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

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

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The Committee's recommendation that the full Commission deny the Application for Certification ("AFC") for the Chula Vista Energy Upgrade Project (the "Project"), as set forth in the Presiding Member's Proposed Decision ("PMPD"), is well grounded in both the law and the evidentiary record. Comments on the PMPD submitted by the Applicant, MMC Energy, Inc. ("MMC"), Energy Commission Staff ("Staff"), and staff of the City of Chula Vista ("City") fail to identify any significant error of law or fact that requires revision of the PMPD, much less a different recommendation.

MMC's and Staff's comments largely reprise the unsuccessful arguments raised in those parties' briefs on the merits. The PMPD properly rejected those arguments. The City's comments, in turn, extend an unfortunate pattern of providing equivocal, incomplete, and contradictory statements concerning the Project's consistency with local laws, ordinances, standards, and regulations ("LORS"). These comments do not constitute competent evidence regarding the City's interpretation of its General Plan and zoning ordinance. These comments also reflect an arbitrary, unreasonable, and largely ad

hoc method of applying local law that is contrary to the plain text of the General Plan and zoning ordinance and thus unworthy of deference.

Again, as set forth in EHC's opening comments, EHC does not agree with every finding in the PMPD. The portions of the PMPD attacked by MMC and Staff, however, are sound—and the recommendation of denial based on the PMPD's analysis of land use and alternatives should stand.

I. The Project Conflicts with Applicable Provisions of the General Plan and Zoning Ordinance.

The PMPD, based on a careful review of the text of the City's General Plan and zoning ordinance, correctly found that the Project is inconsistent with local LORS. Objecting to this finding, MMC and Staff complain that the PMPD fails to accord sufficient "deference" to the City's purported "determinations" regarding the Project. As set forth in detail below, the City has not rendered any "determination" to which the Commission must defer. On the contrary, the City has repeatedly and expressly left it to the Commission to decide in the first instance whether the Project complies with City law. The PMPD did so in accordance with the law and the record, and its conclusions should be affirmed.

A. The PMPD Did Not Fail to Accord Proper Deference to the City.

The legal principles governing the Commission's review of compliance with City LORS are well settled. The interpretation of local legislation, like the interpretation of any other statute, presents a question of law. (See *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.) Although courts will defer to the interpretation of an

ordinance by the administrative agency charged with enforcing it, they may not do so blindly: an agency's interpretation of a provision will not be followed if it is clearly erroneous or contrary to the provision's plain text. (*Id.* at pp. 928, 930.)

The Commission's role here is similar to that of the courts. In order to make the findings required by the Warren-Alquist Act, the Commission must interpret and apply local LORS. (See Pub. Res. Code § 25523(d)(1); 20 Cal. Code Regs. §§ 1752(a)(3), (k), 1755(b).) Where there is evidence of a reasonable administrative interpretation of local LORS on the part of the agency typically responsible for enforcing those laws, the Commission may defer to that interpretation. Ultimately, however, the Commission itself—like a court—must determine what those provisions mean, because the responsibility for finding a project consistent with LORS lies finally and exclusively with the Commission.

MMC's comments on this issue are long on legal rhetoric, but fail to identify competent evidence that the City has rendered any "determination" regarding this Project that warrants deference. MMC's entire argument rests on just two citations to the record: the City's mitigation agreement with MMC (Ex. 803), and an ambiguous, extemporaneous, and unsworn statement regarding the conditional use permit process and "unclassified uses" made by Scott Tulloch, the Assistant City Manager, at the evidentiary hearing. From these two citations, MMC attempts to conjure a formal "determination" by the City that the Project is consistent with the City's General Plan and zoning ordinance.

The attempt fails. As shown in EHC's briefing on the merits, and as the PMPD correctly found, the City's side agreement with MMC cannot make the Project consistent with the General Plan. (See EHC Op. Br. at pp. 11-13; PMPD at p. 284.) The agreement does not even mention zoning. Finally, even by the agreement's own terms, the City could not conclude that "potential inconsistencies" with the General Plan had been resolved unless and until the agreement's provisions were incorporated into the conditions of certification for the Project and MMC had made the promised mitigation payments. (See Ex. 803.) There is no evidence in the record that these preconditions were met. The agreement is not evidence that the City found the Project consistent with its General Plan.

MMC's characterization of Mr. Tulloch's ambiguous statement at the evidentiary hearing as a formal City determination that the Project is consistent with applicable zoning does not bear scrutiny. Even when directly asked, Mr. Tulloch *refused* to state that the City *would* issue a conditional use permit for the Project if it were the lead agency; rather, Mr. Tulloch simply said that the City would have to go through the CUP process before making any such determination. (Reporter's Transcript of October 2, 2008 Evidentiary Hearing (hereafter "RT") 335:25-336:1.) In response to a direct question from Commissioner Pfannenstiel, Mr. Tulloch again confirmed that the City would not go through this process itself, but would rely instead on the Commission's process. (RT 336:14-25.) This is a far cry from a formal determination that the Project is consistent with all applicable zoning provisions, and flatly contradicts MMC's and Staff's assertions that the City would issue a CUP for the Project if it had the power.

The cases cited by MMC are therefore inapposite. In each of these cases, a City Council or Board of Supervisors had made a final, detailed determination that the challenged project was consistent with applicable general plan and zoning policies. (See *Save Our Peninsula Committee v. Board of Supervisors* (2001) 87 Cal.App.4th 99, 142 [noting that Board of Supervisors "expressly found" project consistent with general plan policy based on discussion in Environmental Impact Report]; *A Local and Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 637, 647 [describing City Council's finding of consistency based on expansive record]; *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d at p. 243 & fn. 17 [describing City Council's "specific findings" of consistency with the General Plan].) Here, in contrast, the City Council has never adopted any resolution, under City procedures providing for notice and public participation, regarding this Project's consistency with the General Plan and zoning ordinances. The City Council has never concluded that it would issue a CUP for this Project, nor has it ever said it would make the findings necessary to issue a CUP for this Project. (See CVMC § 19.14.080.) The only evidence MMC has offered regarding a "determination" of zoning compliance for *this* Project is Mr. Tulloch's statement that the City would have to go through the CUP process before reaching a conclusion. (See RT 335:25-336:1, 336:7-8.) Mr. Tulloch, however, made perfectly clear that the City sees no reason to do so, and will not do so, because the Commission will be making the final determination. (RT 336:14-25.) Unlike the situations addressed in the cases cited by MMC, there is simply no formal decision or finding by the City here to which the Commission can or must defer.

The City's comments on the PMPD do not provide any such "determination." On the contrary, the City continues to state that the Commission must make the final determination as to whether this Project complies or conflicts with local LORS. (Scott Tulloch, Assistant City Manager, Reply to Chula Vista Energy Upgrade Project: Document No. 07-AFC-4, Comments on Presiding Member's Proposed Decision ("City Comments") at p. 1.) As legal arguments of a party to this proceeding, moreover, these comments cannot be taken as evidence of the City's interpretation of its policies and ordinances. (See *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1266, fn. 6.) Even if they could, deference would be unwarranted; even the *No Oil* court refused to grant any deference to the conclusions in a memorandum prepared by a senior city planner regarding the meaning of a general plan provision. (See *No Oil*, 196 Cal.App.3d at p. 246.) Mr. Tulloch's comments on the PMPD are similar. They may represent Mr. Tulloch's own "understanding" of City policies as Assistant City Manager, but they do not demonstrate the kind of a long-standing interpretation, by the administrative agency responsible for implementing those policies, to which the courts accord deference. Finally, as discussed in greater detail below, the interpretations of local LORS advanced in the City's comments are arbitrary, unreasonable, and contrary to the plain text of the General Plan and the zoning ordinance. (*Stolman*, *supra*, 114 Cal.App.4th at p. 930 [City's interpretations of its policies "cannot stand undisturbed" where the plain text of those policies compels a different conclusion].)

