

**COMMENTS OF THE
INDEPENDENT ENERGY PRODUCERS ASSOCIATION
ON THE OFFICE OF PLANNING AND RESEARCH PRELIMINARY
DRAFT CEQA GUIDELINE AMENDMENTS FOR GREENHOUSE GAS
EMISSIONS**

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Attorneys for Independent Energy Producers
Association

The Independent Energy Producers Association (“IEP”), a trade association representing independent, non-utility owners of electric generation facilities, is pleased to provide comments on the Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions (“draft guidelines”). IEP supports the general approach taken in the draft guidelines.

The CEQA program should not create conflict, duplication, overlap or inconsistency with the state’s emerging AB-32 GHG reduction program, including programs and regulations lawfully promulgated in accordance with AB 32 (hereinafter collectively referred to as “AB 32”). To this end, the integration of CEQA and AB-32 is extremely important, for both the public and private entities responsible for complying with these laws. Failure to achieve such integration would be counterproductive to the State’s GHG goals, in that regulated entities would be subjected to multiple compliance and mitigation obligations for the same activity. As discussed below, failure to integrate CEQA and AB 32 would discourage many projects that decrease state-wide, net-emission levels and further other important public policy goals. IEP strongly supports the portions of the draft guidelines that base the determination of significance and mitigation on compliance with AB 32. Moreover, contrary to some parties’ comments at the January 26th Workshop, these portions of the draft guidelines are legally supportable under existing case law.

Reliance On State And Regional GHG Plans Would Provide The Most Accurate Basis For Assessing The Environmental Impact Associated With GHG Emissions.

Global climate change is a serious issue, and IEP supports OPR’s effort in drafting CEQA amendments that effectively address GHG emissions. IEP believes that in order to effectively evaluate the impact of a proposed project’s GHG emissions, lead agencies should look beyond the project at issue. This is in part because the effects of global climate change are not localized. Carbon dioxide has no localized environmental or public health consequence—global climate change is, by definition, a global problem. As stated in the AB 32 Scoping Plan,¹ “climate change from greenhouse gas pollutants emitted in another state or country have the same potential to damage our public health and the environment as do climate change pollutants emitted within California, and California is only a small part of the overall solution.” Thus, there is no potential (as some have argued) that reliance on a GHG plan would lead to GHG hot spots, raising localized environmental concerns. Given the fact that any single project can only be said to incrementally affect climate-related impacts, the issue is best addressed across entire sectors rather than on a project-by-project basis.

Reliance on GHG plans is also justified in that GHG plans provide the best method for local agencies to accurately assess GHG emissions. In certain sectors, a new project will often displace the emissions of an existing project. This is especially true in the electricity sector.² When viewed in isolation, a new power plant would appear to increase GHG emissions.

¹ Climate Change Scoping Plan, Appendix H, p. H-1 (Oct. 2008), available at: <http://www.arb.ca.gov/cc/scopingplan/document/scopingplandocument.htm>

² While thermal power plants that are 50MW or greater in size are sited at the California Energy Commission, other power plants that are less than 50MW, or non-thermal, are subject to local lead agency siting authority.

However, on a programmatic or system-wide basis, the State will see a net-reduction in GHG emissions. This is because GHG emissions are directly tied to the way the electric system operates. When plants do not operate or operate less, there is a reduction in GHG emissions. The electric grid operates as a single machine that is coordinated by system operators in real time. The system is dispatched in real time to meet whatever the consumers demand. That real time dispatch is what governs the operation of power plants and which in turn governs the system's GHG emissions. Generally, power plants that are dispatched last are the least efficient. Thus, the majority, if not all power plants that are being proposed today with the best available technologies will displace the less-efficient power plants. If this fundamental fact about the electricity system is not accurately represented, and instead, if a lead agency assumes that a new plant's emissions are incremental, that lead agency would be misinforming the public of what the environmental impact of a new power plant is. Therefore, in order to adequately inform the public, a lead agency should strive to assess the net-emission impact of a proposed project.

The best way for a local lead agency to assess net-emission impacts is to look to a proposed project's compliance with AB 32. Because AB 32 accounts for the emissions of entire sectors, the net impacts of a new project will be accounted for in the State's GHG reduction goals. Moreover, reliance on AB 32 in a CEQA analysis will avoid the potential for double regulation of the same environmental impact. Double regulation would discourage many projects that would lead to net-reductions in emissions. In sum, IEP strongly supports the language in the draft guidelines directing local agencies to consider AB 32 in assessing significance and mitigation.

Reliance On GHG Plans is Legally Permissible And Consistent With Existing CEQA Law.

At the January 26th OPR workshop on the Draft Guidelines, several parties suggested that Section 15064(h)(3) and 15064.4, of the draft guidelines may not be consistent with existing case law. Specifically, some parties questioned whether *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98 (Cal. Ct. of App. 3d Dis., 2002) (hereinafter "CEB") allows for references to GHG plans in the determination of a significant impact.

In CEB, the court assessed the facial validity of several sections of the CEQA guidelines.³ Among those sections was California Code of Regulations section 15064(i)(3), which addressed the assessment of cumulative impacts.⁴ Section 15064(i)(3) provided that in assessing whether a cumulative effect requires an EIR, "[a] lead agency *may* determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem . . . within the geographic area in the which the project is located."⁵ Among other conclusions, the CEB court held that section 15064(i)(3) and the concept of tiering was legally permissible so long as

³ *Communities for a Better Environment v. California Resources Agency*, 103 Cal. App. 4th 98, (Cal. Ct. of App. 3d Dis., 2002).

⁴ *Id.* at PP. 114-16.

