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State of California **California Natural Resources Agency**

M e m o r a n d u m

To: Docket 01-AFC-07C **Date:** May 17, 2023

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Subject: Basis for Finding the Approval of the Russell City Energy Center Settlement Agreement is Not a Project and Exempt Under the California Environmental Quality Act

I. Introduction.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.) requires that state agencies assess and prepare environmental documents disclosing any significant adverse environmental impacts of discretionary project approvals. However, discretionary approvals that do not fit the definition of a "project" are not subject to CEQA, and, additionally, CEQA designates certain projects exempt from its requirements. Of relevance here and discussed below in relation to the approval of the Russell City Energy Center settlement agreement ("Settlement") is the fact that activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment are excluded from the definition of "project" (Cal. Code Regs., tit. 14, §§ 15060(c)(2)-(3) and 15378(a) & (b)(5)), the Class 21 exemption (Cal. Code Regs., tit. 14, §§ 15321; see also 15061(b)(2)), and the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)).

II. The approval of the Settlement is not a project.

CEQA applies to discretionary project approvals, and although a vote to approve the Settlement would be a discretionary act, the Settlement does not meet the definition of a "project" under the CEQA Guidelines (*See* Cal. Code Regs., tit. 14, § 15378). Under CEQA, the definition of "[p]roject does not include . . . administrative activities of governments that will not result in direct or indirect physical changes in the environment." (Cal. Code Regs., tit. 14, § 15378(b)(5)). CEQA Guidelines sections 15060(c)(2)-(3) and 15378(a) further reinforce that CEQA does not apply to activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Approval of the Settlement does not meet the definition of a project because it does not have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (Cal. Code Regs. tit. 14, § 15378(a).) Furthermore, to settle alleged violations of the power plant's license, the Settlement terms provide for the payment of funds to the CEC for deposit in the General Fund and to the City of Hayward to fund energy projects. The Settlement does not modify the design, operation, or environmental impacts of a power plant. Approval of the Settlement approves the payment of these funds, not the approval of any particular project the funds might be expended on. Accordingly, it is evident that approval of the Settlement does not

directly result in any physical change in the environment or any reasonably foreseeable indirect impacts.

III. Even if Approval of the Settlement were a project, the Class 21 exemption and the common-sense exemption would apply.

California Code of Regulations, title 14, section 15321, also referred to as the Class 21 exemption, exempts actions taken by regulatory agencies to "enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency." The Class 21 exemption includes the "adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective." Because the CEC's action to approve the Settlement would be an administrative order adopted for the purpose of enforcing the conditions within the Russell City Energy Center's license, this exemption is directly applicable. Furthermore, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply here, and there is no reasonable possibility that the approval will have a significant effect on the environment due to unusual circumstances. For these reasons, this project is exempt from CEQA.

Moreover, approving the settlement agreement does not involve approving a project. This is because the settlement agreement does not identify a specific project to be carried out and only identifies a category of project to be funded in the future so the Class 21 exemption is applicable to the settlement as a whole.

Approval of the Settlement would also be exempt from CEQA under the common-sense exemption. (Cal. Code Regs., tit. 14, § 15061(b)(3).) As noted above in Section II, CEQA only applies to projects that have the potential for causing a significant effect on the environment. A significant effect on the environment is defined as a substantial, or a potentially substantial, adverse change in the environment, and does not include an economic change by itself or beneficial changes to the environment. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) Because this approval concerns the payment of a civil penalty for alleged license violations and the payment of funds to be expended on unspecified energy projects, and does not provide for any physical or operational changes to the Russell City Energy Center, it can be seen with certainty that there is no possibility that the Settlement may have a significant effect on the environment.

IV. Conclusion.

As shown above, approval of the Settlement is a regulatory action that is not a project under CEQA and is an enforcement action by a regulatory agency, consistent with the Class 21 exemption in section 15321 of the CEQA Guidelines. Additionally, the Settlement is consistent with the common-sense exemption under section 15061(b)(3) of the CEQA Guidelines. For these reasons, approval of the Settlement by the CEC would be exempt from CEQA, and a Notice of Exemption may be filed with the Office of Planning and Research.