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May 16, 2014

By: Email and U.S. Mail

Mayor Peggy Thomsen and Council Members
City of Albany City Council
1000 San Pablo Ave.
Albany, CA 94706

**Re: Environmental Compliance Requirements Regarding a City
Action to Join a Community Choice Aggregation Program**

Dear Mayor Thomsen and Council Members:

We write on behalf of the International Brotherhood of Electrical Workers Local 1245, to advise the City of its obligation to comply with the California Environmental Quality Act¹ before taking any action to join a Community Choice Aggregation (CAA) program. The core purpose of joining a CCA program is to change the source of electricity generation for Albany customers. Specifically, by joining a CCA program, the City would cause customers to stop purchasing electricity from Pacific Gas & Electric Company, and begin purchasing electricity from a different electricity marketer, such as Shell Energy North America.

Given the core purpose of joining a CCA program, it is not at all surprising that this action could result in changes to the environment. These changes would include increased operation and related increases in air pollutant emissions from certain existing electric generation plants that use fossil fuels. These changes could result in significant localized impacts to air quality and public health. As explained in this letter, based on current information it is unlikely that joining a CCA program would lead to increased construction or operation of renewable energy plants. However, if this were to happen, these activities could also result in adverse environmental impacts.

¹ Pub. Resources Code, §§ 21000 et seq.

Changing the sources of electricity generation that supply a given geographic area requires environmental review. The California Public Utilities Commission has previously found this same type of action to cause potentially significant impacts on the environment. The City is required to consider the environmental impacts of joining a CCA program pursuant to CEQA before it can approve such action. We object to the City taking action to join a CCA without first preparing, considering and certifying an Environmental Impact Report.

We understand that it would be natural to assume that a governmental action intended to *increase* the use of renewable energy should *reduce* environmental impacts. But, as we explain in this letter, such action will change the operation of electric generation plants that currently supply Albany customers and the operation of power plants burning fossil fuels used to supply these same customers under a new program. As a result, while air pollutant emissions may go down in some places, they are likely to go *up* in other places. The resultant increases in air pollutant emissions may result in significant localized impacts to air quality and public health. CEQA requires the City to analyze those impacts in an EIR and adopt feasible mitigation measures or alternatives to reduce those impacts to a less than significant level.

Our analysis was prepared with the assistance of technical expert David Marcus. Mr. Marcus's analyses and curriculum vitae are attached to this letter.²

I. CHANGING THE SOURCES OF ELECTRICITY GENERATION THAT SUPPLY CUSTOMERS IS A "PROJECT"

CEQA's primary purpose is to require public agency decision makers to document and consider the environmental implications of their actions.³ CEQA applies to "all governmental agencies at all levels" in California, including local agencies, regional agencies, and state agencies, boards and commissions.⁴ With limited exceptions, CEQA requires that "*discretionary projects proposed to be*

² See **Attachment 1**, Letters from David Marcus to Elizabeth Klebaner.

³ See Pub. Resources Code, § 21000, 21001; see also *Friends of Mammoth v. Board of Supervisors* (1972) 13 Cal. 3d 68, 73-75.

⁴ Pub. Resources Code, §§ 2100 subd. (g), 21001 subds. (f), (g); Cal. Code. Regs., tit.14 §§ 15002, subd. (b), 15020, 1536, 15368, 15379, 15383 (CEQA Guidelines).

carried out or approved by public agencies” are subject to environmental review *before* they are approved.⁵ The Act defines “project” as:

An activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . [including] [a]n activity directly undertaken by any public agency.⁶

Governmental actions that may change the physical environment, and are therefore subject to CEQA, include preliminary planning decisions, zoning changes and financing assistance.⁷ Governmental actions which authorize a change in the source of electricity generation that serves a geographic area cause obvious changes in the physical environment by altering the generation patterns of existing power plants. Such actions have been understood to be subject to CEQA review for more than two decades. In at least two instances, it was determined that this exact type of action may result in potentially significant impacts to the environment.

In 1988, the California Public Utilities Commission prepared an EIR to evaluate the impacts on air quality in the Los Angeles Air Basin from a proposed merger of Southern California Edison Company and San Diego Gas & Electric Company.⁸ The Commission determined that reasonably foreseeable changes in patterns of generation from existing power plants could result in potentially significant localized air quality impacts.⁹ Approximately one decade later, the Bonneville Power Administration (BPA) determined that its action to enter into a long-term contract for peaking capacity required preparation of an Environmental Impact Statement (EIS) under the National Environmental Policy Act.¹⁰ The EIS

⁵ See Pub. Resources Code, § 21080 subd. (a), emphasis added.

