

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

California Energy Commission

**DOCKETED**

**12-OIR-1**

TN # 67385

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In the Matter of:

Rulemaking to Consider Modification of  
Regulations Establishing a Greenhouse  
Gases Emission Performance Standard For  
Baseload Generation of Local Publicly  
Owned Electric Utilities

Docket No. 12-OIR-1

**SOUTHERN CALIFORNIA PUBLIC POWER AUTHORITY  
SAN JUAN PARTICIPANTS AND CITY OF ANAHEIM  
REPLY COMMENTS**

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Dated: September 28, 2012

TABLE OF CONTENTS

	<u>Page</u>
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>II. THE NRDC &amp; SIERRA CLUB PROPOSAL TO REQUIRE POU GOVERNING BODIES TO DELIBERATE ON ALL EXPENDITURES ON NON-EPS COMPLIANT FACILITIES WOULD BE UNDULY BURDENSOME AND IS UNNECESSARY. ....</b>	<b>3</b>
<b>A. NRDC &amp; Sierra Club’s proposal unlawfully extends beyond non-deemed compliant facilities to reach grandfathered facilities. ....</b>	<b>4</b>
<b>B. In their effort to avoid appearing to impose an unduly burdensome reporting requirement on POU’s, NRDC &amp; Sierra Club would impose an unreasonable burden upon POU governing bodies.....</b>	<b>6</b>
<b>1. The public notice and reporting provisions of section 2908 are reasonable to the extent they apply only to covered procurements.....</b>	<b>6</b>
<b>2. It would be unduly burdensome to require that POU governing bodies consider all investments in non-compliant facilities. ....</b>	<b>12</b>
<b>C. It would be unduly burdensome on POU’s to require submission of information to the Energy Commission about all expenditures on non-compliant facilities even if POU governing bodies were not required to spend time considering all such expenditures. ....</b>	<b>13</b>
<b>III. THE ENERGY COMMISSION LACKS JURISDICTION TO ADJUST THE EPS ABSENT PRIOR ACTION BY THE CPUC.....</b>	<b>14</b>
<b>IV. EVEN IF IT HAD JURISDICTION, THE ENERGY COMMISSION SHOULD REJECT THE NRDC &amp; SIERRA CLUB PROPOSAL TO ADJUST THE EPS FOR POU’S TO 825-850 LBS CO<sub>2</sub>/MWh.....</b>	<b>16</b>
<b>A. Setting a new EPS for POU’s at 825-850 lbsCO<sub>2</sub>/MWh would unlawfully discriminate against POU’s.....</b>	<b>16</b>
<b>B. Imposing an EPS of 825-850 lbsCO<sub>2</sub>/MWh on POU’s as a stretch goal to be achieved by POU’s would be inconsistent with the purpose of SB 1368.....</b>	<b>17</b>
<b>C. The CPUC properly set the EPS at 1100 lbsCO<sub>2</sub>/MWh.....</b>	<b>19</b>
<b>D. NRDC &amp; Sierra Club fail to show good cause for changing the EPS. ....</b>	<b>21</b>
<b>V. REQUESTS FOR INFORMATION CONTAINED IN THE REQUESTS FOR REPLY COMMENTS.....</b>	<b>23</b>
<b>A. Request for information on adjustments that might be necessary to reflect California’s specific conditions. ....</b>	<b>24</b>

**B. Request for information on California natural gas prior powerplants that would be affected by an 825-850 lbsCO<sub>2</sub>/MWh..... 25**

**C. Request for information on the design or ability of natural gas powerplants to operate more flexibly to integrate renewable resources. .... 25**

**VI. CONCLUSION. .... 26**

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**I. INTRODUCTION.**

The Southern California Public Power Authority (“SCPPA”)<sup>1</sup> participants in the San Juan Project (“San Juan Participants”)<sup>2</sup> and the City of Anaheim (“Anaheim”)<sup>3</sup> appreciate this opportunity to reply to the comments filed by the Natural Resources Defense Council (“NRDC”) and the Sierra Club (jointly, “NRDC & Sierra Club”) on July 27, 2012, regarding the Tentative Conclusions and Request for Additional Information (“Tentative Conclusions”) that was released on July 9, 2012, in the captioned proceeding. The opportunity to reply to NRDC & Sierra Club was provided by the Requests for Reply Comments released by Chair and Lead Commissioner

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<sup>1</sup> SCPPA is a joint powers authority. The members are Anaheim, Azusa, Banning, Burbank, Cerritos, Colton, Glendale, Los Angeles Department of Water and Power, Imperial Irrigation District, Pasadena, Riverside, and Vernon. This comment is sponsored by Anaheim, Azusa, Banning, Colton, Glendale, and Imperial Irrigation District.

<sup>2</sup> SCPPA holds a 41.8 percent interest in San Juan Project Unit 3. The SCPPA members which participate in San Juan Unit 3 through SCPPA are the Imperial Irrigation District and the cities of Azusa, Banning, Colton, and Glendale.

<sup>3</sup> Anaheim holds a 10.04 percent ownership interest in San Juan Project Unit 4.

Weisenmiller on August 31, 2012, in this proceeding.<sup>4</sup> The Requests for Reply Comments seek replies to two proposals that were presented in NRDC & Sierra Club’s comments on the Tentative Conclusions.

First, the Requests for Reply Comments seek responses to NRDC & Sierra Club’s proposal to require reporting on all expenditures on facilities that do not comply with the Emissions Performance Standard (“EPS”) in the Energy Commission’s EPS regulation.<sup>5</sup> The NRDC & Sierra Club proposal is summarized in the Requests for Reply Comments as follows: “URLs for the agenda and supporting documentation for all expenditures on non-compliant facilities—whether believed to be a covered procurement or not—deliberated by the POU’s governing body should be provided to the Energy Commission within the time frame set forth under the Brown Act.”<sup>6</sup>

Second, the Requests for Reply Comments seek responses to a proposal by NRDC & Sierra Club to lower the EPS, which is currently set at 1100 pounds of carbon dioxide per megawatt hour of electricity (lbsCO<sub>2</sub>/MWh), to 825-850 lbsCO<sub>2</sub>/MWh.<sup>7</sup>

The SCPPA San Juan Participants and Anaheim recommend that the Commission reject both proposals by NRDC & Sierra Club. The first proposal is unlawfully broad, would impose an undue burden on POU’s and their governing bodies, and is unnecessary. The second proposal is beyond the jurisdiction of the Commission absent prior revision of the EPS by the California Public Utilities Commission (“CPUC”). Further, even if the second proposal were not beyond the jurisdiction of the Energy Commission, the proposal unlawfully discriminates against POU’s,

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<sup>4</sup> The Requests for Reply Comments provided that reply comments should be submitted by September 14, 2012. By Order Granting Extension of Time released by Chair and Lead Commissioner Weisenmiller on September 6, 2012, the deadline for submitting reply comments was extended to September 28, 2012.

