr. Radis testified that, in his expert opinion, the proposed interpollutant trading would not result in a significant adverse impact. (Evidentiary Hearing at 162:14-23.)

Paragraph 10

CBD makes the unsubstantiated argument that the "FSA fails to adequately describe or utilize meaningful significance thresholds for all of the air pollutants that would be emitted by the project." (CBD Brief, at 5.) CBD goes on to assert that the FSA fails to properly analyze Air Quality impacts by comparing emissions to applicable standards. (*Id*.) CBD does not explain the inconsistency of its assertion with Mr. Tholen's testimony that he did not disagree with the Applicant's and Staff's analysis or conclusions regarding air quality. (Evidentiary Hearing, at 105:9-20.) Nonetheless, this argument is easily dismissed. Applicant's and Staff's analysis and reliance on AAQS as significance thresholds is supported by substantial evidence. It is an approach commonly followed by CEQA lead agencies, including the CEC, and is recognized by the courts. (Evidentiary Hearing, at 38:4-7, 38:17-18*; see Cadiz Land Co.*, *supra*, 83 Cal. App. 4th at 106 (air quality impacts found to be less than significant based on compliance with National Ambient Air Quality Standards.)

Paragraph 11

CBD claims that Staff did not properly consider the Project's consistency with the federal Prevention of Significant Deterioration (PSD) program. (CBD Brief, at 6.) CBD does not offer any expert testimony or evidence for this claim. As a threshold matter, it is unclear whether the regulations referenced by CBD actually apply. (*See* 75 Fed. Reg. 64898 (new PM2.5 increment does not become effective until October 2011).) Nevertheless, the FDOC included a discussion of the PSD requirements while recognizing that PSD permitting authority rested with the United States Environmental Protection Agency (EPA). (Ex. 302, at 10.) The FDOC reviewed the increment analysis, acid deposition, and visibility analysis methods of the Project PSD application to the EPA. (*Id*.) The FDOC found the PSD application and preliminary results acceptable and agreed with the findings. (*Id*.)

Staff considered the FDOC when it completed a detailed review of applicable LORS, including PSD requirements, and determined that the Project complies with all applicable LORS. (Ex. 300, at 4.1-50, 4.1-52, 4.1-53.) Staff recognized that it did not require additional analysis for the PSD review because the Project was currently going through the PSD permitting process with the EPA, and the EPA would address new requirements that arose during the permitting process, if any such new requirements were applicable. (Evidentiary Hearing, at 167:5-9.)

Paragraph 12

CBD appears to be suggesting that the Project's emissions of PM2.5 were not properly analyzed, and includes additional vague references to PSD permitting. The PSD issue is addressed above in response to paragraph 11.

With respect to PM2.5, CBD makes multiple unfounded assertions that Applicant and Staff did not properly consider incremental increases of PM2.5 emissions or cumulative PM2.5 emissions. (*See* CBD Brief, at 5 ("FSA fails to properly address the significance of additional emissions of pollutants for which the area is either 'unclassified' or currently in attainment but already has significantly impaired air quality – assuming that such impacts are only significant if they would cause new violations of the standards or 'bust the cap'"), at 6 ("Staff did not evaluate the impact of this significant incremental deterioration of PM2.5"), and at 7 (FSA "appears to be a classic example of the an [sic] agency ignoring small but important contributions to a cumulative problem").) These assertions fall short.[4]

Staff and the Applicant completed a detailed analysis of potential Project PM2.5 emissions to assess potential impacts. The modeling was very conservative because it assumed that worst-case meteorological conditions would occur at the same time as worst-case emissions, which has a low probability of occurring. (Evidentiary Hearing, at 39:21-25.) Even assuming worst-case conditions, the modeling demonstrated that the Project would not cause an incremental or cumulative exceedance of the PM2.5 Ambient Air Quality Standards for Project construction or operation. (Ex. 301, at 4.1-22, 4.1-26, and 4.1-40; Ex. 307, at 19-20; Evidentiary Hearing, at 115:2.) Because impacts are less than significant, no additional mitigation is required. (*See* Evidentiary Hearing, at 38:22; Ex. 6 at 5.2-82 to 5.2-83.) In contrast, CBD failed to present substantial evidence that the Project may cause a significant PM2.5 impact.

Oddly, CBD cites Mr. Tholen's written testimony as a basis for arguing that Project PM2.5 emissions may be significant. (CBD Brief, at 8 (citing Ex. 402, at 2-3, 4-7).) Mr. Tholen, however, readily acknowledged the sufficiency of Applicant's and Staff's Air Quality analysis, including for constructing the Project Road Paving. (Evidentiary Hearing, at 105:17, 107:22-25.)

CBD's assertions lack merit or foundation if CBD is attempting to find support from public comment offered by Dr. Phyllis Fox, dated July 22, 2010 ("Fox Comments"). (*See* Ex. 400.) The Fox Comments represent unsupported comment offered without expert qualifications. (Evidentiary Hearing, at 23:8-10; 352:3-13 (Fox Comments are "certainly hearsay" and "not expert testimony").) Neither Applicant nor Staff was given the opportunity to cross-examine Dr. Fox despite Applicant's request to do so. (Applicant's Prehearing Conference

[4] We note that CBD incorrectly stated that the Project is located within the Mojave Desert Air Quality Management District. (CBD Brief, at 5.) The Project is actually located within the Antelope Valley Air Quality Management District.

Statement, p. 6.) Furthermore, Applicant's expert identified significant problems with the assumptions made by the Fox Comments and the accuracy of the conclusions reached therein. (Evidentiary Hearing, at 47:3-6.)

PM2.5 offsets are not required because the AVAQMD is not in an area that is non-attainment for California or federal PM2.5 AAQS. (Ex. 300, at 4.1-10; Evidentiary Hearing, at 39:5-10.) Even though PM2.5 offsets are not required, the Project Road Paving would have the incidental benefit of reducing PM2.5 emissions because PM2.5 emissions are a subset of the PM10 emissions that will be reduced by the paving. (Evidentiary Hearing, at 42:16-22.) Staff expressly rejected CBD's assertions that the Project Road Paving would actually increase PM2.5 emissions. (Evidentiary Hearing, at 115:13-17 ("MS. DE CARLO: Can you please address CBD's argument that road paving will actually result in an increase of PM2.5? MR. RADIS: We actually disagree with that statement on a number of grounds.").)

Paragraph 13

CBD asserts that Staff's analysis of cumulative air quality impacts is flawed because "the FSA only looks at cumulative impacts with [sic] miles of the proposed project site (4.1-37) but would allow the off-sets through interpollutant trading as well as off sets [sic] for other contaminants to be done at much further distances in another air district entirely. This inconsistency in the scale analysis is never clearly explained or supported by staff." (CBD Brief, at 6.) CBD is incorrect because Staff addressed this issue appropriately in the FSA and at the Evidentiary Hearing.

Contrary to CBD's assertion, the Applicant and Staff are not "ignoring" the Project's contribution to cumulative impacts (*see* CBD Brief, at 7) but instead have conservatively evaluated the potential for cumulative impacts by *combining* the Project's conservatively estimated emissions with existing background conditions and all planned or reasonably foreseeable emissions that could affect the analysis. (Ex. 6, at 5.2-73 to 5.2-76; Ex. 300, at 4.1-37 to 4.1-40.) Staff's analysis of cumulative impacts from the Project is explained in detail in the FSA. (Ex. 300, at 4.1-37 to 4.1-40.) Applicant's and Staff's estimates of Project emissions were very conservative because the modeling assumed worst-case meteorological conditions would occur at the same time as worst-case emissions, which has a very low probability of actually happening. (Evidentiary Hearing, at 39:21-25.) For the cumulative analysis, Staff used a conservative background condition to identify emissions from past and present projects. (Ex. 300, at 4.1-37; Evidentiary Hearing, at 163:9-10.) Staff and Applicant also worked with the AVAQMD to identify potential new or reasonably foreseeable sources of emissions within six miles of the Project site. (Ex. 300, at 4.1-37.) The modeling estimated cumulative impacts based on the conservative Project and background conditions and the new or reasonably foreseeable emissions. (Ex. 300, at 4.1-38.)

Based on the modeling results and evidence in the record, Staff determined the Project would not exceed applicable standards for all pollutants except for PM10. (*See* Ex. 300, at 4.1-39-40; Ex. 307, at 19-20.) Staff concluded that cumulative PM10 emissions would not be significant because the Project is required to obtain PM10 offsets. (Ex. 300, at 4.1-40; (Evidentiary Hearing, at 152:12-17.) Staff's analysis is supported by substantial evidence and complies with CEQA. (*See* CEQA Guidelines § 15130(a)(3) (lead agency may make a determination that "a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus not significant.").)

Staff and Applicant fully addressed the sufficiency of Staff's reliance on the six-mile radius for determining new or reasonably foreseeable sources. (Ex. 300, at 4.1-37; *see* Evidentiary Hearing, at 149-150 (discussing the Energy Commission's past reliance on the six-mile radius as a modeling assumption).) For purposes of the modeling, sources located outside of the six-mile radius do not significantly contribute to the maximum downwind impact of the Project, which is the conservative basis of the analysis. (Evidentiary Hearing, at 149:14-20; 150:1-16 (sources outside of the six-mile radius would have a "de minimis" contribution to the impact analysis).)

As explained by Staff's expert at the Evidentiary Hearing:

> MS. WILLIAMS: The cumulative impact between the two sources would be de minimis?
>
> MR. RADIS: Right. The -- the contribution of a source, eight, ten miles away is not going to contribute significantly to the maximum impact identified by the project in the project modeling, which tends to be very close to the source. (Evidentiary Hearing, at 150:17-23.)

