

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

**APPLICATION FOR
CERTIFICATION FOR THE
CHULA VISTA ENERGY UPGRADE
PROJECT**

DOCKET NO. 07-AFC-4
(AFC Filed 8/10/07)

**MMC CHULA VISTA'S
OPENING BRIEF ON REQUESTED BRIEFING TOPICS**

November 5, 2008

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**MMC CHULA VISTA'S
OPENING BRIEF ON REQUESTED BRIEFING TOPICS**

November 5, 2008

Pursuant to the Notice of Evidentiary Hearing Date and Hearing Order (dated September 22 and 24, 2008, respectively) and the Briefing Order (dated October 10, 2008), MMC Energy, Inc. (MMC) hereby files its Opening Brief on Requested Briefing Topics. This Brief addresses the three briefing topics contained in the Briefing Order: 1. Laws, ordinances, regulations and standards (LORS); 2. California Environmental Quality Act (Cal. Pub. Resources Code §§ 21000 et seq.) (CEQA); and 3. Environmental Justice.

MMC has not briefed areas where there is no controversy between the parties in the case. The uncontested subject areas include: Executive Summary and Project Description, Cultural Resources, Hazardous Materials Management, Soil and Water Resources, Traffic and Transportation, Transmission System Engineering, Transmission Line Safety and Nuisance, Waste Management, Geology and Paleontology, and Power Plant Efficiency.

I. MMC HAS MET ITS BURDEN TO PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT CERTIFICATION

CVEUP presents an opportunity for the California Energy Commission ("Commission") to further the goals expressed in the Commission's Integrated Energy Policy Report (IEPR). CVEUP is the direct replacement of older, less efficient technology with efficient LM 6000 technology. The project provides additional peaking generation in the load center and supports the replacement of another older generator, the South Bay Power Plant, as well as the addition of intermittent renewables. The project is located on a parcel off of Main Street such that it will not be as visible to the surrounding land uses and due to CVEUP's design and size will have no significant adverse impacts. MMC has met its burden of "presenting sufficient substantial evidence to support the findings and conclusions required for certification" of the Chula Vista

Energy Upgrade Project (CVEUP). (Cal. Code Regs., tit. 20, § 1748(d)). In the contested subject areas, the evidence shows:

- Land Use LORS: Because electrical generation is considered a conditionally-permitted public/quasi public manufacturing use within the Limited Industrial zone and because CVEUP is an upgrade of an existing on-site peaking facility that was approved by the City of Chula Vista in 2000, CVEUP complies with the City of Chula Vista General Plan and Zoning Ordinance.
- California Energy Commission Override: A Commission override of land use LORS is not necessary because no LORS inconsistencies exist. However, should the Commission choose to engage in an override, CVEUP's compelling local and statewide benefits dictate that the Commission should override any possible LORS inconsistencies.
- Air Quality: The evidence provided by MMC, Staff and the San Diego Air Pollution Control District (SDAPCD) demonstrates CVEUP will comply with LORS. Both MMC and Commission Staff have demonstrated that no significant unmitigated air quality impacts will occur as a result of the construction and operation of CVEUP. Commission Staff and MMC have analyzed CVEUP's air quality impacts at maximum permitted emissions from 4,400 hours of operation, but actual hours of operation are expected to be approximately 500 hours per year. Therefore, providing mitigation at potential to emit levels for operations up to 1200 hours per year provides sufficient safety margin for mitigation for CVEUP's air quality impacts.
- Public Health: CVEUP will not cause significant public health impacts. Both MMC and Commission Staff have determined that risks of chronic or acute non-cancer health effects as well as cancer risks from CVEUP are well below the applicable levels of significance. MMC and Commission Staff both emphasize that the project's effects on asthma rates are uncertain and the modeling results for potential health risk impacts were extremely conservative.
- Power Plant Reliability: CVEUP is designed to provide reliable operation of the facility. CVEUP will be built on ground that is already five feet above the 100-year floodplain level. MMC is willing to install a blackstart generator if such installation would further support the removal of the reliability must run status of the South Bay Power Plant.
- Biological Resources: CVEUP will not result in any unmitigated significant adverse impacts to biological resources. CVEUP will use already highly-disturbed sites for construction of the project and for the laydown area. Use of either proposed laydown site will be consistent with the Chula Vista Subarea Multi-Species Conservation Plan because the proposed use does not involve constructing permanent structures on either location.
- Noise and Vibration: The construction and operation of CVEUP will not result in unmitigated significant noise and vibration impacts. Specifically, MMC and Commission Staff have found the 9 dBA increase in background noise levels is not a significant adverse impact, particularly because those impacts occur only at night when the project is

unlikely to operate. CVEUP will mitigate power plant noise using state-of-the art silencing equipment and will construct a noise wall around the portions of the plant site where one does not already exist.

- Visual Resources: After mitigation CVEUP will not cause any significant adverse impact on visual resources. Because of its location, the project will be seen by relatively few viewers and these are not considered sensitive viewers. Vegetative screening and the existing sound wall will prevent recreational viewers in the adjacent regional park from seeing the facility.
- Alternatives: MMC and Commission Staff have correctly concluded that there are no feasible alternative project sites or technologies that would reduce or avoid CVEUP's adverse environmental impacts. First, CVEUP will not create any significant adverse environmental impacts that will not be mitigated. Second, the three alternative project sites that could meet the siting criteria offer no environmental advantage over the project and/or are economically infeasible. Finally, alternative generation technology is infeasible because it would not provide the new (or additional) and quick start capability generation required in the San Diego region. The "No Project" alternative is also infeasible because it would prevent MMC from replacing the less-efficient Chula Vista Power Plant.
- CEQA Override: Because CVEUP will not result in any unmitigated significant adverse environmental impacts, no CEQA override finding by the Commission is necessary. However, should the Commission choose to engage in a CEQA override, it will find that CVEUP's compelling local and statewide benefits dictate that the Commission would override any such significant unmitigated adverse environmental impacts.
- Environmental Justice: The Commission's environmental justice methodology is consistent with all applicable state and federal policy and guidance, and Commission Staff correctly applied the methodology in its analysis. Commission Staff's analysis of impacts to the environmental justice population was properly based on CEQA levels of significance. Because all impacts of CVEUP will be below the level of significance, those impacts have no environmental justice implications and Commission Staff correctly concluded that CVEUP will not have a disproportionate effect on an environmental justice population.

The Warren-Alquist Act (Cal. Pub. Resources Code § 25000 et seq.) specifies that the Commission's Committee's ("Committee") written decision on MMC's Application for Certification (AFC) must contain all of the following:

- Specific provisions relating to the manner in which the proposed facility is to be designed, sited, and operated in order to protect environmental quality and assure public health and safety.

- Findings regarding the conformity of the proposed site and related facilities with: standards adopted by the Commission or other agencies to safeguard public health and safety; minimum standards of efficiency for the operation of any new facility; applicable air and water quality standards; and other relevant local, regional, state, and federal standards, ordinances, regulations or laws.
- Necessary modifications, mitigation measures, conditions, or other specific provisions relating to the manner in which the proposed facilities are to be designed, sited, and operated in order to protect environmental quality; assure safe and reliable operation of the facility; comply with applicable standards, ordinances, regulations or laws.
- A discussion of any public benefits from the project including, but not limited to, economic benefits, environmental benefits, and electricity reliability benefits.

(Cal. Pub. Resources Code § 25523 and Cal. Code Regs., tit. 20, § 1752).

The record clearly demonstrates that MMC has presented substantial evidence regarding the proposed design, construction and operation of CVEUP and its potential impacts to support certification. MMC has proposed specific mitigation measures and accepted additional mitigation measures proposed by Commission Staff ("Staff") to address potential impacts from CVEUP. These mitigation measures ensure CVEUP will be constructed and operated to protect environmental quality and assure public health and safety. The evidence also shows CVEUP will comply with applicable federal, state, and local LORS.

II. CVEUP COMPLIES WITH LAND USE LORS

This section addresses the Committee's requested briefing topic related to the project's compliance with LORS. Specifically, MMC answers that CVEUP will fully comply with the land use policies of the City of Chula Vista General Plan and with its Zoning Ordinance. MMC also shows no feasible alternatives meet the objectives of the project and eliminate any nonconformance with land use LORS. Moreover, although an override by the Commission will not be necessary due to CVEUP's compliance with all LORS, MMC explains in section IV why the Commission would be able to exercise its override authority if it were asked to do so.

A. CVEUP is Consistent with the City’s General Plan

As set out more fully below, CVEUP is consistent with the specific general plan policies of the City. However, MMC also notes that there are two important overarching considerations in evaluating whether CVEUP is in compliance with the City's general plan. First, it is important to recognize that under California law courts look toward consistency with the general plan as a whole rather than looking toward each individual policy. Second, the general plan analysis must take place in the context of the overall CEQA analysis, which requires comparisons between the proposed project and the applicable baseline, which in this case is the continuing operation of an existing power plant.

1. While Individual General Plan Policies are Addressed Below, State Law Does not Require Perfect Conformity with a General Plan

Environmental Health Coalition (EHC) attempts to point to specific general plan policies that it argues are inconsistent with CVEUP. While consistency with these specific policies are addressed below, it is important to note that the law does not require perfect conformity with each individual policy in determining whether a project is consistent with a general plan. In evaluating consistency with the general plan, the whole of the general plan must be considered together, not just individual policies.

In *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, a local organization brought claims of violation of general plan policies against the City of Vacaville for approving a residential and commercial project. In siding with the City of Vacaville, the court stated that “[s]tate law does not require perfect conformity between a proposed project and the applicable general plan” but a balance that weighs the pros and cons to achieve an acceptable mix. *Id.* at 817, 822. This allows local officials flexibility and is the reason why general plans

ordinarily do not state specific mandates or prohibitions but instead state “policies” and set forth “goals.” (*Id.* at 817, emphasis added).

The courts have emphasized that a project need not be consistent with each individual goal, policy and objective of a city’s general plan. In *Sequoyah Hills*, a homeowners’ association brought suit against the City of Oakland for abuse of discretion in approving a housing development that it felt was inconsistent with three policies from the city’s general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719). The court rejected the homeowners’ association’s claims and explained:

no project could completely satisfy every policy stated in the [General Plan], and state law does not impose such a requirement. . . .Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be "in harmony" with the policies stated in the plan. It is, emphatically, not the role of the courts to micromanage these development decisions.

(*Id.* at 719, quoting *Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406, 407.)

Another court has held that “[a]n action, program, or project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.” (*Corona-Norco Unified Sch. Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994.) As noted above, for example, the general plan policies must be examined within the context that there is an existing power plant on the site that generates air pollution emissions at a higher rate than CVEUP and that the use of this plant would continue and increase in the near term if CVEUP is not approved.

The City, in its August 7, 2008 letter to the Commission, restated this standard by noting that:

A project need not be in complete conformity with each and every policy of the General Plan to be deemed consistent with the General Plan because it is likely that no project would completely satisfy every policy stated in the General Plan. . . . Based upon the preliminary analyses and requirements presented by Staff in

the Preliminary Staff Assessment . . . and the specific benefits and mitigation described above, we believe that the City will find that the Project is in harmony with and therefore, consistent with the General Plan.

(Ex. 803 at 3.)

The City also concluded that “. . . the 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.” (Ex. 802 at 4-5.) Staff also based its consistency determination on the City’s “plans for maintaining and developing the Main Street area as an industrial corridor, the industrial pattern of development immediately surrounding the site, and the City’s General Plan and zoning designations within a one-mile radius of the site.” (Ex. 200 at 4.5-16.) Staff adds that CVEUP appears to be consistent with the City’s goals and objectives for the pattern of industrial development for the area. (10/2/2008 RT 321: 4-8.)

In its letter to the Commission dated August 7, 2008, the City plainly stated that with the mitigation measures requested by the City and agreed to by MMC, the project "will address any potential inconsistencies with the General Plan" and that "the City concludes that any potential inconsistencies with the City's General Plan will have been addressed." (Ex. 803 at 4-5.).

2. The General Plan Policies at Issue Must be Examined Within the Context of the Overall CEQA Analysis

EHC focuses on specific land use policies that they assert indicate a concern with potential toxic air impacts on residences and schools near the project. These policies must be examined within the context of the conclusions reached in the Air Quality and Public Health sections of the Final Staff Assessment (FSA). As discussed more fully below in addressing policies E6.15 and E23.3, these sections conclude that air impacts to the general public and to nearby residents would be less than significant. The Public Health section is particularly relevant as it examines the potential impacts of "toxic" emissions on the residents closest to the

proposed CVEUP and concludes that "under any regulatory definition" the emissions are less than significant and do not constitute a major toxics source. (Ex. 200 at 4.1-72.) Staff has examined non-cancer and cancer risks to nearby residents, using a conservative methodology, and found that the individual project and cumulative risks are "well below" significance levels. (Ex. 200 at 4.7-12, 13.) The Public Health section also states that: "[t]he toxic pollutant-related cancer and non-cancer risks from the proposed CVEUP's operation reflect the effectiveness of control measures . . . Since these risk estimates are far below the significance levels in the applicable LORS, staff concludes that the related operational plan would comply with these LORS." (Ex. 200 at 4.7-13.)

CEQA also requires that impacts be examined against an existing setting or "baseline." (Cal. Code Regs., tit 14, § 15125(a).) "Without a determination and description of the existing physical conditions on the property at the start of the environmental review process, the [CEQA document] cannot provide a meaningful assessment of the environmental impacts of the project." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 119.) Here, the general plan policies must be examined within the context that CVEUP would not be sited on a greenfield site but rather would replace an existing, less efficient, power plant. Staff has concluded that CVEUP, operating at its expected levels, would generate less hourly air emissions than the existing Chula Vista Power Plant. (Ex. 200 at 4.1-42, 43, emphasis added.)

An examination of general plan policies must also be made within the context of CEQA's required "no project alternative." The no project alternative examines the effects of not approving the project and "what would be reasonably expected to occur in the foreseeable future if the project were not approved." (Cal. Code Regs., tit 14, §15126.6(e)(2).) Staff has

determined that under the no project alternative "it is anticipated that [MMC] would continue to operate the Chula Vista Power Plant or it or another power company would seek to build another power plant on the site." (Ex. 200 at 4.9-11.) "In the near term, the more likely result is that existing plants, such as the Chula Vista Plant and the South Bay Power Plant, many of which produce higher level of pollutants, could operate more." (Ex. 200 at 6-15.) "If the project is not built, the region will not benefit from the local, relatively clean and efficient [CVEUP]." (*Id.*)

Thus, general plan policies must be examined considering that the proposed site is currently used for a power plant, that this plant has a higher emission rate than the proposed CVEUP, and that the operations of the existing plant would likely increase in the future. The policies that indicate concerns as to air emissions must be examined in conjunction with the conclusions reached in the FSA's Public Health and Air Quality sections, which sections have determined that air and public health impacts are less than significant.

3. CVEUP is Consistent with General Plan Policy E6.4

CVEUP is consistent with General Plan Policy E6.4 which provides that the City should:

Avoid siting new or re-powered energy facilities *and other* major toxic emitters within 1,000 feet of a sensitive receiver.

(General Plan Policy E6.4, emphasis added.)

The statement "[a]void siting new or re-powered energy generation facilities and other major toxic emitters within 1,000 feet of a sensitive receiver" reveals that the City's intention in drafting this language was to limit Policy E6.4 to major toxic emitters, whether they are energy facilities or otherwise. A rule of statutory construction requires that when several words are followed by a clause that applies as much to the first and other words as to the last, "the natural construction of the language demands that the clause be read as applicable to all"¹ and words

¹ *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743 (superseded on different grounds).

should not be read "in isolation" and particular words and clauses must be "harmonized." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Therefore, the policy is intended only to prohibit the placement of a new or re-powered energy facility that is *also* a major toxic emitter within 1,000 feet of a sensitive receiver.

Moreover, Policy E6.4 reads in its entirety "[a]void siting new or re-powered energy generation facilities and other major toxic 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.*" (Ex. 619 at E-32, emphasis added). Accordingly, the second half of the sentence, which only refers to "major toxic air emitters" and neglects to include the words "new or re-powered energy generation facilities," when read in connection with the first half of the sentence, further suggests that Policy E6.4 is intended to apply only to a new or re-powered energy generation facility that is *also* a major toxic emitter.

The term "major toxic emitter" is not defined in the City's General Plan but both the Clean Air Act and the SDAPCD regulations provide definitions for "major source" of hazardous air pollutants.² CVEUP does not meet either definition and therefore should not qualify as a "major toxic emitter." (Ex. 5 at 3.) As noted above, the Public Health section of the FSA has also concluded that potential exposure risks to residents due to toxic exposures are well below significance levels. (Ex. 4.7-12, 13.)

The first word in the policy, "avoid," also implies some level of discretion, suggesting that the City is not strictly prohibited from placing an energy facility within 1,000 feet of a sensitive receiver. For example, in *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, the court strictly applied the language of a

² See definition of "major source" and "hazardous air pollutant" at 42 USC § 7412; and definition of "major stationary source" at SDAPCD Rule 20.1(c)(35).

general plan and emphasized the county's lack of discretion under the language of the general plan, which used the phrases "*shall* be restricted" and "*shall* not be assigned." (*Id.* at 1341-1342, emphasis added.) The court declared that use of the term "shall" is "mandatory and anything but amorphous." (*Id.* at 1341.) In contrast to the general plan in *El Dorado County*, the Chula Vista General Plan does not state the City "*shall* not place" or is "*prohibited* from placing" energy facilities within 1,000 feet of a sensitive receiver (emphasis added). This implies that Policy E6.4 does not represent an all out mandate against locating energy facilities within 1,000 feet of sensitive receivers.

Rather, in using the word "avoid" instead of "shall not" or "prohibit," the General Plan allows discretion in siting new or re-powered energy facilities. MMC has complied with this policy of "avoidance" in that MMC surveyed other potential sites in the area but ultimately determined that the most environmentally sound option was to recycle and reuse the existing facility already on site, thereby reducing potential new impacts at a different location or increasing impacts under the no project alternative. See the Alternatives discussion at section VI.H. of this brief for a more detailed discussion.

4. EHC's Assertions with Regard to The Timing and Legislative History of the Passage of General Plan Policy E6.4 is Without Merit.

In its Comments on the Preliminary Staff Assessment (Ex. 600), EHC claims that Staff's analysis ignores the history of the Policy E6.4 whose drafting and passing "illustrates that the legislative intent of those that created and voted for the policy is to prevent the same type of siting that the MMC proposal represents." (Ex. 600 at 7.) EHC also asserts that removal of language creating an exception to the siting of a "major toxic emitter" if a health risk assessment is performed showing that health risks are within acceptable state and federal standards, reflects

the City's intent to completely prohibit power plants near "sensitive receptors." MMC disagrees with both claims.

It does not matter when the City adopted Policy E6.4 or that the health risk assessment qualifying language was stricken from the policy. The City Council's adoption of the Policy E6.4 language in its current form – without the health risk assessment language – does not in anyway create "a clear and strong prohibition against new or re-powered energy generation." If anything, the revised language encourages projects like CVEUP. As stated above, a detailed reading of Policy E6.4 reveals that it does not apply to CVEUP because CVEUP is not a "major toxic emitter." MMC emphasizes that Policy E6.4 was intended to apply only to a new or re-powered energy generation facility that is *also* a major toxic emitter.

EHC also claims that the timing of the City's adoption of Policy E6.4 evidences the City's intent to entirely prohibit power facilities within 1,000 feet of sensitive receptors. (Ex. 600 at 9 and Ex. 200 at 4.5-33.) EHC bases its assertion on the fact that RAMCO, the previous owner of the CVEUP site, applied to the City for an expansion in 2001 but ultimately retracted its application. EHC perceives the City's adoption of Policy E6.4 *four years* later as evidence of its intent to prohibit power plants in the area. (Ex. 600 at 9.) This claim is completely unsubstantiated. As mentioned above, the language of Policy E6.4 does not even apply to CVEUP. Furthermore, the policy's passage *four years* after RAMCO's expansion attempt in 2001 says nothing about the City's intent in 2005. In fact, the makeup of the City Council was significantly different in 2005 than it was in 2001, making it difficult to prove the City's "intent," even if intent is relevant.³

³ City of Chula Vista Regular City Council Meeting Minutes for June 12, 2001 and June 21, 2005, available at

Furthermore, if the City truly intended to entirely prohibit power plants within 1,000 feet of sensitive receptors, then it would have enacted an accompanying zoning ordinance section to enforce Policy E6.4. As Staff concluded, “without consistent zoning to implement development in accordance with the General Plan, the intent of those policies cannot be accomplished. Zoning is the legal method by which local jurisdictions can implement development.” (Ex. 200 at 4.5-30.) The City has not enacted any zoning ordinance section implementing EHC’s so-called “prohibition” against power generation facilities within 1,000 feet of sensitive receptors or, for that matter, within the Limited Industrial Zone. (Ex. 620 at 19-98 to 19-104.)

Finally, the legislative history is only relevant when there is substantial ambiguity as to the actual language of the policy, which there isn't in this case. MMC also notes that the "legislative history" cited to by EHC largely consists of EHC's own correspondence. (Ex. 626 at 5-6 and Ex. 600 at Appendix A and Appendix B.) This correspondence says little as to the actual intent of the individual members of the City Council in adopting the general plan policy change. Also, a review of the EHC correspondence leading up to the general plan change indicates their own concern with air emissions, not a concern with power plants per se. In fact, an interpretation precluding power plants regardless of their emission levels would be unreasonable on its face given the lack of impacts associated with power plants and the previous approval of a power plant for the site in 2000. In particular, the City has previously declared the existing Chula Vista Power Plant to be in conformance with the General Plan. “The granting of SUP-00-08 will not adversely affect the Chula Vista General Plan in that said project is in conformance with the City Zoning Ordinance and General Plan. The site is in an area that is characterized by commercial

http://www.chulavistaca.gov/City_Services/Administrative_Services/City_Clerk/Council/CcAgendas.asp (accessed on October 10, 2008).

and industrial uses, and as previously noted . . . has been conditioned to mitigate potential impacts.” (Ex. 802 at 4-9.) The area is still characterized by commercial and industrial uses.

5. CVEUP is Consistent with General Plan Policy E6.15

Second, CVEUP is consistent with Policy E6.15, which seeks to “[s]ite industries in a way that minimizes the potential impacts of poor air quality on homes, schools, hospitals, and other land uses where people congregate.” EHC has stated that CVEUP would be inconsistent with this policy because the site is “located only 350 ft from the nearest residence and 1300 ft from the nearest school.” (Ex. 600 at 9.)

EHC’s claim of inconsistency is not supportable. Although CVEUP will be located approximately 350 feet away from the nearest residential area, an existing power plant is already established and operating on the site. The use of the verb “site” in Policy E6.15 indicates that the policy applies only to industries not yet in existence, whereas CVEUP entails the upgrade of a *pre-existing* power plant site. “General Plan policy E6.15 is focused on siting of new industry. Staff did not identify this policy as applicable to the proposed project given the existing on-site power plant, the fact that the proposed project is an upgrade of the existing on-site use” (Ex. 200 at 4.5-34.)

In addition, if Policy E6.15 did apply, CVEUP would still be consistent because it will not significantly contribute to “poor air quality” in the area. The Air Quality and Public Health sections of the FSA conclude that, with mitigation, CVEUP will not create a significant adverse impact to air quality or public health in the surrounding area. (Ex. 200 at 4.1-1 and 4.7-1.) In fact, by upgrading the existing energy facility, CVEUP will actually improve air quality in the area by generating fewer emissions than the existing Chula Vista Power Plant. (Ex. 200 at 4.1-62 and 1-12.) In fact, Table DR9-1 of MMC’s Response to EHC’s Data Requests 1-35 shows that CVEUP will result in significant reductions in air emissions per generating unit for each

criteria pollutant. (Ex. 5 at Table 12.) “Even when comparing the existing unit with the two new CVEUP units combined, the emissions of carbon monoxide will be significantly lower with the new plant, despite the fact that the new plant will generate more than twice as much electricity as the existing one. (Ex. 5 at 12.) MMC will also be contributing to a fund to create emission reduction credits through the Carl Moyer Fund “in sufficient quantity to fully offset all nonattainment pollutants and their precursors at a minimum ratio of 1:1.” (Ex. 200 at 4.1-1.) Furthermore, MMC will also separately fund a project air quality mitigation program paid to and administered by the City. (Ex. 200 at 4.1-1.) Therefore, even if Policy E6.15 applied to an upgrade of an existing facility, which it doesn't, CVEUP would still be consistent with Policy E6.15.

6. CVEUP is Consistent with General Plan Policy E23.3

General Plan Policy E23.3 advises that the City “[a]void siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools and residential buildings.” EHC claims that CVEUP will violate this policy because “E23.3 could have been, and partly was, passed in response to the original certification.” (Ex. 600 at 9.) EHC makes this statement without any evidence to substantiate it. Setting aside EHC’s completely inaccurate claim, it is clear that CVEUP is consistent with Policy E23.3 because it does not pose a significant human health hazard to schools, residences or otherwise.

The Public Health section of the AFC summarizes the results of MMC’s air toxics risk assessment, which was based on emissions modeling, and found that there will be no significant incremental public health risks from either construction or operation of CVEUP. (Ex. 1 at 5.9-12.)

