

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of:)
)
)

Proposed Adoption of Regulations Establishing a)
Greenhouse Gases Emission Performance Standard)
For Baseload Generation of Local Publicly Owned)
Electric Utilities.)
)
)
_____)

Docket 06-OIR-1
(October 30, 2006)

DOCKET 06-OIR-1

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**REQUEST OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION
FOR A DECISION BY THE ELECTRICITY COMMITTEE CONCERNING THE
ADMINISTRATIVE PROCEDURES FOR ESTABLISHING THE GREENHOUSE
GAS EMISSION PERFORMANCE STANDARD PURSUANT TO SB 1368**

**I. CMUA’S REQUEST: THE CURRENT RULEMAKING SCHEDULE
SHOULD BE AMENDED TO COMPORT WITH THE ADMINISTRATIVE
PROCEDURE ACT.**

In order to harmonize the language of Senate Bill (“SB”) 1368 with the Administrative Procedure Act (“APA”), the California Energy Commission (“CEC” or “Commission”) Electricity Committee should amend the current schedule for 06-OIR-1 currently set forth in the *Staff Issue Identification Paper: Implementation of SB 1368 Emissions Performance Standard* (“White Paper”), as proposed by the California Municipal Utilities Association (“CMUA”) in Appendix A to these Comments.

Accordingly, amending the proposed schedule currently set out in the White Paper will: (1) reduce the excessive administrative burden on CEC staff and the affected parties; (2) provide more opportunity for meaningful participation by the affected parties; (3) improve the likelihood of the CEC’s compliance with the requirements of the APA; and (4) improve the likelihood of the proposed regulations being drafted in harmony with, and not in conflict to SB 1368.

II. THE PROBLEM: THE EXISTING RULEMAKING SCHEDULE MAY INHIBIT MEANINGFUL PARTICIPATION BY AFFECTED PARTIES AND PRECLUDE COMPREHENSIVE REVIEW OF THE ISSUES.

The proposed schedule set for 06-OIR-1 is inconsistent with the APA, extremely aggressive, and may substantially inhibit meaningful participation by affected parties. Furthermore, the breadth and magnitude of issues that must be addressed in this proceeding cannot be adequately addressed under the proposed schedule. As set forth in the White Paper, the current schedule was set, in part, based upon the following language in prospective Public Utilities Code section 8341(e) of SB 1368.

"On or before June 30, 2007, the Energy Commission, at a duly noticed public hearing and in consultation with the [California Public Utilities Commission] and the State Air Resources Board, shall establish a greenhouse gases emission performance standard for all baseload generation of local publicly owned electric utilities " . . . "Enforcement of the greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard."

In effect, the White Paper bases its interpretation of the entire statute on the literal read of the single sentence which states that, "[e]nforcement of the greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard."¹ The White Paper states that "[t]o enable the Energy Commission to begin enforcing the standard, it must be *adopted as a regulation pursuant to OAL review* under the Administrative Procedure Act and filed with the Secretary of State."² Therein lies the problem because *regulations are not adopted pursuant to OAL review. Regulations are adopted by an agency* and then submitted to the Office of Administrative Law ("OAL"), an independent agency "charged with the orderly review of *adopted* regulations" before filing them with the Secretary of State.³ This distinction is critical and begs the question for SB 1368 compliance by the Commission: What actions must be completed on or before June 30, 2007?

According to the White Paper's interpretation and schedule, the available time to hold public workshops is being compressed into a period between December 8, 2006 and January 18, 2007. This compressed workshop schedule is reached by estimating the

¹ Pub. Util. Code section 8341(e)(1).

² White Paper at 2 (emphasis added).

³ Gov't Code sections 11340.1, 11349.5 (emphasis added).

amount of time required to complete the process for filing a Notice of Proposed Action (“NOPA”) *and* the review by the OAL, and then calculating backwards from the White Paper’s proposed filing date at the Secretary of State by the OAL on June 29, 2007.⁴

CMUA strongly disagrees. CMUA believes that this proposed schedule is based upon subjugating the clear and unambiguous sections of SB 1368 to an incorrect literal interpretation of one sentence in section 8341(e)(1). As set forth below, CMUA will: (1) show how this interpretation is contrary to the fundamental rules of statutory construction and enables a procedural result that is not in harmony with, and in conflict to, the statute;⁵ (2) describe the purpose and importance of the APA process; (3) show that the White Paper’s proposed schedule does not even comply with the White Paper’s interpretation of SB 1368; and (4) present two reasonable interpretations of SB 1368 that will enable an expanded time frame for parties’ participation while facilitating the enforcement of the EPS in a timely manner.

