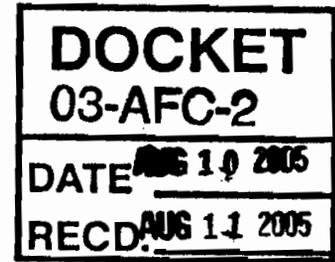


CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512
www.energy.ca.gov



August 10, 2005



Mr. Stephen M. Haase, Director
Mr. Richard Doyle, City Attorney
San Jose Department of City Planning
Building and Code Enforcement
801 N. First Street, Room 400
San Jose, CA 95110

Dear Mr. Hasse and Mr. Doyle:

You recently sent a letter dated July 13, 2005, to Bob Eller of the Energy Commission staff dealing with the possible rezoning of a site that is proposed for the "Los Esteros Critical Energy Facility Phase 2" project. Your letter requested "documentation" of two matters:

1. "the CEC's action as the first agency to grant a discretionary approval for the [Los Esteros Critical Energy Center Phase 2] project" and
2. "the CEC's consideration, exercising its lead agency powers, of all significant environmental effects of the project and its adoption of findings under Section 15091 [of the CEQA Guidelines] for each significant effect."

In making that request, your letter referred to section 15253 of the CEQA Guidelines and assumed its application to the City of San Jose as a "responsible agency" in its consideration of the rezoning request. (The letter also cited "Section 15352(b)(6)," but I believe the intent was to cite section 15253 instead.)

For several reasons, the Commission staff is unable to provide you the "documentation" you requested, but is ready to assist in providing you the environmental information for the Los Esteros project so that the City can proceed with the application for rezoning. We expect the City to be able to process the application for rezoning using the Commission staff's final assessment (the Final Staff Assessment or FSA) without having to wait for the Commission to act first. Indeed, the Committee overseeing the Energy Commission's proceeding for the Los Esteros project stated at its last evidentiary hearing (held June 30, 2005) that it expects the City to act first. There are several reasons for this view.

First, section 15253 of the CEQA Guidelines applies to "responsible agencies" and we do not believe the City is a "responsible agency" under CEQA for the Los

PROOF OF SERVICE (REVISED 7/21/05) FILED WITH
ORIGINAL MAILED FROM SACRAMENTO ON 8/11/05

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Mr. Stephen M. Haase, Director
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August 10, 2005
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Esteros project, even though it is considering an application for rezoning of the site. With limited exception tied to federal law, there is no "responsible agency" for any project seeking an application for certification from the Energy Commission. Public Resources Code section 25500 states that "the commission shall have the *exclusive power* to certify all sites and related facilities in the state" and that "[t]he issuance of a certificate by the commission shall be in lieu of *any* permit, certificate, or similar document required by any state, local or regional agency ... for such use of the site and related facilities" (emphasis added). The CEQA Guidelines define a "responsible agency" as including "all public agencies other than the lead agency which have discretionary approval power over the project." (Cal. Code Regs., tit. 14, § 15381.) Because the Energy Commission has exclusive jurisdiction under its enabling statute, the City has no "discretionary approval power" over the project seeking Commission certification and is, therefore, not a "responsible agency."

Public Resources Code section 25519(c), however, does recognize that other public agencies may make quasi-legislative, not permitting, decisions subject to CEQA, affecting sites that are otherwise under the Commission's exclusive jurisdiction. Section 25519(c) directs such agencies to use "the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency." Such directive, we believe, allows the City to use the FSA as its own EIR (or negative declaration) for purposes of the rezoning decision. (Enclosed is an opinion from the Energy Commission's Chief Counsel supporting the City's use of the FSA for a land use decision regarding a proposed site under the Commission's jurisdiction.)

Making the matter even more clear, in 2001, during the "energy crisis," the Governor issued an executive order that, among other things, directed local governments to use the FSA as their environmental document for decisions regarding a site proposed for a power plant seeking certification from the Energy Commission. (Executive Order D-26-01, February 8, 2001.) That executive order was issued to eliminate any issue over whether section 25519(c) allows public agencies to use the FSA, given questions over the applicability of section 15253 of the CEQA Guidelines. The assumption in your letter regarding the applicability of section 15253 raises the same issue that prompted the Governor's executive order. (Please note that the enclosed Chief Counsel's opinion preceded the executive order.)