As one Court of Appeal recently observed in holding that a city had unreasonably interpreted the plain language of its general plan, "deference is not abdication."

(*California Native Plant Society v. City of Rancho Cordova* (March 24, 2009) __ Cal.App.4th __, 2009 WL 755575 at p. *29.) The PMPD reached proper conclusions based on the text and history of the provisions at issue. Those conclusions should be left undisturbed.

B. The PMPD Properly Concluded that the Project Conflicts with General Plan Policy E 6.4.

1. MMC's Arguments Against Applicability of Policy E 6.4 Lack Merit.

MMC's attack on the PMPD offers, at best, mere variations on the unsuccessful arguments raised in its briefs on the merits. MMC asks for deference to City findings that cannot stand, offers an interpretation of Policy E 6.4 that would effectively delete key terms of the policy, and continues to ignore the policy's legislative history. The PMPD properly rejected these arguments.

MMC repeats its assertion that the Commission must defer to the City's "determination" that the Project is consistent with Policy E 6.4. Yet nothing in the record shows that the City ever clearly found the Project consistent with Policy E 6.4. The only City comment directly addressing this policy stated that the project appeared to be *inconsistent* with it. (Ex. 622, Advanced Planning Section comments at 1.) MMC thus relies solely on its mitigation agreement with the City as evidence of this "determination." (Ex. 803.) As discussed above, in EHC's briefs on the merits, and in the PMPD, the provisions of the agreement are contrary to, and cannot make the project consistent with, Policy E 6.4. MMC's plea for deference is unsupportable.

MMC also repeats its meritless argument that the policy applies only to "major toxic air emitters," again suggesting that the policy's specific reference to "energy generating facilities" should simply be ignored. As discussed in detail in EHC's briefs on the merits, an interpretation of Policy E 6.4 that would delete a significant and specific portion of its language would be unreasonable and unlawful. (See EHC Op. Br. at pp. 8-9; EHC Reply Br. at pp. 4-5.) The Commission must strive to give effect to each term of the policy, and may not delete language or insert exceptions that do not appear in the text. These legal principles are well-settled. (See, e.g., *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744; *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 379-80; *People v. National Auto. and Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282.) MMC's argument violates these principles, and cannot be accepted.

MMC's comments advance a new variation of this argument, raising a hypothetical straw figure: the possibility that Policy E 6.4 could be read to preclude solar facilities, along with other "energy generating facilities," within 1,000 feet of homes. (MMC Comments at 8.) From this hypothetical, MMC assumes that the City could not possibly have intended this result, and then draws the conclusion that Policy E 6.4 must have been intended to apply only to "major toxic air emitters," which—according to MMC's speculation as to the meaning of this undefined term—would not include the Project.

MMC's conclusion does not follow, either legally or logically. First and foremost, under California's Solar Rights Act, the City has very limited discretion to condition or prohibit installation of solar facilities, and may deny applications for solar installation

only upon finding a specific threat to public health or safety. (See Gov. Code § 65850.5(b), (c), (e).) Furthermore, this section was enacted in 2004, prior to the City's adoption of Policy E 6.4; this indicates that the City probably did not believe its use of the term "energy generating facilities" could reasonably be read as referring to solar installations, because such a reading would violate state law. MMC's hypothetical, echoed in City staff's comments, is itself an unreasonable construction of Policy E 6.4 that conflicts with governing statutes.

In any event, nothing in the text or the history of Policy E 6.4 supports *any* of the assumptions necessary to MMC's argument: that because Policy E 6.4 might have precluded construction of a solar facility within 1,000 feet of homes, the policy must not actually apply to "energy generating facilities" at all, but rather applies only to new major sources of criteria air pollutants as defined in the federal Clean Air Act. Policy E 6.4 says nothing about these issues, and MMC has identified no support in the record for any of its assumptions.

Policy E 6.4 does, however, by its plain terms apply to "new and re-powered energy generating facilities." MMC's new, hypothetical argument thus suffers from the same fatal legal flaw as its previous version of this argument: it reads the words "energy generating facilities" right out of the General Plan. Nobody could reasonably argue that this Project is not an "energy generating facility." Whether that term might be interpreted

to exclude other uses, in other hypothetical situations, is irrelevant here.[1] The Project is not a solar facility, and approval of a solar facility is not before the Commission. The mere hypothetical possibility that Policy E 6.4 might preclude a solar facility in a residential neighborhood, which is not addressed in the General Plan or anywhere else in the record, cannot eviscerate the policy's plain text.

MMC's reliance on the Environmental Impact Report ("EIR") for the City's 2005 General Plan Update, included in its Request for Official Notice ("RON"), is similarly unavailing. In fact, to the extent that the EIR is relevant here at all, it supports the PMPD's conclusion that Policy E 6.4 applies to this Project. Figure 5.8-1 of the EIR clearly depicts the existing peaker plant as an "electrical generating facility." Policy E 6.4 applies specifically to both "new" and "re-powered" "energy generating facilities." However MMC characterizes this Project, it falls within the scope of facilities covered by Policy E 6.4.

In any event, the purpose of the General Plan Update EIR—like that of any EIR—is not to interpret the General Plan's policies, but rather to analyze their environmental

[1] MMC's reliance on *No Oil* in this context is misplaced. In that case, the opponents of an exploratory oil drilling project proposed for an open space area argued that drilling was an "industrial" use not allowed on open space lands. (See 196 Cal.App.3d at pp. 243-44.) The Court of Appeal noted that although drilling was listed as a permitted use in an industrial zone, one could not reasonably argue that all of the other uses allowed in the industrial zone, such as banking, laundries, and storage facilities, would be prohibited throughout the entire section of Los Angeles covered by the land use plan at issue. (See *id.* at p. 245.) MMC neglects to mention, however, the Court's holding that the Los Angeles Municipal Code contained a "separate and overriding scheme" specifically allowing oil drilling in non-industrial areas. (*Id.* at p. 245.) No such scheme exists here. The hypothetical contradiction that MMC has attempted to read into Policy E 6.4 has no parallel, and thus finds no support, in *No Oil*.

impacts.[2] The excerpted sections of the EIR examine whether future development envisioned in the General Plan will expose residents to health risks from air pollution. Specifically, the EIR concludes that "[t]he potential for development . . . to expose sensitive receptors to substantial pollutant concentrations is self-mitigated because the adoption of Policies EE 6.4 and EE 6.10 will avoid this effect." (MMC's Request for Official Notice ("MMC's RON"), EIR at p. 406.) This provides no support for a construction of Policy E 6.4 that would limit the policy's scope. The context of this discussion, moreover, demonstrates that its focus is on the second clause of Policy E 6.4, which requires the City to avoid placing sensitive receivers within 1,000 feet of toxic air emitters. (See *id.* at pp. 405-06, 419.) Obviously, this clause is not at issue here; the Project proposed for siting is an "energy generating facility," not a "sensitive receiver."