III. PUBLIC UTILITIES CODE SECTION 8341 INCLUDES PROCEDURAL DIRECTION TO THE COMMISSION FOR ADOPTING EPS REGULATIONS.

Pursuant to prospective Public Utilities Code section 8341, the CEC is required to establish and enforce a greenhouse gases EPS applicable to local publicly owned electric utilities (“POUs”). Listed below are the four relevant sentences in section 8341 that apply to the procedural actions that will be taken by the CEC to establish and implement the EPS. For clarity in CMUA’s Comments, these sentences will be referred to as CEC Actions 1, 2, 3, and 4.

CEC Action 1: Pub. Util. Code 8341(e)(2) - “The greenhouse gases emission performance standard shall be adopted by regulation pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).”

CEC Action 2: Pub. Util. Code 8341(e)(1) - "On or before June 30, 2007, the Energy Commission, at a duly noticed public hearing and in

⁴ See White Paper at 2.

⁵ Gov’t Code section 11342.2 (stating that “no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute”); Gov’t Code section 11349(d) (defining “consistency” as being in harmony with, and not in conflict or contradictory to existing laws). See *e.g.*, *Esberg v. Union Oil Co.*, 28 Cal. 4th 262 (2002); *Rosas v. Montgomery*, 10 Cal. App. 3d 77 (1970).

consultation with the [CPUC] and the State Air Resources Board, shall establish a greenhouse gases emission performance standard for all baseload generation of local publicly owned electric utilities at a rate of emissions of greenhouse gases that is no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation.”

CEC Action 3: Pub. Util. Code 8341(c)(1) - “The Energy commission shall adopt regulations for the enforcement of this chapter with respect to a local publicly owned electric utility.”⁶

CEC Action 4: Pub. Util. Code 8341(e)(1) - “Enforcement of the greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard.”⁷

A. CEC Action 1 – The EPS must be adopted as a regulation following a procedure substantially in compliance with the APA.

CEC Action 1 requires the Commission to follow APA procedures to adopt a regulation to establish the EPS.⁸

- I.** The “plain-meaning” rule is a primary canon of statutory construction and SB 1368 must be interpreted accordingly.

Pursuant to the “plain-meaning” rule, which is a fundamental canon of statutory construction, the rule for interpreting statutes is first to give words their usual and ordinary meaning.

“In construing [a] statute, we follow " '[t]he fundamental rule ... that the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. ...' In determining that intent, we first examine the words of the statute itself. ... Under the so-called 'plain meaning' rule, courts seek to give the words employed by the Legislature their usual and ordinary meaning. ... If the language of the statute is clear and unambiguous, there is no need for construction.”⁹

⁶ Pub. Util. Code section 8341(e)(1).

⁷ Pub. Util. Code section 8341(e)(1).

⁸ Gov’t. Code section 11346(a). Any regulation that substantially fails to comply with the APA requirements may be judicially declared invalid. Gov’t. Code section 11350. *See California Advocates for Nursing Home Reform v. Bonta*, 106 Cal. App. 4th 498, 507 (2003).

⁹ *Bodell Construction Co. v. Trustees of Cal. State University*, 62 Cal. App. 4th 1508, 1515-1516 (1998) (citations omitted in original); *Jensen v. BMW of North America, Inc.*, 35 Cal. App. 4th 112, 122-123 (1995).

Section 8341(e)(2) could hardly be more clear and unambiguous when the words are given their usual and ordinary meaning. Section 8341(e)(2): (1) expressly states that the Commission shall follow the APA in adopting the EPS; and (2) clearly requires that the EPS will be a “regulation,”¹⁰ which is a legal term of art that in itself indicates the Commission must follow the APA.¹¹ The Legislature even cited the statutory reference to the APA and in that way left absolutely no room for ambiguity.

2. The Legislature and courts have clearly and uniformly stated the important purposes for the procedures required by the APA.

SB 1368 directs that the process for adopting the EPS as a regulation must follow the requirements of the APA. The purpose of the APA is to “establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations.”¹² There is strong public policy behind the APA and it “shall not be superseded or modified by any subsequent legislation except to the extent that the legislation shall do so expressly.”¹³

Among other things, the APA requires the CEC to give interested parties an opportunity to comment on the proposed regulations.¹⁴ California courts have been unwavering in their statements concerning the important purposes of the APA.

“One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]. The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they

¹⁰ Gov't. Code section 11342.600.

¹¹ Gov't. Code section 11340.5(a). “No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.” *Id.*

¹² Gov't. Code section 11346(a).

¹³ Gov't. Code section 11346(a).

¹⁴ Gov't. Code section 11346.8.

serve, thus providing some security against bureaucratic tyranny [citation]."¹⁵

“We further observed a major aim of the Legislature in enacting the APA was to provide an opportunity for persons to be affected by proposed regulatory action to be heard on the merits of the proposal.”¹⁶

“The APA is intended to advance "meaningful public participation in the adoption of administrative regulations by state agencies" and create "an administrative record assuring effective judicial review." [citation] In order to carry out these dual objectives, the APA (1) establishes "basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations" [citation] which give "interested parties an opportunity to present statements and arguments at the time and place specified in the notice and calls upon the agency to consider all relevant matter presented to it," and (2) "provides that any interested person may obtain a judicial declaration as to the validity of any regulation by bringing an action for declaratory relief in the superior court." [citation].”¹⁷

Pursuant to SB 1368, the POUs are the primary “affected parties” under the prospective CEC EPS and must be afforded a meaningful opportunity to participate.