⁵ *Id.* at P. 115.

the section is deemed to incorporate the fair argument standard in triggering the EIR preparation.⁶

The fair argument standard governs when an EIR must be prepared. Generally, an EIR must be prepared whenever there is substantial evidence in the administrative record demonstrating that a significant environmental impact may occur.⁷ If there is no substantial evidence that a significant environmental effect may occur, then the agency may prepare a negative declaration.⁸ However, if there is substantial evidence that there will be no significant environmental impact, but there is also substantial evidence to the contrary that there will be a significant impact, then there is said to be a “fair argument” and the agency must prepare an EIR. In other words, an EIR must be prepared whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact, regardless of substantial evidence to the contrary.⁹

Sections 15064(h)(3) and 15064.4 of the draft guidelines clearly allow for a fair argument and are therefore consistent with the CEB case. The language in section 15064(h)(3) is discretionary as indicated by the use of the word “may” Sections 15064(h)(3) is similar to the CEQA guideline section upheld in the CEB case discussed above. Just as the CEB court concluded that the non-binding use of the word “may” allowed for a fair argument, so would a court likely conclude that the word “may” in the context of section 15064(h)(3) allows for a fair argument. The key here is that “may” is discretionary. As currently drafted, section 15064(h)(3) would not preclude a lead agency from considering substantial evidence demonstrating a project may have a significant environmental impact, and thus require the preparation of an EIR, even though that project may be found comply with and further the goals of AB 32.

Similarly, subsections (a) and (a)(1) of section 15064.4 of the draft guidelines would provide discretion for a fair argument to be made. While this subsection uses the word “should” as opposed to “may”, this section is nevertheless consistent with the CEB case. Section 15064.4 allows for a fair argument that an EIR must be prepared. It is important to distinguish between (1) what the agency “should” consider and (2) the agency’s fact-specific determination of a project’s potential impacts. The agency “should” consider all of the provisions set forth in the draft Guidelines, subsections (a)(1)-(4). Even if consideration of these four factors is read as mandatory, the agency must still engage in a fact-specific analysis of each factor and in doing so could reach the conclusion as to whether there is a fair argument on the basis of substantial evidence that the project may – or may not -- have a significant environmental impact. For example, in considering subsection (a) (1) a lead agency could find that a project furthers the goals of AB 32, but also determine based on its fact-specific analysis that there is a fair argument supported by substantial evidence that the project will have a significant environmental impact, thus triggering the need to prepare an EIR. Even if the consideration of the factors set forth in Section 15064.4(1) are read as mandatory, the fact-specific analysis in this section could support a fair argument that a significant environmental effect may occur.

⁶ Id. at P. 116.

⁷ Pub. Res. Code §§ 21002.1, 21080(c)(1).

⁸ Id.

⁹ No Oil, Inc. v. City of Los Angeles 13 Cal. 3d 68, 75 (1974).

By allowing for a fair argument, sections 15064(h)(3) and 15064.4 the draft guidelines are legally supportable and in accord with the portions of the CEB holding discussed above. These sections should be maintained in OPR's submission to the Natural Resources Agency.

Since a 2050 GHG goal has yet to be codified into law, the 2050 goal should not be cited in the CEQA guidelines.

Some parties at the January 26th Workshop expressed a desire to have reference in the draft guidelines to the 2050 GHG reduction goal. IEP believes that, at this point in time, the 2050 goal should not be referenced in the draft guidelines. The 2050 goal has yet to be codified into California law. It remains a "goal", and as such has not been properly vetted in the political process to determine if it is an appropriate goal for California to pursue. Until such time, IEP believes that reliance on the 2050 goal in the CEQA context is inappropriate.

IEP Recommends The Following Language Changes (In Italics And Strikethrough):

1. Change the phrase "climate action plans" in sections 15064 (h)(3), 15125(d), 15130(b)(1)(B), 15130(b)(1)(D), to read: "*The Global Warming Solutions Act of 2006, AB 32 Scoping Plan or other climate action plan.*"
2. Change section 15064.4(a)(2) to read: The extent to which the project, after considering the cumulative effects of existing and reasonably foreseeable projects and activities may increase or cause a net-reduction in the cumulative consumption of fuels or other energy resources, especially fossil fuels that contribute to greenhouse gas emissions when consumed;
3. Change section 15064.4(a)(3) to read: The extent to which the project or related projects and activities may result in increased energy efficiency of and a reduction in overall greenhouse gas emissions from an existing facility, group of facilities, or the energy system;
4. Change section 15064.4(b) to read: Impacts from emissions of greenhouse gases should be analyzed as cumulative impacts to determine if such impacts are cumulatively considerable since there are no direct impacts of such emissions. A lead agency should make a good-faith effort, based on available information, to describe, calculate or estimate the amount of greenhouse gas emissions associated with a project, including emissions associated with energy consumption and vehicular traffic. Whenever possible, a lead agency should utilize the same accounting methodology as that used for the greenhouse gas reporting requirements in the Global Warming Solutions Act of 2006. Because the methodologies for performing this assessment are anticipated to evolve over time, a lead agency shall have discretion to determine, in the context of a particular project, whether to: (1) Use a model or methodology to quantify greenhouse gas emissions associated with a project, and which of any available model or methodology to use. The lead agency may include a qualitative discussion or analysis regarding the limitations of the particular model or methodology selected for use. (2) Rely on qualitative or other performance based standards for estimating the significance of greenhouse gas emissions.

