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 REPLY BRIEF

On November 5, 2008, the parties in the above entitled matter filed Opening Briefs as directed by the Committee. The briefs provided each of the parties' responses to questions as posed by the Committee related 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. Nothing in the opening Briefs filed by the other parties, however, particularly the claims of intervenor Environmental Health Coalition (EHC) compel changing the conclusion that the Commission should approve the Chula Vista Energy Upgrade Project.

LORS

The Project is Consistent with the City of Chula Vista's General Plan and Municipal Code

A neutral analysis demonstrates that 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 applicable to the proposed site. EHC begins with the proposition that CVEUP is inconsistent with both the City's General Plan and Municipal Code, however, then premises its entire argument on this

assumption, rather carefully examining the wording of all applicable sections and interpreting them in a harmonious way to reflect the City's intent. The resulting conclusions reached by EHC are neither supported by the facts nor justified by relevant caselaw.

A. The Proposed Project is not Prohibited by the General Plan.

Section E6.4 of the City of Chula Vista's General Plan states that the city should avoid 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 the city's intent to disfavor major toxic air emitters within 1,000 feet of a sensitive receptor. The proposed project is not a major toxic air emitter, as shown by the lack of any evidence in the hearing record to the contrary. Thus, the proposed project does not fall under the prohibition expressed in Section E6.4 of the General Plan.

1. The Statutory Construction of E6.4 Demonstrates that this Section Applies to Major Toxic Air Emitters.

E6.4 refers to major toxic air emitters. All energy generating facilities are not "unambiguously" prohibited under the applicable LORS as claimed by EHC. A plain reading of E6.4 demonstrates that EHC's interpretation is inaccurate.

The first clause of E6.4 is unambiguously written in the conjunctive with "other major toxic air emitters" describing the category of projects subject to the restrictions of that section of the General Plan. Ordinarily, the word "and" connotes a conjunctive meaning, while the word "or" implies a disjunctive alternative meaning. *Melamed v. City of Longbeach* (1993) 15 Cal.App.4th 70; *Houge v. Ford* (1955) 44 Cal.2d 706, 712.

The second clause of E6.4 is written in the disjunctive, with no references to energy generation facilities. Read in its entirety, this section of the General Plan applies specifically to major toxic air emitters.

A settled principle in California law is that "When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." *Melamed v. City of Longbeach, supra,* at p. 77. The language in section E6.4 is not ambiguous as to the City's intent to avoid the siting of major toxic air emitters from within 1,000 feet of a sensitive receptor, or the siting of a sensitive receptor within 1,000 feet of a major toxic air emitter. The concern about toxic air emitters and sensitive receivers being within 1,000 feet of each other does not apply to the proposed project, which is not a major toxic air emitter.

2. <u>The City's Agreement that the Project is Consistent with E6.4 is Indeed Relevant</u>.

EHC asserts that the City's agreement that the proposed project is consistent with Section E6.4 is not relevant. This assertion is incorrect. In accordance with § 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.[1] 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." [2]

As EHC acknowledges, both the City and Staff have concluded that the project is consistent with the general plan. EHC nevertheless claims that although a city normally will be accorded deference in determining whether a project is consistent with its own general plan, that deference has a limit: where no reasonable person could have reached the same conclusion on the available evidence, the determination must be reversed. *Endangered Habitats League v.*

[1] Cal. Code Regs., tit. 20, § 1744 (e)
[2] *Ibid.*

Couty of Orange (2005) 131 Cal.Ap.4th 777. Here, however, where the parties differ on the application of Section E6.4 to the proposed project, the city's opinion carries weight and should be given due deference.

There is nothing in the record to suggest that the project is a major toxic emitter under Federal or State law. On the contrary, the record is very clear that it is not a major toxic emitter. The most reasonable conclusion is that section E6.4 does not apply to the proposed project. There is nothing that compels a reversal of the city's determination that the proposed project is consistent with Section E6.4.

B. The City of Chula Vista has not Exercised its "Police Powers" to Change the General Plan and Municipal Code in a Manner that would Prohibit the Siting of the Proposed Project.