⁶ Pub. Resources Code, § 21065.

⁷ See, e.g., *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116; *Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal.3d 263; *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments* (2010) 179 Cal.App.4th 113; *City of Carmel-By-the-Sea v. Board of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229; See, generally, California Public Utilities Commission Docket A.88-10-055.

⁸ See California Public Utilities Commission Docket A.88-10-055, available at <http://delaps1.cpuc.ca.gov/CPUCProceedingLookup/?p=401:57:32116475656525::NO>.

⁹ See *ibid.*

¹⁰ 42 U.S.C. §§ 4321 et seq.

evaluated the environmental impacts caused by changes in operation of *existing* thermal resources.¹¹

The BPA EIS provides a good example of what such an analysis could look like. The EIS considered the contract provisions that could result in reasonably foreseeable changes in the types of resources that would be used to satisfy contractual obligations.¹² The EIS then evaluated the environmental impacts that could result from these changes, including new impacts to air quality from the changed operation of existing conventional power plants and new impacts to water and biological resources from the changed operation of existing hydroelectric plants.¹³

Just as in the cases of an agency's proposed approval of a merger of electrical utilities, or an agency's decision to commit to a long-term contract to provide peaking capacity from existing resources, joining a CCA program will, by design, change the source of generation that supplies Albany customers. As fully documented by David Marcus in his written analyses, and summarized, below, joining a CCA program would cause a change in the operation of existing power plants that burn fossil fuels.

David Marcus's analyses consider two presently available CCA program alternatives; the Marin Clean Energy CCA program (MCE) and the Sonoma Clean Power CCA program (SCP). Mr. Marcus's analyses demonstrate that the City's action to join either program would cause certain existing plants burning fossil fuels to increase operations. David Marcus also demonstrated in his analyses that neither program is likely to result in the increased construction or operation of renewable energy plants.

The City's action to approve joining a CCA program may cause direct, or reasonably foreseeable indirect, physical changes in the environment. The changed operation of existing fossil fuel generation, and the construction and increased operation of renewable energy plants will result in various environmental impacts. These include, but are not limited to, increased emissions of air pollutants and toxic

¹¹ U.S. Department of Energy, PacifiCorp Capacity Power Sale Contract, Final EIS, at p. 25 of 202 of pdf, available at <http://energy.gov/nepa/downloads/eis-0171-final-environmental-impact-statement>.

¹² See, e. g., *id.*, at p. 28 of 202 of pdf and attached as **Attachment 2**.

¹³ See *ibid.*

air contaminants. The City is required to comply with CEQA before it approves joining a CCA program.

A. Joining MCE or SCP Will Cause Existing Electricity Generating Plants Burning Fossil Fuel to Increase Operations to Meet the City's Demand for Electricity.

Substantial evidence shows that joining either MCE or SCP will cause certain existing electricity generating plants burning fossil fuel to increase operations. As demonstrated by David Marcus, the City's action to join either CCA program will transfer customers from the City's current electricity supplier to a prospective electricity supplier.¹⁴ In the case of MCE, that supplier is Shell Energy North America. As a result, either MCE's or SCP's electricity demand will increase in order to serve their new customers.¹⁵ That additional electricity supply has to come from somewhere.

David Marcus demonstrated in his comments that with both MCE and SCP, the new electricity demand will be met by the increased operation of existing electricity generating plants burning *fossil fuel*.¹⁶ David Marcus also demonstrated that the increase in the operation of certain existing plants burning fossil fuels could be substantial. In 2012, up to 83 percent of MCE's electricity sales, or 429 gigawatt hours (Gwh), came from the increased operation of existing fossil fuel generation.¹⁷ David Marcus has shown that SCP, which has just started to supply power to customers, would source more than 90 percent of its electricity from fossil fuel generation.¹⁸

Indeed, joining MCE or SCP would cause increased operation of existing plants burning fossil fuels even if each program succeeds in causing new renewable generation to be built. This is because both MCE and SCP will use fossil fuel generation for the majority of their power supply. As demonstrated by David

¹⁴ Letter from David Marcus to Elizabeth Klebaner regarding the potential environmental impacts of the Sonoma County Power Program, at pp. 1-2 (Marcus SCP Letter); Letter from David Marcus to Elizabeth Klebaner regarding the potential environmental impacts of the Marin Clean Energy Authority Program, at pp. 1-2 (Marcus MCE Letter).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Marcus MCE Letter, at p. 2.

