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Memorandum

To: Chair, Vice Chair, and Commissioners
California Energy Commission

From: Aleecia Gutierrez, Director
Energy Assessments Division
California Energy Commission

Date: March 7, 2024

Subject: **CEC Staff Recommendation on Petition for Formal Rulemaking to Determine Methodologies to Integrate Non-Energy Benefits and Social Costs into the CEC's Resource Planning and Investment Decision-Making Processes**

I. Summary

On February 5, 2024, the Center for Biological Diversity, Central California Asthma Collaborative, California Environmental Justice Alliance, Asian Pacific Environmental Network, Greenlining Institute, Local Clean Energy Alliance, Sierra Club California, The Climate Center, Center on Race, Poverty and the Environment, Clean Coalition, 350 Bay Area, GRID Alternatives, The Protect Our Communities Foundation, the BEEP Coalition, the Local Government Sustainable Energy Coalition, and Environment California (Petitioners) filed a petition requesting that the California Energy Commission (CEC) initiate a formal rulemaking to determine methodologies to integrate non-energy benefits (NEBs) and social costs into the CEC's resource planning and investment decision-making processes. As discussed below, CEC staff share Petitioners' desire to see NEBs and social costs incorporated into CEC's programs and analyses. However, the petition did not include proposed regulatory language for the CEC to approve or deny. Additionally, petitioners appear to acknowledge that further stakeholder engagement is necessary to arrive at an approach that appropriately addresses petitioners' concerns and "systematically and comprehensively" considers NEBs in CEC's programs and analyses. For these reasons, staff does not believe the petition for rulemaking process is the appropriate vehicle for this engagement. This is because that process, established in Government Code sections 11340.6 and 11340.7, requires an agency approving such a petition to, within 30 days, schedule the matter for the public hearing that occurs after regulatory language is released for a lengthy public review and comment period. Since proposed regulations have not yet been drafted, it would be premature and infeasible to hold the hearing that would otherwise be required under this process. However, this does not preclude the CEC from taking other action that will facilitate open and robust dialogue and explore pathways toward tangible progress on this subject.

For the reasons provided herein, CEC staff recommend the CEC deny the petition in part to the extent that it invokes the requirements of Government Code sections 11340.6 and 11340.7 and instead grant other relief by approving the request to consider NEBs in CEC's programs and analyses in a transparent public process. To this end, CEC staff recommend adopting an

Order Instituting an Informational Proceeding (OIIP or Informational Proceeding) to identify methodologies to integrate NEBs and social costs into CEC analyses and programs as determined to be appropriate.

II. Procedural and Factual Background

On September 10, 2018, Governor Jerry Brown signed Senate Bill (SB) 100 (Stats. 2019, ch. 312), an act to amend sections 399.11, 399.15, and 399.30 of, and to add Section 454.53 to Chapter 3, Division 1 of the Public Utilities Code. SB 100 requires the California Public Utilities Commission (CPUC), the CEC, and California Air Resources Board (CARB) to utilize programs authorized under existing statutes to achieve the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100% of retail sales of electricity to California end-use customers and 100% of electricity procured to serve all state agencies by December 31, 2045 and, as part of a public process, issue a joint report to the Legislature by January 1, 2021, and every 4 years thereafter, that includes specified information relating to the implementation of the policy, among other changes. The next joint agency report will be issued by January 1, 2025.

On February 5, 2024, Petitioners filed with the CEC's Executive Director a petition to initiate a formal rulemaking pursuant to California Code of Regulations, title 20, section 1221. The Petitioners urge the CEC to initiate a rulemaking to determine methodologies for integrating NEBs and social costs into the CEC's resource planning and investment decision-making processes. On February 12, 2024, the Executive Director certified the petition as complete pursuant to California Code of Regulations, title 20, section 1221. The CEC must, within 30 days of receiving a petition for rulemaking, either deny it and state the reason for denial in writing or grant it and direct staff to prepare an appropriate order pursuant to California Code of Regulations, title 20, section 1222, and schedule the matter for public hearing in accordance with Article 5 of the Administrative Procedure Act (APA).¹ On February 6, 2024, the Petitioners agreed to a seven day extension of time to allow the CEC to consider the petition and render a decision at its regularly scheduled Business Meeting on March 13, 2024.