The City of Chula Vista has not prohibited all energy generating facilities from the Limited Industrial Zone. EHC's reliance on *Laurel Hill Cemetery* case to support the argument to the contrary is misplaced.

Laurel Hill Cemetery is distinguished in the current matter not by the proposition for which it stands, but in the way that proposition has been applied. Unlike the situation in *Laurel Hill Cemetery*, there is no dispute that the City of Chula Vista has the "police power" to prohibit the location of certain types of activities within its jurisdiction. That is not the issue here. The issue is whether the proposed project is a major toxic air emitter and therefore subject to the restriction of Section E6.4.

The proposed project is not a major toxic air emitter. Thus, there is nothing in the record that demonstrates that the City of Chula Vista has exercised its power to prohibit the proposed project through Section E6.4.

C. There are no Feasible Alternatives to the Proposed Project

EHC urges the Committee to find that Alternative Site "C" is feasible. There is nothing in the record, however, to support such a finding.

Alternative Site "C" fails to meet most of the proposed project's objectives.[3] This alternative would require the construction of an additional 3 mile long transmission line, an additional 0.45 mile natural gas pipeline, and an additional 0.2 mile water pipeline.[4] The transmission line would include underground construction in Main Street., which would cause local traffic disruptions, which would lead to a greater traffic and transportation impact than the proposed project. [5]

Furthermore, a discussion of site alternatives is not even required if the commission finds that the project has a strong relationship to the existing industrial site and that it is therefore reasonable not to analyze alternative sites for the project. [6] As an added measure of conservatism, staff did conduct an analysis of the project alternatives. Staff's analysis notes that in replacing the existing Chula Vista Power Plant, the proposed project will utilize virtually all of the existing plant's infrastructure at the existing industrial site. Although the Commission was not required to consider project alternatives, staff's analysis demonstrates that there are no feasible alternatives to this project.

D. The Proposed Laydown Areas are Consistent with the Applicable Zoning.

The evidence demonstrates that the proposed construction / laydown areas are consistent with the applicable zoning. Contrary to the assertions of EHC, staff does not rely on "conclusory assertions" regarding the consistency of the construction / laydown area to local LORS.

[3] Reporter's Transcript p.360, lns.11-12
[4] Exhibit 200, Ch.6, p.9
[5] Exhibit 200, Ch.6, p.9
[6] Public Resources Code Section 25540.6(b)

1. The Use of the Laydown Areas are Consistent with the Permitted Use in the A70 Zone

Although the proposed construction laydown/worker parking area has a City of Chula Vista zoning designation of "A70, Agricultural/County," according to the Farmland Mapping and Monitoring Program of the California Resources Agency (FMMP), the proposed site is designated as "Urban and Built-Up Land."

The on-site laydown area is a former pallet yard that is a graded lot with scattered debris piles. Likewise, the second proposed laydown area is a graded, barren lot, and is currently in use as a storage yard for gravel, concrete highway dividers, pylons, and heavy equipment.[7]

The construction laydown/worker parking area would be consistent with the accessory uses described in §19.20.030 because the site would be used for storage of construction equipment and as a parking area for construction employees. In addition, the construction laydown/worker parking area would only be used temporarily during construction activities. Once construction is complete, the applicant would vacate the site. The proposed project would be consistent with the A70 zoning requirements.

Given the historic and current uses on site, and the FMMP designations for both sites, the proposed project would not convert any Farmland (i.e., with FMMP designations of Prime Farmland, Unique Farmland, or Farmland of Statewide Importance) to nonagricultural use. Neither the construction nor operational activities of the proposed project would result in any impacts to existing agricultural operations or foreseeable future agricultural use. In addition, the project site is not located in an area that is under a Williamson Act contract. Therefore, the proposed project would not result in the conversion of Farmland to non-agricultural use, or

[7] Exhibit 200, Ch.4.2, p.7

conflict with existing agricultural zoning or Williamson Act contracts. The project would have no impact with respect to farmland conversion.[8]

2. The Use of the Laydown Areas are Consistent with the Multi-Species Conservation Plan.

The proposed project area is the existing Chula Vista Power Plant site, a highly disturbed area with no sensitive biological resources immediately adjacent to the Otay River Valley. The proposed laydown areas and linear facilities are similarly developed or barren.[9] There are no biological resources to be preserved.

