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CENTER *for* BIOLOGICAL DIVERSITY



Community Environmental Council



Via Email and U.S. Mail

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 08-GHG OII-1
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DOCKET	
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Re: Comments on October 28, 2008 Committee Workshop on Greenhouse Gas Emission Impacts of Power Plants and the Initial Questions to be Answered in the Order Instituting Information Proceeding. Docket Number 08-GHG OII-1

Thank you for the opportunity to participate in this Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emissions of Power Plants. The Center for Biological Diversity, Communities for a Better Environment, Community Environmental Council and Earthjustice offer the following comments on this proceeding.

We applaud the Energy Commission for instituting this proceeding and hope these comments will support your development of a successful and legally compliant approach to meeting the requirements of California Environmental Quality Act (“CEQA”) within the power plant siting context. The full extent of current law must be used to stem the tide of climate change.

CEQA provides an opportunity and a legal mandate to limit greenhouse gas emissions from new power plants. Making the deep and necessary emission reductions from existing emission levels in order to avert the worst impacts of global warming will be all the more

difficult if new projects continue to release additional greenhouse gas pollution into an oversaturated atmosphere.

To date, the Energy Commission has applied a de facto CEQA exemption to greenhouse gas emissions from new power plants. The Energy Commission has simply not conformed its greenhouse gas analysis with the requirements of CEQA. For example, in April of this year, the Energy Commission certified the Colusa Generation Station's permit for a 660-megawatt (MW) natural gas-fired electric generating facility.¹ The Final Decision had a two page discussion of greenhouse gases that only required the project to report the greenhouse gases emissions.² The Applicant was cleared to construct and operate a project that will be a major emitter of new greenhouse gases without any analysis of the project's contribution to the cumulative impact of climate change and with no attempt to mitigate the project's impacts.

The current approach to greenhouse gases is contrary to the rigorous application of CEQA applied for other environmental impacts of power plants sited by the Energy Commission. The order instituting this proceeding aptly describes the Commission's process.

The Energy Commission's licensing process, which includes extensive environmental impact review, has been certified as the functional equivalent of the CEQA environmental impact review (EIR) process (Public Res. Code § 25541.5). In those cases where the Commission exempts a project from the requirement to obtain certification (Public Res. Code § 25541), it must find that the project will either have no significant adverse environmental effect or has mitigated any such impact to a level of insignificance.³

The Energy Commission must conform its approach to greenhouse gas emissions to its analysis for all other pollutants. The Energy Commission must quantify the potential greenhouse gas emissions from new power plants that it certifies and mitigate these emissions to a level of insignificance.

1. Global Warming Impacts from a Project's Greenhouse Gas Emissions Are Subject to CEQA Review.

It is now well-established that a project's contribution to global warming impacts is subject to CEQA. As noted by the Office of Planning and Research (OPR) in its recent technical advisory, "Senate Bill 97, enacted in 2007, amends the CEQA statute to clearly establish that GHG emissions and the effects of GHG emissions are appropriate subjects for CEQA analysis."⁴

¹ See, e.g., Final Decision, Colusa Generating Station Application For Certification (06-AFC-9), April 2008.

² *Id.* at 127-28.

³ Order Instituting Informational Proceeding (Oct 8, 2008) ("OIIP") at 1.

⁴ Technical Advisory, CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality (CEQA) Review, Office of Planning and Research (June 19, 2008) ("OPR Technical Advisory") at 3.

Similarly, the Air Resources Board (ARB) in a recently released proposal for a greenhouse gas threshold states:

California law provides that climate change is an environmental effect subject to the California Environmental Quality Act (CEQA). Lead agencies therefore are obligated to determine whether a project's climate change-related effects may be significant, requiring preparation of an Environmental Impact Report, and to impose feasible mitigation to substantially lessen any significant effects.⁵

That same document summarizes the legal effect of adding additional greenhouse gases to the atmosphere.