As concluded in the Public Health section of the FSA, Staff “has analyzed the potential public health risks associated with construction and operation of the proposed [CVEUP] and

does not expect that there would be any significant adverse cancer or short- or long-term health effects from the project's toxic emissions.” (Ex. 200 at 4.7-1.) Based on this conclusion, the Preliminary Staff Assessment (PSA) and the FSA did not need to specifically address Policy E23.3. But in directly addressing the potential “significant hazard to human health and safety,” the FSA decisively and definitively concluded that “the toxic air emissions from the construction and operation of this proposed CVEUP would be at levels that do not require mitigation beyond the specific emission control measures noted” in the Air Quality and Waste Management sections. (Ex. 200 at 4.7-16.)

Furthermore, the Hazardous Materials section of the FSA poignantly declares: “The proposed upgrade also does not conflict with the Montgomery Specific Plan (19.66.140) and General Plan Policy E23.3 in that the proposed project will not create a ‘dangerous hazard’ or pose a ‘significant hazard’ to the public.” (Ex. 200 at 4.4-22.)

The fact that CVEUP would be an upgrade to the existing power plant on site provides further proof that CVEUP would not be a significant hazard to human health and safety. This is because CVEUP will improve the air quality in the area by generating a lower rate of emissions than the existing Chula Vista Power Plant. (Ex. 200 at 4.1-62 and 1-12.) In fact, Table DR9-1 of MMC's Response to EHC's Data Requests 1-35 shows that CVEUP will result in significant reductions in air emissions per generating unit for each criteria pollutant. (Ex. 5 at Table 12.) And, as stated previously, MMC will contribute funds to the Carl Moyer Fund to create localized emission reductions, as well as funding a separate City-administered mitigation program. (Ex. 200 at 4.1-1.)

With regard to Public Health, Mr. John Lowe testified:

The standards that the staff has used as a basis for determining project significance are health-based; they are based, you know, on the USEPA and the

ARB level. They're set at levels to adequately protect the health of all members of the public, including the most sensitive – air quality impacts. And that includes the aged, people with existing illnesses, children. And includes the margin of safety as I discussed before. Again, in defining an adequate margin of safety, the EPA strives not only to prevent pollution levels that are demonstrated to be harmful, but to prevent lower pollution levels that might pose an unacceptable risk, even if that risk hasn't been well defined yet. The nature of the risk and the severity of the effect, the size of the population, the kinds of uncertainty and the scientific evidence are all factors that are considered in setting these standards.

(10/2/2008 RT 102: 20-25 and 103: 1-15.)

Mr. Lowe then added that the modeling estimated CVEUP's emissions at the point of maximum air quality impact, thereby creating a conservative result, one that overestimates the project's impacts. (10/2/2008 RT 103: 16-24.)

7. CVEUP is Consistent with General Plan Policy E7.5

Policy E7.5 advises that the City “[p]ursue 40% City-wide electricity supply from clean, renewable resources by 2017.” EHC declares that CVEUP does nothing to help the City meet this commitment. (Ex. 600 at 9.)

MMC responds that CVEUP will in fact aid the City in its goal to use more renewable resources by providing the peaking power necessary to maintain reliability and back up other methods of electrical generation, such as renewable resources, when the demand exceeds the capacity. In other words, peaking projects like CVEUP make the use of renewable resources viable and reliable. Furthermore, the Commission's own 2007 Integrated Energy Policy Report identifies natural gas generation as a “complementary strategy to meet greenhouse gas emission reductions.” (Ex. 200 at 4.1-56.) Staff further states that natural gas generation projects like CVEUP fill the gap that cannot be currently served by renewable generation and provide system stability to integrate new renewable generation. (Ex. 200 at 4.1-56.) Therefore, CVEUP will help the City pursue its goal of achieving 40% renewable resource-based electricity supply by 2017.

8. CVEUP is Consistent with General Plan Policies LUT 1.6 and 1.5

In its Comments on the PSA, the City initially questioned whether CVEUP would meet the goals of General Plan Policy LUT 1.6 which provides: “Attract and maintain land uses that generate revenue for the City of Chula Vista, while maintaining a balance of other community needs, such as housing jobs, open space and public facilities.” (Ex. 200 at 4.9-11.) The City also questioned whether CVEUP would be consistent with Policy LUT 1.5: “Endeavor to create a mixture of employment opportunities for citizens at all economic level.” The City’s concern stems from the fact that the IL zone and ILP designation are “job generating land use designation[s],” which envision “industrial parks.” (Ex. 200 at 4.9-11.) As noted above, in its letter to the Commission dated August 7, 2008, the City subsequently determined that with the mitigation measures requested by the City and agreed to by MMC, the project "will address any potential inconsistencies with the General Plan" and that "the City concludes that any potential inconsistencies with the City's General Plan will have been addressed." (Ex. 803 at 4-5.).

In addition to the above, Staff addressed these concerns in the FSA and declared: “the proposed project property tax revenue, construction and operation sales taxes, as well as the Utility Users’ Tax would generate revenue to the City and provide a fiscal benefit for the City.” (Ex. 200 at 4.9-11.) In addressing the City’s concern about LUT 1.5, Staff explained that while CVEUP will only employ two employees, the site would still contain a power plant whether or not CVEUP is built. Therefore, a use that employs more people on the site would not be possible. (Ex. 200 at 4.9-11.) Furthermore, “[a]s the proposed project involves the efficiency upgrades to an existing peaker power plant, the project would be a continuation and upgrade of an existing use and would not necessarily represent a new project for which Policy LUT 1.5 would apply.” (Ex. 200 at 4.9-11.)

MMC provides further evidence supporting CVEUP's compliance with these two General Plan policies in the Commission Override discussion in section IV below which addresses the project's benefits in more detail.

B. CVEUP Complies with the City's Zoning Ordinance

The second LORS issue is whether CVEUP complies with the City's Zoning Ordinance. The CVEUP site is zoned "ILP, Limited Industrial Precise Plan" but does not include a Precise Plan according to the FSA. (Ex. 200 at 4.5-5.) Allowable activities in this zone include, but are not limited to manufacturing, wholesale businesses, storage and warehousing, laboratories, electrical substations and gas regulator stations, car washing establishments, and other manufacturing uses determined by the Planning Commission to be of the same general character as other uses in the area. (Ex. 1 at 5.6-11, citing Chula Vista Municipal Code § 19.44.020.)

The project site is currently occupied by the 44.5-megawatt (MW) Chula Vista Power Plant that was approved by the City in 2000 and purchased by MMC in 2006. (Ex. 200 at 4.5-3 and Ex. 1 at 5.6-1.) Accordingly, the City has already determined that a power plant is consistent with the City Zoning Ordinances. The applicable ordinances have not changed since the approval in 2000. Staff has also determined that the project fits within the industrial character and zoning objectives of the City for the area by stating: "[g]iven the City's plans for maintaining and developing the Main Street area as an industrial corridor, the industrial pattern of development immediately surrounding the site, and the City's General Plan and zoning designations within a one-mile radius of the site, the implementation of the proposed CVEUP appears to be consistent with the City's goals and objectives for the pattern of development in the project area." (Ex. 200 at 4.5-27.)

EHC claims that Staff referred to power plants as "heavy" industrial uses that are "of a different industrial character than the rest of the use in the Main St. corridor. (Ex. 600 at 14.)

However, this assessment by EHC is misguided. Staff responded in the FSA by stating that Staff's reference to "heavy" industrial uses was made before Staff had conducted any land use analysis for the Staff Assessment process. (Ex. 200 at 4.5-39.)

This section sets forth all the reasons that CVEUP complies with the City's Zoning Ordinance.

1. The City's Approval of the Existing Chula Vista Power Plant Indicates Electrical Generation is a Conditionally-Permitted Consistent Use

In 2000, the City of Chula Vista Redevelopment Agency issued a SUP (now known as a Conditional Use Permit or CUP) to the existing 44.5-MW Chula Vista Power Plant, also a peaker. (Ex. 200 at 4.5-5.) The September 2000 City Redevelopment Agency Agenda Statement declared that the Limited Industrial zone "allows public and quasi public uses, like a peak load power plant, through a Special Use Permit." (Ex. 802 at 4-4.) The Agenda Statement then goes on to say that "[w]ith approval of the Special Use Permit (and the conditions listed in the Agency Resolution) the proposed project is determined to be consistent with the Zoning Ordinance, the Montgomery Specific Plan,⁴ and the General Plan of the City of Chula Vista." (Ex. 802 at 4-4.)

In determining whether CVEUP is consistent with the Limited Industrial zone, MMC specifically calls the Committee's attention to section 19.44.020(P) which sets forth that permitted uses include "[a]ny other limited manufactured use which is determined by the commission to be of the same general character as the above uses." (Ex. 620 at 19-99.) Land use regulations that provide open-ended provisions like that of section 19.44.020(P) are usually viewed by courts as a valid zoning technique. (*In re Stephen Scarpitti* (1981) 124 Cal.App.3d 434, 440.)

⁴ The Montgomery Specific Plan was deleted from the 2005 General Plan Update. See Ex. 200 at 4.5-6, Footnote 4.

Because the City issued a CUP for the existing Chula Vista Power Plant, the City has already determined that “peak load power plants” like CVEUP are of the same general character as other uses in the area. Furthermore, Staff agrees with this interpretation: “[B]y issuing a Special Use Permit (i.e., Conditional Use Permit) for the existing power plant, it is staff’s interpretation that the City 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 Chapter 19.44.” (Ex. 200 at 4.5-18.)

Moreover, Mr. Matt Frank testified that the Mitigated Negative Declaration for the Chula Vista Power Plant describes a category within the CEQA checklist regarding consistency with land use plans and policies, and that the corresponding box was checked "no impact." (10/2/2008 RT 288: 11-14 and Ex. 207 at 30.) This indicates that the City determined that the existing electrical generation use on site was consistent with the Zoning Ordinance. (10/2/2008 RT 288: 15-16.) “And because it was a use permit process, in my opinion, going through the use permit process and approving it means that they [City] did make that determination, that it was an acceptable use subject to the conditions that the use permit was approved.” (10/2/2008 RT 288: 17-22.)

Close scrutiny reveals that the applicable sections of the Zoning Ordinance pertaining to the Limited Industrial and General Industrial zones have not been substantially modified since the 1970s and 1980s, and there have been only minor adjustments since. (Ex. 620 at 19-98 to 19-104.) Consequently, the City’s zoning determination that peak load power plants are a conditionally permitted use within the Limited Industrial zone is still valid and applicable.

Because CVEUP represents the intensification of an existing conditionally-permitted use within the Limited Industrial zone, Staff agrees with MMC that the City views such a land use type to be appropriately sited at the proposed location. (Ex. 200 at 4.5-18.)

The Committee should accord great deference to the City's interpretation of its own zoning regulations. This is because a zoning ordinance is a legislative act and is therefore valid if it is reasonably related to the public welfare. *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.App.3d 511, 522. In particular, "the contemporaneous construction of a statute by an administrative agency charged with its administration and interpretation, while not necessarily controlling, is entitled to great weight and should be respected by the courts unless it is clearly erroneous or unauthorized." *Anderson v. San Francisco Rent Stabilization and Arbitration Board* (1987) 192 Cal.App.3d 1336, 1343.

In addition, the California Supreme Court has opined on the matter and has stated that "the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor." *Associated Home Builders of the Greater Eastbay, Inc. v. Livermore* (1976) 18 Cal.3d 582, 604-605.

This deferential standard of review should be applied to the City's interpretation of its Zoning Ordinance.

2. Electrical Generation is not a Prohibited Use in the Limited Industrial Zone

In addition to the City's determination that peak load power generation facilities represent a conditionally permitted public use within the Limited Industrial zone, the list of prohibited uses within that same zone does not include electrical generation facilities. (Ex. 620 at 19-99 to 19-100.) This provides further proof that the City views electrical generation as a conditionally permitted use within the Limited Industrial zone. If the City truly intended to entirely prohibit electrical generation in the Limited Industrial zone, it would have listed such a

use within the “prohibited uses and processes” section of the Zoning Ordinance. (Ex. 620 at 19-99 to 19-100.)

The fact that the Zoning Ordinance does not list electrical generation as a permitted use does not prevent the City from making a determination on whether or not the use is acceptable. (10/2/2008 RT 287: 10-14.) In referencing section 19.44.020(P) of the Zoning Ordinance, which allows for “[a]ny other limited manufactured use which is determined by the commission to be of the same general character as the above uses,” Mr. Frank testified that that “means that if it's not listed as a permitted use and if it goes through the conditioned use permit process that it may be considered acceptable in that zone. It's just not patently acceptable as permitted by right.” (10/2/2008 RT 287: 21-25.)

3. The Fact that Electrical Generating Plants are a Permitted Use in the General Industrial Zone Does Not Preclude Such Use in the Limited Industrial Zone

EHC emphasizes the point that the City’s Zoning Ordinance specifically includes “electrical generating plants” as a permitted use within the General Industrial zone. (Ex. 600 at 13.) However, the fact that a use is permitted in one zone, is irrelevant, “if something is not listed as a permitted use, it doesn’t necessarily mean it’s a prohibited use or only permitted in other zones.” (10/2/2008 RT: 20-23.)

Mr. Frank testified that the City most likely made a conscious decision to allow power plants in the General Industrial zone through a by-right ministerial process, but not to allow power plants, by right, in the Limited Industrial zone. (10/2/2008 RT: 305 15-20.) However, Mr. Frank stated that while the City may not have listed power plants as a permitted use in the Limited Industrial zone, it did not list it as a prohibited use even though those prohibited uses are explicitly listed (as discussed above). (10/2/2008 RT 305: 21-25 and 306: 1-3.) In permitting the Chula Vista Power Plant in 2000, the City decided not to allow a power plant *by right* in the

Limited Industrial zone, but to allow such use via the CUP process because it is difficult to list every potential use in every zone. (10/2/2008 RT 306: 10-17, emphasis added.) “It would be my interpretation that they [City] did make a conscious decision to not allow it [power plant use] by-right, which essentially puts it into the conditional use permit category where they can allow it as long as they subject it to a discretionary review process.” (10/2/2008 RT 306: 24-25 and 307: 1-4.) Mr. Frank added that a small peaking power plant like CVEUP would qualify as an unclassified use. (10/2/2008 RT 312: 3-15.)

Mr. Frank also noted that Chapter 19.54 (Unclassified Uses) of the Zoning Ordinance contains a category called quasi-public uses and section 19.04.190 defines quasi-public to mean used or seemingly public, for example, electrical substations shall be considered a quasi-public use of a public service type. (10/2/2008 RT 332: 6-11.) The Chula Vista Power Plant CUP reinforces the definition of a power plant as a public/quasi-public use by declaring: “The zoning on the currently vacant site (Limited Industrial) allows public and quasi public uses, like a peak load power plant, through a Special Use Permit.” (Ex. 802 at 4 and 10/2/2008 RT 341: 23-25 and 342: 1-2.)

Moreover, the City concurred that it would issue a CUP for CVEUP if it were subject to the City’s permitting process. Specifically, Mr. Scott Tulloch stated: “[I]t’s [the City’s permitting process] is pretty consistent with what you’ve heard. And that is that the unclassified use category gives the city flexibility where they haven’t either prohibited or specifically allowed a use. It gives them the flexibility to go through that process to determine a specific basis for a specific project.” (10/2/2008 RT 336: 1-8.) Mr. Tulloch added that the Commission’s permitting process was sufficient and that the City did not feel the need to conduct a separate permitting process. (10/2/2008 RT 336: 21-25.)

In agreeing with Mr. Frank's testimony, Staff's witness, Ms. Negar Vahidi asserted that a power plant "could be an unclassified use because it provides the city latitude to make decisions on uses they didn't think about when they put the zoning in place, or the list of categories in place." (10/2/2008 RT 327: 10-14.)

Ms. Vahidi further added that one of the conditional uses listed for the Limited Industrial zone was hazardous waste facility which, in her opinion, represented a highly industrial use that is of heavier intensity than a power generation use. (10/2/2008 RT 326: 22-25 and 327: 1-4.) MMC agrees and notes that CVEUP does not share any of the objectionable characteristics of uses that are specifically prohibited in the Limited Industrial zone, such as the manufacturing of asphalt, cement, rubber, chemicals, coal products, explosives, and fertilizers, the tanning of hides, the storage of fireworks, or refining of petroleum products. (Ex. 5 at 4.)

In addition, Staff declares that its assessment is focused on analyzing CVEUP's impacts at the proposed site, not on the impacts within a different zone. "[A] discussion of other zoning designations at other locations in the City is irrelevant to the analysis of the proposed project impacts in the Land Use section." (Ex. 200 at 4.5-38 to 39.)

4. CVEUP is a Manufacturing Use

Because it will manufacture electricity, CVEUP fits within the permitted uses of the City's Limited Industrial zone. (Ex. 620 at 19-99.) Specifically, CVEUP qualifies as "[a]ny other limited manufactured use which is determined by the commission to be of the same general character as the above uses" pursuant to section 19.44.020(P) of the Zoning Ordinance. (Ex. 620 at 19-99.) The CEC has regularly identified power plants as manufacturing uses within similar "Light Industrial" zones. For example, the Riverside Energy Resources Center was determined to be consistent with the "Manufacturing Park (MP)" zone in the City of Riverside. (Ex. 24 at 1.)

Furthermore, the manufacturing of electricity at a 100MW peaking facility is most likely a use that is of the "same general character" as the specifically-named permitted uses, such as the manufacture of "products from previously prepared materials" or the manufacture of "electrical and electronic instruments, devices and components." (Ex. 620 at 19-98, quoting § 19.44.020(A)-(B) of the Zoning Ordinance.)

5. Several Other Recent Commission Siting Cases Have Certified Electric Generation Projects in Limited Industrial or Equivalent Zones

MMC's Exhibit 24 presents a list of seven recent siting cases where the Commission approved peak load power plants in limited industrial or equivalent zones. (Ex. 24 at 1.) All of these cases represent situations where the Commission certified peaking facilities similar to CVEUP in limited industrial zones, similar to the Chula Vista Limited Industrial zone, often when a heavier industrial zone existed. (Ex. 24 at 1.) Mr. Frank testified that each of these jurisdictions portrays a similar pattern of industrial zoning to the City of Chula Vista. (10/2/2008 RT 291: 9-11.) Yet, MMC stresses that each of the projects listed in Exhibit 24 are unique and not exactly like CVEUP, just similar in type and zoning. (10/2/2008 RT 301: 1-18.)

III. THERE ARE NO FEASIBLE ALTERNATIVES THAT WOULD ELIMINATE ANY NONCOMPLIANCE AND MEET THE PROJECT OBJECTIVES

The Committee asks the parties to address whether any feasible alternative sites would eliminate any potential noncompliance. Despite the fact that CVEUP is in full compliance with both the City's General Plan and the Zoning Ordinance, MMC still elects to speak to this topic and answer the Committee's requested briefing topic related to feasible alternative project sites.

CVEUP will be a nominal 100 MW peaking facility with quick start capability and will provide needed peak electric generation with improved efficiency. The project will replace the Chula Vista Power Plant's older less efficient technology. (Ex. 200 at 6.) The project would use much of the Chula Vista Power Plant's existing infrastructure including: the existing

transmission connection to the SDG&E Otay Substation; natural gas, water, and sanitary sewer pipelines; fencing and sound attenuation wall; utility/control building; stormwater runoff retention basin; and aqueous ammonia storage tank and refilling station. (Ex. 200 at 6-3.)

CVEUP has the following four staff-approved project objectives:

- To construct and operate a cost-effective and efficient nominal 100 MW, natural gas fired, peaking load generating facility with quick start capability;
- To minimize or eliminate the length of any project linears, including gas and water supply lines, discharge lines, and transmission interconnections;
- To deliver electricity to the SDG&E Otay Substation at 69 kV without the need for transmission system reconductoring; and
- To provide voltage support to the local 69 kV transmission system.

(Ex. 200 at 6-5; 10/2/2008 RT 351: 8-15.) An alternative may be found infeasible on the ground that it is inconsistent with the project objectives. CEQA caselaw supports this assertion. (See *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1503; *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1401; and *Sequoyah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 715.)

MMC agrees with Staff's conclusion that there are no feasible alternative project sites that would reduce or avoid CVEUP's adverse environmental impacts for two reasons. First, as Staff and MMC have noted above, CVEUP will fully comply with the General Plan and Zoning Ordinance; second, as discussed below, CVEUP will not create any significant adverse environmental impacts that will not be mitigated; and third and more importantly, the three alternative project sites that could meet the siting criteria offered no environmental advantage over the project and/or are economically infeasible. (Ex. 200 at 6-1.) MMC also agrees with Staff's conclusions that there are no feasible alternative generation technologies and that the "No

Project” alternative failed to meet any project objectives and also failed to provide any of CVEUP’s benefits. (Ex. 200 at 6-1, 6-14-6-15.)

It should be noted that the Warren-Alquist Act exempts projects like CVEUP from having to discuss alternatives. This exemption applies when a project is proposed to be located at an existing industrial site and the project has a strong relationship to that site. (Pub. Res. § 25540.6(b).) Here, CVEUP is intended to replace the existing Chula Vista Power Plant and utilize virtually all of the existing plant’s infrastructure i.e., transmission, natural gas, water, and sanitary sewer. (Ex. 200 at 6-3.) Thus, as Staff noted, the Commission is not required to consider project alternatives because CVEUP would be located at an existing industrial site and CVEUP has a strong relationship with this site. (Ex. 200 at 6-3.) However, because of requests from the City, project interveners, and members of the public, Staff elected to analyze alternatives to CVEUP.

A. There are No Feasible Alternative Sites for CVEUP

Staff established certain criteria for identifying potential alternatives sites. Under this criteria, Staff concluded that potential sites were rare because many of the suitable sites were already or are currently being developed or have a significantly higher environmental value than the CVEUP site. (Ex. 200 at 6-6.) Despite the lack of sites meeting Staff siting criteria, Staff did identify five potential alternative sites for further evaluation (two sites proposed by MMC and three sites identified by Staff). (Ex. 200 at 6-6.) Two of these five alternative sites were rejected from more thorough analysis for various reasons including greater biological impacts, longer distance from the Otay Substation, and incompatibility with the City Redevelopment Agency’s plans to develop recreational facilities. (Ex. 200 at 6-7.) As a result, Staff’s alternatives siting analysis focused on the potential project sites: 1) the intersection of 4th Avenue and Main Street; 2) Faivre Street and Broadway; and 3) the Otay Landfill. (Ex. 200 at 6-7 to 6-9.)

1. The 4th Avenue and Main Street Alternative is Infeasible

One alternative location is located near the intersection of 4th Avenue and Main Street approximately 0.5 mile west of the proposed CVEUP site (“Alt. 1”). This site is approximately 3.87 acres and is currently being used for strawberry farming. (Ex. 200 at 6-7.) In contrast to the CVEUP project site, Alt. 1’s site would require installation of various infrastructure. This new construction includes building a switch yard, constructing a 0.6 mile transmission line to connect to the Otay Substation, and installing pipelines to connect with SDG&E’s gas pipeline as well as potable water and sewer. (Id.) Noise attenuation walls are also likely to be required because the nearest residential receptor is approximately 50 feet closer to this site as compared to the CVEUP site and the distance to public schools is 300 feet closer. (Ex. 200 at 6-7.) Additionally, it is unknown if site control is possible at this location. (Ex. 200 at 6-8.)

Staff determined that Alt. 1 had greater potential for environmental impacts than CVEUP. The trenching activities associated with the new linears that Alt. 1 requires would cause greater adverse traffic impacts as compared to CVEUP. (Ex. 200 at 6-7.) Also, being closer to a school and residence would arguably lead to greater noise impacts to those sensitive receptors. As a primary gateway to the City, Alt. 1’s location has greater sensitivity to visual resources and, as a result, Staff determined that this site would have a greater impact on visual resources. (Ex. 200 at 6-8.) Developing a greenfield site like Alt. 1 also has greater potential to disturb buried cultural resources as compared to building on a previously disturbed site like CVEUP. (Id.) Furthermore, impacts to biological resources could also be greater because this site is undeveloped and used for agriculture. (Id.) Reducing biological impacts at this site could be especially challenging because as noted by Commission Staff and staff from the California Department of Fish and Game, finding appropriate mitigation land in San Diego County can be very difficult. (Ex. 200 at 6-17.) Also of note, this site is currently being used for strawberry

farming and as a result, constructing a power plant on this site would displace farmed acreage thereby negatively impacting the preservation of local agriculture in San Diego County. Because CVEUP would not result in any significant adverse environmental impacts and also because Alt. 1 would cause greater environmental impacts than CVEUP, this alternative is not feasible. (*See* Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

2. The Faivre Street and Broadway Alternative is Infeasible

A second alternative location is located near the intersection of Faivre Street and Broadway approximately 1 mile west of the proposed CVEUP site (“Alt. 2”). This undeveloped site is approximately 2.57 acres. Similar to Alt. 1, Alt. 2 would require installation of various infrastructure. A switch yard, a 1.2 mile transmission line, a 0.85 mile gas pipeline, and potable water and sewer lines would need to be constructed at Alt. 2’s site. (Ex. 200 at 6-8.) Noise attenuation walls are also likely to be required because the nearest residential receptor is approximately 50 feet closer to this site as compared to the CVEUP site. (Ex. 200 at 6-8, 6-10.) Additionally, it is unknown if site control is possible at this location. (Ex. 200 at 6-8.)