5. Change section 15064.7(c) to read: When adopting thresholds of significance, a lead agency may consider thresholds of significance adopted by other public agencies ~~and recommendations of others~~, provided such thresholds or recommendations are supported by substantial evidence, ~~including expert opinion based on facts~~.
6. Change section 15126.4(c)(3) to read: Mitigation measures may include, where relevant, compliance with the requirements in a previously approved plan or mitigation program for the reduction or sequestration of greenhouse gas emissions, which plan or program provides specific requirements that will avoid or substantially lessen the potential *significant* impacts of the project.
7. Change section 15126.4(c)(5) to read: Where mitigation measures are proposed for reduction of greenhouse gas emissions ~~through~~ *may include* off-site measures or purchase of carbon offsets *meeting applicable requirements of AB 32 as determined by ARB, or lead agency requirements*, ~~these mitigation measures must be part of a reasonable plan of mitigation that the relevant agency commits itself to implementing~~.
8. Change section 15130(f) to read: *An EIR should evaluate greenhouse gas emissions associated with a proposed project when those emissions, when viewed in ~~connection~~ combination with the effects of past projects or activities, the effects of other current projects or activities, and the effects of probable future projects or activities, may result in a cumulatively considerable impact to the environment that cannot be mitigated to a level of less than significant. An EIR should also evaluate the extent to which a proposed project may result in a net reduction in state-wide emissions when viewed in connection with the effects of past projects or activities, the effects of other current projects or activities and the effects of future projects or activities.*
9. Amend Appendix G, VII. Greenhouse Gas Emissions – Would the project: Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment, ~~based on~~ *considering* any applicable threshold of significance?

IEP
Comments on OPR Draft Guidelines
February 2, 2009

Conclusion

IEP commends OPR's work thus far in the SB 97 process. The draft guidelines make significant progress towards the need for cohesive GHG reduction policies and plans. IEP strongly supports the portions of the draft guidelines directing lead agencies to consider the extent to which a project complies with and helps achieve the AB 32 goals and other regional plans. These portions of the draft guidelines are legally supportable, and are vital to ensuring that projects achieving net-emission reductions are not evaluated on an incremental basis, but rather in the context of the State's GHG goals. For OPR's reference, IEP has attached comments (Attachments 1 and 2) filed by IEP in the Energy Commission's CEQA GHG proceeding and the Air Resources Board's significance threshold workshop.

February 2, 2009

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ATTACHMENT # 1

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:)
) Docket No. 08-GHG OII-1
Informational Proceeding on Methods for)
Satisfaction of California Environmental)
Quality Act Requirements Relating to Greenhouse)
Gas Emission Impacts of Power Plants)
_____)

**COMMENTS OF THE
INDEPENDENT ENERGY PRODUCERS ASSOCIATION**

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Comments of the Independent Energy Producers Association

The California Independent Energy Producers Association (“IEP”) is pleased to comment in the Order Instituting Informational proceeding on Greenhouse Gas (“GHG”) Emission Impacts of Power Plants. IEP appreciates the importance of this proceeding and the goal of addressing how the Energy Commission should assess GHG impacts from proposed new power generation facilities. Responses to the questions posed in the Order follow.

Introduction and Summary

IEP recognizes the importance of achieving GHG reductions to address global climate change. Moreover, IEP supports power plant emission rules to address this problem which are technically and economically achievable, consistent with the state’s overall GHG reduction program and do not produce regulatory overlap, conflict, duplication or inconsistency. Currently, IEP members achieve significant greenhouse gas emission reductions beyond “business as usual” scenarios by using the best available technologies and meeting emission performance standards set forth in SB 1368. These efforts should be recognized within California Energy Commission’s review pursuant to the California Environmental Quality Act (“CEQA”) and should be deemed sufficient for a finding of no significant adverse environmental impact. If further GHG emission reductions are going to be required by the CEQA processes, a programmatic perspective must be used. The Commission should take into account existing regulatory regimes in evaluating how to modify the CEQA review process.

The environmental advantages associated with new capacity additions must not be undermined by modifications to the CEQA review process. New capacity additions, by replacing and/or repowering older generating capacity from older power plants are in the State’s interest. Therefore the Commission should consider both the positive and negative emission impacts that a proposed project will have on the entire system. Furthermore, repowered and new gas fired electric generation facilities are recognized by the California ISO and other state agencies as essential components of the State’s mandated RPS standards and goals to reduce greenhouse gas emissions.

If GHG emissions impacts are to be considered without accounting for net GHG reductions that a proposed new capacity addition and/or repowering project will have by displacing older facilities’ generation, then the new process will violate CEQA by misrepresenting the true environmental impacts of projects. Moreover, such an approach will misinform key policy decisions and have the unintended consequence of discouraging new capacity additions or repower projects in favor of continued operation of less efficient existing facilities. This result

will have the perverse impact of causing greater GHG emissions. When evaluating feasible mitigation measures, the Commission should allow compliance with other laws regulating GHG emissions to count as mitigation of a significant environmental impact. The Commission should also consider the existing gap in the carbon control technologies. Until there is some form of commercially available and cost-effective means to eliminate carbon emissions, project developers have limited means to do so. Furthermore, the existing lack of protocols governing the use of offsets poses an additional hurdle that must be addressed.

Responses to Questions Posed in the Order

1. Are Power Plant GHG Emissions Appropriate For CEQA Review?

Response: Power Plant GHG Emissions Are Appropriate For CEQA Review Provided That Existing Regulatory Regimes Covering GHG Emissions Are Taken Into Account.

California energy developers are facing several layers of greenhouse gas regulation. Both SB 1368 and AB 32, once implemented, will regulate GHG emissions. Now SB 97 implicitly recognizes that the impacts associated with GHG emissions are to be considered in a CEQA analysis. While the question of whether to address GHG emissions in a CEQA analysis may be moot, the resolution of how to evaluate GHG impacts in a CEQA analysis may pose a significant and costly layer of regulation. To avoid increased costs of regulation, the Energy Commission must be cognizant of existing regulations. Failure to do so could lead to increases in project development costs, discourage project development in state, and create a disincentive for repowering inefficient generation. If these effects occur, the efforts to amend the CEQA process may turn out to be counterproductive by discouraging the net emission reductions posed by new capacity additions and/or repowering projects that utilize efficient technologies.

Existing GHG regulatory regimes should be accounted for in a CEQA analysis when evaluating a proposed project's mitigation measures. If a project implements measures contained within the California Air Resources Board ("CARB") AB 32 Scoping Plan and/or complies with emission performance standards set forth by SB 1368, these measures should constitute mitigation of any alleged significant adverse cumulative environmental impact. If offsets are allowed for compliance with AB 32, the same offsets should be deemed available for mitigating an alleged significant environmental impact. By creating some cohesion between AB 32, SB 1368 and the Energy Commission's CEQA process, the Energy Commission will avoid the counterproductive outcome of discouraging new projects that reduce system emissions.

