STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of: **Application for Certification** **for the Chula Vista Energy Upgrade Project**	**Docket No. 07-AFC-4**

ENERGY COMMISSION STAFF'S OPENING BRIEF

INTRODUCTION

On October 3, 2008, the evidentiary hearing in the matter of the Chula Vista Energy Upgrade Project was held in Chula Vista, California. The majority of the technical areas were undisputed. These undisputed areas are Cultural Resources, Hazardous Materials, Soil and Water Resources, Traffic and Transportation, Transmission Line Safety and Nuisance, Waste Management, Geology and Paleontology, and Power Plant Efficiency. Several technical areas were preliminarily identified as being disputed. These areas are Facility Design, Worker Safety and Fire Protection, Biological Resources, Transmission System Engineering, Power Plant Reliability, and Visual Resources. No evidence was presented, however, that refuted staff's testimony in these areas. Therefore, with respect to all these identified areas, staff respectfully recommends that the Committee adopt the Conditions of Certification identified in the Final Staff Assessment and modified through any testimony offered at the hearings.

The disputed technical areas were identified as Air Quality, Public Health, Socioeconomics, Noise and Vibration, Land Use, and Alternatives. The hearing concluded following a lengthy period of public comment.

On October 10, 2008, the Committee issued a Briefing Order that directed the parties to answer specific questions by November 5, 2008. These questions relate to the proposed project's compliance with applicable Laws, Ordinances, Regulations, and Standards (LORS), possible findings under the California Environmental Quality Act (CEQA), and Environmental Justice. The Committee's questions appear below, each followed by staff's response. Staff concludes that the Chula Vista Energy Upgrade Project, if subjected to the conditions of certification recommended by staff, would comply with all applicable LORS and would not result in a significant adverse impact.

SUMMARY

The proposed project would occupy a site on which an existing power plant already sits. The proposed project would comply with the land use policies in the City of Chula Vista's General Plan and with the City's Municipal Code, specifically, Section 19.44, the City's zoning ordinance applicable to the proposed site. The proposed power plant site is zoned ILP (Limited Industrial Precise Plan) and is located in the City of Chula Vista's Main Street Industrial Corridor, an area in which some segments are slated for redevelopment by the City. Permitted uses in the I-L zone can include peaking power facilities as an "unclassified use" allowed under Section 19.44 of the City of Chula Vista's Municipal Code and as evidenced by the City's prior approval of the existing power plant at the proposed site.

The proposed project would be a substantial improvement over the existing power plant by being more efficient, less polluting, and much quieter. Moreover, the existing facility would be dismantled as part of the proposal to build and operate the new facility. Consequently, the proposed project would result in no significant adverse environmental impact as compared to existing conditions. In the absence of significant adverse environmental impacts and given the attempts by the Public Adviser and the staff to notify the community and foster the public's

participation in the proceeding, the project presents no environmental justice issues. Because the project would cause no significant adverse environmental impact, the Commission may approve the project under CEQA without having to find overriding benefits.

There is nothing in the record to show that the proposed project will cause any significant unmitigated environmental impacts. Even though the project's emissions, assuming a maximum of 4,400 hours of operation a year, do not trigger the air district's requirements for offsets, the applicant will provide offsets for all nonattainment pollutants and their precursors at a 1:1 ratio. The amount of offsets, though not required by the district's rules, are based on historical records of similar facilities that support a reasonably foreseeable and conservative estimate of 1200 hours of operation per year. Additionally, from a public health perspective, emissions from the construction and operation of the proposed project would be at levels that do not require mitigation beyond the emission control measures recommended in the Air Quality section. Each impact identified by staff would be mitigated, and no "override" pursuant to CEQA or the Commission's regulations is necessary.

The Commission's screening demographic analysis indicates the presence of a minority (and low-income) population within proximity of the project. But the assessment of potential impacts in the technical areas of Air Quality, Public Health, Socioeconomics, and Land Use indicates that none of the project impacts are significant. There is simply no evidence in the record that identifies an unmitigated significant adverse environmental impact and, thus, none that could fall disproportionally on any identified minority population.

The Commission's regulations require the Proposed Decision to be "based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application." (Cal. Code Regs., tit. 20, § 1751.) Based on the hearing record, the Commission should find that the

proposed project complies with all applicable LORS, would cause no significant adverse environmental impacts, and presents no environmental justice issues. Because the project would cause no significant adverse environmental impact, the Commission may approve the project under CEQA without having to make overriding findings.

