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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification of the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

COMMENTS OF INTERVENOR ENVIRONMENTAL HEALTH COALITION ON THE PRESIDING MEMBER'S PROPOSED DECISION

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Environmental Health Coalition ("EHC") welcomes the opportunity to comment on the Presiding Member's Proposed Decision ("PMPD") for the Chula Vista Energy Upgrade Project (the "Project").

The PMPD reaches the correct result. As a matter of law, this Project is inconsistent with the City of Chula Vista's General Plan and zoning ordinance. In addition, the analysis of alternative sites and technologies presented in the Application for Certification ("AFC") and the Final Staff Assessment ("FSA") failed to meet the standards of the Warren-Alquist Act and the California Environmental Quality Act ("CEQA"). The PMPD thus correctly concludes that the Project as proposed cannot be certified consistent with controlling law.

As discussed below, EHC does not agree with every conclusion in the PMPD. The grounds for these disagreements were set forth in EHC's briefs on the merits. Although EHC does not waive any of the arguments raised in its briefs, those arguments will not be repeated here.

The PMPD's critical conclusions regarding the Project's conflicts with local land use LORS and its inadequate analysis of alternatives, however, are entirely correct. EHC thus respectfully requests that the Committee affirm, and that the full Commission accept, the PMPD's recommendation that the AFC be denied.

I. The PMPD Correctly Determined that the Analysis of Alternatives in the AFC and FSA Was Inadequate.

According to the PMPD, both the Applicant and Staff performed an insufficient analysis of alternative sites and technologies. This conclusion is correct. The Applicant defined its objectives so narrowly as to preclude analysis of a reasonable range of alternative sites, contrary to the requirements of CEQA. The PMPD also properly concluded that the record did not contain evidence demonstrating the infeasibility of the Otay Landfill site, but rather contained only speculation regarding transmission costs and engineering constraints. The Applicant, moreover, not only failed to analyze any other alternative sites in eastern Chula Vista, but also failed to analyze any site located more than 1,000 feet from residences. The Applicant thus failed to consider *any* site for the Project that could have been consistent with Policy E 6.4 of the City's General Plan.

Furthermore, the PMPD correctly recognized that the Project's objectives also were defined so narrowly as to preclude analysis of alternative energy sources. Uncontroverted testimony in the record established the relative cost-effectiveness of distributed, urban solar generation as an alternative, in whole or in part, to natural gas-fired peaking generation. Requiring analysis of such alternatives is also consistent with the state's energy policy directives. California is unlikely to meet either its renewable

energy goals or its greenhouse gas reduction targets without seriously considering alternatives to fossil-fired generation. That analysis did not occur here.

Finally, the PMPD correctly determined that the "No Project" alternative—essentially, denial of the AFC—would not have significant adverse consequences. Statements in the FSA to the effect that other, dirtier power plants might be built in the Project's place were speculative and unsupported by evidence. The PMPD also properly recognized that one of the Project's supposed benefits—a possible contribution to the closure and decommissioning of the South Bay Power Plant—was negligible and speculative. Both EHC and residents of the South Bay strongly support and have actively worked toward closure of the South Bay Power Plant. It is critical, however, that both the Commission and the community understand that this Project does not appreciably advance that goal. The PMPD's careful and independent review of the evidence submitted on this point contributes to that understanding.

The PMPD's conclusions regarding Project alternatives are legally correct and supported in the record. The Committee should reaffirm, and the Commission should adopt, those conclusions.

II. The PMPD Correctly Determined that the Project Conflicts with Local Land Use Standards and Regulations.

The PMPD, following a thorough and independent analysis of the text of the Chula Vista General Plan and zoning ordinance, properly concluded that the Project conflicts with numerous local laws, ordinances, regulations and standards ("LORS"). The PMPD, consistent with the Commission's adjudicatory role in these proceedings,

properly focused on interpreting the text of the LORS at issue. (See, e.g., *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 927-28 [interpretation of an ordinance, like interpretation of a statute, presents a question of law].) The PMPD's primary conclusions in this issue area are both legally correct and amply supported.

Specifically, the PMPD notes that both the General Plan and the zoning ordinance provide that power plants and other public utilities must be located in areas designated for General Industrial rather than Limited Industrial uses. The PMPD's reading of these provisions is correct, and its observation that electrical generation is akin to "the primary production of products from raw materials" (PMPD at p. 288)—a prohibited use in the Limited Industrial zone—is especially astute. The plain text of the zoning ordinance also supports the PMPD's conclusions regarding the need for a precise plan and its recognition that the Project cannot be approved as an "unclassified use."

The PMPD further recognizes that General Plan Policy E 6.4 unequivocally requires applicants to "avoid" siting energy generation facilities such as the Project within 1,000 feet of sensitive receptors. Both the plain text and the history of this policy confirm the City's intent to protect its residents from precisely this type of proposal. The PMPD correctly determines, moreover, that the Applicant has not taken any steps to "avoid" locating the facility close to residences and other sensitive receptors.[1] The

[1] EHC believes that the term "avoid" in Policy E 6.4 requires something more than just a "reasonable effort" to site a generating facility more than 1,000 feet from homes. As the PMPD points out, "avoid" commonly means "to prevent the occurrence of or to refrain from." (PMPD at p. 284.) The plain language of the policy thus dictates that power plants should not be built within this buffer zone at all.

