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Center for Biological Diversity

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:

CARLSBAD ENERGY CENTER PROJECT

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) DOCKET NO: 07-AFC-6
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) CENTER FOR BIOLOGICAL
) DIVERSITY'S POST-EVIDENTIARY
) HEARING REPLY BRIEF
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INTRODUCTION

Fundamentally, CEQA requires an agency to inform its decisionmakers and the public about the environmental impacts of its decision. The environmental analysis fails here, because the California Energy Commission Staff (“Staff”) refuses to analyze the greenhouse gas emission impacts from the specific proposed power plant in this proceeding. This proceeding does not present a system-wide energy plan to reduce Greenhouse Gases, to integrate renewables, to replace out-of-state coal, to shut-down once through cooling (“OTC”) plants, nor to provide for local reliability. Yet, the Final Staff Assessment portrays the Carlsbad Energy Center Project (“Project”), a proposed power plant in Carlsbad, California, as part of a grand scheme to do all of these things. The reality is that this Project is based on the application of a private power company that advances this Project based on anticipated future revenue. It is not designed to fit into a specific plan for the California energy system, because no such plan exists.

Faithful compliance with the California Environmental Quality Act, Public Resources Code Section 21000, *et seq.* (“CEQA”) ensures a project with significant environmental impacts is thoroughly analyzed. Unfortunately, Staff throws CEQA out the door by concocting a systems theory where all new combined cycle plants with similar characteristics to the Project would need not undergo CEQA analysis for the emissions of greenhouse gases. This is inconsistent with the Commission’s “Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications”¹ (“Committee Guidance”) conclusion that “[a]t least for the immediate future, the Committee believes the prudent course is to address the significance of GHG as a cumulative impact on a case by case basis, and any mitigation likewise.” (Committee Guidance at 28.) Ironically, Staff and Applicant both attempt to use this Committee Guidance and the subsequent MRW report it spawned to justify a generalized

¹ CEC-700-2009-004 (March 2009).

analysis that applies to a whole class of natural gas plants and to justify the lack of specific analysis in this proceeding.

In its opening brief, the Center for Biological Diversity (the “Center”), *inter alia*, detailed the Staff’s failure to conduct a proper cumulative impacts analysis and to consider the cumulative contribution of the plants that have been licensed or are in the process of being licensed. (*See* Center’s Opening Brief at 25-29.) Staff’s analysis could lead to the permitting of many more unnecessary natural gas plants that have the potential to cumulatively emit millions of tons of greenhouse gases. Moreover, even though Staff estimates that the Project has the potential to emit hundreds of thousands of greenhouse gases and admits that it cannot account for the reductions in other greenhouse gas emissions that will supposedly occur as a result of the Project, Staff finds that these emissions are not a significant impact on the environment. Consequently, Staff’s analysis fails to comply with the dictates of CEQA.

The Center also explains in its opening brief the legal and factual basis for including the use of liquefied natural gas (“LNG”) as part of the Project Description. The Center shows that the use of LNG is reasonably foreseeable and that this use will increase the GHG emissions of the projects. Staff’s and Applicant’s claims to the contrary are nothing more than wishful thinking.

Throughout the brief, the Center shows that Staff’s testimony is rife with inconsistencies undermining the validity of Staff’s testimony and argument. These inconsistencies occur between witnesses put forth by Staff, between Staff testimony and Commission documents, and between Staff’s Opening Brief and Commission documents.

STANDARD OF REVIEW

The Commission is required to comply with CEQA’s substantive and procedural mandates. (Pub. Res. Code §§ 21000, 21002; *Mountain Lion Found. v. Fish & Game Comm’n* (1997) 16 Cal.4th 105, 134; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area*

Forest and Watershed Ass'n v. Cal. Dep't. of Forestry & Fire Prot. (2006) 142 Cal.App.4th 656, 667-68.) At its most fundamental level, CEQA compels a “meticulous process” (*Planning & Conservation League v. Dep't. of Water Res.* (2000) 83 Cal.App.4th 892, 911) for providing “public agencies and the general public with detailed information about the effects of a proposed project on the environment.” (*San Franciscans for Reasonable Growth v. City & Cnty. of S.F.* (1984) 151 Cal.App.3d 61, 72.) The EIR, like the functional equivalent document, is “intended . . . ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action,’” serving as an accountability document that “protects . . . the environment” and “informed self-government.” (*Id.*; *Sierra Club v. State Bd. Of Forestry*, 7 Cal. 4th at 1229 [citing *Laurel Heights Improvement Ass'n of S.F. v. Regents of Univ. of Cal.* [“*Laurel Heights*”] (1988) 47 Cal.3d 376, 392].)