3. The Legislature has clearly stated that the APA applies to the CEC’s implementation of SB 1368.

To open a rulemaking, the CEC must prepare and submit to the OAL and interested public, certain documents for a NOPA including: (a) a copy of the express terms of the proposed regulation; and (b) an initial statement of reasons for proposing the adoption of the regulation.¹⁸ Also, included within the APA are procedural requirements to promote meaningful participation by the affected parties and improve the quality of the adopted regulations.¹⁹ One such requirement is that *prior* to publication of the NOPA, the agency should “involve parties who would be subject to the proposed regulations in public discussions regarding those proposed regulations, when the proposed regulations involve

¹⁵ *Morning Star Co. v. State Board of Equalization*, 38 Cal. 4th 324, 333-334 (2006) (quoting *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 568-569 (1996)); *Armistead v. State Personnel Board*, 22 Cal. 3d 198, 204 (1978).

¹⁶ *Union of American Physicians v. Kizer*, 223 Cal. App. 3d 490, 498 (1990); *Armistead v. State Personnel Board*, 22 Cal.3d 198, 204 (1978).

¹⁷ *Voss v. Superior Court of Tulare County*, 46 Cal. App. 4th 900, 908-909 (1996).

¹⁸ Gov’t. Code sections 11346.2, 11346.5. By definition, a “proposed action” means the regulatory action, notice of which is submitted to the [OAL] for publication in the California Regulatory Notice Register.” Gov’t. Code section 11342.595.

¹⁹ Gov’t. Code section 11346.45(a).

complex proposals or a large number of proposals that cannot easily be reviewed during the comment period.”²⁰

“Promulgation of a regulation under the APA represents the unilateral imposition of a state agency's will upon the segment of the public to be regulated. The APA therefore requires the agency to justify its initial decision to propose the regulation and its final decision to issue it in the face of the objections or criticisms of those to be regulated. It also makes provision for an independent review of the agency's authority and reasoning, as well as of the content and form of the regulation.”²¹

Accordingly, this CEC rulemaking, pursuant to the APA, should be sufficiently detailed commensurate with the complexity of this subject matter.²²

B. CEC Action 2 – According to section 8341(e)(1) and the APA, the EPS will be “established” at the time the Commission adopts the EPS regulation at a public hearing.

CEC Action 2 requires that the CEC shall establish an EPS “[o]n or before June 30, 2007, . . . , *at a duly noticed public hearing . . .*.”²³ When the plain-meaning rule is applied to *this sentence* in section 8341(e)(1) and the words are given the meaning they bear in ordinary use, the language is clear and unambiguous and there is no need for construction. Particularly, when the language of CEC Action 2 is read in harmony with the APA, there is absolutely no doubt that the agency action establishing the EPS occurs *at the public hearing*.²⁴

- I. The proposed regulatory action is initiated by submitting a NOPA and is completed at a hearing after which the rulemaking record is closed.

As discussed above, the CEC must prepare and submit a NOPA in order to open a rulemaking.²⁵ Among other things, the NOPA must specify: (1) the time, place, and nature

²⁰ Gov’t. Code section 11346.45(a).

²¹ *Voss v. Superior Court of Tulare County*, 46 Cal. App. 4th 900, 920-921 (1996). See Gov’t. Code section 11349.1.

²² Gov’t. Code section 11346.45(a).

²³ Pub. Util. Code 8341(e)(1)(emphasis added).

²⁴ See Gov’t. Code sections 11346.4(a), 11347.3(b)(8), 11347.3(c).

²⁵ Gov’t. Code sections 11346.2, 11346.4, 11346.5, 11346.8. See Cal. Code Regs., tit. 20 sections 1222,

of the proceedings for adoption of the regulation;²⁶ and (2) the date by which written comments must be received from parties to be considered by the CEC before it adopts the regulation.²⁷ In regard to SB 1368, the Legislature has clearly spoken on these issues. The nature of the proceeding for adopting the EPS shall be a hearing and the time shall be on or before June 30, 2007. Therefore, pursuant to SB 1368, the hearing is the discrete and final procedural action performed by the Commission as it formally adopts the EPS regulation and closes the rulemaking record.²⁸

Pursuant to procedures required by the APA, the Commission is then required to submit the rulemaking package to the OAL for review *after* the regulation is *established* at the hearing.²⁹ The OAL reviews all “regulations *adopted* . . . pursuant to the [APA] procedure . . . and submitted to it”³⁰ The clear, unambiguous and plain meaning of the words in section 8341(e)(1) involving actions and deadlines *pertain only to the regulatory actions of the CEC*. They do not relate or refer to the actions of any other agency, i.e., they do not include the review process of OAL.

