

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

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Informational Proceeding on Methods for
Satisfaction of California Environmental Quality
Act Requirements Relating to Greenhouse Gas
Emission Impacts of Power Plants

Docket 08-GHG OII-1
Order 08-1008-11

COMMENTS OF THE ENERGY PRODUCERS AND USERS COALITION

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Informational Proceeding on Methods for Satisfaction of California Environmental Quality Act Requirements Relating to Greenhouse Gas Emission Impacts of Power Plants

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I. INTRODUCTION AND SUMMARY

At the November 19, 2008 CEC workshop, the Commissioners requested recommendations for an interim approach that can be used to satisfy the CEC's obligations under CEQA as the lead agency for power plant siting. As EPUC observed in its earlier comments, applying CEQA to GHG emissions presents a challenge. A CEQA analysis is used to determine whether a particular activity will have a significant effect on the physical environment. Unlike criteria pollutant emissions and other activities traditionally regulated under CEQA, GHG's global nature precludes identification of a causal link between the emissions of a power plant, for example, and specific environmental changes in a particular location. The absence of any demonstrable physical environmental impact in the local area of CEQA analysis strongly suggests that CEQA is not the best tool to evaluate and regulate GHG emissions. Should the CEC nonetheless seek to implement an interim method despite this, EPUC offers the following recommendations:

- (1) The CEC's analysis should focus on a proposed power plant's net impact on the State or regional carbon footprint, taking into account emissions in the balance of the region's power supply.
- (2) The CEC's analysis of a power plant's impact on the State or regional carbon footprint should capitalize on existing determinations of California agencies. In particular, the analysis should give deference to Air Resources Board (ARB) determinations in that agency's Proposed Scoping Plan and the Commission's own interim Emissions Performance Standard (EPS).

Each of these points is discussed below.

II. THE GLOBAL NATURE OF GHG LIMITS THE SCOPE OF CEC'S CEQA ANALYSIS

The Commission's task under CEQA is to identify a significant effect on the physical environment and one supported by substantial evidence. CEQA requires an evaluation of whether a project will have a significant effect on the environment in "*the area affected by the proposed project.*"¹ A "*significant effect on the environment*" is defined as: "*a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.*"² These also include indirect effects on "*land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.*"³ Notably, the effects considered need to be physical changes in the environment, "*reasonably foreseeable*" and supported by substantial evidence.⁴ In fact, the Guidelines

¹ See, e.g., 14 CCR §15002(g) and 15360.

² 14 CCR §15382.

³ 14 CCR §15358(a).

⁴ 14 CCR §15358(a)(2); 14 CCR §15384(a); *Maintain Our Dessert Environment v. Town of Apple Valley*, 120 Cal.App.4th 396 (2004) (social, economic and business competition concerns are not relevant to a CEQA analysis of a project unless it is demonstrated that those concerns will have a significant impact on the physical environment); *Save our Peninsula Committee v.*

provide that “[i]f, after thorough investigation, a Lead Agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact.”⁵

In the absence of demonstrable physical environmental changes, using CEQA authority to control the emission of GHG is like trying to fit a square peg into a round hole. While it may be possible to roughly quantify whether a plant will increase or decrease statewide or regional GHG emissions, that determination does not allow or justify any conclusions about physical environmental impacts. First, it is unclear how an increase in statewide or regional GHG emissions will affect global GHG and, consequently, the global environment. Second, the link between increased global levels of GHG and geographically-specific physical environmental change in a specific location cannot reasonably be established.

The best the CEC can do is to determine whether a plant will increase or decrease statewide or regional emissions; it has no basis to conclude that emissions associated with a particular power plant will cause a specific physical environmental change. Practically speaking, without the ability to identify specific physical environmental changes, CEQA provides very little guidance.

Monterey County Board of Supervisors, 87 Cal.App.4th 99 (2001) (because the chief purpose of an environmental impact report (EIR) is to provide detailed information regarding significant environmental effects of a proposed project on the physical conditions which exist within an area, it follows that existing conditions must be determined, to the extent possible, in the EIR itself). See also 14 CCR §15384(a) (“[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment [do] not constitute substantial evidence.”)

⁵ 14 CCR §15145.

Even overlooking the difficulty of analyzing GHG emissions under CEQA, under any approach, the CEC must account for the global nature of GHG. While the CEC has traditionally examined environmental impact on a project-by-project basis, this type of analysis is not appropriate for GHG given its global impact. As explained at the workshop, whether a power plant's addition contributes to an increase in statewide or regional GHG emissions largely depends on the impact it has on the existing resource mix. State efforts to move to a regional GHG program, in fact, makes a focus on the net impact on regional emissions more appropriate. If a new power plant serves California or regional electricity demand by displacing a higher-emitting plant, the new plant causes a net decrease in both statewide and regional emissions even though it may bring higher GHG emissions to a particular area. Similarly, the emissions associated with a new combined heat and power (CHP) facility may suggest an impact on GHG due to higher on-site emissions until one accounts for the emissions avoided by combining the production of energy outputs. Unless the addition of a power plant is considered in the context of other factors, including its impact on the entire electricity sector power fleet and other sectors, no conclusions regarding changes in GHG emissions can be made fairly.