<sup>5</sup> 20 California Code of Regulations (“CCR”) §§2900-2913.

<sup>6</sup> Requests for Reply Comments, p. 3.

<sup>7</sup> Requests for Reply Comments, p. 4.

is inconsistent with the purpose of Senate Bill (“SB”) 1368,<sup>8</sup> and is unsupported by the data presented by NRDC & Sierra Club.

**II. THE NRDC & SIERRA CLUB PROPOSAL TO REQUIRE POU GOVERNING BODIES TO DELIBERATE ON ALL EXPENDITURES ON NON-EPS COMPLIANT FACILITIES WOULD BE UNDULY BURDENSOME AND IS UNNECESSARY.**

The Requests for Reply Comments summarize NRDC & Sierra Club’s first proposal as though it were only a proposal to establish a new filing requirement:

To establish a filing requirement for all POU investments in non-EPS compliant facilities regardless of whether the investment could be considered a covered procurement.

However, NRDC & Sierra Club are not simply proposing that the Energy Commission require POU’s to submit information on all investments in non-EPS compliant facilities. Parties have already commented on that proposal. In the Energy Commission’s March 6, 2012, Notice of Rulemaking Workshop, the Commission set a number of questions for comment. The first question was: “Whether to establish a filing/reporting requirement for local publicly owned electric utilities’ (POU) investments in non-deemed compliant powerplants, regardless of whether the investment comes within the meaning of ‘covered procurement.’”<sup>9</sup>

NRDC & Sierra Club’s proposal as presented in their July 27, 2012 comment goes beyond the question that was raised in the Notice of Rulemaking Workshop. NRDC & Sierra Club state their proposal as follows: “URLs for the agenda and supporting documentation for all expenditures on non-compliant facilities – whether believed to be a covered procurement or not – deliberated by the POU’s governing body should be provided to the Commission within the time frame set forth under the Brown Act.”<sup>10</sup> Implicit within that proposal is a requirement that POU

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<sup>8</sup> Stats. 2006, Ch. 598 *codified* as Public Utilities Code §§8340-8341.

<sup>9</sup> Notice of Rulemaking Workshop, Docket No. 12-OIR-1, p. 5 (March 6, 2012).

<sup>10</sup> NRDC & Sierra Club Comments, p. 2 (July 27, 2012).

governing bodies deliberate on “all expenditures on non-compliant facilities—whether believed to be compliant or not,” so that there would be an “agenda and supporting documentation” that would be available to be provided to the public and the Energy Commission under section 2908 of the EPS regulation.

Section 2908 requires each POU to post a public notice whenever its governing body deliberates in public on a covered procurement and to make the information that is provided to the governing body available to the public and the Energy Commission.<sup>11</sup> The requirement that the POU shall make the information that is provided to its governing body available to the public and the Energy Commission can be satisfied by providing the Energy Commission with a URL link to the information.<sup>12</sup> NRDC & Sierra Club propose to extend section 2908 to reach all expenditures on non-compliant facilities by requiring POU governing bodies to consider all expenditures on non-compliant facilities, not just covered procurements.

The proposal by NRDC & Sierra Club as formulated in their July 27, 2012 comments is unlawfully broad and unreasonably burdensome.

**A. NRDC & Sierra Club’s proposal unlawfully extends beyond non-deemed compliant facilities to reach grandfathered facilities.**

As a threshold matter, NRDC & Sierra Club’s proposed deliberation and reporting requirement goes beyond the lawful reach of SB 1368 and the Commission’s EPS regulation.

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<sup>11</sup> 20 CCR §2908 provides as follows:

Each local publicly owned electric utility shall post notice in accordance with Government Code Section 54950 et seq. whenever its governing body will deliberate in public on a covered procurement.

(a) At the posting of the notice of a public meeting to consider a covered procurement, the local publicly owned electric utility shall notify the Commission of the date, time and location of the meeting so the Commission may post the information on its website. This requirement is satisfied if the local publicly owned electric utility provides the Commission with the uniform resource locator (URL) that links to this information.

(b) Upon distribution to its governing body of information related to a covered procurement’s compliance with the EPS, for its consideration at a noticed public meeting, the local publicly owned electric utility shall make such information available to the public and shall provide the Commission’s website.

<sup>12</sup> *Ibid.*

NRDC & Sierra Club’s proposed requirement would apply to “all expenditures on non-compliant facilities.” Thus, the proposal would extend to combined cycle powerplants that were grandfathered under SB 1368.

Under SB 1368, all combined cycle natural gas powerplants that were in operation or had a final decision from the Commission to operate as of June 30, 2007, were deemed to be in compliance with the EPS.<sup>13</sup> In order to implement this provision of SB 1368, the Commission’s EPS regulation defines “deemed-compliant powerplant” as being “any combined cycle natural gas powerplant that was in operation, or for which the Commission had a certificate... on or before June 30, 2007.”<sup>14</sup>

Some combined cycle powerplants that were constructed or in operation on or before June 30, 2007, might have emissions that exceed the EPS. If they have emissions that exceed the EPS, they are not compliant with the EPS. However, those plants are “grandfathered” under the relevant provisions of both SB 1368 and the Commission’s EPS regulation as “deemed compliant” facilities. Consequently, for example, investments in deemed compliant powerplants that are designed and intended to extend the life of one or more generating units by five years or more or which would result in an increase in the rated capacity of the powerplant are not covered procurements. Unless those investments were for routine maintenance, those investments would be covered procurements if they were made in non-deemed compliant powerplants.

It would exceed the scope of SB 1368 and the EPS regulation for the Commission to adopt a deliberation and reporting requirement as proposed by NRDC & Sierra Club that would

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<sup>13</sup> PUC Code §8341(e)(1). (“All combined-cycle natural gas powerplants that are in operation, or that have an Energy Commission final permit decision to operate as of June 30, 2007, shall be deemed to be in compliance with the greenhouse gases emission performance standard.”)