There is a scientific consensus that human activities, chief among them the burning of fossil fuels, profoundly affect the world's climate by increasing the atmospheric concentration of GHG beyond natural levels. Contributing additional GHG pollution to the atmosphere leads to higher global average temperatures, changes to climate, and adverse environmental impacts here in California and around the world. Climate change, caused by 'collectively significant projects taking place over a period of time,' is a quintessential cumulative impact.⁶

The Energy Commission cannot simply exempt greenhouse gases from its environmental review because other state laws such as AB 32 address the emissions of greenhouse gases. AB 32, for example, explicitly states that nothing in that statute shall be construed to relieve a state entity from complying with its existing legal obligations or limit its existing authority "to adopt and implement greenhouse gas emissions reduction measures." Health and Safety Code § 38598. For greenhouse gas emissions, CEQA requires a lead agency to "identify and quantify the GHG emissions; assess the significance of the impact on climate change; and if the impact is found to be significant, identify alternatives and/or mitigation measures that will reduce the impact below significance."⁷

2. Establishing a Threshold of Significance for Greenhouse Gas Emissions

- a. The development of a valid threshold of significance must be tied to the relevant environmental objective.

⁵ Preliminary Draft Staff Proposal Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under the California Environmental Quality Act, California Air Resources Board (Oct. 24, 2008) at 1 (citations omitted).

⁶ *Id.* at 3 (citing the IPCC 4th Assessment Report, Working Group II, Summary for Policymakers, Figure 2 and 14 Cal. Code Regs. ("CEQA Guidelines") § 15355(b)).

⁷ Technical Advisory, CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality (CEQA) Review, Office of Planning and Research (June 19, 2008) ("OPR Technical Advisory" at 5.)

CEQA mandates that a threshold of significance be based on “scientific and factual data” related to relevant environmental impact. CEQA Guidelines § 15064(b). To properly develop a threshold of significance for greenhouse gas emissions, the Energy Commission must first articulate the environmental objective to be achieved by the threshold and then ensure that the proposed threshold meets that objective. As recognized by ARB, the relevant environmental objective with regard to a project’s impact on global warming is stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference (DAI) with the climate system. Framing the objective of a threshold of significance in the context of preventing DAI with the climate system is consistent with CEQA’s fundamental purpose. As set forth in Public Resources Code Section 21000(d), “The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.” With regard to climate change, the prevention of DAI is the critical threshold to protect the health and safety of the people of California. The prevention of DAI with the climate is also the objective adopted by the international community. As set forth in the United Nations Framework Convention on Climate Change, to which the United States is a party: “The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁸

Dangerous anthropogenic interference with the climate system is a defined concept from which a threshold of significance under CEQA can be derived. While environmental impacts from global warming are already being experienced, dangerous anthropogenic interference has typically been defined at temperature increases above 2°C from pre-industrial levels, or a 450 ppm atmospheric concentration of CO₂ eq.⁹ 2050 is the time frame commonly set by scientists in which to achieve the emission reductions necessary for climate stabilization. The emission reduction scenario set by AB 32 and Executive Order S-3-05, whereby emissions are reduced to 1990 levels by 2020 and then to 80% below 1990 levels by 2050, is consistent with a stabilization scenario in the +/- 450 ppm range.¹⁰ However, some climate scientists, including NASA’s premier climatologist, James Hansen, now believe that reductions need to be greater than those intended to cap atmospheric emissions at 450 ppm in order to avoid dangerous climate change based in part on the alarming and unpredicted rate of loss of Arctic sea ice and other

⁸ United Nations Framework Convention on Climate Change (UNFCCC), art. 2, May 9, 1992, available at http://unfccc.int/essential_background/convention/background/items/1349.php.

⁹ See, e.g., Union of Concerned Scientists, How to Avoid Dangerous Climate Change: A Target for U.S. Emissions Reductions (Sept. 2007), available at http://www.ucsusa.org/global_warming/solutions/big_picture_solutions/a-target-for-us-emissions.html.