LORS

A. Does the proposed project comply with the land use policies in the City of Chula Vista General Plan and with the Zoning Ordinance of the City of Chula Vista? If not, are there any feasible alternative sites that would eliminate the noncompliance(s)?

1. The Proposed Project is Consistent with the City's General Plan.

Section E6.4 of the City of Chula Vista's General Plan states that the city should "[*a*]*void* siting new or re-powered energy generation facilities *and other major toxic air emitters* within 1,000 feet of a sensitive receiver, or the placement of a sensitive receiver within 1,000 feet of a major toxic emitter." [Emphasis added] Implicit in section E6.4 is that new or re-powered energy generation facilities are major toxic air emitters. The proposed project simply is not considered a major toxic air emitter, as shown by the lack of any evidence in the hearing record to the contrary. Indeed, Title 19 of the City of Chula Vista's Municipal Code (as discussed in the next section below) allows for the siting of this type of facility as a conditional use.

The proposed project would be developed on a site, which has a General Plan land use designation of I-L (in the northern portion of the site where the peaking units would be installed) and a zoning designation of ILP (for the entire site). Given the site's designations and the current on-site facility (i.e., a peaker power plant) and immediately surrounding land uses (auto salvage yard, light industrial/commercial warehouses, auto body shop, and electric substation), the

evidence shows that the proposed project is compatible with surrounding land uses.[1]

In accordance with section 1744(e) of the Commission's regulations, staff gives due deference to a local agency's assessment of whether a proposed project is consistent with that agency's zoning and general plan. (Cal. Code Regs., tit. 20, § 1744, subdiv. (e)). As section 1744(e) states "Comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." (*Ibid.*) According to the evidentiary record in these proceedings, the city concluded that the "[existing] project will represent an improvement for the area" and "it will contribute to the elimination of blighting influences, which furthers the goals and objectives of the Southwest Redevelopment Plan" when the City granted a Special Use Permit in 2000.[2] There is nothing in the record that would indicate that these goals and objectives have changed since the issuance of that Special Use Permit or that the proposed project would undermine them where the existing plant did not. Because of the history of the City's approval of the existing peaker plant and the fact that the proposed project would be an improved peaking plant replacing the existing one, staff concludes that the City views the proposed project to be an appropriate land use for the proposed location and would be consistent with the City'goals and objectives for development as indicated in its Land Use diagram.[3] Moreover, the evidence demonstrates that the City does not define a peaker power plant as a "major toxic emitter," does not consider this type of project a land use that poses "significant hazard to human health and safety," and views a peaker power plant to be similar to the list of conditional uses permitted within the Limited Industrial Zone as described in the City's Municipal Code (see below for a discussion of conditionally permitted uses in the I-L zone).[4]

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[1] Staff Exhibit 200, ch.4.5, p.11
[2] Staff Exhibit 200, ch.4.5, p.13; Staff Exhibit 207
[3] Staff Exhibit 200, ch.4.5, p.11
[4] Staff Exhibit 200, ch.4.5, p.12

Indeed, the City of Chula Vista directly weighed in on this issue. In Exhibit 204, the letter to staff from the City dated August 7, 2008, the City stated that, with the incorporation of specific agreements between the applicant and the City of Chula Vista, the project is in conformity with the city's General Plan.[5] The Commission should, as does staff, give due deference to the City's conclusion that the proposed project conforms with the City's General Plan.

The Environmental Health Coalition (EHC), an intervenor, has pointed out that the special use permit was issued for the existing on-site facility prior to the amendment of the General Plan in 2005, and has interpreted the General Plan, specifically E6.4, as absolutely prohibiting the location of the proposed project at the current site. If this interpretation were to be accepted, Section E6.4 would itself be inconsistent with other provisions of the General Plan, most notably sections ED1.3 (which encourages the preservation and expansion of existing industrial uses in areas designated as industrial)[6] and PFS 22.4 (which governs energy facility requests and encourages siting and design techniques that minimize community impacts, which includes the use of underground facilities, co-locating new facilities with existing utility infrastructure, and locating facilities in non-residential areas.)[7] The evidence shows that the use of the site of an existing peaker for the construction and operation of the proposed new peaker satisfies the policies of both of these sections of the General Plan. Moreover, Section E6.4 does not mandate the complete prohibition against the siting of energy generating facilities in general, but articulates a preference that the siting of major toxic air emitters within 1000 feet of a sensitive receptor should be avoided. It must be noted that the focus of Section E6.4 is on toxic air emitters, which, as discussed above and below, does not apply to the proposed project.