<sup>14</sup> 20 CCR §2901(e).



extend to non-compliant combined cycle powerplants that are grandfathered because they were in operation or were certificated on or before June 30, 2007.

**B. In their effort to avoid appearing to impose an unduly burdensome reporting requirement on POU, NRDC & Sierra Club would impose an unreasonable burden upon POU governing bodies.**

NRDC & Sierra Club want to appear to be proposing a reporting requirement that would not be burdensome on POU. They accomplish their objective by imposing an undue burden on POU governing bodies.

**1. The public notice and reporting provisions of section 2908 are reasonable to the extent they apply only to covered procurements.**

Section 2908 requires a POU to post notice when its governing body will deliberate in public on a covered procurement and further requires that the information that is made available to the governing body shall also be made available to the public and the Energy Commission. The reporting burden that is imposed by section 2908 is mitigated by permitting a POU to provide the information to the Energy Commission through a URL. Section 2908 is reasonable as applied to covered procurements. The reporting burden is relatively light, and the number of required deliberations is limited.

**a. The number of required POU governing body deliberations is limited.**

Under EPS regulation, there are eight narrowly defined types of covered procurements. First, a new or renewed contractual commitment for a POU procurement of electricity for a term of five years or more from a non-deemed compliant baseload generation powerplant is a covered procurement.<sup>15</sup> The procurement may be approved if the non-deemed compliant powerplant meets the EPS.

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<sup>15</sup> See 20 CCR §2901(d)(2)(A).

Second, a new or renewed contractual commitment for the procurement of electricity for a term of five years or more for output from generating units added to a deemed-compliant baseload generation powerplant that would result in an increase of 50 MW or more in the powerplant's rated capacity is a covered procurement.<sup>16</sup> The procurement may be approved if the deemed-compliant powerplant with the new addition meets the EPS.

Third, an investment in the construction of a new baseload powerplant is a covered procurement.<sup>17</sup> The investment may be approved if the new powerplant meets the EPS.

Fourth, the acquisition of a new or additional ownership interest in an existing non-deemed compliant powerplant previously owned by others is a covered procurement.<sup>18</sup> The acquisition may be approved if the non-deemed compliant powerplant meets the EPS.

Fifth, an investment in generating units added to a deemed-compliant powerplant which would result in an increase of 50 MW or more in the powerplant's rated capacity is a covered procurement.<sup>19</sup> The investment may be approved if the deemed-compliant powerplant, including the addition, meets the EPS.

Sixth, an investment in an existing, non-deemed compliant powerplant that is designed and intended to extend the life of one or more generating units by five years or more, not including routine maintenance, is a covered procurement. Such an investment may be approved if the non-deemed compliant powerplant would meet the EPS after the investment.

Seventh, an investment in an existing, non-deemed compliant powerplant that results in an increase in the rated capacity of the powerplant, not including routine maintenance, is a

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<sup>16</sup> 20 CCR §2901(b)(2)(B).

<sup>17</sup> 20 CCR §2901(j)(1).

<sup>18</sup> 20 CCR §2901(j)(2).

<sup>19</sup> 20 CCR §2901(j)(3).

covered procurement. The investment may be approved if the investment would result in the powerplant meeting the EPS after the investment.

Eighth, an investment in an existing non-deemed compliant powerplant that is designed and intended to convert a non-baseload generation powerplant to being a baseload generation powerplant is a covered procurement.<sup>20</sup> The investment may be approved if the converted powerplant would meet the EPS.

**b. For SCPPA San Juan Participants and Anaheim, governing body deliberations on covered procurements have been rare.**

For the SCPPA San Juan Participants and Anaheim, governing body deliberations on covered procurements have been rare. The SCPPA San Juan Participants and Anaheim procedures for considering an investment that potentially may be a covered procurement are somewhat different. For both SCPPA San Juan Participants and Anaheim, the staff reviews investments that are potentially covered procurements including capital investments at non-deemed compliant facilities such as San Juan Units 3 and 4.<sup>21</sup> For SCPPA San Juan Participants, if staff determines that a specific investment would be a covered procurement or if staff determines that there is a question about whether a specific investment would be a covered procurement, the investment is presented to the relevant governing body, the SCPPA Board of Directors (“Board”), for consideration.<sup>22</sup> For Anaheim, all expenditures including investments that are potentially covered procurements are included in the Anaheim Public Utilities

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<sup>20</sup> 20 CCR §2901(j)(4)(C).

<sup>21</sup> SCPPA, M-S-R Public Power Agency, and Anaheim Response to Tentative Conclusions and Request for Additional Information, (“Response to Tentative Conclusions”), CEC Docket No. 12-OIR-1, pp. 8, 9 ((July 27, 2012).

<sup>22</sup> *Ibid*, p. 7.

Department (“Department”) annual budget. The Department budget is presented to the Anaheim Public Utilities Board and the Anaheim City Council for consideration.<sup>23</sup>

Focusing on SCPPA, which takes the case-by-case approach, there has been only one instance in which staff called upon the SCPPA Board to deliberate on an investment.<sup>24</sup> A primary reason for the rarity of the event is that if a potential investment that would be a covered procurement under the EPS regulation would not meet the EPS, there is no point to having the Board spend its valuable time considering the investment.

For example, there would be no point to the Board spending time deliberating on buying a coal-fired powerplant. Such an acquisition is forbidden by SB 1368 and the EPS regulation. Likewise, there would be no point to the Board spending time considering an investment that is not for routine maintenance but, instead, is intended to extend the life of one or more generating units at a non-deemed compliant powerplant by five years or more or would result in an increase in the rated capacity of a non-deemed compliant powerplant.<sup>25</sup> SCPPA staff knows that since the EPS regulation became effective in 2007 such investments are prohibited if the emissions from the powerplant would continue to exceed the EPS after making the investment. Conversely, there would be no point to the Board spending time considering an investment that is for routine maintenance for SB 1368 compliance purposes. SCPPA staff knows that investments in routine maintenance are not covered procurements even when the investments are made at non-deemed compliant powerplants.

Covered procurements that would not meet the EPS are not brought to the attention of the SCPPA Board by the SCPPA staff simply because the EPS regulation prohibits them and there is no point to pursuing them. The one instance in which the SCPPA Board was called upon to

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<sup>23</sup> *Ibid*, pp. 10-11.