Thus, as a legal matter, the Commission does not need to "act first," i.e., to certify the project or formally approve environmental documents, before the City can act on the Los Esteros rezoning application. Indeed, there is an additional reason for the City to act first. The Commission's final decision must include a finding as to whether the Los Esteros project complies with all applicable laws, including the applicable zoning ordinance. (Pub. Resources Code § 25523(d).) The Commission cannot approve a project that it finds does not comply with an applicable law unless it first

Mr. Stephen M. Haase, Director
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consults with the public agency to try to correct or eliminate the noncompliance. (Pub. Resources Code § 25523(d)(1).) We are currently at that point trying to "correct or eliminate the noncompliance" with the City's zoning ordinance.

Toward that end, Energy Commission staff is interested in trying to accommodate the City's need for an environmental document in considering the Planned Development Rezoning application for the proposed site. We respectfully encourage the City to use the comprehensive staff analysis that is the FSA as it would its own EIR without waiting for the Commission to act first. The Commission will not act first in accordance with its enabling statute.

I have spoken with Renee Gurza of your office regarding the City's letter and how the City might use the FSA. If you have any questions or wish to discuss this matter further, please do not hesitate to call me at (916) 654-3959.

Yours truly,



ARLENE L. ICHIEN
Assistant Chief Counsel

Enc.

cc: Rick Tetzloff, Project Manager, Calpine
Steve De Young, Environmental Manager, Calpine
Bob Eller, Project Manager, Energy Commission
Energy Commission Docket Unit (03-AFC-2)

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

(916) 654-4001

November 13, 2000

The Honorable Ron Gonzales
Mayor, City of San Jose
City Hall
801 North First Street
Suite 600
San Jose, California 95110

Dear Mayor Gonzales:

We, the Committee conducting licensing proceedings on the Metcalf Energy Center, have asked our Chief Counsel to prepare an Opinion regarding the City's use of the Final Staff Assessment for the City's forthcoming entitlement actions. This Opinion is attached.

We agree with our Chief Counsel's Opinion. Accordingly, we urge the City of San Jose to use the Final Staff Assessment as the environmental document of record in your proceedings.

Respectfully submitted,

Handwritten signature of Robert A. Laurie in cursive.

ROBERT A. LAURIE, Commissioner
Presiding Committee Member
Metcalf AFC Committee

Handwritten signature of William J. Keese in cursive.

WILLIAM J. KEESE, Chairman
Associate Committee Member
Metcalf AFC Committee

Proof of Service (Revised _____)
Original mailed from Sacramento
on 11/14/00 *dl*

TO: Robert A. Laurie
Presiding Member, Metcalf AFC Committee
William J. Keese
Associate Member, Metcalf AFC Committee

November 13, 2000

FROM: William M. Chamberlain 
Chief Counsel

RE: Use of Final Staff Assessment as CEQA Environmental Document

You have asked me to provide an opinion whether the City of San Jose may legally use the Commission's Final Staff Assessment (FSA) in the Metcalf Energy Center proceeding as the CEQA-required environmental analysis supporting rezoning, general plan amendments, and annexation requests that the City will be acting on in the near future. As you are probably aware, the Energy Commission staff has worked closely with City staff in an effort to ensure that the FSA would provide the environmental assessment that the City needs for these entitlement actions. This was confirmed in a September 8, 2000, letter from Mr. James R. Derryberry, Director, Department of Planning, Building, and Code Enforcement, concluding that the Final Staff Assessment would be the environmental document used by the City of San Jose for the City's entitlement actions regarding the proposed Metcalf Energy Center. The Final Staff Assessment for the Metcalf Project was released on October 10, 2000. I understand that now the City has questioned whether it can use the FSA before the Energy Commission has certified it or adopted it as a Commission document. For the reasons stated below, I find that the FSA is a legally sufficient document for the City of San Jose to use in its entitlement actions.

The Energy Commission's power plant siting process is a certified state regulatory program under the California Environmental Quality Act (Public Resources Code, § 21080.5; California Code of Regulations, title 14, §§ 15250-15253.) As such, it is exempt from the procedural elements of CEQA, specifically the Environmental Impact Report (EIR) process. The Commission is not required to issue or certify an EIR. However, the Energy Commission staff prepares a comprehensive environmental document, the Final Staff Assessment, in accordance with Public Resources Code sections 25500 et seq. The FSA is substantively similar to an EIR, in that it is an independent assessment of the project's potentially significant effects on the environment, effects on public health and safety, and conformance with all applicable laws, ordinances, regulations and standards. This assessment also includes recommended conditions of certification to mitigate potential impacts of the project.