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[5] Staff Exhibit 204
[6] Staff Exhibit 200, ch.4.5, p.15
[7] Staff Exhibit 200, ch.4.5, p.15-16

Specific sections of the General Plan should be read in harmony with each other. The policy against toxic air emitters in section E6.4 should be read in harmony with the policies in sections ED1.3 and PFS22.4. Read together, these sections support the location of the proposed new peaking facility where an existing peaking facility already exists. Based on the evidentiary record, which includes these sections, the use of the proposed site for the construction of the proposed project is consistent with the land use policies of the City of Chula Vista's general plan.

2. The Proposed Project is Consistent with Title 19 of the City's Municipal Code

Title 19 of the City of Chula Vista's Municipal Code (Municipal Code) serves as the City's zoning ordinance, which is intended to implement the objectives and policies of the City's General Plan. Chapter 19.44 of the Municipal Code is directly related to the I-L, Limited Industrial Zone, and the permitted uses within that zone. Municipal Code §19.44.040, Conditional Uses, identifies the procedures for reviewing and conditioning projects requiring a conditional use permit before they can be approved in the I-L zone. Conditional uses include: machine shops and sheet metal shops; service stations; steel fabrication; restaurants; drive-in theaters; major auto repair, engine rebuilding and paint shops; commercial parking lots and garages; plastics and other synthetics manufacturing; building heights exceeding 45 feet; *unclassified uses*; trucking yards, terminals and distributing operations; retail sale of bulky items such as furniture and carpet; retail distribution centers; roof mounted satellite dishes; recycling collection centers; hazardous waste facilities; and brewing or distilling of liquors.[8] As evidenced by the City's approval of the existing peaking power plant in accordance with section 19.44.040, electric generating facilities, like the one proposed in this case, are an allowable "unclassified use" with a height "exceeding 45 feet." Further evidence of the Municipal Code allowing electric generating facilities in limited industrial zoned areas, section 19.16.040 explicitly exempts "electric generating stations" from the height limitations under the title.

[8] Staff Exhibit 200, ch.4.5, p.17, [Emphasis added]

The unclassified use designation applies to a small peaking power plant such as the proposed project.[9] Scott Tulloch, Assistant City Manager for the City of Chula Vista, explained that the "unclassified use" category gives the City flexibility to permit a use that has neither been explicitly prohibited nor specifically allowed, so long as it is compatible with surrounding land uses.[10] The City permitted the existing power plant as an "unclassified use." The City agrees the proposed project similarly falls under the same category[11] and is, thus, consistent with the City's zoning ordinance and the Limited Industrial zone as described in Municipal Code Chapter 19.44.

B. For each provision of the General Plan or Zoning Ordinance for which there is noncompliance, can the commission "override" the noncompliance pursuant to section 25525 of the Warren-Alquist Act and Section 1752(k) of the Commission's regulations?

The Commission has the authority to "override" a noncompliance with an applicable LORS if it makes two findings regarding public convenience and necessity pursuant to Public Resources Code section 25525 and section 1752(k) of the Commission's regulations. (Pub. Resources Code § 25525 and Cal. Code Regs., tit. 20, § 1752, subdiv. (k)).

California Code of Regulations, title 20, section 1752 provides that the presiding member's proposed decision shall contain the presiding member's recommendation on whether the application should be approved, and proposed findings and conclusions. With respect to any facility that does not comply with an applicable LORS, subsection (k) of 1752 requires that the decision include "findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both of the following: (1) Whether the facility is required for public convenience and necessity; and (2) Whether there are no more prudent and feasible means of achieving such public convenience and necessity." Such

[9] Reporter's Transcript of Hearing, p.312, lns.3-15; p.332, lns.2-15
[10] Reporter's Transcript of Hearing, p.336, lns.3-8
[11] Reporter's Transcript of Hearing, p.336, lns.3-11

findings for an override are unnecessary in this case, given the project's conformance with the City's General Plan and Municipal Code.

