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***DEPARTMENT OF JUSTICE***

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By Electronic Mail
(Robert.Reider@sdcounty.ca.gov)

Robert C. Reider
San Diego County Air Pollution Control District
10124 Old Grove Road
San Diego, CA 92131

RE: **Comments of California Attorney General on proposed Negative Declaration for the Miramar Energy Facility Unit II**

Dear Mr. Reider:

Thank you for the opportunity to provide comments on the proposed Negative Declaration for the San Diego Gas & Electric (SDG&E) Miramar Energy Facility Unit II ("Miramar II").[1] The San Diego Air Pollution Control District ("Air District") proposes to approve this new 46 megawatt peaking gas-fired power plant based on a Negative Declaration. The new plant will emit substantial amounts of ozone precursors and particulate matter in an air basin that already is in nonattainment for these pollutants. Moreover, the plant will emit these pollutants during warm periods when local air quality will be at its worst. The plant will also emit substantial amounts of carbon dioxide ("CO2"), thereby contributing to climate change. Because it appears that the project may have a significant effect on the environment, a Negative Declaration is insufficient under the California Environmental Quality Act ("CEQA"). Therefore, we request that the Air District prepare an environmental impact report ("EIR"), or possibly a mitigated negative declaration, for the project that recognizes the project's potential significant climate change and air quality impacts and identifies appropriate mitigation measures.

The Proposed Project

According to the Initial Study and proposed Negative Declaration, Miramar II will be a companion plant to an identical plant, Miramar I, built on the same site in 2005. The San Diego air basin is designated nonattainment for the national and state ozone standards and the state standards for particulate matter (PM 10 and PM 2.5). The Miramar II plant would increase emissions of criteria air pollutants nitrogen oxides (NOx) and volatile organic chemicals ("VOCs"), precursors of ozone, and particulate matter. The Air Quality Analysis for the project

[1] The Attorney General submits these comments pursuant to his independent power and duty to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. (See Cal. Const., art. V., § 13; Cal. Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) These comments are made on behalf of the Attorney General pursuant to his independent authority and not on behalf of any other California agency or office.

estimates emissions of NOx, VOCs and PM10 from the project as follows: NOx, 42 lbs/hour, 234 lbs/day and 17.8 tons/year; for VOCs 15 lbs/hour 68 lbs/day and 6 tons/year; for PM10, 6.7 lbs/hour, 160 lbs/day and 13 tons/year. In addition, the document states that the plant would emit 77,000 tons of CO2 per year at maximum operation.

SDG&E is seeking authorization to operate Miramar II up to 2,878 hours per year. The Air District permit for Miramar I allows it to operate up to 5,000 hours per year. SDG&E proposes, as part of the Miramar II project approval, to modify the permit for Miramar I to reduce the authorized hours of operation to 2,878 per year. Miramar I has only operated an average of 250 hours per year and only operated 500 hours in 2006, a very hot year.

SDG&E asserts that the Miramar II plant will reduce the need for power from the South Bay Power Plant, an older plant with high energy costs and increased pollution. The California Independent System Operator ("CAISO"), which regulates California's power supply, has identified the South Bay Plant as a Reliability Must Run ("RMR") facility that cannot be closed. CAISO has said that it could remove the RMR designation in 2010, if the new Otay Mesa base load generation plant (planned to open in 2009) and sufficient new peaking resources are online. SDG&E states that Miramar II is intended to help satisfy these requirements.[2]

The document does not examine the cumulative air quality impact of the new plant in conjunction with related past, present, and foreseeable future projects in the air basin. Instead, it considers only emissions from the Miramar I and Miramar II plants. The Analysis states only that there are no other projects within 6 miles that have the potential to create significant air quality impacts.[3]

Global Warming

Greenhouse gases ("GHG") in the atmosphere trap heat near the Earth's surface. Elevated atmospheric concentrations of these gases, emitted from human activities, cause average temperatures to increase, with adverse impacts on humans and the environment.[4] The overwhelming scientific consensus is that global warming is already underway. *(Ibid.*) According to the leading experts, including the Intergovernmental Panel on Climate Change ("IPCC"), continuing the current rate of emissions will result in disastrous environmental effects, including
increasingly rapid sea level rise, increased frequency of droughts and floods, and increased stress on wildlife and plants due to rapidly shifting climate zones. To avoid the most catastrophic

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[2] See, Application of San Diego Gas & Electric Company (U 902 E) For Expedited Approval of the Miramar Energy Facility II Project, Application 08-06-017, filed June 16, 2008, p. 15 (copy attached and available at: http://docs.cpuc.ca.gov/efile/A/84280.pdf).

[3] Initial Study, Miramar Energy Facility Unit 2, pp. 20-21; Air Quality Analysis Report, Miramar Energy Facility Unit 2, January 2008, p. 32.