The Multi-Species Conservation Plan (MSCP) is a comprehensive, long-term habitat conservation plan developed to address the needs of multiple species and the preservation of natural vegetation communities in San Diego County. The MSCP provides a blueprint for habitat preservation.[10]

The on-site laydown area is a 1.47-acre former pallet yard located adjacent to the project site to the southeast. This area is a graded lot with scattered debris piles, essentially devoid of vegetation. Like the project site, the pallet yard laydown area is surrounded by industrial and commercial uses to the east, west, and north.[11] Likewise, the second proposed laydown area is a graded, barren lot, and is currently in use as a storage yard for gravel, concrete highway dividers, pylons, and heavy equipment.[12]

The analysis here is simple, and the evidence plain. The laydown areas are graveled and barren, and there are simply no sensitive biological resources to be protected or preserved on the proposed laydown areas.[13]

[8] Exhibit 200, Ch.4.5, p.8
[9] Exhibit 200, Ch.4.2, p.1
[10] Exhibit 200, Ch.4.2, p.3
[11] Exhibit 200, Ch.4.2, p.7
[12] Exhibit 200, Ch.4.2, p.7
[13] Exhibit 200, Ch.4.2;Reporter's Transcript p.226, lns.14-19; p.228, lns.2-3, 9-11

CEQA

Staff's Analysis comports with the California Environmental Quality Act.

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

A. Staff's Analysis Uses the Correct Baseline of Existing Conditions, which include Consideration of the Existing Facility.

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."[14]

A proposed project should be evaluated by comparing its impacts against existing physical conditions. "[T]he baseline environmental setting must be premised on realized physical conditions on the ground, as opposed to merely hypothetical conditions allowable under existing plans." *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th 645.

CEQA requires that a proposed project must be evaluated by comparing the impacts of the project to the existing physical environment,[15] not from speculative or unsupported circumstances. Succinctly summarized, "[a] baseline figure must represent an environmental condition existing on the property prior to the project." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118-128.

[14] Cal.Code Regs., tit.14, §15125 (a) [Emphasis added]
[15] *Ibid.*

In this case, the existing conditions include the emissions of the existing facility at the proposed site. Unlike EHC, staff considered the existing facility's actual hours of operation, based on historical data, to estimate the existing project's emissions.[16]

The historical data shows that the existing facility operated no more than 400 hours a year. Those emissions 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.[17]

B. The Mitigation Proposed by Staff is Based on What is Reasonably Foreseeable Consistent with CEQA

1. Mitigation for Facility Operation Related Impacts

There is substantial evidence to support that the mitigation measures as to the operation of the proposed project will be effective. Operation of the proposed project even at the maximum permitted level of 4,400 hours does not trigger the requirement under the District's rules for emission reductions for criteria pollutants. Nevertheless, staff recommends offsets for nonattainment pollutants and their precursors at a 1:1.[18] The recommendation is based on 1,200 hours of operation per year, which is three times higher than historical trends for such facilities, and thus provides a "rather significant safety factor".[19]

Here, it would be improper to accept EHC's position and base an assumption regarding the number of hours the facility will operate based on the maximum permitted hours as originally required by SDG&E, as this would be unsupported by the existing conditions and historical use.

[16] Exhibit 200, ch.4.1,pgs.40-44
[17] Exhibit 200, ch.4.1, p.54
[18] Exhibit 200, ch. 4.1, p.37
[19] Exhibit 200, ch. 4.1, p.37

Therefore, given that even though the District does not require offsets for this project, staff has recommended offsets for nonattainment pollutants and their precursors at a 1:1, there is "substantial evidence" supporting the FSA's conclusion that mitigation measures as to the actual operations of the proposed project will be effective.