Applicant and Staff also fully analyzed whether or not inter-district transfers of emission offsets would be effective in mitigating Project impacts. (Ex. 300, at 4.1-29 to 4.1-31.) Staff and the AVAQMD have recognized the validity of using inter-district transfers of emission offsets to mitigate Project emissions. (Ex. 300, at 4.1-29 to 4.1-31.) As described by Staff's expert, inter-district transfers of emission offsets from the San Joaquin Valley Air Pollution Control District can satisfactorily mitigate the Project's ozone emissions:

> MR. RADIS: Based on long-range pollutant transport studies conducted by the California Resources Board we found that the San Joaquin Valley upwind impacts the air quality in the Mojave Desert air basin. It's an upwind basin with a more severe classification than Antelope Valley. It's allowed by the district's rules, and it's been done in the past. We advocate that given the distance that the applicant used a higher ratio than required under existing rules and regulations. This will add benefit that we can demonstrate that air quality benefit. (Evidentiary Hearing, at 116:20-117:4.)

The AVAQMD concurs that the California Air Resources Board (CARB) and U.S. Environmental Protection Agency (EPA) have long recognized that AVAQMD's ozone problems have a regional origin:

> San Joaquin Valley is upwind and contributes overwhelmingly to air pollution within the Mojave Desert Air Basin (*Assessment of the Impacts of Transported Pollutants on Ozone Concentrations in California*, CARB March 2001). These facts indicate that the provisions of [Health & Safety] Code 40709.6(a)(1) and (a)(2) can be, and indeed have been, met. (Ex. 110, Attachment A, at 2.)
>
> The regional nature of the AVAQMD ozone problem has been explicitly and implicitly recognized by both districts, CARB and USEPA since the mid 1990s, as ozone State Implementation Plans

> (SIPs) submitted and approved by all four agencies include a "but for" attainment demonstration for the AVAQMD …The reduction of ERCs within the SJVAPCD and their consumption within the AVAQMD represents a reduction in potential upwind ozone precursors, in direct support of regional ozone attainment efforts. (Ex. 302, at 15.)

Staff also addressed the adequacy of inter-pollutant offsets for PM10. (Evidentiary Hearing, at 117:7-14.) Inter-pollutant trading for PM10 is allowed by many air districts and has been approved by the Energy Commission in the past. (Evidentiary Hearing, at 117:7-11.)

In summary, Staff's cumulative impact analysis is backed by substantial evidence in the record. Cumulative impacts are less than significant. No additional analysis is required.

Paragraph 14

CBD's Brief reiterates its argument that Staff's proposed COCs are inadequate because they require certain information to be gathered after the Energy Commission certification. (Evidentiary Hearing, at 282:6-14; CBD Prehearing Conference Statement, at 6-7.) Applicant fully addressed this argument in its Opening Brief at pages 6-7. CBD's Opening Brief cites case law in support of its assertion that Staff's reliance on the COCs amounts to a "*post-hoc* rationalization" that is precluded by CEQA. (CBD Brief, at 7, 10.) CBD's reading of the case law is misplaced, as we discuss below.

Staff applied all applicable COCs from the FSA to the Project Road Paving. (Evidentiary Hearing, at 284:23-285:1.) This approach is conservative because the COCs were designed to protect rare and sensitive species based on protocol surveys of a habitat that is generally superior to the habitat associated with the Project Road Paving. (Evidentiary Hearing, at 306:14-307:22). The COCs include ample specificity and performance standards to ensure their effectiveness. Where applicable, the COCs require the Applicant to provide specific information about the precise nature of the impact from the Project Road Paving before construction activities commence. (*See* Ex. 300, at 4.2-89 to 4.2-91.) The COCs require Applicant to conduct sensitive species surveys in natural habitats prior to implementation of any road paving. (Evidentiary Hearing, at 282:1-5.) The Applicant must also develop a biological resource mitigation plan prior to construction and identify specific mitigation obligations associated with the Project Road Paving. (Evidentiary Hearing, at 286:8-11.) The Applicant is required to obtain concurrence from the Energy Commission's Compliance Project Manager that the COCs are being applied appropriately. (Evidentiary Hearing, at 286:11-14.) In the Staff's expert opinion, the COCs are specific enough and include adequate implementation measures to ensure that the appropriate surveys will be completed in a timely manner prior to construction to ensure sensitive species are protected. (Evidentiary Hearing, at 286:25-287:2.)

It is well recognized under CEQA that mitigation measures may incorporate further studies to define the specific parameters of the mitigation when the results of later field studies are used to tailor mitigation to fit actual environmental conditions. (*National Parks & Conserv. Ass'n v. County of Riverside*, 71 Cal. App. 4th 1341, 1366 (1999) (county appropriately allowed determination about placement of tortoise protection fences along railroad line to be based on further study of migration patterns during operation of project).) Such an approach is particularly appropriate under CEQA when a mitigation measure has been defined, but the extent of mitigation that may be required will depend on the results of a later study. (*Riverwatch v. County of San Diego*, 76 Cal. App. 4th 1428, 1447 (1999).)

CBD cites to *Sundstrom v. County of Mendocino* 202 Cal. App. 3d 296, 307-09 (1988), for the premise that Staff's application of COCs amounts to "the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." CBD's reliance on *Sundstrom* is misplaced. As a threshold matter, the case involved a Negative Declaration, not an EIR, and the court was considering whether the lead agency properly determined an EIR was not required. (*Id.* at 304-305.) Moreover, in *Sundstrom*, the Negative Declaration entirely failed to consider potential hydrology effects for which there was evidence of a potentially significant impact. (*Id*. at 305.) Instead of considering the potential impact, the lead agency added a mitigation measure for the applicant to prepare a future study of the issue after the CEQA process was completed and to incorporate mitigation measures that may be identified by the future study. (*Id*. at 306.)

Staff's analysis of the Project Road Paving is easily distinguishable from the lead agency's action in *Sundstrom*. Staff has performed a detailed review of the Project Road Paving. Staff is not delaying the formulation of mitigation measures to future studies. Instead, Staff has applied numerous detailed COCs that were conservatively developed based on habitat that is largely superior to habitat affected by the Project Road Paving and which were prepared in coordination with the California Department of Fish & Game. (Evidentiary Hearing, at 306:18-21; *see* Ex. 300, at 4.2-44, 4.2-56, 4.2-63.) It is well recognized under CEQA that mitigation measures may incorporate further studies to define the specific parameters of the mitigation when the results of later field studies are used to tailor mitigation to fit actual environmental conditions. (*National Parks & Conserv. Ass'n, supra* 71 Cal. App. 4th at 1366.) Substantial evidence supports a determination that Staff's reliance on COCs is appropriate and ensures that impacts from the Project Road Paving will be less than significant.

Paragraphs 15 and 16

CBD restates its contention that the environmental review of the Project Road Paving was inadequate. Please refer to the response to paragraphs 7, 8 and 9 above.

Paragraph 17

CBD questions the effectiveness of the Project Road Paving to offset the Project's PM10 emissions. (*See* CBD Brief, at 9 ("Neither the staff nor applicant have directly rebutted much of the substance of the Center's testimony regarding the inadequacy of road paving to act as a valid ERC for PM10 because it actually leads to an increase in the fraction of the PM that is PM 2.5 and smaller fines.").) To the contrary, Staff and Applicant expressly addressed this issue.

Staff determined that road paving is a valid method for offsetting PM10 emissions. (Evidentiary Hearing, at 115:9-12.) Staff proposed AQ-SC19 to ensure the effectiveness of the Project Road Paving. (Ex. 300, at 4.1-62; Ex. 306, at 10.) AQ-SC19 requires bankable emission reduction credits that are based on *actual* daily average traffic count, daily vehicle miles travelled, and road dust silt content, thereby ensuring the accuracy of the PM10 reductions. (*See* Ex. 306, at 10; Evidentiary Hearing, at 249:11-15.) The FDOC also expressly supports the validity of using road-paving to offset PM10 emissions. (Ex. 302, at 14 ("AVAQMD supports the use of road paving PM10 reductions to offset natural gas combustion PM10 emissions within a PM10 non-attainment area.").)

The Energy Commission has approved road paving in the past, including for the Victorville 2 Hybrid, Blythe Energy and High Desert Power projects. (Evidentiary Hearing, at 51:5-14.) The methodology for determining credit generation from road paving is widely accepted. (Evidentiary Hearing, at 51:1-4.) The methodology was used for the Energy Commission projects and in an EPA-approved Maricopa County (Arizona) road paving credit rule. (Evidentiary Hearing, at 51:5-14.) Substantial evidence supports the use of the Project Road Paving to offset Project PM10 emissions.

Paragraphs 18, 19 and 20

CBD restates its contention that the environmental review of the Project Road Paving was inadequate. Please refer to the response to paragraphs 7, 8 and 9 above.

Paragraph 21

CBD restates its contention that Staff's reliance on the COCs amounts to a "*post-hoc* rationalization" in violation of CEQA. Please refer to the response to paragraph 14 above.

Paragraph 22

CBD restates its contention that there was no analysis of the interpollutant offsetting proposal. Please refer to the response to paragraphs 7, 8 and 9 above.

Paragraphs 23, 24, 25 and 26

CBD makes several unfounded arguments about the adequacy of Staff's review of greenhouse gas (GHG) emissions. (CBD Brief, at 10-13.) Staff's GHG analysis is very detailed. (*See* Ex. 300, at 4.1-83 to 4.1-103.) Applicant also provided substantial information about the Project's GHG emissions. (Exs. 6, 35 and 56.) Staff's methodology for evaluating GHG emissions has been carefully developed based on related statutory and regulatory requirements (e.g., AB 32, SB 1368, etc.), Energy Commission guidance and planning documents, and other Energy Commission siting cases. (*See* Ex. 300, at 4.1-83 to 4.1-89, 4.1-102 to 4.1-103 (citing to, among other sources: Energy Commission Integrated Energy Policy Reports (2003 and 2007); Committee Guidance On Fulfilling California Environmental Quality Act Responsibilities For Greenhouse Gas Impacts In Power Plant Siting Applications (2009); and California Energy Commission. Framework for Evaluating Greenhouse Gas Implications of Natural Gas-Fired Power Plants in California (2009).)