When a court reviews a lead agency’s CEQA decision, it must determine whether the agency committed “a prejudicial abuse of discretion.” (Pub. Res. Code § 21168.5.) “Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” (*Id.*) Challenges to an agency’s failure to proceed in the manner required by law, such as an EIR’s failure to fully and accurately describe a proposed project, are issues of law and subject to a less deferential standard than challenges to an agency’s factual conclusions. (*See id.*; *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal. App. 4th 1186, 1201; *see also San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced* (2007) 149 Cal.App.4th 645, 672.) In short, the court must determine whether the EIR is sufficient as an informational document. (*Dry Creek Citizens Coal. v. Cnty. of Tulare* (1999) 70 Cal.App.4th 20, 26.)

Factual questions, such as challenges to a methodology, accuracy of data, or effectiveness of mitigation measures, are subject to the substantial evidence standard. (*San Joaquin Raptor*, 149

Cal.App.4th at 654; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.5th 412, 435.) While a court reviewing an agency's decisions under CEQA does not second guess the correctness of an EIR's conclusions, it must determine whether those conclusions are supported by substantial evidence, consisting of "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (Pub. Res. Code § 21082.2(c).) Substantial evidence, however, does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [and] evidence which is clearly inaccurate or erroneous." (*Id.*) Thus, the reviewing court is not to "uncritically rely on every study or analysis presented by a project proponent in support of its position." (*Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1355 [quoting *Laurel Heights*, 47 Cal.3d at 409 n.12].)

ARGUMENT

I. The Environmental Analysis Fails to Inform, Because It Does Not Include Analysis of the Use of Liquefied Natural Gas("LNG") as Part of the Project Description.

As detailed in Center's Opening Brief, the use of LNG must be considered as part of the project description. (Center's Opening Br. at 5-12.) An activity falls within the scope of a project if it is a reasonably foreseeable consequence of that project, and if it may change significantly the scope or nature of the project's environmental effects. (*Laurel Heights*, 47 Cal.3d at 396.) The Center showed that the use of LNG was both reasonably foreseeable and would increase the emissions of greenhouse gases from the Project. (Center's Opening Br. at 5-12.)

Staff's claim that the use of LNG by the Project is speculative does not withstand scrutiny and contradicts statements in the 2009 Integrated Energy Policy Report ("IEPR").² (Staff's Brief at 3, 29-30.) To support its speculation theory, Staff relies on statements in the IEPR and on testimony

² Both Staff and Applicant cite to the 2009 IEPR but do not reference an exhibit number. To be consistent, the Center uses the 2009 IEPR posted on the Commission's website at <http://www.energy.ca.gov/2009publications/CEC-100-2009-003/CEC-100-2009-003-CMF.PDF>, rather than Exh. 602.

that currently there are “no LNG imports into California.” (*Id.* at 3.) Incredibly, Staff selectively quotes the IEPR even though this document actually supports the argument and testimony proffered by the Center. (*See* Center’s Opening Br. at 6-10; *see also* Exh 647 [testimony of Rory Cox].) For example, the IEPR states:

A potential additional source of natural gas supply is liquefied natural gas (LNG). In the near future, California could receive natural gas from an LNG facility located at Costa Azul, Mexico. The construction of the Costa Azul LNG terminal was completed last year and still awaits the first of its commercial deliveries. LNG is available, but suppliers at the moment are reluctant to enter the lower-priced Pacific Coast market. When supply does start to flow, North Baja Mexico will have first choice to receive up to 300 MMcf/d to meet its industrial and power plant needs. Any excess in supply would add to California’s supply mix.

(2009 IEPR at 133; *see also Id.* at 140 [IEPR confirms that “California does have potential new sources of natural gas from an existing LNG import facility in Baja, Mexico, along with pipeline projects on the horizon”].) The portions of the IEPR strung together by Staff simply state that more natural gas supply will be available to California, including new pipeline projects, than previously believed. (*See* Staff Br. at 3, 29-30 [citing IEPR 2009 at 133-35, 140-41.]) The IEPR states that the use of LNG might not be as high as projected in the 2007 IEPR (IEPR at 141) but it in no way discounts the delivery of LNG from the Costal Azul plant to California. In fact, when discussing the newly increased availability of North American natural gas, the IEPR notes that:

Plentiful supplies of natural gas will moderate prices and make natural gas an attractive option throughout the West as the electricity industry starts to build a less carbon-intensive infrastructure. Because California is at the end of the gas supply pipelines, demand for natural gas ‘upstream’ of California could increase competition and prices and reduce available supplies for California.

(2009 IEPR at 243.) Thus, even if domestic supplies of natural gas do increase, it is likely that Southern California will rely on the existing Costa Azul LNG terminal, which, as the Center has

already pointed out in its Opening Brief, Sempra has positioned to be capable of supplying ALL of San Diego's foreseeable demand for natural gas. (Center's Opening Br. at 9.)