¹⁰ While the emission reduction targets embodied in AB 32 and Executive Order S-3-05 can inform a determination of significance thresholds, this is because they reflect scientific data on needed emissions reductions. Under CEQA, regulatory standards can serve as proxies for significance only to the extent that they accurately reflect the level at which an impact can be said to be less than significant. See, e.g., *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004).

recent climate change observations.¹¹ Therefore, the emission reduction pathways set by AB 32 and Executive Order S-3-05 would appear to represent bare minimum reductions and, as our scientific understanding progresses, may ultimately be determined to be insufficient to stabilize the climate.

b. Scientific and factual data most strongly support a threshold of zero.

The more new emissions are added to the atmosphere, the more difficult it will be to attain the emission reduction targets required for climate stabilization. As noted in the CAPCOA White Paper, a 50 percent reduction in the rate of growth assumed under the business-as-usual scenario will preclude attainment of Executive Order S-3-05 emissions targets.¹² Under CAPCOA's own analysis, the only two thresholds that are highly effective at reducing emissions and highly consistent with AB 32 and Executive Order S-3-05 are a threshold of zero or a quantitative threshold designed to capture 90 percent or more of likely future discretionary projects (a 900-ton CO₂ Eq threshold).¹³ However, these thresholds were evaluated to conform with an emission reduction pathway aimed at stabilizing greenhouse gas emissions at 450 ppm CO₂ eq. As our current scientific understanding now calls for even greater reductions and indicates that we may have already approached a climactic tipping point, a threshold of zero ensures that new projects do not have a cumulatively significant impact on global warming.

To support a non-zero threshold, the CEC will have to explain why the collective emissions that are not captured under its proposal will not interfere with efforts to avoid dangerous climate change. As recognized by ARB, the threshold of significance for GHGs "must be sufficiently stringent to make substantial contributions to reducing the State's GHG emissions peak, to causing that peak to occur sooner, and to putting California on track to meet its interim (2020) and long-term (2050) emissions reduction targets." (ARB Proposed Thresholds at 4.) The further the threshold is from zero, the more difficult it will be to support this threshold with substantial evidence and "resolve every fair argument that can be made about the possible significant environmental effects of a project, irrespective of whether an established threshold of significance has been met with respect to any given effect." *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal. App. 4th 1099, 1109 (2004).

In addition, it is important to recognize that in the context of proposed power plants any additional administrative burdens associated with a zero threshold are nominal because power plants are large projects for which the functional equivalent of EIRs are already being prepared.

¹¹ Hansen, J. et al., *Target Atmospheric CO₂: Where Should Humanity Aim?* (April 2008) available at <http://www.columbia.edu/~jeh1>. In *Target Atmospheric CO₂: Where Should Humanity Aim?*, Hansen concludes that "[i]f humanity wishes to preserve a planet similar to that on which civilization developed, paleoclimate evidence and ongoing climate change suggest that CO₂ will need to be reduced from its current 385 ppm to at most 350 ppm." An emissions pathway whereby developed countries would reduced emissions to 80% below 1990 levels as envisioned under Executive Order S-3-05 would cap atmospheric concentrations of CO₂ at approximately 450 ppm. See, e.g., Union of Concerned Scientists, *supra* note 9.

¹² CAPCOA White Paper at 33-34.

¹³ CAPCOA, *CEQA & Climate Change* at 56-57 (Jan. 2008).

Indeed, as the OIIP states, the Energy Commission engages in “extensive environmental impact review” through its process.¹⁴ Fossil fuel power plants are major emitters of greenhouse gas emissions and collectively a large contributor to California’s greenhouse gas emissions. Consideration of these emissions in the siting process is legally required and prudent public policy. It makes little sense for the siting commission to refuse to address the most pressing environmental problem of the day as part of its analysis.¹⁵ Not only does CEQA require that the Energy Commission quantify the greenhouse gas emissions from power plants,¹⁶ but it is imperative that an “apprehensive citizenry” know how the impacts of power choices affect the climate.

- c. A threshold of significance should be applied uniformly across all projects subject to CEC approval

Question 2(A) seems to suggest that a threshold should be different for different types of energy projects. It is more consistent with CEQA to assess a project’s contribution to global warming and then determine the significance of this impact regardless of the type of project. Under CEQA, it is the impact that is relevant to determining significance, not the source of this impact.