CBD asserts without foundation that Staff did not provide evidence to support its determination that Project GHG emissions are insignificant. (CBD Brief, at 11-12.) This argument misses the mark because the entirety of Staff's GHG analysis provides the evidentiary basis for its conclusion that the Project would have an insignificant GHG impact:

> The project would lead to a net reduction in GHG emissions across the electricity system that provides energy and capacity to California. Thus, staff believes that the project would result in a cumulative overall reduction in GHG emissions from the state's power plants, would not worsen current conditions, and would thus not result in impacts that are cumulatively significant. PHPP would also provide other potential GHG benefits by filling nearly all of the expected

future roles for gas-fired generation, in a high renewables, low-GHG system. (Ex. 300, at 4.1-102.)

CBD also claims that Staff did not consider measures to reduce GHG emissions during construction. (CBD Brief at 13.) To the contrary, Staff expressly determined that "control measures that staff recommends to address criteria pollutant emission, such as limiting idling times and requiring, as appropriate, equipment that meets the latest criteria pollutant emissions standards would further minimize greenhouse gas emissions to the extent feasible." (Ex. 300, at 4.1-92.) CBD suggests that Staff did not consider applicable GHG PSD guidance, but Staff addressed the Project's consistency with the PSD program, as discussed above in Paragraph 11. CBD also questions Staff's analysis of the California Emission Performance Standard, particularly if the Project does not operate at maximum efficiency. (CBD Brief, at 12.) However, Staff fully analyzed this issue (Ex. 300, at 4.1-90 and 4.1-91) and determined the "project would meet the EPS under all reasonable operating scenarios." (Ex. 300, at 4.1-53.)

In summary, substantial evidence in the record supports a finding that the Project would not cause a significant impact related to GHG emissions. CBD offers no evidence to the contrary. No additional analysis is required.

Paragraphs 27 and 28

CBD restates its assertion that cumulative impacts were not properly analyzed. Please refer to the response to Paragraph 13 above.

Paragraph 29

CBD asserts that the Project "may have significant growth inducing impacts," because the Project Road Paving "will foster growth in the surrounding environment." (CBD Brief, at 14.) This argument lacks merit and support in the evidentiary record, and has been soundly rejected by Staff and the Applicant through expert testimony that is now part of the evidentiary record.

CBD has offered no expert basis for its assertions regarding growth inducing impacts. Mr. Tholen offered an unsupported assertion that the Project Road Paving may induce growth but did not provide any explanation or analysis to support his assertion. (Ex. 402, at 2-3.) CBD only offered Mr. Tholen as an Air Quality expert. (Evidentiary Hearing, at 106:6-8.) Mr. Tholen is not qualified as an expert in land use or demographics. (*Id*.) Moreover, Mr. Tholen acknowledged that he is not familiar with development patterns in the area surrounding the proposed Project Road Paving. (Evidentiary Hearing, at 108:11.) To the extent that Mr. Tholen relied on the Fox Comments, they are hearsay and lack foundation, and should be given very little weight for the reasons previously described. (Evidentiary Hearing, at 352:3-13 (Fox Comments are "certainly hearsay" and "not expert testimony").) Accordingly, Mr. Tholen's assertion that the Project Road Paving may induce growth should be given very little weight as a non-expert comment without a technical basis or a practical familiarity with applicable Project-level facts.

Contrary to CBD's unsupported statement that "At [sic] hearing, applicant's witnesses provided opinion but no data or analysis for statements that road paving would not be growth inducing" (CBD Brief, at 14), *both* Staff and Applicant provided substantial evidence that the Project Road Paving would not induce growth. CEQA requires a general discussion about "the

ways in which the proposed project" may cause population growth or construction of housing. (*See Napa Citizens for Honest Gov't, supra*, 91 Cal. App. 4th at 369 ("Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth.").) Based on its review of the evidence in the record, Staff determined that the Project Road Paving would not induce growth. (Evidentiary Hearing, at 268:21-25; 269:1-18; 272:16-17; 273:12-13.) The proposed roads are existing roads that provide access to existing nearby land uses. (Evidentiary Hearing, at 272:20-22.) The road segments are part of an existing roadway grid system and included within the local and regional planning activities of the affected jurisdictions. (Ex. 301, p. 22; Evidentiary Hearing, at 268:22-23; 269:8-9.) Therefore, paving the proposed existing road segments would not expand the road system into previously underserved areas and will not induce growth. (Evidentiary Hearing, at 268:22-25; 269:1; 272:16-17.)

The Applicant also determined that the Project Road Paving would not induce growth. (Evidentiary Hearing, at 240:4; 248:10-20.) For the preferred road segments Nos. 2, 4, 6, 8 and 9,[5] Project Road Paving would be completed in low-density, previously developed residential areas with little potential for new expansion or growth. (Evidentiary Hearing, at 221:25-222:2, 248:14-15.) The applicable land use development and zoning standards do not support a significant amount of new growth. (Evidentiary Hearing, at 240:4; 248:13-14.) The Project Road Paving would not introduce new urban infrastructure to previously underserved areas that would support or encourage a higher intensity of development. (Evidentiary Hearing, at 248:17-20.)

Moreover, Applicant's expert analysis concluded that the Project Road Paving would not increase traffic or cause an adverse traffic impact. (Evidentiary Hearing, at 240:4.) In particular, road segments Nos. 2, 6 and 8 are located within subdivided residential areas where alternate streets are already paved. (Evidentiary Hearing, at 240:8-10.) There is no reason to expect drivers to divert from one of the existing paved roads to the newly paved roads because the newly paved road would not establish or facilitate a throughway that would promote traffic. (Evidentiary Hearing, at 240:10-12.) The same analysis is applicable to road segment No. 4 because paving a short distance of the road would not provide a preferable route that would divert existing traffic. (Evidentiary Hearing, at 240:12-15.) Traffic is expected to continue to be local traffic going to adjacent properties. (Evidentiary Hearing, at 240:15-17.) For road segment No. 9, traffic volumes on proximate roads are limited and there is no reason for traffic to divert to a newly paved road. (Evidentiary Hearing, at 240:21-23.)

In summary, Staff and the Applicant's analysis of potential growth inducing effects of the Project Road Paving easily passes muster under CEQA which requires a general discussion about "the ways in which the proposed project" may cause population growth or construction of housing. (*See Napa Citizens for Honest Gov't, supra*, 91 Cal. App. 4th at 369 ("Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth.").) No additional analysis is required.

[5] To address concerns raised by the Intervenors, Applicant identified preferred road segments Nos. 2, 4, 6, 8 and 9, which provide an adequate quantity of PM10 emission reductions while having the lowest possibility of producing environmental impacts or growth inducing impacts, although both Staff and Applicant determined that paving any of the ten road segments would not result in a significant environmental impact. (Evidentiary Hearing, at 53:14-54:11, 252:18-20; Ex. 146; Ex. 301.)

Paragraphs 30 through 37

CBD has two basic critiques of Staff's Alternatives analysis: first, that Staff did not analyze a reasonable range of alternatives; and second, that Staff rejected alternatives without an adequate basis. (CBD Brief, at 14-17.) CBD does not provide any evidentiary basis for its assertions, and they are easily discharged as lacking merit under CEQA.

CEQA requires an EIR to analyze "a reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." (CEQA Guidelines § 15126.6(a); *see Citizens of Goleta Valley v Board of Supervisors* 52 Cal. 3d 553 (1990).) The EIR is to "briefly describe the rationale for selecting the alternatives to be discussed." (CEQA Guidelines § 15126.6(c).) The "no project" alternative is also required to be analyzed. (*Id*. at § 15126.6(e).)

"Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." (*Residents Ad Hoc Stadium Com. v. Board of Trustees*, 89 Cal. App. 3d 274, 287 (1979).) This means that the discussion of alternatives "need not be exhaustive," does not require a "crystal ball inquiry," and is limited to what is "realistically possible given the limitation of time, energy, and funds." (*Id*. at 286.) "When the alternatives have been set forth in this manner, an EIR does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated." (*Id*. at 287-288.)

Staff's analysis of a reasonable range of Alternatives, which is based on information provided by Applicant and developed independently by Staff, easily passes muster under CEQA. In fact, given the extensive Staff analysis of alternative transmission line routes, the scope of the Alternatives analysis for this Project surpasses any that Applicant is aware of. In its Alternatives analysis, Staff evaluated three alternative project sites, five alternative transmission routes, and several alternative energy producing technologies. (Ex. 300, at 6-1, 6-32, and A-1 to A-2.) For each permutation of the analysis, Staff completed a detailed study and review based on the AFC, data responses, and technical analysis from Staff for other environmental topic areas. (*See* Ex. 300, at 6-1, 6-32, A-1 to A-2.) Staff also considered whether the various alternatives would meet the project objectives. (Ex. 300, at 6-8 to 6-9.) Substantial evidence supports that Staff analyzed a reasonable range of potentially feasible alternatives in manner that informed decision-makers and the public. (CEQA Guidelines § 15126.6(a).)

CBD argues that Staff rejected Alternatives without a sufficient basis. (CBD Brief, at 15.) This is not true. For each alternative site and alternative transmission line route, Staff prepared a detailed analysis, including but not limited to listing "advantages" and "disadvantages" of each. (Ex. 300, at 6-12 to 6-25.) Staff prepared a very detailed analysis of two additional transmission line routes. (Ex. 300, Alternatives Appendix A, at A-1 to A-230.) Staff also considered various alternative generation technologies (Ex. 300, at 6-25 to 6-28) and the "no project" alternative (Ex. 300, at 6-25 to 6-28).

Staff determined the Project site was environmentally superior to the alternative sites and generation alternatives. (*Id*. at 6-1; Evidentiary Hearing, at 330:15-331:5.) The alternative transmission routes were found to have additional environmental impacts and thus were not environmentally superior alternatives. (Ex. 300, at 6-2; A-1 to A-2.) Staff found that none of the eight alternative energy-producing technologies considered were adequate to meet the project

objectives. (Ex. 300, at 6-6; Evidentiary Hearing, at 328:4-10, 331:6-14) The "no project alternative" was also considered by Staff and found to be inferior to the proposed project because it would delay development of electrical resources required in the region, impact statewide electricity supplies, and otherwise not meet project objectives. (Ex. 300, at 6-6 to 6-7; Evidentiary Hearing, at 331:15-21.)

