STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

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

ENERGY COMMISSION STAFF'S REPLY TO RESPONSE AND COMMENTS TO THE PRESIDING MEMBER'S PROPOSED DECISION

On March 16, 2009, Response and Comments to the Presiding Member's Proposed Decision were filed by the parties in this proceeding. The response and Comments filed by the City of Chula Vista, the Applicant, and Staff all take issue with the same findings in the PMPD, specifically those proposed findings in the Land Use and Alternatives sections. Staff is in agreement with those parties on those issues.

Intervenor Environmental Health Coalition (EHC) also filed a Response and Comments to the Presiding Member's Proposed Decision, agreeing with the PMPD's proposed findings in the areas of Land Use and Alternatives. Staff disagrees with EHC's comments, including those regarding Staff's Greenhouse Gas Emissions analysis. Staff's continuing position is that, based on the hearing record, the CVEUP complies with all applicable LORS and causes no significant environmental impacts with the imposition of staff's recommended conditions of certification.

I. The Proposed Project is Consistent with LORS

In its Response and Comments to the PMPD, EHC limits its comments specifically to the proposed findings regarding Chula Vista's general plan policy E6.4, whether energy generating facilities may be sited as an "Unclassified Use" in Limited Industrial areas such as the proposed site, and whether a "Precise Plan" is required for the site.

a. General Plan Policy E6.4 does not apply to all energy generating facilities.

EHC's position regarding E6.4 makes the same assumption the PMPD makes: that this provision of the General Plan applies to all energy generating facilities and not just those that are considered "major toxic emitters." As pointed out by both the Applicant and the City, if this interpretation is taken to its next logical conclusion, that policy would

prohibit *all* energy generating facilities, even rooftop solar, irrespective of whether those facilities are major toxic emitters. The City itself has never taken this position, and through its Municipal Code encourages the development of clean solar energy systems,[1] further demonstrating that E6.4 does not apply to all energy generating facilities as the PMPD and EHC claim.

Furthermore, as shown by the hearing record, the City does not consider a peaker power plant as a "major toxic emitter," does not consider this type of project a land use that poses a "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.[2]

Moreover, if the proposed findings in the PMPD were to be adopted, the PMPD would have concluded that the City's zoning ordinance does not allow it to replace an older, outdated facility with one that is cleaner, quieter, and more efficient at the same site. Considering this, the expansive interpretation of E6.4 offered in the PMPD is clearly at odds with other provisions in the General Plan, most notably sections ED1.3 (which encourages the preservation and expansion of existing industrial uses in areas designated as industrial)[3] and PFS22.4 (which encourages siting and design techniques that, among other things, encourages co-locating new facilities with existing utility infrastructure).[4] The use of the site of an existing peaker for the construction and operation of the proposed facility would be consistent with the policies of both of these sections of the General Plan.

Specific sections of the General Plan should be read in harmony with each other. The policy against major toxic air emitters in section E6.4, read together with the policies in sections ED1.3 and PFS22.4, indicates that E6.4 does not apply to all energy generating facilities, and allows for the location of the proposed new peaking facility where an existing peaking facility already exists. It is reasonable to interpret this policy, as the City does, as referring only to those energy generating facilities that are major toxic emitters, which the proposed peaking facility is not. There is nothing in the record showing that the proposed project would be a major toxic emitter, nor has EHC made such a showing.

b. <u>The City has the discretion, as it did in 2000, to issue a Conditional Use Permit for the proposed project in the Limited Industrial Zone as an "Unclassified Use."</u>

The City has made it clear throughout these proceedings, as well as in its comments on the PMPD filed on March 16, 2009, that the City has the discretionary authority to issue a Conditional Use Permit for a power plant (that is not under the energy Commission's jurisdiction) to replace the existing peaker plant at that site. The existing site is within

[1] See Chula Vista Municipal Code Chapter 20.08, Municipal Solar Utility.

[2] Staff Exhibit 200, ch.4.5, p.12

[3] Staff Exhibit 200, ch.4.5, p.15

[4] Staff Exhibit 200, ch.4.5, p.15-16

the Limited Industrial Zone, and a replacement power plant would be considered by the City to be a permissible “unclassified use” within that zone.