2. Mitigation for Construction Related Impacts

The worst-case particulate emissions for construction equipment and worst-case fugitive dust emissions were modeled by staff concurrently, although the worst-case fugitive emissions would not occur at the same time as the worst-case equipment emissions and would only occur during the short site preparation phase of construction.[20] These modeling input assumptions used by staff are conservative, likely underestimate the impact of staff's recommended engine and fugitive dust emission controls, and are expected to overestimate the worst-case construction impact potential.[21] Staff has nevertheless recommended that construction emission impacts be mitigated to the greatest feasible extent

Based on the relatively short-term nature of the worst-case construction impacts, and staff's recommendation of requiring all feasible construction emission mitigation measures, staff believes that the construction air quality impacts will be less than significant with the implementation of the mitigation measures contained in the recommended conditions of certification.[22]

3. Condition AQ-SC6 Provides for Effective Mitigation

AQ-SC6 requires the project owner to provide emission reduction mitigation to offset the project's NOx, PM10, SOx, and VOC emission increases at a ratio of 1:1. Those emission

[20] Exhibit 200, ch. 4.1, p.28
[21] Exhibit 200, ch. 4.1, p.28
[22] Exhibit 200, ch. 4.1, p.33

reductions are based on the maximum reasonably foreseeable annual emissions for the facility.

Under AQ-SC6, the emissions reductions proposed by staff can be provided by one of three options, which read as follows:

1. The project owner can fund emission reductions through the Carl Moyer Fund in the amount of $16,000/ton, or final 2008 ARB Carl Moyer Program Guideline cost effectiveness cap value, for the total ton quantity listed in the above table, minus any tons offset using the other two listed methods, with an additional 20 percent administration fee to fund the City of Chula Vista and/or the SDAPCD to be used to find and fund local emission reduction projects to the extent feasible. Emission reduction projects funding by this method will be weighted for evaluation and selection, within the funding guideline value of $16,000/ton of reduction, based on the proximity of the emission reduction project and the relative health benefit to the local community surrounding the project site. Emission reduction project cost will not be a consideration for selection as long as the emission reduction project is within the proposed or approved 2008, or other year as applicable, Carl Moyer funding guideline value,
2. The project owner can fund other existing public agency regulated stationary or mobile source emission reduction programs or create a project specific fund to be administered through the SDAPCD or other local agency, which would provide surplus emission reductions. This funding shall include appropriate administrative fees as determined by the administering agency to obtain local emission reductions to the extent feasible. The project owner shall be responsible for demonstrating that the amount of such funding meets the emission reduction requirements of this condition. Emission reduction projects funding by this method will be weighted for evaluation and selection based on the proximity of the emission reduction project and the relative health benefit to the local community surrounding the project site.
3. ERC certificates from emission reductions occurring in the San Diego Air Basin can be used to offset each pollutant on a 1:1 offset ratio basis only if local emission reduction projects are clearly demonstrated to be unavailable using methods 1 or 2 to meet the total emission reduction burden required by this condition. ERCs can be used on an interpollutant basis for SOx for PM10, NOx for VOC, and VOC for NOx, where the project owner will provide a letter from the SDAPCD that indicates the District's allowed interpollutant offset ratio, or PM10 for SOx ERCs can be used on a 1:1 basis.

The CEQA Guidelines provides that the "discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead… agency…which are not included but the Lead

Agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR."[23]

Here, specific to AQ-SC6, staff has identified the mitigation measures that are reasonably expected to reduce the impacts of the project related to this condition. The emissions of this project will be offset by a 1:1 ratio, and AQ-SC6 includes three separate options for achieving this level of mitigation. CEQA requires the lead agency to "ensure that feasible mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected and discarded." *Federation of Hillside and Canyon Associates v. City of Los Angeles* (2000) 83 Cal.App.4th 1252.