Similar to Alt. 1, Staff determined that Alt. 2 had greater potential for environmental impacts than CVEUP. Trenching will be required to install this alternative’s linears and as a result, Staff determined that this construction would result in greater traffic impacts than CVEUP. (Ex. 200 at 6-8.) Furthermore, being closer to residences could arguably lead to greater noise impacts as compared to CVEUP. Also, Staff determined that Alt. 2 would have greater visual impacts as compared to CVEUP due to this alternative being adjacent to Broadway, a major thoroughfare. (Id.) Developing a greenfield site also has greater potential to disturb buried cultural resources as compared to building on a previously disturbed site. (Id.) As an undeveloped site located adjacent to the Otay Valley Regional Park preserve, developing this

site presents a greater likelihood of impacting biological resources. (Id.) Not only could this site provide habitat linkage from the preserve, but there is also a possibility that a portion of this site is covered by the Chula Vista Subarea Multi-Species Conservation Plan 75%-100% development limitation. Of note, reducing biological impacts at this site could be especially challenging because as stated by Commission Staff and staff from the California Department of Fish and Game, finding appropriate mitigation land in San Diego County can be very difficult. (Ex. 200 at 6-17.) Therefore, because CVEUP will comply with land use LORS, will not result in any significant adverse environmental impacts (as discussed more fully below) and also because Alt. 2 would cause greater environmental impacts than CVEUP, this alternative is not feasible. (See Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

3. The Otay Landfill Alternative is Infeasible

The third alternative location analyzed by Staff is the Otay Landfill at 1700 Maxwell Road in the City (“Staff Alt. C”). The landfill is owned by Allied Waste Company and located on site are two 3.4 MW methane burning power plants that are owned and operated by Covanta Energy. (Ex. 200 at 6-9.) Covanta Energy has a lease with Allied Waste Company and owns the gas rights under the landfill. (Id.) Although sufficient land is available for development adjacent to the existing methane burning power plants, additional linear facilities will be required to accommodate a new power plant like CVEUP. (Ex. 7 at 9.) These additional linear facilities include an approximately 3-mile long transmission line to connect with the Otay Substation, a 0.45 mile gas pipeline, and a 0.2 mile potable water pipeline. (Id.) Additionally, it is unknown if site control is possible at this location. (Id.)

Staff Alt. C fails to meet all the Staff-approved project objectives. (10/2/2008 RT 360: 11-12.) It is a project objective to minimize or eliminate the length of any project linears,

including gas and water supply lines, discharge lines, and transmission interconnections. (Ex. 200 at 6-5.) Unlike CVEUP which would utilize the existing project linears at its site, Staff Alt. C would require construction of over 3.5 miles of project linears i.e., 0.45 mile gas pipeline, 0.2 water pipeline, and 3 mile transmission line. (Ex. 200 at 6-9.) As a result, this alternative fails to meet the project objective related to minimizing or eliminating project linears.

The construction of Staff Alt. C's new linear facilities will also result in greater impacts to traffic and transportation as compared to CVEUP. Constructing the approximately 3-mile long transmission line could include underground construction along Main Street. (Ex. 200 at 6-9.) Combining construction of the transmission line with the gas and water pipelines, this alternative will have a much greater impact on traffic and transportation as compared to CVEUP which does not require construction of any linear facilities. (Ex. 200 at 6-3.)

Also, siting a power plant at the landfill raises significant environmental and safety concerns. Even though the landfill is compacted, constructing a power plant like CVEUP at the landfill raises concerns of subsidence or settling. (Ex. 5 at 26.) To address these concerns, stabilizing a power plant like CVEUP would require several large columns to support the foundation. (Id.) Placing these columns would disturb the landfill's containment liner and drainage system and complex engineering measures would be needed to prevent landfill contaminants from polluting groundwater. (Id.) Additionally, methane gas produced by the landfill would present a significant explosion hazard when a power plant like CVEUP is located on site. (Id.) To mitigate this explosion hazard, gas would need to be vented away from the power plant and a system installed to detect dangerous levels of gas. (Id.) And given the fact that CVEUP will fully comply with land use LORS and because Staff has determined CVEUP will not cause any significant adverse environmental impacts (as discussed more fully below),

any benefit from Staff Alt. C's longer distance from sensitive receptors is diminished. And considering Staff Alt. C's greater impacts on traffic, and Staff Alt. C's unique environmental and safety hazards, this alternative is not feasible. (See Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

Moreover, the engineering and permitting requirements associated with locating the project at the landfill cause this alternative to be cost prohibitive. Commission and CEQA regulations require consideration of "feasible" alternatives. (Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a).) And CEQA defines feasible as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (emphasis added) (Cal. Pub. Res. Code § 21061.1; Cal. Code Regs., tit. 14, §15364.) As discussed in the previous paragraph, Staff Alt. C would require complex engineering to address landfill specific issues related to subsidence, drainage, groundwater pollution, and gas explosion hazards. (Ex. 5 at 26.) These engineering requirements would be cost prohibitive. (Id.) Also, the permitting process would be more involved and expensive because approvals would be needed not only from the Commission, but also the California Waste Management Board. (Id.) Moreover, because transmission and gas lines for the energy industry generally cost \$1 million per mile, construction of the 3-mile long transmission line and 0.45 mile gas pipeline would result in approximately \$3.45 million of additional costs that CVEUP does not have. (10/2/2008 RT 355: 5-12.) Given the significant additional costs that Staff Alt. C has as compared to CVEUP, this alternative's failure to meet all project objectives, and the environmental impacts associated with locating a power plant on a landfill, Staff Alt. C is an infeasible alternative.

In summary, even though an alternative site is not necessary due to CVEUP's full compliance with City land use LORS, MMC and Staff have determined that no feasible alternative sites for the proposed CVEUP exist.

IV. THE CALIFORNIA ENERGY COMMISSION CAN FIND OVERRIDING CONSIDERATION FOR CVEUP

The Committee asks whether the Commission can override any provision of the General Plan or the Zoning Ordinance should CVEUP not comply, pursuant to section 25525 of the California Public Resources Code (Warren-Alquist Act) and section 1752(k) of Title 20 of the California Code of Regulations. MMC responds that no LORS inconsistencies exist (as demonstrated in detail in section II above), therefore no override finding by the Commission is necessary. Furthermore, although not mentioned in the Briefing Order, MMC has demonstrated the construction and operation of CVEUP will not create a significant environmental impact (see sections II and VI of this brief for a discussion of project related impacts in contested subject areas.) However, should the Commission choose to engage in an override, it will find that CVEUP's compelling local and statewide benefits dictate that the Commission should override any such inconsistencies.

A. CVEUP Directly Comports with Statutory Override Criteria and is Precisely Suited to an Override Determination Under the Energy Commission's Previous Decisions

The Commission override standard, as set forth in California Public Resources Code section 25525 and applied in the three licensing cases described below, calls for the Commission to consider whether a project is required for public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity. The public convenience and necessity element looks to whether the project in question would provide a local benefit to the community and add reliability to the statewide system. The more prudent and feasible means element looks at whether the project, as proposed, is at least as

prudent and feasible a means as the alternatives for achieving these benefits. This has been interpreted to require the Commission to consider the project's environmental impacts, efficiency, consumer benefits and contribution to electric system reliability.

PRC section 25525 presents the statutory standard for override:

The commission may not certify a facility contained in the application when it finds . . . that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

The Commission has repeated these requirements in Cal. Code Regs., tit. 20, § 1752(k), which provides in relevant part:

(k) With respect to any facility which does not comply with an applicable state, local or regional standard, ordinance or law, findings and conclusions on whether the noncompliance can be corrected or eliminated; and if such noncompliance cannot be corrected, findings on both 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.
- (3) Any other findings and conclusions relevant to the commission's decision.

1. Commission Override Decisions Unhesitatingly Apply These Standards to Further State Energy Policies and Otherwise Meet Public Need for Electricity

In the absence of judicial decisions interpreting § 25525, the Commission has repeatedly resorted to Pub. Util. Code § 1001 as a tool for interpreting the phrase "convenience and necessity." (*E.g.*, El Segundo Decision at 296.) The Commission has observed:

In this context, "necessity" is not used in the sense of something that is indispensably requisite. Rather, any improvement which is highly important to

the public convenience and desirable for the public welfare may be regarded as necessary.

(*Id.*) In determining convenience and necessity, the Commission has broad discretion,⁵ so long as that discretion is exercised consistently with the policies and purposes of the Warren-Alquist Act.

a. Prior Commission Decisions Granting an Override Consistently Reflect The Exercise Of Discretion In Favor Of Furthering State Energy Policies

In three override decisions, the Commission has taken as its starting point for finding public convenience and necessity the extent to which a project is reasonably related to the goals of the Warren-Alquist Act, which expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. (Metcalf Energy Center (MEC) Decision at 463; El Segundo Power Redevelopment Project (El Segundo) Decision at 296; Los Esteros Critical Energy Facility, Phase 2 (Los Esteros) Decision 367-368.) Moreover, the Warren-Alquist Act declares it is the responsibility of state government to ensure the state is provided with an adequate and reliable supply of electrical energy. (Los Esteros Decision at 368 (citing Pub. Resources Code § 25001).) In applying § 25525 override criteria, the Commission has consistently held that determining "public convenience and necessity" must rely on the totality of the evidence of record and consider environmental impacts, consumer benefits, and electrical system reliability – hewing precisely to the criteria set forth in that statute. (*E.g.*, Decision to Certify the Metcalf Energy Center, (MEC) at 461.)

⁵ *California Motor Transport Co.*, 28 Cal.Rptr. at pp. 871-872.

- b. In Determining Whether There Are Not "More Prudent And Feasible Means" To Achieve Public Convenience And Necessity, Commission Decisions Consistently Balance Project Benefits Against LORS Inconsistency

Applying the "more prudent and feasible means" criterion, the Commission stated in its MEC Decision, "In essence, the lack of conformity of a project with LORS is to be balanced against its benefits." (*Id.*) Nothing in the law suggests, however, that this aspect of the Commission's task is intended to affect the statutory override criteria or to dilute the Commission's authority and responsibility to give full effect to the Warren-Alquist Act and related state energy policies.

- c. Prior Commission Decisions Granting an Override Have Consistently Turned On The Straightforward Issue Of Need For Electricity

High load areas in California inevitably present more complex land use issues for site locations. In a direct reflection of California's critical need for greater supply, however, the Commission's previous override decisions present no especially complex analysis: in essence, where high demand areas have been shown to need additional local electricity generation and that providing that generation addresses the statewide need for more supply, the Commission has not hesitated to override local land use LORS.

- d. The Metcalf Energy Center (MEC) Decision

In the MEC Decision, for example, the Commission found the evidence of record conclusively established that:

- The MEC project would generate electrical energy, and that energy would be consumed in the local area.
- The San Jose area uses much more electrical energy than is generated locally and, consequently, there is a need for more generation to address both demand and reliability concerns.
- The hallmark industries in the San Jose/Silicon Valley area are heavily dependent upon a reliable and adequate supply of electrical energy.

(MEC Decision at 464-465.) The Commission concluded: "Since the MEC will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." (*Id.*) With respect to whether "more prudent and feasible" alternatives existed, the Commission referenced its Alternatives discussion and pointed out that no better alternatives were available since each alternative presented LORS inconsistencies of its own and/or adverse environmental impacts. (*Id.* at 468.) Finally, the Commission noted that timing was a critical consideration. (*Id.*)

e. The Los Esteros Decision

In the Los Esteros Decision, the Commission made three points regarding public convenience and necessity. First, the Decision stated the evidence conclusively established that the project would meet the goals and policies of the Warren-Alquist act by generating electrical energy and having that energy consumed in the local area. (Los Esteros Decision at 368.)

Second, the evidence established that the San Jose area uses much more electrical energy than is generated locally, and consequently, there was a need for more generation to address both demand and reliability concerns. (*Id.*)

Third, the Decision noted the enabling statute focuses on electricity's essential nature to the welfare of the state as a whole and substantial additions to the state's generating system are needed. "Since the LECEF will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." (*Id.*)

In discussing the lack of more prudent and feasible means, the Commission straightforwardly applied the balancing test described above, taking into account the project's impacts upon the environment, consumer benefits, and electric system reliability as specified in §

25525, while giving substantial but not overwhelming weight to avoiding LORS noncompliance. (*Id.* at 369.)

The Commission found the project would not create any significant direct or cumulative adverse environmental impacts. Furthermore, there were numerous mitigation measures and Conditions of Certification in place to ensure all of the project's impacts were reduced to below levels of significance. In fact, the project could provide environmental benefits by displacing or encouraging the retirement of older plants which do not meet current environmental performance standards. (*Id.*)

f. The El Segundo Decision

In its El Segundo Decision, as in the other override analyses, the Commission began by assessing whether the El Segundo project was reasonably related to the goals and policies of the enabling legislation (the Warren-Alquist Act). The El Segundo project satisfied this objective in that it would generate electricity, which would be available for consumption in the local area. (El Segundo Decision at 296.)

In addition, the Decision noted the El Segundo project would provide electricity to the state as a whole. "The evidence establishes that the El Segundo project's duct-firing capability will provide the electrical system with flexible peaking capacity that is necessary to keep the electrical grid stable." (*Id.* at 297.) The Commission then explained the need for increased supplies of electrical energy in Southern California and throughout the state over the next several years. In fact, the Commission found the retirement of several aging power plants in the South Coast region, along with continued economic and population growth, were contributing to a tight supply-demand situation. (*Id.*)

With respect to its alternative means analysis, the Commission stated that the net result of the potential use of any of the alternative sites or alternative cooling options appeared to be

reasonably likely to create potential problems at least comparable to or greater than those encountered by the proposed project. Therefore, none of the various alternative proposals provided a more prudent and feasible means of achieving public convenience and necessity.

(Id.)

In sum, previous override decisions have laid heavy emphasis on the need for electric energy generation, in keeping with the Commission's charge under the Warren-Alquist act. While each site considered presented its distinct land use issues – and the Commission considered both consumer benefit and mitigation evidence in far more detail than presented above – the core analysis in each override decision pivots on the question of whether the project can supply a need that is recognized under state energy policy. And in each instance, the Commission has not hesitated to make the decision to further this policy.

2. In Furtherance Of State Energy Policy, The Commission Has Overridden More Significant LORS Than Any Potentially At Issue Here

While the LORS EHC seeks to protect (i.e., General Plan Policy E6.4 and Zoning Ordinance chapter 19.44) may cause local concern, relative to other LORS the Commission has addressed they are neither unique nor especially pressing. In the three Commission Decisions described above, the Commission chose to override LORS that were at least as important to the city or county in which those facilities were located. In fact, the MEC, Los Esteros and El Segundo Projects involved Commission overrides of either more numerous, comparable, or statewide LORS.

In its MEC Decision, the Commission chose to override a multitude of LORS, specifically "the provisions of the General Plan, zoning ordinances, and other LORS . . . which would prohibit construction and operation of the MEC project at the proposed location," including: (1) Sections of the City of San Jose 2020 General Plan, including portions of the land

use/transportation diagram, the economic development major strategy, residential land use policy, industrial land use policy, urban service area policy, urban design policy, scenic routes policy, trails and pathways policy, riparian corridor policy, noise policy and land use compatibility guidelines for community noise; (2) Section 20.20.100 of the San Jose Municipal Code "Allowed Uses and Permit Requirements"; (3) Sections of the North Coyote Valley Campus Industrial Master Development Plan including the general goals, the public improvement guidelines, the private improvement guidelines, the general development plan standards and the environmental performance standards; (4) Sections of the site design and building and fixtures design guidelines of the Riparian Corridor Policy Study; and (5) Certain policies from the Santa Clara County General Plan. (MEC Decision at 469 and App. E.) That list consists of considerably more LORS than are at issue here, yet the Commission had no trouble exercising its responsibility to override all of them in order to meet the clearly countervailing demands of public convenience and necessity.

In its Los Esteros Decision, the Commission specifically overrode the conflicting provisions of the City of San Jose's zoning ordinances which "would prohibit construction and operation of the [Los Esteros] project at the site discussed herein." (Los Esteros Decision at 372). The land use section of the decision found that the Los Esteros project required a zoning change, specifically an amendment to the then-existing Planned Development Zone. (Los Esteros Decision at 365.) The Los Esteros project's conflict with the City of San Jose LORS was considerably more acute than CVEUP's supposed conflict with the City of Chula Vista LORS. Yet, in the Los Esteros Decision, the Commission again chose to override the conflicting City of San Jose LORS in favor of supplying an important need for local electricity generation.

Finally, in the El Segundo Decision, the Commission expressly overrode applicable provisions of the California Coastal Act and the City of El Segundo's Local Coastal Program. (El Segundo Decision at 295.) The Commission decision to override a California state law shows that EHC's LORS concerns are certainly no weightier than what the Commission has previously set aside as a means to achieve more significant statewide ends.

B. CVEUP Provides Extensive Community and Consumer Benefits

As discussed below, the project benefits to the consumers, the local community and the local electric system clearly outweigh any issues related to LORS nonconformity.

1. The Record Identifies Several Consumer Benefits of CVEUP

First, CVEUP would provide property taxes that would be substantially greater than the current property taxes from the site due to the increased value of the new equipment. (Ex. 1 at 1-1.) Specifically, CVEUP will generate about \$800,000 in property taxes annually. (Ex. 200 Addendum at 10.) In addition, CVEUP would help to further the redevelopment goals of the Southwest Redevelopment Area by ensuring that the industrial use on site remains viable, and complements ongoing industrial and commercial development in the area while minimizing impacts on the neighboring community. (Ex. 1 at 1-1.) The distribution of the property taxes from CVEUP would include about \$160,000 in housing set-aside, \$88,000 to the Chula Vista Elementary School District, \$57,000 to the Sweetwater Union High School District, \$15,000 to Southwestern College, \$68,000 to the County of San Diego, \$8,000 to the County Office of Education, \$6,000 to the County Administration and \$398,000 to the Redevelopment Agency. (Ex. 1 at 1-13 and Ex. 200 Addendum at 8.) MMC will also provide the benefit of being subject to the City's Utility Users' Tax (UUT) despite Federal Energy Regulatory Commission determinations regarding the electric portion of the UUT otherwise. (Ex. 21 at 2 and Ex. 200 at 4.9-6.) The UUT provides for an additional approximately \$63,000 in taxes annually.

The project will provide for a peak of approximately 160 construction jobs over an 8-month period. In addition to the direct employment benefit, CVEUP will require and use the services of local or regional firms for major maintenance and overhauls, plant supplies, and other support services throughout the life of the facility. (Ex. 1 at 1-13.) The cost of materials and supplies required by the project during construction of CVEUP (and demolition of the existing plant) is estimated at approximately \$14.5 million. (Ex. 1 at 5.10-17.) The estimated value of materials and supplies that will be purchased locally during construction and demolition is \$1.8 million. (Ex. 1 at 5.10-17.)

CVEUP will provide about \$8.9 million in construction and demolition payroll, at an average rate of \$58 per hour, including benefits. (Ex. 200 at 3-5.) It is expected that approximately \$8.01 million will stay in the local area during the 8-month construction period. These additional funds will cause a temporary beneficial impact by creating the potential for other employment opportunities for local workers in other service areas, such as transportation and retail. (Ex. 1 at 5.10-17.)

Operation of CVEUP will generate a small but permanent beneficial impact by creating employment opportunities for local workers through local expenditures for materials, such as office supplies and services. The average salary per operations employee is expected to be \$56,000 per year, excluding benefits for two full-time contract employees. There will be an annual operations and maintenance budget of approximately \$1.25 million of which \$300,000 is estimated to be spent locally, (i.e., within San Diego County). These additional jobs and spending will generate other employment opportunities and spending in the City of Chula Vista and San Diego County area. (Ex. 1 at 5.10-19.)

The total local sales tax expected to be generated annually during construction and demolition is \$139,500 (i.e., 7.75 percent of local sales). Assuming all local sales are made in Chula Vista, the maximum sales tax the City could receive is \$22,500 (1.25% of \$1.8M) during the construction and demolition period. (Ex. 1 at 5.10-18.)

Furthermore, MMC will also provide \$210,000 in direct funds to the City, in addition to the funds contributed for air quality related mitigation for the local area. (Ex. 21 at 1.) This contribution from MMC will give the City the ability to use these funds in the affected local community for energy efficiency and related improvements to homes and local businesses. “These funds are intended to directly benefit the local residents potentially most directly affected by the reconstructed plant and shall be payable to the City within 30 days of the CEC final decision regarding CVEUP.” (Ex. 21 at 1.)

In addition to the direct funds to the City, MMC will also fund the estimated cost of mitigating the air emissions from CVEUP at a 1:1 ratio at the level outlined in the FSA and at the fixed cost of \$210,000. (Ex. 21 at 1.) If the City cannot identify a mitigation project that meets Commission Staff criteria, the \$210,000 will be contributed to the Carl Moyer program administered by the San Diego Air Pollution Control District. (Ex. 21 at 2.)

Yet another benefit is MMC’s agreement with the City to provide funding for the equipment, software and installation costs to establish the wireless Evapotranspiration Weather Station. (Ex. 21 at 2.)

If the City decides to underground the existing transmission lines on Albany Avenue between Main Street and Orange Avenue, MMC has agreed to pay for half of the additional cost required to place those transmission lines below ground. (Ex. 21 at 2.)

This extensive list of community benefits demonstrates the contribution CVEUP will make to the City and the local community.

2. CVEUP Will Aid in the Removal of the Reliability Must Run Status for the South Bay Power Plant

It is a primary goal of the City to remove the Reliability Must Run (RMR) status of the South Bay Power Plant. (10/2/2008 RT 6: 18-21.) The City seeks to demolish the South Bay Power Plant because it relies on outdated, less efficient technology and its presence creates a blight on the City's waterfront. (10/2/2008 RT 7: 11-14.) But in order to accomplish this, the California Independent System Operator (CAISO) must find that the power generated by the South Bay Power Plant is no longer necessary (i.e., it can remove the RMR status.) (Ex. 801 at 1.)

Therefore, more power must be generated in the South Bay region in order to reduce the need for the South Bay Power Plant and remove its RMR status. CVEUP will help the City achieve its goal of demolishing the South Bay Power Plant. Ms. Irina Green of CAISO testified that CVEUP will contribute to the removal of the RMR status of the South Bay Power Plant. (10/2/2008 RT 234: 4-7; and RT 241: 24-25.)

As less efficient generation is replaced with current technology, the overall costs to electric consumers will decline because the marginal cost of generation will be reduced consistent with the reduced use of gas to generate electricity. The removal of the RMR status for the South Bay Power Plant is a direct example of this process. As more efficient generation is brought into service, older less efficient facilities will be removed from service. Over time, these individual actions provide overall efficiency improvements to the entire electric system.

C. CVEUP Will Contribute Substantially to Essential Elements of Local and Statewide Electric System Reliability

CVEUP will represent an efficient replacement for the existing in-city generation. (Ex. 200 at 5.3-6.) CVEUP will replace the existing Chula Vista Power Plant, which is much less efficient and emits much higher concentrations of air pollutants. (Ex. 1 at 1-12 and Ex. 200 at 3-5.) CVEUP would provide additional fast-start and peak electric generation capacity with improved efficiency. CVEUP would do this by reusing existing infrastructure, such as the existing transmission interconnection, water supply, and gas supply. (Ex. 1 at 1-2.) “Further, the configuration of CVEUP, as two simple-cycle power plants in parallel, allows for one of the turbine generators to be shut down, with the remaining machine still producing a percentage of the full power at optimum efficiency, rather than operating a single, larger machine at an inefficient part load output.” (Ex. 200 at 5.3-6.)

CAISO has identified a local reliability area that includes the cities of Chula Vista and San Diego, where power generation is needed to support local demand for electricity. Thus, CVEUP would help to meet identified local generation needs as well as the ability to produce electricity more efficiently than the current plant and thereby further the statewide goals of limiting the environmental effects of power generation. (Ex. 1 at 1-1.)

Furthermore, SDG&E circulated a Request For Offers (RFO) stating that additional peak electric generation capacity is needed in the vicinity. CVEUP would provide the fast-start capability that is required by the RFO and necessary to respond to steep increases in power demand. (Ex. 1 at 1-1.)

1. The Project Has Its Genesis In California's Recognized Need For Electric System Reliability, A Recognition Firmly Rooted In Legislative Enactments As Well As California Public Utility Commission and Commission Policies And Decisions

a. California's Energy Need Is Urgent And Immediate

In its *Opinion On New Generation And Long-Term Contract Proposals And Cost*

Allocation (D. 06-07-029 (July, 2006)) the CPUC summarized California energy policy in the simplest possible terms:

The State's energy policies - as noted in the Commission's and the California Energy Commission's (Commission) Energy Action Plan II (EAP II) and the Commission's Integrated Energy Policy Report (IEPR) - uniformly point to the need for the State to invest in new generation in both northern and southern California.