- d. Adoption of significance thresholds by other lead agencies.

As the CEC may be aware, ARB, SCAQMD and San Diego County are in the process of developing thresholds of significance for GHGs. In its significance proposal for industrial projects, ARB has proposed a 7,000 ton threshold in conjunction with performance standards for construction and transportation-related emissions. In addition, the San Joaquin Valley Air Pollution Control District (SJVAPCD) has applied a 42,000 ton CO₂ eq. on a project-specific basis. SJVAPCD’s application of a 42,000 ton threshold to a dairy to determine the GHG impacts has been challenged by the Center for Biological Diversity and California Rural Legal Assistance. *Center for Biological Diversity et al. v. SJVAPCD*, Case No. 08 CE CG 03614 (Fresno Sup. Ct. filed Oct. 16, 2008).

3. The Proper Baseline for Determining Significance.

- a. General observations on the determination of baseline emissions

¹⁴ OIIP at 1. The substantive requirements of CEQA apply to certified regulatory programs. *See, e.g., City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1393, 1422.

¹⁵ Some local agencies have considered greenhouse gas emissions thresholds because these agencies are concerned that every Project that emits greenhouse gases would require an environmental impact report. Since the Energy Commission is already conducting an EIR equivalent process, this administrative concern is not an issue in the power plant siting context.

¹⁶ Quantification of greenhouse gas emissions from power plants should take into account the embodied emissions of a particular fuel source. Thus, to the extent a proposed natural gas power plant is supplied by liquefied natural gas, this additional carbon intensity of this fuel source must be accounted for.

This question seems to conflate baseline with significance thresholds. Under CEQA, the baseline from which to evaluate project impacts is typically “the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published.” Guidelines § 15125(a). Thus, where a power plant is to be built at a vacant site, project impacts would presumably be measured from a “zero” GHG baseline. Accordingly, all GHG emissions must be considered new unless a lead agency determines, based on substantial evidence, that the proposed project would replace specifically identified existing emission sources for the lifetime of the project. Thus, in *Center for Biological Diversity v. City of Desert Hot Springs*, RIC 464585, Riv. Sup. Ct. (Aug. 8, 2008), the trial court rejected an EIR’s assertion that a residential and commercial development would have a “beneficial impact on CO₂ emissions” because California homes are more efficient than those elsewhere in the country absent any showing that existing homes would be demolished or remain unoccupied.

These same principles can be applied in the context of power projects. For example, with regard to “solar facilities that burn some natural gas for startup or for generation augmentation” one would first quantify the emissions resulting from natural gas usage. The solar component of the project would presumably not add additional emissions to the environment. Should a project proponent want to take credit for lowering the “baseline” as a result of the project, it would have to demonstrate, based on substantial evidence, that the project includes an enforceable reduction in an existing source of emissions that otherwise would continue to emit greenhouse gases for the same period as the proposed project. Thus, if the solar project resulted in the closure of an existing fossil fuel powered energy source that would otherwise have emitted GHGs for the life of the new project, the project proponent could take credit for this reduction and potentially offset the emissions from the natural gas component of the project. However, if the solar panels were merely adding capacity to the existing energy infrastructure, project emissions would increase from the baseline to the extent greenhouse gas emissions resulted from the natural gas component of the project.

Accordingly, it is inappropriate to consider any power plant projects that emit greenhouse gases to be categorically less than significant, prior to conducting any analysis. As recognized in *Center for Biological Diversity v. City of Desert Hot Springs*, simply because a new project may be more efficient than an alternative straw project does not mean that it does not have impacts. It only means that impacts are less than whatever it is being compared to. Moreover, in some cases, the claimed efficiencies of new projects are illusory. While coastal power plant re-powers may reduce impacts on marine environments by eliminating once-through cooling, a November 2003 Report titled “Unnecessary Pollution,” Environment California found that the re-powering of the Los Angeles Department of Water and Power’s aging natural gas power plants actually resulted in a substantial net increase in air pollution and global warming emissions, even with the installation of pollution controls and new, cleaner, and more efficient turbines.¹⁷