Contrary to the claims of EHC, AQ-SC6 provides for a level of mitigation that is sufficient under CEQA. EHC raises the point that the Carl Moyer Fund cannot be used to offset the emissions reduction obligations of any entity, citing Health and Safety Code § 44281(b), then goes on to acknowledge staff's clarification on the record that the program will be used as a pass-through for funding. The program is funded for others to access the funds for mitigation purposes.[24] These mitigation funds would be used for emission reduction projects within the community, such as energy efficiency and related improvements to local homes and business, and are intended to directly benefit the residents potentially most affected by the proposed project.[25] The Carl Moyer Fund is an established vehicle by which the appropriate levels of emission reductions (based on tonnage) can be achieved.[26]

[23] Cal.Code Regs., tit.14, § 15126.4(a)(1)(A)
[24] Reporter's Transcript, p. 66 lns.1-4
[25] Exhibit 205, p.3
[26] Reporter's Transcript p.77 lns.18-25, p.78 lns.1-5, 17-21

Additionally, it should be noted that the Conditions of Certification that the Commission would impose, including AQ-SC6, are fully enforceable. Fee based mitigation measures must be based on a reasonable plan of actual mitigation that the lead agency commits itself to implementing. *Anderson First Coalition v. City of Anderson* (2005) 130 Ca.App.4th 1173, 1188-1189. The Compliance Project Manager (CPM) is charged with overseeing and ensuring the enforcement of all Conditions of Certification that are imposed by the Commission. The CPM "shall be responsible for…ensuring that the design, construction, operation, and closure of the facilities are in compliance with the terms and conditions of the Energy Commission Decision."[27]

Here, by adopting AQ-SC6 as a Condition of Certification, the Commission will ensure that the appropriate mitigation measures are implemented by oversight of the CPM. The Commission can support such a reasonable plan by the adoption and enforcement of Condition of Certification AQ-SC6.

4. <u>There are No Issues with respect to Noise</u>.

The proposed project can be built and operated in compliance with all applicable noise and vibration laws, ordinances, regulations, and standards and, if built in accordance with staff's proposed conditions of certification, would produce no significant adverse noise impacts on people within the affected area, either direct, indirect, or cumulative.

When projected plant noise is added to the daytime ambient value, the cumulative level is 3 dBA above the ambient value, and would be below the range that is a potentially significant adverse impact and would, in fact, be barely noticeable. When plant noise is added to the

[27] Exhibit 200, ch. 7, p.2

nighttime ambient value, the cumulative level is 9 dBA above the ambient value. While this is a noticeable increase, it lies within the range that is only potentially significant.[28]

Since the plant is unlikely to operate a significant portion of the time during quiet nighttime hours, any noise impacts would be insignificant. Additionally, the evidence demonstrates that even a 9 decibel increase would not result in a significant adverse environmental impact.[29] Consequently, there are no issues with respect to noise.

5. Staff's GHG Analysis Sufficiently Discusses the Project's GHG Emissions Impacts in Accordance with CEQA

The evidence in the current matter provides enough information to enable a decision that intelligently takes account of the proposed project's environmental consequences. One circumstance that is not in dispute is that the proposed project would replace a less efficient existing facility, resulting in a lower emission rate of CO_2/MWh for the site.

CEQA requires that a lead agency conduct a thorough investigation, using its best efforts to disclose all that it reasonably can. *Berkeley Keep Jets Over the Bay Committee v. Board of Ports Commissioners* 91 Cal.App.4th 1344. The record is clear on the issue of staff's diligence.[30]

EHC correctly points out in their brief that the existing units operated very little, which would be expected for peaking units. Yet EHC chooses to conclude that the proposed project would significantly deviate from typical San Diego region peaker operating capacities. The proposed project is designed as a peaking unit and there is no evidence that it will be operated other than to meet local peak demands. If the proposed project operates more than the existing units, as EHC contends, it would only do so because it was dispatched ahead of other peaking and local reliability units. And for the proposed project to be dispatched ahead of other units, it

[28] Exhibit 200, Ch.4.6, p.11
[29] Reporter's transcript, p.257, lns.15-17.
[30] Exhibit 200, ch. 4.1

would have to be cheaper, more efficient, or have better locational value. The proposed project therefore would not result in a significant cumulative GHG impact.[31]

EHC suggests that the proposed project, which could reasonably be expected to operate at no more than a 5 percent capacity factor, should be compared to the Base Load (>60 percent capacity factor) Emission Performance Standard of 0.500 mt CO_2/MWh. They refer to the EPS as the "prevailing standard…. used to define 'clean electricity' purchases that are necessary to meet AB32's goals." The evidentiary record is clear that the EPS does not apply[32] because the EPS is not a prevailing standard, nor the appropriate standard to use in assessing the proposed project's GHG emissions.