III. Petitioners' Requests and Assertions

Petitioners request that the CEC “determine methodologies to integrate [NEBs] and social costs into the CEC's resource planning and investment decision-making processes” and to institute a rulemaking proceeding to accomplish this objective. Petitioners request that the CEC ultimately “complete a separate and transparent rulemaking to systematically and comprehensively address” NEBs and social costs in an “iterative process that begins with certain NEBs and social costs, and over time, refines methodologies and includes other NEBs and social costs.”² Petitioners assert that to accurately reflect the value of NEBs and social costs in the state's energy procurement decisions, “this rulemaking must develop a methodology that also qualitatively values NEBs and social costs—as standards for resource

¹ Gov. Code § 11340.7(a); Cal. Code Regs., title 20, §1221(c.)

² Petition at 4, 6.

portfolios to meet—utilizing appropriate lifecycle analyses.”³ Petitioners seek an outcome that would fully integrate NEBs and social costs into the CEC’s resource planning, investment decision-making, and cost-effectiveness determinations.

The Petitioners ask that the methodologies developed under the requested rulemaking inform the 2025 Joint Agency Report that will be prepared by the CEC, CPUC, and CARB pursuant to SB 100. The Petitioners assert that such an approach allows more projects to “pencil out” in terms of economic feasibility and that this, in turn, has the potential to unlock funding for disadvantaged and low-income communities that is currently unavailable. Furthermore, the Petitioners make the case that adequate consideration of NEBs and social costs not only yields positive benefits, but also avoids harm by preventing disproportionate impacts from accruing to disadvantaged and low-income communities. The Petitioners assert that the CEC’s current practices fail to adequately address NEBs or social costs, and therefore fail to realize either the benefits or avoided harms enumerated above.

The Petitioners propose that the CEC undertake a rulemaking and, in doing so, integrate NEBs and social costs into CEC programs and processes through both quantitative and qualitative means. The Petitioners illustrate the desired approach through examples of how the Petitioners would like the CEC to address (1) land use and species impacts, (2) impacts to human health and welfare, and (3) resiliency. Finally, the Petitioners assert that the CEC must incorporate lifecycle analyses into cost-effectiveness determinations and include all reasonably foreseeable impacts.

IV. CEC Staff Recommendation

CEC staff recognize and agree with the Petitioners on the value and importance of systematically and comprehensively addressing how to appropriately incorporate NEBs and social costs into CEC analyses, policies, and programs. CEC staff also recognize the need for a robust and transparent public process to ensure that methodologies are well vetted and provide meaningful information.

The process that would be initiated through granting the petition in full and immediately instituting a formal rulemaking would not allow for meeting these objectives. This is because the petition for rulemaking process provided under the APA does not contemplate the traditional pre-rulemaking phase in which the public can engage with the agency to inform proposed terms. Instead, this petition process is designed to skip directly to the “adoption, amendment, or repeal of a regulation”⁴ phase. In other words, this petition process is appropriate where a petitioner makes a specific, discrete request, ideally with proposed regulatory language. Here, the Petitioners provided considerable justification and conceptual background for the substance of their request, but did not propose regulatory language. Furthermore, the Petitioners appear to recognize the magnitude of their request and the need for a pre-rulemaking phase to “comprehensively and systematically” address such a large and

³ Petition at 4.