CBD asserts that Staff should have analyzed an "all solar" alternative for just the Project site or a solar alternative using photovoltaic technology. (CBD Brief, at 15-16.) CBD's argument fails because CEQA does not require an exhaustive review of every possible permutation of an alternative. (*Residents Ad Hoc Stadium Com., supra*, 89 Cal. App. 3d at 287-288 ("an EIR does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated.") Staff analyzed an "all-solar" alternative and found it infeasible. (*See* Evidentiary Hearing, at 324:7-22 (all solar alternative would lead to increased impacts to biological resources, greater distance to load, and not satisfy Project objectives.) Staff was not obligated to analyze multiple variations of the all-solar alternative. (*See Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477, 491 (2004) (EIR need not consider in detail every conceivable variation of alternatives stated).)

CBD also questions whether Staff properly rejected alternatives based on economic considerations. (*See* CBD Brief, at 15 ("a finding of economic infeasibility must be based upon quantitative, comparative evidence showing that the alternative would render the project economically impractical.) This argument has little weight. As an initial matter, it is important to recognize that Staff was not obligated to reject any alternative as infeasible because none of the alternatives were required to reduce a significant environmental impact. (*Citizens of Goleta Valley, supra*, 52 Cal. 3d at 566 (1990) (discussing that the first goal of an alternatives analysis is to "offer substantial environmental advantages over the project proposal").) Here, Staff determined the Project would not result in any significant environmental impacts. (Ex. 300, 301.) Moreover, Staff did not reject alternatives solely for economic reasons but for a variety of technical, environmental and economic reasons. For example, the all solar alternative was rejected because it would cause increased environmental impacts. (*See* Evidentiary Hearing, at 324:7-22.)

In summary, substantial evidence supports that Staff analyzed a reasonable range of potentially feasible alternatives in a manner that informed decision-makers and the public. (CEQA Guidelines § 15126.6(a).) Staff was not obligated to analyze every conceivable alternative to the Project or every potential variation to the alternatives that were evaluated. (*Residents Ad Hoc Stadium Com., supra*, 89 Cal. App. 3d at 287-288.) No additional analysis is required.

Paragraphs 38, 39 and 40

CBD attempts to build upon its faulty arguments regarding significant Project impacts and LORS inconsistency, all of which are rebutted herein, to argue that the Committee and Commission cannot make the findings necessary to approve the Project. The CBD Brief is particularly focused on the findings necessary for an "override," asserting that Staff's analysis and the record are deficient because "the record does not contain substantial evidence to support either of the findings necessary to 'override' a significant impact under CEQA." (CBD Brief, at 17.) In the event the Committee or Commission was in a position to have to evaluate whether or not "override" findings could be made pursuant to Title 20, California Code of Regulations, §

1755(d),[6] the evidentiary record contains ample evidence regarding the benefits of the Project to support such a finding (*see, e.g.*, Exs. 300, 301, 1-22) but we need not address that issue now because it is entirely inapplicable.

The Committee need not occupy itself with the need for an "override" because it is incontrovertible that the Project is consistent with all applicable LORS and will not result in a significant unmitigated environmental impact. (*See* Ex. 300, 301, 1-22; Evidentiary Hearing, at 343:1-2 ("The proposed project was not found to have any significant impacts").) Therefore, an "override" is not required. Contrary to CBD's unsupported assertions, there is substantial evidence in the record to support an Energy Commission finding under Title 20, California Code of Regulations § 1755(c)[7] because the proposed Conditions of Certification mitigate all potential environmental impacts to less than significant levels. Accordingly, the Energy Commission is not required to make the findings in § 1755(d) because the evidence supports making the findings in § 1755(c). Staff and Applicant have introduced substantial evidence to support findings that the Project is consistent with all applicable LORS and will not result in a significant unmitigated environmental impact. (*See generally* Ex. 300, 301, 1-22; Evidentiary Hearing, at 343:1-2 ("The proposed project was not found to have any significant impacts").) In contrast, the interveners have failed to offer any expert evidentiary support to contradict Applicant's and Staff's determinations. The only expert proffered by interveners was in the area of Air Quality and he unequivocally stated that he did not disagree with Staff's Air Quality analysis. (Evidentiary Hearing, at 105:17.)

CBD tries to rescue this failed argument by suggesting the Project would not be consistent with the federal PSD program. (*See* CBD Brief, at 19.) This argument clearly falls short, as discussed above in Paragraph 11. Substantial evidence in the record supports Staff's conclusions that the Project is consistent with all applicable LORS. (Ex. 300, 301, 302.) As such, Title 20, California Code of Regulations, § 1752(k)[8] does not apply and the Energy Commission is not required to make the findings provided therein. No additional analysis is required.

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[6] Title 20, California Code of Regulations, § 1755(d) provides: "If the commission cannot make both the findings required under subsection (c), then it may not certify the project unless it specifically finds both of the following: (1) That specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and (2) That the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility."

[7] Title 20, California Code of Regulations, § 1755(c) provides: "The commission shall not certify any site and related facilities for which one or more significant adverse environmental effects have been identified unless the commission makes both of the following findings: (1) With respect to matters within the authority of the commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding. (2) With respect to matters not within the commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency."

[8] Title 20, California Code of Regulations, § 1752(k) provides: "With respect to any facility which does not comply with an applicable state, local or regional standard, ordinance or law, findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both the following: (1) Whether the facility is required for public convenience and necessity; and (2) Whether there are no more prudent and feasible means of achieving such public convenience and necessity."

Paragraph 41

CBD makes several general unsupported claims regarding LORS compliance, none of which are specific enough to provide a basis for responding to.

Paragraph 42

CBD restates its PSD assertions. Please refer to the response to paragraph 11 above.

Paragraphs 43 through 46

CBD restates its assertions regarding the ability of the Commission to make findings of overriding considerations. Please refer to the response to paragraphs 38, 39 and 40 above.

DATED: April 1, 2011

Respectfully submitted,

/S/ MICHAEL J. CARROLL

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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	
APPLICATION FOR CERTIFICATION FOR THE PALMDALE HYBRID POWER PROJECT	DOCKET NO. 08-AFC-9

OPENING BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

March 25, 2011

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STATE OF CALIFORNIA
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INTRODUCTION

Para. 1

The Center for Biological Diversity initially intervened in this proceeding because the Commission has consistently failed to accurately or adequately identify and consider the impacts of the project on the environment, including the impacts of the proposed mitigation measures to off-set the significant air quality impacts of the project through emission reduction credits ("ERCs"), particularly road paving to off-set PM10. The impacts of proposed mitigation measures must be analyzed as part of the environmental review, but were not here. The need for review under the California Environmental Quality Act ("CEQA") before the use of road paving can be approved as an ERC was specifically addressed by the appellate court in a recent decision. *California Unions for Reliable Energy et al. v. Mojave Desert Air Quality Management District* (2009) 178 Cal.App.4th 1225 (decision unequivocally required the Air District to conduct environmental review of any scheme to offset particulate matter via road paving before it issues any such ERCs). The Final Staff Assessment ("FSA") appears to have ignored the decision of the appellate court. Although Staff later attempted to backfill the information regarding road paving with additional testimony, to date, these and other deficiencies remain. As a result, the Commission's environmental review for the project does not comply with the most fundamental substantive requirements of CEQA. (Public Resources Code §§ 21002, 21002.1(b).)

Para. 2

The proposed project is a large gas-fired power plant of 520 MW with a solar thermal component of 50MW – the solar component is estimated to provide only 10% of the total output of the power plant. The project will be a major source emitter for many air contaminants including greenhouse gases. On its face, the project represents a step in the wrong direction for the State's goals for supplying 20-50% of the energy needs of the population with clean, sustainable, renewable energy in order to reduce greenhouse gas emissions and the proposed project would also have significant impacts on air quality in an area suffering from significant air quality impairment. In addition, because there are feasible alternatives to the project that would substantially avoid many of the significant impacts of the project that were not adequately identified and analyzed by the Commission, the project application must be denied in order to comply with CEQA. As detailed below, approval of the project would also violate other laws, ordinances, regulations, and statutes; on this basis as well the project application must be denied.

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[1] § 25500.) A certificate issued by the Commission

[1] All statutory references herein are to the Public Resources Code unless otherwise specified. Citations herein to "Siting Regs." refer to the Commission's Power Plant Site Certification Regulations, codified in Title 20 of the

may operate in lieu of other permits and supersede most otherwise applicable ordinances, statutes, and regulations. (*Id.*) Accordingly, the Commission itself must determine whether the project complies "other applicable local, regional, and state, . . . standards, ordinances, or laws," and whether the Commission believes the project is consistent with Federal standards, ordinances, or laws. (§ 25523(d); *see also* Siting Regs. § 1752(a).) The Commission may not certify any project that does not comply with applicable Laws, Ordinances, Regulations, and Statutes ("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." (§ 25525; Siting Regs. § 1752(k).) Neither finding can be made in this instance.

Para. 3

The Commission also serves as lead agency for purposes of CEQA. (§ 25519(c).) Under CEQA, the Commission may not certify the Project unless it specifically finds, based on substantial evidence in the record, 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. (§ 21081; Siting Regs. § 1755.) While the Applicant bears the burden of providing sufficient substantial evidence to support each of the findings and conclusions required for certification of the Project, (Siting Regs. § 1748(d)), it is the Commission that must determine whether sufficient substantial evidence is in the record to support its findings and conclusions under CEQA.

Para. 4

ARGUMENT

I. APPROVAL OF THE PROJECT WOULD VIOLATE CEQA

The Commission's power plant siting process is a certified regulatory program for purposes of CEQA. (See § 21080.5; CEQA Guidelines § 15251(j).) Although certification exempts the Commission from CEQA's environmental impact report requirement, the Commission still must comply with CEQA's substantive and procedural mandates. (Public Resources Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) The environmental review documents must "contain facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [and cases cited therein].) The documents "must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id.*) Because environmental review provided in the FSA, even when considered with the later filings from the staff and applicant, is

Para. 5

California Code of Regulations. Citations herein to "CEQA Guidelines" refer to regulations codified in Title 14 of the California Code of Regulations.

deficient the Commission has failed to comply with CEQA. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 717-718 [misleading impact analysis based on erroneous information renders EIR insufficient as an informational document]; *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 [where baseline was inaccurate "comparisons utilized in the EIRs can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts which would result."].) If, however, the Commission intends to use the PMPD as the CEQA equivalent document, then it must allow for a sufficient period of public review of that document and respond to all public comments in writing before making any decision on the proposal.