Nor does the EIR provide any support for MMC's argument that Policy E 6.4 was intended to apply only to the 13 largest emitters of toxic air pollutants in Chula Vista. MMC in essence argues that the absence of the existing peaker plant from the EIR's list of facilities "monitored" by the Air Pollution Control District ("APCD") means that the Project should not be considered a "major toxic air emitter" within the meaning of Policy E 6.4. The absence of the existing plant from this list, which appears in an EIR prepared in December 2005, says nothing about emissions from this Project, which was not

[2] For this reason, EHC objects to admission of the EIR on relevance grounds. A demonstration of relevance is a precondition to admission of any evidence. (See Evid. Code § 350.) MMC's Request for Official Notice does not even attempt to explain the document's relevance here.

proposed until 2007. Indeed, the existing plant may have been omitted from this list because it *did not operate* in either 2004 or 2005, and was not producing any emissions at all. (Ex. 200 at p. 4.1-54 [Table AQ-22].) In any event, the APCD's Final Determination of Compliance and Authority to Construct contains dozens of conditions limiting the Project's emissions of criteria air pollutants and providing for "monitoring" of those limitations during startup and operations. (See Ex. 200 at pp. 4.1-84 to 4.1-95; PMPD at pp. 151-63.) The APCD's permit for the existing facility also provides for such monitoring. (Ex. 1, App. 5.1-A, Title V Permit No. 978119 at pp. 3, 6, App. A.) Finally, the EIR does not quantify emissions from any of the facilities on the list, making a comparison with this Project impossible. The EIR sheds no light on this Project's significance with respect to Policy E 6.4. For all of these reasons, the list of facilities in the EIR is not probative of any matter relevant to this proceeding. It certainly provides no support for MMC's contention that Policy E 6.4's explicit reference to "energy generating facilities" may simply be disregarded.

MMC's objections to the PMPD's account of the legislative history of Policy E 6.4 are similarly misguided. MMC identifies 3 purported "errors" in the PMPD's analysis, but none are actually errors. First, as discussed above, MMC's complaint regarding Policy E 6.4's hypothetical applicability to solar facilities is not only illogical but also contrary to state law and the policy's plain text.

Second, MMC's assertion that that the PMPD relies solely on one legislator's opinion distorts the record. The PMPD did not rely solely on one legislator's opinion, but rather on the drafting history of Policy E 6.4. (PMPD at pp. 282-83.) Quite aside

from what any individual legislator might have intended, the drafting history shows that the City Council considered and rejected an earlier draft of the policy that would have permitted energy generating facilities within 1,000 feet of homes based on an evaluation of mitigation measures or health risk assessments. (See Ex. 626A, 626B, 626C, 626D at pp. 10-11, 626G.) Indeed, the cases cited by MMC acknowledge that this type of drafting history—specifically portions of proposed legislation that were considered, but not adopted, by the legislative body—is "relevant legislative history." (*No Oil*, *supra*, 196 Cal.App.3d at p. 248, fn. 23; see also *Water Quality Ass'n v. City of Escondido* (1997) 53 Cal.App.4th 755, 764-65 [interpreting statute in context of amendment that Legislature proposed but did not adopt].) Other cases have held that documents evidencing the arguments presented during debate on local legislation, including statements made by legislators, may be probative of the general object of the legislation. (See *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 407 [collecting cases and distinguishing *No Oil*].) The PMPD properly considered the legislative history of Policy E 6.4 as a whole.

Indeed, other provisions of the General Plan confirm that had the City wanted to allow power plants within 1,000 feet of homes pending the results of a health risk assessment or the adoption of mitigation measures, it would have done so. Policy E 6.10 allows the siting of new sensitive receivers within 500 feet of highways, provided that a health risk assessment is prepared and any attendant health risks are mitigated. (See Ex. 619 at p. E-33.) The fact that the City included such an exception in Policy E 6.10, adopted at the same time as Policy E 6.4, confirms that Policy E 6.4 eschews a "case-by-

case" approach in favor of a categorical prohibition. This is consistent with the drafting history of Policy E 6.4 discussed in the PMPD.

Third, MMC's argument that its mitigation agreement with the City somehow contradicts the plain meaning and legislative history of Policy E 6.4 is groundless, as discussed above and in EHC's briefs on the merits. To the extent that the City's various and conflicting comments have at times suggested that mitigation could make the Project consistent with Policy E 6.4, these comments themselves conflict with the policy. As discussed above, the drafting history of the policy shows that the approach suggested by City staff and MMC—one where the City would evaluate the air quality impacts of proposed facilities on a case-by-case basis, in light of mitigation measures and health risk assessments, in order to determine compliance with the General Plan (see MMC Comments at p. 12, City Comments at pp. 1-2)—was specifically rejected by the City Council. This interpretation is therefore clearly erroneous and unworthy of deference.

In short, MMC has identified no error of fact or law in the PMPD's discussion of the Project's inconsistency with Policy E 6.4. The conflict is plain on its face, and the PMPD's conclusions regarding both the meaning of the policy and its legislative history are correct as a matter of law.

2. City Staff's Latest Interpretation of Policy E 6.4 Is Unreasonable and Contrary to the General Plan's Plain Meaning.

City staff's comments on the PMPD offer a strained and confusing account of Policy E 6.4 that has no basis in the policy's text or history. After having first determined—correctly—that the Project appeared to be inconsistent with Policy E 6.4

(Ex. 622), and then having found—erroneously—that the largely irrelevant mitigation measures negotiated in the City's agreement with MMC might ameliorate General Plan inconsistencies (Ex. 803), the City now opines that "energy generation facilities . . . are those that would be considered as major toxic emitters, to be defined by applicable air standards and regulations based on a case-by-case basis dependent upon the proposed facility." (City Comments at p. 1.) This latest interpretation has no basis in the text or history of Policy E 6.4. Indeed, the shifting nature of the City's varying positions on this policy indicate that the City has no stable and consistent interpretation that warrants deference here.[3]

City staff's latest interpretation is also legally and logically unsupportable for three basic reasons. First and foremost, it has absolutely no basis in the text of Policy E 6.4. Furthermore, it plainly conflicts with the policy's drafting history, which shows that the City Council rejected a proposal that would have allowed the City to make "case-by-case" siting decisions based on health risk assessments or mitigation measures. Second, it does not constitute evidence that the City has ever actually implemented the policy in this manner, and thus does not merit deference. (See *McPherson*, *supra*, 78 Cal.App.4th

[3] On the contrary, the City's shifting positions give the unfortunate appearance that City laws were used strategically to create leverage in negotiations with MMC over potential benefits that the City might obtain if this Project were approved. EHC understands that the current economic climate presents difficulties for public agencies like the City. That said, however, a General Plan must serve as a stable and consistent framework for the City's development—not as a malleable set of conditions to be used as leverage in negotiations with specific developers. California law demands—and the City's residents deserve—more.

at p. 1266 & fn. 6.) Third, to the extent this latest position actually reflects the City's view of Policy E 6.4, it is arbitrary and unworkable on its face. Under the view expressed in the City's PMPD Comments, Policy E 6.4 would mean whatever the City decides that it should mean, on a case-by-case basis, according to undefined standards and unspecified regulations to be implemented (or not) at the discretion of City officials. City staff cannot pick and choose how and whether to follow fundamental City policies on a "case-by-case basis." Policy E 6.4 is mandatory, fundamental, and clear. It affords none of the freewheeling discretion that City staff apparently would find in it. The interpretation of Policy E 6.4 advanced in the City's PMPD comments is arbitrary, unreasonable, and clearly erroneous in light of the policy's text and legislative history.