[4] Intergovernmental Panel on Climate Change, Fourth Assessment Report (IPCC 4th) (2007) Working Group (WG) I, Frequently Asked Question 2.1, *How Do Human Activities Contribute to Climate Change and How Do They Compare with Natural Influences?* http://ipcc-wgl.ucar.edu/wg1/FAQ/wg1_faq-2.1.html.

outcomes (so-called "dangerous climate change"), we must reduce our emissions and stabilize atmospheric levels of greenhouse gases, with emissions peaking during the 2000-2015 time period. (*Id.*)

As mentioned in the Initial Study, the effects of global warming in California include exacerbation of air quality problems, reduction in water quality and supply from Sierra snowpack, sea level rise, damage to ecosystems, and increase in infectious diseases, asthma and other human health-related problems. (Initial Study at p. 22.)

With Executive Order S-3-05 and the Global Warming Solutions Act of 2006 ("AB 32"), the Governor and Legislature recognized California's vulnerability to the adverse effects of increasing temperatures, the urgency of curbing GHG emissions, and California's important role as a leader in the fight against climate change. Informed by the science, California is committed to reducing total GHG emissions to 1990 levels by 2020, and to 80 percent below 1990 levels by 2050, even as the State's population and economy grow. Addressing the problem requires prompt action at every opportunity. According to Rajendra Pachauri, Chairman of the United Nations IPCC, "If there's no action before 2012, that's too late. What we do in the next two to three years will determine our future. This is the defining moment."[5]

CEQA Requirements

The basic purpose of CEQA is that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Pub. Res. Code, § 21002.1, subd. (b).) This requirement is the "core of an EIR." (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 564-65.)

An agency may adopt a "negative declaration" if it finds that there is no substantial evidence that a proposed project may have a significant effect on the environment. (Pub. Resource Code §§ 21080(c)(1); 21064; 14 Cal.Code Regs. §15371). In contrast, an EIR is required if substantial evidence in the record supports a "fair argument" that a significant environmental effect may occur. (Pub. Resources Code § 21080(d)); *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 112, 1123.) "Substantial evidence" means "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." (14 Cal. Code Regs. §15384(a).) The "fair argument" standard is a "low threshold." *(Citizen Action to Serve All Students v. Thornley* (1990) 202 Cal.App.3d 296, 310.) An agency may also avoid preparing an EIR based on a "mitigated negative declaration" if the applicant has agreed to revisions to the proposed project that "avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur..." (Pub. Resources Code §§ 21080(c)(2); 21064.5.)

Global warming is an "effect on the environment" under CEQA, and an individual project's incremental contribution to global warming can be cumulatively considerable. (See Cal.

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[5]Rosenthal, *U.N. Chief Seeks More Leadership on Climate Change*, N.Y. Times (November 18, 2007).

Pub. Resources Code, § 21083.05, subd. (a); see also Sen. Rules Comm., Off. Of Sen. Floor Analyses, Analysis of Sen. Bill No. 97 (2007-2008 Reg. Sess.) Aug. 22, 2007.)

An EIR must provide an accurate depiction of existing environmental conditions. (14 Cal. Code Regs. § 15125, subd. (a).) "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952); 14 Cal.Code Regs. § 15125; *accord*, California Office of Planning and Research, Technical Advisory, CEQA and Climate Change, p. 6.)

The Proposed Negative Declaration Does Not Comply with CEQA

Criteria Pollutant Emissions:

A fair argument can be made that the plant's emissions are significant because (1) the air basin already is a nonattainment area for ozone and particulate matter under state and federal air pollution laws; and (2) the emissions from this peaking plant would occur during warm weather, when air quality already is compromised, making a bad condition worse.

The evaluation of air quality impacts of the project only considers the combined emissions from the Miramar I and Miramar II plants. Regarding further analysis of cumulative impacts, the documents state that there are no other projects within 6 miles that have the potential to create significant air quality impacts in conjunction with the project. Particularly with respect to NOx and VOC emissions that contribute to regional ozone formation, there is no explanation as to why it is appropriate to apply a 6-mile radius limit. There is a fair argument that the air basin is the relevant area for analysis and the cumulative impact evaluation should not be limited to only the emissions from the Miramar I and Miramar II plants.[6] Accordingly, there is a fair argument that this project will add new emissions of ozone precursors that may have a significant environmental effect by contributing to an existing air quality problem.

The California Energy Commission ("CEC") has found that emissions from similar power plants in nonattainment areas have potential significant effects on air quality that must be mitigated. In a licensing application for two peaking plants using the same turbine as proposed for Miramar II, and located in an ozone and particulate nonattainment area (Salton Sea Air Basin), the CEC found that the applicant was required to provide offsets to insure that the project would not have significant adverse impacts on air quality.[7] The Air District has not explored offsets for Miramar II. Similarly, the CEC recently issued an Environmental Assessment for two

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[6] There are other new power plants proposed or under construction in the air basin (Chula Vista, Otay Mesa, Orange Grove), as well as potentially other reasonably foreseeable future sources.