2. SB 1368 sets a deadline for the CEC regulatory action establishing an EPS for baseload generation.

CEC Action 2 in Section 8341(e)(1) sets a deadline of June 30, 2007, for a specific regulatory action, i.e., *the establishment of the EPS at a duly noticed public hearing*. The specific regulatory action shall establish a greenhouse gases EPS “for all baseload generation of [POUs] at a rate of emissions of greenhouse gases that is no higher than the rate of emissions of greenhouse gases for combined-cycle natural gas baseload generation.”³¹

1223. The definition of a “rulemaking proceeding” includes “any hearings designed for the adoption . . . of any rule, regulation, or standard of general application, which implements . . . any other statute enforced or administered by the commission.” Cal. Code Regs., tit. 20 sections 1220(a).

²⁶ Gov’t. Code section 11346.5(a)(1)

²⁷ Gov’t. Code section 11346.5(a)(15).

²⁸ Gov’t. Code section 11346.8(d).

²⁹ Then, once the hearing is complete, the agency shall, pursuant to Government Code section 11346.9, prepare and submit to OAL the *adopted regulation*, an updated informative digest, and the final statement of reasons.

³⁰ Gov’t. Code section 11349.1(a).

³¹ Pub. Util. Code section 8341(e)(1).

The regulatory action authorized and directed by the Legislature in CEC Action 2 is only to *establish* this standard. In other words, this language does not authorize the CEC to *adopt other regulations* concerning enforcement or ensuring compliance. It is not unusual for a statute to grant the CEC authority for adopting a standard or collecting data on a particular subject, but having the enforcement authority remain with the local governing body.³² The language in CEC Action 2 does not preclude CEC enforcement authority, but the CEC must find that legislative prescription elsewhere in SB 1368.³³ This prescription is given, in fact, and will be discussed by CMUA in the next section, below.

C. CEC Action 3 – The CEC shall adopt regulations for the enforcement of SB 1368.

CEC Action 3 directs the “[t]he Energy Commission [to] adopt regulations for the enforcement of [Public Utilities Code sections 8340 and 8341] with respect to a local publicly owned electric utility.”³⁴

I. The “regulation” necessary for enforcement is different than the “regulation” establishing the EPS.

The actual words in section 8341(c)(1) are plain on their face and are not superfluous.³⁵ The Legislature had reason to include CEC Action 3 in a separate subsection of SB 1368 because as discussed above, the authorization in section 8341(e)(1) does not provide for enforcement powers. The authorization of section 8341(c)(1) is distinct and must be specifically referenced in any NOPA submitted to the OAL that concerns adopting regulations for the enforcement of SB 1368.³⁶ Furthermore, the

³² See e.g., Pub. Util. Code section 9620 (authorizing the CEC to collect data for evaluating a POU’s progress in meeting certain resource adequacy requirements but not authorizing any enforcement powers); Pub. Util. Code section 9615 (amended by Stats. 2006, Chapter 734) (authorizing the CEC to summarize information about a POU’s energy savings and demand reductions programs and then making recommendations to the POUs, Legislature, and Governor, but not authorizing any enforcement powers); Pub. Util. Code section 387 (amended by Stats. 2006, Chapter 464) (requiring a POU to report certain information to the CEC concerning its renewable portfolio standard but making the POU responsible for implementing and enforcing the standard).

³³ “An intention to legislate by implication is not to be presumed.” *People v. Welch*, 20 Cal.App.3d 997, 1002 (1971).

³⁴ Pub. Util. Code 8341(e)(1).

³⁵ “An interpretation that renders statutory language a nullity is obviously to be avoided.” *Williams v. Superior Court*, 5 Cal.4th 337, 357 (1993).

³⁶ Gov’t. Code sections Section 11346.5(a)(2), 11346.2(a)(2).

Legislature did not expressly include any deadline in the language of section 8341(c)(1) that applies to any CEC action adopting regulations for enforcement and compliance monitoring.

2. APA requirements apply to the CEC's adoption of implementing "regulations."

Unlike section 8341(e)(2), the language in section 8341(c)(1) does not include a statutory reference to the APA. This is not necessary, however, because the section expressly provides that the CEC "shall adopt regulations for the enforcement of this chapter."³⁷ The Government Code defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."³⁸ The CEC, as a state agency, is prohibited from utilizing any rule which is a regulation as defined in the Government Code, unless the rule has been duly adopted as a regulation following APA procedures.³⁹ Consequently, the CEC must follow the APA procedures in adopting the implementing regulations.