3. Commission Staff Continues to Misconstrue Policy E 6.4.

In its comments, Staff simply repeats two mistaken arguments that it has maintained throughout this proceeding: that Policy E 6.4 cannot possibly mean what it says because the City has not amended its zoning code since the policy was adopted, and that the Project must be consistent with Policy E 6.4 because Staff views a power plant in this location as generally consistent with surrounding uses. Staff continues to ignore the fact that those surrounding uses include a residential neighborhood. Staff also continues to misunderstand the relationships among the General Plan, the zoning ordinance, and specific development projects. EHC's briefs on the merits addressed the numerous flaws in Staff's arguments (EHC Op. Br. at 9-11, EHC Reply Br. at 4-7), and the PMPD properly rejected them. Staff has offered no reason to revise the PMPD's conclusions regarding Policy E 6.4.

C. The PMPD Correctly Found that the Project Conflicts with Policy LUT 45.6.

MMC objects to the PMPD's conclusion that the Project is inconsistent with the General Plan's vision for Main Street as a "limited industrial" corridor. MMC's objection, however, focusing solely on the "industrial" nature of the Project, overlooks the "limited" modifier. Power plants are not a "limited" industrial use under the General Plan, but rather a "general" industrial use. (See EHC Op. Br. at 5; Ex. 619 at pp. LU-53 to LU-54.) The only support MMC finds in the record for its objection is the City's issuance of a special use permit for the existing plant in 2000—five years before the current General Plan was adopted. MMC's objection is groundless.

D. The PMPD Correctly Determined that the Project Is Inconsistent with the Environmental Justice Purpose of Policy E 23.3.

Neither MMC nor the City provide any reason to revise the PMPD's determination that the Project conflicts with General Plan Policy E 23.3. MMC once again accuses the Committee of failing to defer to the City's "determination" that E 23.3 does not apply to this Project. Yet MMC once again fails to cite anything in the record showing that the *City* ever made such a determination. Rather, in support of its statement that "the City has concluded that Policy E 23.3 does not apply to the Upgrade Project," MMC cites the AFC, the FSA, the testimony of its own experts at the evidentiary hearing, and the health risk assessment performed by the Chula Vista Unified School District—none of which constitute any conclusion reached by the City. (MMC Comments at p. 13.) MMC's plea for deference thus has no support in the record. The PMPD correctly found that nothing had been done to "avoid" siting the project in violation of Policy E 23.3.

The City's comments, in turn, focus narrowly on the health risk assessment, thus ignoring the environmental justice purposes of Policy E 23.3 that the PMPD correctly identified. As the PMPD found, testimony regarding the existing disproportionate burden on the community affected by this Project was uncontroverted. (PMPD at 285; Ex. 608; RT 192:2.) The City has pointed to nothing in the record demonstrating that this finding was erroneous.

E. The Project Is Inconsistent with the Chula Vista Municipal Code.

1. The PMPD Correctly Found that the Project Cannot Be Approved as an "Unclassified" Use.

MMC, Staff, and City staff continue to insist that the Project could be approved in the Limited Industrial zone, with a conditional use permit, as an "unclassified" use. This contention, grounded in misconceptions concerning the scope of the City's discretion to approve "unclassified" uses, contravenes the plain text of the zoning ordinance. The PMPD correctly determined that the Project is not an "unclassified" use.

MMC's arguments lack support in the record. MMC states that the City approved the existing plant as an "unclassified" public/quasi-public use in 2000. The special use permit for the existing plant, however, makes no reference to "unclassified" uses, and contains no useful discussion of the plant's consistency with the zoning ordinance. (See Ex. 802.) It could very well be the case, as the PMPD suggests, that the City misconstrued its zoning ordinance when it approved the existing plant.

Continuing in this same vein, MMC also states that the City's interpretation of the zoning code has not changed since 2000. This contention also finds no support in the

record. MMC once again cites Mr. Tulloch's statement during the evidentiary hearing as support for this assertion.[4] Mr. Tulloch, however, said nothing about the consistency of the City's interpretation of the zoning code. Nor did Mr. Tulloch say that the City would grant a CUP for this Project if it were the lead agency. He said only that the City would have followed the CUP *process*, and clarified that the City "would want to go through that process" itself before making any determination. (RT 335:25-336:1, 336:6-8.) By the same token, Mr. Tulloch did not state—as MMC suggests—that the Project would be *approved* as an unclassified use if the City were the lead agency. MMC repeatedly reads much more into Mr. Tulloch's statement than that statement can convey—and what MMC hopes to find in the statement simply is not there.

MMC accuses the PMPD of taking Mr. Tulloch's statement out of context, but then proceeds to do the same thing. Mr. Tulloch's statement came at the end of an extemporaneous discussion by MMC's and Staff's land use experts, in response to questions from counsel and the Hearing Officer, concerning the potential applicability of the "unclassified use" category. It was clear at the evidentiary hearing that neither expert had considered whether this Project was an "unclassified use." Rather, these experts responded to questions by admitting that they were unfamiliar with the provision, looking

[4] MMC objects in a footnote to the PMPD's discussion of unsworn comments regarding the General Plan. (MMC Comments at p. 14, fn. 2.) Yet Mr. Tulloch's remarks at the evidentiary hearing—on which MMC places such heavy reliance—were similarly unsworn. (See RT 335:7-336:25 [Hearing Officer offered to, but did not, swear Mr. Tulloch].) In any event, as previously discussed, Mr. Tulloch's remarks as a party to this proceeding are not in and of themselves competent evidence regarding the City's interpretation of its policies. (See *McPherson*, *supra*, 78 Cal.App.4th at p. 1266, fn. 6.)

it up on the internet, and then opining, extemporaneously, that this provision gave the City flexibility to approve uses that it had not specifically considered in drafting the zoning code. (See RT 310:15-311:2, 312:3-12, 327:9-14, 17-18.) Mr. Tulloch's statement occurred in this context. Although his statement is no model of clarity, it seems that Mr. Tulloch also was unfamiliar with the specific language and purpose of the "unclassified use" provision. Rather, he expressed his "understanding" that the unclassified use provision would allow the City flexibility where it had neither prohibited nor specifically allowed a particular use, and stated that this understanding was "consistent" (or "in that vein") with what the other experts had said. (RT 336:3-11.)

Even a cursory review of the actual language of Chula Vista Municipal Code ("CVMC") chapter 19.54 shows that all three extemporaneous opinions were wrong. Unclassified uses are not a catch-all category of unspecified uses that can be approved in any zone with a CUP, so long as those uses have neither been permitted nor prohibited. They are a specific set of identified, enumerated uses that are not included "automatically" in *any* of the City's defined zones. (CVMC § 19.54.010(A).) Power plants are not listed among these "unclassified" uses. Furthermore, although "unclassified" uses do include public/quasi-public uses, nothing in the zoning code defines a power plant as a public/quasi-public use. (See EHC Reply Br. at pp. 8-10.) Even MMC's expert admitted as much at the evidentiary hearing. (RT 334:16-23.) This Project is not an "unclassified" use as defined in the zoning ordinance.