¹⁸ Marcus SCP Letter, at pp. 2-3.

Marcus, in 2012, 83 percent of MCE's power supply came from conventional, fossil fuel generation.¹⁹ According to MCE's November 2013 Integrated Resource Plan Annual Update, in 2014 more than 75 percent of MCE's electricity is expected to come from conventional generation.^{20,21} That amount is expected to increase to 78 percent in 2015.^{22,23} David Marcus has also shown that in years 2014 through 2016, 95 percent *or more* of the power proposed to be supplied by SCP would come from conventional, fossil fuel generation.²⁴

As a result, joining MCE or SCP would, contrary to the City's goals, increase operation of certain fossil fuel-burning plants and cause new significant adverse localized air quality and public health impacts from those plants.

B. Joining MCE or SCP is Unlikely to Cause Increased Operation or Construction of Renewable Energy Plants, But If It Did, There Would Be Environmental Impacts.

David Marcus has also shown that joining MCE or SCP is unlikely to increase the operation or construction of renewable energy plants. In particular, David Marcus has shown that the majority of the energy purchases made under either program will go to the fossil fuel plant industry.²⁵ In particular, MCE plans to acquire at least 540 Gwh of new conventional resources per year.²⁶ This amount dwarfs planned renewable energy purchases, which are estimated at just 89 Gwh per year.²⁷ Similarly, in years 2014 through 2016, SCP plans to purchase 157 or

¹⁹ Marcus MCE Letter, at p. 2.

²⁰ See MCE, Integrated Resource Plan Annual Update, Nov. 2013, at Appendix A, *Load and Resource Tables*, available at http://marincleanenergy.org/sites/default/files/key-documents/Integrated_Resource_Plan_2013_Update.pdf.

²¹ "Total Energy Requirement" for 2014 is 1,328 Gwh; "Conventional Energy Requirements (including energy w/ unbundled RECs)" for 2014 is 1,034 Gwh. $1034/1328 = 0.778$.

²² See MCE, Integrated Resource Plan Annual Update, Nov. 2013, at Appendix A, *Load and Resource Tables*, available at http://marincleanenergy.org/sites/default/files/key-documents/Integrated_Resource_Plan_2013_Update.pdf.

²³ Total Energy Requirement" for 2015 is 1,309 Gwh; "Conventional Energy Requirements (including energy w/ unbundled RECs)" for 2015 is 1,023 Gwh. $1023/1309 = 0.781$.

²⁴ Marcus SCP Letter, at p. 3.

²⁵ See Marcus MCE Letter, at p. 3; see Marcus SCP Letter, at pp. 3-4.

²⁶ Marcus MCE Letter, at pp. 2-3.

²⁷ *Ibid.*

more Gwh from fossil fuel.²⁸ SCP plans to purchase only 22 Gwh per year from renewable plants over the same time period.²⁹

David Marcus has also shown that the miniscule amount of renewable generation purchases that would be made under either program would have occurred anyway.³⁰ In other words, those renewable plants will find a buyer with or without MCE and SCP. However, even if MCE and SCP succeed in adding new renewable generation to the grid, the construction or increased operation of renewable energy plants would result in distinct impacts to the environment. We discuss these, and other environmental impacts of a City action to join a CCA program in the following sections.

II. JOINING A CCA PROGRAM WILL CAUSE CHANGES TO THE PHYSICAL ENVIRONMENT

As described above, the City's decision to join either MCE or SCP involves changing the operation of existing conventional generation, causing increased operation of certain fossil fuel-burning plants. These activities will result in increased localized emissions of criteria air pollutants, toxic air contaminants, and greenhouse gases. While it is unlikely that the City's decision to join a new electricity service will cause the increased consumption or construction of renewable generation, these activities would also result in changes to the physical environment.

The full spectrum of potential environmental impacts caused by the City choosing to join MCE, SCP or any other CCA program is not reviewed here. This analysis should be conducted in an EIR, and the EIR should be provided for review to decision makers and the public *before* the City considers joining a CCA program.³¹ However, even with limited available information, it is clear that changing the pattern of generation from existing plants burning fossil fuel would cause impacts on the physical environment.

²⁸ Marcus SCP Letter, at pp. 3-4.

²⁹ *Ibid.*

³⁰ See Marcus SCP Letter, at pp. 2-3; Marcus MCE Letter, at pp. 2-3.

³¹ See discussion *infra*, Section III, regarding the need for an EIR.

A. Increased Operation of Electricity Generating Plants Burning Fossil Fuel Causes Increased Emissions of Criteria Air Pollutants.