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.[5] 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. The City’s findings that both the original project and the proposed project would be considered an “unclassified use” within the Light Industrial Zone are within the City’s discretionary authority.

Qualifying as an “unclassified use” in the Light Industrial Zone places the proposed project within the discretion of the permitting authority. The City, using its discretion, could approve the project were it to have jurisdiction over the project. Given that the Energy Commission has exclusive jurisdiction, the Commission should use its discretion to approve the project as having no significant adverse impact and as complying with all applicable LORS.

c. A Precise Plan Modifier is not relevant to the proposed site.

In its comments on the PMPD, EHC makes passing mention of the PMPD’s findings with respect to a Precise Plan. As pointed out in staff’s initial comments on the PMPD, a Precise Plan is not required for the proposed site. As the evidence demonstrates, the City used its discretion not to require a precise plan for the existing peaker plant.

The FSA itself notes that the proposed CVEUP site does not include a Precise Plan Modifier. This information is based on discussions with the City of Chula Vista’s senior planning staff in January of 2008, as referenced in the Record of Conversation in the **Land Use** section of the FSA, where the City’s Principal Planner indicated that the site does not have a “modifier” on it, because it is currently subject to a Special Use Permit (i.e., the SUP for the existing on-site power plant).

Based on the City’s application of its own zoning ordinance, there is no violation with regard to a precise plan for the site, whether considering the existing facility or the proposed one. Therefore, discussion of a Precise Plan Modifier is not relevant to the project site.

[5] Staff Exhibit 200, ch.4.5, p.13; Staff Exhibit 207

II. The PMPD Should Give Due Deference to the City's Interpretation of its own ordinances and general plan.

In its comments on the PMPD, the City of Chula Vista has restated its previous interpretations regarding its own ordinances. Those interpretations of the City's General Plan and Zoning Ordinances stand in stark contrast to the interpretations set forth in the PMPD. Staff continues to support the City's interpretation of its own ordinances.

As section 1744, subdivision (e), in the Commission's regulations states, "Comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." (Cal. Code Regs., tit. 20, § 1744, subdiv. (e).) In its comments on the PMPD filed on March 16, 2009, the City reiterates its position regarding the applicability of E6.4 to major toxic emitters. Those comments also make it clear that the City considers the project to be an "unclassified use" that would be permissible within the Limited Industrial zone, and that there is no requirement for a "Precise Plan." These interpretations are reasonable and should be given due deference by the Energy Commission and applied to this case.

EHC asserts that the PMPD's proposed findings on the project's inconsistency with the City zoning ordinance are "amply supported." However, this ignores the "due deference" standard typically followed by the Energy Commission with regard to a City's interpretation of the quasi-legislative provisions it has adopted regarding land use. The Commission has on occasion rejected a City's interpretation of its ordinances where such interpretation is implausible or result-driven, or where such ordinances implement what are in effect permit-like requirements. (See, e.g., the Final Decision for the Los Esteros II AFC, and the Staff Motion for Override in that case.) Here, the City's interpretation is reasonable and interprets a purely legislative land use provision that has no disqualifying "permit-like" characteristics that would offend the "in lieu" provisions of Public Resources Code Section 25500. Thus, the Energy Commission should defer to the City's interpretation of the zoning ordinance.

III. The Staff's Alternatives Analysis complies with CEQA

a. A LORS inconsistency, assuming there is one, does not by itself mandate an expanded alternatives analysis.

A review of the evidentiary record demonstrates that the alternatives analysis submitted by Staff was sufficient. CEQA requires an analysis of "a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would *avoid or substantially lessen any of the significant effects of the project* …." (Cal. Code Regs., tit. 14, § 15126.6, subd. (a), emphasis added.)

EHC fails to note that the PMPD's "critical conclusions regarding the Project's conflicts with local land use LORS" are incorrectly intertwined with the analysis of alternatives. On Page 26, the PMPD concludes that what it identified as the LORS conflicts

"constitute adverse environmental impacts whose importance outweighs the largely economic advantages of reusing the existing infrastructure." However, an inconsistency between a project and land use controls, standing alone, does not mandate a finding of significant environmental effect. "It is merely a factor to be considered in determining whether a particular project may cause significant environmental effect." *Lighthouse Field Research Rescue v. City of Santa Cruz* (2005) 131 Cal. Ap. 4th 1170, 1207. It must be noted that there are no proposed findings within the PMPD that the proposed mitigation or conditions of certification recommended by staff are insufficient to avoid or minimize any significant adverse environmental impacts.