There is nothing in the record to suggest that the new project will run for more hours than projected based on historical data. The more appropriate comparison is that of the proposed peaker to the existing peaker, as shown in Air Quality Table AQ-22.[33] The proposed project has a significantly lower GHG emission rate than the existing peakers.

EHC argues that the project is not a replacement of megawatt for megawatt, but is an increase in installed megawatts on site and in the region. This leads EHC to make a common error. They assume that generation capacity is directly representative of metric tons of GHG. This is not the case, as GHG emissions do not result from installed megawatts, but from operating megawatt hours. EHC has not provided any evidence that megawatt hours are going to increase on site, in the region, and in the WECC with the construction of the proposed project. Nor do they show that if the megawatt-hours increase, metric tons of GHG would increase given the significant improvement in GHG emission rate compared to the existing peaking units. In fact, the proposed project could generate 60 percent more megawatt-hours per year (9,000 MWhr

[31] Exhibit 200, ch. 4.1, p.57
[32] Exhibit 200, ch.4.1, p.1, p.52, p.54
[33] Exhibit 200, ch. 4.1, p.54

vs 5,600 MWhr annual average) and not increase GHG emissions at the site, given the average metric tons of GHG per year from the existing peaking units.

The project would not necessarily cause a net increase in global GHG emissions because it would operate to replace energy from the existing Twinpac™ unit and other less efficient peaking power sources in San Diego County. Therefore, the new project's emissions are expected to be less than those of the existing power plant and other peaking power plants that the project will replace and, thus, would contribute to improve the overall system average.[34]

Even though it may be possible to identify how many gross GHG emissions are attributable to a specific project, it is difficult to determine whether this will result in a net increase of these emissions system wide, and, if so, by how much. It would thus be speculative to conclude that the siting of this project, which is replacing a less efficient facility on the same site, results in a cumulatively significant adverse impact resulting from greenhouse gas emissions.[35]

However, even if the project was not a direct replacement of a higher-emitting existing power plant, it would be difficult to conclusively determine whether the project would result in a net increase in GHG emissions, for several reasons. Because of the complex interchange among facilities that make up California's electricity system, it is possible and perhaps likely that this project would displace electricity that may have otherwise been generated by more GHG intensive facilities, such as out-of-state coal plants or local old inefficient peaking units. Additionally, the local, regional and WECC-wide interchange varies by time of day, season, and year to year, making it difficult to forecast dispatch order for a year and allow quantification of the displaced electricity and GHG emissions. Lastly, facilities of this nature, with quick-start

[34]Exhibit 200, ch. 4.1, p.55
[35]Exhibit 200, ch. 4.1, p.56

capabilities, are needed to support California's efforts to increase use of renewable resources[36] as a part of an overall effort to reduce GHG emissions from the electricity sector.

EHC nevertheless asserts that the project "will cause a net increase in greenhouse gas emissions." EHC further argues that staff appears "disingenuous" in its conclusion that the proposed project's greenhouse gas emissions will not cause a significant impact on GHG emissions, again making an unsupported claim that staff's conclusion is "speculative" and "contrary to the available evidence." EHC's position essentially ignores how the electricity system operates to meet load, the order in which facilities are dispatched, and the programmatic approach currently under development pursuant to the AB 32 regulations that will address both the degree of electricity generation emissions reductions, and the method by which those reductions will be achieved. That regulatory approach will presumably address emissions not only from the newer, more efficient, and lower emitting facilities licensed by the Commission, but also the older, higher-emitting facilities not subject to any GHG reduction standard that the Energy Commission could impose.

There is substantial evidence in the record to demonstrate the thoroughness of staff's GHG analysis under CEQA. Staff's analysis provides more than enough information to support a decision that intelligently takes account of the proposed project's environmental consequences, specifically as to GHG emissions.