<sup>24</sup> *Ibid*, pp. 7-8.

<sup>25</sup> 20 CCR §2901(j)(4)(A)-(B).

consider an investment in a non-deemed compliant powerplant was when SCPPA had to address the need for a rotor replacement in San Juan Unit 3 in 2009. There was a possibility that the rotor replacement would result in an increase in capacity at San Juan Unit 3. The SCPPA Board considered the replacement and found that it constituted routine maintenance. Consequently, the Board concluded that the replacement was not a covered procurement under the EPS regulation.<sup>26</sup>

Subsequently the SCPPA staff had occasion to consider a proposal by General Electric (“GE”) for further work that would yield an increase in capacity at San Juan Unit 3. The SCPPA staff rejected GE’s proposal specifically because the work was designed solely to provide an increase in rated capacity and would not be routine maintenance.<sup>27</sup> Insofar as the investment would be a covered procurement that would not meet the EPS, the investment was not taken to the SCPPA Board for deliberation.

More generally, there has not even been consideration of permissible covered procurements by the SCPPA San Juan Participants and Anaheim, primarily because the SCPPA San Juan Participants and Anaheim have not been interested in acquiring new baseload generation. The SCPPA San Juan Participants and Anaheim are subject to California’s Renewable Portfolio Standard (“RPS”).<sup>28</sup> As a result, the SCPPA San Juan Participants and Anaheim have been keenly focused on acquiring renewable resources. The acquisition of the renewable resources often involves solar generation or wind generation that is highly intermittent

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<sup>26</sup> See SCPPA San Juan Participants Comments on Questions in Notice of Rulemaking Workshop, p. 12 (March 26, 2012).

<sup>27</sup> *Ibid*, p. 14.

<sup>28</sup> The Renewables Portfolio standard (RPS) was established by senate Bill 1078 (Sher, Chapter 516, Statutes of 2002), effective January 1, 2003, with revisions to the law following as a result of Senate Bill 1250 (Perata), Chapter 512, Statutes of 2006), Senate Bill 107 (Simitian, Chapter 464, Statutes of 2006), and Senate Bill X12 (Simitian, Chapter 1, Statutes of 2011, First Extraordinary Session). The law requires retail sellers of electricity and local publicly owned electric utilities (POUs) to increase the amount of renewable energy they procure until 33 percent of their retail sales are served with renewable energy by December 31, 2020.

in nature. Intermittent renewable resources are far from having an annualized plant capacity factor of at least 60 percent. Thus, they have little chance of qualifying as “baseload generation” under SB 1368 and the EPS regulation.<sup>29</sup> Furthermore, even if they were to achieve a capacity factor of 60 percent, wind and solar resources are “determined to be compliant” under section 2903 of the EPS regulation.<sup>30</sup> Geothermal resources are “determined to be compliant” under section 2903 as well.<sup>31</sup>

NRDC & Sierra Club state that “not a single POU has submitted compliance filings for covered procurements at existing powerplants.”<sup>32</sup> The fact that there have not been any POU submissions under section 2908 of the EPS regulation should not be surprising. The lack of submissions simply reflects compliance with California law. To SCPPA San Juan Participants and Anaheim’s knowledge, all California POU’s are aware of the EPS and are aware that covered procurements in powerplants that do not meet the 1100 lbsCO<sub>2</sub>/MWh EPS are prohibited. It is unlikely the POU’s would have any interest in wasting time considering procurements that they cannot pursue lawfully. Likewise, the POU’s are well aware of the RPS and are likely to be focused on the acquisition of renewable resources rather than the procurement of additional non-renewable baseload generation.

Both POU avoidance of investments that are consistent with the EPS regulation and POU pursuit of investments that meet the RPS are behavior patterns that are allegedly desired by NRDC & Sierra Club. It is disingenuous for NRDC & Sierra Club to complain about the lack of submissions under section 2908 of the EPS regulation when the lack of submissions is a direct

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<sup>29</sup> 20 CCR §2901(b) (“‘Baseload generation’ means electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent.”)

<sup>30</sup> 20 CCR §2903(a); Pub. Res. Code §25741(a)(1).

<sup>31</sup> *Ibid.*

<sup>32</sup> NRDC & Sierra Club Petition, Docket No. 12 OIR-1, p. 4 (November 14, 2011) (bold in original).

consequence of POU compliance with the EPS and the RPS, both of which are supported by the NRDC & Sierra Club.

**2. It would be unduly burdensome to require that POU governing bodies consider all investments in non-compliant facilities.**

It would be unduly burdensome to extend the section 2908 reporting requirements to expenditures on all non-compliant facilities, including investments that are consistent with the EPS regulation, by the artifice of requiring the POU governing bodies consider all such expenditures. For example, the SCPPA staff considers about 100 capital investments each year for a single non-deemed compliant powerplant that does not meet the EPS, the San Juan Project Unit 3.<sup>33</sup> The investments include maintenance and replacement work on obsolete equipment or systems, purchasing and installing spare pumps and motors that are needed to be prepared for equipment failures, and modernizing control equipment.<sup>34</sup> The investments individually run from \$50,000 to millions of dollars.<sup>35</sup> In each instance, with the exception of the replacement of the rotor blades and the subsequent GE proposal to increase rated capacity, it has been self evident to the SCPPA staff that the investment is consistent with the EPS regulation as routine maintenance.

Adoption of the NRDC & Sierra Club proposal would result in all of these investments being needlessly brought to the SCPPA Board even though they were clearly not covered procurements under the EPS regulation. Although requiring all of these investments to be raised to Board consideration would result in meeting the NRDC & Sierra Club objective of extending the section 2908 notice and reporting requirements to all expenditures in non-compliant powerplants like the San Juan Project, it would be unduly burdensome on the SCPPA Board.

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<sup>33</sup> Transcript 92:13.

<sup>34</sup> Transcript 92:20-21.

<sup>35</sup> *Ibid.*

The SCPPA Board consists primarily of general managers from the member utilities. The Board meets only once each month and has an ample agenda for each meeting. Increasing the burden on the SCPPA Board and potentially other POU governing bodies as would occur under the NRDC & Sierra Club proposal cannot be justified, particularly when investments that are proscribed under the EPS regulation are already being scrupulously avoided.