¹⁷ Bernadette Del Chiaro, Environment California Research and Policy Center, “Unnecessary Pollution: Impacts Of L.A. Dept. Of Water And Power’s Increased Reliance On Natural Gas Instead Of Clean, Renewable Energy,” (Nov. 2003) available at http://www.environmentcalifornia.org/uploads/Ua/5t/Ua5tBw4WLdZsIxRX1BmK4w/Unnecessary_Pollution.pdf

- b. A system wide approach to baseline emissions and significance is not currently available

California's current approach to energy supply does not lend itself to a systematic approach to determining either baseline emissions or the significance of a particular project because energy planning in California does not occur from a systematic perspective. ARB in its Proposed Scoping Plan describes the barriers to achieving a low-carbon electricity supply presented by the current power plant permitting system.¹⁸ ARB outlines the policies designed to reduce carbon production in the electric supply such as the loading order in the Energy Action Plan, but then concludes and explains that

[T]he existing permitting process for power plants in California does not allow these policies to take precedence. In part due to the decision under AB 1890 to eliminate the 'needs' test for new power plants being permitted by the California Energy Commission, permitting decisions on new fossil-fired power plants are no longer tied to consistency with the State's energy policies. Rather, the decisions on whether to apply for permits and whether to build permitted power plants are left to private developers.¹⁹

Without a comprehensive statewide energy planning regime that examines the need for new fossil fuel generation, the impacts on system reliability, and impact on the climate from energy generation, it is hard to imagine how a "systematic" approach under the current system could comply with the requirements of CEQA. Allowing private developers to propose and site whatever they believe is necessary and then incorporating any greenhouse gas regulation into a future cap and trade system, that by definition relies on the free market rather than planning, are both counter-productive policies for developing a systematic approach to reducing greenhouse gas emissions and achieving the other goals of the electric system such electric reliability.

The current ad-hoc system on power plant siting is in direct conflict with any serious effort to reach a low-carbon future and avoid dangerous climate change. Natural gas facilities sited today represent future carbon commitments that will interfere with our ability to stabilize the climate. From a system-wide programmatic perspective, it would be useful for the CEC to chart California's pathway to a low-carbon future. Unlike the existing regime, a programmatic document would prioritize the loading order already established by the CEC which specifies that new electricity supply resources will be added in the following order:

- increased energy conservation and energy efficiency to minimize increases in electricity and natural gas demand;
- renewable energy resources and distributed generation;

¹⁸ ARB, Climate Change Proposed Scoping Plan Appendices, Vol. I (October, 2008) at C-93.

¹⁹ *Id.*

- additional less polluting, fossil fuel, central-station generation.

The CEC should look holistically at California's energy needs and set forth a pathway first through energy efficiency, then renewables, and finally less polluting fossil fuel that simultaneously would meet these needs and reduce emissions to the extent necessary for climate stabilization. The Commission's Integrated Energy Policy Report ("IEPR") could serve as a starting point for analyzing the variety of factors at issue and identifying barriers to achieving the pathway to a low carbon electrical system. The programmatic document could also look at the phase-out of aging and less efficient fossil fuel facilities and dirtier fossil-fuel sources of energy and examine whether their replacement with additional fossil fuel facilities will allow California to make the deep emission cuts necessary for climate stabilization. This type of analysis would allow for a more sophisticated determination of whether a particular project should be considered significant.

4. CEQA Requires that All Feasible Alternatives and Mitigation Measures be Adopted to Reduce Significant Impacts.

- a. A clear understanding of the purpose of a particular energy project is critical to the consideration of alternatives and mitigation

"[A]n environmental impact report must include a meaningful discussion of both project alternatives *and* mitigation measures." *Laurel Heights Imp. Ass'n of San Francisco, Inc. v. Regents of University of California*, 47 Cal.3d 376, 403 (1988). Questions set forth by the CEC in its Order Instituting Informational Analysis omit the critical inquiry into alternatives to new fossil fuel commitments. While mitigation is necessary to offset the global warming impacts from new fossil fuel facilities, these impacts can be avoided entirely through the adoption of alternatives that embrace energy efficiency and renewables.

