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January 16, 2009

Ms. Mary Nichols, Chair
California Air Resources Board
1001 "I" Street
Sacramento, CA 95814

RE: Industrial Sector and Interim Significance Thresholds for Greenhouse Gas Emissions Under the California Environmental Quality Act

Dear Ms. Nichols:

We appreciate the opportunity to comment on the *Preliminary Staff Proposal on Greenhouse Gas Thresholds of Significance under CEQA: Potential Performance Standards and Measures* ("CEQA Proposal"). Our firm represents clients siting and operating various types of energy facilities throughout California. Our primary concern in this proceeding is that the recommendations for the industrial sector will create a strong regulatory disincentive for energy facilities that fall outside of the California Energy Commission's ("CEC") jurisdiction. These power facilities that are outside of CEC jurisdiction are necessary to achieve the state's goals for electric reliability ("resource adequacy") and help protect the environment through increasing the use of renewable energy in accordance with California's renewable portfolio standard ("RPS"). To avoid discouraging resource adequacy and RPS attainment, we respectfully recommend that CARB include language in the CEQA Proposal guiding local agencies that site power facilities to: 1) recognize energy facilities' system-wide effects; and 2) utilize the CEC's CEQA GHG process currently being developed by the CEC, in lieu of the Industrial Projects Significance Thresholds delineated in the CEQA Proposal.

In addition, during the interim period, should CARB determine that energy facilities outside CEC jurisdiction meet the definition of Industrial Projects within the CEQA Proposal, we request that Attachment A.3 of the Proposal be revised to reflect that either a mitigated negative declaration ("MND") or an environmental impact report ("EIR") may be used to addresses all feasible GHG mitigation measures to be implemented in the event that a project will emit more than 7,000 MTCO2(e)/year. Finally, if mitigation is required, CARB should consider the lack of

protocols for offsets, and guide local agencies to allow compliance with AB 32 or other regional GHG plans as mitigation of a significant environmental impact.

I. State Legal Obligations And The Need For Local Agencies To Utilize The CEC CEQA GHG Process:

The Warren Alquist Act provides that the California Energy Commission ("CEC") has jurisdiction and is the CEQA lead agency for siting thermal power plants that are 50MW or greater in size.[1] Local agencies are the CEQA lead agencies for thermal power plants that are less than 50MW in size ("0-50MW plants") and for non-thermal facilities of any size. Although 0-50MW plants within local lead agencies' siting purview are smaller than those subject to CEC siting authority, 0-50MW plants are nevertheless crucial to the following legal obligations of the State.

A. Resource Adequacy

Many of these 0-50MW plants are peaker power facilities ("peakers"). Peakers are an important part of the State's energy resource portfolio because they provide the firm power needed during periods of peak demand. In addition, peakers assist the utilities in fulfilling their resource adequacy obligation to serve customers within the utilities' service territory. By doing so, peakers ensure that the State has adequate supplies of electricity.[2]

B. Renewable Procurement

Peaker power facilities are also critical to renewable energy integration. Most renewable energy facilities such as wind and solar are characterized as "intermittent resources," meaning these resources are not available to generate at all hours. Peakers enhance the reliability of renewable generation by being available to operate when the sun is not shining due to transient cloud cover or the wind is temporarily not blowing. Without sufficient peaking resources, the state cannot integrate sufficient renewable generation to meet its environmental goals.

We believe the current CEQA Proposal could dramatically increase the time needed to complete the CEQA process for peaker projects, and potentially result in substantial and additional permitting and regulatory costs, thereby discouraging renewable integration and undermining the purpose of the significance thresholds: GHG reductions. This result would be contrary to the State's GHG emission reduction strategy. In the California Public Utilities Commission ("CPUC") and CEC joint recommendations to CARB, the agencies stated that renewable integration will be a "cornerstone" of emission reductions.[3] Similarly, the CARB AB 32 scoping plan anticipates the implementation of a 33% RPS and includes the RPS as an emission

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[1] See Public Resources Code §§ 25500 and 25120.
[2] In California, the obligation to serve has been recognized in CPUC and court decisions for almost a century. Public Utilities Code § 451 frames a public utility's duty to serve.
[3] See: CPUC and CEC, D.06-04-009, CEC-100-2008-007-F, *Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies* Joint Recommendations to CARB (October 2008) p.1, available at: http://www.energy.ca.gov/2008publications/CEC-100-2008-007/CEC-100-2008-007-F.PDF

reduction measure Because peakers are necessary for aggressive renewable penetration, it is imperative that CARB not discourage their construction by adding further regulatory and cost burdens.

C. CARB Should Direct Local Agencies To Utilize The CEC CEQA GHG Process

The application of the proposed threshold of 7000 MTCO2(e)/year will jeopardize 0-50MW plants by adding substantial, and in many cases, unnecessary mitigation costs to achieve the 7000 MTCO2(e) threshold. In many cases, the assessment of mitigation necessary will be inaccurate because most local agencies do not have the resources to properly account for the effect the construction of a new power plant will have on system-wide GHG emission levels. Unlike most other industries, power plants are dispatched in real time to instantaneously meet demand. 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 first moment it operates and for the duration of its lifetime operation. The operating procedures of the CAISO and other dispathchers ensure that demand will be met by the utilities pursuant to their 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 immediately displaced.

