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Defending Our Waters—from the High Sierra to the Golden Gate

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July 3, 2006

Jackalyne Pfannenstiel, Chair and Commissioners
c/o Christopher Meyer, Compliance Project Manager
California Energy Commission
1516 9th Street, MS-2000
Sacramento, CA 95814

Submitted via electronic mail to cmeyer@energy.state.ca.us

RE: Proposed modification of the Contra Costa Power Plan Unit 8 Project Decision

Dear Chair Pfannenstiel and Commissioners:

Thank you for the opportunity to provide comments on the proposed modification of the California Energy Commission's (CEC) Decision for the Contra Costa Power Plant Unit 8 Project. Baykeeper and California Coastkeeper Alliance are very concerned about the effects that the Contra Costa Power Plant's once-through cooling system (OTC) has had and is having on the aquatic life in the San Francisco Bay and Delta, and especially on listed species such as the delta smelt. We previously voiced these concerns during the California Public Utilities Commission's (CPUC) proceeding to approve the transfer of Unit 8 from Mirant to the Pacific Gas & Electric Company (PG&E). A copy of our comments in that proceeding is attached, and we respectfully request that it be incorporated, by reference, into this letter.

Baykeeper and California Coastkeeper Alliance commend the CEC staff and Commissioners for their willingness to address important and unresolved environmental issues related to Unit 8. It is sound environmental and economic policy to facilitate the modernization and repowering of power plants, and it sets a precedent for the repowering of older facilities that still rely on OTC. We support staff's recommendation that approval of the amendment be conditioned on an additional amendment specifying how the Unit's cooling system impacts will be eliminated or mitigated. Due to the significant localized impacts, mitigation must refer to onsite mitigation, in particular conversion of once-through cooling to an alternative technology. This is necessary in order to ensure the long term viability of the ecosystem. We urge the CEC to take steps to ensure that Unit 8 and the entire Contra Costa plant operate in a way that minimize their effects on our already-compromised Bay and Delta.

1. **Unit 8 should employ a cooling system that minimizes water withdrawals from the Sacramento-San Joaquin Delta**

The high cost of OTC to our fisheries is well-understood, and the already taxed Bay-Delta ecosystem cannot sustain the continued use of this antiquated, environmentally devastating technology. Data analyzed by the U.S. Environmental Protection Agency show that the Contra Costa Plant alone "takes" an average of 7,195 endangered delta smelt and 74,969 longfin smelt

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annually.[1] These numbers are due solely to entrainment; they do not take into account the effects of impingement or thermal discharges. Considering the continuing and dramatic decrease in delta fish populations over the years, we cannot afford to allow a new unit to go online using technology that is likely to contribute to this decline.

Staff's recommendation recognizes the importance of minimizing Unit 8's impacts and would require Mirant and PG&E to mitigate. The current situation—in which we have unauthorized takings of threatened and endangered species from an impaired environment—requires that mitigation be defined as use of a cooling system other than OTC, such as cooling towers or the use of reclaimed water for cooling (*i.e.*, as opposed to offsite "mitigation", which will fail to address the significant localized impacts). We urge the Commission to prohibit Mirant and PG&E from continuing to use OTC, and Delta water and habitats, for cooling Unit 8.

2. Unit 8 operation should be contingent on the timely completion of an ESA Section 7 consultation

Unit 8 should not operate until it is demonstrated that the Contra Costa plant has obtained all necessary permits, including incidental take permits as determined by the United States Fish and Wildlife Service ("USFWS") and the United States Army Corps of Engineers ("Corps"). The Commission conditioned approval of Unit 8 on the implementation of several mitigation measures, including installation of an aquatic filter barrier ("AFB"), as well as the understanding that the plant would comply with all federal and state requirements. To date, however, the AFB has not been installed, and Mirant has yet to implement the five alternative measures recommended by the Army Corps.

Mirant has expressed the opinion that reinitiation of a Section 7 consultation is inappropriate. However, the Corps and the USFS have both stated that "Mirant is not covered for take of [endangered] delta smelt at the Pittsburg power plant...because the AFB was not implemented to exclude delta smelt from entrainment."[2]

The regulating agencies' conclusions strongly suggest that completion of the Section 7 consultation is needed. We strongly urge the CEC to require that the owners of Unit 8 obtain all the necessary permits *before* operation begins. Furthermore, the requirement that PG&E and Mirant obtain all federal permits before operation should be made an explicit condition through incorporation into the amendment itself.

3. The Commission should consider undertaking a subsequent environmental review

We request that the CEC prepare a subsequent environmental review of Unit 8, pursuant to the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et seq.* A subsequent EIR may be prepared when the lead agency determines circumstances have changed to the extent that there has been a substantial increase in the severity of previously identified significant effects or when new information shows that project will have new or more significant effects not

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[1] EPA 821-R-02-2002, Case Study Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule, Part E: San Francisco Bay/Delta Estuary, pg. E3-15 (February 28, 2002).

