DOCKET
03-AFC-2
DATE May 26 2006
RECD. May 26 2006

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	Docket No. 03-AFC-2
	)	
Application for Certification for the Los Esteros Critical Energy Facility Ii (Phase 2)	)	**Motion for Override of LORS Noncompliance**
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I. INTRODUCTION

For approximately two years or more the City of San Jose ("City") has repeatedly expressed its intent to conform the local zoning of the Los Esteros Critical Energy Facility ("LECEF") to the combined-cycle use that is the subject of this license proceeding. Such zoning conformity is the only obstacle to the granting of an Energy Commission license for the combined-cycle ("Phase 2") use. Commission staff ("Staff") has spent significant time discussing with the City the time frame and mechanisms for conforming the zoning designation in a manner consistent with applicable state law. Various mechanisms have been agreed to but subsequently abandoned by the City. Pursuant to Public Resources Code section 25523(d)(1), Staff has met and consulted with the City on multiple occasions in an effort to correct or eliminate the project's nonconformity with the City's zoning designation. Even so, the City is no closer to the amendment of its zoning ordinance today than it was two years ago, despite repeated statements from City Planning staff that it intends to act.

Moreover, the City has now apparently rejected the conforming of its land use designation by any method other than preparing its own separate and duplicative environmental impact analysis for the project. Staff believes that such an approach is unproductive, unnecessary, and inconsistent with provisions in the California Environmental Quality Act ("CEQA") and the Warren-Alquist Act. Reluctantly, Staff has concluded that the only way to resolve the current impasse is for the Commission to

make findings overriding the nonconformity pursuant to Public Resources Code section 25525, which would then allow the Commission to license the combined-cycle project despite the lack of conformity with the City's zoning.

Staff therefore requests the Committee to schedule an evidentiary hearing to receive evidence upon which to consider making the findings of "public convenience and necessity" under Section 25525 and amending the Presiding Member's Proposed Decision accordingly. To help the Committee first understand the issues and events leading up to the current impasse, the following sections provide a short historical summary, an explanation of the City's zoning ordinance, the legal issues it raises in light of the Energy Commission's exclusive permitting authority, and the City's misguided reasons for its current position.

II. PROCEDURAL HISTORY

The LECEF project has its origins in the US Dataport Planned Development Zoning Project ("Dataport"). The Dataport project was proposed as a large "super hub computer server farm" facility with power provided by a 49 MW gas-fired turbine with 84 two-megawatt (MW) diesel generators providing backup (168 MW of backup generators if all operated simultaneously). The Dataport applicant did not seek a Commission license, and Dataport was approved by the City acting as the CEQA lead agency on April 3, 2001. (Final Staff Assessment ["FSA"], p. 1-8.) The City's adopted ordinance approving the Dataport project PD zone (San Jose Ord. No. 26343) imposed conditions on the project requiring elimination of the diesel backup generators and "environmentally superior technology for power generation" with a lower overall impact on air quality. (San Jose Resolution No. 70844, Feb. 19, 2002.)

This led to LECEF "Phase 1," a 180 MW simple-cycle gas-fired facility that could provide reliability for the Dataport server project while providing significant peaker generation and reduced air emissions. The City rezoned the Dataport site for LECEF Phase 1 on March 5, 2002, and the Commission subsequently granted the LECEF license on July 2, 2002. (FSA, p. 1-8; Los Esteros Phase I Final Decision, July 2002, p.

1.) The original project license was issued pursuant to the emergency four-month siting process, which meant that the license was valid for only three years. The project became operational in March 2003.

The AFC for the original three-year Phase 1 license clearly indicated that Phase 2 would be for the conversion of the facility to combined cycle operation with an additional steam turbine. (See Los Esteros Phase 1 Final Decision, July 2002, p.1.) In December 2003 the Applicant filed a combined AFC for 1) a permanent license for the Phase 1 peaker project, and 2) a license to subsequently convert the project to a combined-cycle (Phase 2) power plant. The Phase 1 "relicense" of the existing facility was granted on March 16, 2005. The Presiding Member's Proposed Decision ("PMPD") for Phase 2 was published in October 2005.