Fossil fuel generation, such as natural gas facilities, emit criteria air pollutants when generating electricity, and increased power production activities generally result in increased criteria pollutant emissions.³² Criteria air pollutants include: particulate matter, sulfur dioxide, carbon monoxide, lead, ozone, and volatile organic compounds (VOCs) and oxides of nitrogen (NOx) which are ozone precursor pollutants.³³ Increased criteria pollutant emissions from an existing fossil fuel plant may result in localized and regional impacts, depending on the rate of emissions, ambient air quality and the plant's proximity to residential populations and sensitive receptors, such as schools.

Criteria air pollutants cause smog and are a public health concern. Short-term exposure to ozone can irritate the eyes and cause constriction of the airways and can aggravate existing respiratory diseases such as asthma, bronchitis, and emphysema.³⁴ Carbon monoxide can reduce the oxygen-carrying capacity of the blood, and short-term exposure can cause angina in persons suffering from heart disease.³⁵ Particulate matter regulated under state and federal law includes dust-sized particles and fine particulates that are 2.5 microns or less in diameter. Exposure to these particulates is linked with increases in asthma attacks, and acute and chronic health effects.³⁶ Sulfur dioxide and oxides of nitrogen are products of fuel combustion. These pollutants can affect regional visibility and short-term exposure to these pollutants is associated with increased risk of acute and chronic respiratory diseases.³⁷

³² See, e. g., Application for Certification for the Cogentrix Quail Brush Generation Project, August 2011, at p. 4.7-8 ("worst-case" criteria pollutant emissions assumed when generators are operated at 100 percent load), excerpts attached as **Attachment 3**.

³³ U.S. Environmental Protection Agency, *Six Common Air Pollutants*, available at <http://www.epa.gov/air/urbanair/>.

³⁴ U.S. Environmental Protection Agency, *Health Effects of Ozone in the General Population*, available at <http://www.epa.gov/apti/ozonehealth/population.html>, attached as **Attachment 4**.

³⁵ U.S. Environmental Protection Agency, *Carbon Monoxide: Health*, available at <http://www.epa.gov/airquality/carbonmonoxide/health.html>, attached as **Attachment 5**.

³⁶ U.S. Environmental Protection Agency, *Particulate Matter: Health*, available at <http://www.epa.gov/pm/health.html>, attached as **Attachment 6**.

³⁷ U.S. Environmental Protection Agency, *Sulfur Dioxide: Health*, available at <http://www.epa.gov/airquality/sulfurdioxide/health.html>, attached as **Attachment 7**; U.S.

Given the wide array of pollutants with known, documented adverse effects on public health, increased emissions of these pollutants caused by increased operation of electricity generation plants burning fossil fuels is likely to cause significant adverse impacts to air quality and public health.

B. Increased Operation of Electricity Generating Plants Burning Fossil Fuel Causes Increased Emissions of Toxic Air Contaminants.

Electricity generating plants burning fossil fuel, such as natural gas facilities, emit numerous carcinogens and harmful air contaminants when they generate electricity.³⁸ These contaminants include ammonia, VOCs, diesel particulate matter, acrolein and polycyclic aromatic hydrocarbons.³⁹ Increased power production activities generally result in increased emissions of toxic air contaminants.⁴⁰ Increased emissions of toxic air contaminants may impact persons living and working in the vicinity of the fossil fuel plant, depending on the rate of emission of these contaminants, the extent to which nearby communities are already burdened by cancer risks from other emissions sources, and other factors.⁴¹

C. Increased Operation of Electricity Generating Plants Burning Fossil Fuel Causes Increased Emissions of Greenhouse Gases.

Increased operation of fossil fuel generation results in increased emissions of greenhouse gases. Incremental emissions of greenhouse gases contribute cumulatively to global climate change.⁴² However, communities impacted by

Environmental Protection Agency, *Nitrogen Dioxide: Health*, available at <http://www.epa.gov/oaqps001/nitrogenoxides/health.html>, attached as **Attachment 8**.

³⁸ See, e. g., Application for Certification for the Cogentrix Quail Brush Generation Project, August 2011, at pp. 4.8-5 -10 (“worst-case” criteria pollutant emissions assumed when generators are operated at 100 percent load), excerpts attached as **Attachment 8**.

³⁹ *Ibid.*

⁴⁰ See, e. g., Application for Certification for the Cogentrix Quail Brush Generation Project, August 2011, at p. 4.7-8 (“worst-case” criteria pollutant emissions assumed when generators are operated at 100 percent load) and *id.* at Appendix F-4 (assumes 100 percent operations to evaluate public health impacts from toxic air contaminants), excerpts attached as **Attachment 8**.