A. The Environmental Setting or "Baseline" Information Fails to Reflect Existing Physical Conditions Particularly As Relevant to Proposed Mitigation Measures

Para. 6

An accurate and detailed description of the baseline or environmental setting is critical to identification and analysis of impacts. In order to assess the impacts of a project the agency must have detailed and specific information regarding the resources of the project site and 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.) The environmental setting or baseline information must be fair and accurate and cannot understate the value of the environmental resources so as minimize the significance of the impacts of the project. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 725 [failure to adequately describe adjacent riparian habitat and potential for wetlands on the project site "understates the significance of" the river adjacent to the site and precluded serious consideration of environmental impacts].)

Para. 7

Two of the key issues raised by the Center are the failure to adequately identify and analyze the impacts to air quality from the project and the failure to provide any CEQA review for proposed mitigation measures of road paving and inter-pollutant trading. The FSA did not address the environmental impacts of these proposed mitigation measures at all including failing to identify the baseline conditions at the sites of the 10 (earlier 11) roads proposed for paving. Instead, Staff attempted to back-fill this information regarding the road paving with additional testimony up to and including at the hearing. Staff first provided all environmental analysis of the impacts of the road paving in rebuttal testimony. Exh. 301. The scant information provided regarding the baseline status of the areas where road paving is proposed as a mitigation was not based on actual surveys or data collection. As a result, the baseline for the existing resources that

may be impacted by the road paving is unknown. For example, staff's rebuttal notes the presumed final width of the roads after paving (Exh. 301 (rebuttal) at 4; but provided no information about the current width of those roads (Tr. at 291). When asked at hearing, staff provided some general information about a few of the road segments (Tr. at 292-98 (testifying at hearing regarding estimated width of Carson Mesa road, existing, shoulders and surrounding lands, drainages, etc.).

Para. 8

Staff provided no information or analysis regarding impacts of the proposed use of inter-pollutant trading as a mitigation measure which staff proposed even later in the process – along with proposed changes to the conditions of certification the pre-hearing conference statement. Exh. 306 at 10. The entire "discussion" of inter-pollutant trading is one sentence:

> Should the project owner pursue an alternate method of obtaining PM10 ERCs, such as inter-pollutant trading of NOx and SOx for PM10, the project owner shall provide, at a minimum, NOx and SOx ERCs at ratios of 2.629:1 and 1:1, respectively, per guidance from SJVAPCD rules.

No information is provided regarding the baseline status of the pollutants that could be proposed to be traded within the SJV district or the AV district, the distance from the project at which such trades might be allowed, or actual effect of such a trade on the air quality within either district. *See* Tr. at to 166.

Para. 9

Overall the information provided falls well below the minimum standards required under CEQA and as a result, the description of the environmental setting is flawed and these deficiencies undermined the scant "analysis" provided and precluded a full and fair consideration of alternatives and mitigation measures for the significant air quality impacts of the project. (*San Joaquin Raptor/Wildlife Rescure Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 742 n.13, 741-42 ["Beginning with an incomplete project description, continuing with an inaccurate and misleading description of the site followed by an inadequate discussion of alternatives and concluding with an incomplete and conclusionary discussion of the cumulative effects of the development project, the FEIR fails to comply with CEQA in all major respects."]; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal. App. 4th 74, 95 [environmental resources in the project area must be quantified to the extent possible to provide accurate basis for analysis of relevant impacts; "failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals" of CEQA] .)

B. The FSA Fails to Adequately Disclose and Analyze the Project's Impacts

1. Environmental Review of the Direct and Indirect Impacts to Air Quality is Incomplete and Inadequate and the Proposed Mitigation Measures are Inadequate

a. Significance Thresholds and Compliance with PSD

Para. 10

The FSA fails to adequately describe or utilize meaningful significance thresholds for all of the air quality pollutants that would be emitted by the project. The FSA recognizes that because the area is already in non-attainment under federal or state standards for many pollutants, *any* emission of additional pollutants is significant. Exh. 300/FSA at 4.1-21. However, the FSA fails to properly address the significance of additional emissions of pollutants for which the area is either "unclassified"[2] or currently in attainment but already has significantly impaired air quality – assuming that such impacts are only significant if they would cause new violations of the standards or "bust the cap". *Id.* ("The second criterion [for significance] is whether the project's construction and operational emissions would cause a new violation to the ambient air quality standards.") For greenhouse gases ("GHGs") no significance threshold is provided although the FSA mentions the new EPA regulations and the thresholds contained therein for regulation. FSA at 4.1-21. Under CEQA, the Commission needs to do more than state that the impacts do not violate existing standards when addressing significance – this is only one part of the analysis. The Commission should provide actual analysis of the impacts to the resource at issue as well. (*See Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 113-14 [application of significance threshold based on project's consistency with regulatory standard cannot supersede CEQA's fair argument standard].)

Para. 11

The FSA notes that the project will be required to obtain a Prevention of Significant Deterioration ("PSD") permit from EPA for a suite of contaminants that would be emitted by the plant and will also be subject to new regulatory requirements for several of those contaminants including GHG emissions. FSA at 4.1-49. However, the FSA provides no analysis of the whether or how the project would or could comply with the new PSD regulations for GHGs or other contaminants including PM2.5. CEQA requires more as do the Commission's own siting regulations. For example, the regulations require the Commission to consider whether the project can or will comply with existing LORS administered by other agencies, and to determine whether all feasible alternatives and mitigations have been or will be imposed by the Commission or other agencies. *See, e.g.*, Siting Regs. § 1755(c).[3]

b. Particulate Matter Emissions and Proposed Off-sets

Para. 12

The proposed project is located in the Mojave Desert Air Quality Management District area, is in non-attainment for PM10 particulate matter under California status and is "unclassified/attainment" for PM2.5 California Status. (4.1-10 (air quality table 5) *see also* 4.1-

[2] The FSA states that the area is "unclassified/attainment" for PM2.5 under the State standard (FSA at 4.1-10) but the AVAQMD's own website lists this as "unclassified" only. http://www.avaqmd.ca.gov/index.aspx?page=289

[3] See discussion below of findings needed for project approval and Siting Regs. § 1755(c).

36-37). Importantly, for PM2.5 this does not mean that the PM2.5 air quality is acceptable, only that it is not so bad that it violates the existing standards – in this basin the ambient background for PM2.5 is already, under existing conditions 80% (28/35) of the way towards a level that would violate the California standards for hourly PM2.5 (4.1- 26, 4.1-39-40; *but see* Exh. 307 at 20 (staff's revised the calculations of ambient background using 2005 to 2009 data which yields 46% (16.3/35)).[4] In the FSA, the staff showed that the normal operations would "bust" the cap at 113% (FSA at 4.1-26); even under the *revised* calculations provided by staff on February 25, 2011 (assuming for the sake of argument they are correct), the staff still expects the project to lead to a deterioration in the PM2.5 burden such that the resulting air quality will be between 67% (for construction) and 80% (for normal operations and cumulative) of the standard—and there by cause a significant deterioration in air quality. The new EPA regulations on PSD for PM2.5 are designed to address precisely this situation in order to ensure that air quality does not continue to deteriorate up to the "cap". Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers (PM2.5)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC), 75 Fed. Reg. 64864 (October 10, 2011). The Staff did not evaluate the impact of this significant incremental deterioration of the PM2.5 in the basin. It appears that staff assumed that the new EPA PSD regulations for PM2.5 might not be applied to this project and therefore failed to accurately or adequately address the need for PSD permitting. At hearing staff stated that the PSD regulations were not analyzed in the FSA because: "This is something that was passed after the analysis was done." Tr. at 167. However, in fact, the new PM2.5 regulations were adopted in October 2010 well before the FSA was issued in December 2010. While it is certainly true that EPA will require such analysis, the Commission must also evaluate this significant impact to the environment, but did not.

Para. 13

In assessing the cumulative contribution to PM the FSA only looks at cumulative impacts with 6 miles of the proposed project site (4.1-37) but would allow the off-sets through inter-pollutant trading as well as off sets for other contaminants to be done at much further distances in another air district entirely. This inconsistency in the scale analysis is never clearly explained or supported by staff. Despite all the significant impacts to air quality many of which are not adequately mitigated, the FSA oddly concludes that:

> It is unlikely that the project emissions, fully mitigated, combined with emissions from the Lockheed Martin Aeronautics and Northrop Grumman facilities will

[4] A September 10, 2010 letter from EPA's Clean Air Scientific Advisory Committee (CASAC) Particulate Matter Review Panel concluded that "there is no evidence of a threshold (i.e., a level below which there is no risk for adverse health effects)" for PM2.5. This letter is available at: http://yosemite.epa.gov/sab/sabproduct.nsf/CCF9F4C0500C500F8525779D0073C593/$File/EPA-CASAC-10-015-unsigned.pdf

> lessen the overwhelming contributions from fugitive and windblown dust. Therefore, the cumulative impacts of PHPP and the Lockheed Martin Aeronautics and Northrop Grumman facilities on the existing air quality would be insignificant.

FSA at 4.1-37. This appears to be a classic example of the an agency ignoring small but important contributions to a cumulative problem that CEQA was designed to capture – such a gambit is unlawful under CEQA. Cumulative impacts analysis is arguably most important in cases such as this where additional contributions to an already serious problem are considerable even if they do not in and of themselves "cause" a violation of existing standards or "blow the cap". (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 721 [concluding that "the standard for a cumulative impacts analysis is defined by the use of the term 'collectively significant' in Guidelines section 15355 and the analysis must assess the collective or combined effect of energy development. The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have upon air quality."].) The Commission cannot rely on an environmental review that "avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling." (*Id.* [disapproving a "ratio" theory that would allow a conclusion that "the greater the over-all problem, the less significance a project has in a cumulative impacts analysis."].)