Critical to a proper assessment of both alternative and mitigation options is a complete and accurate description of the purpose of a fossil fuel project. As recently noted in *Natural Resources Defense Council v. SCAQMD*, Case No. BS 110792 (L.A. Sup. Ct. Jul. 28, 2008):

It is not clear what the underlying fundamental objective of the District's project is. If the District's environmental objective is to eliminate reliance on diesel-powered backup generators, then one possible mitigation measure would be to limit access to the Priority Reserve to those power companies wanting to replace dirty power generators with newer, cleaner generating plants. Giving credit to allow the construction of a new plant by a different energy firm will not necessarily preclude a firm with inadequate capacity from firing up its dirty diesel-powered generators in response to its own supply shortages. Or, if the problem is a state-wide shortage of electricity, that shortage needs to be quantified (which is flatly not in the administrative record), then the alternatives of siting the capacity in areas with cleaner air and transporting it into the basin via additional

transmission capacity is an alternative that should be considered. Or, if the problem is with peak power, the question remains whether that limited, incremental power can be provided using solar, wind or other renewable facilities.

....

Without a clear understanding of the underlying fundamental purpose of this program, it is impossible to consider meaningful alternatives or measures to mitigate the environmental impacts of the program.

NRDC, at *23-24.

Thus, in the case of all sitings that result in future fossil fuel commitments, it is first appropriate and necessary under CEQA to ask what function the particular project would fulfill prior to engaging in an examination of feasible alternatives and mitigation. For example, if the purpose is to supply peak power, could solar power, which operates well during peak period, be an alternative to all or part of the project's proposed capacity.

Once all alternatives and mitigation has been examined that would reduce the proposed carbon footprint of the proposed project, emissions generated by the project should be mitigated pound for pound through offsite mitigation. Funding of energy efficient retrofits is one example of feasible mitigation that could be adopted.

b. CEQA sets requirements for override findings

CEQA provides for project disapproval as well approval when significant environmental effects remain unmitigated. "A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." CEQA Guidelines § 15042. The Energy Commission should consider using this authority when a project would have unmitigated cumulative impact on the climate.

Conversely, CEQA does allow projects to be approved even if the project "would cause a significant effect on the environment." CEQA Guidelines § 15043. However the "agency makes a fully informed and publicly disclosed decision that: (a) There is no feasible way to lessen or avoid the significant effect (see Section 15091); and (b) Specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project. (See: Section 15093.)" *Id.* A statement of overriding considerations must be supported by substantial evidence and must disclose the impacts of project and cannot mischaracterize the relative benefits of project. *Woodward Park Homeowners Ass'n v. City of Fresno*, 150 Cal.App.4th 683, 717 (2007).

5. Programmatic v. Site Specific Mitigation of Cumulative Impacts

- a. Until such time as a robust and effective programmatic approach to addressing global warming impacts from the energy sector is adopted,

mitigation must be adopted on a case-by-case basis for projects currently under review

Addressing the Energy Commission's need to conform its greenhouse gas analysis with CEQA on programmatic basis poses a practical problem in near term. There are currently twenty-two proposed power plants in the siting process. CEQA requires the Energy Commission to address their greenhouse gas emissions now and not at some time in the future when the Energy Commission develops a programmatic approach. Any programmatic approach that was consistent with CEQA would require the requisite environmental review, *i.e.*, a programmatic EIR. Once this EIR was done, then the Energy Commission could potentially tier off this environmental analysis. However, each project would still have to be evaluated to ensure that it fits within the programmatic environmental analysis.