In summary, given GHG's global nature, the most the CEC can do is evaluate whether a project results in a net increase or decrease of statewide or regional GHG emissions. Even this determination, however, is vulnerable to challenge.

III. IF THE CEC PROCEEDS WITH AN INTERIM CEQA APPROACH, ITS GHG ANALYSIS SHOULD CAPITALIZE ON EXISTING DETERMINATIONS MADE BY CALIFORNIA AGENCIES

At the November 19 workshop, Commissioners Byron and Douglas requested concrete recommendations for an interim approach that could be used to satisfy the obligations under CEQA to evaluate a power plant's impact on GHG.⁶ As noted above, the interim approach could at most evaluate the net increase or decrease to statewide or regional GHG emissions. Examined in this light, the tools to create such an interim approach are already available due to efforts that have been undertaken by the CEC, CPUC and CARB. Critical features of this interim approach must include the following: (1) an appropriate CEQA baseline for determining significance, (2) factors that will be used to identify a "significant effect on the environment," (3) exceptions for reliability, and (4) mitigation tools. Each of these is discussed below.

A. Consistent with Current Regulations, the CEQA Baseline Should Be Based on Current Conditions

The Commission's task under CEQA is to evaluate the impact on GHG emissions. The baseline used to quantify emissions will determine how much impact a project will have on the environment. While some have suggested that the baseline used should be based on the AB 32 2020 emissions target, consistent with current CEQA regulations, the baseline for this analysis should be current conditions.

⁶ Practically speaking, given the time it takes to permit and construct a new power plant in California, there is likely to be limited application of this interim methodology. If siting and construction take at least two years, few new plants are likely to be developed and constructed before AB 32 is implemented in 2012.

CEQA guidelines make clear that impact is quantified based on existing conditions:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.⁷

* * *

The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced.⁸

It would be inconsistent with CEQA to use a different baseline, especially one based on a 2020 emissions target, to assess impact on GHG emissions. If the CEC prefers not to rely on data from a single year, it can develop a baseline by using a multiyear average of emissions preceding the date of regulation.

⁷ 14 CCR §15125(a) (emphasis added).

⁸ 14 CCR §15126.2(a) (emphasis added).

B. Identification of “Significant Effect on the Environment” As Required Under CEQA Should Be Based On the Analyses and Conclusions of CEC, CARB and CPUC

At best, the CEC will be in a position to determine whether a power plant will increase or decrease State or regional GHG emissions. The CEC will have difficulty identifying a significant effect on the environment as required by CEQA. Consequently, if the CEC intends to engage in some form of CEQA analysis, it may have to focus on measuring changes in statewide or regional GHG emissions. To promote accuracy, it should focus on a new power plant’s net impact on the State or regional carbon footprint. This would require the CEC to develop some mechanism through which it can determine whether the installation of a power plant will result in a net increase or decrease in statewide or regional emissions. Admittedly, calculating this number with precision is a difficult task.

Various proposals have been offered to establish a significance threshold.⁹ None of these thresholds, however, reflect the GHG evaluation that

⁹ At the November 19, 2008 workshop, the CEC presented four options for an interim significance threshold that could be used:

- (1) A zero threshold which would require mitigation of all plants;
- (2) A system threshold which would require mitigation of plants that exceed the average emission rate of California plants in 2004: 0.40 mt/MWh or 7,577 Btu/kWh (staff’s estimate of the emission rates in CARB’s 2004 inventory);
- (3) Thresholds that vary depending on whether a resource is in a local reliability pocket or not. If it is in a local reliability area, it will be categorized as having an insignificant impact if its emissions are less than the system threshold. If it is outside a local reliability area, a zero threshold will be used for determining the scope of mitigation required.
- (4) Threshold based on the emissions of best available control technology (BACT). The significance threshold would vary for different types of technology. If the emissions are less than BACT, no mitigation will be required. If above BACT, mitigation will be required.

Missing from this list of options is a significance threshold that takes into account CARB’s Proposed Scoping Plan recommendations and the interim EPS, adopted by the CEC and CPUC in 2007.

California state agencies have already undertaken. As explained below, findings of the CEC, CPUC and CARB should form the basis of the CEC's CEQA interim approach.

The CEC can rely on CARB's Proposed Scoping Plan to identify the type of power plants that will have a beneficial impact on the State or regional carbon footprint. CARB's Proposed Scoping Plan details its comprehensive plan to ensure the State achieves AB 32 targets by 2020. For the electricity sector, CARB's Proposed Scoping Plan makes several specific recommendations: increased reliance on energy efficiency, renewables procurement and CHP. The recommendations reflect CARB's determination that these resources will promote GHG reductions and therefore decrease the State or regional carbon footprint. This analysis is relevant to the CEC's task under CEQA and should be applied in the CEC's interim approach to support the conclusion that these resources have a less than significant effect.