Staff's testimony, on the other hand, that delivery of LNG to the Project is speculative, is inconsistent with the IEPR's discussion of LNG being delivered from Costal Azul to California. (*cf.* Transcript, Evidentiary Hearing, Feb. 3, 2010 ("Tr." ³) at 169-70, 330-31 to 2009 IEPR 133, 140.) Applicant's similar argument fails because it too relies on Staff's testimony. (App. Br. at 48 (citing Tr. at 169-70, 330-31.) Staff ignores Sempra's billion dollar investment in infrastructure and regulatory changes to facilitate the use of regasified LNG in San Diego County and the thirty year timeframe of the project. (Center's Opening Br. at 7-8.) The CEQA Guidelines generally address the need to describe future events in an EIR, stating that "[w]hile foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Cal. Admin. Code tit. 14 ["CEQA Guidelines"] § 15144.; *see also Vineyard*, 40 Cal.4th at 421 [EIR held insufficient because it did not "clearly and coherently" explain how the project's long-term water demand will likely be met with identified sources, the environmental impacts of using these sources, and how those impacts would be mitigated].) Here, rather than disclosing all the information reasonably available, Staff disputes record evidence that the Commission's own report supports. The interconnected infrastructure and pipeline, together with the regulatory positioning by Sempra, make it reasonably foreseeable that LNG will be used at the Project.

Staff's claim that the use of LNG will not increase greenhouse gas emissions is also flawed. Without citation, staff argues that "[w]hether the burning of LNG significantly increases greenhouse gas (GHG) emissions is itself a disputed matter. However, the notion that the possible use of LNG somehow changes the impact analysis of CECP is no more than speculation and 'unsubstantiated opinion and narrative' that does not meet the definition of 'substantial evidence.'" (Staff Br. at 3-4

³ All Transcript cites refer to the February 3rd, 2010, Evidentiary Hearing unless otherwise noted.

[quoting CEQA Guidelines § 15384].) Ironically, Staff’s failure to provide a cite to any evidence in the record is, itself, “unsubstantiated opinion and narrative.” In addition, Staff cites to the wrong legal standard – substantial evidence – when addressing the Center’s project description argument. (See, e.g. *Communities for a Better Environment, et al. v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83 [“*CBE v. Richmond*”] [when an EIR fails to apprise the public and decisionmakers about the scope of the project, the less deferential failure to proceed in a manner required by law standard, not the substantial evidence standard, applies].) Moreover, without legal justification, Staff dismisses the testimony presented by the Center, which does constitute substantial evidence. Mr. Cox testified, based on his professional experience and peer-reviewed studies in the record, that the use of LNG “adds significant greenhouse gas emissions.” (Exh. 647 at 4; see also Exhs. 618 at 8-9, Exh. 619 at 19-20, Exh. 620 at 7-10, Exh. 632 at 7, 78, and 91-95; see CEQA § 21082.2(c) [substantial evidence includes “expert opinion supported by facts”].) He also explained that “[a]nalysis done by Bill Powers at Powers Engineering concluded that LNG sourced from the Tangguh project in Indonesia and delivered to the Costa Azul terminal would result in an increase of 25 percent greenhouse gas emissions over domestic natural gas.” (Exh. 647 at 4-5, see also Exh. 632 at 91-95.) Mr. Cox’s testimony and the underlying reports are sufficient to show that the Project’s use of LNG will increase greenhouse emissions, and thus, meet the *Laurel Heights* standard.

Applicant makes several specious claims regarding the greenhouse gas emissions associated with LNG. (See Applicant Br. 48-49.) Relying on a misreading of the Committee Guidance, applicant argues that “the Commission has already concluded that life-cycle analyses for power plants in its jurisdiction are neither required nor appropriate.” [Applicant Br. at 49 (citing Committee Guidance at 19).] The Committee actually states that life-cycle fuels analysis is more difficult, but can be done “depending on what is reasonable (and what reliable information is

reasonably available).” (Committee Guidance at 19.) With a cite to the Jamarillo study (a study placed in this record by Mr. Cox), the 2009 IEPR demonstrates that these greenhouse gas emissions can be calculated and that the Commission has considered the life-cycle emissions of LNG.⁴ (2009 IEPR at 138 and n. 195; Exh. 620.)