6. <u>There is No Need to Supplement and Recirculate the FSA.</u>

EHC has suggested that the FSA must be revised to conclude that the proposed project's impacts are significant, and to propose mitigation. As revised the FSA, according to EHC, must then be recirculated for additional agency review and public comment. The Commission should

[36]Exhibit 200, ch. 4.1, p.55

decline EHC's request to take these unnecessary steps, as there is a sufficient record to substantiate staff's conclusions and recommendations.

Public Resources Code § 21092.1 provides: "When significant new information is added to an [EIR] after notice has been given pursuant to section 21092 and consultation has occurred pursuant to Sections 21104 and 21153, but prior to certification, the public agency shall give notice again pursuant to section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the [EIR]." Under the CEQA Guidelines, "New information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect …." (Cal. Code Regs. tit. 14, § 15088.5.)

Examples of "significant new information" include information of: (1) a new significant environmental impact form the project or from a newly proposed mitigation measure; (2) a substantial increase in an environmental impact already identified; and (3) a feasible alternative or mitigation measure that is considerably different from any already analyzed. (*Ibid*.) None of these examples apply in this case. A fourth example is a situation where the draft EIR is "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*Ibid*.) This is also not the situation here where extensive analyses were done by the staff and others in a multitude of technical areas. The fact that EHC takes issue with the conclusions of staff's analysis in one or more technical areas, including staff's discussion of GHG emissions, does not warrant recirculation of the FSA even assuming its equivalence to a draft EIR. As the Guidelines states, "Recirculation is not reuired where the new information added to the EIR merely clarifies or amplifies … an adequate EIR." (*Ibid*.)

Basically, what EHC argues for is amplification of the staff's description and claims regarding system-wide effects of adding a new peaking facility.

In *Joy Road Area Forest and Watershed Association v. California Department of Forestry*, 142 Cal.App.4th 656, significant new information about impacts, mitigation measures, or alternatives was added to a Timber Harvest Plan without notice or recirculation as required by Public Resources Code § 21092.1. Here, there is no significant new information to be added to the FSA, nor is there any indication that additional information would change staff's analysis and conclusions. The FSA is a comprehensive analysis of the project's impacts in multiple technical areas and has, in fact, engendered meaningful public review and comment as intended under CEQA. There is no evidence to support that the proposed project's system-wide impacts are significant, that further mitigation is warranted, or that the FSA should be supplemented.

7. The Proposed Project Furthers the State's Efforts to Reduce GHG Emissions

The proposed project promotes the state's efforts to increase electrical generation efficiencies and reduce the amount of natural gas used by electricity generation and, thus, greenhouse gas emissions.[37] As the 2007 Integrated Energy Policy Report (CEC 2007a) noted:

> New natural gas-fueled electricity generation technologies offer efficiency, environmental, and other benefits to California, specifically by reducing the amount of natural gas used—and with less natural gas burned, fewer greenhouse gas emissions. Older combustion and steam turbines use outdated technology that makes them less fuel- and cost-efficient than newer, cleaner plants.… The 2003 and 2005 IEPRs noted that the state could help reduce natural gas consumption for electric generation by taking steps to retire older, less ef
> ficient natural gas power plants and replace or repower them with new, more efficient power plants.

The 2007 Integrated Energy Policy Report identifies natural gas generation as a "complementary strategy to meet greenhouse gas emission reductions." Peaking facilities, such as the proposed project, with their quick-start capabilities, are integral to supporting increased

[37]Exhibit 200, ch.4.1, p.54

use of renewable resources. They provide system stability to integrate new renewable generation, and help displace imported coal generation, which has much higher GHG emissions.[38]

Thus, in the context of the Energy Commission's Integrated Energy Policy Report, the CVEUP's replacement of the existing plant furthers the state's strategy to promote efficiency and reduce fuel use and GHG emissions.

ENVIRONMENTAL JUSTICE

A. The Proposed Project is Consistent with Environmental Justice Principles.

The proposed project would not cause any unmitigated significant adverse environmental impacts in any of the relevant technical areas analyzed in this case. It would, therefore, not cause any "high and adverse" effect that falls disproportionally on any population.