MMC further objects to what it views as the PMPD's overly narrow interpretation of the unclassified use category on the basis of another straw figure: the inclusion of

certain types of schools as both "unclassified" uses and as permitted or conditional uses in other districts. (MMC Comments at 17, citing CVMC §§ 19.32.020(C), 19.47.040(B), 19.54.020(D).) According to MMC, this inclusion is inconsistent with the definition of "unclassified uses" cited in the PMPD, which plainly excludes uses automatically included in defined zones.

There is no inconsistency. "Unclassified uses" are defined as uses that due to their "unique and special" characteristics are "impractical" to include "automatically" in any defined zone. (See CVMC § 19.54.010(A).) The purpose of this section is to ensure that such uses may be approved only with a conditional use permit. (*Id.*) Accordingly, the reference to "automatic" inclusion of particular uses in defined zones should be read as encompassing permitted rather than conditional uses. Power plants are "included automatically"—as a *permitted* use—in the General Industrial zone. (CVMC § 19.46.020(E).) Therefore, by definition, power plants cannot be "unclassified" uses.

MMC attempts to find an inconsistency based on the inclusion of colleges, universities, private schools, and elementary public schools among "unclassified" uses. (CVMC § 19.54.020(D).) As MMC points out, "schools" also are listed as conditionally allowable uses in the Public/Quasi-Public zone. (CVMC § 19.47.040(B).) There is no inconsistency here; "schools" are not "automatically" included in the Public/Quasi-Public zone as permitted uses, but rather may be approved only with a conditional use permit. At most, this is a redundancy, given that the Public/Quasi-Public zone also allows "unclassified" uses with a CUP. (CVMC § 19.47.040(K).) MMC also points out that "business and technical schools, including photography, art, music and dance" are

permitted uses in the Central Business zone. (CVMC § 19.32.020(C).) Again, there is no inconsistency. "Business and technical schools" are not listed among the zoning code's "unclassified" uses. (CVMC § 19.54.020.) The inclusion of these specific types of schools in the Central Business zone does not mean that the definition of "unclassified" uses is wrong. It means only that business and technical schools can be approved in the Central Business zone without a CUP. Colleges, universities, private schools, and public elementary and secondary schools, consistent with the "unclassified" use provisions, would require a CUP in this zone. (See CVMC § 19.32.030(J).) MMC's alleged inconsistency evaporates upon examination.

Even assuming for the sake of argument that some inconsistency (however ephemeral) existed in the zoning code's requirements for various types of schools, it would do nothing to prove that *this Project* should be approved as an "unclassified" use. Although such uses are labeled as "unclassified," they are not *unspecified*, but rather are listed in detail in the zoning ordinance. (CVMC § 19.54.020.) Various types of schools are listed among these uses. Peaking power plants are not. The PMPD correctly read the zoning ordinance, and correctly determined that this Project does not meet the plain definition of "unclassified" uses set forth therein.

The City's comments similarly provide no reason to revise the PMPD. Mr. Tulloch, attempting to clarify his statement at the evidentiary hearing, claims that he meant "unclassified uses" to allow the City flexibility to approve a use that is neither specifically allowed nor prohibited in a particular zone. Like MCC's interpretation, discussed above, Mr. Tulloch's reading of this provision contradicts the plain text of the

ordinance and cannot be credited. (*Stolman*, *supra*, 114 Cal.App.4th at p. 930.) It also would effectively render the City's zoning scheme meaningless by allowing the City to approve virtually any use, in any zone, with a CUP, so long as it had neither authorized nor prohibited that use in enacting its zoning ordinance. Such an interpretation of the zoning ordinance would be necessarily arbitrary and unreasonable as a matter of law.

Staff's comments add little to MMC's and City staff's comments, except to point out that the Commission approved RAMCO's application for an emergency peaker project for the same site in 2001. Staff infers from this that the site's zoning must allow power plants. Staff does not mention, however, that the City at that time *objected* to the expansion on the ground that it was inconsistent with local land use LORS. (See Final Decision in re Application for Certification of the Chula Vista Peaker Generating Station by RAMCO, Inc., Docket No. 01-EP-3 (June 13, 2001) at 12-13, available at http://www.energy.ca.gov/sitingcases/peakers/chulavista/documents/CHULAVISTA_FINAL_DECISION.PDF; see also Staff Supplemental Assessment, RAMCO Chula Vista II Peaker Generating Station (01-EP-3) (June 12, 2001), Attachment II, pp. 9-19, available at http://www.energy.ca.gov/sitingcases/peakers/chulavista/documents/CHULAVISTA_SUPPLEMENT.PDF.) This decision, while not precedential in any manner, hardly shows a pattern of unquestioning deference to the City's interpretation of its policies. What it does suggest, rather, is that the City has no consistent, long-standing interpretation of the policies applicable to this site. The PMPD's analysis of local LORS governing this Project is far more detailed and careful than the analysis resulting from the Commission's streamlined approval of the emergency peaker plant. The PMPD's

analysis is also consistent with the City's zoning ordinance. Staff's comments offer no reason to revise the PMPD on this point.

2. The PMPD Correctly Determined that the Project is Similar to Uses Prohibited in the Limited Industrial Zone.

The PMPD rightly concluded that power generation is akin to manufacturing from raw materials, which is prohibited under Limited Industrial zoning. (PMPD at pp. 298-99.) MMC insists that had the City wished to prohibit power plants specifically, it could have done so. Of course, the converse is also true: the City certainly knew how to permit power generation, having done so in the General Industrial zone, but chose not to allow this use in the Limited Industrial zone. The proper inference to be drawn from this omission, under settled principles of statutory interpretation, is that power generation is allowed only in the General Industrial zone. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827 ["[I]f a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent the provision is not applicable to the statute from which it was omitted."].) MMC's argument conflicts with this principle.

MMC also argues that although manufacturing from "coal and coke" is prohibited in the Limited Industrial zone, the natural gas used in the Project is a different raw material, and thus must not be prohibited. (MMC Comments at 18, citing CVMC § 19.44.050(A)(3).) MMC goes on to point out that the General Industrial zone also prohibits manufacturing from coal or coke, but allows power generation, and deduces from this that power generation must not be the type of manufacturing use prohibited in

the Limited Industrial zone. (MMC Comments at 18, citing CVMC § 19.46.041(A)(3).) This argument, however, overlooks two other critical zoning provisions. First, the Limited Industrial zone not only prohibits manufacturing from "coal and coke," but *also* prohibits manufacturing involving "turpentine, matches, paint, *and other combustible materials*." (CVMC 19.44.050(A)(4) [emphasis added].) It is beyond dispute that natural gas is a "combustible material." Second, the General Industrial zone prohibits manufacturing involving "turpentine, matches, and paint" (CVMC 19.46.041(A)(4))—but pointedly *omits* any mention of "other combustible materials." Read as a whole, therefore, the zoning ordinance is entirely consistent with the PMPD's conclusion that natural gas-fired power generation is a form of manufacturing from raw materials, specifically "combustible" ones, that is allowed in the General Industrial zone but prohibited in the Limited Industrial zone. MMC's argument to the contrary founders, once again, on its selective reading of the ordinance.

3. The PMPD Correctly Concluded that the Zoning Ordinance Requires a Precise Plan.

MMC states that no precise plan is needed for the Project because the City is not the lead agency. (MMC Comments at 19.) A precise plan, however, is not merely an approval needed from the City—it a requirement of the zoning applicable to the site. (See EHC Op. Br. at pp. 23-24.) MMC cannot simply ignore this requirement.