Proposed mitigations that rely on prospective command and control regulations or a cap and trade system to achieve emissions reductions run counter to the urgency with which greenhouse gas emissions must be reduced, and to the requirements of CEQA. CEQA does not allow mitigations to be deferred to some future time. Sharp reductions from business-as-usual are needed today. Less than ten more years of business-as-usual emissions may make it virtually impossible to keep temperature increases within the range necessary to avoid large scale climactic feedbacks. *Green Mountain Chrysler v. Crombie*, 508 F. Supp. 2d 295, 312-14, 316 (D. Vt. 2007) (summarizing expert testimony of Dr. James Hansen).²⁰ Not only is the efficacy of prospective regulations unknown, but regulatory action will take years to implement and may be subject to further delays from legal challenges. Mitigation that defers to prospective and uncertain future regulation is both contrary to CEQA and insufficient to meet the immediate challenge of the climate crisis facing California and the world.

b. Use of cap and trade as a potential future programmatic approach is problematic

Use of AB 32's cap and trade program as a programmatic approach to mitigation from energy sector emissions poses several concerns. The 2020 emission reduction goals of AB32 are only a first and interim step toward the reductions necessary to stabilize the climate. Power plants built today will most certainly endure well past 2020 and likely to 2050 and beyond. The cap and trade program does not ask the question of whether or not these new fossil fuel commitments are consistent with a low carbon future. As set forth in response 3(b), a programmatic approach that maps out California's low carbon energy future and puts proposed projects in the context of the attainment of this objective is a more useful approach.

Cap and trade programs also have a broken and unsuccessful track record. Under Guidelines § 15064(h)(3), "[a] lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply

²⁰ See also Hansen, J., et al. 2007. *Climate change and trace gases*. *Phil. Trans. R. Soc.* 365:1925-1954 available at http://pubs.giss.nasa.gov/docs/2007/2007_Hansen_et_al_2.pdf

with the requirements of a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem.” However, a project may not rely on this programmatic approach “[i]f there is substantial evidence that the possible effects of a particular project are still cumulatively considerable....” Guidelines § 15064(h)(3). Therefore, if the proposed cap and trade program under AB 32 is ultimately not effective at reducing greenhouse gas emissions, projects attempting to rely on this program can be challenged under CEQA because there will be substantial evidence that impacts will occur even assuming program compliance.

6. Use of the “Public Convenience and Necessity” Override Must Still Take Into Account a Project’s Cumulative Effect on Global Warming.

The certification of a project that does not conform with applicable state, local or regional standards, ordinance or laws is constrained by the language of Public Resource Code Section 22525. This provision allows certification

if the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability. The commission may not make a finding in conflict with applicable federal law or regulation. The basis for these findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523.

The determination of “need” can only be made within the context of “entire record of the proceeding” and must include analysis of the “impacts of the facility on the environment, consumer benefits, and electric system reliability.” If used by the Energy Commission, this provision would force the Commission to make choices about the whether the impacts of a project on climate change are outweighed by its consumer benefits and/or its effect on electric reliability. Conversely, the analysis required by this provision might reveal that some projects proposed by private developers are not “needed” because they have too much impact on climate change and do not provide the consumer benefits and/or electric system reliability. In either scenario, a rigorous analysis of project alternatives, i.e. “more prudent and feasible means of achieving public convenience and necessity” would inform whether there was a better project and whether the project was “needed.” Thus, in its siting cases, the Energy Commission should develop an analysis of a range of alternatives that explicitly considers the alternatives effect on the climate and its consumer and electric system reliability benefits, if any.

7. The Energy Commission Should Consider the Potential Greenhouse Gas Emissions From Power Plants that Have Been Permitted But Not Built.

Plants that have already been permitted by the Energy Commission but have not been built will emit greenhouse gases if eventually constructed. For projects that have had licenses expire or have voluntarily surrender their licenses, the Energy Commission should require that if these project are ever revived that these projects must analyze and mitigate their greenhouse gases pursuant to the dictates of CEQA.

Thank you for your consideration. Please do not hesitate to contact William Rostov at (510) 550-6725 wrostov@earthjustice.org or Matthew Vespa at (415) 436-9682 x.309 mvespa@biologicaldiversity.org if you have any questions or concerns.

Sincerely,



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