2. What Should Be The CEQA Threshold Of Significance For GHG Emissions From A Given Project?

Response: In The Absence Of Clearly Defined Thresholds Of Significance for GHG Emissions, The Energy Commission Should Avoid Developing A Specific Numeric Threshold That Is Applied On a Project Specific Basis.

Since climate change occurs on a global scale, the exact quantity at which GHG emissions

will lead to even a cumulative significant impact is uncertain. Absent certainty in this area, assigning a specific numeric threshold at which a particular quantity of emissions poses a significant impact could lead to the counterproductive results discussed in Question 1 without assurances that GHG induced impacts will be avoided.

The Energy Commission should consider existing GHG regulations in determining whether a project would create a significant impact. AB 32 sets statewide goals that will encompass both existing and future sources of GHG emissions. In doing so, AB 32 essentially creates a state-wide significance threshold for California's GHG emissions. Thus, the Energy Commission could look to compliance with AB 32 as meeting a significance threshold for a given source. In the interim period before AB 32 is implemented, compliance with emission performance standards, progress towards achieving energy efficiency goals, use of renewable energy, and a net decrease in carbon emissions from siting a particular power plant are all bases upon which the significance of a power plant's emissions could be evaluated.

2a. What GHG Emission Levels Are Less Than Cumulatively Considerable?

Response: Consistent With The AB 32 Scoping Process, The Energy Commission Should Implement A De-Minimis Threshold Below Which Emissions Are Not Considered Cumulatively Significant.

Projects that will create no significant cumulative GHG emissions impact should fall within a de-minimis threshold. If no de-minimis threshold is applied, the benefit these projects create will be forgone as a result of unnecessary CEQA analysis and mitigation of non-existent GHG impacts. Adopting a de-minimis threshold will avoid this result. At this time IEP is unable to recommend a specific de-minimis threshold. However, IEP recommends that a "no-less" than principle should apply between the agencies developing de-minimis thresholds such that there is consistency in treatment.

2b. Have Other Agencies Adopted Thresholds Of Significance For GHG Emissions?

Response: Both the CARB And South Coast Air Quality Management District ("SCAQMD") Are Developing Proposals For GHG Significance Thresholds.

At this early point, IEP is unable to endorse either proposal being developed by SCAQMD and CARB. However, one noteworthy aspect of the SCAQMD proposal is the attempt to integrate significance thresholds for GHG emissions with the AB 32 scoping measures. SCAQMD proposes a tiered analysis in determining whether a project's emissions are significant. One of the tiers (in part) allows a finding of non-significance if the project complies with AB 32 scoping measures.

3. What Is The Proper CEQA "Baseline" For Determining The Significance For GHG Emissions?

Response: CEQA Provides That Potential Impacts Should Be Measured Against Existing Environmental Conditions.

CEQA Guidelines § 15125(c) provide that an EIR include a description of the environmental conditions as they exist at the time the Notice of Preparation is published. This description forms the baseline from which the significance of an environmental impact is measured. In the context of GHG emissions, existing levels of GHG emissions should be used to determine the baseline from which a proposed project's GHG emission impacts are measured. The Commission should use a multi-year average to determine to determine current levels of GHG emissions.

3c. Should Certain Generation Technologies Be Considered Categorically Less Than Significant?

Response: There Should Be Categorical Exemption from a CEQA GHG Analysis for Renewable Energy, and Repower Projects to Promote California's Interests.

Since the effects of global climate change are not localized, net benefits to the entire grid would likely lead to net reductions in GHG emissions. When a renewable facility is sited, that facility replaces non-renewable capacity that would have otherwise been operated to meet load. In this regard, increased development of renewable energy has been referenced as an integral measure in achieving the AB 32 goals. The Commission should encourage development of these sources by streamlining the CEQA GHG analysis for renewable technologies.

Repowering projects (including both baseload and peaking projects) should also be treated as categorically exempt because of the net GHG emission reductions created by these projects. As discussed above, repowering projects are in the state's interest and result in both GHG emission reductions and many other environmental and economic benefits. In addition, new simple cycle natural gas power facilities are needed for system reliability and to support new, intermittent renewable generation. Such projects have been recognized by the Cal/ISO as necessary in meeting the RPS. If the GHG emissions of a repowering project are judged against a strict, inflexible standard that does not account for the net decrease in GHG emissions, these projects may be delayed or not undertaken at all. On the other hand, adopting a programmatic approach or, alternatively, an exemption from the GHG impact analysis will encourage repowering projects. Repowering of inefficient power plants is in the State's interest, and thus favorable treatment in a CEQA analysis is warranted.

If the Commission does not adopt a categorical exemption for repower projects, the Commission must not undermine these projects by adopting a project-by-project approach. Such an approach would thwart the important state interest in repowering projects by increasing regulatory costs. Instead, the net-benefit a repower project creates by not only displacing the on-site emissions, but also by increasing generating capacity system-wide are essential considerations in accurately assessing a repower project's overall environmental impact.

4. If an Individual Power Plant is found to have a Significant Cumulative Impact Due to GHG Emissions, is it Feasible to Mitigate Significant Cumulative Impacts?

Response: Gaps in carbon capture and storage technologies and the lack of protocols governing offsets limit feasible mitigation.

Projects that are being proposed by IEP members use the best, most efficient technologies available. Members meet performance standards and are planning for future regulations adopted by AB 32. In short, these modern proposed power plants already include all feasible GHG mitigation measures that are currently available. Additional mitigation would be feasible only if significant advances are achieved in carbon capture and storage technologies. In the absence of available carbon capture and storage technologies, the Commission should allow compliance with existing GHG laws as mitigation under CEQA.