Staff's comments, in contrast, assert that the City used its discretion not to require a precise plan for this project. The zoning ordinance, however, does not give the City any discretion not to require a precise plan where the City Council has, by ordinance,

applied the precise plan modifying district to a parcel of land. On the contrary, once the City Council applies this designation to a parcel—as it has done here—a precise plan must be prepared and approved before any development can occur. (See CVMC §§ 19.12.120(B), 19.14.570, 19.14.576.)

In contradictory fashion, Staff also claims that the precise plan modifying district does not actually apply to the Project site. (Staff Comments at p. 12.) Yet Staff's own testimony in this proceeding repeatedly stated that the precise plan district applies to this site. (See, e.g., Ex. 200 at p. 3-3, 4.5-5, 4.5-44.) Staff supports its comment with a citation to a "conversation" with "senior planning staff" of the City. (Staff Comments at p. 12.) The content of this "conversation," however, is not in evidence. Even if it were, it not only would be hearsay, legally insufficient to support a finding of consistency with the zoning ordinance (20 Cal. Code Regs. § 1212(d)), but also would contradict the plain text of the zoning ordinance. Staff's arguments contradict prior testimony, lack legal and factual support, and provide no basis for revising the PMPD.

City staff's comments state that the City sometimes requires a precise plan to develop properties to which the precise plan modifying district has been applied, but sometimes does not. (See City Comments at p. 4.) This does not demonstrate that a precise plan is not required; under the plain text of the zoning ordinance, it is. Nor does this demonstrate that the City has discretion to forego preparation of a precise plan; under the plain text of the zoning ordinance, it does not. This only demonstrates that the City apparently enforces the requirements of its zoning ordinances inconsistently. This is contrary to law, which requires the City to implement its zoning ordinances in a uniform,

consistent manner. (Gov. Code § 65852; *Neighbors in Support of Appropriate Land Use v. County of Tuolomne* (2007) 157 Cal.App.4th 997.) It may not make up the rules as it goes along. The City's comments not only have no basis in the zoning ordinance, but also further confirm that little deference should be accorded the City's shifting, inconsistent interpretations of local LORS. The PMPD reached the correct conclusion regarding the need for a precise plan, and nothing in the other parties' comments provides a basis for revisiting that conclusion.

4. The Proposed Construction Laydown/Parking Area Conflicts with Applicable Zoning.

Although EHC agrees with most of the PMPD's findings regarding land use LORS, it respectfully disagrees with the PMPD's discussion of zoning provisions applicable to the construction laydown/parking area. The PMPD appears to have accepted Staff's interpretation of "accessory" uses. (PMPD at p. 285, fn. 48.) This interpretation, however, does not accurately reflect what an "accessory" use is. An accessory use by definition reflects the character of the primary use with which it is associated—here, construction of a peaking power plant, which is an industrial use. (See *Teachers Insurance & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1494-96 [use of alley in residential zone for deliveries to commercial building was a commercial use].) Whether the use of this land as a parking lot accessory to an agricultural facility would be allowed is irrelevant. (See *id.* [fact that deliveries might be accessory to residential use did not make deliveries accessory to commercial use].) The Project does not propose any agricultural use to which the proposed use could possibly be

"accessory." Moreover, neither Staff nor MMC has identified any authority for the proposition that an industrial use may be allowed in an agricultural zone solely because it will be temporary. Finally, although the PMPD seems to suggest otherwise, EHC has disputed, and continues to dispute, that the zoning for the area allows this use.

II. The PMPD Correctly Found that Staff and MMC Had Failed to Analyze a Reasonable Range of Alternatives.

MMC and Staff criticize the PMPD's conclusions regarding analysis of alternatives. These criticisms either distort or find no support in the record, and they should be rejected.

A. MMC's Comments Contradict its Prior Testimony Concerning Project Objectives.

MMC complains that the PMPD overlooked the Project's "fundamental" objectives, which it now characterizes as the modernization of the existing plant and the reuse of transmission facilities at the existing site. (See MMC Comments at pp. 20, 23.) The very pages of the AFC cited in support of this complaint, however, demonstrate that it is completely unfounded. Accordingly, the case law discussed in MMC's comments is inapposite.

In its AFC—offered as sworn testimony in this proceeding—MMC stated that "[t]he *key objective* of the CVEUP is to provide more efficient peaking capacity available cost-effectively to the growing San Diego area market." (Ex. 1 at p. 6.1 [emphasis added].) To this end, MMC proposed the "*demolition* of the existing power plant and construction of the *new* 100-MW facility *on a currently unoccupied portion* of the existing parcel." (*Id.* [emphasis added].) MMC also proposed to remove the existing

Twinpak turbine and install two more efficient LM6000 sprint turbines. (*Id.*) The AFC also states that the provision of quick-start, peaking power in the San Diego reliability area is important. (*Id.* at 6-1 to 6-2.) The Project thus proposes a complete teardown and replacement of the existing plant, not an "upgrade" or a "modernization."

Furthermore, the AFC *never* identified reuse of the existing plant's linear facilities as the "fundamental" objective of the Project. Rather, the ability to use such existing facilities was listed as one of several factors MMC considered in choosing a site for the Project. (*Id.* at 6-2.) MMC objects to the PMPD's interpretation of these factors as Project "objectives," yet the AFC itself described these factors as "siting objectives." (*Id.*) In short, the fundamental objective of this Project, as described in the AFC, was to tear down the existing plant and build an entirely new plant, using two more efficient turbines instead of the single existing turbine, in order to provide cost-effective peaking power to San Diego. MMC's attempt in its comments to convert one of several siting objectives into the Project's controlling objective founders on its own testimony.[5]

The AFC's discussion of alternative sites further confirms that MMC's comments regarding the "fundamental" objectives of the Project are baseless. Both of those sites would have been located on parcels separate from the existing plant, and both of those sites would have required construction of additional transmission facilities. (Ex. 1 at pp. 6-4, 6-5, Fig. 6.3-1.) Yet MMC did not reject those alternatives based on incompatibility

[5] MMC's quotation from the Commission's *Morro Bay* decision is not evidence of the objectives at issue here. This Project's objectives are reflected in MMC's own testimony in this proceeding.

with any "fundamental" objective related to the "upgrade" of the existing plant or the reuse of project linears. MMC rejected those alternatives largely because "the construction of a transmission line would be costly and would raise the possibility of additional environmental impacts." (*Id.* at p. 6-11.) This is entirely consistent with the PMPD's conclusion that MMC's rejection of all off-site alternatives was primarily for economic reasons (see PMPD at pp. 25-27), not due to any conflict with "fundamental" objectives. The PMPD describes and analyzes the Project objectives—as stated in the AFC itself—correctly and carefully. MMC's late attempt to reformulate those objectives has no basis in the evidence and should be rejected.

B. The PMPD Correctly Concluded that Analysis of Alternative Sites Is Required Here.

MMC reiterates its failed argument, based on Public Resources Code section 25540.6(b), that no analysis of alternative sites was required here.[6] As explained in EHC's briefing on the merits, this section does not relieve the Commission of its responsibility under CEQA to analyze a range of reasonable alternatives to the Project. (EHC Op. Br. at pp. 55-56.) Nor has the Commission as a whole ever found—as section 25540.6(b) requires—that MMC's AFC need not discuss any alternative sites. Furthermore, because the Project's conflicts with local LORS stem almost entirely from its inappropriate location, it is reasonable to require consideration of alternative sites.