(D. 06-07-029 at 6 (footnote omitted).) In the referenced Energy Action Plan II (EAP II, 2005), the CPUC and the Commission jointly stated:

Significant capital investments are needed to augment existing facilities, replace aging infrastructure, and ensure that California's electrical supplies will meet current and future needs at reasonable prices and without over-reliance on a single fuel source.” *Even with the emphasis on energy efficiency, demand response, renewable resources, and distributed generation, investments in conventional power plants will be needed. The State will work to establish a regulatory climate that encourages investment in environmentally-sound conventional electricity.* Key Actions 3 and 4 implementing “Electricity Adequacy, Reliability and Infrastructure” state we will “encourage the development of cost-effective, highly-efficient, and environmentally-sound supply resources [after incorporating higher loading order resources] to provide reliability and consistency with the State's energy priorities,” and “establish appropriate incentives for the development and operation of new generation to replace the least efficient and least environmentally sound of California's aging power plants.”

(EAP II, 2005 at 7 (emphasis added).)

b. Meeting California's Energy Needs Turns On Developing More Efficient Gas-Fired Facilities To Complement Increased Renewables

Not surprisingly, the direction of energy policy described in the Commission's IEPR closely parallels the EAP discussion and CPUC decisions. In the 2007 IEPR, focused in large

part on the challenges of meeting the goals of developing renewable energy under AB 32, the Commission observed:

Even as California increases its use of preferred strategies of efficiency and renewable resources, conventional resources - natural gas, nuclear, coal and large hydroelectric - will continue to be the mainstay of the state's resource mix for the immediate future. Non-renewable generation resources and large hydroelectric currently account for 89 percent of the state's electricity supply. Even when California's 33 percent renewable target is met, two-thirds of the state's electricity will still come from conventional sources - the vast majority of those will be natural gas-fired. Of the nearly 24,000 megawatts of new capacity licensed since 1998, 36 plants - 12,910 megawatts - have been built and are in operation. An additional 2,278 megawatts are currently under construction, and 18 additional plants, totaling 8,361 megawatts, have been approved, but construction has not moved forward. Of these megawatts, 99 percent are fueled by natural gas and 1 percent by geothermal. While nuclear and "clean" coal-fired generation offer the potential to generate electricity with lower CO₂ emissions, the Energy Commission does not expect them to contribute significantly to the state's near-term AB 32 goals given the economic, environmental, and regulatory barriers these technologies face.

(2007 IEPR at 7.)

c. Flexible, Gas-Fired Generation Is Required To Replace Aging Facilities And To Integrate Renewables

Probably most significant for the Committee's consideration in the matter of a potential Commission override, the 2007 IEPR is replete with specific references to the need for resources to meet peak demand. The Report states that statewide annual peak demand is projected to grow, on average, 850 MW per year for the next 10 years, or 1.35 percent annually. Population growth in California's drier, warmer areas increases peak demand more than it increases annual energy consumption. (*Id.* at 44.) In the South Coast/San Diego region, peak demand is projected to increase by approximately 1,600 MW between 2007 and 2018, (*Id.* at 47, Fig. 2-8) as even more temperate climates become increasingly dependent on air conditioning. As the Report points out, the general decline in the load factor in California over the last 20 years is caused, in part, by a greater proportion of homes in warmer areas and more homes and businesses with central air

conditioning. (*Id.* at 95.) Moreover, "More than 75 percent of new single-family homes in the area are projected to have central air conditioning. These trends foretell a continuing reduction in the state's load factor and continuing concern about meeting peak energy needs." (*Id.*)

The 2007 Report goes on to consider effective means of meeting the challenge of increasing peak demand – and complementing the increase in renewables -- with a heavy emphasis on increasing the efficiency and flexibility of conventional generation.

Existing coal and nuclear plants and some recently built gas-fired baseload plants cannot ramp up and down as rapidly as needed to meet the increased peakiness of California's electricity load and the expected increased use of intermittent and must-take renewables to achieve 33 percent renewable electricity by 2020. . . . To meet the growing demand for air conditioning, California needs greater quantities of electricity that can ramp up quickly.

(*Id.* at 146.) The Report points to newer natural gas power plants, which are more efficient than older gas power plants and which "can ramp up and down more quickly to provide electricity to meet peak demand and system regulation requirements." The Report cautions that price volatility for natural gas can be problematic, but nevertheless concludes that California most likely will continue to build new natural gas power plants for years to come:

Natural gas power plants are also the best complement to renewable resources since they have the ability to come on line quickly when wind or solar resources lose output due to lack of wind or sunshine. Natural gas power plants have proven to be reliable providers of electricity for California.

(*Id.* at 218.) Continuing in this vein, the Report observes that newer natural gas electricity generation technologies provide efficiency and environmental benefits by reducing greenhouse gas emissions as they reduce the amount of natural gas used. (*Id.* at 239.) Newer, more efficient gas-fired plants are needed to replace aging, inefficient⁶ facilities: "[A]s electricity demand grows, California remains dependent on these older plants for summertime peak power.

⁶ Aging facilities can be between 25 and 62 years old, operate at only 33% efficiency, and remain idled during low-demand hours, burning natural gas and emitting greenhouse gas emissions without producing electricity. (*Id.* at 240.)

California must take serious steps to retire these aging facilities that are being misused as peakers and replace them with newer technology that can more effectively provide electricity when needed without added emissions." (*Id.* at 240.)

The Commission's 2005 IEPR took much the same approach to the challenges of meeting peak demand, noting that an additional problem in this area is that most new gas-fired power plants are combined cycle units designed to run at high load factors where they are most efficient, but unable to ramp up or down quickly enough to meet peak demand. "While some utilities have invested in simple-cycle peaking plants that run just a few hours each year, most of the state's new power plants are combined-cycle and are not well matched with swings in system demand. *California must quickly and thoughtfully craft solutions for meeting this increasingly 'peaky' demand.*" (2005 IEPR at 50 (emphasis added).) And even before AB 32, the Commission's attention was tuned to the challenge of adding renewables to California's energy portfolio, given that the availability of intermittent renewable sources simply doesn't track peak demand. "With significant wind energy in the mix, the need for controllable generation is larger." (*Id.* at 114.)⁷

2. SDG&E's Long Term Procurement Plan Is Integrally Related to Current Commission and CPUC Energy Policies and Strategies

SDG&E's Long Term Procurement Plan (LTPP) addresses elements of state forecast and procurement criteria. (R. 06-02-013.) Specifically, the LTPP states:

Identification of a need for up to 250 MW of new peaking capacity to be added in 2008 to meet local grid reliability concerns. SDG&E will seek early Commission action on these resources based on the need shown in this LTPP in order for the projects to be on-line in 2008. The number of megawatts that would be procured

⁷ The Commission's 2008 Update to the EAP II echoes this now-familiar refrain: "Even with energy efficiency, demand response, and renewable resources, investments in conventional power plants and transmission and distribution infrastructure will still be needed." (EAP II, 2008 Update at 15.) And again, "Finally, we recognize that some new fossil-fueled generation is probably in our future as well. Over the last decade and at present, the majority of such generation under development is natural gas." (*Id.* at 16.)

for 2008 is relatively small, and the additional peakers represent a prudent hedge against extreme circumstances.

(R. 06-02-013 at 2.)

The LTPP emphasizes its goal of retiring older generating units in its service area, which it hopes to achieve through the 2008 and 2010 peaker RFO for new generation. “The generation targeted for the service area will provide the needed local generation to meet SDG&E’s bundled customers’ local resource adequacy (RA) and energy requirements and satisfy the California Independent System Operator’s (ISO or CAISO) grid reliability criteria.” (R. 06-02-013 at 3-4.)

3. CVEUP and Projects Like it Significantly Advance California Energy Policy Implementation, and it is Therefore Required for Public Convenience and Necessity

As the discussion above should make abundantly clear, it is no coincidence that CVEUP is slated for a high-load center with inadequate local generation, that it is a flexible, quickly ramping, simple-cycle, fuel-efficient, low-emission plant capable of contributing substantially to meeting existing and growing local area peak demand. (R. 06-02-013 at 3-4, 21, 25.) Because advancing statewide energy policy is fundamental to Commission override decisions, it is hardly surprising, either, that the important contributions of CVEUP precisely track the project elements impelling the overrides in the MEC, Los Esteros and El Segundo decisions.

First and foremost, CVEUP will provide a local generation facility. The local area imports the vast majority of its power, resulting in transmission losses, inflexibility, and reliance on older, more polluting, less efficient plants. (10/2/2008 RT 416: 4-19.) CVEUP will make a contribution to local supply as demonstrated by its contribution to the generation needs to remove the RMR status of the South Bay Power Plant. The addition of local generation at this point is very important due to the delays suffered by nearby projects including Inland Empire, Otay Mesa, Pala and Margarita decreasing the amount of generation coming on line in the next

year. (10/2/08 RT 412: 9 to 413: 10 and R. 06-02-013 at 2.) Local generation was a critical component of the "public convenience and necessity" analyses in both the MEC and Los Esteros decisions.

Reliability was essential to previous override decisions, and CVEUP ably meets reliability criteria. CVEUP will improve local reliability and generation in an area that includes the City of Chula Vista, thereby meeting local generation and peaking capacity needs. (Ex. 1 at 1-1.) Adding reactive peaking power is essential to avoiding rolling blackouts and even uncontrolled loss of load associated with voltage collapse. In addition, CVEUP will be built and operated in a manner consistent with industry norms for reliable operation (Ex. 200 at 5.4-1) and will reliably connect to the CAISO-controlled grid. (Ex. 9 at 1.)

Whether CVEUP is viewed in light of the various – but universally agreed on – articulations of California energy policy, in light of specific decisions of the CPUC, or in light of criteria applied in the Commission's override decisions, there is simply no question that CVEUP is required for public convenience and necessity. As the demand for local generation in the local area increases, it is clear that CVEUP should be brought online as quickly as possible.

It is no exaggeration to point out that new gas-fired projects like CVEUP constitute a highly significant element of statewide energy policy and energy procurement strategy. On balance, they provide positive environmental benefits and are no less than essential to the integration of intermittent renewables into California's energy mix. If any LORS inconsistency truly exists here, a highly doubtful proposition, the Commission should exercise its statutory responsibility to override it.

V. PROPOSED FINDINGS AND CONCLUSIONS

MMC suggests the following language for the Committee's Land Use Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidence, we find as follows:

1. The project will comply with all land use LORS; therefore, a Commission override is not necessary.
2. The Condition of Certification LAND-1 set forth below is appropriate and will ensure that the project is constructed and operated in accordance with the City's minimum Limited Industrial zoning code standards, to the extent feasible. In addition, in its August 7, 2008 letter to the Commission staff, the City has stated that the implementation of the agreed upon "portfolio of local mitigation commitments . . . , will address any potential inconsistencies with the General Plan" (COCV 2008c).
3. The project would be compatible with existing on-site or nearby land uses, as it is consistent with the general character of these permitted uses and the planned development pattern for the City's Main Street Industrial Corridor.
4. The Land Use aspects of the project do not create significant direct or cumulative environmental effects.

VI. CEQA

CEQA requires government agencies to "first identify [significant] environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives." (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233.) This section addresses the Committee's requested briefing topic related to the project's potential significant adverse environmental impacts. This section initially discusses the correct environmental baseline for the analysis then walks through the contested topic areas and for each, answers whether feasible mitigation would reduce or avoid any potential impact. The discussion of feasible project alternatives and CEQA override are discussed separately from the contested topic areas.

A. Baseline for Assessing Impacts

1. The Baseline for Assessing Impacts Should Be the Existing Chula Vista Power Plant

The Committee has requested that the parties state what the environmental baseline should be for assessing impacts. The environmental baseline against which the Commission is to measure CVEUP's environmental impact should be the existing Chula Vista Power Plant. This idea that the existing setting should constitute the baseline is enshrined in CEQA Guidelines⁸ section 15125(a) which declares: "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant." (See also Ex. 200 at 4.5-33.) Furthermore, claims regarding whether the existing project is operating under a valid permit are also dismissed within the CEQA context for determining baseline. "[I]n general preparation of an EIR is not the appropriate forum for determining the nature and consequences of prior conduct of a project applicant." (*Riverwatch v. County of San Diego* [4th Dist. 1999] 76 Cal.App.4th 1428, 1452-1453.)

Although CEQA caselaw has supported the use of permit limits as the environmental baseline in determining whether a project is able to use a categorical exemption, MMC has not proposed to use the limits of the existing air permit in determining air quality impacts and potential mitigation for CVEUP. (See *Committee for a Progressive Gilroy v. State Water Resources Control Board* [3rd Dist. 1987] 192 Cal.App.3d 847.) MMC has produced the operating hours for the facility in previous years. (Ex. 3 at 3.) These actual operating hours provide a conservative base level of operation against which to compare the expected operation

⁸ Cal. Code Regs., tit. 14.

of the new facility. Although MMC has presented the maximum operating hours available under the applicable permits for the existing facility, for the purposes of calculating impacts, MMC and Staff have used the actual operating hours history from the Chula Vista Power Plant. (Ex. 3 at 3-4; Ex. 1 at 1-2 and 5.1-7 to 8; Ex. 200 at 3-4 and 4.1-40.) In fact, the operation of the Chula Vista Power Plant has increased over the few years MMC has owned the project, operating approximately 50 hours so far in 2008. (10/2/2008 RT 415: 18-24.) This existing level of operation constitutes the existing background conditions under which CVEUP should be analyzed.

Therefore, the existing on-site Chula Vista Power Plant is the baseline against which the Commission should assess the significance of CVEUP's impacts.

B. Air Quality

1. The Commission and the Public Need to be Informed of the Potential Maximum Air Quality Impacts and the Expected Air Quality Impacts of CVEUP and therefore, Both Levels of Impact Should be and were Assessed by MMC and Staff

CEQA specifies “[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment”. (Cal. Pub. Resources Code §21061.) As with any project permitted by the Commission both Staff and MMC have analyzed the air quality impacts of CVEUP at the maximum *permitted* emissions from 4000 hours of operation, 200 hours of warm starts and 200 hours of cold starts (“4,400 Hours”).⁹ (See Ex. 200 at 4.1-33 and Ex. 1 at 1-2; 10/2/08 RT 48: 18-21.) The total emissions by pollutant from operation at 4,400 Hours is shown both in the AFC and in the FSA. (See Ex. 200 at 4.1-34, Air Quality Table 20 and Ex. 1

⁹ The 4,400 hours were selected to be consistent with the level of operation required of projects bidding into requests for offers from San Diego Gas and Electric Company. (10/2/2008 RT 56:12-16.)

at 5.1-10, Table 5.1-7.) As Mr. Greg Darvin testified, “[w]e modeled it at approximately 4,400 hours per year of operation. That’s 4,000 hours of baseload and approximately 200 cold starts and 200 warm starts.” (10/2/08 RT 48: 18-21.) These analyses provide the Commission and the public with detailed and quantified estimates of the maximum impacts from CVEUP, if it were to operate to the maximum permitted level. Thus, both MMC and Staff have provided detailed calculations quantifying the theoretical maximum impacts from CVEUP.

As stated in the FSA, 4,400 Hours of operation per year is the maximum *permitted* level of operation. (Ex. 200 at 4.1-64.) The actual hours of operation are expected to be far lower, “in reality it would probably run closer to 500 [hours per year].” (10/2/2008 RT 54: 6-7.) Even 1,000 hours per year would be considered a worst-case scenario. (10/2/2008 RT 54: 18-21.) “Actual operation will depend upon actual SDG&E system demand and [CAISO] dispatch requirements. Despite the allowed operating hours, the historic capacity factor of peaking power plants of this size is approximately 6%.” (Ex. 200 at 3-4.) Staff estimated it is likely CVEUP would operate less than 10 percent of the 4,400 hour limit in a worst-case year and less than 5 percent of the time on average. (Ex. 200 at 4.1-23.)

MMC agrees. As provided in the AFC and based upon 2004 data, peaking power plants operate 5 to 10 percent of available hours, which equates between 438 and 876 hours per year. (Ex. 1 at 1-2.) In addition, Staff provided 2005 and 2006 data that show similar operating hours:

The historical capacity factors, for peaker power plants built after the year 2000, found in a review of the Energy Commission’s Quarterly Fuel and Energy Reporting data and available SDAPCD 2005 and 2006 data (Moore 2008) show generation or hour-based capacity factors that have not exceeded 8.4 percent for any single facility.

(Ex. 200 at 4.1-40)

Therefore, for a peaking power plant, the impacts assessment does not end at the calculation of maximum impacts because peaking power plants typically do not operate at

anywhere near their permit limits. Based upon the real operating data for peaking power plants, MMC proposed project mitigation at 1000 hours per year (11.4 percent annual capacity factor) and Staff calculated potential project mitigation emissions based upon a conservative operating assumption of 1200 hours per year (13.7 percent annual capacity factor). (Ex. 5 at 12; Ex. 4 at 6; and Ex. 200 pp. 4.1-39 to 4.1-40.) Both Staff and MMC used conservatively high operating hour assumptions for the expected operation case by using 1,200 and 1,000 hours and both also used the potential to emit values (maximum permitted emission rates) for each pollutant in calculating those emissions. (Ex. 200 at 4.1-41; Ex. 5 at 12; and Ex. 4 at 6.)

Therefore, for peaking power plants the Commission and the public should have assessments of both the maximum permitted emissions and a conservative estimate of the actual emissions from CVEUP assessed in order to make a decision on this application. As shown above, this assessment has been completed by both MMC and Staff.

2. CVEUP Will Not Cause Any Unmitigated Significant Adverse Air Quality Impacts

The evidentiary record before the Committee demonstrates CVEUP will not cause any unmitigated significant adverse air quality impacts. The AFC and the FSA support this conclusion. (Ex. 200 at 4.1-1 and Ex. 1 at 5.1-27.) However, before mitigation, Staff believes CVEUP has the potential to create significant air quality impacts as a result of its construction and operation. MMC emphasizes that under the SDAPCD SDAPCD rules and regulations, CVEUP will not create any potentially significant impacts requiring emissions offsets. (Ex. 202 at 8, referencing SDAPCD Rule 20.2(d)(5).) Mr. Darvin testified “[t]he project’s impacts are below all established air quality significance levels.” (10/2/2008 RT 50: 1-3.) He also stated that CVEUP’s actual emission levels will be below those reflected in the modeling because when

modeling is done for new projects “potential emissions” are used, “which are the highest guaranteed emission rates that the turbine vendor provides.” (10/2/2008 RT 50: 15-20.)

Staff asserts CVEUP’s construction impacts “have the potential to worsen the existing violations of the PM10 and PM2.5 ambient air quality standards and are, therefore, potentially significant.” (Ex. 200 at 4.1-29.) The maximum NO_x, CO, and SO₂ impacts will remain below the California Ambient Air Quality Standards (CAAQS) and National Ambient Air Quality Standards (NAAQS). (Ex. 200 at 4.1-29.) Staff also believes that operation of CVEUP will result in potentially significant air quality impacts, as well as cumulative impacts in conjunction with other projects in San Diego County. (Ex. 200 at 4.1-34 and 4.1-50.) To address this situation, MMC and Staff have agreed upon several feasible mitigation measures that will reduce CVEUP’s potential impacts from construction and operation to a level below significance.

3. Staff Proposed and MMC Agreed upon Mitigation Measures will Reduce Any Adverse Impacts on Air Quality

Both MMC and Staff assessed the impacts of CVEUP at 4,400 hours and for Staff 1,200 hours and MMC 1,000 hours. But, when determining the appropriate level of mitigation, the Commission should base its calculation on an operating level in the 1,000 to 1,200 hour range (a “Conservative Expected Operating Case”) to keep the mitigation roughly proportional to the expected impacts of CVEUP. (Cal. Code Regs., tit.14, §15126.4[a][4][B].) Mitigating a conservative expected operating case is consistent with CEQA’s requirements to evaluate a proposed project’s “likely” impacts. (Cal. Pub. Resources Code §21061; see also *Environmental Council of Sacramento v. City of Sacramento* [3d Dist. 2006] 142 Cal.App.4th 1018, 1039-1040.) MMC agrees to the mitigation measures proposed by Staff setting mitigation levels based upon conservative potential to emit levels for each pollutant for 1,200 hours of operation.

Staff has determined that a 13.7 percent annual capacity factor, or 1,200 hours of operation, would provide a reasonable safety margin for the determination of CEQA emission mitigation requirements for this project.

(Ex. 200 at 4.1-41.) From an air quality perspective the level of emissions at which CVEUP should be mitigated the Conservative Expected Operating Case of 1,200 hours.

The FSA lists several Conditions of Certification that will address and mitigate the impacts associated with the construction and operation of CVEUP. These measures are found on pages 4.1-76 to 4.1-95 of the FSA that include the limits and restrictions imposed by SDAPCD. (Ex. 200.) Impacts from construction emissions are addressed through the imposition of best management practices that reduce emissions by controlling idling times, the number of operating equipment, fuel specifications and related measures included in Conditions of Certification AQ-SC1 through AQ-SC5. (Ex. 200 at 4.1-76 to 4.1-80.)

To address emissions from operation impacts, condition of certification AQ-SC6 requires MMC to fund, on a 1:1 ratio, emissions of NO_x, PM₁₀, SO_x, and VOC at \$16,000/ton for a total contribution of \$210,000. (Ex. 200 pp. 4.1-80 to 4.1-82.) Staff calculated the specific amount of mitigation by pollutant based upon the potential to emit for 1,200 hours of operation. (Ex. 200 at 4.1-41.) As stated above, 1,200 hours of operation provides a reasonable safety margin for the determination of mitigation for this facility. (Ex. 200 at 4.1-41.) In addition, the use of potential to emit levels (maximum permitted emission rates per pollutant) in determining the emissions of each pollutant is also conservatively high because the actual emissions of each pollutant from CVEUP are expected to be lower based upon source tests of similar facilities. (Ex. 200 at 4.1-42.)

MMC's contribution of \$210,000 to fund the cost of mitigating air emissions from CVEUP at a 1:1 ratio is structured to benefit, to the extent possible, southern Chula Vista. (Ex. 803 at 3.) These funds can be used by the City for specific projects but any project must be

determined by Commission Staff to provide legally enforceable and sufficient mitigation that meets the requirements of the Warren-Alquist Act and CEQA. (Ex. 803 at 3.) But if the City is unable to identify a Staff-approved project within two years of the final Commission decision on CVEUP, the \$210,000 will be contributed to the Carl Moyer program administered by SDAPCD. (Ex. 803 at 4.) This contribution of funds to the Carl Moyer Program will be restricted to “projects within the area of Chula Vista [to] have first access to that money up to a period of two years.” (10/2/2008 RT 49: 14-17.) Mr. Darvin explained that “under CEQA, to mitigate any increase in nonattainment pollutants, the idea was to fund, through the Carl Moyer program, the monies needed such that sources local to Chula Vista could apply for those funds.” (10/2/2008 RT 64: 9-13.)

In addition to Staff’s proposed Conditions of Certification, MMC has reached an agreement with the City to provide supplemental air quality mitigation. (Ex. 21 and Ex. 803.) MMC has agreed to provide an additional \$210,000 in direct funds to the City for air quality related mitigation in the local area. MMC stresses that the purpose of its agreement with the City to provide additional mitigation is not to meet any obligations of emission reduction credits for SDAPCD because CVEUP is explicitly exempt from that. (10/2/2008 RT 64: 4-8.) Because this second \$210,000 is not required to meet either SDAPCD or Staff requirements for offsets, the city has greater flexibility in determining how to use these funds. “This contribution from MMC will give the City the ability to use these funds in the affected local community for energy efficiency and related improvements to homes and local businesses. These funds are intended to directly benefit the local residents potentially most directly affected by the reconstructed plant” (Ex. 803 at 3.)

MMC expects EHC to raise a concern about using the Carl Moyer program to fund mitigation for a private project. The guidelines for the Carl Moyer program explicitly prohibit using the public funds from the program to finance mitigation for private projects. (Ex. 618 at II-1 and 10/2/2008 RT 58: 9-20.) This prohibition is reasonable and avoids the use of public funds to finance mitigation for private projects. In this instance, MMC is not proposing to use public funds for mitigation for CVEUP. (10/2/2008 RT 58: 15 to 59:1.) Essentially, MMC's contribution to the City through the Carl Moyer program is a vehicle to fund mitigation to be used on a local level and thus will not be using public funds in the traditional sense of the Carl Moyer program. (10/2/2008 RT 67: 10-14.) Therefore, MMC's proposed use of the Carl Moyer program does not violate the program's guidelines.

4. CVEUP Can Reduce Overall System Greenhouse Gas Emissions through Replacement of an Existing Less Efficient Generator

In 2006 the California Legislature passed and Governor Schwarzenegger signed Assembly Bill (AB) 32. AB 32 set up a comprehensive green house gas reduction mandate for California. In addressing the electric industry AB 32 took a system-wide and comprehensive approach and required the California Air Resources Board (ARB) to take into account all emissions from electric production whether they occur in California or outside of California.

“Statewide greenhouse gas emission” means the total annual emissions of greenhouse gases in the state, including all emissions of greenhouse gases from the generation of electricity delivered to and consumed in California, accounting for transmission and distribution line losses, whether the electricity is generated in state or imported.

(Cal. Health and Safety Code §38505[m].) Since enactment of AB 32, ARB as well as this Commission in conjunction with the California Public Utilities Commission (CPUC) have been developing greenhouse gas reporting regulations, early action measures and a scoping plan to guide the state toward reducing greenhouse gas (GhG) emissions to 1990 levels by 2020.