Another hurdle in the achievement of further mitigation of GHG emissions is the lack of protocols governing the use of offsets. The lack of offset protocols not only stifles GHG emission mitigation efforts but also poses a barrier to investment in new generation. Without certainty in the use of offsets, some investment decisions may be delayed until protocols are developed. As stated in IEP's comments on the Joint Recommendations To CARB on GHG emission reduction strategies (California Public Utilities Commission ("CPUC") decision D.06-04-009), the principles that IEP views as necessary for a proposed offset program are: 1) offsets must be permanent and verifiable; 2) an offset representing a ton of GHG emission reductions should be equivalent to a ton of mitigated GHG emissions under CEQA; and ; 3) offsets should be tradable in other carbon reduction programs such as AB 32 and the Western Climate Initiative.

The development of protocols governing offset use is currently taking place in the AB 32 scoping process. The purpose of reiterating the comments IEP made to the Energy Commission and CPUC in D-06-04-009 is to emphasize the importance of offset protocols in CEQA mitigation efforts. Offsets that are used for compliance with AB 32 should also be able to be used for compliance with CEQA. This is because both AB 32 and CEQA propose to regulate the same emissions and sources. Failure to coordinate these efforts could result in the same emissions being required to be offset multiple times such that the project becomes uneconomic and none of the offsets occur. To encourage development of new projects and the associated, potential net-GHG reductions the Commission should recognize offsets from both regulatory arenas.

4d. If The Commission Were To Find A Power Plant's Cumulative Impact To Be Significant And If Impacts Cannot Feasibly Be Mitigated To A Less Than Significant Level, What If Any Basis Should Support CEQA "Override" Findings To Allow Project Approval?

Response: As Discussed Above, The Commission Should Strive For Cohesion Between Changes To The CEQA Analysis And Existing GHG Regulations. If The Commission Does Not Accept IEP's Argument That AB 32 and SB 1368 Should Support a Finding of No Significant Impact, Compliance With These Laws May Also Support The Exercise Of A CEQA Override.

CEQA Guidelines § 15093 provides that if economic or social benefits outweigh unavoidable adverse environmental impact, an agency may find that the impact is acceptable. The Energy Commission should exercise an override in the context of GHG emissions when the impact on global climate change is outweighed by the benefits of a project. Such benefits include when a

project is reasonably need to maintain grid reliability or achieves other state interests.

As discussed above compliance with AB 32 and SB 1368 should support a finding of no-significant impact. If the Commission does not follow this position, compliance with these laws should be deemed a basis for assessing the relative severity of a project's impacts compared to the benefits of the project.

5. Is It More Appropriate To Mitigate Power Plant GHG Emissions Case-by-Case Or With A More Encompassing Review?

Response: The Commission Should Implement A More Encompassing Review.

IEP strongly supports a programmatic approach that evaluates system-wide emissions. As noted, global warming is not a local problem. There is no localized impact requiring that project specific impacts be weighed differently from the project's impacts on electric system emissions overall. A project-by-project approach would be counterproductive because such an approach would consider the emission impacts of a project while ignoring emission reductions. Without considering system emission impacts on a net-basis, the Commission could easily cause overall increases in emissions or, at a minimum, fail to achieve the optimal reductions in emissions from the electric system as a whole. Such a result would increase system costs while causing or failing to address the environmental impact at issue. Failure to account for these positive attributes may disincentivize projects that reduce California's overall GHG emissions.

The OII asks whether AB 32 is a programmatic approach that could be used in addressing cumulative impacts. A cap-and-trade program adopted pursuant to AB 32 would address the uncertainty of assessing net-impacts by making less-efficient facilities more costly to continue to operate. The Energy Commission has the expertise and tools to reasonably estimate the net impact on emissions a project will have by displacing less-efficient generation. Such an approach can be reasonably verifiable if conducted in a rigorous manner by an unbiased entity such as the CEC. The Commission can also assess the effect that a cap-and-trade program will have on the operation of the less-efficient facility. Demonstrating that an inefficient facility will eventually no longer be cost-effective to operate under even the most conservative load scenarios would create a reasonably accurate forecast in demonstrating the beneficial effect a project will have by displacing older generation.

For repower projects, the analysis is ever more straightforward as the reductions occur on-site and are a direct and certain result of the new facility. A net-impact analysis should certainly be conducted for re-power projects. The beneficial GHG impact a repower project will have is determinable since a repower project necessarily replaces the less efficient capacity.

November 7, 2008

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ATTACHMENT # 2

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:)	
)	Docket No. 08-GHG OII-1
Informational Proceeding on Methods for)	
Satisfaction of California Environmental)	RE: Written Comments Responding
Quality Act Requirements Relating to Greenhouse)	to Questions and Conceptual
Gas Emission Impacts of Power Plants)	Approaches Posed at the
_____)	November 19, 2008 Workshop.

**COMMENTS OF THE
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Comments of the Independent Energy Producers Association

The California Independent Energy Producers Association¹ (“IEP”) is pleased to submit these comments regarding topics identified in the second workshop on Greenhouse Gas (“GHG”) Emission Impacts of Power Plants.² As stated at the November 19th workshop and in our prior comments, IEP supports the Commission’s effort to develop legally supportable and appropriate California Environmental Quality Act (“CEQA”) GHG policies that are consistent with the objectives and policies of the state’s overall GHG regulatory effort. IEP encourages the California Energy Commission (“CEC” or “the Commission”) to develop regulations that accurately inform the public of the GHG-related environmental impacts or benefits posed by the construction of a new power plant. To do so, however, the Commission will need to adopt policies that reflect the fact that most new power plants in California, and certainly new renewable power plants and the peakers needed to support them, in fact reduce GHG emissions from the electric system as a whole.