Even considering the PMPD's conclusion in the Land Use section that the proposed project is inconsistent with LORS, this does not invalidate Staff's alternatives analysis. The CEQA Guidelines define "effects" as being interchangeable with "impacts." (Cal. Code Regs., tit. 14, § 15358.) In either case, as analyzed under CEQA, "they must be related to a physical change." (*Ibid.*) Aside from the proposed finding that the project is inconsistent with LORS, the PMPD makes no finding that the environmental effects caused by the proposed project at the proposed site are significant.

Given sufficient mitigation of the project's potentially significant effects, the range of alternatives identified by staff is reasonable. A broader range would not have substantially added to the discussion of mitigating or avoiding *significant* environmental impacts. Therefore, staff's alternatives analysis complies with CEQA.

b. EHC's assertion that "distributed, urban solar generation" is an alternative to the proposed project is not supported by the evidence.

Staff has addressed this issue in its filed testimony, the Briefs filed in this matter, and in Staff's Comments on the PMPD. It is worth noting, however, that as set forth in the 2007 IEPR on page 186, natural gas generation "must be used prudently as a complementary strategy to reduce greenhouse gas emissions." Peaking facilities, such as the proposed project, are necessary to support the shift to large-scale renewable generation.

Many of the gas-fired license applications currently before the Energy Commission are for projects that will support a transition to a more renewable-based generation system.[6] There is nothing in the evidence that suggests the opposite as asserted by EHC: that renewable-based generation is an alternative to peaking power. This assertion is unsupportable and inconsistent with the Energy Commission's own statements about the role of peaking power in the electricity system.

[6] Committee Report: *Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications*, (March 2009) CEC-700-009-004.

IV. Staff's GHG Analysis and the PMPD's findings comply with CEQA, and are supported by the Committee Report

a. Staff's GHG Analysis and the PMPD's findings are supported by the Committee Report

EHC's comments fundamentally misread the Siting Committee's Report on CEQA analysis of GHG emissions. *Committee Report: Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications*, (March 2009) CEC-700-2009-004. (Committee Report) It was the Siting Committee's opinion that, at least until the emergence of a functioning CARB program for cumulative impact mitigation, the Energy Commission's licensing decisions should be based on an analysis of GHG impacts discussed by staff and other parties in each individual siting case. However, contrary to EHC's comments, the Committee Report concluded that the impact of an individual power plant can only be meaningfully evaluated by looking at how it is likely to affect GHG emissions within the electricity system as a whole.

Moreover, the Report acknowledged the greater efficiency of newer power plants over those they replace (or displace in the dispatch order) and that the replacement of older facilities results in a GHG emission benefit by comparison to the "existing conditions" of a CEQA baseline. "As the 2007 IEPR acknowledged, new gas-fired power plants are more efficient than older power plants, and they displace these older facilities in the dispatch order. This displacement will occur even if the older plants are not retired."[7] In other words, replacing an older power plant with a newer, more efficient power plant reduces overall GHG emissions, and this is an environmental benefit rather than a significant adverse cumulative impact.

The 2007 IEPR notes that the state has not yet built enough new generation to move the oldest coastal facilities, including Southbay, into retirement, which has had significant adverse consequences for, among other things, GHG emissions. In the Committee Report, the Committee found that "[n]ew electricity generation that can further displace or close facilities provides clear GHG…benefits."[8] The Committee expressed doubts about the correctness of limiting GHG CEQA analysis for power plants to a single project: as the Committee stated on page 28 of its Report:

> There are many advantages to the use of programmatic approaches: they provide consistent, proportionate mitigation based on a plan from an agency with both purview and expertise, vetted through a public process. By contrast, case by case mitigation is very consumptive of agency resources, and can be inconsistent as well as unpredictable for those who must plan projects based on some kind of forecast for expense. The Committee sees no conceptual or legal reason for insisting that case by

[7] Committee Report, *supra*, at p. 20

[8] Committee Report, *supra*, p.21

> case CEQA analysis be performed for all projects indefinitely. GHG cumulative impact mitigation…is especially well-suited to being addressed programmatically, and CARB is providing the means for doing so. Committee Report, *supra,* p.28.