D. CEC Action 4 – CEC enforcement of the EPS.

CEC Action 4 requires that "[e]nforcement of the greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard."⁴⁰ This is the problematical sentence ostensibly supporting the CEC's proposal for a compressed timeline for 06-OIR-1. However, the CEC's reasoning in the White Paper cannot be sustained when this sentence is read together with the entire statutory scheme of SB 1368 which includes the clear and unambiguous language in § 8341(e)(1)-(2).⁴¹

³⁷ Pub. Util. Code 8341(c)(1).

³⁸ Gov't. Code sections Gov. Code 11342.600; *Union of American Physicians v. Kizer*, 223 Cal. App. 3d 490, 496-497 (1990).

³⁹ Gov't. Code sections Gov. Code, § 11340.5(a).

⁴⁰ Pub. Util. Code 8341(e)(1).

⁴¹ The well-established rules of statutory construction require that a specific statutory provision be harmonized and considered with reference to the entire statutory system of which it is a part. *Bowland v. Municipal Court*, 18 Cal.3d 479, 489 (1976).

According to the APA, a non-emergency CEC regulation may not be enforced until OAL has reviewed the regulation and filed it with the Secretary of State.⁴² Therefore, in the normal course, there will be a time lag between the final adoption and the effective date. The regulation cannot be effective until OAL completes its review and OAL cannot begin the review until *after* the regulation is *adopted* by the CEC *at* a duly noticed public hearing.⁴³ This presents a conundrum for interpreting this statute.

The essential point is that the words of CEC Action 4 in section 8341(e)(1) cannot be read in isolation, but rather must be interpreted in context with the remainder of SB 1368.⁴⁴ The “[w]ords must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.”⁴⁵ Therefore, a reading of CEC Action 4, must be undertaken by considering it in context with the entirety of SB 1368, particularly CEC Actions 1, 2, and 3.⁴⁶ This is discussed in the next section, below.

⁴² Pursuant to the APA, all CEC regulations are subject to administrative review by the OAL, an independent agency “charged with the orderly review of adopted regulations” and thereafter the Governor’s Office. Gov’t Code sections 11340.1, 11349.5. The OAL will evaluate whether: (1) the CEC’s rulemaking record supports the need for the regulation; (2) the CEC is authorized to adopt the particular regulation; (3) the regulation, as written, will be easily understood by those entities directly affected by it; (4) the regulation is in harmony with existing law; (5) the regulation is consistent with the law interpreted, implemented or made specific by the regulation; and, (6) the regulation duplicates or overlaps existing state or federal law or regulation. Gov’t. Code sections 11349, 11349.1. The OAL must either “approve a regulation . . . and transmit it to the Secretary of State for filing or disapprove it within 30 working days after the regulation has been submitted to the [OAL] for review.” Gov’t. Code section 11349.3(a). A disapproved regulation will be returned to the CEC with a statement of reasons for the disapproval and the CEC will be required to rewrite and resubmit the regulation. Gov’t. Code section 11349.3(b).

⁴³ “No state agency shall . . . enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, *which is a regulation* . . . , unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been *adopted as a regulation and filed with the Secretary of State* pursuant to this chapter.” Gov’t Code section 11340.5(a) (emphasis added).

⁴⁴ “It is a well-settled rule of statutory interpretation that courts must consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part.” *Phelps v. Stostad*, 16 Cal.4th 23, 32 (1997). In statutory construction, the courts “do not consider . . . statutory language in isolation.” *Flannery v. Prentice*, 26 Cal.4th 572, 578 (2001). Instead, the court will “examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts.” *Alford v. Superior Court*, 29 Cal.4th 1033, 1040 (2003).

⁴⁵ *California Manufacturers Assn. v. Public Utilities Commission*, 24 Cal. 3d 836, 844 (1979).

⁴⁶ “The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible.” “We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” . . . The legislative purpose will not be sacrificed to a literal construction of any part of the statute. . . .” *Bodell Construction Co. v. Trustees of Cal. State University*, 62 Cal.App.4th 1508, 1515-1516 (1998) (citations omitted in original).

IV. INTERPRETATION OF SB 1368

SB 1368, signed by the Governor and filed with the Secretary of State on September 29, 2006, adds Chapter 3 (commencing with Section 8340) to Division 4.1 of the Public Utilities Code. This new chapter relates to the establishment of greenhouse gases EPS by the CEC for POU's, and by the California Public Utilities Commission ("CPUC") for load-serving entities.

SB 1368 requires the CEC to adopt regulations involving a very complex subject matter applicable to more than 50 POU's that are very diverse in many ways including operational constraints, reliability constraints, resource ownership, existing contracts, control areas, types and amount of load served, and political structure. This is a novel subject for a Commission rulemaking and the CEC has no guidance from other examples, since no similar regulations currently exist in California or any other state.⁴⁷

Below, CMUA discusses three interpretations of SB 1368. The first is the interpretation proposed by the White Paper which CMUA is internally inconsistent and in conflict with the requirements of SB 1368. The second and third interpretations are reasonable alternatives proposed by CMUA that may guide the Electricity Committee in its decision to amend the procedural schedule as requested by CMUA.