Any analysis geared towards addressing the GHG emissions of power plants, whatever the size, must reflect that new projects will displace less efficient generation with greater GHG emissions. Our fear is that without guidance, local agencies will not have the resources to consider these net effects. The application of the 7000 MTCO2(e)/year significance threshold on a project specific basis would fail to account for these net emission reductions. Without guidance, local agencies may discourage the construction of 0-50MW plants by imposing unnecessary mitigation derived from an unsound GHG emissions analysis.

To avoid this result, we respectfully recommend that the CARB Staff include language specifically recommending local agencies utilize whatever programmatic GHG analysis and methodology is approved by the CEC when reviewing/determining GHG significance thresholds as part of the CEQA review process. At this point in time, the CEC has yet to commence such an analysis. However, in the interim, local agencies should be directed to contact CEC staff and seek guidance as to whether a specific plant will lead to a net reduction in GHG emissions. Once a programmatic analysis or policy is developed, local agencies should be recommended to cite that analysis or policy for evidentiary support that the construction of certain facilities will result in a net reduction in GHG emissions, and therefore would not have a significant impact. Otherwise, there is a very real risk that projects that will reduce system GHG emissions will be rejected in the false belief that they increase such emissions.

II. CEQA Proposal And The Use Of Mitigated Negative Declarations

Under CEQA, a lead agency is required to conduct an "initial study," for any proposed project which is not exempt from CEQA requirements, in order to determine whether the project may

have a significant effect on the environment.[5] An Environmental Impact Report ("EIR") is ordinarily required if the initial study reveals substantial evidence "that the project may have a significant effect on the environment."[6] However, where a project applicant is willing and able to modify a project to avoid potentially significant effects identified in the initial study, a MND, in lieu of an EIR, may be prepared..[7] While it does not specifically reference MNDs, the flowchart illustrating the Preliminary Draft Proposal for Industrial Projects (attached to the Preliminary Draft Staff Proposal as Attachment A) appears to be consistent with CEQA in this regard, since it does not require an EIR where "[t]he project, ***with mitigation***, will emit no more than 7000 metric tons CO2e/yr," *i.e*. the flowchart appears to acknowledge that if a project's GHG emissions can be brought under 7000 MTCO2(e)/year through the use of mitigation measures, there is a "[p]resumption of less than significant impacts related to climate change." (Emph. added.)

Thus, for example, as we interpret the flowchart, if the initial study on a proposed power plant project reveals that it will emit 8000 tons per year, but the project applicant is willing and able to modify the project to incorporate design features that will reduce emissions to 6900 tons per year, then the presumption of less than significant impacts related to climate change applies (assuming the project meets minimum construction and transportation performance standards). Similarly, if design features to reduce emissions below 8000 are not available, but a mitigation measure is imposed on the project requiring the project applicant to annually purchase 1100 tons of carbon offsets, thus reducing the project's net impact to 6900 tons per year, then the presumption of less than significant impacts related to climate change applies. In both scenarios, a mitigated negative declaration, rather than an EIR, would be required for the project.

We also request confirmation from CARB Staff that either an MND or EIR are allowed when the GHG impacts of a project are reduced to less than 7000 metric tons CO2e/yr through the use of mitigation measures. If this interpretation is correct, then it will be necessary to develop protocols governing the use of offsets and other mitigation measures. Currently, carbon capture, control and storage technologies are not cost effective. In addition there are no existing protocols on the use of offsets in the GHG context. We believe that resolving these issues is a prerequisite to effectively implementing a quantitative GHG significance threshold for 0-50MW plants.

A related issue we believe CARB should consider including language in the significance threshold that allows for compliance with AB 32 or another GHG regional plan to support a finding of no significant impact. This approach has been taken in the South Coast Air Quality Management District ("SCAQMD") CEQA significance threshold proposal.[8] That proposal attempts to integrate significance thresholds for GHG emissions with the AB 32 scoping measures. SCAQMD Staff has proposed a tiered analysis in determining whether a project's

[5] 14 Cal. Code Regs § 15063.
[6] 14 Cal. Code Regs § 15063(d).

[7] Public Resources Code §§ 21064.5, 21080(c)(2); 14 Cal. Code Regs § 15064(f)(2), 15070(b).
[8] See SCAQMD Draft Guidance Document – Interim CEQA GHG Significance Threshold (October 2008), p 3-10, available at: http://www.aqmd.gov/ceqa/handbook/GHG/oct22mtg/GHGguidance.pdf

emissions are significant, and one of the tiers (in part) allows a finding of non-significance if the project complies with AB 32 scoping measures. By recognizing such compliance in this manner, regulators will have the certainty that a new facility will fit within the State's GHG reduction goals. Moreover, regulated entities won't face costs of complying with two regulatory schemes geared towards preventing the same environmental impact.

III. Conclusion

We recognize that global climate change is a serious issue facing both the State and the world. To this end, we believe that it is imperative to develop effective GHG strategies that work in concert with the State's obligations of ensuring there are sufficient energy supplies. We also believe that any significance thresholds recommended to OPR must not undermine the RPS. We therefore respectfully recommend that CARB include specific language guiding local agencies to cite these system-wide effects and utilize the CEC's CEQA GHG process.

Secondly, we request that the CEQA Proposal be modified to reflect that either a MND or EIR may be prepared when the GHG impacts of a project are reduced to less than 7000 MTCO2(e)/year through the use of mitigation measures. We also encourage CARB to guide local agencies to consider compliance with AB 32 or another regional GHG plan to support the finding of no significant impact.

Thank you for the opportunity to comment in the proceeding.

Sincerely,

Brian Biering