III. THE CURRENT PHASE 1 ZONING: OF PERMITS AND PRE-EMPTION

The Los Esteros site was formerly used for plant nurseries. (Los Esteros Phase 1 Final Decision, p. 264.) The site's "base zoning", in the traditional land use sense, was and continues to be "agricultural." However, for larger development projects the City uses a land use device it calls a "Planned Development Zone," or "PDZ," which is a specialized land use classification "individually designed to meet the needs of the territory so zoned." (San Jose Ord. § 20.10.070.) On February 19, 2002, the San Jose City Council approved a PDZ for the site; the City Planning Director issued a PDZ permit effectuating the PDZ the following day. (Los Esteros Phase 1 Final Decision, supra, at p. 265-266.)

PDZs are required to be accompanied by a "General Development Plan." This plan includes a specific map and "site plan" of all buildings, uses, setbacks, roads, landscape areas, development standards, lots sizes, and building dimensions; the Plan also includes all conditions for environmental mitigation, and any other "appropriate conditions for approval." (San Jose Ord. § 20.120.510.) Such specifications are detailed and exact. Finally, a "PDZ permit" is issued to "effectuate" both the PDZ and the General Development Plan conditions. (San Jose Ord. § 20.10.070.)

Unless the use is consistent with the "base zoning" (in this case, agriculture), even a small change in the PDZ or an expansion of the PDZ use requires a new "PD permit." (San Jose Ord. § 20.100.910.) Agricultural zoning does not allow power plants as a use. The Phase 2 project will require certain new buildings and structures on the property, such as the steam turbine and HRSG units, not depicted on the existing General Development Plan. Thus, the City's laws would require a new PD permit for the Phase 2 facility.

The original PDZ was for a "two in one" project—it included not only the Phase 1 facility but also the Dataport "server farm," which was to be built immediately adjacent to the power plant. The server farm was never financed or constructed, and is not expected in the foreseeable future. But the complex interlocking combination of the Phase 1 power plant with the integrated "server farm" project, combined with the City's willingness to conform the zoning using the Staff FSA (coupled with the original Dataport EIR), may have prevented Staff from considering the appropriateness of the PDZ for a Commission-licensed power plant. In retrospect, it was not appropriate.

The City's PDZ is similar in concept to land use/zoning devices frequently known as "planned unit development" ("PUD") classifications. (Curtin, *Curtin's California Land Use and Planning Law,* 19th ed., 1999, p. 46.) The PUD device in its various forms frequently includes site maps with detailed requirements. Clearly, the creation of PDZ Zones with detailed site maps and specific project conditions for environmental mitigation is very different from traditional "rule-giving" Euclidean zoning. Rather, it is a land use device which possesses both quasi-legislative and quasi-adjudicatory features, tilting heavily toward the latter; it entails very specific requirements for a single project on a specific piece of land. It is thus hardly surprising that the California Supreme Court has held that PUD permit issuance is a quasi-adjudicatory act. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 773, fn. 1 [122 Cal.Rptr. 542]; Remy & Thomas, *Guide to the California Environmental Quality Act*, 10th ed., 1999, p. 296-298.)

However ill-defined, the distinction between legislative acts and quasi-adjudicatory acts is critical. The latter require specific findings by the decision-maker, and are subject to a different standard of judicial review. Given the importance of the distinction, one might expect it to be established and clear. Unfortunately, it is not, and the California courts have shed much ink regarding which kinds of local government land use actions fall into which category. (See *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 518, fn. 8 [169 Cal.Rptr. 904]; Remy & Thomas, *supra,* p. 297.)

A. The Significance of the "Quasi-Adjudicatory" Distinction.

Traditional "Euclidean" zoning is legislative action by local governments. Local governments generally adopt by ordinance classifications of different uses for property, and divide their municipalities into various districts according to such uses (e.g., for residential, commercial, and industrial districts). Such ordinances set category-applicable requirements for allowed uses, structure heights, setbacks, etc. The general applicability of such rule-giving governmental action makes it "quasi-legislative," as distinct from permit actions that address specific project proposals and properties, which are normally classified as "quasi-adjudicatory" (also often termed "quasi-judicial").