- a. ARB, this Commission and the CPUC have Developed a Comprehensive, Programmatic and System Wide Approach for the Electric Industry

In October ARB issued the *Proposed Scoping Plan, a framework for change* (“Proposed Scoping Plan”). In addition, the Commission and the CPUC approved the *Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies D.08-10-037* (October 2008) (“Final Opinion”). Both the Proposed Scoping Plan and the Final Opinion take a comprehensive, programmatic and system wide approach to reducing GhG emissions for the electric industry. Specifically, the Proposed Scoping Plan states, “The comprehensive approach in the plan reflects a balance among these and other important factors” including cost-effectiveness, minimization of leakage, and impacts on specific sectors like small business and disproportionately impacted communities. (Proposed Scoping Plan at ES-7.) The Proposed Scoping Plan includes both command and control and market based mechanisms to achieve GhG reductions in the electric industry. These strategies include expanding the renewable portfolio standard (RPS) to 33 percent, maximizing current energy efficiency and participating in the Western Climate Initiative regional cap-and-trade program. (Proposed Scoping Plan at 30 – 38 & 41-46.) This same mix of measures is included in the Final Opinion. (Final Opinion at 6-10.) The focus of both the Proposed Scoping Plan and the Final Decision on measures that apply to load serving entities such as RPS and requirements for individual emitters such as participation in a regional cap-and-trade program show the range and depth of the efforts by these agencies to meet the requirements of AB 32.

Under the Proposed Scoping Plan, the electric industry will be asked to contribute 40 percent of the GhG reductions needed to meet AB 32’s goals even though the industry as a whole contributes between 23 and 25 percent of the annual GhG emissions. (Final Opinion at 2; Proposed Scoping Plan at 11 & 17.) This vast difference between the emissions contribution and

reduction requirements placed upon the electric industry demonstrate how the Proposed Scoping Plan has fulfilled the mitigation requirements for GhG emissions from the electric industry.

Although the Commission has initiated a proceeding to establish CEQA GhG significance standards for power plant siting, this proceeding has just begun and will most likely be unable to provide guidance on this project. (See Docket # 08-GHG OII-01.) In the absence of specific guidance, we must use the available information from ARB, this Commission and the CPUC in addressing GhG impacts from CVEUP.

b. Construction Emissions are Short-Term and Mitigated through Fuel Standards

MMC agrees with the analysis and conclusions reached by Staff in the FSA. (Ex. 200 at 4.1-52.) Like all construction projects, construction of CVEUP will result in short-term unavoidable vehicle and equipment GhG emissions. Furthermore, requirements to reduce the impacts from criteria pollutants also reduce GhG emission such as decreased idling times and the use of newer more efficient equipment where appropriate. Even ARB, who is also conducting a proceeding to set significance levels for other industries, has not presented a zero emission increase as the significance threshold, noting that some definable level of emissions increase in the near term and at mid-century will still be consistent with climate stabilization. (Preliminary Draft Staff Proposal, Recommended Approaches for Setting Interim Significance thresholds for Greenhouse Gases under the California Environmental Quality Act at 4 [Oct. 24, 2008].) Therefore, given the short-term nature of GhG emissions from construction and the benefits obtained by mitigation to reduce criteria pollutant emissions from construction, the GhG emissions from construction of CVEUP are not significant.

c. Attributing an Increase in GhG Emissions from CVEUP is Speculative

Burning natural gas to produce power creates GhG emission from both the CO₂ contained in the gas and the CO₂ created as a byproduct of combustion. The only way to reduce GhG emissions from CVEUP is for the project to run less. The Commission recognized long ago that power plants do not drive demand for electricity but instead respond to demand. Electricity production must meet demand requirements at all times and cannot be produced in excess of what is needed. In order to meet California's demand several different types of resources are deployed. The state is expanding the use of renewable resources to serve load, and many resources such as wind, photovoltaic and solar thermal technologies do not have any or have very few GhG emissions. Even so, the Proposed Scoping Plan and the Final Opinion set a goal of meeting California's energy demand with 33 percent renewables, which leaves 67 percent of the electricity coming from another source. Although some of these other needs are served by large hydroelectric and nuclear assets, fossil-fired generation still fills a major part of the demand for electricity. (2007 IEPR at 64.)

Finally, electric generators work as part of a system. As noted in the 2007 IEPR, gas-fired peaking facilities are needed to support the addition of intermittent renewable generation sources, such as wind and solar. (2007 IEPR at 186.) This project – a replacement of an older less efficient generator - is just the type of project recognized by the 2007 IEPR as needed to provide efficiency, environmental and other benefits to California. (2007 IEPR at 184; Ex. 200 at 4.1-54.) CVEUP will provide electricity at a much higher efficiency than the Chula Vista Power Plant. By improving the efficiency of the facility, less gas is burned to create the same amount of energy, reducing both criteria and GhG emissions. Furthermore, peaking generation is called to operate only when dispatched due to demand needs. (Ex. 200 at 4.1-53.) Therefore, CVEUP will only run when there is a reliability need (the Chula Vista Power Plant is currently

used in this way) or when running CVEUP would be more efficient than running the next available generator. The CAISO's dispatch order by heat rate ensures that the most efficient units run first. The addition of CVEUP, a more efficient unit, reduces the overall GhG emissions of the system. Furthermore, the Commission found in the Final Commission Decision on the Humboldt Bay Repowering Project (06-AFC-7) (September 2008) ("Humboldt Decision"):

[E]ven if it were not replacing this existing facility, it would be speculative to conclude that the project would result in a cumulatively significant GHG impact. AB 32 emphasizes that GHG emissions reductions must be 'big picture' reductions that do not lead to 'leakage' of such reductions to other states or countries. If a gas-fired power plant is not built in California, electricity to serve the load will come from another generating source. That could be renewable generation like wind or solar, but it could also be from higher carbon emitting sources such as out-of-state coal imports that are still a significant part of the energy that serves California¹⁰.

As stated by Staff "even though we can identify how many gross GHG emissions are attributable to a project, it is difficult to determine whether this will result in a net increase of these emissions, and if so, but how much. It would, thus, be speculative to conclude that any given project results in a cumulatively significant adverse impact resulting from greenhouse gas emissions." (Ex. 200 at 4.1-56.)

Because each power plant operates as a part of a larger electric system; a comprehensive, programmatic and system-wide approach to GhG reductions is the most effective way to reduce GhG emissions from the electric power industry. Furthermore, the programmatic approach taken by ARB in the Proposed Scoping Plan, and this Commission and the CPUC in the Final Opinion provides for the electric power industry to contribute 40 percent of the GhG reductions for the state while the sector only contributes between 23 and 25 percent of the emissions. Therefore,

¹⁰ Final Commission Decision Humboldt Bay Repowering Project (06-AFC-7) at 120 (September 2008).

emissions for this sector are being reduced by and mitigated through this comprehensive and system-wide approach.

5. Proposed Air Quality Findings and Conclusions

MMC suggests the following language for the Committee's Air Quality Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidence, we find as follows:

1. The project will comply with all applicable air quality LORS.
2. The air quality impacts of CVEUP have been assessed for the maximum operating limits of 4,400 hours.
3. Peaking power plants typically operate at a capacity factor of between 5.7 and 10.5 percent annually.
4. Mitigation for air quality impacts should be roughly proportional to the expected impacts of CVEUP, which is set at a conservative level equivalent of operating 1,200 hours per year, a 13.7 percent capacity factor. Providing mitigation at potential to emit levels for 1200 hours a year ensures a reasonable safety margin for CEQA mitigation for CVEUP.
5. The Conditions of Certification set forth below are appropriate and will ensure that the project is designed and constructed both in accordance with applicable law and in a manner that protects environmental quality and public health and safety and to ensure compliance with all applicable LORS.
6. The applicant will provide \$210,000 in direct funds to the City of Chula Vista for mitigation measures in the local area.
7. The applicant will provide an additional \$210,000 to the Carl Moyer Program to fund the cost of mitigating air emissions from the project at a 1:1 ratio to benefit, to the extent possible, southern Chula Vista. These funds are to be used by the City of Chula Vista for specific projects that must be determined by Commission Staff to provide legally enforceable and sufficient mitigation that meets the requirements of the Warren-Alquist Act and CEQA. If the City of Chula Vista is unable to identify a Commission Staff-approved project within two years of the final Commission decision on the project, the \$210,000 will be contributed to the Carl Moyer program administered by the San Diego Air Pollution Control District.

8. After mitigation the air quality aspects of the project do not create significant adverse direct or cumulative environmental effects.

C. Public Health

1. MMC and Staff Analyzed the Impacts of CVEUP Based on 4,400 Hours of Operation

Both MMC and Staff evaluated the impacts on public health from CVEUP operating at 4,400 hours per year. (See Ex. 200 at 4.1-33 and Ex. 1 at 1-2.) The resulting impacts described below are well below all public health significance levels and therefore, neither entity conducted further analyses at a lower operating level.

2. CVEUP Will Not Cause Any Significant Adverse Public Health Impacts

The evidentiary record clearly demonstrates that CVEUP will not cause any significant adverse public health impacts. The AFC and the FSA support this conclusion. (Ex. 200 at 4.7-1 and Ex. 1 at 5.9-12.) Staff stated that it “analyzed the potential public health risks associated with construction and operation of the proposed [CVEUP] and does not expect that there would be any significant adverse cancer or short- or long-term health effects from the project’s toxic emissions.” (Ex. 200 at 4.7-1.) In fact, Staff concluded that risks of chronic or acute non-cancer health effects as well as cancer risks were “well below” the level of significance. (Ex. 200 at 4.7-11-12.) In particular, with regard to cancer risk, Staff concluded that in the worst case scenario, CVEUP would produce a risk level of 0.15×10^{-6} , compared with a significance level of 10.0×10^{-6} . (Ex. 200 at 4.7-12.) With regard to acute non-cancer health impacts, CVEUP would produce a risk level of 0.088, compared with a significance level of 1.0. (Id.) Finally, with regard to chronic non-cancer health impacts, CVEUP would produce a risk level of 0.0069, compared with a significance level of 1.0. (Id.)

Thus, even under a worst case scenario, the public health risks posed by CVEUP would be an order of magnitude less than -the level which the Commission and other authorities

consider to be significant. Staff's public health analysis was more than sufficient to demonstrate that impacts to public health from CVEUP will be far less than significant. Staff reached this conclusion despite an analysis "intentionally biased toward protection of public health. In other words, the analysis is designed to overestimate the public health impacts from exposure to emissions." (Ex. 200 at 4.7-3.)

EHC suggests that CVEUP may have significant impacts on asthma in the area due to the PSA's "incomplete analysis" of the project's particulate matter emissions. (Ex. 600 at 15-16.)

Staff responded to EHC's comments in the FSA and by noting several key points:

After noting that it had evaluated multiple studies, Staff noted that:

[t]here is no single cause of asthma in all cases. Theories of causation include those about lifestyle factors, genetics, and specific environmental agents. Studies to identify predisposing environmental agents or symptom triggers have not yielded a unifying theory to explain the present epidemic.

(Ex. 200 at 4.7-15.)

Staff also noted that:

[I]n comparison to other sources, natural gas-fired power plants such as the proposed CVEUP would produce limited amounts of pollutants capable of causing or exacerbating asthma and thus should be considered minor sources. Given the emissions controls and offsets required for the proposed CVEUP, staff believes that its operation would not create any significant public health impacts [and] that the proposed CVEUP would have an insignificant impact on existing asthma rates in the surrounding area.

(Ex. 200 at 4.7-16.)

With regard to concerns about children, staff stated that:

the health protective limits . . . are presently established with uncertainty factors that ensure protection of children as sensitive receptors.

(*Id.*)

Finally, Staff concluded that:

the proposed CVEUP would have an insignificant impact on existing asthma rates in the surrounding area.

(Id.)

The testimony of EHC's witness, Ms. Joy Williams, made three points regarding perceived inadequacies of the analysis in the FSA. First, that the FSA did not comprehensively address CVEUP's diesel emissions impacts from construction. (Ex. 602 at 2.) Second, that the FSA public health analysis understated the severity of asthma in the community. (Ex. 602 at 2-3.) And third, Ms. Williams testified that the air quality and public health analyses lack a precautionary perspective regarding the potential public health impacts of exposure to particulate matter. (Ex. 602 at 3.)

MMC's witness, Mr. John Lowe responded to each of Ms. Williams' points. First, with respect to diesel emissions, Mr. Lowe pointed out that California Environmental Protection Agency ("Cal-EPA") developed a reference exposure level (REL) that is equivalent to the United States Environmental Protection Agency's (USEPA) reference concentration. (10/2/2008 RT 100: 14-20.) However, the REL is based on long-term inhalation exposure, whereas the duration of construction at CVEUP is a short-term event. (10/2/2008 RT 101: 3-11.) Therefore, "comparisons to the diesel impacts to the chronic reference exposure level would be an inappropriate way of characterizing the risks for diesel emissions from construction." (10/2/2008 RT 101: 11-14.) Even Ms. Williams acknowledged that a 70-year exposure period is used when evaluating a chronic risk. (10/2/2008 RT 151: 20-24.) Thus, Staff's analysis in the FSA is the more appropriate means of calculating potential risks from diesel emissions during construction. (10/2/2008 RT 101: 15-18.)

Second, Mr. Lowe addressed Ms. Williams' point about asthma impacts in the community. He testified that the standards employed by Staff as a basis for determining project

significance are based on the USEPA and ARB standards. (10/2/2008 RT 102: 20-23.) These standards are set at levels that adequately protect the health of all members of the public, including the most sensitive, such as the aged, people with existing illnesses, and children. (10/2/2008 RT 102: 23-25 and 103: 1-4.) The model used by Staff in the FSA to assess health impacts estimated project emissions at the point of maximum air quality impact and incorporated the highest ambient background concentration resulting in very conservative figures. (10/2/2008 RT 103: 17-23.) Furthermore, the nature of the risk and the severity of the effect, the size of the population, the level of uncertainty and the scientific evidence are all factors that are considered in setting these standards. (10/2/2008 RT 103: 11-15.)

Staff's witness, Dr. Obed Odoemelam, also responded to Ms. Williams' testimony on asthma. Dr. Odoemelam asserted that there are many uncertainties about asthma and there are no specific measures that can be applied in all cases to determine the type of exposure that will cause asthma. (10/2/2008 RT 118: 13-20.) Dr. Odoemelam added that the Chula Vista Elementary School District's independent air quality analysis confirmed that Staff's analysis properly addressed sensitive receptors in the FSA. (10/2/2008 RT 119: 20-23, referencing Ex. 203.) During the evidentiary hearing, Ms. Williams was unable to provide statistics that would contradict Mr. Odoemelam's statement regarding asthma incidence statistics. (10/2/2008 RT 153: 15-20.)

Finally, Mr. Lowe addressed Ms. Williams' third point regarding the incorporation of the precautionary principle. He responded to Ms. Williams' testimony by stating that Staff's analysis of air quality impacts, the standards used in the FSA to evaluate public health risks and particulate matter, and the corresponding mitigation measures are consistent with the definition of a precautionary principle. (10/2/2008 RT 104: 15-22.)

To summarize, the evidence before the Committee clearly shows that CVEUP will not cause any significant adverse public health impacts.

3. No Mitigation Measures Are Necessary Because There Will Be No Significant Adverse Impact to Public Health

Even without any significant adverse public health impact, MMC points out that “[e]mission criteria pollutants will be minimized by applying Best Available Control Technology (BACT) to the facility. BACT for the combustion turbine includes the combustion of natural gas.” (Ex. 1 at 5.9-12.)

In addition, because CVEUP is a minor source pursuant to SDAPCD Rules 20.1 and 20.2, offsets are not required. (Ex. 1 at 5.9-12.) The combination of using BACT and clean fuels will result in no change in CVEUP’s status as a “minor source.” (Ex. 1 at 5.9-12.) Therefore no further mitigation of emissions is required to protect public health. (Ex. 1 at 5.9-12 to 5.9-13.)

Staff agreed with MMC’s conclusion and did not include any Conditions of Certification in the FSA.

Staff has determined that the toxic air emissions from the construction and operation of the proposed CVEUP would be at levels that do not require mitigation beyond the specific emission control measures noted above (and included as conditions of certification in the AIR QUALITY and WASTE MANAGEMENT sections), and therefore, do not recommend any related conditions of certification.

(Ex. 200 at 4.7-16.)

Because no significant adverse impacts to public health will result as a consequence of the construction and operation of CVEUP, no mitigation measures are necessary.

4. Proposed Public Health Findings and Conclusions

MMC suggests the following language for the Committee’s Public Health Findings and Conclusions of the Presiding Member’s Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidence, we find as follows:

1. The project will comply with all applicable public health LORS.
2. The Conditions of Certification set forth in the Air Quality and Waste Management sections of this decision are appropriate and will ensure that the project is designed and constructed both in accordance with applicable law and in a manner that protects environmental quality and public health and safety and to ensure compliance with all applicable public health LORS.
3. The public health aspects of the project do not create direct or cumulative environmental effects.

D. Power Plant Reliability

1. CVEUP Will Not Cause Any Significant Adverse Power Plant Reliability Impacts

The evidence before the Committee demonstrates that CVEUP will not cause any significant adverse power plant reliability impacts. The FSA best summarizes this topic: “[MMC] predicts an equivalent availability factor of 92 to 98 percent, which staff believes is achievable. Based on a review of the proposal, staff concludes that the [CVEUP] would be built and operated in a manner consistent with industry norms for reliable operation. This should provide an adequate level of reliability.” (Ex. 200 at 5.4-1.)

This was a “contested” subject area during the evidentiary hearing due only to questions regarding use of a blackstart generator and the project’s location outside of the floodplain. One of MMC’s witnesses on this topic, Mr. Harry Scarborough, explained that MMC’s decision to eliminate the blackstart generator from the project plans was based on the fact that additional construction requirements are necessary when installing a blackstart. (10/2/2008 RT 270: 19-25.) Mr. Scarborough also offered that MMC is willing to include a blackstart generator and request an amendment to the air district permit if required by the Commission. (10/2/2008 RT 271: 19-22.)

The second power plant reliability issue pertained to the elevation of CVEUP in regards to the flood plain. MMC's other witness on this topic, Mr. Steven Blue, testified that CVEUP, as well as the existing facility, are both five feet above the flood plain. (10/2/2008 RT 274: 23-25 and 275: 1-7.) In addition, Exhibit 25, a topographic map of the CVEUP site, visually demonstrates that the project site is above the elevation of the 100-year flood plain. (See Ex. 25.) Mr. Blue and Mr. Scarborough were also able to respond to EHC's Exhibit 625 which states that the Chula Vista Power Plant is within a designated flood plain. (10/2/2008 RT 277: 4-8.) They explained that the Federal Emergency Management Agency (FEMA) map states that the 100-year flood elevation is indeed at 45 feet as claimed by EHC, but that the current on-site plant is at 50 feet due to the addition of nearly 30 feet in fill in order to bring the site above flood plain level. (10/2/2008 RT 277: 9-13 and 278: 1-4.) CVEUP will likewise sit at 50 feet in elevation. (10/2/2008 RT 277: 20-24.)

Therefore, because no issues exist as to the use of the blackstart generator and CVEUP's location above the 100-year flood plain, no significant adverse impact to power plant reliability will result from the construction and operation of CVEUP.

2. No Mitigation Measures Are Necessary Because There Will Be No Significant Adverse Impact to Power Plant Reliability

Because there will be no significant adverse impacts to power plant reliability, no mitigation measures are necessary and Staff proposes no Conditions of Certification. (Ex. 200 at 5.4-1.)

3. Proposed Power Plant Reliability Findings and Conclusions

MMC suggests the following language for the Committee's Power Plant Reliability Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidence, we find as follows:

1. The Reliability aspects of the project do not create significant direct or cumulative environmental effects.
2. The Committee, therefore, concludes that the project will not have an significant effect on system reliability. The project will enhance the reliability of the local electrical system by making additional peaking power available.
3. No Conditions of Certification are adopted in this Decision concerning the topic of Power Plant Reliability.

E. Biological Resources

This section addresses the Committee's requested briefing topic related to the project's potential to cause significant adverse environmental impacts to biological resources.

Specifically, MMC answers that CVEUP will not cause any significant adverse impacts on biological resources that will not be mitigated to a less than significant level. MMC has not included a discussion of what number of hours of operation CVEUP's impacts on biological resources should be assessed because the project's hours of operation do not affect its potential impact on biological resources. Although an override by the Commission will not be necessary to address any impact to biological resources, MMC explains in section IV why the Commission would be able to exercise its override authority if it were asked to do so.

CVEUP will be constructed on the existing Chula Vista Power Plant site which is located along the Main Street corridor. An automobile salvage yard is on the site's northern border, the new Chula Vista Commerce Center is on the east, commercial/warehouse businesses are to the west, and the Otay River Preserve which is part of the Chula Vista Subarea Multi-Species Conservation Plan ("MSCP") is to the south. (Ex. 200 at 4.2-6.) The proposed site of CVEUP is a disturbed/developed area with no sensitive biological resources. (Ex. 200 at 4.2-8.) CVEUP will use existing electrical transmission, natural gas, water service, and sanitary sewer pipelines.

(Ex. 200 at 4.2-7.) There are two proposed laydown areas and only one would be used during construction. Both sites are graded and essentially devoid of vegetation. (10/2/2008 RT 226: 16-19, 228: 9-11; Ex. 200 at 4.2-7.) One laydown site is onsite and was used during the recent construction of the Chula Vista Commerce Center. (Ex. 200 at 4.2-7.) The second laydown site is offsite and is currently being used as a storage yard for gravel, concrete highway dividers, pylons, and heavy equipment. (Id.) Both of these proposed laydown areas are within the MSCP.

1. CVEUP Will Not Result in Any Direct Construction Impacts to Biological Resources that Will Not be Mitigated to a Less Than Significant Level

Because CVEUP will be constructed in the existing Chula Vista Power Plant site, a developed area devoid of sensitive biological resources, dismantling of the existing plant, grading, and construction will not result in any direct impacts to any special status species or wildlife resources. (Ex. 200 at 4.2-8.) Additionally, because CVEUP will use existing electrical transmission, natural gas, water service, and sanitary sewer pipelines, and the laydown areas are graded and devoid of vegetation, these project components will also have no impact on biological resources. (Ex. 200 at 4.2-7.)

Landscaping trees along the existing boundary fence could support birds protected by the Migratory Bird Treaty Act. To avoid potential impacts to nesting birds, pre-construction nest surveys can be conducted prior to any construction that would occur between January 15 and September 15. (Ex. 200 at 4.2-9.) If birds are detected, buffer zones can be designated around the nests to avoid any impacts to birds. (Ex. 200 at 4.2-23.)

2. CVEUP Will Not Result in Any Indirect Construction Impacts to Biological Resources that Will Not be Mitigated to a Less Than Significant Level

a. Noise Impacts to Biological Resources Will Be Reduced to a Less Than Significant Level

The timing of construction activities and use of either of the two laydown sites will overlap with the nesting season for many of the bird species inhabiting the Otay River Preserve to the south i.e., January 15-September 15. (Ex. 200 at 4.2-9.) Construction noise can adversely affect nesting activities and even discourage birds from nesting in otherwise suitable areas. (Id.) Additionally, the MSCP which encompasses the Otay River Preserve, prohibits noise levels above 60 A-weighted decibels when special status species are present and requires uses adjacent to the Preserve to minimize noise impacts. (MSCP § 7.5.2 p. 7-26; Ex. 200 at 4.2-9.) To avoid impacting birds, where feasible, construction and/or demolition activities can be prohibited between January 15 and September 15. (Ex. 200 at 4.2-9.) When avoidance is not feasible, pre-construction nest surveys and the use of buffer zones can be employed to reduce any impacts to nesting species to a less than significant level. (Id. at 4.2-10, 4.2-23.)

b. Any Impacts to Aquatic Species Will Be Reduced to a Less Than Significant Level

The CVEUP site slopes south and as a result, stormwater runoff discharges into the Otay River Preserve. Construction has potential to increase sedimentation and erosion from runoff and this runoff could conceivably have some impact on water quality and aquatic habitat within the Otay River Preserve. (Ex. 200 at 4.2-10.) However, implementation of MMC's proposed erosion and sedimentation plan as well as Best Management Practices proposed by the California Department of Fish and Game will reduce any impacts to water quality and aquatic species to a less than significant level. (Id. at 4.2-10.)

c. **Impacts to Local Wildlife Due to the Introduction of Predators Will Be Reduced to a Less Than Significant Level**

Predators could be attracted to the site by food items left by construction employees and these predators (i.e., coyotes, ravens, raccoons) could affect sensitive species. (Id. at 4.2-10.)

Also, dogs that prey on wildlife could be brought to the site by construction employees.

Implementation of Best Management Practices, including instructions to leave pets at home and place food related trash in sealed containers, will avoid these potential impacts. (Id.)