Applicant’s argument, that since “only 1.3% of the carbon associated with LNG is uniquely attributable to that fuel (as distinguished from other sources of natural gas), such an analysis for CECP would likely show no significant difference between the project and no-project alternatives on this point, or potentially a slight decrease” (Applicant Br. at 49), fails for two reasons. First, it explicitly recognizes that the required analysis of LNG has not occurred in this proceeding. Second, the 1.3% increase in carbon from LNG cited by the Applicant is based solely on the unsubstantiated testimony of Applicant’s witness, Mr. Rubenstein, where he discusses an analysis that he prepared, which the Applicant did not even place in the record. Even more antithetical to CEQA, when cross-examined by the Center, Mr. Rubenstein refused to even reveal who had sponsored the mysterious report. (Tr. at 380:6-8.)⁵ This is unacceptable in the CEQA context. An expert’s reliance on undisclosed information “does not meet the ‘informational’ goals of CEQA.” (*CBE v. Richmond*, 184 Cal.App.4th at 88.)

An expert's opinion ‘concerning matters within [his or her] expertise is of obvious value, but the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment.’ If [this] position becomes the rule-that a project proponent can pick and choose who sees pertinent data-then a stake is driven into

⁴ In regards to this study, Mr. Cox summarizes its conclusion “that imported LNG had a 28 percent midpoint increase over domestic natural gas.” (Exh. 620 at 7.) The 2009 IEPR approaches this study from a different perspective and concludes that the increased greenhouse gas emissions from the use of LNG are less than from the use of coal. (2009 IEPR at 138 and n. 195.) However, this does not change the validity of Mr. Cox’s testimony that the use of LNG creates a significant increase in greenhouse gas emissions, and it supports his reliance on studies that analyzed the greenhouse gas emissions from the use of LNG.

⁵ Note, Mr. Rubenstein was incorrectly identified as Mr. Vidaver in the transcript.

the ‘heart of CEQA’ by preventing the information necessary for an informed decision from reaching the decisionmakers and the public.

(*Id.* [quotations omitted].) Amazingly, Staff relies on the same improper tactic when Mr. Walters testified about a Sempra Energy-sponsored report that he alleged shows only “minor” increases from LNG. (Tr. at 333:19-23.) However, Staff also did not place any such report in the record. Although Staff and Applicant want to dispute Mr. Cox’s testimony, neither apparently had sufficiently credible reports that could be placed in the record. Neither testimony satisfies the requirements of CEQA and therefore must be disregarded.

II. The Environmental Analysis of Greenhouse Gases Fails to Comply with CEQA.

A. The Environmental Analysis Fails to Adequately Analyze the Emissions of Greenhouse Gases from the Project.

Staff’s finding that the Project’s emissions of greenhouse gases will not be a significant effect is contrary to CEQA. (*See* generally Center’s Opening Br. at 12-33.) Staff supports its finding of non-significance with a cite to the CEQA guidelines (Staff Brief at 28-9.); this cite, however, supports the Center’s position, not Staff’s. Staff correctly quotes section 16064.4(b)(1) which requires an agency to consider “[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting” as a factor in determining the significance of the greenhouse gas emissions from a Project. (Staff Brief at 29.) However, Staff pays no heed to the Final Statement of Reasons (“FSR”) that explains how to determine if a Project’s greenhouse gas emissions result in a reduction.⁶ To provide an analysis that complies with CEQA, Staff must “fully account[] for all project emissions.” (FSR at 24.) This accounting must be supported by substantial evidence. (*Id.*) Here, Staff calculates that the

⁶ (Californian Natural Resources Agency, “Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97” [“FSR”] (Dec. 2009) [FSR explains the purpose and meaning of the changes to the CEQA Guidelines].)

operational greenhouse gas emissions of the Project will be about 846,000 tons (Exh. 222⁷ at 4.1-107), but then admits that “the amount of displacement of less efficient facilities has not been quantified.” (Staff Brief at 34.) Staff’s argument, that this admission is “immaterial,” is contrary to the very provision of the CEQA Guidelines it cites and does not constitute substantial evidence. (See Center’s Opening Br. at 12-25 [explaining application of CEQA Guidelines § 15064.4(b)].)

Staff argues that there is no need for CEQA analysis on the gross amount of greenhouse gases emitted by the Project, because the carbon intensity of the Project is less than the carbon intensity of the electric system. (Staff Brief at 27, 34.) However, Staff provides no support in CEQA for the proposition that Staff can solely rely on an increase in efficiency to make a finding that substantial new emissions of greenhouse gases are not a significant impact. Staff relies on an inapplicable metaphor arguing that “[b]y [the Center’s] logic, one who replaces his Hummer with a Prius should be penalized for doing so, even if he reduces his carbon footprint by half. This is not what CEQA requires.” (Staff Brief at 32.) First, CEQA requires environmental analysis of significant environmental impacts and the study of feasible mitigations and alternatives to those impacts. There are no penalties associated with CEQA compliance. Staff reveals its apparent bias arguing that complying with the public disclosure requirements for greenhouse gases emissions imposes some sort of penalty on power plant developers. This is nonsense.