Para. 14

The environmental review relies heavily on the assumed effectiveness of the proposed ERCs as mitigation for the project's PM impacts. However, staff fails to identify several impacts of the proposed mitigation measures of road paving and inter-pollutant trading and fails to analyze all of the impacts— assuming that there will be a net benefit that off-sets the significant impact of the project. CEQA Guidelines require that mitigation measures be fully described, their effectiveness be addressed, and formulation of mitigation measures not be deferred. (CEQA Guidelines § 15126.4(a)(1)(B).) By deferring evaluation of environmental impacts of the mitigation measures until after project approval, the measures would amount to no more than a *post hoc* rationalization in support of a decision already made-- such procedures are unlawful because they skirt the required procedure for public review and agency scrutiny of potential impacts of the proposed mitigation measures. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307-09 [noting that such practices lead to "the sort of *post hoc* rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." Citations omitted].) Further, conclusions regarding the effectiveness of mitigation measures must be supported by substantial evidence. (See, e.g., *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099 at p. 1116-119.)

In the belated, discussion provided by staff in their rebuttal testimony, they rely on the

fact that data was *not* gathered to excuse the lack of critical data needed for analysis. *See* Exh. 301. However there is no good reason for the lack of data. CEQA grants all lead agencies the right to require a project applicant to submit "data and information" that may be necessary so that the agency can determine whether the project may have a significant effect on the environment. (Pub. Res. Code § 21160; *see also*, *Sierra Club*, *supra*, 7 Cal.4th at p. 1220.) Here, the Commission failed to obtain sufficient information from the project proponent or independently, for a full and fair analysis of the impacts of the project, the proposed mitigation measures, or alternatives.

Para. 15

a. Road Paving as an Offset

Para. 16

As noted above, the FSA provides no information regarding the impacts of road paving as an off-set at the proposed sites and presumed that the Commission could rely on the Air Board adoption of a new rule allowing this ERCs. Staff did not require the applicant to undertake the necessary surveys in a timely way in order to adequately evaluate impacts, nor did staff independently undertake the necessary surveys. Instead, staff and the applicant attempted to back-fill the analysis after the FSA was issued in rebuttal testimony and at hearing. Clearly, environmental analysis of the road paving as an offset was needed for this application whether or not a "rule" was adopted by the Air Board (which it has not been), and the Commission has failed to provide such identification and analysis in violation of CEQA.

Para. 17

Neither the staff nor applicant have directly rebutted much of the substance of the Center's testimony regarding the inadequacy of road paving to act as a valid ERC for PM10 because it actually leads to an increase in the fraction of the PM that is PM 2.5 and smaller fines. Exh. 402 at 2-3, 4-7; Exh. 400. As summarized in the testimony:

> Impacts resulting from mitigating PM2.5 impacts with PM10 emission reductions. The major difference between entrained road dust and combustion emissions is the composition of the particles. PHPP's combustion particulate emissions will be comprised almost entirely of PM2.5, and the great majority will be at or below 0.1 microns in diameter; ample evidence from CARB and EPA health-based studies and referenced by Dr. Fox [Exh. 400] has clearly associated increased mortality and morbidity with increases in ambient air pollution, and ultrafine particulate is inherently more dangerous since the smallest particles are able to penetrate deep into the lungs where they are readily dissolved and absorbed. Road dust particulate matter—PM10-- consists mostly of sand and soil, and due to its larger aerodynamic size is far less able to penetrate deep into bronchi or lungs. Moreover, ultrafines generated by combustion can greatly increase health risks due to their carrying toxic components deep into lung tissue. Any emission reduction credits used for offsets must have the same qualitative health impacts as the actual emissions. Due to essential size and composition differences between PM10 and PM2.5,

> with proportionally greater risks to human health and attainment challenges associated with PM2.5 emissions increases, reductions in PM10 from paving roads cannot be expected to effectively mitigate or offset PHPP's PM2.5 emissions.
>
> In sum, paving of existing unpaved public roads to generate PERCs would actually impede progress toward reducing PM2.5 in the area surrounding the proposed power plant and in the broader air basin, increase risks to and endanger the health of the region's residents, and impair their ability to enjoy the outdoor environment. These issues are significant environmental impacts that must be analyzed under the California Environmental Quality Act ("CEQA").

Exh. 402 at 2-3. By allowing the use of road paving ERCs for all PM10 without regard to the fraction that is smaller fines the Commission is not providing a true off-set for the impact— to put it in CEQA terms, the Commission cannot show that road paving provides effective and in-kind mitigation for the impacts of increased particulate emissions (including both PM10 and smaller fractions).

Para. 18

As to the on-the-ground impacts of road paving, before the sole evidentiary hearing on this application, no relevant surveys were conducted regarding impacts to the resources along the 10 road segments proposed to be paved. No protocol surveys were conducted, no jurisdictional delineations made, and no soil surveys were performed. Tr. at 276 (no protocol surveys), 274-75 (no jurisdictional delineations), 273-74 (no soil surveys were done). In sum, impacts to soils and water quality from the proposed road paving are not clearly identified or analyzed.

Para. 19

At hearing, it was made clear that the biology staff were not asked to look at this issue until January 2011 (Tr. at 277, 278), although the Center had made staff and all parties aware at least as early as July 2010, that such analysis was required under CEQA (Exhibit 400 (CBD letter re FDOC dated July 22, 2010), and the road segments were identified by the applicant to staff in July 2009 (Tr. at 277). Biology staff stated that they had no time to complete protocol surveys because they were not asked to address this issue until January 2011 and there was no time before the hearings in March 2011 to undertake such surveys. (Tr. at 276:14-19, 278 (January and February are the wrong time of year for protocol surveys), 281 (same)) Instead, staff substituted "reconnaissance level surveys". *Id.* When asked to explain the scope of the "reconnaissance" surveys, staff stated "I visited the sites in February and then yesterday, stopped periodically along all segments to look at such things as -- as habitat, drainages, connectively, adjacent land uses, things. of that nature. So again it was strictly reconnaissance level survey. But where biological resources were observed they were amended." Tr. at 276-77.[5] While there

[5] Testimony by applicant's witness Ms. Head, regarding "surveys" did not refer to any protocol surveys or formal delineations of waters of the state either and only applies to 5 of the 10 road segments that are proposed as possible sites for paving . Tr. at 220-222 ("fairly cursory survey"), at 256 (no surveys or delineations conducted on the other 5 or 6 road segments).

is no doubt that some information may be acquired by an experienced biologist stopping along a road periodically to look at the resources, this wholly insufficient to meet CEQA's standards which require detailed information relevant to the potentially significant impacts of a project be collected and provided in the environmental review documents. Even where staff believed their may be jurisdictional waters requiring streambed alteration permits (which the Commission permit would act in lieu of), no surveys were done but a condition inserted to require such surveys after the fact. (Tr. at 274-75) As the DFG staff Ms. Wilson stated, normally when DFG issues streambed alteration permits such delineations are done prior to issuing any permit. (TR at 275-76). Indeed, CEQA requires such analysis be done before any decision is made. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307-09; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450 ("For the [environmental review documentation] to serve these goals it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation *before* the decision to go forward is made." Emphasis added.)

Para. 20

Unfortunately, Staff appears to have misunderstood both its duties and authority under CEQA. It is well established that section 21160 vests the agency operating under a certified regulatory program with authority to require an applicant to submit additional information throughout the process if such information is necessary to enable the agency to determine whether a project will have significant adverse impacts on the environment. (*Sierra Club v. Board of Forestry* (1994) 7 Cal.4th 1215, 1220-21 [holding that "[b]ecause the board approved the plans without having before it the data necessary to make an informed assessment of the environmental impact of the proposed timber harvest, that approval must be rescinded."].)

Para. 21

Further, Staff attempted to minimize the import of this omission by adding a new proposed condition of certification that would require the applicant conduct surveys after approval of the project and comply with local road paving guidelines (Exh. 307 at 2). Such *post hoc* surveys would do nothing to cure the lack of identification and analysis of these resources before project approval as required by CEQA.

b. Inter-pollutant Trading as an Offset

Para. 22

As noted above, there is no analysis whatsoever provided regarding the potential impacts of allowing inter-pollutant trading as an off-set for PM10 emissions from this project. This provision was inserted in a revision by staff with no analysis. As a result, the Commission cannot adopt this as a mitigation measure for the project.

c. GHG Emissions

Para. 23

Recent amendments to the CEQA Guidelines require that the impacts of a proposed project's greenhouse gas emissions be determined and assessed. (CEQA Guidelines § 15064.4.)

Any analysis regarding the Project's greenhouse gas emissions must be rigorous, site-specific, and inclusive of both short-term and long-term effects.[6] Greenhouse gases are also pollutants "subject to regulation" under the Clean Air Act and recent EPA regulations also require GHG emissions to be considered in the PSD permitting. The fact that the Air District failed to address GHG emissions in the FDOC (Exh. 302), does not relieve the Commission of the need to identify and analyze the significant GHG emissions from the project, alternatives that could avoid these emissions, and require that the impacts be minimized where possible. While the FSA identified GHG emissions, the *analysis* of the impacts falls far short of and is both incomplete and misleading and its conclusions are unsupported. Further, it is unclear why staff did not provide any analysis of the new PSD GHG regulations. The FSA also failed to even consider any mitigation measures to reduce the in fact significant GHG emissions from the project. FSA at 4.1-53 ("No Conditions of Certification related to greenhouse gas emissions are proposed.")

Para. 24

There is no sound basis for the FSA's conclusions regarding the significance of the GHG emissions or any supposed "benefits" of the project in this regard. The project, which includes only a 10% renewable energy component, will be a significant source of new GHG emissions of over 1,852,123 MTCO2E/yr. FSA at 4.1-91 (GHG table 3). The staff notes that the project currently has no contracts to sell power and there are many unknowns regarding the actual ability of this project to obtain contracts, to operate efficiently, and to access the grid without impairing access by other renewable energy sources, but nonetheless concludes that there will somehow be a net benefit to GHG emissions overall. While the FSA admits to uncertainty and lists many "potential" benefits if the various events occur, it then somehow concludes that the project would in fact result in a net benefit.