Typically, conditional use permits or special use permits are required for certain kinds of projects within a district. These permits or approvals are "quasi-adjudicatory" in that they require factual findings upon which to determine the rights of a specified landowner with respect to a specific piece of property. Likewise, variances, which allow a specific property to exceed requirements of the general zoning law, are quasi-adjudicatory acts. Quasi-legislative local land use actions are the prerogative of local government, even for power plant sites. However, quasi-adjudicatory (specific approval or permit-type) actions such as variances are subsumed by the preemptive circumference of the Commission's permit pursuant to Public Resources Code section 25500.

Thus, when a local government comments that it would, were it the permitting agency, require a variance (or special use permit or other quasi-adjudicative approval) for a power plant project, the Commission does not leave it to the local government to grant such an approval. Rather, it subsumes the action into the Commission's license while soliciting (through Staff) comments from the local government regarding what criteria and whether any special conditions should apply.

B. The City's PDZ Permit Conditions are Pre-empted by Commission Licensing.

Pursuant to the Warren-Alquist Act, the Commission has "the exclusive power to certify all sites and related facilities in the state," and this authority "shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency . . . and shall supersede any applicable statute, ordinance, or regulation of any state, local or regional agency . . . ." (Pub. Resources Code, § 25500.)

Clearly, the PDZ zoning and PDZ permit that the City requires have all of the attributes of a permit. They create specific requirements for a specific piece of land, include detailed site plans, include specific environmental measures and any other conditions the City finds appropriate. This, of course, is the very same thing the Commission does when it grants an AFC license. The potential for conflict between these two permits, as well as the waste of time and agency resources, is the very thing Public Resources Code section 25500 is intended to prevent by preempting local permitting.

The City's Zoning Ordinance recognizes the PDZ permit as a "development permit" (San Jose Ord. § 20.200.270), specifically categorizing it with the City's other land use permits, including site development permits, special use permits, conditional use permits, single-family house permits, administrative permits, and variances. As with these other quasi-adjudicatory permits, specific "findings" must be made before the permits can be issued (San Jose Ord. § 20.100.940). There is simply no way to

distinguish the City's PDZ Permit from the other kinds of permits which are subsumed by the Commission's permit in accordance with Public Resources Code section 25500.

The City, through its original creation of the PDZ District for the applicant, intended this property to be used for a power plant. The combined-cycle facility has no environmental or land use impacts that differ in any meaningful way from those of the existing facility. As the PMPD states:

> Construction and operation of the LECEF Phase 2 combined-cycle power plant and its associated linear facilities would not significantly interfere with, disrupt, or physically divide any established communities around the project site. It would be consistent with existing land uses, particularly the existing LECEF simple-cycle facility since it would be built within the boundaries of the current LECEF site, and it would not result in the conversion of any farmland. In addition, the proposed project would not conflict with any existing or planned land uses, recreational or agricultural land uses. Therefore, there are no land use impacts. (PMPD, pp. 295-296.)

Based on the above, the Commission could find that the present project conforms to all applicable laws, ordinances, regulations, and standards (LORS), that the PDZ is consistent with Phase 2 power plant uses, that the PDZ's pages of detailed permit conditions are preempted by Section 25500 and are of no legal effect, and that the issuance of a new PD permit is preempted by the Commission's statute (or that the Commission's permit serves in place of the PD permit).

While Staff does not oppose such a finding, it believes that the legal effect of such a finding is unclear. If the PDZ conditions are ineffective because they are preempted, one could argue that the "base" zoning for the site (agricultural) continues to apply, and would be inconsistent with Phase 2 use. Thus, a finding of conformity with LORS by itself would risk creating legal uncertainty that Staff believes is inadvisable. Staff believes that the better course is to make "LORS override" findings. There are adequate bases for such findings, as described under "V," below.

IV. THE LONG WAIT FOR CITY ACTION

Commission overrides of inconsistency with local government ordinances are uncommon, in part because the Commission solicits local government participation in the siting process (Pub. Resources Code, §§ 25519(f), 25538), but also because the Commission is required to "consult and meet" with local government officials in an effort to avoid the necessity for an override. (Pub. Resources Code, § 25523(d)(1).)

Staff began its consultations with the City regarding zoning consistency in 2004. In those days the City planning staff decided that it would change the zoning for the project site using the Final Staff Assessment (FSA) as the underlying environmental document, the same approach the City had taken in 2002 when it rezoned the Dataport site for the LECEF Phase 1. (FSA, p. 4.5-6.) At the June 28, 2005, evidentiary hearing, the City's representative stated that he anticipated no difficulty getting the zoning change approved, and that such approval would be completed in any case no later than August 2005. (PMPD, p. 295.)