Moreover, use of this metaphor expressly demonstrates Staff’s failure to consider whether the new emissions, even if more efficient, cause a cumulative increase in greenhouse gas emissions. This type of reasoning was expressly rejected in a federal case brought by the Center that found that the adoption of new national fuel efficiency standards that increased these efficiency standards

⁷ In the Opening Brief, the Center referred to the Revised Final Air Quality Section of the FSA as Exh. 220. It appears, the correct cite is Exh. 222. The Center uses Exh. 222 to refer to this document. Cites to Exh. 220 in the Center’s Opening Brief should also be construed to refer to Exh. 222.

requires an analysis of the total emissions of greenhouse gases from the rulemaking even though the efficiency of the vehicle fleets increased. (*Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216-17 [9th Cir. 2008].)⁸ The Center’s case applied in the context of the National Environmental Policy Act (“NEPA”), but California Courts have looked to NEPA as “persuasive” authority to the interpretation of CEQA. (*See, e.g., No Oil, Inc. v. City of Los Angeles* [1974] 13 Cal.3d 68, 86, fn. 21.) Not only does Staff’s metaphor completely fail in comparison to a case requiring a cumulative impacts analysis of the increase in efficiency of motor vehicle standards, but it also fails in the context of this case, because the Staff’s analysis does not show the actual displacement of a comparable amount of greenhouse gas emissions. In fact, the only emissions that Staff can identify that will be displaced are from the existing 60 year old boiler units 1, 2, and 3 that would need to be removed in order to operate the new plant. In 2008, these three boilers emitted approximately 69,162 tons of GHGs, or, 8 percent of the new emissions expected from the Project. (Exh. 222 at 4.1-108.) From 2006-2008, these units averaged 113,958 tons of GHGs, or less than 14 percent of the total emissions expected from the new plant. (*Id.*) (*Communities for a Better Env’t v. South Coast Air Quality Mgmt Dist.* (2010) 48 Cal.4th 310, 322 [“*CBE v. SCAQMD*”] [baseline must be based on actual use, not permitted levels].) Here, Staff ask the public to trust them even though Staff admit that they cannot show the amount of actual reductions. CEQA is based on analysis and disclosure, not blind faith in the public agency staff’s unsubstantiated claims.

Staff’s threshold of significance argument also fails, because there **will be** emissions of greenhouse gases from the Project. (Exh. 222 at 4.1-107.) CEQA requires an agency to analyze the

⁸ In the Center’s Opening Brief, the Center mistakenly cited to *Center for Biological Diversity v. National Highway Traffic Safety Admin.*, 508 F.3d 508 (9th Cir. 2007). This decision was vacated and superseded by the case cited above. All three of the propositions cited from the early case in the Center’s Opening Brief on pages 23, 28 and 31 remain valid in the subsequent case *CBD v. NHTSA.*, 538 F.3d 1172.

environmental effects of a Project. A threshold of significance is a short cut to identifying significant environmental effects. (CEQA Guidelines § 15064.7(a).) Since Staff did not adopt a threshold (Exh. 222 at 4.1-142), Staff is required to analyze whether the emissions of greenhouse gases from the Project are significant. (*See Amador*, 116 Cal.App.4th at 1111 [impacts having “an effect on the environment” are analyzed even where significance criteria are not provided by CEQA Guidelines].) As just discussed, Staff admits that it did not bother to analyze the impacts of the Project’s greenhouse gas emissions, because Staff aver that the Project’s emission would be offset by an indeterminate amount of reductions from unidentified future displacement and/or shutdown of less efficient, and therefore more polluting, generation. Yet, Staff’s obligation was to provide a quantitative analysis of the emissions and determine if those emissions were significant. (*See Center’s Opening Br.* at 19-23).

Furthermore, Staff’s reliance on the Western Grid as the baseline is misplaced; Staff misconstrue the environmental baseline. (*Center’s Opening Br.* at 15-19.) Even if this was the correct baseline, Staff’s analysis still fails to meet the informational requirements of CEQA. By its own admission, Staff did not calculate the amount of reductions that will purportedly occur as a result of the Project. (*Staff Br.* at 34) Staff does not even translate the efficiency gain into an estimated amount of greenhouse gas reductions. (*Center’s Opening Br.* at 18). Instead, Staff claims, with no cite, that calculating the emission reductions is possible through modeling, but complicated, so they didn’t do it. (*Staff Br.* at 34.) A new report authored by the Commission and other state agencies confirms that the Commission does have methods for determining greenhouse gas reductions from the system. (*Petition to Reopen Administrative Record and Request for Official Notice [“RON”]*, Exh. 2 at 68 [“[i]n support of tracking progress towards AB 32 goals, the Energy

Commission also intends to estimate GHG emissions resulting from the power system using analytic methods to convert resource planning assumptions into GHG emissions”].)⁹