[6] MMC's argument that it need not consider any alternative sites rings especially hollow in the context of its argument that it also need not consider any alternative technologies. MMC cannot avoid the alternatives analysis required by law simply by refusing to analyze any alternatives whatsoever.

The PMPD correctly declined to adopt MMC's erroneous construction of section 25540.6(b).

Staff's comments appear to suggest a view that alternatives to the Project need not be analyzed because, according to Staff, the Project's significant environmental effects have been mitigated. (Staff Comments at p. 4.) This view is contrary to law. As the Supreme Court clearly held more than 20 years ago, both mitigation measures and alternatives must be discussed in a CEQA document. (*Laurel Heights Improvement Ass'n v. Regents of the Univ. of California* (1988) 47 Cal.3d 376, 399-403.) Staff cites no authority for its contrary position.

C. The PMPD Reasonably Concluded that the Project's LORS Conflicts Required Additional Analysis of Alternatives.

MMC argues that it did not need to evaluate sites that would eliminate LORS conflicts because conflicts with local land use policies and plans are not automatically considered environmental impacts under CEQA. The PMPD, however, correctly treated the Project's LORS conflicts as significant environmental impacts.

The LORS with which this Project conflicts were adopted for the purpose of avoiding or mitigating environmental effects. (See CEQA Guidelines, App. G, § IX(d); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930-31.) Indeed, the excerpt from the General Plan EIR submitted with MMC's Request for Official Notice shows that at least one of the General Plan policies with which the Project conflicts—Policy E 6.4—was explicitly intended as a self-mitigating policy that would help ameliorate the environmental impacts of development under the General Plan.

(MMC RON, EIR at pp. 406, 419.) Violation of this policy necessarily implicates environmental concerns, as does the Project's inconsistency with Policy E 23.3. The prohibition of power generation in the Limited Industrial zone similarly serves the purpose of avoiding environmental impacts. Indeed, the stated purposes of the zone explicitly include "providing and protecting an environment free from nuisances created by some industrial uses," ensuring "the purity of the total environment of Chula Vista and San Diego County," and "protect[ing] nearby residential, commercial, and industrial uses from any hazards or nuisances." (CVMC § 19.44.010.) The "unclassified use" and precise plan provisions of the zoning code address similar concerns with land use compatibility, aesthetics, design, traffic circulation, open spaces, and other typically "environmental" concerns. (See CVMC §§ 19.54.001(B), 19.56.040.) The PMPD correctly treated the Project's conflicts with these policies as significant environmental impacts that must be avoided under CEQA if feasible.

D. The PMPD Correctly Found that MMC and Staff Had Failed to Analyze a Reasonable Range of Alternatives.

CEQA requires analysis of a "range" of reasonable alternatives, including alternative sites, that could feasibly avoid the Project's significant impacts. (See CEQA Guidelines § 15126.6(a), (f)(2)(A).) Here, however, the AFC failed to analyze *any* alternatives that would avoid the Project's impacts, most notably its conflicts with local LORS that were adopted specifically for the purpose of environmental protection.[7] As a

[7] MMC claims that the two alternative sites analyzed in the AFC would "avoid the environmental impacts that would result from installing new linear lines at a more distant (Footnote continued.)

result, only one potentially feasible alternative site that would avoid some of the Project's LORS conflicts—Staff's Alternative C—was even considered here. This does not constitute a "range" of reasonable, potentially feasible alternatives, as CEQA requires.

Moreover, no evidence supports MMC's claim that Staff's discussion of Alternative C "illustrates whatever advantages there may be" from locating the Project in eastern Chula Vista. (MMC Comments at p. 28.) By MMC's own admission, the relative environmental costs and benefits of other potential alternative sites were not considered. (See RT 352:17-19; Ex. 5 at p. 25.) This approach is inadequate under CEQA. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 735-36.) Nor did MMC examine whether existing transmission facilities in eastern Chula Vista could feasibly be used to deliver power from the Project. (See Ex. 7 at p. 9.) It is MMC's burden to provide evidence sufficient to support certification of this Project. (20 Cal. Code Regs. § 1748(d).) It is also MMC's responsibility under CEQA to provide an adequate discussion of alternatives. (*San Joaquin Raptor/Wildlife*, *supra*, 27 Cal.App.4th at p. 737.) MMC should not be heard to complain about a lack of evidence in the record concerning meaningful analysis of alternatives (see MMC Comments at p. 28), when MMC itself failed to provide that evidence.

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site." (MMC Comments at p. 26.) This is irrelevant. CEQA requires analysis of alternatives that would avoid or lessen impacts associated with the *Project*, not impacts potentially associated with some other unspecified, hypothetical location. (See CEQA Guidelines § 15126.6(a).) The alternatives discussed in the AFC do not meet this standard.

Finally, as addressed in EHC's briefs on the merits (EHC Op. Br. at p. 33, EHC Reply Br. at pp. 11-15), the evidence of record does not support a finding that Staff's Alternative C is infeasible. The PMPD correctly found that Staff's rejection of this alternative was based upon speculation rather than evidence. (See PMPD at pp. 26-27.) Under CEQA, the Commission may not certify this Project if there are feasible alternatives that would avoid its significant environmental impacts. (Pub. Res. Code §§ 21002, 21002.1(b).) The record demonstrates that Staff's Alternative C—or another similar site—may well offer a feasible alternative that could avoid the Project's significant LORS conflicts.

E. The PMPD Correctly Required Further Analysis of Alternative Technologies.

MMC's objections to the PMPD's conclusions requiring further analysis of distributed solar generation are misplaced. MMC again protests that solar generation would not meet what it characterizes as the Project's fundamental objectives, but as discussed above, MMC's recharacterization of its objectives lacks a foundation in the evidence. Indeed, rooftop solar generation could largely meet what the AFC characterized as the Project's "key" objective, namely delivering additional, more efficient peak power to the San Diego service area. Although the solar peak and the demand peak do not overlap completely, the evidence nonetheless shows that solar projects could provide substantial additional capacity during the same demand periods when peaking power is needed. (See PMPD at p. 30 [discussing testimony of Bill Powers].)

CEQA requires analysis of potentially feasible alternatives that could meet most of the Project's "basic" objectives. (See CEQA Guidelines § 15126.6(a), (b); *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1456.) Analysis of alternative technologies that could meet most of this Project's "key" objectives is therefore required here. This analysis, moreover, must include a quantitative, comparative analysis grounded in substantial information concerning the relative benefits of solar and fossil-fired alternatives. (Cf. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733-37.)

The PMPD also correctly found that Mr. Powers' testimony regarding the potential feasibility and cost-effectiveness of distributed solar generation was essentially uncontroverted. (PMPD at pp. 29-30.) The fact that MMC disagrees with Mr. Powers' testimony is not evidence that solar generation is infeasible. Staff similarly objects to the PMPD's discussion of Mr. Powers' testimony, asserting that Mr. Powers' conclusions were in fact controverted. Yet Staff fails to cite any specific document in the record, or any specific testimony at the evidentiary hearing, in support of this assertion. (Staff Comments at p. 5; *id.* at p. 9 [requesting deletion of Finding 11, PMPD at p. 32].) The Committee has already conducted a careful review of the transcripts and exhibits submitted as evidence in this proceeding, the results of which are reflected in the PMPD. The Committee has no obligation to sift through the transcripts and exhibits again to figure out whether Staff's objection has any basis in the record. (Cf. *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) The PMPD's discussion of Mr. Powers' testimony accurately reflects the evidence as a whole.