PMPD also is correct in finding that the measures proposed in the Applicant's agreement with the City do not resolve the Project's conflicts with local LORS. Finally, the PMPD rightly suggests that the City's adoption of Policy E 6.4 is a changed circumstance that precludes reliance on the previously issued special use permit for the existing facility. The PMPD's conclusions reflect a careful and independent reading of the controlling LORS and the facts in the record. Those conclusions should be affirmed by the Committee and adopted by the full Commission.

III. Contrary to the PMPD's Conclusions, the Record Demonstrates that the Project Will Cause Significant Air Quality, Public Health, and Environmental Justice Impacts.

EHC respectfully disagrees with the PMPD's conclusions that certification of this Project would not cause significant air quality, public health, and environmental justice impacts. Again, the reasons for this disagreement are set forth in EHC's briefs on the merits, and will not be reiterated here.

One specific area of concern that deserves brief mention here is fact that the PMPD declines to determine the significance of impacts associated with greenhouse gas emissions. (See PMPD at p. 134.) EHC's briefs on the merits demonstrated that this approach is unlawful, especially in light of the dramatic net increase in greenhouse gas emissions that the Project will cause in relation to the existing facility and the FSA's failure to substantiate its conclusion that the Project would necessarily displace the greenhouse gas emissions of older, less efficient power plants. (See EHC's Opening Brief at pp. 45-49; EHC's Reply Brief at pp. 24-27; see also CEQA Guidelines §§ 15144 [requiring agency to use "best efforts to find out and disclose all that it reasonably can"],

15145 [requiring "thorough investigation" before agency can dismiss impact as speculative].) Unfortunately, the unsubstantiated analysis in the FSA was carried over into the PMPD.

Recent legal and policy developments—including some instigated by the Commission itself—indicate that the approach taken in the PMPD is out of step with the developing law in this area. For example, the Governor's Office of Planning and Research recently issued draft amendments to the CEQA Guidelines that confirm the responsibility of public agencies to determine the significance of environmental impacts, particularly in the context of greenhouse gas emissions.[2] While not yet final, these draft amendments reflect the state's current policy priorities in this area as well as CEQA's existing requirement that the significance of environmental impacts be determined.

In addition, a committee established by the Commission to provide guidance in evaluating the greenhouse gas impacts of power plant siting applications under CEQA recently released its final Committee Report (hereafter "GHG Committee Report").[3] This report, while acknowledging the analytical difficulties associated with examining a particular power plant siting application in the context of the overall electrical generating system, nonetheless concluded that cumulative greenhouse gas impacts should be addressed on a case-by-case basis pending development of a more comprehensive

[2] See Office of Planning and Research, Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions § 15064.4, *available at* http://opr.ca.gov/download.php?dl=Workshop_Announcement.pdf.

[3] California Energy Commission, Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications, CEC-700-2009-004 (March 2009) .

approach pursuant to AB 32.[4] Contrary to this recommendation, the PMPD concludes that development of a programmatic approach to greenhouse gas emissions under AB 32 will ameliorate the effects of this Project, and declines to engage in case-by-case analysis. (PMPD at p. 134.) The GHG Committee Report also recommended that Commission Staff conduct a "systemic analysis" that would enable assessment of a particular project's impacts in the context of the overall generating system.[5] Neither the FSA nor the PMPD attempts such a systemic analysis, although this analysis would be essential to any conclusion regarding the significance of the Project's greenhouse gas impacts. Accordingly, in the event that this Project undergoes further environmental analysis, the Committee should require further analysis of the significance of the Project's greenhouse gas emissions consistent with CEQA's requirements.

In conclusion, EHC greatly appreciates the PMPD's careful and independent analysis of both the law and the record. While some points of disagreement remain, EHC wholeheartedly concurs in the PMPD's recommendation that the AFC be denied in light of the Project's inconsistency with local LORS. EHC thanks the Committee for its consideration of these comments, and reserves the right to file additional comments in reply to those of other parties.

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[4] *Id.* at p. 28.

[5] *Id.* at p. 30.

DATED: March 16, 2009

Respectfully submitted,

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By: /s/ Kevin P. Bundy
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DECLARATION OF SERVICE

I, Kevin P. Bundy, declare that on March 16, 2009, I served and filed copies of the attached

COMMENTS OF INTERVENOR ENVIRONMENTAL HEALTH COALITION ON THE PRESIDING MEMBER'S PROPOSED DECISION

The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: http://www.energy.ca.gov/sitingcases/chulavista/index.html. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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AND

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☒ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

☐ depositing in the mail an original and 12 paper copies as follows:

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

/s/ Kevin P. Bundy
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