3. CVEUP Will Not Result in Any Operational Impacts to Biological Resources That Will Not Be Mitigated to a Less Than Significant Level

a. **CVEUP Will Not Cause Any Significant Operation Related Noise Impacts to Biological Resources**

CVEUP's site characteristics and design features serve to avoid any adverse noise impacts to biological resources. (Ex. 200 at 4.2-11.) The site currently has an 18-foot-high noise attenuation wall. Additionally, MMC intends to use improved silencers on equipment, a wall for the fin fan cooler, and if necessary, extend the perimeter noise wall around the site's entire boundary. (Ex. 200 at 4.2-10.) CVEUP will also be located further north on the site as compared to the existing equipment. (Ex. 200 at 4.2-11.) Taken together, the design features and site location avoid any operational noise impacts to biological resources located within the Preserve to the south. (Id.)

b. **CVEUP Will Not Cause Any Significant Operation Related Air Impacts to Biological Resources**

CVEUP will employ best-available control technology and will comply with air quality standards that are designed to protect vegetation, wildlife, and human health. (Ex. 200 at 4.2-11.) CEC Staff also analyzed the potential air impacts on vegetation and determined that there will not be any significant impacts to special status plants, animals, or other biological resources in the Preserve. (Id.)

c. CVEUP Will Not Cause Any Operational Visual/Light Impacts to Biological Resources That Will Not be Reduced to a Less Than Significant Level

Operational lighting at CVEUP will consist of existing pole-mounted security lighting at the property's southern end, with additional pole-mounted security lighting to be added to the northern end. (Ex. 200 at 4.2-11.) The additional lighting will be farther from the Preserve than existing lighting. (Id.) The existing 18-foot tall wall along the southern property line will assist to reduce light entering the Preserve. (Id.) Additional measures can be taken to further reduce any impacts from these security lights i.e. use lighting with shields/hoods, face lighting downwards, use minimum necessary brightness, etc. (See Ex 200 at 4.2-11; 4.12-33.) By implementing these measures, any impacts to biological resources in the Preserve will be reduced to a less than significant level. (Ex. 200 at 4.2-11.)

d. The Risk of Birds Colliding With CVEUP Structures is Minimal

Although bird fatalities can occur from collisions with man made structures i.e. lighthouses, smokestacks, communication towers etc., CVEUP's two proposed 70-foot tall exhaust stacks present little risk to birds. (Ex. 200 at 4.2-12.) The exhaust stacks will be constructed at the site's developed northern end where there is no habitat for birds. (Id.) Additionally, the site lacks any topographic or habitat feature that would attract birds from the Preserve. (Id.) Last, to reduce any possible impacts to nocturnal migrants, lighting will be limited to the minimally necessary, hooded, and angled to minimize glare. (Id.) As a result, there is minimal risk of birds colliding with CVEUP structures.

e. Landscaping Will Not Impact Native Species in the Preserve to the South

Improper landscaping at CVEUP could present risk of non-native plant species adversely impacting native species in the Preserve to the south. Water runoff from the site with high fertilizer or pesticide content could also adversely impact native plants in the Preserve. To avoid

these impacts, MMC can develop a landscaping plan that will only use native plant species. (Ex. 200 at 4.2-14.) This use of native plant species will avoid any impacts discussed in this paragraph. (Id.)

4. Use of Either of the Two Proposed Laydown Areas Would Be Consistent With the Chula Vista MSCP Subarea Plan

Only one of two laydown areas is proposed to be used during construction of CVEUP i.e., the onsite laydown area or the off-site laydown area. The on-site laydown area is a 1.47-acre former pallet yard located adjacent to the project site to the southeast. This site is graded and essentially devoid of vegetation and was used during the recent construction of the Chula Vista Commerce Center. (10/2/2008 RT 226: 16-19, 228: 9-11; Ex. 200 at 4.2-7, 4.2-13.) The off-site laydown area is a 2.7 acre area that is located approximately 3.4 miles to the east. This site is also graded and devoid of vegetation and is currently being used as a storage yard for gravel, concrete highway dividers, pylons, and heavy equipment. (10/2/2008 RT 226: 16-19, 228: 9-11; Ex. 200 at 4.2-7.) Both of these proposed laydown areas are within the MSCP 75%-100% conservation area. This designation requires any development to be restricted to only 25% of the project area. (MSCP § 5.1.2 p. 5-3.) However, because use of either laydown area does not require development, the MSCP is not implicated.

The City's Habitat Loss and Incidental Take ordinance ("HILT Ordinance") implements the MSCP. (See City Code § 17.35.010; see also MSCP 5.1.2 p. 5-3.) The HILT Ordinance is intended to "assure that development occurs in a manner that protects the overall quality of the habitat resources, encourages a sensitive form of development, and retains biodiversity and interconnected habitats." (City Code § 17.35.010.) To accomplish this goal, the HILT Ordinance requires a project proponent to acquire a HILT permit prior to receiving other development approvals e.g. use permit, variance, clearing or grubbing permit, etc. (City Code §

17.35.040.) This HILT permitting process allows the City to implement the MSCP's 25% development limitation by precluding issuance of a development permit for any development covering more than 25% of a site. (City Code § 17.35.100(B)(2).)

Use of either proposed laydown area would not require a City development permit and would not impact any special status species, and as a result use of either laydown area would be consistent with the HILT Ordinance and the MSCP. As noted, the laydown areas either have been used or are currently being used for construction laydown or storage. Both sites are graded and essentially devoid of any vegetation. As such, use of either laydown area would not impact any special status species. And given each site's historic or current use, additional City development permits would not be required to use either site as a laydown area. Therefore, a HILT permit would not be required to use either laydown area. Furthermore, use of either laydown area would only be temporary and after construction, the site would be vacated. (Ex. 200 at 4.2-13.) Thus, use of the either laydown area would be consistent with the HILT Ordinance's goal and MSCP because such use does not require a development permit and there will be no change to the overall quality of habitat resources, development patterns in the MSCP, or biodiversity and interconnected habitats.

For all the reasons set forth above, CVEUP will not cause any significant unmitigated adverse impacts on biological resources.

5. Proposed Biological Resources Findings and Conclusions

MMC suggests the following language for the Committee's Biological Resources Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidentiary record, we find as follows

1. CVEUP will comply with all applicable laws, ordinances, and regulations related to biological resources.
2. The Conditions of Certification set forth below are appropriate and will ensure that the project is designed and constructed both in accordance with applicable law and in a manner that protects environmental quality and public health and safety and to ensure compliance with all applicable LORS.
3. CVEUP's aspects related to biological resources do not create significant direct or cumulative unmitigated effects.

F. Noise and Vibration

This section addresses the Committee's requested briefing topic related to the project's potential to cause significant adverse noise and vibration. Specifically, MMC answers that CVEUP will not cause any significant adverse noise or vibration that will not be mitigated to a less than significant level. Although an override by the Commission will not be necessary to address any noise or vibration impact to biological resources, MMC explains in section IV why the Commission would be able to exercise its override authority if it were asked to do so.

CVEUP will be located along the City's Main Street corridor in a densely developed area of industrial, commercial, and residential uses. A newly developed office building is to the site's eastern border, to the north is an automobile salvage yard which is between the project site and Main Street, and to the west is a warehouse facility. The Otay River Preserve, which is part of the Chula Vista Subarea Multi-Species Conservation Plan ("MSCP") is to the south. The closest noise-sensitive uses are residences approximately 400 feet west and 1,000 feet north of the project site. (Ex. 200 at 4.6-5.)

CVEUP will be constructed on the northern portion of the site and will replace the existing Chula Vista Power Plant. An 18-foot-high noise wall on the property's southern boundary will remain and the new project will use the existing electric transmission, natural gas, water, and sewage connections. Ambient noise in the project area consists of the existing power

plant, local industry, airplane and helicopter overflights, and traffic on local roads and freeways. (Ex. 200 at 4.6-5.)

1. MMC and Staff Analyzed the Impacts of CVEUP Based on 4,400 Hours of Operation

Both MMC and Staff evaluated the noise impacts from CVEUP operating at 4,400 hours per year (including 200 hours of warm starts and 200 hours of cold starts). (See Ex. 200 at 4.6-11 and Ex. 1 at 1-2.) The resulting mitigated impacts described below are well below all noise significance levels and therefore neither entity conducted further analyses at a lower operating level.

2. Construction of CVEUP Will Not be a Significant Source of Noise

Noise associated with construction of CVEUP will be temporary and will vary depending on the construction phase. There are generally five phases of power plant construction: 1) demolition, site preparation, and excavation; 2) concrete pouring; 3) steel erection; 4) mechanical; and 5) clean-up. (Ex. 1 at 5.7-8.) The City's noise ordinance does not limit the volume of construction noise, but instead restricts noise to certain hours of the day. To ensure compliance with the City ordinance and avoid creating any significant noise during the night, the project can restrict noisy construction and demolition work to 7 a.m. to 8 p.m. on weekdays and 8 a.m. to 8 p.m. on weekends. (Ex. 200 at 4.6-7.) This restriction will ensure CVEUP's compliance with the City's noise ordinance. (Id.)

Although regulation of construction noise is limited to hours and not decibels, it is Staff's position that pile driving could disturb the nearest residential receptor and annoy students at a school northeast of the site. (Ex. 200 at 4.6-8.) However, pile driving noise can be reduced by employing a quieter construction process than traditional pile driving technology. By using this

different technology, one can be assured that pile driving will not be an annoyance to any sensitive receptors. (Ex. 200 at 4.6-9.)

3. The Use of Noise Mitigation Measures Will Ensure CVEUP's Operations Comply with Applicable LORS Related to Noise

Noise modeling indicates that CVEUP as proposed will comply with applicable LORS related to noise. (Ex. 200 at 4.6-10.) It is also Staff's position that the 9 dBA increase in background noise caused by CVEUP will be insignificant. (Ex. 200 at 4.6-11; *see also* 10/2/2008 RT 255: 14-20; 257: 5-17.) As explained by Staff, an increase in background noise levels of more than 10 dBA is significant but an increase in background noise levels less than 5 dBA is insignificant and for increases between 5 and 10 dBA, the circumstances of that case will determine if the increase is significant or not. (10/2/2008 RT 257: 5-17.) In this particular situation, Staff determined that the 9 dBA increase in background noise levels is not a significant adverse impact. (10/2/2008 RT 257: 15-17.) Staff's witness, Mr. Steve Baker, added that the fact that CVEUP is not likely to operate during the nighttime hours strengthens Staff's determination of a less than significant impact. (10/2/2008 RT 260: 13-23; and Ex. 200 at 4.6-11.) To ensure compliance with applicable LORS and that the increase in background noise levels would remain insignificant, project design and implementation can utilize additional mitigation measures e.g., improved air inlet silencing, increased gas turbine enclosure vent silencing, acoustical walls/shrouds around certain equipment, etc. (Id. and Ex. 200 at 4.2-10 to 4.2-11.) Mr. Baker testified that these mitigation measures, including the improved perimeter noise attenuation wall, would ensure that CVEUP meets the City's noise standards. (10/2/2008 RT: 264: 15-22 and 265: 9-24; Ex. 200 at 4.2-10 to 4.2-11.) Furthermore, although CVEUP will not be a significant source of noise, a noise complaint process will be established to investigate/address any noise complaints. This process will utilize a telephone number for the

public to report any significant undesirable noise condition associated with construction and/or operation of the project and require MMC to respond to each complaint in a specific timeframe. (Ex. 200 at 4.6-15.) Taken together, these measures will ensure that CVEUP will not be a significant source of noise.

Furthermore, no worker's time-weighted average exposure is expected to approach the limits established by the Occupational Safety and Health Act of 1970 Guidelines i.e., 90 dBA at 3 feet. However, signs will be posted in plant areas where noise levels commonly exceed 85 dBA and hearing protecting devices will be required. (Ex. 200 at 4.6-12.)

In light of the various measures that MMC can take to reduce or avoid adverse noise impacts i.e., restricted construction hours, utilize alternative pile driving technologies, additional project components, noise reporting, and notifications, CVEUP will not create any unmitigated significant adverse noise impacts.

4. Proposed Noise and Vibration Findings and Conclusions

MMC suggests the following language for the Committee's Noise and Vibration Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidentiary record, we find as follows

1. CVEUP will comply with all applicable laws, ordinances, and regulations related to noise and vibration.
2. The Conditions of Certification set forth below are appropriate and will ensure that the project is designed and constructed both in accordance with applicable law and in a manner that protects environmental quality and public health and safety and to ensure compliance with all applicable LORS.
3. CVEUP's aspects related to noise and vibration do not create significant direct or cumulative unmitigated effects.

G. Visual Resources

This section addresses the Committee's requested briefing topic related to the project's potential to cause significant adverse environmental impacts to visual resources. Specifically, MMC answers that CVEUP will not cause any significant adverse impact on visual resources that will not be mitigated to a less than significant level. MMC found that no significant visual impacts will result from implementation of CVEUP. (Ex. 1 at 5.13-21.) MMC has not included a discussion regarding at what number of hours of operation CVEUP's impacts on visual resources should be assessed because the project's hours of operation do not affect its potential impact on visual resources. Although an override by the Commission will not be necessary to address any impact to visual resources, MMC explains in section IV why the Commission would be able to exercise its override authority if it were asked to do so.

CVEUP will be constructed on a 3.8 acre parcel located along the City's Main Street corridor in an area zoned for limited industrial uses. A newly developed office building is to the site's eastern border, to the north is an automobile salvage yard which is between the project site and Main Street, and to the west is a warehouse facility. None of these neighboring sites contain features of scenic significance and the level of visual quality is low. (Ex. 1 at 5.13-2.) To the south is open space land that is part of the Otay River Preserve. However, the character of the overall view from the Preserve is industrial and the project site is already dominated by the industrial character of the existing facility. (Id.)

MMC's existing Chula Vista Power Plant occupies the site and will be removed as part of the project. (Ex. 803 at 2.) The new plant will be constructed on vacant land in the northern portion of the site. CVEUP's tallest building features will be two exhaust stacks with an elevation of 70 feet and diameter of 10 feet. (Ex. 200 at 4.126.) These exhaust stacks will be located at the north end of the project site. CVEUP would also have a gas turbine generator that

is 34 feet tall and a selective catalytic reduction unit that is 31 feet tall. An 18-foot sound wall runs along the site's southwestern, southern, and southeastern border. A six-foot chain linked fence with brown wooden slats encompasses the remaining borders to the west, north, and east. (Ex. 200 at 4.12-7.) Both of these walls would remain as part of CVEUP.

CVEUP will not involve new linears, so there will be no visual changes related to electric transmission, natural gas, water, and sanitary sewer pipelines. One of two proposed laydown areas would be used during construction. Both sites are fenced with chain link and wooden slats and have been or are currently used for storage. (Ex. 200 at 4.12-6; 4.2-7.)

The nearest residential areas are located north and west of the project site. One area lies one block north of Main Street while the other is on the other side of the warehouses adjacent to the site's western border. As a simple cycle air cooled project with no cooling towers, CVEUP will not create any vapor plumes. (Ex 200 at 4.12-1.)

1. Lighting Impacts From Night Operation and/or Construction Will be Reduced to a Less Than Significant Level

Some of the initial construction could occur during night and once built, CVEUP could be operated 24 hours per day. (Ex. 1 at 5.13-16.) Although lighting during these time periods could impact views from three key observation points ("KOP"), mitigation measures will reduce these impacts to a less than significant level. (Ex. 200 at 4.12-11, 4.12-24.) As discussed in Staff's FSA, lighting would be of minimal brightness but consistent with applicable state and federal worker safety regulations. (Id.) To the extent possible, task specific lighting that complies with applicable safety regulations will be used. Additionally, lighting would be shielded and directed to avoid all off-site and upward illumination. (Id.) Lighting for maintenance purposes will be used only when needed. With these measures, any impacts to visual resources from night lighting would be reduced to a less than significant level. (Id.)

2. CVEUP Would Adversely Impact Visual Resources at Only One of the Five Key Observation Points, But These Impacts Would be Reduced to a Less Than Significant Level

Of the views from the five KOPs analyzed by Staff, only the view from KOP 5, Beyer Way on the bridge section over the Otay River looking east towards the plant site, would be adversely impacted by CVEUP. (Ex. 200 at 4.12-12 – 4.12-23.) However, Staff has set forth mitigation measures that will reduce these impacts to a less than significant level. (Ex. 200 at 4.12-23.) The project's two exhaust stacks would extend above the horizon and be outlined against the sky as seen from this KOP. This will result in form and line contrast which would be accentuated by the presence of light colored adjacent buildings. Also, more of the project would be visible from this KOP as compared to other KOPs and could attract the attention of passing viewers. However, painting the stacks and other prominent project structures a light color will allow them to blend with adjacent beige-colored industrial and commercial structures thereby reducing the project structures' prominence. The strategic placement of perimeter landscaping will reduce any visual impacts even further. With these measures in place, the project's visual impacts will be reduced to a less than significant level. (Ex. 200 at 4.12-23.)

With measures in place to minimize the use of night lighting and to color CVEUP's equipment behind strategically placed landscaping, CVEUP will not cause any unmitigated significant adverse impacts to visual resources.

3. Proposed Visual Resources Findings and Conclusions

MMC suggests the following language for the Committee's Visual Resources Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidentiary record, we find as follows

1. CVEUP will comply with all applicable laws, ordinances, and regulations related to visual resources.
2. The Conditions of Certification set forth below are appropriate and will ensure that the project is designed and constructed both in accordance with applicable law and in a manner that protects environmental quality and public health and safety and to ensure compliance with all applicable LORS.
3. CVEUP's aspects related to visual resources do not create significant direct or cumulative unmitigated effects.

H. Alternatives

This section addresses the Committee's requested briefing topic regarding feasible alternative project sites. This section also addresses issues related to feasible alternative generation technologies, including demand side management. It should be noted that Staff has concluded that there are no significant unmitigated environmental impacts. Accordingly, Staff has also concluded that this section is not required as a means to reduce or avoid significant impacts. (Ex. 200 at 6-5.)

CVEUP will be a nominal 100 MW peaking facility with quick start capability and will provide needed peak electric generation with improved efficiency. The project will replace the Chula Vista Power Plant's older less efficient technology. (Ex. 200 at 6.) The project will use much of the Chula Vista Power Plant's existing infrastructure including: the existing transmission connection to the SDG&E Otay Substation; natural gas, water, and sanitary sewer pipelines; fencing and sound attenuation wall; utility/control building; stormwater runoff retention basin; and aqueous ammonia storage tank and refilling station. (Ex. 200 at 6-3.)

CVEUP has the following four staff-approved project objectives:

- To construct and operate a cost-effective and efficient nominal 100 MW, natural gas fired, peaking load generating facility with quick start capability;
- To minimize or eliminate the length of any project linears, including gas and water supply lines, discharge lines, and transmission interconnections;

- To deliver electricity to the SDG&E Otay Substation at 69 kV without the need for transmission system reconductoring; and
- To provide voltage support to the local 69 kV transmission system.

(Ex. 200 at 6-5; 10/2/2008 RT 351: 8-15.)

An alternative may be found infeasible on the ground that it is inconsistent with the project objectives. CEQA caselaw supports this assertion. (See *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1503; *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1401; and *Sequoiah Hills Homeowners Ass'n v. City of Oakland* (1993) 23 Cal.App.4th 704, 715.)

MMC agrees with Staff's conclusion that there are no feasible alternative project sites that would reduce or avoid CVEUP's adverse environmental impacts for two reasons. First as Staff noted, CVEUP will not create any significant adverse environmental impacts that will not be mitigated. Second, and more importantly, the three alternative project sites that could meet the siting criteria offered no environmental advantage over the project and/or are economically infeasible. (Ex. 200 at 6-1.) MMC also agrees with Staff's conclusions that there are no feasible alternative generation technologies, and that the "No Project" alternative failed to meet any project objectives and also failed to provide any of CVEUP's benefits. (Ex. 200 at 6-1, 6-14-6-15.)

It should be noted that the Warren-Alquist Act exempts projects like CVEUP from having to discuss alternatives. This exemption applies when a project is proposed to be located at an existing industrial site and the project has a strong relationship to that site. (Pub. Res. § 25540.6(b).) Here, CVEUP is intended to replace the existing Chula Vista Power Plant and utilize virtually all of the existing plant's infrastructure, such as transmission, natural gas, water, and sanitary sewer facilities. (Ex. 200 at 6-3.) Thus, as Staff noted, the Commission is not

required to consider project alternatives because CVEUP would be located at an existing industrial site and CVEUP has a strong relationship with this site. (Ex. 200 at 6-3.) However, because of requests from the City, project interveners, and members of the public, Staff elected to analyze alternatives to CVEUP.

1. The “No Project” Alternative is Infeasible

As an initial matter, any project alternative is effectively a “No Project” alternative because an alternative site would require a new AFC with the inherent associated delays for regulatory approval. The Commission does not have authority to approve an alternative or require MMC to relocate the project to a different project site without a new AFC. (Ex. 200 at 6-1.) Included with the new AFC for an alternative site would be a revised engineering and environmental analysis that more thoroughly assesses the alternative’s environmental impacts, non-conformity with LORS, and potential mitigation measures. (Ex. 200 at 6-2.) This more rigorous AFC-level analysis could reveal significant obstacles to the alternative that were not revealed by the more general alternative analysis presented in the FSA for CVEUP. (Id.) Thus, because relocation to an alternative site does not guarantee that the alternative would ultimately be acceptable and because relocation would require MMC to terminate its current development effort, each alternative constitutes a “No Project” alternative.

Because CVEUP will replace the existing Chula Vista Power Plant, the “No Project” alternative is environmentally inferior to the project and would preclude the City from realizing CVEUP’s numerous benefits. As also discussed in section IV regarding the Commission’s override authority, under the “No Project” alternative the older less efficient Chula Vista Power Plant and South Bay Power plant would continue to operate, which produce higher levels of air emissions. (Ex. 200 at 6-14.) In the long term, other project proponents may propose power plants to serve the demand that CVEUP is intended to meet, but there is no guarantee that these

other plants will consume less fuel or emit less pollutants per kilowatt-hour as compared to CVEUP. (Id.) In addition to CVEUP’s environmental superiority over the “No Project” alternative, which consists of the continued operation of the Chula Vista Power Plant, CVEUP will provide the City numerous other benefits. Among these benefits are \$800,000 in additional annual Proposition 13 taxes (Staff Addendum to FSA (Ex. 200) at 8); MMC tax payments under the City’s utility users’ tax (Ex. 21 at 2 and Ex. 200 at 4.9-6); injecting at least \$1.8 million into the local economy with construction expenditures (Ex. 1 at 5.10-17); providing jobs and approximately \$8.9 million in construction and demolition payroll (Ex. 200 at 3-5.); \$210,000 in direct funds to the City (Ex. 21 at 1); an additional \$210,000 to fund the cost of air emission mitigation (Ex. 21 at 1.); and providing power to meet the local demand in a CAISO identified local reliability area. Additionally, the “No Project” alternative would fail to meet any of the Staff-approved project objectives. Combining the aforementioned fact with the reality of foregoing numerous environmental and City benefits under the “No Project” alternative, the “No Project” alternative is not feasible.

2. There are No Feasible Alternative Sites for CVEUP

Staff established certain criteria for identifying potential alternatives sites. Under this criteria, Staff concluded that potential sites were rare because many of the suitable sites were already or are currently being developed or have a significantly higher environmental value than the CVEUP site. (Ex. 200 at 6-6.) As discussed in section III.A above, despite the lack of sites meeting Staff siting criteria, Staff did identify five potential alternative sites for further evaluation (two sites proposed by MMC and three sites identified by Staff). (Ex. 200 at 6-6.) Two of these five alternative sites were rejected from more thorough analysis for various reasons including greater biological impacts, longer distance from the Otay Substation, and incompatibility with the City Redevelopment Agency’s plans to develop recreational facilities.

(Ex. 200 at 6-7.) As a result, Staff's alternatives siting analysis focused on the potential project sites: 1) the intersection of 4th Avenue and Main Street; 2) Faivre Street and Broadway; and 3) the Otay Landfill. (Ex. 200 at 6-7 to 6-9.)

a. The 4th Avenue and Main Street Alternative is Infeasible

One alternative location is located near the intersection of 4th Avenue and Main Street approximately 0.5 mile west of the proposed CVEUP site ("Alt. 1," as referenced in section III). This site is approximately 3.87 acres and is currently being used for strawberry farming. (Ex. 200 at 6-7.) In contrast to CVEUP project site, Alt. 1's site would require installation of various infrastructure. This new construction would include building a switch yard, constructing a 0.6 mile transmission line to connect to the Otay Substation, and installing pipelines to connect with SDG&E's gas pipeline as well as potable water and sewer. (Id.) Noise attenuation walls are also likely to be required because the nearest residential receptor is approximately 50 feet closer to this site as compared to the CVEUP site and the distance to public schools is 300 feet closer. (Ex. 200 at 6-7.) Additionally, it is unknown if site control is possible at this location. (Ex. 200 at 6-8.)