B. The Project Is Not Part of a Statewide Energy Plan nor Part of a Plan to Reduce Greenhouse Gases.

Rather than explaining how Staff’s analysis complies with CEQA, Staff articulates a variety of unsupported theories on how the project is part of a “carbon reduction strategy” and is therefore beneficial. (Staff Brief at 27.) Staff relies on the concept of the economic dispatch theory to argue that the Project will reduce the carbon intensity of emissions across the entire electric system, that the Project replaces out of state coal, that the Project increases the electricity system’s ability to integrate renewables, and argues that the combination of these “strategies” complies with the goals of AB 32. (Staff Br. at 27, 32-33) All these theories mislead the public, because they imply that the Project is part of a grand statewide plan to reduce greenhouse gases and integrate renewables. The reality is that, at the moment, the state has no such plan. (*See, e.g.*, 2009 IEPR at 11, 173-74.) Staff argues that the addition of certain types of natural gas plants, such as the CECP, to the electric system produces generalized benefits even though Staff has not done the specific analysis to show that this particular plant in this particular location is needed to reduce carbon emissions and to integrate renewables. (*cf.* 2009 IEPR at 110 [Commission discussion of Committee Guidance concludes that “[t]he question remains as to the quantity, type, and location of natural gas-fired generation to fill remaining electricity needs once preferred resource targets are achieved”].)

By holding up the economic dispatch theory as if it were gospel, Staff simply glosses over the messy reality of how the energy system actually works. Factors besides pure efficiency effect the way electricity is dispatched in California. (Exh. 222 at 4.1-112.) For example, the Final Staff Assessment states “[l]ocal load pockets have transmission constraints as to how much power can be

⁹ The Center concurrently submits a Petition to Reopen Administrative Record and Request for Official Notice.

imported from outside the pocket, so some units are required to operate within the pocket to meet load or maintain grid stability—even if these reliability units are old, inefficient, and expensive generating units.” (Exh. 222 at 4.1-111.) Staff also admits that the Project will operate at times in conjunction with less efficient units both on the same site as CECP and at other locations in the load pocket. (Tr. at 244:16-245:6 and Exh. 222 at 4.1-112 [“dispatch order can change, or deviate from economic or efficiency dispatch, in any one year or due to other concerns such as permit limits, contractual obligations, local reliability needs or emergencies.”]) This will be especially true as energy consumption is forecast to increase as the population and economy of the State grow. (2009 IEPR at 54-55.)

Yet nowhere in the record is there any actual evidence supporting the claim that the Project would run “*only*” in place of unidentified existing dirtier plants. (Staff Br. at 31) Staff relies on an excerpt from its consultant’s report¹⁰ that states:

When one resource is added to the system, all else being held equal, another resource will generate less power. If the new resource has a lower cost or fewer emissions than the existing resource mix, the aggregate system characteristics will change to reflect the cheaper power and lower GHG emissions rate.

Needless to say, as summarized above, all things are not held equal in the complex, ever-changing California energy system. Growth in consumption, design characteristics of existing generation facilities, addition of significant amounts of renewables, and local reliability needs are just a few of the variables complicating Staff’s simplistic view of dispatch. Thus, Staff’s claims that the Project will undoubtedly replace inefficient gas burning power plants any time it runs and thereby reduce greenhouse gas emissions below the new emissions of the Project is misleading.

As explained above, the Project is only directly responsible for the displacement of Units 1-3 of the Encina Plant, equivalent to about 14 percent of the Project’s projected emissions. (Exh. 222 at

¹⁰ Staff’s opening brief wrongly identified this quote as coming from the 2009 IEPR.

4.1-108.) In fact, Applicant explicitly argues that the potential shutdown of Units 4 and 5 is not part of the Project and the impacts of shutdown should not be evaluated as a part of this Project.

(Applicant Br. at 5.) Thus, this Project cannot, by itself, even replace this less efficient generation at the Project site and will at times run in conjunction with these units. (Tr. at 244:16-23.) The Independent Systems Operator (“ISO”), not the economic dispatch theory determines whether inefficient gas burning OTC plants continue to operate on the grid. (*See, e.g.* Tr. 201:16-202:6.)

Finally, staff’s approach is contrary to the 2009 IEPR which states: “Emissions from natural gas generation account for a large portion of in-state GHG emissions from the electricity sector, so it is essential for the Energy Commission to consider GHG impacts of natural gas plants in its power plant licensing process.” (2009 IEPR at 47-49.)