Introduction and Summary

IEP recognizes that global climate change is a serious problem and supports the Commission’s efforts to address the issue in the context of CEQA and power plant siting. There is no question that the state’s emerging GHG regulatory program will look to the electric system for significant reductions in GHG emissions. Indeed, the electric system is being directed by the state to mitigate significantly more than its proportionate share of GHG emissions under AB-32. The electricity sector is being called upon to provide approximately 40% of the emission reductions even though it represents only 25% of the total GHG emissions in California.³

IEP has two primary concerns regarding the Commission’s proposed program. First, the Commission’s proposed program should not create conflict, duplication, overlap or inconsistency with the state’s emerging AB-32 GHG reduction program. To this end, the integration of CEQA and AB-32 is extremely important, for both the public and private entities responsible for complying with these laws.

IEP’s second concern is that the Commission’s assessment of the impact of new power plants on the GHG emissions of the electric system must be accurate. The fundamental purpose of CEQA is to inform the public of the environmental impacts of proposed projects. To the extent that the Commission provides the public with information that is misleading, it will

¹ IEP is a nonprofit trade association, representing the interests of developers and operators of independent energy facilities and independent power marketers

² On November 7, 2008, IEP submitted its first written comments in this proceeding in response to the Order Instituting Investigation 08-GHGOI-1. IEP also presented extensive oral comments at the workshop through its attorney, Christopher Ellison.

³ See California Air Resources Board, Proposed AB-32 Scoping Plan, pp. 11 and 21 (Oct. 2008), available at: <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

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fundamentally violate CEQA. Furthermore, if the Commission's program is misleading, the program will lead to policy decisions that may, in fact, have the unintended consequence of exacerbating the GHG emissions problem. The reason for this is simple. New power plants, even though they may emit GHG emissions, typically reduce the operation of existing power plants with even greater GHG emissions. Thus, to the extent that the Commission focuses only on the mitigation of emissions from new facilities, and ignores their beneficial impact on system-wide emissions, the program may discourage new facilities that should be a key part of the GHG solution.

At the November 19th workshop there was considerable discussion on how to address GHG emissions of new power plants before a systematic GHG assessment is conducted by the Commission. IEP supports the Commission addressing the GHG related impacts from projects that have already been proposed or will be proposed before the Commission is able to conduct a GHG assessment that evaluates impacts on a system-wide basis. The Commission should ensure that its GHG assessment for new projects does not discourage projects that cause a system-wide, net GHG emission reduction. In the longer term, this means developing a method of assessing the impact of new projects on system-wide emissions through an assessment of system dispatch protocols and the GHG emissions of the marginal units likely to be displaced. In the near term, the Commission should consider compliance with SB1368 as one basis for supporting a finding of no significant impact. Facilities that do not fall within the prescriptions of SB 1368, facilities that are needed to firm renewable generation, and repowering projects should all be considered categorically insignificant during the interim period.

To this end, IEP will discuss the four approaches and five questions posed in the CEC workshop handout titled "Conceptual Approaches for Evaluating GHG Emissions from Power Plants." IEP does not completely support any of the 4 approaches; however, on a conceptual basis, some of these approaches may be said to achieve the Commission's fundamental CEQA objective, which is the legal obligation to accurately inform the public.

The first approach (zero-threshold) is the furthest from achieving this objective. Below, IEP reiterates how the application of a zero threshold approach would lead to an inaccurate assessment of the environmental impacts posed by a project. The second approach (efficient power-plant system threshold) makes some progress towards providing a more accurate assessment of the cumulative impact posed by a new project. While IEP does not support the specific number posed in Approach #2, IEP does support the concept of determining the level at which a new project will likely lead to a net reduction in system-wide GHG emissions. IEP requests the Commission clarify its intention behind Approach #3 (System/LRA threshold). While reliability is a consideration in power plant siting cases, it is unclear to IEP how local reliability areas ("LRA") could serve as a proxy for the Commission's assessment of GHG-related impacts. Simply put, while reliability is critical, it is not a good proxy for environmental impacts. Finally, IEP does not support the specific numbers posed in Approach #4 (Mitigation

by Technology). While using best available control technology is a sound basis for mitigation, the thresholds proposed in Approach #4 would preclude project proponents from siting many facilities that would be environmentally beneficial. IEP's responses to the five questions are discussed below.

Discussion

Addressing GHG Emissions Before AB-32 Or A Systematic CEC GHG Assessment Are Implemented:

During the Interim Period, The Commission Should Address GHG Impacts By Allowing Compliance With SB-1368 To Support A Finding Of No Significant Impact. The Commission Should Also Endorse Categorical Findings Of Non-Significance Based On Certain Project Types.

How GHG emissions of new power plants should be addressed before AB-32 is implemented and a systematic GHG assessment is conducted ("the interim period") is a pressing issue that should be addressed in this workshop. Pursuant to SB-97 and other legal developments in California, the Commission should be addressing GHG impacts in projects that are presently going through the siting process and those projects that will be proposed during the interim period. A few of the 4 Approaches discussed below could make some progress towards avoiding the discouragement of beneficial new projects. IEP encourages the Commission to engage a systematic assessment that determines the level at which the interconnection of a new project results in the displacement of less efficient generation. IEP's vision for conducting a CEC systematic GHG assessment is discussed in greater detail below in the context of the 4 Approaches.