A. The White Paper's interpretation of section 8341(e)(1) is inconsistent with the statutory scheme of SB 1368 and the APA, and directly in conflict with the White Paper's own implementation schedule.

If the CEC follows its current schedule, CEC Action 1 will be completed if and when the Commission substantially complies with the APA requirements. CEC Actions 2 and 3 will be completed when the regulations are adopted at the hearing proposed by the CEC on May 2, 2007, a full two months ahead of the hearing deadline set by SB 1368.⁴⁸

⁴⁷ The activities in the greenhouse gas EPS rulemaking (R.06-04-009) at the CPUC will offer only minimal guidance for *at least* three reasons: (1) the resolution of significant issues for the POU's will be different than those reached in the CPUC process; (2) POU's will present new issues that were not contemplated in the CPUC process; and (3) the CPUC need not follow the APA to the same extent as the CEC. This latter point means that the CEC must draft actual regulations which are presented to OAL for review and filing with the Secretary of State. In contrast, the CPUC will establish its EPS by a decision of its Commissioners. Therefore, regardless of what actions the CPUC has already undertaken or will undertake, the CEC is treading on novel ground and must ensure substantial compliance with the APA procedures.

⁴⁸ Some might be tempted to argue that the Legislature recognized this time constraint since the August 7th version of SB 1368 had an EPS establishment date of March 31, 2007 and the chaptered version has the date extended to June 30, 2007. They might argue that this history supports a legislative intent to include the

Yet, the enforcement aspect of CEC Action 4 is not scheduled or possible before June 29, 2007 - almost two months later – the date for filing with the Secretary of State as contemplated by the White Paper.

The problem is self-evident. Even if the timeline proposed in the White Paper is followed and presuming that OAL completes its review on or before June 30, the CEC will not have complied with its own interpretation of section 8341(e)(1). There will have been at least a two month gap between the time the “rule has been adopted as a regulation” by the CEC, the time the regulation is “filed with the Secretary of State” after the OAL review, and the time that the regulation is enforceable by the CEC. So, even in the CEC’s proposed schedule, the Commission will fail literally to begin enforcement “immediately upon the establishment” of the EPS.⁴⁹ It would surely stretch the rules of statutory interpretation to define the word “establish” differently in this sentence than how it was unambiguously used in CEC Action 2.

The lesson is abundantly clear: the CEC’s literal interpretation of section 8341(e)(1) isolated from the remainder of SB 1368 must be wrong, and therefore, cannot be used to compel a compressed schedule with the OAL review inserted before June 30, 2007.⁵⁰ According to the bare reasoning put forth in the White Paper, it is not legally

entire APA process before the June 30th date. However, the courts "can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law. 'As evidences of legislative intent they [unpassed bills] have little value.' [citations.]" *Ingersoll v. Palmer*, 43 Cal. 3d 1321, 1349 (1987); *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal. 3d 1379, 1396 (1987). "The statute presently in effect [is binding], not . . . a legislative statement of intent that failed to become law." *Peralta Community College Dist. v. Fair Employment & Housing Com.*, 52 Cal. 3d 40, 52 (1990) (insertion in original).

⁴⁹ It is enlightening to compare the SB 1368 section dealing with the CPUC processes. Section 8341(d)(1) states that "[o]n or before February 1, 2007, the [CPUC], . . . , shall establish a greenhouse gases emission performance standard" Further, "[e]nforcement of the [CPUC] greenhouse gases emission performance standard shall begin immediately upon the establishment of the standard." This enforcement language is identical to the language in 8341(e)(1) and when applied to the CPUC adoption *decision* procedures, is literally possible. The CPUC EPS is established when the Commission vote to adopt a Proposed Decision and then the resulting Final Decision may literally become effective immediately. The CPUC rulemaking process is complete upon a Final Decision and the CPUC is not required by law to follow APA sections similar to the CEC for adopting regulations. *This is a critical distinction.*

⁵⁰ "One of the most basic rules of construction is that statute should be given the interpretation which yields a reasonable result. [citation] It is not to be presumed that the Legislature would command performance of a thoroughly useless act." *Netwig v. Huntington Beach Union High Sch. Dist.*, 52 Cal. App. 3d 529, 532 (1975). "Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided." *Calif. Mfgers. Assn. v. PUC*, 24 Cal 3d 836, 844 (1979). The statute did not say that the OAL process must be done by June 30, nor could it. It expressly calls only for a hearing before June 30.

possible for the CEC to follow a literal interpretation of CEC Action 4 *and* comply with the APA.