[2] *See* Letter to Susan Moore, Acting Field Supervisor, USFW from Mirant's Counsel Jennifer Hernandez, dated February 22, 2006; letter from Jane M. Hicks, Chief, Regulatory Branch, ACE to Ryan Olah, USFWS, dated February 16, 2006; letter from Wayne S. White, Field Supervisor, USFWS, to Michael Finnan and Jane Hicks, ACE, dated January 31, 2006.

previously considered.[3] As stated in our letter to the CPUC on May 30, 2006, much has changed since the CEC authorized Unit 8 in 2001. Delta fish populations have dropped to crisis levels, the serious impacts of OTC in the Delta are better understood, the mitigation measures originally contemplated by the CEC have not been implemented, and the plant seems to be currently operating in violation of the federal and state Endangered Species Acts.

We commend the CEC for addressing these very important issues. We urge the Commission to explicitly condition approval of the requested amendment on the requirement that Unit 8 minimize to eliminate reliance on Delta water for cooling, and the requirement that the plant obtain all necessary permits and certifications prior to the operation of Unit 8.

Thank you for your consideration of these comments.

Sincerely,

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[3] *See* Cal. Pub. Res. Code § 14 § 15162; 14 C.C.R. § 15162.

BAYKEEPER.

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May 30, 2006

Commissioners
c/o Public Advisors Office
California Public Utilities Commission
505 Van Ness Avenue, Room 2103
San Francisco, CA 94102

Submitted via United States and electronic mail to public.advisor@cpuc.ca.gov

Re: Proposed decision for application 05-06-029, approving Contra Costa Unit No. 8 asset transfer.

Dear Commissioners:

On behalf of Baykeeper, Baykeeper's Deltakeeper Chapter, and the California Coastkeeper Alliance, we offer these comments on the Commission's proposed decision granting Pacific Gas & Electric ("PG&E") a Certificate of Public Convenience and Necessity and denying Californians for Renewable Energy's motion for a supplemental Environmental Impact Report ("EIR"). Since the original environmental review was conducted by the California Energy Commission ("CEC") in 2001, circumstances affecting both the Contra Costa Power Plant and the environment have changed considerably. As a result of these changes, the environmental effects of the Plant, and therefore transfer of Unit 8, are likely to be substantially more severe than those contemplated in the original review. It is appropriate and necessary, therefore, for the California Public Utilities Commission ("CPUC") to conduct a supplemental environmental review pursuant to the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et seq.*

CEQA is intended to serve the dual purposes of alerting public decision makers to the true environmental consequences of their actions and disclosing those consequences to the larger public through an EIR. The purpose of an EIR is to provide public agencies and the public with detailed information about the effects that a proposed project may have on the environment and list the ways in which those effects might be minimized. Pub. Res. Code § 21000. As recognized by the California Supreme Court, "[t]he EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate and enhance the environmental quality of the state.'" *Laurel Heights Improvement Ass'n v. Regents of University of California*, 47 Cal. 3d 376, 392 (Cal 1998) (citations omitted).

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Under CEQA, a "responsible agency" is a "public agency, other than the lead agency, which has responsibility for carrying out or approving a project." Cal. Pub. Res. Code § 21069. A responsible agency has authority to supplement a lead agency's EIR in situations where preparation of a subsequent EIR is appropriate but only minor changes are necessary to make the original EIR applicable to the current situation. CEQA Guidelines § 15163. Preparation of a subsequent EIR is appropriate when "new information of substantial importance" shows that the project will have significant effects not discussed in the previous EIR or the effects previously examined will be substantially more severe than shown in the previous EIR. *Id* at § 15162.

As a public agency that has responsibility for approving the transfer of Unit 8, the CPUC is a responsible agency and has the authority to prepare a supplemental EIR. A supplemental EIR is necessary because new information is available that suggests that the effects of Unit 8 will be substantially more severe than expected in 2001 as a results of the significantly changed circumstances discussed below.

1. **Declines in the delta and longfin smelt populations will result in Unit 8 having a greater impact than contemplated by the CEC's review.**

In the years since the CEC issued its final committee decision approving the Unit 8 plant, the population of delta smelt has declined to the extent that the effect of the Plant on this and other species will be much greater than considered 2001. Delta smelt, an indicator of the health of the Delta's fisheries, is currently listed by the United States Fish and Wildlife Service ("USFWS") as being threatened with extinction. 50 C.F.R. § 17.11. Since the CEC's 2001 decision, the population of delta smelt has dropped to its lowest levels in recorded history. In fact, populations are so low that the USFWS is considering changing the delta smelt's status from threatened to endangered. 68 Fed. Reg. 45270 (August 1, 2003). Similarly, striped bass and longfin smelt populations, also key Delta fish species, have declined dramatically since 2001 and, in 2005, were at or near the lowest levels in recorded history.