⁴ Gov. Code § 11340.6.

complex issue.⁵ Denying the present petition would also be consistent with a recent decision in which the Office of Administrative Law noted that it may not be feasible for an agency, especially a commission-led agency like the CEC, to meet the deadlines for notice and other actions stipulated in the Government Code, including Article 5 of the APA, upon granting a petition for rulemaking.⁶

Nevertheless, this does not prevent the CEC from taking additional action as it deems appropriate to address the substance of the petition.⁷ CEC staff believe that the appropriate action in this case would be to adopt an Order Instituting Informational Proceeding (OIIP or Informational Proceeding). This would be consistent with the Petitioners' stated objectives and would allow the process they requested to take place. Specifically, an Informational Proceeding would allow the CEC to hold "hearings designed to gather and assess information to assist the commission in formulating policies; informing the public of commission actions; or obtaining public comment and opinion."⁸ This would provide a venue to develop the record on NEBs and social costs from multiple perspectives and seek detailed public input on how the CEC could best take action on these issues. Outcomes of the proceeding could, depending on the findings of the Informational Proceeding, include, but are not limited to, the opening of a formal rulemaking to draft and adopt regulations, or an internal guidance document specifying how staff will incorporate NEBs and social costs into their work going forward. Staff also recognize that the combination of the timing of the submittal of the petition and the length of time it will take to conduct meaningful public engagement may limit the ability of the Informational Proceeding to inform the 2025 SB 100 Joint Agency Report (2025 Report). Staff will, however, consider any available information and findings from this Informational Proceeding to inform the 2025 Report. Development of NEB and social cost methodologies in the 2025 Report can also inform the Informational Proceeding.

For these reasons, staff recommend the CEC take the following action:

1. Grant the Petitioners' underlying request that the CEC address NEBs and social costs in its planning and decision-making;
2. Take "other action" on the petition to fulfill this request by instituting the above-described Informational Proceeding to assist the CEC in formulating methodologies to integrate NEBs and social costs into CEC analyses, policies and programs through a public process; and
3. Deny the petition to the extent it asks the CEC to issue an Order Instituting a Rulemaking and adopt a regulation pursuant to Government Code sections 11340.6 and 11340.7.

⁵ Petitioners ask the CEC to act with urgency, but emphasize the need for process and collaboration, rather than rushed drafting of a regulation behind closed doors. For example, the Petitioners' emphasize the need for an "iterative process" and ask the CEC to "open a rulemaking", "develop a methodology", and "undertake this vital task" and recognize the CEC will need to "work[] to integrate social costs into its cost-effectiveness determinations..." and "consider how to add in NEBs and social costs as [] "constraints or policy objectives."" (emphasis added.)

⁶ Office of Administrative Law, Notice of Decision re: California Gambling Control Commission Petition (Dec. 2022), available at <https://oal.ca.gov/wp-content/uploads/sites/166/2022/12/Petition-Decision-for-Gambling-Control-Commission-Petition-12-22-2022.pdf>.

⁷ Gov. Code § 11340.7(b) ("A state agency may... grant any other relief or take any other action as it may determine to be warranted by the petition..."); Cal. Code Regs., tit. 20, §1222 (b) ("The [CEC] may, upon its own motion, adopt an order to institute an informational proceeding.")

⁸ Cal. Code Regs., tit. 20, § 1220(b) (emphasis added).

The CEC is authorized to take the recommended actions pursuant to California Code of Regulations, title 20, section 1221(c), which provides the CEC may either deny petitions for rulemaking or grant petitions and “direct the staff to prepare an appropriate order pursuant to section 1222 of [title 20 of the California Code of Regulations].” The CEC is further authorized to take the recommended actions pursuant to California Code of Regulations, title 20, section 1222, subsection (b), which provides that the CEC “may, upon its own motion, adopt an order to institute an informational proceeding.” Finally, this action is consistent with the APA, which provides that an agency may “grant or deny [a] petition in part, and may grant any other relief or take any other action as it may determine to be warranted by the petition...”⁹

⁹ Gov. Code § 11340.7(b).