Staff determined that Alt. 1 had greater potential for environmental impacts than CVEUP. The trenching activities associated with the new linears that Alt. 1 requires would cause greater adverse traffic impacts as compared to CVEUP. (Ex. 200 at 6-7.) Also, being closer to a school and residence would arguably lead to greater noise impacts to those sensitive receptors. As a primary gateway to the City, Alt. 1's location has greater sensitivity to visual resources and, as a result, Staff determined that this site would have a greater impact on visual resources. (Ex. 200 at 6-8.) Developing a greenfield site like Alt. 1 also has greater potential to disturb buried cultural resources as compared to building on a previously disturbed site like CVEUP. (Id.) Furthermore, impacts to biological resources could also be greater because this site is

undeveloped and used for agriculture. (Id.) Reducing biological impacts at this site could be especially challenging because as noted by Commission Staff and staff from the California Department of Fish and Game, finding appropriate mitigation land in San Diego County can be very difficult. (Ex. 200 at 6-17.) Also of note, this site is currently being used for strawberry farming and as a result, constructing a power plant on this site would displace farmed acreage thereby negatively impacting the preservation of local agriculture in San Diego County. Because CVEUP would not result in any significant adverse environmental impacts and also because Alt. 1 would cause greater environmental impacts than CVEUP, this alternative is not feasible. (See Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

b. The Faivre Street and Broadway Alternative is Infeasible

A second alternative location is located near the intersection of Faivre Street and Broadway approximately 1 mile west of the proposed CVEUP site (“Alt. 2,” as referenced in section III). This undeveloped site is approximately 2.57 acres. Similar to Alt. 1, Alt. 2 would require installation of various infrastructure. A switch yard, a 1.2 mile transmission line, a 0.85 mile gas pipeline, and potable water and sewer lines would need to be constructed at Alt. 2’s site. (Ex. 200 at 6-8.) Noise attenuation walls are also likely to be required because the nearest residential receptor is approximately 50 feet closer to this site as compared to the CVEUP site. (Ex. 200 at 6-8, 6-10.) Additionally, it is unknown if site control is possible at this location. (Ex. 200 at 6-8.)

Similar to Alt. 1, Staff determined that Alt. 2 had greater potential for environmental impacts than CVEUP. Trenching will be required to install this alternative’s linears and as a result, Staff determined that this construction would result in greater traffic impacts than CVEUP. (Ex. 200 at 6-8.) Furthermore, being closer to residences could arguably lead to

greater noise impacts as compared to CVEUP. Also, Staff determined that Alt. 2 would have greater visual impacts as compared to CVEUP due to this alternative being adjacent to Broadway, a major thoroughfare. (Id.) Developing a greenfield site also has greater potential to disturb buried cultural resources as compared to building on a previously disturbed site. (Id.) As an undeveloped site located adjacent to the Otay Valley Regional Park preserve, developing this site presents a greater likelihood of impacting biological resources. (Id.) Not only could this site provide habitat linkage from the preserve, but there is also a possibility that a portion of this site is covered by the Chula Vista Subarea Multi-Species Conservation Plan 75%-100% development limitation. Of note, reducing biological impacts at this site could be especially challenging because as stated by Commission Staff and staff from the California Department of Fish and Game, finding appropriate mitigation land in San Diego County can be very difficult. (Ex. 200 at 6-17.)

Therefore, because CVEUP would not result in any significant adverse environmental impacts, and also because Alt. 2 would cause greater environmental impacts than CVEUP, this alternative is not feasible. (*See* Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

c. The Otay Landfill Alternative is Infeasible

The third alternative location analyzed by Staff is the Otay Landfill at 1700 Maxwell Road in the City (“Staff Alt. C,” as referenced in section III). The landfill is owned by Allied Waste Company and located on site are two 3.4 MW methane burning power plants that are owned and operated by Covanta Energy. (Ex. 200 at 6-9.) Covanta Energy has a lease with Allied Waste Company and owns the gas rights under the landfill. (Id.) Although sufficient land is available for development adjacent to the existing methane burning power plants, additional

linear facilities will be required to accommodate a new power plant like CVEUP. (Ex. 7 at 9.) These additional linear facilities include an approximately 3-mile long transmission line to connect with the Otay Substation, a 0.45 mile gas pipeline, and a 0.2 mile potable water pipeline. (Id.) Additionally, it is unknown if site control is possible at this location. (Id.)

Staff Alt. C fails to meet all the Staff-approved project objectives. (10/2/2008 RT 360: 11-12.) It is a project objective to minimize or eliminate the length of any project linears, including gas and water supply lines, discharge lines, and transmission interconnections. (Ex. 200 at 6-5.) Unlike CVEUP, which will utilize the existing project linears at its site, Staff Alt. C would require construction of over 3.5 miles of project linears i.e. 0.45 mile gas pipeline, 0.2 water pipeline, and 3 mile transmission line. (Ex. 200 at 6-9.) As a result, this alternative fails to meet the project objective related to minimizing or eliminating project linears.

The construction of Staff Alt. C's new linear facilities would also result in greater impacts to traffic and transportation as compared to CVEUP. Constructing the approximately 3-mile long transmission line could include underground construction along Main Street. (Ex. 200 at 6-9.) Combining construction of the transmission line with the gas and water pipelines, this alternative would have a much greater impact on traffic and transportation as compared to CVEUP which does not require construction of any linear facilities. (Ex. 200 at 6-3.)

Also, siting a power plant at the landfill raises significant environmental and safety concerns. Even though the landfill is compacted, constructing a power plant like CVEUP at the landfill raises concerns of subsidence or settling. (Ex. 5 at 26.) Stabilizing a power plant like CVEUP would require several large columns to support the foundation. (Id.) Placing these columns would disturb the landfill's containment liner and drainage system, and complex engineering measures would be needed to prevent landfill contaminants from polluting

groundwater. (Id.) Additionally, methane gas produced by the landfill presents a significant explosion hazard. (Id.) To mitigate this explosion hazard, gas would need to be vented away from the power plant and a system installed to detect dangerous levels of gas. (Id.)

Given that Staff has determined CVEUP would not cause any significant adverse environmental impacts, Staff Alt. C's longer distance from sensitive receptors would provide a marginal at best, particularly given Staff's determination that public health risks relating to CVEUP's air emissions would be "well below" the levels of significance. Considering Alt. C's greater impacts on traffic, and Alt. C's unique environmental and safety hazards, this alternative is not feasible. (*See* Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a) (requiring alternatives to substantially lessen or avoid the significant adverse impacts of the proposal on the environment).)

Moreover, the engineering and permitting requirements associated with locating the project at the landfill would cause this alternative to be cost prohibitive. Commission and CEQA regulations require consideration of "feasible" alternatives. (Cal. Code Regs., tit. 20, §1765 and tit. 14, §15126.6(a).) And CEQA defines feasible as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (emphasis added) (Cal. Pub. Resources Code § 21061.1; Cal. Code Regs., tit. 14, §15364.) As discussed in the previous paragraph, Staff Alt. C would require complex engineering to address landfill specific issues related to subsidence, drainage, groundwater pollution, and gas explosion hazards. (Ex. 5 at 26.) These engineering requirements would be cost prohibitive. (Id.) Also, the permitting process would be more involved and expensive because approvals would be needed not only from the Commission, but also the California Waste Management Board. (Id.) Moreover, because transmission and gas

lines for the energy industry generally cost \$1 million per mile, construction of the 3-mile long transmission line and 0.45 mile gas pipeline would result in approximately \$3.45 million of additional costs that CVEUP does not have. (10/2/2008 RT 355: 5-12.) Given the significant additional costs that Staff Alt. C has as compared to CVEUP, this alternative's failure to meet all project objectives, and the environmental impacts associated with locating a power plant on a landfill, Staff Alt. C is an infeasible alternative.

3. There is No Feasible Alternative Generation Technology

a. Conservation/Demand Side Management is Not a Feasible Alternative to CVEUP

Included in this discussion of alternative generation technology is the use of conservation or demand side management as an alternative to meeting California's growing electricity demand with projects like CVEUP. Demand side measures include programs that increase energy efficiency, reduce electricity use, or shift electricity use away from peak demand hours. (Ex. 200 at 6-12.) On this topic, Staff concluded that "current demand side programs are not sufficient to satisfy future electricity needs, nor is it likely that even much more aggressive demand side programs could accomplish this as the economic and population growth rates of the last ten years." (Ex. 200 at 6-12.) As a result, new generation facilities are needed in the immediate future to meet current demand. (Id.) This need for new peak generation in the region is also evidenced by CAISO and SDG&E's recent RFO to provide peak capacity in the vicinity. (Ex. 200 at 6-13.) Moreover, because no new generation in the San Diego region is expected to come online in 2008 or 2009, CVEUP becomes a more critical component to meeting demand. (10/2/2008 RT 413: 6-10.) Thus, although demand side programs are likely to receive more attention in the future, these types of measures are an infeasible alternative to CVEUP to meet the immediate need for peak generation.

b. Renewable Resources Are Not a Feasible Alternative to CVEUP

MMC agrees with Staff's conclusion that the use of renewable resources does not offer a feasible alternative to CVEUP. (Ex. 200 at 6-13, 6-14.) Because there are no geothermal resources in the project's vicinity, use of this technology as an alternative to CVEUP is not feasible. (Ex. 200 at 6-13.) Similarly, because there are no water sources for hydroelectric power in the project's vicinity, use of this technology is also not feasible. (Id.) And as discussed further below, biomass, wind, solar/photovoltaic, or cogeneration/combined heat and power ("CHP") are also not feasible alternative technologies.

Biomass, wind, solar, and CHP all fail to meet the project objective of serving as a peak load facility with quick-start capability. (Ex. 200 at 6-14; 10/2/2008 RT 394: 9-15.) Biomass facilities are not designed to operate as a quick start peaking facility and, as stated by EHC's witness Mr. Bill Powers, CHP is not quickstart, it merely removes load from the system. (Ex. 200 at 6-14; 10/2/2008 RT 394: 9-15.) The San Diego region has two peak demand periods and the afternoon peak is several hundred megawatts higher than the 8 p.m. peak. (10/2/2008 RT 381: 10-12.) Solar's peak production however, does not coincide with peak demand and wind by its nature is not entirely predictable. (10/2/2008 RT 413: 3-6.) Although EHC's witness confirmed that electric storage is needed to address the intermittent nature of solar and wind, there is a significant deficit of storage capacity to meet this need. (10/2/2008 RT 408: 11-12.) This deficit in storage capability is implicitly acknowledged by Mr. Powers' own position that a 3.5 MW battery peaker is a "large-scale battery installation." (10/2/2008 RT 381: 25, 382:1-3.) If a large-scale battery installation only provides 3.5 MW of power, then more than 25 of these large-scale installations would be required to replace CVEUP. But as EHC's witness stated, there are "a few examples" (emphasis added) of large-scale battery installations in California. (10/2/2008 RT 381: 22-24.) As for CHP, EHC's witness conceded that most utilities require this

technology to have backup service from the electric grid. (10/2/2008 RT 385: 9-13.) Therefore, these alternative technologies are infeasible because they do not have quick start capability to meet peak demand and will not be able to meet the region's need for additional peaking power.

Not only would biomass, wind, and solar fail as a peak-load facility with quick start capability, but these technologies require significantly more land than CVEUP to generate an equivalent amount of power. Biomass facilities are usually sized to generate less than 20 MW, therefore five biomass plants are needed to replace CVEUP. (Ex. 200 at 6-14.) Additionally, traditional biomass plants are fueled by agricultural sources, e.g. wood chips, so several hundred additional acres would be required for the fuel source. (Id.) As for wind farms, this technology generally requires approximately 4.5 acres per megawatt of generation. (Ex. 200 at 6-13.) As a result, approximately 450 acres are required to replace CVEUP with wind generation. (Id.) Similarly, a solar project would also require significantly more land than CVEUP. At 4 acres per megawatt, rooftop photovoltaic arrays require less land than solar thermal projects which require approximately 5 acres per megawatt. (Id.) However, a photovoltaic project producing the equivalent amount of power as CVEUP would still require at least 400 acres i.e. more than 100 times the amount of land taken by the 3.8 acre CVEUP. (Ex. 200 at 3-1, 6-13.)

In the event sufficient land was available for a biomass, wind, or solar project as an alternative to CVEUP, such large development would be subject to an environmental analysis and this analysis may identify numerous significant adverse environmental impacts. (10/2/2008 RT 382: 12-18.) Combining the potential environmental impacts with land acquisition and transmission costs, these alternative technologies are infeasible.

Even if there were no issues related to storage, environmental impacts, or cost, these alternative technologies may not be feasible because as EHC's witness asserts: utility

cooperation is necessary for these technologies to be successful. (10/2/2008 RT 405: 7-9, 406: 1-8.) Therefore, until SDG&E endorses a specific biomass, wind, solar, or CHP project with equivalent capacity to CVEUP, such project's viability is entirely speculative. As a result, use of these renewable resources as an alternative to CVEUP is infeasible.

In summary, no feasible alternative sites or technology for the proposed CVEUP exist. However, because no unmitigated significant adverse impacts will occur due to the construction and operation of CVEUP, no alternative sites or technology are necessary.

VII. OVERRIDE UNDER SECTION 21081(B) OF CEQA AND SECTION 1755(D) OF THE COMMISSION'S REGULATIONS

This section addresses the Committee's requested briefing topic related to the Commission's ability, under section 21081(b) of CEQA and section 1755(d) of the Commission's regulations, to override unmitigated significant adverse environmental impacts caused by CVEUP. As determined by Staff and as discussed in sections II and VI.A.-H. of this brief above, CVEUP will not result in any unmitigated significant adverse environmental impacts. (Ex. 200 at 6-5.) Therefore, MMC responds that because CVEUP will not result in any significant adverse environmental impacts, no override finding by the Commission is necessary. However, should the Commission choose to engage in an override, it will find that CVEUP's compelling local and statewide benefits dictate that the Commission should override any such significant unmitigated adverse environmental impacts.

The Commission override standard, as set forth in section 21081(b) of CEQA, calls for the Commission to consider whether specific overriding economic, legal, social, technological, or other project benefits "outweigh the significant effects on the environment." (Pub. Res. § 21081(b).) Section 15093(a) of the CEQA Guidelines explains that the override procedure requires:

The decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits of a proposed project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered “acceptable.”

This procedure reflects CEQA’s policy that public agencies must weigh a proposed project’s benefits against its significant unavoidable environmental impacts and may find the adverse impacts acceptable if the benefits outweigh those effects. (*See Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222.)

Similarly, the Commission override standard as set forth in section 1755(d) of the Commission’s regulations requires the Commission to consider whether specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and if the project’s benefits outweigh the project’s unavoidable significant adverse environmental effects. (Cal. Code Regs., tit. 20, §1755.) As discussed in section VI.H. of this brief titled “Alternatives,” none of CVEUP’s alternatives are feasible due to reasons related to increased environmental impacts as compared to the proposed CVEUP, failure to meet CVEUP project objectives, increased safety risks, cost prohibitions, and/or the inability to meet the region’s demand for peak generation. Therefore the applicable analysis under section 1755 should focus on weighing CVEUP’s benefits against the project’s significant unmitigated adverse environmental impacts.

Given CVEUP’s lack of significant unmitigated adverse environmental impacts, it is impractical to engage in any meaningful balancing of the project’s benefits against hypothetical significant unmitigated adverse environmental impacts in accordance with sections 21081(b) and 1755(d). However, as more fully discussed in section IV of this brief regarding the Commission’s authority to override any LORS inconsistencies, the project has numerous

compelling statewide and local benefits including: \$800,000 in additional annual Proposition 13 taxes (Staff Addendum to the FSA (Ex. 200) at 8), furthering redevelopment goals of the Southwest Redevelopment Area by ensuring that the industrial use on site remains viable (Ex. 1 at 1-1.), CVEUP property taxes of approximately \$157,800 to the City of Chula Vista and \$471,050 to the Redevelopment Agency (Ex. 1 at 1-13 and Ex. 200 at 3-5.), MMC tax payments under the City's utility user's tax (Ex. 21 at 2 and Ex. 200 at 4.9-6), injecting at least \$1.8 million into the local economy with construction expenditures (Ex. 1 at 5.10-17), providing jobs and approximately \$8.9 million in construction and demolition payroll (Ex. 1 at 1-13 and 5.10-19; Ex. 200 at 3-5.), \$210,000 in direct funds to the City (Ex. 21 at 1), an additional \$210,000 to fund the cost of air emission mitigation (Ex. 21 at 1.), helping to meet identified local generation needs as well as the ability to produce electricity more efficiently than the current plant and thereby further the statewide goals of limiting the environmental effects of power generation (Ex. 1 at 1-1.), contribute to the removal of the outdated, inefficient, blight causing South Bay Power Plant (10/2/2008 RT 234: 4-7; and RT 241: 24-25.), and contribute to essential elements of local and statewide electric system reliability (*see* full discussion of this benefit in section IV of this brief).

Thus, given CVEUP's numerous economic, social, technological, and environmental benefits, in the highly unlikely event that a significant unmitigated adverse environmental impact exists, substantial evidence exists in the record to support the Commission's authority to override such impact.

VIII. ENVIRONMENTAL JUSTICE

A. **CVEUP Has No Environmental Impacts That Fall Disproportionately on Minority or Low-Income Populations**

Both Staff and MMC correctly concluded that CVEUP will not result in a disproportionate impact on an environmental justice population. (Ex. 200 at 1-4; Ex. 1 at 5.10.2.4.9 and 5.10A-4.) Staff and MMC examined the impact of CVEUP on potential environmental justice populations in 11 technical areas: Air Quality, Hazardous Materials Management, Land Use, Noise, Public Health, Socioeconomics, Soils and Water Resources, Traffic and Transportation, Transmission Line Safety and Nuisance, Visual Resources, and Waste Management. (Ex. 200 at 1-4; Ex. 1 at 5.10A-4.) Because neither Staff nor MMC found significant impacts in any area, Staff concluded that CVEUP would not have a significant disproportionate impact on the environmental justice population. (Ex. 200 at 1-4; Ex. 1 at 5.10.2.4.9 and 5.10A-4.) The analysis used by Staff and MMC complied with the Commission’s methodology and with applicable state and federal guidance.

1. **The Applicable State and Federal Guidance Require an Analysis to Determine Whether Any Significant Impact Falls Disproportionately on an Identified Environmental Justice Population**

California law defines environmental justice as “. . . the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.” (Cal. Gov’t Code, § 65040.12[e]; Cal. Pub. Resources Code, § 71116[j].) The Office of Planning and Research coordinates California’s environmental justice program but outside the limited context of city and county general plans, it does not issue guidelines for addressing environmental justice matters. (Cal. Gov’t Code, § 65040.12[a], [c].) The Office of Planning and Research does consult with the California Resources Agency (“Resources Agency”) and the Resources Agency, in turn, directs

the entities under its jurisdiction to consider environmental justice in the entities' decision-making process. (*Id.* at [b][1]; *see* California Resources Agency, Environmental Justice Policy 1 ["All Departments, Boards, Commissions, Conservancies and Special Programs of the Resources Agency must consider environmental justice in their decision-making process if their actions have an impact on the environment, environmental laws, or policies"].¹¹)

As an entity under the Resources Agency's jurisdiction,¹² the Commission must consider environmental justice in its decision-making process. The Resources Agency provides some guidance on how to incorporate environmental justice in decisions. This guidance includes: identifying relevant populations that might be adversely affected, holding required public workshops and hearings at times and in locations that encourage meaningful public participation, and working in conjunction with other agencies on the state and federal level to ensure consideration of disproportionate impacts on relevant populations. (California Resources Agency, Environmental Justice Policy, *supra.*) The Resources Agency's guidance therefore identifies demographic screening, public outreach, and impact analysis as important factors in implementing its environmental justice policy.

Two federal documents also provide guidance on how to incorporate environmental justice in a California agency's decision-making process. First, Executive Order 12898 requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects. . . on minority populations and low-income populations." (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,

¹¹ Available at http://www.resources.ca.gov/environmental_justice_policy_20031030.pdf (last visited Oct. 30, 2008).

¹² *See* Pub. Res. Code § 25200.

Exec. Order No. 12,898, 3 C.F.R. 859 [1995], *reprinted as amended in* 42 U.S.C. § 4321 at 73, § 3-301[b] [1994 & Supp. VI 1998] [hereafter cited as Executive Order 12,898].) Second, the USEPA issued guidance that calls for a two-step environmental justice analysis: (1) does the potentially affected community include minority and/or low-income populations and, if it does, (2) are the environmental impacts likely to fall disproportionately on minority and/or low-income members of the community? (United States Environmental Protection Agency, Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses 3.2.1 [1998].¹³) Thus, federal guidance identifies demographic screening and impact analysis as questions that must be addressed in order to incorporate environmental justice into the decision-making process.

2. The Commission’s Methodology Complies with Applicable Policy and Guidance

The Commission’s environmental justice approach is consistent with guidance from both the Resources Agency and the federal government. The Commission’s approach “consists of: (1) specific public outreach efforts to notify, inform and involve community members, including non-English speaking people; (2) analysis of the applicable demographics to determine the percentage of minority and low-income population living in the potentially affected area; and (3) assessing the potential environmental and health impacts of the proposed project.” (California Energy Commission, Environmental Justice: Frequently Asked Questions;¹⁴ *see* Ex. 200 at 1-3, 4.) The Commission’s methodology mirrors the three primary factors outlined by the Resources

¹³ Available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf (last visited Oct. 30, 2008).

¹⁴ Available at http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html (last visited Oct. 30, 2008).

Agency (public outreach, demographics, impact assessment) and includes both factors identified by the federal government (demographics and impact assessment).

a. Public Outreach

Public outreach for a proposed project is conducted on an on-going basis and begins with the dissemination of information on the proposed project to all local area media and public libraries. (California Energy Commission Staff Approach to Environmental Justice;¹⁵ Ex. 200 at 2-4.) The Commission's Public Advisor's Office then contacts community individuals and groups, local leaders, and community activists to inform them of the project and the Commission's process. Concurrently, Staff makes similar contacts with the community to provide project details, answer questions about the project and application proceeding, and to explain Staff's analysis. Staff holds multiple local public participation workshops and hearings, with translators provided as needed. (California Energy Commission Staff Approach to Environmental Justice, *supra*.)

b. Demographics

Census-block data are used to develop a demographic screening map covering both a one and a six-mile radius around the proposed project. (California Energy Commission Staff Approach to Environmental Justice, *supra*.) The demographic screening map is used to identify whether a minority or low-income population of greater than 50 percent exists within the potentially affected area. Areas with such populations are considered to have potential environmental justice issues.

¹⁵ Available at http://www.energy.ca.gov/public_adviser/staff_env_justice_approach.html (last visited Oct. 30, 2008).

c. Impact Assessment

If an identified environmental justice population exists, Staff analyzes whether there is a significant impact on the population as a whole and, if there is, whether the significant impact falls disproportionately on the environmental justice population. (California Energy Commission Staff Approach to Environmental Justice, *supra*; Ex. 200 at 1-3, 4.) Generally, “technical staff follow a five-step analysis: (1) describe the existing setting; (2) analyze ‘unique circumstances,’ if any, of the affected population; (3) analyze the project’s direct, indirect, and cumulative impacts; (4) assess and recommend appropriate mitigation; and (5) determine whether the project creates an unavoidable significant adverse impact on the affected population and, if so, consider whether the impact is disproportionate.” (California Energy Commission Staff Approach to Environmental Justice, *supra*.)

The applicable environmental justice guidelines and policies do not provide any specific guidance with regard to identifying whether an impact is significant. In performing the fifth step of this analysis, Staff has traditionally used the same standards of significance as those used during the environmental review process required by the Commission, which is based on the requirements for an EIR under CEQA.¹⁶ The CEQA guidelines provide more detailed criteria than the applicable environmental justice guidelines for establishing whether an impact is significant.¹⁷ CEQA itself does not expressly require analysis of impacts to environmental justice populations. However, the analysis of impacts under CEQA is sufficient to meet the

¹⁶ The power plant siting process is excused from CEQA provisions requiring the preparation of a traditional Environmental Impact Review. However, the Commission has established a certified state regulatory program that essentially requires the same level of environmental review. This program includes the preparation of the AFC and the Preliminary and Final Staff Assessments. (*See* Pub. Res. Code § 25500 et seq.) When Staff prepares its Preliminary and Final Staff Assessments, Staff therefore performs a process that is equivalent to CEQA environmental review. (*See* 20 C.C.R. § 15250, 15251(j), 1716(b).)

¹⁷ *See* CEQA Guidelines, Appendix G, available at http://ceres.ca.gov/topic/env_law/ceqa/guidelines/appendices.html (last visited Oct. 30, 2008).

requirements of all applicable environmental justice guidelines and standards. This is because CEQA review is triggered by impacts that are merely significant, while the applicable environmental justice guidelines refer to “high and adverse” impacts. Any “high and adverse” impacts to any part of the population are revealed as a significant impact during CEQA review. Staff has therefore considered CEQA significant adverse impacts to be synonymous with “high and adverse” impacts as described in Executive Order 12898. (*See, e.g.*, Carlsbad Energy Center Application for Certification at 5.10A-3; Vernon Power Plant Application for Certification at 8.8A-5.)

3. Staff Followed its Methodology in Correctly Concluding that CVEUP Will Not Result in a Disproportionate Impact on an Environmental Justice Population

As part of the Commission’s environmental justice methodology Staff conducted extensive public outreach for this project, evaluated and found an environmental justice population, and conducted an extensive evaluation of potentially disproportionate high and adverse impacts by conducting an extensive evaluation of significant adverse impacts in accordance with federal and state law and guidelines.

a. Staff Conducted Extensive Public Outreach

Commission’s public outreach complied with its methodology. Commission’s outreach program is an ongoing process that is facilitated by both the Public Advisor’s Office (PAO) and Staff. (Ex. 200 at 2-4.) The Commission sent the CVEUP AFC to libraries across California, including the San Diego County Library System, the City of Chula Vista Public Library, the National City Public Library, and to libraries in Eureka, Fresno, Los Angeles, Sacramento, San Diego, and San Francisco. (Ex. 200 at 2-4.) Pursuant to Energy Commission regulations, Staff also noticed property owners within 1,000 feet of CVEUP and 500 feet of all linear facilities associated with CVEUP. (Ex. 200 at 2-4.) The PAO also notified “sensitive receptors” within a

six mile radius of CVEUP. (*Id.*) For complete information regarding Staff's outreach efforts, please see the FSA. (Ex. 200 at 2-4.)