Staff's approach in this matter, undertaken prior to the filing of the Committee Report, takes into consideration the displacement effect of new energy generation. As the Committee Report notes:

> Any new power plant will be reducing the carbon intensity of the electric generating system by displacing less efficient gas…generation, although the precise measure of displacement will be impossible to accurately determine. Thus, even if a new power plant is determined to result in significant cumulative impact, the magnitude of the impact cannot be quantified with any certitude, although the actual impacts would logically be significantly less than the measure of GHG emitted. This would make a pound for pound approach disproportionate, and thus inconsistent with CEQA and the U.S. Constitution." (Committee Report, *supra*, p.26)

The Committee Report acknowledged that such a benefit is all the greater when a gas-fired facility helps integrate renewable generation into the electric system loading order. The Chula Vista facility is a peaking facility that will be built in a "load pocket" where local generation is frequently needed to provide reliability. Peaking generation, with its flexible ramping, is necessary to provide reliability but also to help integrate intermittent renewable generation that fluctuates with wind conditions, solar intensity, and nighttime conditions. Currently, these services are provided by such power plants as South Bay, which are boiler facilities that must run all the time, even when they are not needed, simply to be available when they are needed, and which use environmentally damaging once-through cooling of ocean water for the boilers. It is the energy policy of this state to close these older, less efficient, environmentally damaging facilities while replacing them with more appropriate technology, such as the peaking project that is the subject of this application.

b. <u>Staff's GHG Analysis and the PMPD's findings are consistent with the Office of Planning and Research's draft amendments to the CEQA Guidelines</u>

EHC's claim that the FSA and PMPD depart from the Office of Planning and Research's draft amendments to the CEQA Guidelines is also misplaced. The draft guidelines endorse evaluating GHG emissions from a proposed project "in connection with the effects of past projects, the effects of other current projects, and the effects of probably future projects" when considering whether a project's emissions would be cumulatively considerable. (Amendment to Cal. Code Regs., tit. 14, § 15130, subd. (f).) In determining significance, the proposed Guidelines allow for assessment of a project's effects on fuel consumption, energy efficiency, and overall reduction of GHG emissions from existing facilities. A system analysis of a proposed project's impacts is consistent with the approach described in these sections, examining not only the direct effects of a

project, but also what may be beneficial indirect effects in displacement or curtailment of less efficient, more polluting facilities that currently operate in the system. Moreover, the Guidelines as proposed to be amended, allow for qualitative discussions and leave to the lead agency the discretion as to what method, qualitative or otherwise, to use in assessing the GHG impacts of a proposed project. (Proposed amendment of Cal. Code Regs., tit. 14, § 15064.4.)

Consistent with the approach allowed by CEQA, the FSA and PMPD both rely on a qualitative assessment of the likely effects of the project with respect to the replacement of a less efficient peaking facility and the indirect effects on South Bay, an existing baseload facility inefficiently providing peaking power. Nothing in the Guidelines precludes or discourages a system approach to analyzing the GHG effects attributable to a proposed project. Moreover, the Guidelines, including the proposed amendments, support the use of adopted plans as programmatic approaches to addressing cumulative impacts. To the extent the 2007 IEPR is an adopted plan that describes a beneficial role for new gas-fired peaking facilities in helping to integrate renewable resources into the system and displacing older, less efficient facilities, the proposed new peaking facility would cause a beneficial environmental effect over all. In that context, the PMPD's conclusions that the project's GHG emissions are too speculative to be considered cumulatively significant is reasonable and supported by the hearing record in this case, the Committee Report, and the 2007 IEPR.

V. Conclusion

Staff's continuing position is that, based on the hearing record, the CVEUP complies with all applicable LORS and causes no significant environmental impact with the imposition of staff's recommended conditions of certification. The Committee should recommend approval of the proposed project with staff's recommended conditions of certification.

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Respectfully submitted,

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