In August 2005 the City's counsel indicated by correspondence that it did not believe that it could legally rely on the FSA as its environmental document, and requested that a document with "findings" be provided. Staff (and also, based on past correspondence with the City, the Commission's Chief Counsel) disagrees with the City on this matter. Public Resources Code section 25519(c) provides that when the Commission, through its certified regulatory program, prepares environmental documents, local agencies such as the City "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." As previously stated, the City relied on a combination of the FSA and the prior Dataport EIR for its CEQA documents when it approved Los Esteros Phase 1 zoning.[1] (San Jose Resolution No. 70844, Feb. 19, 2002.)

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[1] The City has subsequently orally stated that it only relied on the Phase 1 FSA because of the Governor's Emergency Order of February 2001 indicating that this document was to be used by local

Subsequent to the August 2005 communication, Staff was informed by the applicant that the City was amenable to using the Phase 2 PMPD as its environmental document for the purpose of its zoning change. Staff attempted to get confirmation that this was the approach the City would use but received conflicting responses from the City.

In November 2005 Staff met with City officials, including the City Attorney and the Planning Director, in an effort to find agreement on a satisfactory path to satisfying CEQA process concerns and efficiently conforming the City's zoning. Staff and the City agreed that an addendum to the prior environmental documents (the Dataport EIR and the Phase 1 Staff FSA) could be the appropriate course of action. Staff understood that such addendum would be based on either the analysis in the FSA, or on the Phase 2 PMPD, or some combination of the two documents. The only caveat to the agreement was that City staff would assess whether Phase 2 impacts constituted a "substantial increase in the severity" of impacts considered in prior documents, consistent with the CEQA Guidelines. The City knew at this time that Phase 2 had incrementally greater emissions compared to Phase 1, but presumably also knew that such emissions were fully offset.

In January 2006 Staff heard from the applicant that City staff had requested that the applicant provide written analysis in the form of an initial study to support the addendum. This deviated from what Staff understood to be the approach—reliance on existing Commission documents—but the applicant stated that it did not object to providing additional analysis and that it had been assured of prompt City action.

In January, February, and March the applicant filed status reports indicating that it was meeting all of the City's information requests, and that the addendum would be forthcoming. Applicant's status reports state that as recently as March 8 the City's planning department had indicated that the addendum would go to the City Planning

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governments. However, the Executive Order expired by its own terms at the end of 2001, while the City's zoning decision occurred in 2002.

Commission in April, and to the City Council for approval in May. However, on April 13 applicant filed a status report stating that on March 28 the City planning staff informed applicant that "Calpine and the Commission would shortly receive a letter from the City" and indicated that there was no agreement on direction or schedule.

During this entire period Staff had received no indication from the City that there was a problem with the addendum. When Staff became aware of problems in April it contacted the City Attorney, who was also unaware of the difficulties and indicated that future conference calls including other City officials would be necessary. Shortly thereafter applicant forwarded to Staff an April 18 letter signed by the City's Acting Planning Director, informing applicant that there would be no addendum.[2] Unfortunately, the reasons set forth in the April 18 letter indicate significant factual, conceptual, and legal confusion.

These confusions are multi-faceted but can be categorized as follows: 1) the City fails to understand that the Phase 2 project's air quality impacts are fully mitigated consistent with provisions in the federal and state clean air acts, consistent with CEQA, and consistent with Bay Area Air Quality Management District ("BAAQMD") rules; 2) the City disapproves of the use of BAAQMD-approved Emission Reduction Credits ("ERCs") to mitigate air quality impacts; and 3) the City believes that it has legal authority to impose different (but unspecified) mitigation on a power plant that is jurisdictional to the Commission. The City's thinking is muddled and mistaken on all three points.