Unlike most other industries, power plants are operated and dispatched in real time to instantaneously match demand—there is no significant storage of electricity. Thus, it is not speculation that a new power plant will displace the emissions of a less efficient power plant. In fact, it is a certainty that a new power plant will displace less efficient generation from the very first moment it operates and for the duration of its lifetime operation thereafter. Standard operating procedures ensure that demand, at any given moment, *will* be met by the utilities pursuant to the utility obligation to serve. If a new power plant is not constructed, something else will be dispatched in its place to meet that demand. If a new, efficient power plant is constructed, whatever would have been dispatched last and on the margin will be displaced. The Commission's program must reflect that new projects will displace less efficient generation with greater GHG emissions.⁴ As noted above, in the near term the Commission should consider

⁴ Moreover, it is the developer, not the public, that assumes the risk that a proposed new project will not be more efficient and therefore will not be dispatched (i.e. that the new project is not needed). If such is ever the case, the new project will simply not be dispatched by the CAISO and will not operate. If it does not operate, there will be no

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compliance with SB-1368 as one interim basis for supporting a finding of no significant impact. As the investor owned utilities (“IOUs”) have pointed out in their initial comments, not all facilities will fall within the prescriptions of SB-1368. IEP concurs with the IOUs in their assessment that those facilities falling outside of SB-1368 should be considered categorically insignificant. In addition, facilities that are needed to firm renewable generation, provide peaking support, and repowering projects should all be considered categorically insignificant during the interim period. IEP cannot stress strongly enough that it is imperative for the Commission to avoid application of a significance threshold that does not account for the fact that new facilities will displace less efficient generation.

Approach #1: Zero Threshold – Mitigation for All Projects:

The Commission’s Application Of A Zero-threshold Approach Would Thwart The Fundamental Purpose Of CEQA, Which Is To Inform The Public Of What The Environmental Impact Will Be From Siting A New Power Plant.

As IEP has discussed in its initial comments and at the November 19th workshop, IEP does not support a zero threshold, project-by-project approach. GHG emissions are directly tied to the way the electric system operates. When plants do not operate or operate less, there is a reduction in GHG emissions. The electric grid operates as a single machine that is coordinated by system operators in real time. The system is dispatched in real time to meet whatever the consumers demand. That real time dispatch is what governs the operation of power plants and which in turn governs the system’s GHG emissions.

Generally, power plants that are dispatched last are the least efficient. Thus, the majority, if not all power plants that are being proposed today with the best available technologies will displace the less-efficient power plants. If this fundamental fact about the electricity system is not accurately represented, and instead, the Commission assumes that a new plant’s emissions are incremental, the Commission will be misinforming the public of what the environmental impact of a new power plant is. In addition to misinforming the public, the Commission will make the siting of new power plants more onerous for project proponents, and also disincentivize net GHG emission reductions.

As IEP has advocated before, the Commission should engage in some reasonable, systematic GHG assessment of what the system impact is when a new power plant is proposed. The Energy Commission has the staff and expertise to determine what the marginal effect (in terms of the system-wide GHG emissions) will be when a new power plant is constructed. That information should be used either in a programmatic EIR or in individual power plant siting cases to determine what the marginal impact of introducing a new power plant will be. Under a

emissions—and no revenue for the project owner. Accordingly, developers have an overwhelming market incentive to only propose power plants that are, in fact, more efficient than the marginal resources currently on the grid.

systematic GHG assessment approach, the Commission would avoid the primary pitfall of the zero-threshold approach. The zero-threshold approach would require mitigation from projects that do not have a significant impact, and in fact have a significant benefit. Application of a zero-threshold approach would be intellectually dishonest as to the environmental effects of projects, and thereby subject project siting determinations to legal attacks.

Approach #2: System Threshold – Mitigation for Some Projects:

IEP Supports The Application Of A Marginal Heat Rate As A Proxy For Determining Whether There Is A Significant Impact.

Approach #2 makes significant progress in addressing GHG emissions on a systematic basis. While IEP does not support the specific 7,577 Btu/kWh threshold proposed in Approach #2 (IEP's rationale is discussed below), IEP does support the methodology suggested by Approach #2. The methodology underpinning Approach #2 is an identification of the heat rate at which a new power plant will likely lead to a system-wide net emissions reduction. IEP supports such a methodology because it asks the right question and would best inform the public of the true environmental impact of a project. System heat rates of power plants correlate to GHG emissions and thus, heat rates may serve as an appropriate proxy for measuring the effect a new project will have on system-wide GHG emission levels.

If heat rate is used as the proxy for measuring a project's significance, the Commission should engage a study that determines the *marginal* heat rate at which a new project leads to a net GHG emissions impact. IEP does not support the quantities set forth by Approach #2 because those quantities appear to be estimates of the *average* 2004 system heat rate, not the marginal heat rate at which a new project leads to net-system GHG reduction. The marginal heat rate is a better proxy because it more accurately determines the marginal impact of a project on the system as a whole. To that end, by using the marginal rather than average heat rate as a proxy, the Commission would be providing a more sound and accurate assessment to the public of the environmental impact or benefit posed by a new power plant project.

Approach #3: Mitigation Based on Local Reliability Areas

LRAs Are Unrelated To the Assessment of A Significant GHG Related Impact.

IEP supports the Commission's attempt to assess GHG emissions on a system-wide basis, but is unsure how LRAs aid in the determination of GHG related impacts. Does Approach #3 suggest that LRAs should be used to simplify the determination of system-wide impacts by defining the "system" as a set of smaller systems defined by the geographical boundaries of the LRAs? While reliability is a consideration in siting cases, CEQA is an informational document of the environmental impacts. IEP's initial reaction to this proposal is that reliability is not an

appropriate proxy for determining for determining GHG related impacts.

Approach #4: Best Available Control Technology – Mitigation by Technology:

IEP Members Currently Use Best Available Control Technologies, And Support the Use of BACT as a Proxy for Determining Significance; However, The Numbers Suggested In Approach #4 Are Problematic.