CEQA

A. Will the proposed project cause any significant adverse environmental impacts?

The proposed project would not result in any significant adverse environmental impact in any of the technical areas, provided the staff's recommended conditions of certification are adopted by the California Energy Commission and implemented by the project owner.

The Briefing Order issued by the Committee directed the parties to include a discussion of (i) whether the existence of impacts should be assessed assuming 1200, 4400, or some other number of hours of operation, and (ii) what the "baseline" for assessing impacts should be. Staff will address the baseline question first, followed by a discussion regarding staff's analysis of project air quality impacts.

1. The baseline for CEQA analysis in assessing impacts is the existing physical environmental conditions.

CEQA Guidelines Section 15125(a) requires an environmental impact report to "include a description of the physical environmental conditions in the vicinity of the project, *as they exist*…at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (Cal. Code Regs., tit. 14, § 15125, subdiv. (a), [Emphasis added]). Although the Commission's certified regulatory program under CEQA is exempt from having to prepare an EIR, the issue of baseline is relevant to the staff's assessment of a project's environmental impacts. In accordance with the Guidelines, it is reasonable to consider the existing conditions as constituting the baseline. Case law also

holds that a proposed project should be evaluated by comparing its impacts against existing physical conditions.

In *San Joaquin Raptor Rescue Center, 149 Cal.App.4th 645, 57 Cal.Rptr.3d 663,* the court highlighted the varying approaches to the determination of a project's baseline, stating: "Although the baseline environmental setting must be premised on realized physical conditions on the ground, as opposed to merely hypothetical conditions allowable under existing plans [citations], established levels of a particular use have been considered to be part of an existing environmental setting." [Citations.]

CEQA requires that a proposed project must be evaluated by comparing the impacts of the project to the existing physical environment.[12] (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 693, 707-710, 58 Cal.Rptr.3d 102 (*Woodward Park*) [EIR for proposed office and retail project held inadequate where it compared impacts of the project, including NOx emissions, to the office and retail development that could be built under existing zoning, not to the existing physical condition of the property]; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118-128, 104 Cal.Rptr.2d 326 (*Save Our Peninsula*) [EIR for proposed residential development held inadequate where baseline water use figures were based on assumptions about water use that were unsupported by either existing conditions or evidence of historical use]; cf. *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 190, 228 Cal.Rptr. 868 [CEQA review required for amendment to general plan to add a waste management facility even though such a facility may have been allowed under a special use permit; "the local agency is required to compare the newly authorized land use with the actually existing conditions," not with "hypothetically permitted facilities" that did not exist].) Succinctly summarized, these cases stand for the principle that "[a] baseline figure

[12] CEQA Guidelines, Section 15125(a)

must represent an environmental condition existing on the property prior to the project." (*Save Our Peninsula, supra,* at p. 123, 104 Cal.Rptr.2d 326.)

In this case, the existing conditions include the emissions of the existing facility at the proposed site. Staff considered the existing facility's actual hours of operation, based on historical data, to estimate the existing project's emissions. The historical data shows that the existing facility operated no more than 400 hours a year. Those emissions were a very small amount,[13] and were properly used as a baseline in calculating the recommended amount of offsets needed to mitigate the proposed project's criteria pollutants and their precursors for which the district is in noncompliance.[14]

2. It was proper for staff to assess the project assuming 1200 hours of operation for purposes of calculating offsets.

Estimating the proposed project's number of annual hours of operation does involve a degree of forecasting. As stated in section 15144 of the CEQA Guidelines, "While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all it reasonably can." (Cal. Code Regs., tit. 14, § 15144.) Here, staff testified that the use of 1,200 hours is a conservative worst-case estimate based on that which is reasonably foreseeable.[15]

The use of 1,200 hours is based on an operating profile of the proposed project that is substantiated by the historical operation of like peaking facilities in the region. In addition, the forecast reflects a rather significant safety factor. Staff reviewed the SDG&E service area peaker capacity factors forecast in the Scenario Analysis of California's Electricity System performed for the *2007 Integrated Energy Policy Report* (CEC 2007). The maximum capacity factors for the