Staff’s and Applicant’s claims about the Project’s benefits on the electric system are contradicted by Staff’s own testimony in the record. Citing the FSA, Staff argues that the Project will “replace the shares of out-of state coal plants owned or under long-term contract in the portfolios of the California utilities.” (Staff Br. at 27.) Applicant makes a similar argument that “the Project may also reduce GHG emissions by displacing electricity produced from coal,” citing the FSA and the testimony of Mr. Walters and Mr. Vidaver. (Applicant Br. at 47.) Yet, these statements are contradicted by Mr. Vivader’s subsequent testimony that in fact the Project will not displace out of state coal plants because these plants will continue to operate despite the construction of new plants like CECP in California. (*See* Tr. at 361:11-13; *see also* Center’s Opening Br. at 24-25, 30 [discussing Staff’s oral testimony that coal was not a consideration in the conclusions about greenhouse gas emissions].)

Staff’s claims that this specific project will “complement” the integration of renewables is also contradicted by Staff’s own witness. Mr. McIntosh, Staff’s witness from ISO, agreed with the Center’s witness Mr. Hunt that more studies need to be done to determine which specifically located

new natural gas fired plants are necessary to integrate the projected 33% renewables. (Tr. at 218:8 – 219:8.) While the record shows that this may be the type of plant that could help integrate renewables, there is no specific showing that this plant is itself necessary or well located to perform this function. (Tr. at 203:4-6 [Mr. McIntosh states: “My testimony is that you can get those attributes at other locations; I’m just talking about those are the type of machines we need”]; *see also* Tr. at 225:24-226:10-12.) Applicant argues that the Project is consistent with MRW report (Applicant Br. at 42), but this report discusses only the general characteristics of natural gas fired power plants that would provide support for the integration of renewables. (*See, e.g.*, Tr. at 301:17-302:6) Boiled down to its simplest formulation, Staff argue that this Project and all new combined cycle natural gas power plants with similar characteristics should be given a free pass on the analysis of their greenhouse gas emissions, because these plants have the generalized characteristics for integrating renewables. However, Staff’s consultant, Mr. McClary, testified that his MRW report was limited in scope and “was never intended to do an individual plant analysis, this is a framework report that guides - that starts to explore how best to guide assessment by the Energy Commission.” (Tr. at 302:25-303:3) So, this report in no way constitutes a plan for making specific siting decisions about the needs and location of a specific plant. The City of Carlsbad’s discussion of the merits of the No Project Alternative and the lack of basis for override also demonstrate that the Project is not needed to integrate renewables, retire OTC power plants, or reduce greenhouse gas emissions. (Carlsbad Br. at 116-119, 127-133.)

Despite Staff’s claims to the contrary, the Project is not part of a plan to reduce greenhouse gases. The Committee Guidance specifically addresses this issue:

Although CARB has already adopted the AB 32 Scoping Plan, the regulations to implement the Plan are still being drafted and are planned to take effect before 2012. The Energy Commission cannot rely on the prospect of future regulations to support a determination of whether power plants in the licensing process will have a significant adverse impact on the climate. Therefore, during this short interim

period before the AB 32 regulations take effect, the Siting Committee believes that the Energy Commission should not rely on CARB's programmatic approach for its CEQA analysis and mitigation. Rather, during this interim period, we recommend that the Energy Commission analyze each project according to basic CEQA precepts for determining (1) whether the project has a significant adverse cumulative effect, (2) if so, whether feasible mitigation can be required for the project, and (3) if not, whether the project has overriding benefits that justify licensing the project.

(Committee Guidance at 2.) Staff's and Applicant's argument that this Project complies with the goals of AB 32 is meaningless, because the record does not support a finding that this Project complies with AB 32. There is no information in the record showing that this Project is part a statewide program to integrate renewables or is part of any agency's plan to effectively reduce greenhouse gases from the electric system. As noted in the Center's Opening Brief, a comprehensive statewide energy plan for the siting of new natural gas plants, the integration of thirty-three percent renewables, and the retirement of old plants would be very good public policy. However, no such plan exists. (Center's Opening Br. at 24.) Moreover, the regulatory regime for AB 32 is still in its infancy. Making a claim that this Project complies with a non-existent regulatory regime misleads the public and decision makers.

A recent report by California energy agencies, entitled "California's Clean Energy Future Implementation," ratifies the Center's position. (See RON Exh. 2 at 81.) When discussing the CEC licensing process, the report explains that the Commission is moving towards the type of quantitative analysis advocated by the Center:

The AB 1890 process eliminated "need" as a consideration in power plant licensing. Consideration of GHG emissions in the power plant CEQA process and desire to guide power plant development into preferred locations and types of facilities has suggested resurrecting a "need conformance" component to Energy Commission licensing process. In anticipation of this emerging requirement, the Energy Commission is developing a "need assessment" effort that would provide the quantitative basis for "need conformance" in each power plant proceeding.

(RON Exh. 2 at 81.) As discussed, such an analysis has not been done in this proceeding.