> The ability and magnitude to which PHPP would fulfill these roles are uncertain given that the project would have an annual availability in the range of 90 to 95% (PHPP 2008) but as of yet, does not have a power purchase contract that would specify how and when it would operate to achieve such a capacity factor. Additionally, since PHPP interconnects to the grid at the Vincent Substation (located outside the Big Creek/Ventura and Los Angeles LRAs), it is unclear how PHPP would operate in conjunction with generation used to address capacity and energy requirements in these LRAs. The PHPP's capacity factor will depend on the provisions of bilateral power sales contracts, as well as market prices for electricity, ancillary services, and natural gas.

FSA at 4.1-84 (emphasis added); *see also* FSA at 4.1-93-97 (providing general statements about

[6] *See* Cal. Nat. Res. Agency, *Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97* (Dec. 2009) at 83-84 [available at www.ceres.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf].)

how the project could potentially displace older power or contribute to retirement). Staff cannot properly rely on a set of uncertain future events occurring for its certain conclusions. Similarly, staff's conclusions about the actual efficiency of the project and its ability to provide baseload energy that meets the California Emission Performance Standard ("EPS") (the GHG performance standard) of 0.500 MTCO2/MWh is based entirely on an assumption that the gas fired power plant portion of the project will operate at very high capacity and maximum efficiency. For example, the Estimated Annualized GHG Performance is based on the Estimated Annual Energy Output which is based on assumptions that the project would operate on the proposed "project owner's assumed maximum operating basis." *Id.* (note b). The resulting estimate of EPS at .370 is then used throughout the FSA without acknowledging it is an assumption and without disclosing what the EPS would be if the plant operates at lower capacities. See FSA 4.1-94-95 (GHG table 5). Again, as discussed above, this is a completely unsupported assumption because the applicant does not yet have any contracts nor has the analysis been done regarding its ability to access the grid efficiently and meet the requirements of the LRAs. Thus, Staff's conclusion that the project has "noteworthy public benefits" because "Projects that include renewable energy generation such as the PHPP are needed to meet California's mandated renewable energy goals" (FSA at 4.1-50), is contrary to the evidence here where the project itself represents a step backwards in the RPS standard providing only 10% of the generation from solar power. Similarly, because the FSA did not *analyze* the impacts of the project on the grid and potential congestion or the specific, alleged "need" for the energy that will be supplied by the gas-fired component of the project, the Staff's conclusion that another purported benefit because "Projects that include dispatchable generation, such as PHPP, are needed support the California electricity grid as it moves to a high renewable, low GHG-emitting system" (FSA at 4.1-50), is likewise unsupported on this record.

Para. 25

Also of concern is that, in order to support its erroneous finding that GHG emissions of close to 2 million tons per year from project (generated primarily by the project's large gas-fired power plant component) are not significant, the staff appears to be using nearly the exact same logic it used to support the same finding for solar power plants that use gas backups and would produce GHG emissions at levels an order of magnitude less. *See, e.g.,* Palen Solar Power Project Decision, CEC-800-2010-010 CMF, GHG section at 14-16 (pdf 163-165).

Para. 26

In addition, the FSA does not account for all GHG emissions and, specifically, does not provide any lifecycle analysis of GHG emissions from manufacture and transportation of the project components and the significant GHG emissions produced by natural gas extraction activities and transportation. Moreover, even for the significant GHG emissions that are identified, the FSA provides no discussion regarding avoidance or minimization of these emissions by utilizing alternative technology (such as an all-solar project) or through operational

measures and also provides no minimization or mitigation measures or off-sets for GHG emissions either during construction or those associated with operation of project. The lack of specific measures to minimize or mitigate or off-set GHG emissions from all sources is puzzling as the Commission's own Guidance calls for such measures:

> In the Committee's view, even relatively low construction emissions for power plant projects should be subject to "best practices" mitigation that seeks ways to reduce GHG construction emissions. Such mitigation will need to be considered by Energy Commission staff on a case-by-case basis at least for the initial set of cases heard before the Energy Commission . . .

(Committee Guidance on Fulfilling CEQA Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications (March, 2009) at 18.) The Commission's Framework for Evaluating Greenhouse Gas Implications of Natural Gas-Fired Power Plants in California, May, 2009, CEC-700-2009-009 (at 93-98) also explains that whether any new gas-fired power plants will help to meet the needs of California in transitioning to a higher renewable energy portfolio requires the analysis of many site-specific issues (including siting, transmission grid, and LCA requirements), and needs to be carefully examined before any conclusion could be reached as to whether a new gas-fired plant will actually contribute to decreases in GHG emissions over all. Here no such detailed analysis of any of these factors was provided in the FSA.

d. Cumulative Impacts are Significant and Unmitigated

Para. 27

Cumulative impacts analysis is a critical part of any CEQA analysis. (*Joy Road Area Forest and Watershed Assoc. v. Cal. Dept. of Forestry* (2006) 142 Cal. App. 4th 656, 676.) Where, as here, the impacts of a project to air quality are "cumulatively considerable" the agency must also examine alternatives that would avoid those impacts and mitigation measures for those impacts. (CEQA Guidelines §15130(b)(3).) Here, the scale of the impact within the air district and the specific increase in the cumulative burden on air quality near the proposed project site have not be adequately identified, avoided, minimized or mitigated. Cumulative impacts to air quality particularly regarding significant deterioration of air quality in the basin and the GHG emissions are woefully inadequate.

Para. 28

The FSA concludes that if the conditions are adopted all significant cumulative impacts to air quality will be mitigated to a level of less than significance (FSA at 4.1-37). Because all impacts were not adequately identified and analyzed, the conclusion regarding cumulative impacts is also flawed. For example, as detailed above, both of the proposed "off-set" mitigation measures will have additional impacts to air quality that have not been properly identified, much less avoided, minimized or mitigated, and were not considered in the cumulative analysis. For GHGs, which are cumulative in nature, no mitigation measures or off-sets are even discussed,

much less adopted. Therefore, the conclusions regarding cumulative impacts are unsupported.

e. Growth inducing impacts

Para. 29

In addition to significant cumulative impacts, the project may have significant growth inducing impacts. The proposed mitigation measure for the project of road paving "will foster growth in the surrounding environment" and may remove obstacles to growth in this area; as a result, this project has a "characteristic" "which may encourage and facilitate other activities that could significantly affect the environment." (CEQA Guidelines § 15126.2(d).) Growth inducing impacts are distinct from and must be analyzed in addition to cumulative impacts of a project. Here, paving roads that are now unpaved in a largely rural community may be growth inducing in terms of increased traffic (Exh. 402 at 3; Exh. 400 at 18-20 (discussing growth in traffic), and because additional urban development will be more likely along paved roads (Exh. 400 at 13). As a result, the resulting size, location, and configuration of the roads that are paved may determine the siting of future development in the area. At hearing, applicant's witnesses provided opinion but no data or analysis for the statements that the road paving would not be growth inducing. *See, e.g.,* Tr. at246-48. The environmental review should also have included an analysis of the environmental effects of other reasonably foreseeable actions that could be the consequence of the proposed road paving because those impacts may be significant and change the scope or nature of the environmental effects of the project. The failure to undertake such analysis violates CEQA.

D. The Alternatives Analysis in the FSA Fails to Meet CEQA's Requirements: The Commission has Failed to Analyze a Meaningful Range of Alternatives to the Proposed Project

Para. 30

Under CEQA, a lead agency may not approve a project if there are feasible alternatives that would avoid or lessen its significant environmental effects. (Public Resources Code §§ 21002, 21002.1(b).) To this end, environmental review documents are 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.) As the Supreme Court has stated "The core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-65.) The discussion of alternatives must be sufficiently detailed to foster informed decision-making and public participation, not simply vague and conclusory. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th at pp. 1456, 1460; *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935; *Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 .) The same

requirements apply to an environmental document prepared as part of a certified regulatory program. (*See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1228-29.) Alternatives must be analyzed in such a document even if measures intended to mitigate a project's significant impacts also are proposed. (*See Friends of the Old Trees v. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1393-94.)

Para. 31

The FSA summarily rejected many proposed alternatives including alternative sites and alternative technologies and only examined in detail alternatives to one aspect of the project – the transmission line. The FSA rejected an all-solar alternative stating:

> While an all-solar energy project would utilize an available renewable natural resource within a region of California where its potential for power production is among the highest in the state, an all-solar energy project would not fully meet the project objectives to provide a reliable source of power generation that would supply electrical energy night and day.

FSA at 6-6, *see also* FSA 6-27 (discussing only all-solar of the full 570 MW as a rejected alternative and failing to consider of all solar at this site as an alternative); Tr. at 325. However, mere assertion of a conflict with some project objectives does not render an alternative impractical or economically infeasible. Clearly an all-solar alternative should have been fully analyzed here. No finding of infeasibility could be made as no analysis was conducted.

Para. 32

The FSA also failed to consider a proposed alternative that would have a large solar capacity of 20% or 33% to at minimum match the RPS goals of the state—whether by reducing the gas-fired component or increasing the solar component. (Tr. at 327-28)

Para. 33

As recent decisions have clarified, a finding of economic infeasibility must be based upon quantitative, comparative evidence showing that the alternative would render the project economically impractical. (*See, e.g., Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461-62 [holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible]; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 [holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party].) Thus, the agency's rejection of alternatives solely based on the applicant's statements without providing any actual comparative cost figures fails to adequately address feasibility of the alternatives.