[13] Reporter's Transcript of Hearing, pgs.75-76, lns. 18-25, 1-2
[14] Staff Exhibit 200, chapter 4.1
[15] Staff Exhibit 200, ch.4.1, p.25

existing and named peakers for 2009 to 2020 range from 5.7 - 10.5 percent, a fraction of the capacity factor assuming 4400 hours of operation per year. Considering these historic capacity factors, staff augmented its estimate to 13.7 percent annual capacity factor, or 1,200 hours of operation, to provide a reasonable margin of error for purposes of determining the appropriate level of offsets for this project's criteria pollutants for which the district is in nonattainment.[16] In any event, as shown by staff's testimony, the actual emissions from an LM6000 gas turbine would likely be some fraction of the permitted maximum emissions.[17]

Intervenor EHC confuses the analysis required by the district assuming the maximum permitted level of emissions with the relevant CEQA analysis using a baseline of existing conditions and a forecast of how the proposed plant is reasonably expected to operate. As required by the air district, the applicant provided an air pollutant emission estimate and an air quality impact analysis (AQIA) for criteria pollutants and air toxic contaminants assuming the maximum number of hours of operation, which is 4,400 hours per year, for which the applicant seeks approval. The analysis showed that the emissions from the proposed project do not meet the district's thresholds of significance for triggering offset requirements for criteria pollutants. The district's rules require offsets when NOx or VOC emissions exceed 50 tons per year. Consequently, the project is not required by the district's rules to provide offsets. Implicit in the conclusion that the project need not provide offsets is that its NOx and VOC emissions, even at the maximum level to be permitted, are not significant based on the district's offset trigger thresholds, and thus would not adversely affect ozone air quality and public health.[18]

Nevertheless, because the district is in nonattainment for certain criteria pollutants, staff recommends that proposed project's nonattainment pollutants and their precursors be offset at a

[16] Staff Exhibit 200, ch.4.1, pgs.40-41
[17] Staff Exhibit 200, ch.4.1, p.42
[18] Staff Exhibit 200, chapter 4.1

ratio of 1:1. Staff bases this recommendation on its analysis of the project's emissions that are reasonably expected to occur, assuming hours of operation similar to historic capacity factors for like peaking facilities, multiplied by a factor of three to arrive at a reasonable worst-case scenario. Staff's analysis appropriately takes into account existing conditions, the emissions from the existing plant, which averages only 300 hours of operation a year, as part of the baseline in accordance with CEQA. The applicant's proposal would satisfy staff's recommended requirement.

The applicant has proposed to provide emission reductions through a process similar to or including the Carl Moyer Fund that will be paid to and administered by the City of Chula Vista.[19] This proposal includes a determination of the difference between existing site emissions and expected new project emissions based on actual emissions for the existing peaker turbines and the new facility's potential to emit based on staff's forecast of 1200 hours per year,[20] a reasonably foreseeable worst-case scenario. The recommended mitigation based on this highly conservative estimate of the maximum hours of operation that is reasonably expected to occur is above and beyond the fact that, under the district's rules, the proposed project's emissions do not reach the thresholds that trigger offset requirements.

To use the maximum permitted level as a baseline for assessing potential impacts of the project would not be appropriate, since that approach does not take into account an operating profile of the proposed project that is reasonably foreseeable. The use of 1,200 hours represents a reasonable worst-case scenario for calculating offsets. It is based on historic operating profiles of other peaking facilities in the region and provides a margin of safety for mitigating nonattainment pollutants that, under the district's rules, do not require offsets.

[19] Staff Exhibit 200, ch.4.1, pgs.39, 41
[20] Staff Exhibit 200, ch.4.1, pgs.38-39

B. For any such impact: (1) Is there feasible mitigation, or a feasible project alternative, that would reduce or avoid the impact? (2) If there is no such mitigation or alternative, can the commission "override" the impact under section 21081(b) of the Warren-Alquist Act and Section 1755(d) of the Commission's regulations?

With the implementation of the Conditions of Certification, specifically in the disputed technical areas of Air Quality, Socioeconomics, and Land Use, as well as Waste Management (as specified in the Public Health Section), any and all impacts from the project will be reduced to less than significant.

The Commission certainly has the authority to "override" an unmitigated significant impact pursuant to section 21081(b) of CEQA and section 1755(d) of the Commission's regulations. (Pub. Resources Code § 21080, subdiv.(b); Cal. Code Regs., tit. 20, § 1755, subdiv. (d).) If the Committee were to adopt the Conditions of Certification as proposed by staff, such override is unnecessary in the current matter. As set forth by staff in the FSA and through staff's testimony in the hearings on this matter, the proposed mitigation is not only feasible, but would reduce any direct or indirect impacts from the proposed project to less than significant.