C. Staff's and Applicant's Reliance on the Avenal Decision is Misplaced.

The Avenal Decision does not justify non-compliance with CEQA nor the Staff's incomplete analysis. A certified regulatory agency, such as the Commission, has a duty to comply with substantive requirements of CEQA. (Pub. Res. Code §§ 21000, 21002; *Mountain Lion Found.*, 16 Cal.4th at 134; *Sierra Club v. State Bd. of Forestry*, 7 Cal.4th at 1236; *Joy Road Area*, 142 Cal.App.4th at 667-68.) In order to ensure that new natural gas plants “support the goals and policies of AB 32 and the related parts of California’s GHG framework,” the Avenal decision requires new natural gas plants to meet the following three requirements:

- (1) not increase the overall system heat rate for natural gas plants;
- (2) not interfere with generation from existing renewable facilities nor with the integration of new renewable generation; and
- (3) take into account the factors listed in (1) and (2), reduce system-wide GHG emissions and support the goals and policies of AB 32.

(Avenal Energy Decision, 08-AFC-01, at pp. 110-111 (December 2009).) As discussed above, these general standards articulated in the Avenal decision are insufficient to provide an adequate CEQA analysis of greenhouse gas emissions. (*See generally* Center’s Opening Br. [detailing CEQA violations].) Apparently in response to the Avenal decision, Staff improperly puts forward a qualitative quasi-programmatic analysis of the electric system when it should have been conducting a site-specific analysis. The recently published “California’s Clean Energy Future Implementation” discusses the qualitative analysis anticipated. “Even absent . . . quantitative ‘need assessment and need conformance’ processes, siting case assessments are increasingly turning to qualitative reviews of power plant *locations*, operating characteristics, etc. as indicators of whether they appear to have desirable properties that can be described as benefits offsetting undesirable outcomes.” (RON Exh. 2 at 81 [emphasis added].) Here, Staff does not even meet this criteria; Staff examined the general operating characteristics of the Project but as discussed above, the record contains no qualitative

evidence that the Project's location provides a necessary or even complementary benefit to the electric system.

By making a finding that the emissions of greenhouse gases are not a significant impact, the environmental analysis fails to consider feasible mitigations and alternatives to the Project's greenhouse gas emissions. As the Center argued in its opening brief, the alternatives analysis should have a renewable generation alternative that would result in fewer emissions of greenhouse gases. (Center's Opening Br. at 33-39.) Similarly, the No Project Alternative is a viable alternative to the Project. (*See* Carlsbad Br. at 116-119.) Proper study of both of these alternatives is essential because the Project represents a long-term infrastructure investment. In addition to being required by CEQA, the report "California's Clean Energy Future" summarizes the necessity of this type of analysis: "Given the long-term nature of energy infrastructure decisions, California's decision makers will consider climate change when evaluating energy demand, resource availability, and the siting of transmission and generation infrastructure." (RON Exh. 1 at 8.) Here, Staff created a theory that dismisses the climate change implications of the Project rather than adequately studying the impacts, feasible mitigations, and alternatives of this specific Project. (*See, e.g., CBE v. SCAQMD*, 48 Cal.4th at 324 [an agency must follow "the dictates of CEQA and realistically analyz[e] [a] project's effects. After proper analysis, the agency might decide to disapprove the project because of its immitigable adverse effects or to approve it with a finding of overriding considerations."])

CONCLUSION

This licensing proceeding is situated at a key fork in the road for the California energy system. Does the Commission ostensibly mislead the public by approving an analysis that explicitly says the current regulatory regime is working to reduce greenhouse gases, even though in a recent report the Commission and other state agencies explicitly admit that the licensing of new natural gas

fired power plants does not currently fit into a coherent roadmap for achieving greenhouse gas reductions? Given this context, the Committee should deny or defer this permitting decision until the necessary analysis of the greenhouse gas emissions occurs and the Commission is able to determine whether this plant actually fits into an integrated plan for California's future. Although the Committee is faced with an important policy choice, the dictates of CEQA require the Commission to reject the inadequate greenhouse gas analysis made by Staff. Alternatively, the Committee could make a find that the emissions from the Project are significant and that feasible mitigations and alternatives were not properly studied. Ultimately, the environmental analysis also needs to be redone because the Project Description fails to consider the use of LNG. The Center respectfully requests that the Committee adopt the findings and legal conclusions proposed in its opening brief at pages 40-42.

DATED: October 11, 2010



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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT**

**Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 6/14/2010)**

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DECLARATION OF SERVICE

I, John W. Wall, declare that on October 11, 2010, I served and filed copies of the attached Center for Biological Diversity's Reply Brief, dated October 11, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/carlsbad/index.html]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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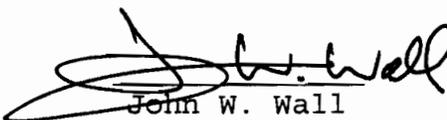
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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.


John W. Wall