IEP members currently use the most best available and most efficient technologies, and IEP supports the use of best available control technologies (“BACT”) as a foundation for a finding of no significant environmental impact. One form of mitigation is requiring the best available technology, which is a reasonable mitigation requirement in this context because there are no existing offset protocols or cost effective CO2 reduction technologies. If a project proponent is meeting emission standards, and also using BACT, what more can that proponent do to mitigate? Thus, conceptually, IEP supports this approach. However, just as IEP agreed with conceptual underpinnings but not the specific numeric thresholds in Approach #2, the specific numerical proposed thresholds under approach #4 are not appropriate. Many projects that may lead to net-emission reductions will not fall within these thresholds, and thus the Commission will ultimately be discouraging net emission reductions. Specifically, many of the most efficient peaker plants that are on the market would not fall within this threshold and would require mitigation. Requiring mitigation from these facilities would discourage their siting even though they may support renewables development, grid reliability, and lower system GHG emissions by means of displacement. The State would thereby forego the environmental benefits created by adding new peakers. Since, renewable energy development is an integral part of the state GHG reduction vision, these peaker plants must be encouraged to the greatest extent possible to firm the capacity of renewable resources. Thus, while IEP supports the use of best available control technologies as a proxy for determining significance, the application of the proposed thresholds in Approach #4 would disincentivize projects that create net-system emission reduction and achieve other important state goals.

Question 1: Should Mitigation Liability Be Based On Permitted Or Actual GHG Emissions?

This question is troubling because it suggests consideration of additional mitigation beyond AB-32, SB-1368 and a system-based GHG assessment. As set forth above, IEP urges the Energy Commission to base its impact assessment of a project on a system-wide analysis rather than simply ignoring the system effects of the new generation.

That said, if the CEC requires mitigation beyond the compliance strategy called for in these comments, then IEP believes the CEC has little choice but to use permitted emissions to assess mitigation liability, even though they are a “worst case” projection and will always overstate real project impacts. Using permitted emissions for this calculation would allow for greater certainty

in what is required of a project when that project is sited. While actual emissions allow for a better assessment of the real environmental impacts, IEP has not been able to envision how such a system could provide both the Commission and the project owner with certainty of what mitigation is required and necessary for both enforcement and project financing and development. Moreover, if the Commission requires yearly, mandatory reporting of GHG emissions under CEQA, the Commission will likely be duplicating the AB-32 reporting requirements. Annual reporting of GHG emissions to the CEC may not be what staff envisioned in formulating this question, but IEP nevertheless recommends the Commission carefully consider cohesion with AB-32 in this process. The potential for double regulation here underscores the need for cohesion between the State's GHG programs.

Question 2: Should the Retirement Of An Existing Facility Result In A “Netting Out Of Emissions Liability? If So, How Should This Be Calculated?”

IEP requests the CEC to clarify what it means by this question. Our interpretation is that this question is asking whether a repowering project should be able to take credit for the permanent retirement of the prior facility. In our first set of comments, IEP argued that repowering of inefficient power plants is in the State's interest, and thus favorable treatment in a CEQA analysis is warranted. Moreover, it seems self-evident that the projects actual impact on the environment is the net difference between the emissions of the former facility and the repowered one. Thus, the Commission should absolutely net out the liability with regard to repowering projects.⁵ In IEP's first written comments in this workshop, IEP discussed this issue in the context of Question 3c., which asked whether certain generation technologies should be considered categorically less than significant. IEP argued that repowering projects should be treated as categorically exempt because of the net GHG emission reductions created by these projects. Repowering projects are in the state's interest and result in both GHG emission reductions and many other environmental and economic benefits. If however, repower projects are not treated as categorically exempt and mitigation liability is assessed, the party siting the project should be able to take credit for any reduction in emissions from the repower project.

This question reads as though the Commission will be calculating the emission or mitigation liability on a project specific basis. IEP stresses again that emissions should be addressed on a system-wide basis. Credit for reduction of system-wide net emissions should be addressed in the context of a system-based GHG assessment.

Question 3: Should Construction Emissions Be Held Significant Even If Best Practices

⁵ IEP appreciates that there is a potential here for double counting emission reductions. Double counting could occur when the repower project developer takes credit for an emission reduction created by the new project and the former owner of the original facility also possesses a cap-and-trade allowance distribution that was allocated to the facility's former operations. This potential for double counting the same emission reductions across AB-32 and CEQA underscores the need for regulatory cohesion between CEQA and AB-32.

Are Followed?

Emissions from construction activities should not be held significant if best practices are followed. Emissions from construction related activities will be addressed under AB-32 in the regulation of the transportation and industrial sectors. By requiring the proponent of a project to mitigate emissions from construction, an activity that is also regulated under AB-32, will again, create a disincentive for power plant construction by regulating the same activity in different regulatory regimes. This is another reason why cohesion with AB-32 should be a foundational goal of this proceeding. As an interim matter, construction emissions are both temporary and inconsequential in the context of global climate change.

Question 4: How Should the Energy Commission's CEQA Mitigation for Power Plant GHG Emissions Work in Concert with Developing Federal, State and Local GHG Rules and Programs?

In line with our comments above addressing the need for regulatory cohesion at the state level, the Commission should seek to encourage cohesion with federal and local programs. It is difficult to provide specific feedback without knowing exactly what a federal GHG program will require. However, the Commission should seek to avoid double counting of emissions and duplicate mitigation requirements that will discourage new facilities in favor of those already operating. As a foundational matter, IEP supports the Commission striving to create cohesion with the various GHG programs to the greatest extent possible.

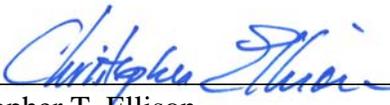
Question 5: If required To Mitigate GHG Emissions, How Would the Mitigation or Fee Amount (\$/Metric Tonne) Be Derived?

IEP believes that this is not the right time for the Commission to be asking this question. Without first determining how the Commission will define the circumstances (if any) when mitigation should be required, the Commission should not engage specific questions as to how mitigation should be derived.

Conclusion

IEP appreciates the Commission's consideration of its comments in this proceeding. In summary, IEP believes that above all else, the Commission should strive to create a GHG emission analysis under CEQA that is cohesive with AB-32 and SB-1368. The Commission should engage in a system-based assessment of impacts that assesses accurately the true impact a new project will have on the GHG emissions of the electric system as a whole. The Commission should then cite to this document in the GHG assessment for individual projects.

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