Section 25519(c) of the Public Resources Code provides the authority use of the FSA by the City. Section 25519(c) states, in pertinent part:

(c) The commission shall be the lead agency as provided in Section 21165 for all projects which require certification pursuant to this chapter and for projects which are exempted from such certification pursuant to Section 25541. . . . If the

commission prepares a document or documents in the place of an environmental impact report or negative declaration under a regulatory program certified pursuant to Section 21080.5, any other public agency which must make a decision which is subject to the California Environmental Quality Act, Division 13 (commencing with Section 21000), on a site or related facility, shall use the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency. (Emphasis added.)

The City's new concern—that the FSA is a staff document when the statute refers to a document “prepared by the commission”—is misplaced. Section 25519(c) is but one example of several instances in which the Warren-Alquist Act refers to “the commission” without distinguishing between the decisionmakers who are appointed by the Governor and the staff that serves them. However, to make the siting process set forth by the Warren-Alquist Act consistent with other state laws, it is necessary to make this distinction and to assign some tasks to the Commissioners and others to the staff. Preparation of the FSA is a function that is implicitly delegated to the Staff by the Commission's siting regulations. (See, e.g., § 1742.5.) Such delegation is a legal necessity in a state licensing proceeding subject to the adjudicatory provisions of the state's Administrative Procedure Act (APA). These provisions of the Government Code require a “separation of functions” between agency investigatory/advocacy staff and the agency decision-makers. (See Govt. Code, §§ 11400 et. seq.)

The APA makes a clear distinction between the “agency head” (or decisionmaker) and the staff that presents cases to it. See Gov't Code § 11405.40. The Commissioners, as the “agency head,” are required by the APA to issue a written decision on a record. This summary document will come at the conclusion of the proceeding. But that document could not be the one referred to by section 25519(c) because the Warren-Alquist Act requires that document to determine whether the proposed facility will comply with state and local requirements. Plainly, in a case such as Metcalf, the Commission cannot make that determination until local agencies respond to requests for rezoning and other entitlements. Thus, if section 25519(c) were interpreted to refer only to the Commission's final decision document, we would have a chicken and egg problem: The City could not act without the Commission's decision, but the Commission's decision requires knowledge of the City's action.

Indeed, the Warren-Alquist Act provides that if the Commission finds that there is a noncompliance with local requirements, “the commission” is required to “consult and meet with” the local agency whose requirements are not met in an effort to find a way to resolve the noncompliance. Both the APA and the State Open Meetings Law (Gov't Code §§ 11121 et seq.) make such a requirement impractical if it is interpreted literally to require the members of the Energy Commission to conduct such consultations and meetings personally. Thus it is necessary to recognize that the Legislature must have meant that the Commission's staff would undertake this consultation and meeting process. Similarly, I conclude that in section 25519(c) when the Legislature refers to a document “prepared by the commission,” it means a document prepared by the

Commission staff as an integral part of the Commission's certified regulatory program. The FSA is such a document, and because it contains all of the substantive analysis the City requires, the City should not hesitate to rely upon it for CEQA purposes.

In summary, the FSA is the appropriate environmental document regarding the requirements of Section 22519(c) and is legally sufficient for the City's use in its entitlement actions associated with the Metcalf Energy Center.

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

**APPLICATION FOR CERTIFICATION
FOR THE LOS ESTEROS CRITICAL
ENERGY FACILITY, PHASE 2
(LOS ESTEROS 2)**

DOCKET No. 03-AFC-2

(Revised 7/21/05)

PROOF OF SERVICE

DOCKET UNIT

Send an original signed document plus
12 copies and/or an electronic copy plus
one printed copy to the address below:

CALIFORNIA ENERGY COMMISSION
DOCKET UNIT, MS-4
Attn: Docket No. 03-AFC-2
1516 Ninth Street
Sacramento, CA 95814-5512
doCKET@energy.state.ca.us

In addition to the documents sent to the
Commission Docket Unit,
also send individual copies of any
documents to:

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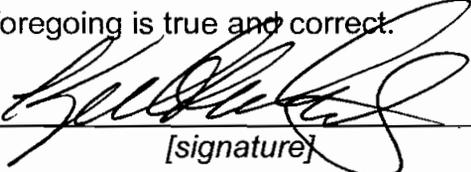
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DECLARATION OF SERVICE

I **Keith A. Muntz** declare that on **August 11, 2005**, I deposited copies of the attached **Staff letter in response to the City of San Jose's letter dated July 13, 2005 to Bob Eller** in the United States mail at Sacramento, CA with first class postage thereon fully prepaid and addressed those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

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


[signature]

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