B. CMUA presents two reasonable interpretations for section 8341(e)(1) in harmony with, and not in conflict to the whole statute.

As shown above, the plain meaning rule prevails in interpreting CEC Actions 1, 2, and 3.⁵¹ The CEC must follow the APA in adopting regulations for establishing and implementing an EPS. The regulations shall also cover the remaining subsections of SB 1368 for implementing the EPS.⁵²

I. Interpretation 1 – SB 1368 requires that the EPS regulations and implementing regulations shall be adopted at the same hearing and have the same effective date.

As the three CEC Actions are interpreted in context with the whole statutory scheme of 1368, the plain meaning rule compels the reading that the EPS is “established” at the public hearing when the rulemaking record is closed. Interpretive problems arise in CEC Action 4 since the *action of establishing* the EPS and the *action of enforcing* the EPS cannot be coincident within the normal APA process.

A reasonable interpretation may be achieved when the words are construed in context, and the provisions [particularly sections 8341(c)(1), (e)(1)-(2)] relating to the same subject matter are harmonized to the extent possible. It is possible to interpret the sections to make them workable and reasonable, in accord with common sense and justice, and avoiding an absurd result.⁵³

As discussed above, SB 1368 utilizes two separate sections to direct CEC regulatory actions, one for establishing the EPS⁵⁴ and one for implementing the remainder

⁵¹ "If the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words." *Building Industry Assn. v. City of Camarillo*, 41 Cal.3d 810, 818 (1986).

⁵² See e.g., Pub. Util. Code sections 8341(c)(2), (e)(4), (e)(5).

⁵³ "If the meaning of the words is not clear, we must take the second step and refer to the legislative history. [Citation.] 'The final step--and one which . . . should only be taken when the first two steps have failed to reveal clear meaning--is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable [citations], in accord with common sense and justice, and to avoid an absurd result [citations].' [Citation.]." *Jensen v. BMW of North America, Inc.*, 35 Cal. App. 4th 112, 122-123 (1995).

⁵⁴ CEC Action 2 in Pub. Util. Code 8341(e)(1).

of SB 1368.⁵⁵ An express deadline is placed on the former regulatory action but not the latter. Therefore, a reasonable interpretation is that CEC Action 4 in section 8341(e)(1) is used by the Legislature to tie these two regulatory actions together by effectively requiring that the *action of establishing* the EPS regulation and the *action of establishing* the enforcement regulations shall be coincident.

This can be achieved through a single rulemaking that adopts both sets of regulations at the same hearing. The effective dates of the EPS regulations and the enforcement regulations will be exactly the same, enabling the CEC to begin enforcement of the EPS immediately upon the standard becoming effective. CEC Action 4 serves a necessary purpose indicating the legislative intent that the CEC shall not delay enforcing the EPS – for instance, the CEC may not draft an enforcement regulation with a later effective date than the EPS regulation;⁵⁶ the CEC may not delay in submitting the regulations to OAL;⁵⁷ and, the CEC may not refuse to enforce the EPS once it becomes effective. This interpretation is consistent and not in conflict with SB 1368.⁵⁸

2. Interpretation 2 - The EPS regulations and implementing regulations shall have an effective date that is coincident with the adoption date.

In the alternative, a second interpretation is that SB 1368 requires the CEC regulations to have an *effective* date that is the same date as the adoption hearing, i.e., on or before June 30, 2007. Pursuant to the APA, a regulation may not be adopted before the CEC has considered all relevant subject matter presented to it.⁵⁹ As discussed above, the NOPA sets the final date for submitting comments⁶⁰ and the date for the final agency action adopting the regulation.⁶¹ In the case of SB 1368, the final agency action is the hearing. Therefore, the date set for the adoption hearing may never be earlier than the final

⁵⁵ CEC Action 3 in Pub. Util. Code 8341(c)(1).

⁵⁶ On the contrary, in some statutory schemes the CEC may specify the date when the regulations shall take effect and may even specify different dates for different regulations. *See e.g.*, Pub. Resources Code section 25609 (relating, in part, to solar installations and building standards).

⁵⁷ Gov't. Code sections 11364.4(b).

⁵⁸ Gov't. Code sections 11342.2.

⁵⁹ Gov't. Code section 11346.8(a).

⁶⁰ Gov't. Code section 11346.5(a)(15).

⁶¹ Gov't. Code section 11346.5(a)(1).

submission date but there is no limitation that would prevent having the submission date and hearing date on the same day.⁶²

Likewise, the regulation's *effective* date may never occur *before* the final regulatory action closing the record. Typically, a regulation required to be filed with the Secretary of State is effective on the 30th day after OAL files it with the Secretary, but, the Government Code provides two relevant exceptions to this general rule.⁶³ A regulation may become effective on a particular day if so specifically prescribed by the authorizing statute.⁶⁴ Also, an agency may make a written request to OAL demonstrating good cause for an earlier effective date than the 30th day after filing.⁶⁵ In either case, it appears that the CEC may request an effective date on or before June 30, 2007, as long as the requested effective date is no earlier than the adoption date at the hearing which closes the record.