Despite these significant declines in local fish populations, the Plant still takes in water from areas that provide habitat for numerous Delta fish, including the delta smelt. In fact, data analyzed by the U.S. Environmental Protection Agency showed that the Contra Costa Plant entrained an average of 7,195 delta smelt and 74,969 longfin smelt annually. EPA 821-R-02-2002, Case Study Analysis for the Proposed Section 316(b) Phase II Existing Facilities Rule, Part E: San Francisco Bay/Delta Estuary, pg. E3-15 (February 28, 2002). As populations decline, the effects of the Contra Costa Plant's "takings" are amplified and, as a result, are greater than those considered in 2001. Because of the decline of the Delta fisheries, the environmental impact of the Power Plant will substantially more severe than shown in the CEC's original environmental review and the CPUC should prepare a supplemental EIR addressing these effects.

2. **Closure of Units 6 and 7 mean water will have to be withdrawn for Unit 8 and boiler blowdown will not receive the dilution originally considered by the CEC.**

One of the basic assumptions in the CEC's review was that Unit 8 would use the same intake and outfalls as Units 6 and 7. CEC Decision, Contra Costa Unit 8 Power Project, Application for Certification, p. 99 (May 1, 2001). This assumption led the CEC to conclude that the entrainment

impacts of Unit 8 would be minimal because it would rely on water already withdrawn for the other units. The CEC also concluded that, because the outfalls would be the same, the effects of Unit 8's boiler blowdown would be minimal as a result of it being diluted by the cooling water discharges of Units 6 and 7. *Id.* at 115. Today these assumptions are no longer correct.

In May of this year the owner of Units 6 and 7, Mirant, has announced it plans to close both units. "Mirant Files Notice to Shut Down Pittsburg 7 and Contra Costa 6 Plants in California," Mirant Press Release, dated May 4, 2006. Without the cooling water from these plants, Unit 8 will be responsible for impacts from once-through cooling and boiler blowdown, a fact that was explicitly recognized by the CEC in the staff's final assessment: "Unit 8 operating alone (without Units 6 and 7) could result in significant impacts without approved federal and state incidental take permits (ESA/2081) and the accompanying mitigation requirements (SA pp. 372-373)." As is discussed below, it appears that the Plant is currently operating without federal and state take permits and has failed to implement many of the mitigation requirements on which the initial review was conditioned. The imminent closure of Units 6 and 7 clearly constitutes "new information of substantial importance"; operation of Unit 8 will have considerable impacts on the aquatic environment beyond those which were examined in the previous EIR.

3. Mitigation conditions in the original environmental review have not been fulfilled.

The CEC's approval of Unit 8 was conditioned on the implementation of several mitigation measures, as well as the understanding that the Plant would comply with all federal and state requirements. The CEC's final decision explicitly required the Plant owner to install an aquatic filter barrier at Unit 7, obtain all necessary incidental take permits and statements, and perform fisheries monitoring. *CEC Decision* at 104-118. These requirements are also reflected in the Plant's National Discharge Elimination System permit as well as the terms of its lease with the California State Lands Commission. *See* Waste Discharge Requirements for Mirant Delta, LLC, Order No. R2-2002-0072, NPDES Permit No. CA0004880 (June 19, 2002); State Lands Commission, Lease PRC No. 415.1 to Southern Energy Delta (June 14, 1999) (stating "Lessee shall not violate any law or regulation whose purpose is to conserve resources or protect the environment. Violation of this section shall constitute grounds for termination of the Lease").

As far as Baykeeper is aware the Plant owner has failed to fulfill these requirements. No aquatic filter barrier has been installed at either Unit 6 or 7 and the Plant appears to be operating without a federal incidental take permit or a state consistency determination. *See* "Mirant plants attract attention in Delta crisis," Contra Costa Times (March 15, 2006). Not only are these failures inconsistent with the original environmental review, they may also put the Plant in violation of the terms of its NPDES permit and California State Lands Commission lease. Without the implementation of the mitigation measures specified in the original review, operation of Unit 8 will cause environmental effects that are likely to be substantially more severe than anticipated by the original EIR.

In the five years since the CEC license issued, the circumstances surrounding approval of the license have changed greatly. Delta fish populations are in crisis, the units that would have supplied Unit 8 with cooling water are being shutdown, mitigation measures required in the Contra Costa Plant's permit have not been implemented and the Plant appears to be operating without a federal take permit and the accompanying state consistency determination.

Considering these substantial changes, the CPUC is obligated to prepare a supplemental EIR to consider the impacts of Unit 8 prior to authorizing the asset transfer.

Thank you for your consideration of these comments.

Sincerely,

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