1. The Proposed Project Would Cause No Significant Adverse Environmental Impact

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.[39] An environmental justice issue would be identified only if an unmitigated significant adverse environmental impact were identified that affects the identified minority or low income population.

EHC claims that "most of the Project's impacts will fall on the residents" of the community, but fails to identify a single unmitigated significant impact from the project.

The CEQA Guidelines define a "significant effect on the environment" as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project." Cal Code Regs., tit.14, §15382. EHC's analysis does not acknowledge

[38]Exhibit 200, ch. 4.1, p.55
[39] Executive Order 12898 of February 11, 1994

the relevant legal standards, and urges the Commission to apply a broad and overreaching approach that has no legal justification.

2. EHC's Analysis Does Not Apply the Relevant Baseline

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]). "A baseline figure must represent an environmental condition existing on the property prior to the project." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra.* Here, the baseline used by EHC regarding environmental justice fails to include the existence of the peaking power plant. As such, the baseline figure used by EHC does not represent the environmental conditions existing on the property.

3. Staff's Public Health Analysis Shows no Unmitigated Significant Adverse Impact

In conducting the Public Health analysis for both cancer risks and non-cancer health effects, staff assumed worse-case scenarios. Staff's analysis utilized simplified assumptions that were intentionally biased towards the protection of public health. [40]

Staff calculated the highest levels of pollutants that could be emitted from the source, and assumed maximum possible levels of exposure to members of the public.[41] The analysis employed by staff was "designed to overestimate the public health impacts from exposure to emissions. In reality it is likely that the actual risks from the project will be much lower than the

[40] Exhibit 200, chapter 4.7, p.3
[41] Exhibit 200, chapter 4.7, p.3-4

risks estimated by the screening level assessment."[42] The emissions from the construction and operation of the proposed project would be at levels that do not require mitigation beyond the specific emission control measures as recommended in the Air Quality and Waste Management sections of the Final Staff Assessment.[43]

Specifically as to the risk of asthma rates, staff found that "the proposed CVEUP would have an insignificant impact on existing asthma rates in the surrounding area."[44] Despite staff's identification of an environmental justice population, there are no unmitigated significant adverse impacts in the area of Public Health that would raise an environmental justice issue.

CONCLUSION

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 any significant adverse environmental impacts. Therefore, staff recommends that the Commission grant the license to the Chula Vista Energy Upgrade Project, subject to the conditions of certification as recommended by staff.

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

DATED: November 19, 2008

Respectfully submitted,

_____/S/_____

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[42] Exhibit 200, chapter 4.7, p.3
[43] Exhibit 200, chapter 4.7, p.16
[44] Exhibit 200, chapter 4.7, p.16

FINDINGS AND CONCLUSIONS

The Briefing Order of October 10 encouraged the parties to draft proposed findings and conclusions for each issue addressed in their briefs. Staff submits the following proposed findings and conclusions regarding the substantive disputed issues:

LORS

The Conditions of Certification, if implemented by the project owner, will ensure that the project will be designed, sited, and operated in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards.

The evidentiary record establishes that no feasible alternatives to the project, as described during these proceedings, exist which would reduce or eliminate any significant environmental impacts of the mitigated project.

CEQA

The Conditions of Certification will ensure protection of environmental quality and assure reasonable safe and reliable operation of the facility. The Conditions of Certification will further assure that the project will neither result in, nor contribute to, any significant direct, indirect, or cumulative adverse environmental impact.

ENVRONMENTAL JUSTICE

Compliance with all Conditions of Certification will ensure that no unmitigated significant adverse impacts will result from project-related activities. Since all potential impacts from the project would be mitigated to less than significant, no population, including the identified environmental justice population, would be disproportionally impacted by the project.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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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:

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DECLARATION OF SERVICE

I, Chester Hong, declare that on November 19, 2008, I deposited copies of the attached **ENERGY COMMISSION STAFF'S REPLY 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/_____

Attachments