EHC takes issue with two aspects of the outreach related to CVEUP. First, EHC claims that the public outreach conducted by the Commission was insufficient because a Public Advisor's Office representative was not assigned to CVEUP proceedings. (Exhibit 608 at 4; 10/2/2008 RT 202:19.) However, as counsel for the Staff explained at the evidentiary hearing, a Public Advisor's Office representative has been assigned to the proceedings at all times, and has been present at all hearings. (10/2/2008 RT 208:3.)

Second, EHC's expert witness, Diane Takvorian, argues that outreach efforts were insufficient to satisfy the environmental justice guidelines. (Ex. 608 at 4.) Ms. Takvorian argues that because the PSA was released only 8 days before the May 12, 2008 PSA workshop, there was insufficient time to grant local residents full access to the information about the proposal. (*Id.*) The PSA was actually released and posted on the internet 13 days before the workshop, on April 29, 2008. Furthermore, the regulations do not set any particular timeline for the release of the PSA before the workshop regarding the PSA. (*See* 20 C.C.R. § 1743.) In fact, the Commission is not legally obligated to hold a workshop following the PSA. The Commission has discretion to decide whether or not to hold such a workshop at all. (*See* 20 C.C.R. § 1718.) Furthermore, the comment period on the PSA did not end at the PSA workshop but extended for 30 days after Staff published the PSA. (PSA at 1-1.) Ms. Takvorian also argues that because the PSA was released only in English, there was insufficient outreach to the area's minority population. However, nothing in the guidelines requires the PSA to be distributed in Spanish or any other language. The Resources Agency guidelines suggest ensuring that public documents relating to environmental issues are printed in multiple languages if appropriate. (California

Resources Agency, Environmental Justice Policy, *supra* at 2.) In this case, though, the size of the PSA document, combined with the strict timeframe of the CVEUP siting proceedings, makes a translation of the entire PSA infeasible. MMC hired a translator for the PSA workshop, as MMC did for all public meetings on this project. Therefore, the outreach performed by Staff and supplemented by MMC through translation services was sufficient under all applicable environmental justice guidelines.

b. Both Staff and MMC Identified an Environmental Justice Population Within CVEUP's Affected Area

The purpose of the screening analysis is to determine whether a minority or low-income population, defined as greater than 50 percent of the affected area's general population, exists. (California Energy Commission, Environmental Justice: Frequently Asked Questions, *supra*; Ex. 200 at 1-4.) Staff reviewed Census 2000 information that shows the minority population by census block is 73.41 to 81.13% within a six-mile and one-mile radius of the proposed CVEUP. (Ex. 200 at 1-4.) MMC similarly concluded that many of the census blocks in the affected area contain minority populations over 50% of the total population. (Ex. 1 at 5.10A, pages 3 and 4.) Therefore, Staff and MMC determined that an environmental justice population exists within CVEUP's affected area. (Ex. 200 at 1-4; Ex. 1 at 5.10A-4.) No party has challenged Staff's determination.

i. *EHC's Attempts to Expand the Applicable Demographic Screening Methodology is Unnecessary Because All Parties Agree there is an Environmental Justice Population around CVEUP*

EHC complains that the data presented by Staff is not sufficient to analyze the demographics of the population surrounding CVEUP. Specifically, EHC comments that the PSA lacks information describing the economic demographics of the area within one mile and six miles from CVEUP. (Ex. 600 at 22.) However, the purpose of an environmental justice

screening analysis is to determine whether a below-poverty level and/or minority population exists within the potentially affected area of the proposed site. (Ex. 200 at 1-4.) The Resources Agency guidelines provide only that “reasonable efforts” must be made toward identifying relevant populations that might be adversely affected by projects submitted by outside parties. (California Resources Agency, Environmental Justice Policy, *supra*.)

The FSA and the AFC identify the minority population, within one to six miles of the CVEUP site, by census block, which is the smallest geographic unit for which the Census Bureau collects and tabulates data. (Ex. 200 at 4.9-3; Ex. 1 Tables 5.10A-1 and 5.10A-2.) The AFC includes a table listing the distribution of both minority and below-poverty populations within each census block in the affected area. (Ex. 1 Tables 5.10A-1 and 5.10A-2.) The PSA, FSA, and the AFC also provide a detailed, color-coded map of the area within six miles of the project providing data on the minority population by census block. (FSA, Socioeconomics – Figure 1.) Furthermore, the PSA and FSA reveal the below-poverty population within one and six miles of the CVEUP site. (PSA at 4.8-11; Ex. 200 at 4.9-3.) The FSA and AFC also include detailed, color-coded maps of the area within six miles of the project providing data on the percent of the population below poverty by census block. (Ex. 200 at Socioeconomics - Figure 2; Ex. 1 Figures 5.10A-1 and 5.10A-2.) The demographic screening methodology used by Staff is more than adequate to satisfy the Resources Agency’s policy described above. (*See part I[A][1] of the Environmental Justice section of this brief.*)

- ii. *EHC’s Information about Peaking Power Plants Near Homes and Schools is also Unnecessary because all Parties Agree there is an Environmental Justice Population*

EHC also complains that the PSA’s Demographic Screening section failed to compare the proximity of schools and homes to CVEUP with that of other peaking power plants certified by the Commission in recent years. (Ex. 600 at 17.) However, the purpose of Demographic

Screening is not to compare the proximity of past projects to infrastructure and public services, but rather to determine the percentage of minority and low-income population living in the potentially affected area. (See, e.g., California Energy Commission, Environmental Justice: Frequently Asked Questions, *supra*; California Resources Agency, Environmental Justice Policy, *supra*, “Implementation”; California Energy Commission Staff Approach to Environmental Justice, *supra*.) Furthermore, nothing in CEQA nor in any of the guidelines cited by EHC or by Staff requires the analysis requested by EHC in any part of the environmental justice review process. A comparison to past projects is irrelevant to Staff’s present analysis of environmental justice, since it does not help to determine whether significant minority or low-income populations exist near CVEUP.

c. Both Staff and MMC Concluded CVEUP Would Not Have a Disproportionate Impact on the Environmental Justice Population

Once the existence of an environmental justice population has been established, the key determination to be made is whether the project would cause *significant* adverse impacts to an environmental justice population. (See California Energy Commission Staff Approach to Environmental Justice, *supra*, “Impact Assessment”; Ex. 200 at 4.5-40 [Response to Comment 13] [emphasis added].) Because Staff and MMC determined that an identified environmental justice population exists, Staff and MMC analyzed whether any significant impact would disproportionately affect the environmental justice population. Staff examined the impact of CVEUP on potential environmental justice populations in 11 technical areas: Air Quality, Hazardous Materials Management, Land Use, Noise, Public Health, Socioeconomics, Soils and Water Resources, Traffic and Transportation, Transmission Line Safety and Nuisance, Visual Resources, and Waste Management. (Ex. 200 at 1-4.) Likewise, MMC examined the impact of CVEUP on all technical areas addressed by the AFC, which includes the 11 areas examined by

Staff. (Ex. 1 at 5.10A-4.) Staff identified no significant impacts in any of the technical areas evaluated. (Ex. 200 at 1-4.) Because neither Staff nor MMC found any significant impacts in any area, Staff and MMC concluded that CVEUP would not have a significant disproportionate impact on any environmental justice population. (Ex. 200 at 1-4; Ex. 1 at 5.10.2.4.9 and 5.10A-4.) Staff's analysis complied with its own methodology and with applicable policy and guidance.

EHC claims that Staff's methodology is not sufficient to comply with its obligation to consider environmental justice in its decision-making process and that Staff failed to follow its own methodology. This claim is based on a misguided understanding of both what the applicable environmental justice policies require and how the analysis performed by Staff satisfies those requirements.

i. EHC's Attempt to Expand the Applicable Environmental Justice Analysis Beyond Staff's CEQA-Based Methodology is Not Supported by State or Federal Law

EHC claims that despite a finding of no significant unmitigated impacts under CEQA, CVEUP could still have environmental justice impacts under California or federal environmental justice law. Ms. Takvorian stated in the evidentiary hearing that she disagreed with the proposition that a finding of no significant impact in a given area under CEQA translates into a finding of no impact in that area to an environmental justice population. (10/2/2008 RT 201:10.) However, when asked to expand on her reasons for disagreeing with Staff's position on environmental justice impact analysis, Ms. Takvorian did not cite any law, regulation or guideline that supports her beliefs. Instead, Ms. Takvorian simply discussed the overarching policies and goals of the principle of environmental justice. (10/2/2008 RT 205:5.) While these policies and goals are valuable from a theoretical standpoint, they do not provide any guidance to assist the Commission and power project applicants in preparing their environmental justice

analysis. The Commission and MMC must therefore conduct their environmental justice analyses according to established regulations and guidelines. The Energy Commission is governed by the Warren-Alquist Act (Public Resources Code section 25000 et seq.) and Title 20 of the California Code of Regulations. (California Energy Commission, Frequently Asked Questions, *supra*.¹⁸) The Commission also conducts its environmental review analysis in conformity with applicable environmental justice guidelines. (*See* part I[A][1] of the Environmental Justice section of this brief.) The Commission and MMC must do no more and no less than satisfy these regulations and guidelines.

A review of the applicable environmental justice regulations and guidelines, case law, past Commission decisions, and hearing testimony from CVEUP proceedings reveals that a finding of no significant impact under a project's CEQA analysis is sufficient to support a finding of no "disproportionately high and adverse human health or environmental effects. . . on minority populations and low-income populations," as the impact analysis is phrased in Executive Order 12898. The applicable guidelines, discussed above, do not require analysis of impacts to environmental justice populations beyond the impact analysis conducted during the environmental review process required by CEQA. (*See* part I[A][2][c] of the Environmental Justice section of this brief.)

A review of California case law and Commission decisions similarly reveals no opposition to the Commission's method of determining the existence of an impact to an environmental justice population. No reported judicial decision supports EHC's claims that the CEQA impact analysis is insufficient for purposes of analyzing impacts to environmental justice populations. Applicants and Staff routinely use CEQA levels of significance for purposes of

¹⁸ Available at http://www.energy.ca.gov/public_adviser/siting_faq.html (last visited October 30, 2008).

analyzing impacts to environmental justice populations. (*See, e.g.*, California Energy Commission, Environmental Justice: Frequently Asked Questions, *supra*; Carlsbad Energy Center Application for Certification at 5.10A-3; Vernon Power Plant Application for Certification at 8.8A-5.)

Testimony from the evidentiary hearing similarly supports Staff’s impact analysis methodology. As discussed above, Ms. Takvorian provided no explanation of why the applicable environmental justice guidelines would not support a CEQA-based impact analysis. (*See* part I[A][3][c][i] of the Environmental Justice section of this brief.) Furthermore, Dr. Fatuma Yusuf, CVEUP’s expert on socioeconomics, testified that in her practice she considers all impacts which have been mitigated to levels below significance to have no environmental justice impact, because “those impacts have all been taken care of.”¹⁹ (10/2/08 RT 219:10.)

As described above, in its CEQA-based analysis, Staff analyzed the impacts of CVEUP to 11 technical areas of the environment. Staff concluded that CVEUP would not create any significant unmitigated impacts to any of these areas. (Ex. 200 at 1-4.) Therefore, this conclusion is enough to support a finding that no “high and adverse” impacts exist to an environmental justice population within each of those 11 technical areas. Staff’s analysis of the impacts to potential environmental justice populations was entirely sufficient under applicable laws and guidelines.

¹⁹ Regulations issued by the Commission require an AFC to include a discussion of public health impacts, including information revealing “sensitive receptors” within the area. (California Energy Commission Siting Regulations, Appendix B[g][9][D].) The regulations define a “sensitive receptor” as “infants and children, the elderly, and the chronically ill, and any other member of the general population who is more susceptible to the effects of the exposure than the population at large.” (California Energy Commission Siting Regulations, Appendix B[g][9][E][i].)

ii. *EHC Attempts to Modify the Applicable Environmental Justice Analysis to Claim That Existing Power Plant Infrastructure Is Not a Valid Consideration Ignores Settled CEQA Law Regarding Project Baseline*

EHC claims that by noting the pre-existence of a power plant in the CVEUP site, Staff and EHC have ignored the initial environmental injustice of placing a power plant in the area in the first place. This argument ignores an important part of the environmental justice analysis. As described above, the environmental justice impact analysis used in CEC siting proceedings is conducted in a similar manner to CEQA impact analysis. A major principle in conducting the environmental analysis required by CEQA is that of baseline. That is, when analyzing the environmental impacts of a project, the analysis views the project not from the perspective of an environment without any development, but rather of an environment with the level of development that exists at the time the environmental analysis for the proposed project begins. (Pub. Res. Code § 15125[a] [“An EIR must 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.”].) Therefore, the fact that an older power plant already exists at the CVEUP site is a strong consideration in the environmental justice analysis, because that is the background against which the environmental impacts of CVEUP are assessed. In the case of CVEUP, it is a particularly strong factor in favor of a finding of no environmental justice impacts because CVEUP would likely cause less impacts to the people of Chula Vista than the aging peaking power plant currently on the site.²⁰ Therefore, the consideration of the existing peaking power plant in the environmental justice analysis is

²⁰ Staff concluded in the FSA that the actual normal hourly emissions from the two new gas turbines combined are expected to be lower than the normal hourly emissions from the existing gas turbines, with the exception of SO₂ emissions (which are strictly a function of total fuel flow) and PM₁₀/PM_{2.5} emissions. (Ex. 200 at section 41, pages 42 and 43.) For a more complete analysis of the air quality impacts of the CVEUP, please see the Air Quality section of this brief.

proper, and is a strong factor supporting a finding that CVEUP will not have significant impacts to an environmental justice population.

iii. EHC's Claim that Staff Failed to Apply the Applicable LORS to the CVEUP Assessment is Based on a Misunderstanding of Both the Methodology and the Facts

EHC claims the Commission's analysis does not adequately address the LORS which address issues of environmental justice. EHC's claims are based on a misunderstanding of both the methodology used by the Commission and the facts. EHC complains that the table in the PSA is an inadequate assessment of the applicable LORS. (Ex. 600 at 18.) First, EHC claims that Staff failed to present the California definition of environmental justice. (Ex. 600 at 18.) The California definition of environmental justice appears in the FSA at page 2-5 and again at 4.9-2. Next, EHC complains that Staff failed to mention its own environmental justice policy in the PSA. (Ex. 600 at 19.) This is simply not true. Although Staff does not reproduce its entire environmental justice policy in the PSA or the FSA, both of those documents clearly implement Staff's environmental justice policy. (See, e.g., Ex. 200 at 1-4 [implementing the demographic screening and outreach portions of Staff's policy], 2-4 [implementing the outreach portion of Staff's policy], and FSA 1-4 [implementing the impact assessment portion of Staff's policy].) Staff also noted that the commenter incorrectly assumes that the only LORS taken into consideration by Staff are those that appear in Table 1. (Ex. 200 at 4.9-18.) As Staff explained, the intent of Table 1 is to provide the legal framework within which the proposed project is analyzed. (*Id.*) The exclusion of certain LORS does not alter Staff's conclusions with regard to environmental justice. (*Id.*)

EHC next claims that Staff's discussion of the LORS fails to apply the LORS to the current situation. (Ex. 600 at 20 [commenting on PSA at 4.8-1, 2].) Staff explained that this is incorrect because the commenter assumed that all LORS would be addressed in the

Socioeconomics section. (Ex. 200 at 4.9-19.) However, Staff addressed the applicable LORS under the various technical topics of the FSA when appropriate. (Ex. 200 at 4.9-19.) For example, the discussion regarding the land use LORS appears in the Land Use section of the FSA. (Ex. 200 at section 4.5, pages 9-22.)

EHC further claims that Staff's analysis ignores environmental justice as an issue apart from presenting demographic data. (Ex. 600 at 21.) This is untrue as well. In the FSA, Staff made clear that the presentation of demographic data is one step in Staff's three-step approach to environmental justice analysis. (Ex. 200 at 1-3. ["The purpose of the screening analysis is to determine whether a minority or low-income population exists within the affected area of the proposed site."].) In a separate step of its environmental justice review, Staff then clearly explained that it determined that the project would not cause significant adverse direct or cumulative socioeconomic impacts in the eleven technical areas described above. (Ex. 200 at 1-4; part I.A of the Environmental Justice section of this brief.) As described above, these impacts were analyzed according to the Commission's certified state regulatory program under CEQA. (Part I[A][2][c] of the Environmental Justice section of this brief.) The analysis of these impacts was performed according to the Commission's regulations, and it goes well beyond the mere presentation of demographic data.

EHC also claims that Staff failed to address the policies of the Chula Vista General Plan regarding environmental justice, specifically policies E 6.4, E 6.15, and E 23.3. (Ex. 600 at 19.) However, Staff adequately addressed these policies in the FSA. (See Ex. 200 at 4.5, pages 16 and 17; Ex. 200 at 4.5-33 [response to Comment 2].) For discussion of the Chula Vista General Plan and other land use issues, please see the Land Use section of this brief.

iv. *EHC's Claim that Staff's Public Health Impact Analysis Is Inadequate is Based on a Misunderstanding of Both the Methodology and the Facts*

EHC argues that Staff failed to take into account the lack of access to health care in the community surrounding CVEUP. (Ex. 600 at 22; Ex. 608 at 3.) While access to health care is not a required factor in the applicable public health impact analysis, the public health analysis conducted by Staff and MMC does take into account those parts of the population which are already particularly susceptible to the substances emitted from CVEUP. Regulations issued by the Commission require an AFC to include a discussion of public health impacts, including information revealing “sensitive receptors” within the area. (California Energy Commission Siting Regulations, Appendix B[g][9][D].) The regulations define a “sensitive receptor” as “infants and children, the elderly, and the chronically ill, and any other member of the general population who is more susceptible to the effects of the exposure than the population at large.” (California Energy Commission Siting Regulations, Appendix B[g][9][E][i].) John Lowe, MMC’s expert witness on public health, testified that the standards used by Staff as a basis for determining the significance of CVEUP’s air quality and public health impacts are set at levels to adequately protect the health of all members of the public, including the most sensitive: the aged, people with existing illnesses and children. (10/2/2008 RT 102:20). Furthermore, in assessing these health impacts, Mr. Lowe explained that the impacts were estimated at the point of maximum air quality impact, incorporating the highest ambient background concentration. (10/2/2008 RT 103:16.) Therefore, the public health analysis does take into account those parts of the population which are already particularly susceptible to the substances emitted from CVEUP. However, contrary to EHC’s suggestion, access to health care is not a factor in establishing whether or not a person or place is a “sensitive receptor.” The purpose of these regulations is to establish whether the community, as it exists at the time the project is proposed,

is susceptible to potential adverse effects of a power project. The level of access to health care is irrelevant to the issue of whether certain persons within the community are already susceptible to the effects caused by a new power project. Therefore, the analysis requested by EHC regarding health care access is unnecessary and not required by any applicable regulations or guidelines.

EHC is also concerned with the potential impact of CVEUP on asthma rates in the community. (Ex. 602.) When conducting their analyses for both cancer risk and non-cancer health effects, both Staff and MMC used methodology assuming worst-case scenarios. In Staff's analysis, it used simplified assumptions intentionally biased toward protection of public health. (Ex. 200 at 4.7-3.) "In other words, the analysis is designed to overestimate the public health impacts from exposure to emissions. Therefore, in reality is likely that the actual risks from the project will be much lower than the risks estimated by the screening-level assessment." (*Id.*) In its worst case scenario-based analysis, Staff used the highest levels of pollutants that could be emitted from the source, and assumed maximum possible levels of exposure to members of the public. (Ex. 200 at section 4.7, pages 3 and 4.) Similarly, MMC's public health analysis evaluated health risks based on a hypothetical maximum exposed individual located at the "maximum impact receptor," the place where the highest concentrations of air pollutants associated with emissions from CVEUP are predicted to occur. (Ex. 1 at 5.9-6.) Both impact analyses essentially assumed the highest levels of pollutants that could conceivably be emitted from the source. This involves the use of an operation time of 24 hours per day, which is unlikely to occur. (Ex. 200 at 4.1-66.) Therefore, the impacts presented by the assessments, which are below the level of significance, are actually likely to be significantly higher than the actual, real-world impacts created by CVEUP. (*See* Ex. 200 at 4.1-66.) Staff and MMC thus both concluded that cancer risk and toxic air emissions that result from the construction and

operation of CVEUP would be at levels that are less than significant and do not require mitigation beyond the specific emission control measures described in the FSA. (Ex. 200 at 4.7-16.) In fact, public health risks from CVEUP are expected to be well below the significance levels established by the Commission.²¹ With regard to cancer risk, Staff concluded that in the worst case scenario, CVEUP would produce a risk level of 0.15×10^{-6} , compared with a significance level of 10.0×10^{-6} . (Ex. 200 at 4.7-12.) With regard to acute non-cancer health impacts, CVEUP would produce a risk level of 0.088, compared with a significance level of 1.0. (*Id.*) Finally, with regard to chronic non-cancer health impacts, CVEUP would produce a risk level of 0.0069, compared with a significance level of 1.0. (*Id.*) Even under a worst case scenario, the public health risks posed by CVEUP would be a mere fraction of the level which the Commission and other authorities consider to be significant. Staff's public health analysis was more than sufficient to demonstrate that impacts to public health from CVEUP will be far less than significant. (*See also* the Public Health section of this brief for further discussion of CVEUP's impacts on asthma rates.)

B. Impacts Below CEQA Significance and Environmental Justice Disproportionate High and Adverse Impact Levels do Not Require Mitigation Nor Do They Support a Finding of Significant Adverse Impacts

Although EHC's witness Ms. Takvorian disagreed with the proposition that a finding of no significant impacts under CEQA translates into a finding of no impact to an environmental justice population, she could provide no law, regulation or adopted guidance to support this proposition. (10/2/2008 RT 201:10 & 205:5.) As described in section A(3)(c)(i) above, analysis

²¹ The Commission's significance standards exceed those required by state law. For example, with regard to cancer risk, Staff uses a standard of significance that is higher than that described in Proposition 65. (Ex. 200 at 4.7-6.) As described above, both of these analyses also assume maximum permitted emissions and maximum levels of exposure, producing impacts that are likely to be far more significant than those which the CVEUP would actually produce in the real world.

based on the Warren-Alquist Act and CEQA based analysis is sufficient to support a finding of no disproportionately high adverse human health or environmental effects on minority populations as specified in Executive Order 12898. Furthermore, MMC's review of applicable law and regulations supports the analyses completed by Staff and MMC pursuant to Warren-Alquist Act and CEQA significance criteria to determine disproportionately high and adverse impacts to an environmental justice population. (See section A[3][c][i] above.)

Both Staff and MMC conducted detailed analyses of 11 technical areas for impacts to the environment and applied the results of this analysis to their respective evaluations of impacts to environmental justice populations. (Ex. 200 at 1-4; Ex. 1 at 5.10A-4.) The analysis conducted by Staff and MMC is extensive and detailed, providing the public and the Committee with extensive information about the potential impacts of CVEUP. (See Ex. 200 and Ex. 1.) What Ms. Takvorian is requesting is a higher significance threshold for environmental justice populations than that applied to the remainder of the population. There is simply no legal support for this position. Thus, no further analysis, determination of impacts or mitigation is required. This extensive and detailed analyses of impacts ensures fair treatment of all populations as required by governing law. (Cal. Gov't Code, § 65040.12[e]; Cal. Pub. Resources Code, § 71116[j].)

C. Proposed Findings and Conclusions

MMC suggests the following language for the Committee's Environmental Justice Findings and Conclusions of the Presiding Member's Proposed Decision:

FINDINGS AND CONCLUSIONS

Based on the evidence, we find as follows:

1. California and federal law requires consideration of disproportionately high and adverse impacts consistent with significant adverse impacts under CEQA.

Impacts below these levels do not require mitigation and cannot support a finding of significant adverse impact.

2. The project will comply with all applicable environmental justice LORS.
3. The environmental impacts of the project do not disproportionately fall upon minority or low-income populations.

IX. CONCLUSION

The above sections clearly demonstrate that CVEUP will be consistent with all applicable state, local, and regional standards, ordinances, and laws and with the specified mitigation, will not cause a significant environmental impact. Therefore, MMC respectfully requests that the Commission certify CVEUP.

DATED: November 5, 2008

DOWNEY BRAND LLP

By: _____/s/_____
Nicolaas W. Pullin

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

**APPLICATION FOR CERTIFICATION FOR
THE CHULA VISTA ENERGY UPGRADE
PROJECT**

DOCKET NO. 07-AFC-4

**PROOF OF SERVICE
(Revised 10/27/08)**

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
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DECLARATION OF SERVICE

I, Lois Navarrot, declare that on November 5, I deposited copies of the attached MMC **CHULA VISTA’S OPENING BRIEF ON REQUESTED BRIEFING TOPICS** 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 the 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/
Lois Navarrot