For conventional generation not specifically identified by the Scoping Plan as beneficial measures, the CEC should consider, among other factors in the CEQA analysis, the interim emission performance standard (EPS) to assess whether the generation will have a significant impact on GHG emissions. Pending AB 32's implementation in 2012, the CEC and CPUC have adopted an interim EPS of 1,100 lbs CO₂/MWh.¹⁰ As clarified by SB 1368, this interim measure was established specifically for this purpose: to limit GHG emissions pending the implementation of AB 32.¹¹ While the interim EPS applies only to

¹⁰ D.07-01-039; CEC Regulations (Chapter 11, §2902).

¹¹ SB 1368, §1.

utility base-load procurement contracts that are five years or longer, the CEC can use this number to determine when a conventional generator will have a significant effect on the State or regional carbon footprint.

C. The CEC Must Consider a Power Plant's Contribution to System Reliability

In addition to considering the impact on GHG, the CEC must consider the impact on system reliability. All generation does not equally serve load.

Transmission constraints within the State require that certain amounts and certain types of generation be located within designated load pockets. Without these resources, load cannot be adequately served. Likewise, particular types of generation – e.g., peaking resources – may be required for reliability purposes. For this reason, reliability must be one of the factors considered in the CEC's CEQA interim approach.

Examination of system reliability is required by the CEQA statutory scheme. Public Resources Code §25525 explicitly requires the CEC to consider system reliability in its power plant evaluation:

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless 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 25523.¹²

Due to existing transmission constraints, local area reliability issues can arise if the appropriate type of resources cannot be built. Reliability issues can occur if there is insufficient generation in a local area load pocket or if the right type of resource (baseload or peaking) is not available in the pocket. While the CPUC's resource adequacy program is dedicated to identifying these shortages, the problems cannot be resolved if the CEC does not have the flexibility to make reliability exceptions. Given this limitation, the CEC must have the flexibility to approve the construction of a plant even if it will have a significant impact on the State or regional carbon footprint because the generation may be needed to ensure reliability.

D. All Efforts Taken To Combat GHG Emissions Should Count as CEQA Mitigation Efforts

AB 32 provides a statewide GHG mitigation plan that should govern all GHG emissions upon its implementation in 2012. In the interim, if the CEC determines that a proposed power plant will have a significant impact on statewide or regional emissions, all efforts taken to reduce GHG emissions should qualify as CEQA mitigation efforts.

The CEC/CPUC final decision on GHG regulatory strategies and CARB's Proposed Scoping Plan indicate that all generators in the State will be subject to GHG emission reducing efforts in 2012. This means in-State generators will be required to undertake efforts to mitigate GHG emissions. First they will be

¹² Emphasis added.

required to secure allowances to cover their emissions. While some portion of allowances will be allocated administratively, the amount of allowances that California generators will be required to purchase in the cap-and-trade market will increase year by year. Generators will also incur costs through investments that will be directed to reducing compliance cost obligations. Finally, if generators are unable to secure needed allowances, they will be required to purchase offsets. Since all of these efforts achieve the same end-result, all GHG programs, methods, offsets, and credits associated with GHG emission reductions should be recognized under CEQA. Moreover, given GHG's global nature, qualifying mitigation measures must not be limited to local efforts.

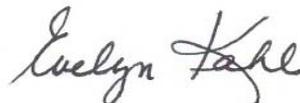
Pending AB 32's implementation, the CEC should require a proposed project found to have a significant impact to engage in mitigation efforts to bring the projects impact down to a less than significant level -- the 1,100 lbs EPS. Requiring mitigation to the point of zero emissions should be rejected as an unreasonable approach that is likely to chill investment in California generation. Mitigation efforts for "significant" power plants should be evaluated by the CEC on a project-by-project basis, maximizing flexibility for offsetting reductions

E. The GHG Groundwork Undertaken By California Agencies Provides the Basis for a Viable Interim CEQA Approach

The work undertaken by California agencies provides valuable guideposts that can be used in the CEC's CEQA interim approach. Based on the above discussion, the CEC should apply its interim CEQA methodology in the following manner:

- (1) Calculate the CEQA baseline upon evaluation of existing conditions. This baseline will be used to determine whether the proposed power plant has a “significant effect,” as defined by CEQA.
- (2) Take the nature of a proposed power plant into consideration.
 - a. If it is an efficient cogeneration project, renewable project, or one that increases energy efficiency, the CEC should conclude based on the Scoping Plan that the plant will not have a significant impact on the State or regional carbon footprint.
 - b. If the power plant is a conventional generator and it falls within the scope of the CEC and CPUC’s adopted interim EPS, the CEC should conclude that the plant will have a less than significant impact on GHG emissions.
- (3) Take system reliability into consideration. The CEC should make exceptions for power plants that are needed for local or system reliability.
- (4) If the proposed power plant is not an efficient CHP facility, renewable project, one that will increase energy efficiency, or one that is less than 1,100 lbs/MWh, the CEC should require mitigation of impact to a less than significant level. All reasonable efforts that are undertaken to promote GHG reductions, regardless of statutory scheme and geographic location, should qualify as a CEQA mitigation effort.

Respectfully submitted,



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