ENVIRONMENTAL JUSTICE

A. Does the proposed project have environmental impacts that fall disproportionally on minority or low-income populations? b. For any such impact: (1) is the impact below the level of CEQA "significance," and if so, does such an impact have the consequences for the applicant or for the Commission under California or Federal law? (2) What, if anything, is the applicant or the commission required to do as the result of the existence of such impact?

This project has no unmitigated significant adverse environmental impacts. Thus, there are no significant impacts that would fall disproportionally on any minority or low-income population. The impacts identified for this project as mitigated can have no legal implications for either the applicant or the Commission under either federal or state environmental law.

In general, environmental justice impacts are identified when a minority and/or low-income population is found to be disproportionally affected by “high and adverse” impacts from the project when compared to the overall population.[21] An environmental justice issue would be identified only if an unmitigated significant adverse impact were identified that affects the identified high minority or low income population.

One of the ways by which the Commission comports with the federal environmental justice guidelines is to provide a demographic identification analysis to determine minority and low income communities in some range of proximity to the project. The Commission's screening demographic analysis indicates the presence of minority [and low-income] populations within proximity of the project. Both the staff and the Public Advisor’s office conducted extensive public outreach and facilitated participation. Indeed public outreach and participation, which occurred in this case, are both hallmarks of the commission’s process.

However, the assessment of impacts in the FSA indicates that none of the project impacts are significant in a CEQA context, which is the same as determining that such impacts are not "high and adverse" in terms of the federal Executive Order and the federal environmental justice guidelines that implement it. As the Federal Environmental Protection Agency (U.S. EPA) put it in its Final Guidance for NEPA[22] Compliance, "[t]he initial step in the analysis of potential effects is to assess whether there indeed will be potential physical or natural environmental impacts."[23]

[21] Executive Order 12898 of February 11, 1994
[22] (National Environmental Policy Act, the federal counterpart to CEQA)
[23] (U.S. EPA, "Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses," 1998, Section 3.1 [hereafter "EPA Guildelines"].)

The U.S. EPA Guidelines further provide that the agency must determine whether or not the effect of a proposed project is "significant" in terms of implementing regulations adopted by the Council on Environmental Quality ("CEQ"), elaborating as follows:

> According to CEQ's *Guidance for Considering Environmental Justice Under the National Environmental Policy Act*, the ". . . Executive Order does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law. For example, for an EIS to be required there must be a sufficient impact on the environment to be "significant" within the meaning of NEPA . . . . CEQ requires that significance be evaluated in terms of "intensity" or "severity of impact."

The CEQ guidance document quoted above likewise provides that "disproportionately high and adverse human health impacts" requires a consideration of whether measured health effects or risks of an environmental hazard are "significant (as employed by NEPA)" (CEQ, "Environmental Justice Guidance Under the National Environmental Policy Act," 1998, Appendix A, Sec. 1-1, p. 20.) CEQ regulations define the term "significantly," for NEPA purposes, as something to be considered in terms of both the "context" and "intensity" of the impact, and "intensity" refers to "the severity of the impact." (40 C.F.R. Sec. 1508.27(b).) This is similar to "significant effect" in a CEQA context. (See, e.g., Cal Code Regs., tit. 14, § 15382 ["significant effect on the environment" defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project"].) As one NEPA treatise puts it: "The CEQ NEPA Regulations state that the degree to which a proposed action affects public health or safety relates to the intensity and, therefore, to the significance of its effect." (Bass, Herson, and Bogdan, *The NEPA Book* (2001 2d ed.) p. 49.) Thus, for a project to have a "disproportionately high and adverse human health or environmental effect," to use the terms of the federal Executive Order, the effect should be "significant" to raise environmental justice considerations.

Staff has found this project to be without such significant effects in any of the relevant technical areas if mitigated as recommended by staff's analysis.[24] There is no credible evidence that contradicts staff's conclusions that the proposed project would cause no unmitigated significant adverse environmental impacts in the areas of Air Quality, Public Health, Land Use, or any of the remaining technical areas analyzed by staff.