**C. It would be unduly burdensome on POUs to require submission of information to the Energy Commission about all expenditures on non-compliant facilities even if POU governing bodies were not required to spend time considering all such expenditures.**

It would be unduly burdensome to require POUs to provide information on all expenditures on all non-compliant facilities even if POU governing bodies were not required to spend their valuable time considering such information. Requiring the submission of documentation for each and every investment, even if there were a *de minimis* cutoff at \$50,000 as suggested by NRDC & Sierra Club,<sup>36</sup> would impose an undue administrative burden on POUs. As discussed above, there are about 100 such investments every year San Juan Project Unit 3 alone.

Needlessly increasing the reporting burden on POU staffs could adversely affect the reliability of service to California electricity consumers. Although SCPPA members including the SCPPA San Juan Participants and Anaheim are making substantial strides in incorporating new renewable resources to meet the demands of their consumers, non-EPS compliant powerplants such as the San Juan Project are going to be required to meet consumer demand reliably until the plants are phased out in an orderly and responsible fashion. Powerplants, like any machinery, require maintenance in order to be operated prudently and responsibly. Requiring POUs to submit documentation to the Energy Commission for each and every

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<sup>36</sup> *Ibid*, p. 3.



investment in routine maintenance at non-EPS compliant power plants could prevent timely maintenance at the power plants, jeopardizing the operation of the power plants and potentially jeopardizing the reliability of service to consumers.<sup>37</sup>

Additionally, requiring POUs to produce information on expenditures on non-compliant facilities, whether believed to be covered procurements or not, would distract POUs from the important work they are doing to meet California's RPS, to reduce GHG emissions, and to meet other mandates as imposed by the Legislature as well as by the governing bodies of POUs themselves.

Submission of such information may provide an opportunity for entities such as NRDC & Sierra Club to go on a fishing expedition to try to find instances in which POUs have undertaken expenditures at non-compliant facilities in violation of the EPS, but given the scrupulous attention by SCPPA San Juan Participants and Anaheim to avoid any investments that would violate the EPS regulation, such a fishing expedition, at least in the case of the SCPPA San Juan Participants and Anaheim, would be in vain.

Accordingly, even if the NRDC & Sierra Club proposal were modified to be a proposal for submittal of supporting documentation for all expenditures on non-compliant facilities without requiring POU governing body consideration, the proposal should be rejected as unduly burdensome and wholly unnecessary.

### **III. THE ENERGY COMMISSION LACKS JURISDICTION TO ADJUST THE EPS ABSENT PRIOR ACTION BY THE CPUC.**

The Requests for Reply Comments provide an opportunity for parties to respond to the NRDC & Sierra Club proposal that the Energy Commission reduce the EPS from the current

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<sup>37</sup> *Ibid*, p. 4.

level of 1100 lbsCO<sub>2</sub>/MWh to 825-850 lbsCO<sub>2</sub>/MWh.<sup>38</sup> However, the Energy Commission lacks jurisdiction to revise the EPS absent prior action by the CPUC.

The structure of SB 1368 is clear. SB 1368 required the CPUC to establish an EPS for the baseload generation of load-serving entities on or before February 1, 2007.<sup>39</sup> SB 1368 required the Energy Commission to establish an EPS for the baseload generation of POUs on or before June 30, 2007. SB 1368 explicitly requires that the EPS established by the Energy Commission “shall be consistent with” the standard adopted by the CPUC for load-serving entities.<sup>40</sup>

Thus, the clear intent of the Legislature was that the CPUC should establish an EPS for load serving-entities and that subsequently the Energy Commission should establish an EPS for POUs that would be consistent with the standard set by the CPUC. This would assure that the EPS that applies to POUs would be the same as the EPS that applies to load serving entities.

In its August 31, 2007 Final Statement of Reasons (“FSOR”) adopting its EPS regulation, the Energy Commission recognized that the EPS that it sets for POUs must be consistent with the

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<sup>38</sup> Requests for Reply Comments, p. 4.

<sup>39</sup> Pub. Util. Code §8341(d)(1):

On or before February 1, 2007, the commission, through a rulemaking proceeding, and in consultation with the Energy Commission and the State Air Resources Board, shall establish a greenhouse gases emission performance standard for all baseload generation of load-serving entities, 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.

<sup>40</sup> Pub. Util. Code §8341(e)(1):

On or before June 30, 2007, the Energy Commission, at a duly noticed public hearing and in consultation with the 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 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. The greenhouse gases emission performance standard established by the Energy Commission for local publicly owned electric utilities shall be consistent with the standard adopted by the commission for load-serving entities.

EPS set by the CPUC for load-serving entities: “The law requires that the Commission’s standard be consistent with that adopted by the CPUC in a companion proceeding.”<sup>41</sup> Having recognized the limits to its jurisdiction, the Energy Commission should avoid any attempt to go beyond its jurisdiction by adjusting the EPS for POUs in the absence of a prior adjustment by the CPUC.

**IV. EVEN IF IT HAD JURISDICTION, THE ENERGY COMMISSION SHOULD REJECT THE NRDC & SIERRA CLUB PROPOSAL TO ADJUST THE EPS FOR POUs TO 825-850 LBS CO<sub>2</sub>/MWh.**

Even if one were to ignore the fact that the Energy Commission lacks jurisdiction to adjust the EPS absent prior action by the CPUC, the Energy Commission should reject the NRDC & Sierra Club proposal to reduce the EPS to 825-850 lbsCO<sub>2</sub>/MWh.

**A. Setting a new EPS for POUs at 825-850 lbsCO<sub>2</sub>/MWh would unlawfully discriminate against POUs.**

Unilaterally reducing the EPS that applies to POUs to 825-850 lbsCO<sub>2</sub>/MWh would unlawfully discriminate against POUs. It would obviously be discriminatory to set an EPS of 825-850 lbsCO<sub>2</sub>/MWh for POUs while the EPS remains at 1100 lbsCO<sub>2</sub>/MWh for load serving entities. Such discrimination would be unlawful.

SB 1368 requires that the EPS be non-discriminatory. By providing that the CPUC shall establish the EPS for load serving entities and that subsequently the Energy Commission shall establish an EPS for POUs that “shall be consistent with the standard adopted by the [CPUC] for load serving entities,” the Legislature clearly prohibited discrimination. The Energy Commission may not discriminate against POUs by establishing an EPS for POUs that is lower than the EPS that the CPUC establishes for load serving entities. Conversely, the Energy

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<sup>41</sup> FSOR, p. 1 (August 31, 2007).