⁴¹ See *ibid.*

⁴² See, e. g., California Energy Commission, Final Staff Assessment for the Pio Pico Energy Center, May 2012, at p. 105, excerpts attached as **Attachment 9**.

greenhouse gas emitting facilities may also consider greenhouse gas emissions a local problem, due to environmental justice concerns.⁴³

D. The Construction and Operation of Renewable Energy Plants Also Results in Changes to the Physical Environment.

As discussed above, it is unlikely that joining MCE or SCP will cause the construction or increased operation of renewable energy plants. Increased reliance on renewable generation avoids greenhouse gas emissions and is beneficial for society in a number of other important respects. However, the construction and operation of renewable generation is not benign. Such plants, like all industrial development, result in adverse environmental impacts and may result in potentially significant impacts to the environment. We review some of these impacts below.

1. Constructing new renewable energy plants causes short-term emissions of criteria air pollutants.

Constructing a new power plant causes short-term air quality impacts from dust generated by earth disturbance and off-road vehicles. Construction activities also cause emissions of diesel particulates and ozone precursors from off-road vehicles, delivery trucks, and from workers commuting to and from the project site. For example, the City of Adelanto recently concluded that a 27 megawatt (MW) photovoltaic facility located in San Bernardino County would require mitigation measures to reduce construction emissions of particulate matter to a less than significant level.⁴⁴

2. Constructing new renewable energy plants may cause conversion of California farmland resources.

The development of new renewable plants often results in conversion of agricultural lands to industrial use. For example, an 18 MW photovoltaic facility proposed in the Central Valley would have converted 160 acres of Farmland of

⁴³ See Draft Environmental Impact Report for the Chevron Refinery Modernization Project, March 2014, at pp. 4.8-39-41, excerpts attached as **Attachment 10**.

⁴⁴ See City of Adelanto Initial Study Environmental Checklist for LDP 13-05 and CUP 13-04, at p. 7, excerpts attached as **Attachment 11**.

Statewide Importance to industrial use.⁴⁵ In western Fresno County alone, hundreds of acres of farmland have been removed from agricultural leases in order to construct new solar facilities.⁴⁶

3. Constructing and operating new renewable energy plants may impact biological resources.

Constructing and operating renewable energy plants impacts special status species. In the Central Valley, solar energy development has eliminated hundreds of acres of habitat for the endangered San Joaquin kit fox, the State-listed threatened Swainson's hawks, and other protected species.⁴⁷ Renewable development in the Mojave Desert has resulted in direct take and elimination of habitat for the endangered Desert tortoise and many other special status species.⁴⁸ Geothermal resource development in the Eastern Sierra impacts mule deer migration and may impact species that depend on thermal resources, such as the federally-listed endangered Owens tui chub.⁴⁹

4. Constructing new renewable energy plants may expose workers and nearby communities to serious health risks.

Constructing renewable plants can pose serious health risks to workers and nearby communities. *C. immitis* is a soil fungus, native to the San Joaquin Valley and other parts of California, which causes Coccidioidomycosis, commonly known as "Valley Fever."⁵⁰ Valley Fever is typically transmitted by inhaling airborne spores

⁴⁵ See County of Fresno, Initial Study and Environmental Checklist for the Gestamp Asetym Solar Project, at p. 18, excerpts attached as **Attachment 12**.

⁴⁶ See Kurtis Alexander, The Fresno Bee, *PG&E solar projects concern Fresno County leaders; PG&E undoes contracts to use ag lands for alt energy.*, attached as **Attachment 13**.

⁴⁷ See San Bernardino County Initial Study Environmental Checklist Form for the Marathon Solar Project, excerpts attached as **Attachment 14**; San Bernardino County Initial Study Environmental Checklist Form for the Agincourt Solar LLC Project, excerpts attached as **Attachment 14**; County of Fresno Evaluation of Environmental Impacts for the Gestamp Asetym Solar Project, excerpts attached as **Attachment 14**.

⁴⁸ See California Energy Commission, Final Staff Assessment-Part A for the Blyth Solar Power Project, Sept. 2013, excerpts attached as **Attachment 15**.

⁴⁹ See County of Mono, Mammoth Pacific I Replacement Project, Final Environmental Impact Report, September 2012, excerpts attached as **Attachment 16**.

