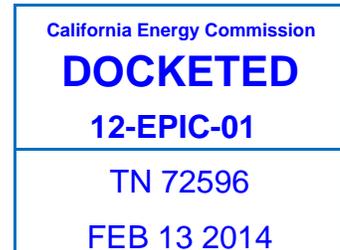




February 13, 2014

Via e-mail: docket@energy.ca.gov

California Energy Commission
Dockets Office, MS-4
Re: Docket No. 12-EPIC-01
1516 Ninth Street
Sacramento, CA 95814-5512



Re: Docket No. 12-EPIC-01 (EPIC 2015-2017 Triennial Investment Plan)

To Whom It May Concern:

The Center for Biological Diversity (“Center”) offers the following comments in response to the workshop held on February 7, 2014, regarding the California Energy Commission’s anticipated 2015-2017 Electric Program Investment Charge (“EPIC”) Triennial Investment Plan. These comments address only one of the questions posed for public comment during the workshop, namely whether the Commission should fund preparation of a Programmatic Environmental Impact Report (“PEIR”) for small-scale bioenergy projects developed pursuant to SB 1122. The Center may address other issues and submit additional comments once the Commission has prepared its proposed Triennial Investment Plan.

Specifically, Commission staff posed the following question in the Staff Presentation for Topic 3 (addressing local regulatory and permitting challenges):

Should EPIC provide funding for a Programmatic Environmental Impact Report for biomass? How should this be structured to best capture benefits for IOU ratepayers?

The Center takes no position at present on whether the Commission can or should expend EPIC funds on preparation of a PEIR for SB 1122 facilities. At this point, the Center merely wishes to draw the Commission’s attention to several preliminary factors that bear consideration in determining whether and how to move forward with this proposal.

First, it is not clear what project or program would be evaluated by the PEIR. In general, the California Environmental Quality Act (“CEQA”) applies to discretionary “projects” proposed to be carried out, funded, or permitted by public agencies. *See generally* Pub. Res. Code §§ 21065, 21080(a). A “program EIR,” in turn, may be prepared on a “related” series of actions “that can be characterized as one large project.”

CEQA Guidelines¹ § 15168(a). During the workshop, Commission staff did not identify what “project”—i.e., what discretionary action or related series of actions—would be analyzed in the proposed PEIR. Regardless of whether it is carried out or funded by the Commission or another agency, there must be an actual *project* identified for analysis. A PEIR should not—and indeed cannot—be prepared in a vacuum for the sole purpose of streamlining subsequent environmental review.

A second and closely related consideration is whether the Commission or another agency should serve as the “lead agency” charged with preparing the PEIR and approving the underlying project. *See* Pub. Res. Code § 21165; CEQA Guidelines § 15050. Again, whether the Commission or another agency is the proper lead agency will turn largely on how the underlying project is defined and which agency has the primary role in approving it. *See* CEQA Guidelines § 15151.

Third, a PEIR must disclose and evaluate the significant impacts of the broader program under analysis, and identify feasible ways to avoid or mitigate those impacts. Indeed, a program EIR is not just about reducing paperwork, but rather is intended to allow “more exhaustive consideration” of effects and alternatives than would be “practical” in a project-level review, to ensure consideration of cumulative impacts that “might be slighted” on a case-by-case basis, to avoid “duplicative reconsideration of basic policy considerations,” and to allow consideration of “broad policy alternatives and programwide mitigation measures” at an early stage when the agency has greater flexibility to deal with basic problems and cumulative impacts. CEQA Guidelines § 15168(b). Specific facilities will still be required to undertake site-specific CEQA review of impacts, mitigation measures, and alternatives that cannot be determined on a program level. *Id.*, § 15168(c)(1).

Finally, and perhaps most importantly at this juncture, the question as posed by Commission staff—seeking input on how the PEIR can be “structured to best capture benefits for IOU ratepayers”—betrays a potential misunderstanding of the purpose of an EIR. Under CEQA, an EIR is intended to disclose, analyze, and mitigate the environmental impacts of a project so that California’s environment can be protected and decision-makers can be held accountable for their actions. *See generally Laurel Heights Improvement Assn. v. Regents of Univ. of California*, 47 Cal. 3d 376 (1988). Although the benefits of a project may be relevant in determining whether to go ahead with a project despite significant environmental impacts that cannot be mitigated or avoided, Public Resources Code section 21081(a)(3), (b), an EIR must be “structured” to comply with CEQA, not to predetermine an outcome based on preconceived notions about the wisdom of a project. CEQA demands a good-faith effort at full disclosure of a project’s significant impacts, and mandates consideration and adoption of all feasible mitigation measures and/or alternatives available to reduce those impacts to a less-than-significant level. Should the Commission undertake to fund a PEIR for bioenergy projects under SB

¹ References to the “CEQA Guidelines” are to title 14 of the California Code of Regulations.

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1122, it must do so in accordance with these principles. A PEIR structured primarily to articulate the purported benefits of the program easily could run afoul of these requirements.

Thank you very much for the opportunity to provide these preliminary comments on the Commission's anticipated Triennial Investment Plan. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin P. Bundy', written in a cursive style.

Kevin P. Bundy
Senior Attorney

Cc: Prab Sethi (via email: Prab.Sethi@energy.ca.gov)