Commission may not discriminate in favor of POUs by establishing an EPS for POUs that is higher than the EPS that the CPUC establishes for load serving entities.

Given that SB 1368 prohibits discrimination between POUs and load serving entities in setting the EPS, it would be unlawful for the Energy Commission to impose an EPS of 825-850 lbsCO<sub>2</sub>/MWh on POUs while the 1100 lbsCO<sub>2</sub>/MWh EPS remains in place for the POUs.

**B. Imposing an EPS of 825-850 lbsCO<sub>2</sub>/MWh on POUs as a stretch goal to be achieved by POUs would be inconsistent with the purpose of SB 1368.**

NRDC & Sierra Club propose a new EPS of 825-850 lbsCO<sub>2</sub>/MWh so as to impose a stretch goal on POUs. NRDC & Sierra Club’s intent to get the Energy Commission to impose a stretch goal on POUs is manifested by their argument that “the 2007 EPS is not sufficiently stringent to require the use of the *most efficient and least polluting* baseload fossil-fueled technology commonly available today—high efficiency natural gas combined-cycle ....”<sup>42</sup>

NRDC & Sierra Club contend that imposing the new EPS of 825-850 lbsCO<sub>2</sub>/MWh would be consistent with the purpose of SB 1368 because “the purpose of SB 1368” was to ensure “that California continues to procure only highly efficient resources.”<sup>43</sup> NRDC & Sierra Club appeal to California’s desire to be a trendsetter by saying that “updating the EPS to reflect what is now technologically and economically feasible will maintain California’s leadership role in setting policies that achieve a meaningful reduction in greenhouse gas pollution.”<sup>44</sup>

However, the purpose of SB 1368 was *not* to impose the “most efficient and least polluting baseload fossil-fuel technology” on load serving entities and POUs. Instead, the purpose of SB 1368 was to prevent backsliding by load serving entities and POUs that could occur if load serving entities and POUs made new investments in high greenhouse gas (“GHG”)

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<sup>42</sup> *Ibid*, p. 6 (emphasis added).

<sup>43</sup> NRDC & Sierra Club Comment, p. 5.

<sup>44</sup> *Ibid*.

emitting powerplants, particularly, coal-fired plants. The explicit purpose of SB 1368 was to prevent “new long-term financial commitments” in non-EPS compliant power plants to reduce the potential financial risk and reliability risk to California consumers that could arise if enforceable GHG emission limits were imposed, as will occur on January 1, 2013.<sup>45</sup>

The Energy Commission elaborated on the purpose of SB 1368 in the FSOR for the EPS regulation:

The purpose of SB 1368 is to take steps to meet greenhouse gases emissions reduction goals, reduce potential financial risk to California consumers for future pollution-control costs, and reduce potential exposure of California consumers to future reliability problems in electricity supplies.<sup>46</sup>

The Energy Commission further explained the potential financial risk and reliability risk to California consumers that could arise if enforceable GHG emission limits were imposed as follows:

[The] purpose [of SB 1368] is to reduce future problems specifically associated with investments in power plants that emit high amounts of greenhouse gases. The future problem SB 1368 is trying to address is the following: it is foreseeable that power plants, in the near future, will be required to mitigate their greenhouse gases emissions. Whether this mitigation takes the form of technological improvements to the power plant itself or the purchase of offsets, it is likely to be costly. If POUs have invested a large amount in high-GHG emitting power plants, then they will likewise be required to pay a large amount to mitigate for these high-GHG emitting power plants. If they cannot afford to mitigate, then the power plants may have to shut down, raising reliability concerns.<sup>47</sup>

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<sup>45</sup> Section 1(i) of SB 1368 states: “A greenhouse gases emission performance standard for new long-term financial commitments to electrical generating resources will reduce potential financial risk to California consumers for future pollution-control costs.”

Section 1(j) of SB 1368 states: “A greenhouse gases emission performance standard for new long-term financial commitments to electric generating resources will reduce potential exposure of California consumers to future reliability problems in electricity supplies.”

<sup>46</sup> FSOR, CEC Docket No. 06-OIR-1, Notice File No. Z07-0227-01, OAL File No. 07-0601-04S, p. 41 (August 31, 2007).

<sup>47</sup> *Ibid.*

Thus, as the Energy Commission itself recognized in the FSOR, the legislative intent underlying SB 1368 was not to impose a stretch goal that would require POUs to use only the “most efficient and least polluting baseload possible fuel technology.” Instead, the purpose was to prevent POUs from incurring both financial and reliability risk by making additional investments in “high GHG emitting powerplants.”

NRDC & Sierra Club admitted in their March 26, 2012 comment in this proceeding that the “EPS was designed specifically to reduce potential financial risk to California consumers for future pollution control costs from high emitting resources.”<sup>48</sup> Approving NRDC & Sierra Club’s proposed 825-850 lbsCO<sub>2</sub>/MWh EPS would go beyond the intent of the Legislature as expressed in SB 1368, as recognized in the FSOR, and even as recognized by NRDC & Sierra Club earlier in this proceeding.

**C. The CPUC properly set the EPS at 1100 lbsCO<sub>2</sub>/MWh.**

The CPUC properly set the current EPS of 1100 lbsCO<sub>2</sub>/MWh in its Rulemaking (“R.”) 06-04-009. The record in R.06-04-009 established the following:

- Based on the million British thermal units (MMBtus) consumed by CCGT’s in California in 2004 and 2005 as reported in the CEC’s Continuous Emissions Monitoring System (CEMS), CCGTs with capacity factors of 60% or more had emissions as low as 833 in 2004 and 794 in 2005.
- Based on the same CEMS reported data, CCGTs with capacity factors of 60% or greater had emissions as high as 1058 in 2004 and 1006 in 2005.
- The weighted average of emission rates based on the 2004/2005 CEMS data for baseload CCGTs is in the range of 856-915 lbs of CO<sub>2</sub>/MWh, depending on whether energy or capacity is used as the weighting factor.
- Data from the CEC dating back to 2000 for CCGTs in the Western Energy Coordinating Council region show some facilities not included in the foregoing data with capacity factors greater than 60% and with emission rates ranging from 993-1208 lbs of CO<sub>2</sub>/MWh.