⁵⁰ Duane R Hospenthal, MD, PhD et al., Coccidioidomycosis, Dec. 8, 2011, attached as **Attachment 17**.

of *C. immitis*, which grow in soil during the wet season. These particles can be disturbed in project site soils during earthmoving activities.

In most cases, the primary infection is in the lungs.⁵¹ In 35-40% of cases, infection leads to mild influenza 1 to 4 weeks after exposure, although some persons develop severe pneumonia.⁵² If left untreated, in 1% of cases Valley Fever can spread beyond the lungs and can be fatal.⁵³

Last year, the Los Angeles Times reported an outbreak of Valley Fever at two large solar-power construction sites in San Luis Obispo County where 28 workers developed the disease.⁵⁴ The Times reported that the threat of acquiring the respiratory illness extends to residents living near the power plant construction sites.⁵⁵

5. Operating new renewable energy plants may increase consumption of limited water resources.

Imperial County is a major producer of geothermal power.⁵⁶ The U.S. Department of Agriculture also recently designated Imperial County a natural disaster area due to drought.⁵⁷ The Imperial Irrigation District (IID) has put in place interim water supply management policies to allocate limited water supplies between competing uses.⁵⁸ IID estimates that up to 50,000 acre feet per year (AFY) of water could be requested by non-agricultural projects over the next two decades.⁵⁹

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Julie Cart, Los Angeles Times, *28 solar workers sickened by valley fever in San Luis Obispo County*, May 1, 2013, attached as **Attachment 18**.

⁵⁵ *Ibid.*

⁵⁶ California Energy Commission, *Geothermal Energy in California*, available at <http://www.energy.ca.gov/geothermal/background.html>.

⁵⁷ USDA, *USDA Designates Imperial County in California as a Primary Natural Disaster Area With Assistance to Producers in Arizona*, http://www.fsa.usda.gov/FSA/newsReleases?area=newsroom&subject=landing&topic=edn&newstype=ednewsrel&type=detail&item=ed_20140410_rel_0055.html.

⁵⁸ See Imperial Irrigation District, *IID Interim Water Supply Policy for Non-Agricultural Projects*, available at <http://www.iid.com/Modules/ShowDocument.aspx?documentid=5395>, attached as **Attachment 19**.

⁵⁹ *Ibid.*

According to IID, a 49.9 MW dual flash geothermal plant under development in Imperial Valley utilizes approximately 750 AFY of water.⁶⁰ However, several binary geothermal facilities that consume as much as 6,600 AFY of water to generate the same amount of electricity have been proposed in the County.⁶¹ One of these plants has already been constructed.⁶² Geothermal power production can be water intensive, taxing limited water resources and potentially diverting water away from ecological and competing industrial uses.

III. AN EIR IS REQUIRED TO EVALUATE THE ENVIRONMENTAL IMPACTS OF A CITY ACTION TO JOIN A COMMUNITY CHOICE AGGREGATION PROGRAM

CEQA's purpose and goals must be met by preparing an EIR, except in certain limited circumstances.⁶³ CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the "fair argument" standard. Under that standard, a lead agency *must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.*⁶⁴ The fair argument standard creates a "low threshold" favoring environmental review through an EIR.⁶⁵ An agency's decision *not* to require an EIR can be upheld only when there is no credible evidence to the contrary.⁶⁶

⁶⁰ See IID, Imperial Integrated Regional Water Management Plan, Appendix L, IID Power Plant Water Use Evaluation, p. 4, attached as **Attachment 20**.

⁶¹ See *id.* at p. 7.

⁶² See Ormat Technologies, Inc., *Ormat Technologies, Inc. Provides Operational Update on North Brawley Power Plant*, available at www.ormat.com and attached as **Attachment 21**.

⁶³ See Pub. Resources Code, § 21100.

⁶⁴ Pub. Resources Code § 21082.2; CEQA Guidelines § 15064(f), (h); *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) ("Laurel Heights II") 6 Cal. 4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

⁶⁵ *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

⁶⁶ *Sierra Club v. County of Sonoma*, (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 ["If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an [environmental impact report] and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact"].

CEQA defines “substantial evidence” as “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”⁶⁷ The California Natural Resources Agency regulations further define “substantial evidence” as:

Enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.⁶⁸

“If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.”⁶⁹

Substantial evidence shows that the City’s action to join a CCA program may result in significant environmental impacts. As described above, joining MCE or SCP would cause increased operations of certain existing electricity generating plants burning fossil fuels. This increased burning of fossil fuels would cause potentially significant environmental impacts. Even a temporary increase in the operation of a fossil fuel generating plant can result in potentially significant impacts to air quality and public health.

