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

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INTRODUCTION

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).)

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.

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.

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

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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

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].)

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.).

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.

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

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].)

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

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.

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."].)

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.

a. Road Paving as an Offset

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.

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).

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.

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.)

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."].)

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

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

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.")

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.

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).

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

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.

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

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

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.)

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.

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)

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.

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.

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.

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.

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.

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.

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).)

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.

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.

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.

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.

"[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.

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.

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.

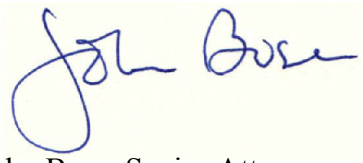
denied, to their detriment, that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (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:

(C*heck all that Apply*)

For service to all other parties:

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__x__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

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For filing with the Energy Commission:

_x__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

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____depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-9
1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.