Para. 34

The FSA did not consider an-all solar alternative with PV at this site and rejected consideration of a PV solar alternative on rooftops to the solar thermal portion of the project because "if the solar component is not located at the proposed PHPP, then it would not be able to offset the natural gas-fired component to increase project efficiency and reduce the need for duct burning, which is an important element of the project." FSA at 6-6; *see also* 6-27-28 (rejecting

an all PV alternative and again noting the lack of nighttime transmission for solar energy and assuming "need" for such generation without any showing of such need).[7] By this logic the solar energy component of the project (which is a very small percent of the overall generation capacity) is highly valued for its ability to help bring on line a gas-fired power plant – a plant that will increase pollutant loads in an already impacted air basin. This makes little sense where the approval of the project would also undermine progress in the State towards the RPS goals and impair local and regional air quality. If the Commission approves this project as proposed it will be taking a step in the wrong direction on GHG emissions and the small amount of offset the solar thermal plant provides to the gas-fired power plant does not change that calculation. The failure to fully consider any all solar alternative to the project (both all solar at this site and an all solar project that might include PV rooftops to replace the full gas component of the proposed plant) is fatal to the CEQA review. The Commission also failed to consider an alternative condition of certification that would require the applicant to secure contracts or otherwise ensure older sources with higher emissions be taken off-line *before* this project can come on line and thereby actually replace older dirtier sources with this newer power plant. *See* Tr. at 329-330. That each of these alternatives should have been considered is clear.

Para. 35

Even though an all PV alternative is outside of the Commission's jurisdiction, an agency must consider such alternatives. (*See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 575.) Thus, the Commission has not complied with its duty under CEQA to analyze a reasonable range of feasible alternatives in the FSA. If the Commission does not remedy this omission in the environmental review by revising and re-circulating environmental documents with an adequate alternatives analysis, then it must reject the project.

Para. 36

Staff's conclusory rejection of alternatives is not supported by specific facts and analysis in any meaningful detail and therefore are insufficient to support a finding that an alternative is infeasible. (See *Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336, 1356-57.) Moreover, the reasons for the staff's rejection of the alternatives during the environmental review varied making any coherent comparison difficult and staff repeatedly relied on an assumed "need" for various aspects of the project that has never been analyzed.

Para. 37

Moreover, neither Staff nor the Applicant has provided any specific economic analysis demonstrating that any of the alternatives, including the No Action alternative, would cause any economic impairment to the applicant. Indeed, the Applicant does not even have a PPA or other contract to sell the power from the proposed plant, nor has it made any other showing regarding

[7] The FSA also rejected the No Action alternative based on conclusory statements of "need" and wrongly states that the proposed project would contribute towards renewable energy goals which it does not. "The "No Project" Alternative would not provide an efficient and reliable power generating facility to meet future electrical power needs of the rapidly growing City of Palmdale and surrounding area, as well as provide additional generating capacity contributing towards development of renewable energy for the state and region as a whole. " FSA at 6-28

the economics of a solar-only project on this site, an all PV alternative, or even the No Action alternative. The only economic issues that are discussed are bare conclusions of the "needs" of the applicant—nothing has been disclosed as to the cost to the consumer of the energy that may ultimately be generated from the project nor the cost to the consumer from any needed power line upgrades to provide this power to the utility companies and which could be passed through to the consumer by the CPUC. As a result no meaningful economic comparison could be or was made between the project and other alternatives such as a solar only alternative or an alternative that would require that the applicant show that a specific older power plant with higher emissions (including GHGs) in this air basin (or a connected air basin) will be taken off-line before the proposed plant can go on-line.

F. The Commission Cannot Make the Findings Necessary to "Override" the Project's Significant Impacts Under CEQA.

Para. 38

In order to approve the project despite its significant environmental impacts, the Commission must find (1) that mitigation measures or alternatives to lessen these impacts are infeasible, and (2) specific overriding benefits of the project outweigh its significant environmental effects. (§ 21081; Siting Regs. § 1755(c), (d).) Here the few identified "benefits" cannot outweigh the significant deterioration of air quality that will be caused by the project. Even assuming for the sake of argument that the identification and analysis of environmental impacts were adequate, which they were not, as explained above, the alternatives analysis fails to provide sufficient meaningful analysis of alternatives that could avoid the significant impacts of the project. As a result, the record does not contain substantial evidence to support either of the findings necessary to "override" a significant impact under CEQA.

Para. 39

Neither the Applicant nor Staff has demonstrated that all of the considered or rejected alternatives which could avoid the significant impacts of the project, including an all-solar alternative, are infeasible. Because an all-solar alternative at this is feasible, for example, the Commission cannot make the findings required to "override" the Project's significant impacts. Importantly, nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with the applicant's proposal. The statutory definition of "feasible" does not support such a conclusion (Pub. Res. Code § 21061.1), and in fact, the CEQA Guidelines expressly provide that a feasible alternative may impede achievement of those objectives to some degree. (*See* CEQA Guidelines § 15126.6(a), (b).)

Para. 40

In any event, because the FSA failed to adequately identify and analyze a number of the project's impacts as significant, as detailed above, the Commission has no basis to conclude that mitigation of these impacts is infeasible, because inadequate mitigation has been proposed.

Finally, there is inadequate evidence to support a finding that the project's benefits outweigh its significant effects. On this record, therefore, the Commission cannot make the findings necessary to "override" the Project's significant environmental impacts under CEQA.

II. THE PROJECT IS INCONSISTENT WITH FEDERAL AND STATE LORS.

Para. 41

As detailed above, the CEQA review for the proposed project to date is inadequate and therefore the Commission's approval of this project would violate CEQA. The project may violate other State LORS particularly as to the issues that were not analyzed related to road paving impacts. For example, the road paving may require streambed alteration permits or California ESA take permits but because it failed to address these issues the Commission cannot properly state whether those laws will be complied with. It is of great concern that the Commission would issue a permit which acts in-lieu of those specific permitting procedures and obligations that are usually left to the expert agency, DFG, without even identifying the issues or analyzing the need for compliance.

Para. 42

The evidence also fails to show whether or how the project would comply with Federal PSD Regulations. Because the environmental review is incomplete it is impossible to determine the full impacts of the project or its compliance with other Federal LORS. As discussed above, the FSA failed to address the recently approved PSD regulations which are now in effect and assumed that they would not apply to this project. As a result, the Commission has no information from staff regarding the likelihood that the proposed project may be able to comply with those regulations for PM or GHGs. Therefore, it is impossible for the Commission to find that the project is consistent with all Federal LORS.

C. The Commission Cannot "Override" the Project's Noncompliance with CEQA and Other LORS.

Para. 43

The LORS at issue here include compliance with CEQA. Under CEQA, an override finding can only be made for significant impacts where "specific economic, legal, social, technological, or other considerations . . . make infeasible the mitigation measures or alternatives identified in the environmental impact report" and "the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." Pub. Res. Code § 21081. Such findings cannot be made in this instance.

Para. 44

"[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore Energy Center, Final Commission Decision, October 2008 (06-AFC-6) CEC-800-2008-004-CMF*, at p. 453

[quotation omitted].) In order to approve a project with significant affects on the environment the Commission must find that:

> (1) With respect to matters *within the authority* of the commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding.
>
> (2) With respect to matters *not within the commission's authority but within the authority of another agency*, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency.

Siting Regs. § 1755(c). Here, because the Commission has not adequately considered several matters that are within the authority of another agency—the EPA as regards the PSD regulations – these findings cannot be made. In cases where significant impacts remain, the Commission "may not certify the project unless it specifically finds both . . . (1) That specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and (2) That the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility." Siting Regs § 1755(d). As detailed above, these findings cannot be made in this matter either.

Para. 45

Where a project conflicts with LORS, the Commission can only approve the project if it makes several specific findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Siting Regs. §§ 1752(k)[8], 1755(b).) Neither finding can be made on the record here.

Para. 46

There is no showing that public convenience and necessity requires the project. The phrase "public convenience and necessity," as used in the regulations, depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are

[8] (k) With respect to any facility which does not comply with an applicable state, local or regional standard, ordinance or law, findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both the following:
(1) Whether the facility is required for public convenience and necessity; and
(2) Whether there are no more prudent and feasible means of achieving such public convenience and necessity.

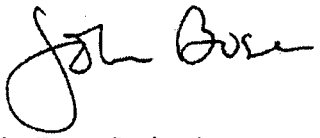
denied, to their detriment, that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.) Under any of these tests, public convenience and necessity do not require this project as proposed, and as a result it cannot be certified. There are feasible alternatives to the project and the proposed site could provide an opportunity for development of solar, renewable energy in an area of the highest solar resource in the State. As discussed above, there is no showing on this record, that an all solar alternative on this site is not feasible or other alternatives to the gas fired proposal. There is no also no showing on this record that the project's 520MW gas component is either necessary or would serve the public convenience. Because other feasible alternatives exist and have not been adequately explored the Commission cannot make the findings needed to override the violations and conflicts with LORS.

CONCLUSION

In light of the above, the testimony, exhibits and public comment submitted in this matter, the Center urges the Commission to deny the application.

Dated: March 25, 2011

Respectfully submitted,



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APPLICATION FOR CERTIFICATION
For the *PALMDALE HYBRID POWER PROJECT*

Docket No. 08-AFC-9

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(Revised 3/22/2011)

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DECLARATION OF SERVICE

I, John Buse, declare that on, March 25, 2011, I served and filed copies of the attached *Opening Brief of Intervenor Center for Biological Diversity* dated March 25, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/palmdale/index.html]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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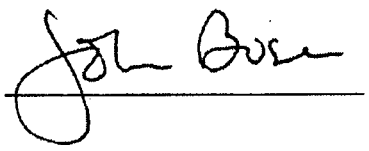

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STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 08-AFC-9
	)	
Application for Certification,	)	**PROOF OF SERVICE**
for the CITY OF PALMDALE HYBRID	)	
POWER PLANT PROJECT	)	(Revised March 22, 2011)
	)	
	)	

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on April 1, 2011, I served and filed copies of the attached document to all parties identified on the Proof of Service List above in the following manner:

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☒ Transmission via electronic mail to all email addresses on the Proof of Service list; and

☒ by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked "email preferred."

I further declare that transmission via electronic mail and U.S. Mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 1, 2011, at Costa Mesa, California.

Paul Kihm