The South Coast Air Quality Management District (SCAQMD) determined that any stationary source, such as a power plant, that emits fine particulate matter at a rate of 55 pounds per day (lbs/day) would cause a potentially significant air quality impact.⁷⁰ The hybrid solar thermal and combined cycle natural gas Victorville 2 Hybrid Power Plant is located in San Bernardino County, within SCAQMD jurisdiction. The Victorville 2 plant was designed to include two natural gas-fired combustion turbine-generators rated at 154 MW each.⁷¹ The Victorville 2 plant is much more efficient than the older natural gas plants serving California’s

⁶⁷ Pub. Resources Code, § 21080 subd. (e)(1).

⁶⁸ CEQA Guidelines, § 15384, subd. (a).

⁶⁹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

⁷⁰ See South Coast Air Quality Management District, Final Methodology to Calculate Particulate Matter (PM) 2.5 and PM 2.5 Significance Thresholds, at p. 8, *available at* http://www.aqmd.gov/ceqa/handbook/PM2_5/PM2_5.html and excerpts attached as **Attachment 22**.

⁷¹ California Energy Commission, Final Staff Assessment for the Victorville 2 Hybrid Power Project, March 2008, at p. 1-2, excerpts attached as **Attachment 23**.

load, so the following example likely underestimates the impacts that would be caused by a City action to join MCE or SCP.

The California Energy Commission staff concluded that when operated at its maximum potential hourly, daily and annual operations of 8,760 hours per year, the Victorville 2 plant would emit fine particulate matter at a rate of 117 tons per year and 864 lbs/day.⁷² Accordingly, just two hours of maximum operation in any one day would cause the plant to emit 72 lbs of fine particulate matter.⁷³ Under SCAQMD's significance thresholds, this rate of emissions would result in a potentially significant impact to air quality under CEQA.

The environmental impacts of the Victorville 2 plant's operations are representative of the plants that will be supplying the City's load after the City joins a CCA program. Existing fossil fuel burning plants,⁷⁴ and those fossil fuel burning plants that are planned,⁷⁵ in California are located in areas where people would be exposed to air pollutants and toxic air contaminants that are emitted from these plants. Many of these facilities are located within a couple of miles of residential neighborhoods.⁷⁶ All but one of these facilities are located in areas that are designated in non-attainment of federal and state air quality standards,⁷⁷ where

⁷² See *id.* at pp. 4.1-8, 4.1-9, Table 4, excerpts attached as **Attachment 23**.

⁷³ 864 lbs/day/ 24 = 36 lbs/hr.

⁷⁴ The 429 MW Russell City Energy Center, located in Hayward California, <http://www.calpine.com/power/plants.asp>; the 600 MW Metcalf Energy Center, located in South San Jose, <http://www.calpine.com/power/plant.asp?plant=183>; the 950 MW Encina Power Station, located in Carlsbad, California, <http://www.nrgenergy.com/about/assets.html>; the 510 MW Otay Mesa Generating Station, located in Eastern San Diego in the community of Otay Mesa, <http://www.calpine.com/power/plant.asp?plant=247>; 11529 MW Dynegy Moss Landing Power Plant, located in Monterey County, http://www.dynegy.com/downloads/Dynegy_Facilities.pdf; and the 95 MW Hanford Combined Cycle Power Plant, located in Hanford, Kings County.

⁷⁵ Victorville 2, located in the City of Victorville, <http://www.energy.ca.gov/sitingcases/victorville2/>; Avenal Energy Power Plant, located in the City of Avenal, <http://www.energy.ca.gov/sitingcases/avenal/>; the Watson Cogeneration Project, located in City of Carson, <http://www.energy.ca.gov/sitingcases/watson/>; Pio Pico Energy Center, located in Otay Mesa, California, <http://www.energy.ca.gov/sitingcases/piopico/>.

⁷⁶ For example, the Metcalf Energy Center is located within one mile of a residential neighborhood. See <https://www.google.com/maps/place/Metcalf+Energy+Center/@37.219871,-121.744587,17z/data=!3m1!4b1!4m2!3m1!1s0x808e2f6866720c67:0x8bc587f3f011e26f>. The Russell City Energy Center is located in Hayward within two miles of the Mount Eden neighborhood.