[7] Niland Gas Turbine Plant, Small Power Plant Exemption (06-SPPE-1), Mitigated Negative Declaration & Final Initial Study, October 2006, pp. 3-14 - 3-15, at: http://www.energy.ca.gov/sitingcases/niland/index.html; see also Riverside Energy Center, Small Plant Exemption Decision & Mitigated Negative Declaration (04-SPPE-1), December 2004, pp. 39-41; 52-53, at: http://www.energy.ca.gov/sitingcases/riverside/documents/index.html

peaking plants in Chula Vista using the same turbine and located in the same Air District as Miramar II. There, the CEC staff recommends mitigation measures to offset the project emissions. The Assessment states "all project emissions of nonattainment criteria pollutants and their precursors (NOx, VOC, PM10, and SO2) are considered significant and must be mitigated" and "the mitigation includes both feasible emission controls (BACT) and the use of emission reduction credits to offset emissions of nonattainment criteria pollutants and their precursors."[8] These CEC findings raise a fair argument that without similar mitigation, the Miramar II plant could have significant adverse impacts on air quality.

Contribution to Global Warming:

As an initial matter, the document's assessment of Miramar II's CO2 emissions is misleading. The actual potential CO2 emissions are 77,000 tons per year. The document reduces this figure to 18,000 tons, based on a reduction in the authorized hours of operation of Miramar I (from 5000 to 2878 hours), and corresponding reduction in potential emissions from Miramar I. However, the construction of Miramar II will not result in reduction in actual hours of operation of Miramar I and this appears to be only a paper reduction. Miramar I has only operated an average of 250 hours per year since it began operation, and only operated 500 hours in 2006, a very hot year (when the need for the peaking plant was high). As stated in the project's air quality analysis, the Miramar Energy Facility will "most likely be operated with both units under full load during hot season afternoons and evenings, ...."[9] (If that was not the case, the hours of operation for Miramar I could remain at 5000 per year, and there would be no need to build Miramar II.) Therefore, it appears that the GHG emissions from construction of Miramar II must all be considered additional, new emissions.

Moreover, the Initial Study does not demonstrate how allowing the additional annual GHG emissions from this plant, along with emissions from other expected new natural gas-fired electricity generation, is consistent with achieving the very extensive GHG reductions for the electricity sector that are required to meet the goals of AB 32. The California Air Resources Board's Draft Climate Action Scoping Plan for complying with AB 32 indicates that regulatory measures will be imposed to substantially reduce the electricity sector's annual GHG emissions below the current levels by 2020.[10] While the Initial Study mentions actions by SDG&E that are consistent with AB 32, it fails to mention that SDG&E is not consistent with the Renewable Portfolio Standard, one of the major measures the state has adopted for the electricity sector to comply with AB 32. The Air Board also indicates that reductions from regulatory measures will not be enough to achieve AB 32's goals, and it will require the electricity sector to participate in a cap and trade program that achieves additional reductions.[11] In light of the need for significant

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[8] Chula Vista Energy Upgrade Project, Application For Certification (07-AFC-4), Staff Report, April 2008, p. 4.1-26, at: http://www.energy.ca.gov/sitingcases/chulavista/index.html.

[9] Air Quality Analysis Report, Miramar Energy Facility Unit 2, January 2008, p.13.

[10] Climate Change Draft Scoping Plan, CARB, June 2008, Table 1, p.8 and Table 4, p. 17, available at: http://www.arb.ca.gov/cc/scopingplan/document/draftscopingplan.htm.

[11] Scoping Plan, p. 17; Recommendations for Designing a Greenhouse Gas Cap-and-Trade System for California (June 2007) Market Advisory Committee to the CA Air Resources

*reductions* in current GHG emissions from the electricity sector, a fair argument can be made that the increased emissions from the proposed plant may have a significant effect on the environment. Thus, an EIR, or at the very least a mitigated negative declaration, is required to evaluate this effect and identify feasible mitigation measures to eliminate or substantially reduce the effect.

Finally, although SDG&E has suggested that building the Miramar II plant will allow it to eventually close the more polluting South Bay Plant, there are no proposed conditions of approval that would ensure that power from the Miramar II plant is used to replace power from the South Bay plant, or that the plant will actually be closed. Appropriate conditions would be required before this could be recognized as mitigation for the Miramar II plant's GHG emissions.

Thank you for your consideration of these comments.

Sincerely,

/S/

SANDRA GOLDBERG
Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

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Board, p. 40, at http://climatechange.ca.gov/market_advisory_committee/index.html.