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<sup>48</sup> NRDC & Sierra Club Joint Comments, p. 1 (March 26, 2012).

- Dry cooling, which offers the benefit of lower water consumption, increases the heat rate of a CCGT on the order of 1.5%.<sup>49</sup>

The CPUC's Assigned Commissioner and the Administrative Law Judge released a Proposed Decision in R.06-04-009 on December 13, 2006, concluding that establishing an EPS of 1000 lbsCO<sub>2</sub>/MWh was reasonable.<sup>50</sup> However, after considering comments on the Proposed Decision, the CPUC found that it was appropriate to allow "a small amount of leeway" above 1000 lbsCO<sub>2</sub>/MWh to "more appropriately take into account smaller-sized CCGTs utilizing newer technologies, as well as the variability in heat rates based on altitude and ambient temperatures where the facility is located."<sup>51</sup>

The CPUC concluded from data and other considerations contained in the record in R.06-04-009 that establishing an EPS at 1100 lbsCO<sub>2</sub>/MWh was reasonable. The CPUC explained that an EPS of 1100 lbsCO<sub>2</sub>/MWh reflects emission rates associated with both existing and new CCGT units and takes into account the potential for CCGT plant "outliers" that utilize dry cooling technologies, are smaller-sized, or are located in deserts or high altitudes: "It represents a level that reflects emission rates associated with both existing and new baseload CCGT units and reasonably accounts for potential CCGT plant 'outliers' from the average [CCGTs] that utilize dry cooling technologies, are smaller-sized facilities or are located in the desert or at high altitudes."<sup>52</sup> At the same time an EPS of 1100 lbsCO<sub>2</sub>/MWh avoids establishing a standard that is representative of inefficient older deemed-compliant CCGT powerplants constructed prior to June 30, 2007, and which remain in operation.<sup>53</sup>

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<sup>49</sup> R.06-04-009, D.07-01-039, p. 69 (January 25, 2007).

<sup>50</sup> R.06-04-009, Proposed Decision, p. 60 (December 13, 2006).

<sup>51</sup> D.07-01-039, *ibid*, p. 70.

<sup>52</sup> *Ibid*.

<sup>53</sup> D.07-09-039, *ibid*.

The CPUC also found that its adopted EPS of 1100 lbsCO<sub>2</sub>/MWh met the intent of the Legislature while taking into account the concern reflected in the SB 1368 grandfathering provisions that some older, less efficient CCGT powerplants might not be able to meet the EPS: “[Our] adopted level reflects the intent of the Legislature to base the EPS on CCGT emissions rates, while acknowledging the concern reflected in the statute’s grandfathering provisions that some of the older, less efficient CCGT powerplants currently operating may not be able to meet it.”<sup>54</sup>

The Energy Commission should not seek to disturb the 1100 lbsCO<sub>2</sub>/MWh that was carefully established by the CPUC in accordance with SB 1368. The EPS as established by the CPUC is based upon an ample factual record, properly balances a variety of considerations, and fully complies with the intent of the Legislature.

**D. NRDC & Sierra Club fail to show good cause for changing the EPS.**

The data presented by NRDC & Sierra Club in Appendix 1 to their July 27, 2012 comments fail to demonstrate any significant change in CCGT emission rates that would justify changing the EPS that was established by CPUC. NRDC & Sierra Club’s Table 2 provides annual average emission rates of “older sources” that are contained in a data set maintained by the United States Environmental Protection Agency (“US EPA”) Clean Air Markets Division (“CAMD”). The “older sources” were constructed prior to 2005. The net average emissions rates for the “older sources” range from 793 lbsCO<sub>2</sub>/MWh to 846 lbsCO<sub>2</sub>/MWh.<sup>55</sup> Six California units are included in NRDC & Sierra Club’s Table 2. Those units and their associated net emissions rate are as follows:

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<sup>54</sup> *Ibid.*

<sup>55</sup> NRDC & Sierra Club Comments, Appendix 1, Table 2.



- Calpine Sutter 810 lbsCO<sub>2</sub>/MWh
- Calpine Sutter 824 lbsCO<sub>2</sub>/MWh
- Riverside Energy Center 840 lbsCO<sub>2</sub>/MWh
- Delta Energy Center 839 lbsCO<sub>2</sub>/MWh
- Sunrise Power 844 lbsCO<sub>2</sub>/MWh
- Sunrise Power 839 lbsCO<sub>2</sub>/MWh

NRDC & Sierra Club’s Table 1 shows emission rates for newer generation facilities constructed between 2006 and 2012. The net emissions rates for those facilities range from 763 lbsCO<sub>2</sub>/MWh to 849 lbsCO<sub>2</sub>/MWh. Table 1 shows the net emissions for two California generation units as follows:

- Inland Empire Energy Center 803 lbsCO<sub>2</sub>/MWh
- Inland Empire Energy Center 835 lbsCO<sub>2</sub>/MWh<sup>56</sup>

There is not much difference between NRDC & Sierra Club data for older pre-2005 CCGTs and NRDC & Sierra Club’s data for newer 2006-2012 CCGTs. In fact, the highest net emissions rate shown for the newer CCGTs (Turkey Point at 849 lbsCO<sub>2</sub>/MWh) is *higher* than the highest net emissions rate shown for the CCGTs constructed prior to 2005 (Columbia Energy Center at 846 lbsCO<sub>2</sub>/MWh). Likewise, the two newer California units had emissions rates that were similar to the emissions rates of the older California units. Thus, NRDC & Sierra Club’s tables comparing pre-2005 CCGTs to CCGTs constructed between 2006 and 2012 fail to provide the Energy Commission with reasonable cause to reconsider the currently effective EPS as established by the CPUC.