⁷⁷ Russell City and Metcalf Energy Center are located within Bay Area Air Quality Management District (BAAQMD) jurisdiction. See <http://www.baaqmd.gov/The-Air-District/Jurisdiction.aspx>. The Bay Area is designated in nonattainment of state and federal ozone and fine particulate matter

a relatively minor increase in emissions results in a potentially significant impact to air quality.⁷⁸

Substantial evidence supports a fair argument that joining MCE or SCP may have a significant effect on the environment. The City's action to join MCE or SCP would cause existing plants burning fossil fuel to increase their operation. Even a temporary increase in the operation of such a plant could result in a significant impact. The Victorville 2 plant, which is more efficient than many natural gas plants serving California's load, would result in significant air quality impacts if operated at maximum capacity for just two hours in one day. This evidence is just one example of a potentially significant environmental impact that City approval of joining MCE, SCP, or another CCA program, could cause. The City is required to prepare an EIR before approving such action.

The EIR should identify the City's goals in joining a CCA program, state how the proposed action may achieve these goals and analyze the environmental impacts that may result from the proposed action.⁷⁹ The EIR is also required to analyze a reasonable range of alternatives to the proposed action, including a no action

standards. See http://hank.baaqmd.gov/pln/air_quality/ambient_air_quality.htm. The Encina Power Station, the Otay Mesa Generating Station and the Pio Pico Power Plant Project are located within the jurisdiction of the San Diego Air Pollution Control District (SDAPCD). The San Diego Air Basin is designated in nonattainment of federal and state ozone standards and state standards for particulate matter. See <http://www.epa.gov/oaqps001/greenbk/ancl.html>; <http://www.arb.ca.gov/pm/pmmeasures/pmch05/sd05.pdf>. The Hanford facility and the Avenal Power Plant Project are located in Kings County, within the jurisdiction of the San Joaquin Valley Air Pollution Control District. See Health & Saf. Code § 40600. Kings County is designated in nonattainment of federal and state ozone and particulate matter standards. See <http://www.epa.gov/oaqps001/greenbk/ancl.html>; <http://www.arb.ca.gov/regact/2013/area13/area13fro.pdf>. The Watson Cogeneration Project and the Victorville 2 Project are located within Los Angeles County and San Bernardino County, respectively, within the jurisdiction of SCAQMD. See <http://www.aqmd.gov/>. Los Angeles County is designated in nonattainment of federal standards for ozone and particulate matter. See <http://www.epa.gov/oaqps001/greenbk/ancl.html>. San Bernardino County is designated in nonattainment and unclassified for state standards for fine particulate matter and in nonattainment of federal standards for ozone. See <http://www.arb.ca.gov/regact/2013/area13/area13fro.pdf>; <http://www.epa.gov/oaqps001/greenbk/ancl.html>.

⁷⁸ See SCAQMD CEQA Air Quality Handbook (1993), at pp. 6-1-6-4 (discussing the relevance of nonattainment status to a significance finding for the purpose of CEQA and setting varying quantitative emissions thresholds for areas with different attainment designations), attached as **Attachment 24**.

⁷⁹ See CEQA Guidelines, §§ 15122-15126.4.

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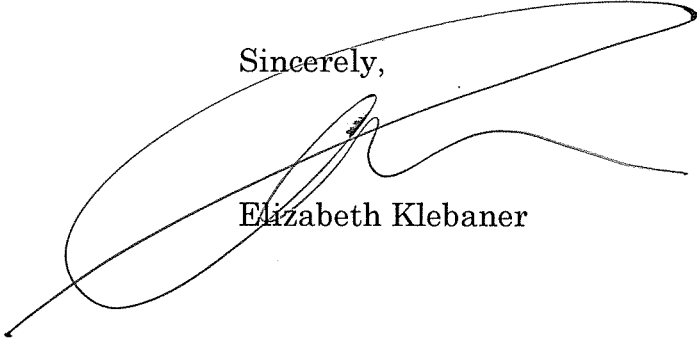
alternative, and to identify the environmentally preferred alternative.⁸⁰ Only in this way can the City document and consider the environmental consequences of its action, as required under state law.

IV. CONCLUSION

Before the City takes any action to join a CCA program, it must comply with CEQA. Joining a CCA program may result in potentially significant impacts on the physical environment, including significant impacts to air quality and public health. An analysis of the available CCA programs – namely, MCE and SCP – shows that joining either program may result in significant impacts to air quality and public health from increased operation of existing fossil fuel generation. Accordingly, CEQA requires the City to prepare an EIR prior to approving Albany's membership in either program.

Thank you for your attention to this matter.

Sincerely,



Elizabeth Klebaner

EK:clv
Attach.

⁸⁰ See CEQA Guidelines, § 15126.6.