Although, it is true that laws are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent,⁶⁶ a law is only retrospective if it "relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred."⁶⁷ Therefore, as long as the requested effective date did not precede the comment submission and adoption dates, the law would not act retrospectively and may pass muster in the OAL review.

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⁶² See 64 Op. Atty Gen. Cal. 312 (1981) (concluding that an agency may not enforce a regulation before the date of final comments but not precluding the two from occurring simultaneously at the hearing).

⁶³ Gov't. Code section 11343.4

⁶⁴ Gov't. Code section 11343.4(a)

⁶⁵ Gov't. Code section 11343.4(c).

⁶⁶ *Evangelatos v. Superior Court*, 44 Cal.3d 1188, 1207 (1988).

⁶⁷ *Bear Valley Mut. Water Co. v. County of San Bernardino*, 242 Cal. App. 2d 68, 72-73 (1966).

V. CONCLUSION

The plain meaning interpretation of SB 1368 and the whole statutory scheme of the APA clearly demonstrate that the EPS shall be “established” when the Commission adopts the regulation at the scheduled hearing. The Electricity must interpret the statute in light of this plain meaning and interpret the enforcement question accordingly. CMUA requests the Electricity Committee to consider the practical and legal arguments set forth above that will provide additional time for affected parties to fully participate in this rulemaking and thoroughly address the myriad issues presented by SB 1368. CMUA further requests the Electricity Committee to adopt a revised schedule substantially similar to Appendix A no later than the *Electricity Committee Workshop on Greenhouse Gases Emission Performance Standard for Implementing Senate Bill 1368* on December 8, 2006.

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Respectfully submitted,



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Appendix A

CMUA Proposal for 06-OIR-1 Schedule

CEC Proposed Date	CEC Proposed Schedule in White Paper	CMUA Proposed Date	CMUA Proposed Schedule
Dec 8, 2006	First public workshop	Dec 8, 2006	First public workshop
Jan 11, 2007	Second public workshop	Jan 11, 2007	Second public workshop
Jan 18, 2007	Third and final public workshop		
Jan 8-19, 2007	CEC staff begins preparing a Notice of Proposed Action (NOPA)	Jan 2007	CEC staff begins preparing a Notice of Proposed Action (NOPA) and updates as required during the workshop process.
		Feb 15, 2007	Third public workshop
Feb 20, 2007	NOPA submitted to the Office of Administrative Law (OAL)		
Mar 2, 2007	NOPA is published; 45 day public comment period begins		
		Mar 15, 2007	Fourth public workshop
		Apr 12, 2007	Fifth public workshop
May 2, 2007	Public Hearing for adoption of EPS by CEC	May 1, 2007	NOPA submitted to OAL. CEC staff is preparing rulemaking packet for OAL submission.
		May 11, 2007	NOPA is published; 45 day public comment period begins.
May 18, 2007	Submits rulemaking packet to OAL with adopted regulations and final statement of reasons; Review process begins; 30 working day review by OAL; no party or CEC may participate during the review		CEC staff accepts comments through the APA process up through hearing date.
June 29, 2007	Estimated approval date by OAL and filing with Secretary of State.	June 27, 2007	Public Hearing for adoption of EPS by CEC on or before June 30, 2007
		July 9, 2007	Submits rulemaking packet to OAL with adopted regulations and final statement of reasons; Review process begins; 30 working day review by OAL; no party or CEC may participate during the review
		Aug 10, 2007	Estimated approval date by OAL and filing with Secretary of State. Under interpretation 1, the EPS shall be effective this date. Under interpretation 2, the EPS shall be effective from June 27, 2007.

This proposed schedule provides for five public workshops as opposed to only three in CEC's proposal. More importantly, each workshop is separated by approximately one month to allow for improved preparation, planning, collecting and evaluating data, and working collaboratively with CEC staff, and meaningful time period for CEC staff to review and revise the proposed regulation based on additional information and input. The time frame of one week in between the second and third workshops in the CEC's proposed schedule makes the third workshop almost meaningless.

This proposed schedule does not discriminate against any party and permits all parties the same time for consideration and comment, and allows all stakeholders – including the CEC – an

opportunity to fully review the issues. Furthermore, it allows CEC staff more opportunity to consider alternatives, prepare the NOPA, draft the proposed regulations, and prepare the Final Statement of Reasons.

In the CEC schedule, the three workshops are compressed into a 6 week time frame, with the Christmas holidays included within that time. CMUA's proposed schedule more than triples the time frame, proposing 5 workshops within a span of 19 weeks. Even with this procedural expansion, the filing of the regulation with the Secretary of State will potentially occur only 5 weeks later than under the proposed CEC schedule.