With the implementation of the Conditions of Certification as recommended in the FSA, any and all impacts from the project will be reduced to less than significant. Thus, the impacts identified for this project can have no legal implications for either the applicant or the Commission under either federal or state environmental law. In addition, even where effects on environmental justice populations are in fact "disproportionately high and adverse," the remedies considered or required by CEQA for significant adverse environmental impacts are the very remedies required by the federal environmental justice guidelines. "As mentioned previously, disproportionately high and adverse effects should trigger the serious consideration of alternatives and mitigation actions in coordination with extensive community outreach efforts." (U.S. EPA Guidelines, *supra,* Sec. 3.2.2.) The CEQ Guidelines are to the same effect. Thus, mitigation and consideration of alternatives, as required by CEQA, and by the Commission regulations that implement its CEQA equivalent process, would be the appropriate means of addressing "disproportionately high and adverse" impacts to environmental justice communities if such impacts were attributable to a proposed project. That is not the case, though, regarding the proposed project in this proceeding. Absent any unmitigated significant adverse environmental impacts from the proposed project affecting the identified minority population, there is no environmental justice issue.

[24] See Staff Exhibit 200, Chapters 4.1, 4.5, 4.7, and 4.8

CONCLUSION

The proposed project complies with the land use policies in the City of Chula Vista's General Plan and with the City of Chula Vista's Municipal Code. Additionally, with the adoption of the Conditions of Certification, the proposed project would cause no significant adverse direct, indirect, or cumulative impacts. Consequently, no "override" pursuant to CEQA or the Warren-Alquist Act is necessary. Lastly, there is simply no evidence in the record that identifies an unmitigated significant adverse environmental impact that could fall disproportionally on any identified minority population. Therefore, there is no issue regarding Environmental Justice in any of the relevant technical areas.

Staff respectfully urges the Committee to adopt staff's recommendations for Conditions of Certification for the Chula Vista Energy Upgrade Project.

DATED: November 5, 2008

Respectfully submitted,

______/S/_________________

KEVIN W. BELL
Senior Staff Counsel
California Energy Commission
1516 9th Street
Sacramento, CA 95817
Ph: (916) 654-3855
e-mail: kwbell@energy.state.ca.us

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

Application for Certification For the *CHULA VISTA ENERGY UPGRADE PROJECT*

Docket No. 07-AFC-4

PROOF OF SERVICE
(Revised: 10/28/08)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

***Harry Scarborough**
Sr. Vice President
MMC Energy Inc.
437 J Street, Suite 305
San Diego, CA 92101
hscarborough@mmcenergy.com

APPLICANTS CONSULTANT

Douglas M. Davy, Ph.D.
Senior Project Manager
CH2M Hill
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833
ddavy@ch2m.com

APPLICANTS ENGINEER

Steven Blue
Project Manager
Worley Parsons
2330 E. Bidwell, Suite 150
Folsom, CA 95630
Steven.blue@worleyparsons.com

COUNSEL FOR APPLICANT

Jane Luckhardt, Esq.
Downey Brand Law Firm
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

INTERESTED AGENCIES

California ISO
P.O. Box 639014
Folsom, CA 95763-9014
e-recipient@caiso.com

INTERVENORS

California Unions for Reliable Energy (CURE)
c/o Marc D. Joseph
Gloria Smith
Suma Peesapati
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com
speesapati@adamsbroadwell.com

City of Chula Vista, California
c/o Charles H. Pomeroy
Caren J. Dawson
McKenna, Long & Aldridge, LLP
444 South Flower Street
Los Angeles, CA 90071
cpomeroy@mckennalong.com
cdawson@mckennalong.com

Environmental Health Coalition
Diane Takvorian & Leo Miras
401 Mile of Cars Way, Suite 310
National City, CA 91950
DianeT@environmentalhealth.org
LeoM@environmentalhealth.org

ENERGY COMMISSION

Jackalyne Pfannenstiel
Chairman and Presiding Member
jpfannen@energy.state.ca.us

James D. Boyd
Vice Chair and Associate Member
jboyd@energy.state.ca.us

Raoul Renaud
Hearing Officer
rrenaud@energy.state.ca.us

Chris Meyer
Project Manager
cmeyer@energy.state.ca.us

Kevin Bell
Staff Counsel
kwbell@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, **Chester Hong**, declare that on **November 5, 2008**, I deposited copies of the attached **ENERGY COMMISSION STAFF'S OPENING BRIEF** in the United States mail at Sacramento, California, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

_______/S/____________
CHESTER HONG

Attachments