Likewise, NRDC & Sierra Club’s Table 3 fails to support establishing an EPS of 825-850 lbsCO<sub>2</sub>/MWh. NRDC & Sierra Club’s Table 3 presents “annual CO<sub>2</sub> emission rates for

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<sup>56</sup> *Ibid.*

California CCGTs constructed since 2007.”<sup>57</sup> The representative net emission rates shown in Table 3 are as follows:

• Gateway Generating Station	862.1 lbsCO <sub>2</sub> /MWh
• Gateway Generating Station	880.7 lbsCO <sub>2</sub> /MWh
• Roseville Energy Park	916.7 lbsCO <sub>2</sub> /MWh
• Roseville Energy Park	916.7 lbsCO <sub>2</sub> /MWh
• Inland Empire Energy Center	813.7 lbsCO <sub>2</sub> /MWh
• Inland Empire Energy Center	793.1 lbsCO <sub>2</sub> /MWh
• Otay Mesa Energy Center, LLC	853.9 lbsCO <sub>2</sub> /MWh
• Otay Mesa Energy Center, LLC	857.0 lbsCO <sub>2</sub> /MWh
• Colusa Generating Station	947.6 lbsCO <sub>2</sub> /MWh
• Colusa Generating Station	969.2 lbsCO <sub>2</sub> /MWh <sup>58</sup>

These emission rates are within the range of emission rates considered by the CPUC in D.07-01-039.<sup>59</sup>

NRDC & Sierra Club fail to demonstrate any change in circumstances that would justify adopting their proposed 825-850 lbsCO<sub>2</sub>/MWh EPS.

#### **V. REQUESTS FOR INFORMATION CONTAINED IN THE REQUESTS FOR REPLY COMMENTS.**

The Requests for Reply Comments contained three requests for information in connection with the NRDC & Sierra Club proposal for adoption of an 825-850 lbsCO<sub>2</sub>/MWh EPS. The SCPPA San Juan Participants respond below to the three requests for information.

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<sup>57</sup> *Ibid* p. 3.

<sup>58</sup> *Ibid*.

<sup>59</sup> D.07-01-039, *ibid*, p. 69.

**A. Request for information on adjustments that might be necessary to reflect California’s specific conditions.**

The Requests for Reply Comments note that NRDC & Sierra Club rely on a national data base in their Appendix 1 to support their recommended 825-850 lbsCO<sub>2</sub>/MWh EPS. The Requests for Reply Comments observe that NRDC & Sierra Club fail to take into account circumstances that are unique to California: “Although this data includes selective catalytic reduction in some cases, it does not account for corresponding allowable emission of NO<sub>x</sub> and ammonia slip, which apply in California.”<sup>60</sup> The Requests for Reply Comments observe further that it “might be necessary to reflect California’s specific conditions” instead of relying on upon a national data base.<sup>61</sup>

The SCPPA San Juan Participants and Anaheim thoroughly agree with the observations in the Requests for Reply Comments. Any data from a national data base should be adjusted to reflect California-specific environmental regulations.

However, time and treasure should not be exhausted trying to make necessary adjustments to the data presented by NRDC & Sierra Club. Aside from being beyond the jurisdiction of the Energy Commission absent prior action by the CPUC, the NRDC & Sierra Club proposal to reduce the EPS to 825-850 lbsCO<sub>2</sub>/MWh is inconsistent with the intent underlying SB 1368 and is not supported by the data that NRDC & Sierra Club append to their comments. Their proposal should be rejected without further effort being expended to improve the quality of the data that they have presented.

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<sup>60</sup> Requests for Reply Comments, p. 4.

<sup>61</sup> *Ibid.*

**B. Request for information on California natural gas prior powerplants that would be affected by an 825-850 lbsCO<sub>2</sub>/MWh.**

The Requests for Reply Comments seeks input on how many of California's natural gas fired powerplants would be affected by a lower EPS of 825-850 lbsCO<sub>2</sub>/MWh.<sup>62</sup> SCPPA San Juan Participants and Anaheim do not own or participate in any natural gas fired powerplants that have an annualized plant capacity factor of 60 percent which are not deemed-compliant powerplants. However, there could still be a potential effect of an 825-850 lbsCO<sub>2</sub>/MWh EPS.

Anaheim and some of the SCPPA San Juan Participants participate in SCPPA's Magnolia Power Project ("Magnolia"). Magnolia is a deemed-compliant powerplant insofar as it was in operation before June 30, 2007.<sup>63</sup> Under section 2901(j)(3) of the EPS regulation, the 825-850 lbsCO<sub>2</sub>/MWh EPS proposed by NRDC & Sierra Club could affect the potential for investing in an addition to Magnolia if the addition would result in an increase of 50 megawatts or more to the powerplant's rated capacity.

Also, switching to 825-850 lbsCO<sub>2</sub>/MWh EPS could affect the ability of the SCPPA San Juan Participants and Anaheim to acquire gas-fired facilities in the future that would assist in integrating renewable resources.

**C. Request for information on the design or ability of natural gas powerplants to operate more flexibly to integrate renewable resources.**

The Requests for Reply Comments seek input on the extent to which NRDC & Sierra Club's proposed EPS may impact the design or ability of natural gas powerplants to operate more flexibly for integrating renewable resources.<sup>64</sup> The Requests for Reply Comments observe that the cycling of natural gas powerplants to support intermittent renewable resources "entails

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<sup>62</sup> Requests for Reply Comments, p. 4.

<sup>63</sup> 20 CCR §2901(e).

<sup>64</sup> Requests for Reply Comments, p. 4.

lower efficiencies and requires fast ramp capabilities” which could result in an increase in emissions.<sup>65</sup>

The observation in the Requests for Reply Comments is correct. Imposing an extremely low EPS of 825-850 lbsCO<sub>2</sub>/MWh could inhibit using natural gas powerplants effectively to integrate renewable resources. Particularly for natural gas powerplants that are constructed after June 30, 2007, operators of combined cycle powerplants that are within the 825-850 lbsCO<sub>2</sub>/MWh EPS while operating at high efficiency would be reluctant to operate the plants more flexibly at lower efficiencies if such operation could result in an increase in annual average emissions so that the plants would no longer qualify as meeting the EPS.

## **VI. CONCLUSION.**

For the reasons set forth above, the SCPPA San Juan Participants and Anaheim recommend that the Energy Commission reject the NRDC & Sierra Club proposal that POU governing boards be required to consider all investments in non-compliant powerplants with subsequently reporting under section 2908 for the EPS regulation.

Likewise, the SCPPA San Juan Participants and Anaheim recommend that the Energy Commission reject the NRDC & Sierra Club proposal for a reduction of the EPS to 825-850 lbsCO<sub>2</sub>/MWh insofar as adjusting the EPS would exceed the Commission’s jurisdiction absent

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<sup>65</sup> *Ibid.*

prior action by the CPUC, would unlawfully discriminate against POUs, would be inconsistent with SB 1368, and would be unsupported by the data presented by NRDC & Sierra Club.

Respectfully submitted,

*/s/ Norman A. Pedersen*

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