Finally, Staff also repeats the unfounded argument advanced in its briefs on the merits that even the possibility of implementing of a rooftop solar system along the lines of that proposed by Mr. Powers is "remote and speculative." (Staff Comments at p. 5.) As EHC pointed out in its Reply Brief, SDG&E has submitted an application for just such a system. (EHC Reply Br. at pp. 29-30.) SDG&E continues to move forward with that application.[8] Contrary to Staff's assertions, rooftop solar generation in San Diego is well on its way to becoming a physical reality.

If California is ever to achieve significant progress toward its renewable energy and greenhouse gas reduction goals, responsible state agencies (and energy providers themselves) must begin to analyze available alternatives to fossil-fired generation in a serious and consistent manner. This analysis should happen not only at the statewide policy level, in accordance with the Warren-Alquist Act, but also at the project level, as required by CEQA. The PMPD takes a critically important step in this direction—a step that should be affirmed, and followed in future proceedings, by the full Commission.

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[8] SDG&E recently reached and submitted for approval a settlement agreement with other parties who had challenged the solar project's cost-effectiveness and its potential impact to ratepayers. (Joint Motion of San Diego Gas & Electric Company (U 902 M), Utility Consumers Action Network, Western Power Trading Forum and CAlifornians for Renewable Energy for Adoption of Settlement Agreement and Continued Suspension of the Procedural Schedule in this Proceeding, CPUC Docket No. A08-07-017 (March 20, 2009), available at http://docs.cpuc.ca.gov/EFILE/MOTION/98840.htm.)

F. The PMPD's Discussion of the "No Project" Alternative Is Well-Grounded in the Record.

MMC complains that the PMPD failed to account for the significant environmental impacts of the "no project" alternative. MMC's complaints ignore the weight of evidence in the record. In discussing the Project's alleged efficiency benefits (MMC Comments at pp. 30-31), MMC overlooks that the Project will increase emissions of most air pollutants, as well as greenhouse gases, as compared to the existing plant. (See Ex. 200 at pp. 4.1-26, 4.1-34, 4.1-53 to 4.1-54.) If the Project is not built, this increase in emissions will not occur. Furthermore, MMC's (and Staff's) conjectures regarding the possibility that other, less-efficient power plants might be built if the Project were not approved were properly dismissed by the PMPD as "purely speculative." (PMPD at p. 31.) Similarly, MMC's (and Staff's) argument that the Project would make a significant contribution to removal of the South Bay Power Plant was effectively refuted by CalISO's testimony at the evidentiary hearing. (See *id.*; RT 231:12-241:25 [describing need for several hundred megawatts of local generation, possibly including plants with dual-fuel and black start capability, as well as additional transmission capacity, before "reliability must-run" designation can be removed from South Bay].) Although EHC sincerely wishes that CalISO were less insistent about maintaining South Bay's "reliability must-run" status, CalISO's testimony on this point was to the contrary. Both MMC and Staff failed to address this testimony in their comments. MMC's complaints regarding the PMPD's discussion of the "no project" alternative are unfounded.

Staff also objects to Findings 16, 17, and 18 of the PMPD's alternatives discussion on relevance grounds. (Staff Comments at pp. 9-10.) The objection lacks merit. These findings are clearly relevant to the Commission's analysis of the "no project" alternative's potential impacts regarding system reliability. Moreover, aside from general citations to entire exhibits, Staff again fails to identify any specific support in the record for its objections. There is no need to delete these findings from the PMPD.

G. The PMPD Properly Discussed the Project's Purported Benefits.

MMC complains that the PMPD fails to include a discussion of the Project's benefits in accordance with Public Resources Code section 25523(h). Ironically, MMC supports its complaint almost exclusively by citations to portions of the PMPD that discuss the Project's benefits. (See MMC Comments at pp. 31-38.) MMC's main objection seems to be that the PMPD did not reiterate all of these benefits in a separate (and apparently redundant) section. The statute does not require that the Committee accommodate MMC's preferred method of organizing the PMPD.

III. Staff and MMC Should Be Required to Reanalyze the Project's Greenhouse Gas Impacts in a Manner Consistent with CEQA.

EHC discussed the Final Staff Assessment's ("FSA") inadequate analysis of the Project's greenhouse gas ("GHG") impacts in its briefs on the merits (EHC Op. Br. at pp. 45-49, EHC Reply Br. at pp. 24-27), and has addressed the PMPD's erroneous adoption of that analysis in its opening comments. The Committee also should be aware that the California Attorney General's office has recently released a set of "Frequently Asked Questions," intended to guide cities and counties in complying with CEQA in the course

of updating their general plans, that lend additional support to EHC's position. In this document, the Attorney General makes very clear that the two main conclusions of the FSA and the PMPD—that difficulties inherent in analyzing the Project's GHG impacts render a significance determination "speculative," and that future regulations adopted to implement AB 32 will adequately address any impacts—are inconsistent with CEQA.[9] General plan EIRs, like staff assessments for power plant projects, involve difficult determinations concerning both existing environmental conditions and the effect of future development. The fact that analysis is difficult, however, does not relieve a public agency of its responsibility to make a good-faith effort, using all tools that are reasonably available, to disclose, analyze, and mitigate the Project's GHG impacts. (See CEQA Guidelines §§ 15144, 15151; see also *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1370-71.) The FSA for this Project failed to do so. The Commission should not make the same mistake in its decision on the Project.

IV. Conclusion

As stated in opening comments, and as should be evident from its briefs on the merits, EHC does not agree with every finding and conclusion in the PMPD. EHC nonetheless recognizes the careful and independent review of the applicable law and the evidence in the record that the PMPD reflects. This independent analysis is exactly what

[9] California Attorney General's Office, Climate Change, the California Environmental Quality Act, and General Plan Updates: Straightforward Answers to Some Frequently Asked Questions (March 6, 2009), available at http://ag.ca.gov/globalwarming/ceqa.php.

the Warren-Alquist Act demands, and the Committee should be commended for its efforts.

Those efforts led to the correct result here. The Project fundamentally conflicts with several provisions of the City's General Plan and zoning ordinance. The PMPD correctly identified these conflicts in accordance with both the plain meaning of the provisions at issue and the evidence in the record. These conflicts directly implicate the natural and human environment of the City, and under CEQA, must be avoided if doing so is feasible. Yet, as the PMPD correctly found, MMC and Staff failed to analyze a reasonable range of alternatives to the Project, and failed to demonstrate that the one alternative site that might have avoided the Project's conflicts with local LORS—Staff's Alternative C—is infeasible. These conclusions should be affirmed by the Committee and should form the basis of the Commission's denial of this application.

DATED: March 30, 2009

Respectfully submitted,

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Kevin P. Bundy
KEVIN P. BUNDY

Attorneys for Environmental Health Coalition

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 **PROOF OF SERVICE** (Revised Feb. 10, 2009)

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DECLARATION OF SERVICE

I, Kevin P. Bundy, declare that on March 30, 2009, I served and filed copies of the attached

REPLY 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:

(check all that apply)

For Service to All Other Parties

☒ sent electronically to all email addresses on the Proof of Service list;

☒ by personal delivery or by depositing in the United States mail at San Francisco, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses NOT marked "email preferred."

AND

For Filing with the Energy Commission

☒ 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:

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

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

/s/ Kevin P. Bundy
Kevin P. Bundy

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