A. Contrary to the April 18 Letter, Air Offsets and Additional Mitigation Have Been Identified.

The April 18 letter states that the Phase 2 project would have emissions "in excess of BAAQMD thresholds for which the CEC has determined that mitigation is required to reduce impacts to a less than significant level [and], *in the absence of*

[2] Staff apparently never received the April 18 letter from the City, despite its inclusion in the "cc" list on the signature page. Staff received the letter forwarded from the applicant. The April 18 letter is the only written communication from the City, but the City has subsequently confirmed these views in oral communications regarding it.

identified offsets/mitigation these increased emissions constitute what the City of San Jose Planning staff considers to be a substantial increase in the severity of a previously identified significant impact." (Emphasis added.) This statement is inexplicable, inasmuch as both the BAAQMD Final Determination of Compliance ("FDOC") and the PMPD included expressly identified offsets (banked ERCs) for Phase 2 and additional mitigation that went beyond ERC requirements.

B. Banked ERCs are Recognized as Valid Mitigation for Air Quality Impacts Under Federal Law, State Law, and BAAQMD Rules.

Were the issue merely whether, in fact, "offsets/mitigation" have been identified, the above confusion could easily have been corrected. However, the April 18 letter goes on to state that the "City of San Jose Planning Staff is not supportive of the use of Emission Reduction Credits, from discontinued uses that are outside the project area, to mitigate the project's impact . . . ." This statement is indicative of a conceptual misunderstanding of federal and state law requirements for mitigating stationary source emissions with ERCs, and how such ERCs are regarded under CEQA.

1. Under Both State and Federal Law, Offsets are an Integral Mitigation Measure for Large Stationary Sources such as Power Plants.

Offsets were recognized as an important measure for air pollution control in the federal Clean Air Act of 1970, and subsequent amendments of that statute have emphasized their importance. (See generally, Grad, *Treatise on Environmental Law,* §§ 2.03[13][a] *et seq.*) Over time they have become a cornerstone of the federal New Source Review rules which are used to regulate stationary sources. (Manaster & Selmi, *California Environmental Law and Land Use Practice*, § 41.23[4][d].) Offsets are enforceable emission reduction credits that 1) offset all anticipated emission increases from a new stationary source, and 2) result in a net air quality benefit. (*Ibid.*) Offsets are likewise a required device of the California Clean Air Act, and are adopted into the rules of the various regional air districts. (*Id.* at §§ 41.01 *et seq.).*

The conceptual theory behind offsets is to establish a baseline date for existing stationary polluting sources, allow the owners of these sources to take "credit" for verified emission reductions from these sources (ERCs), provide a rule-based verification and accounting system for such credits (an ERC "bank"), and allow such credits to be purchased and sold in an open market for use by new stationary sources. Credits for new emissions sources are frequently required by air district rules to be provided at specified "ratios" that require more credits than the maximum emissions calculated for the new emission source. Ratios are also frequently used based on distance of the offset from the new source, or where credits for one criteria pollutant "precursor" is substituted for another (e.g., sulfur dioxide credits may be substituted at a ratio for PM10 credits because sulfur dioxide is a PM10 "precursor"). Over time, in any given air district, the number of potential and available ERCs will become more scarce and expensive, re-capturing the economic "externalization" of pollution on the environment. The number of ERCs available steadily diminishes over time, and this is reflected by a decreasing inventory of stationary emissions.

New Source Review, which requires both ERCs and "best available control technology" for new stationary sources, is a remarkable environmental success story. For instance, in the San Francisco Bay Area, stationary sources in 1975 emitted 542 tons per day ("TPD") of ozone precursors (nitrogen oxides and reactive organic gases); by 2005 such stationary emissions had been reduced by more than two-thirds-- to 155 TPD. (CARB, *The 2005 California Almanac of Emissions & Air Quality,* Tables 4-15, 4-16, p. 128.) These significant emissions reductions occurred during unprecedented increases in both economic activity and population growth.

2. BAAQMD has Adopted Rules for New Source Review that Require ERCs as Mitigation for Emissions from Stationary Sources.

BAAQMD requires all stationary source emissions of more than 10 tons per year ("TPY") of NOx to be "fully offset"; if a stationary source exceeds 35 TPY in emissions, ERCs for the project must be provided for all emissions at a ratio of 1.15 to 1.

(BAAQMD Rule 2-2-302.) These rules were applied by BAAQMD in the current case, and the FDOC required ratioed NOx offsets and identified the ERC banking certificates which provide them. (FDOC, pp. 23-24.) The ERCs come from sources in San Francisco, Palo Alto, and San Pablo. (*Id*., p. 24.)

Significantly, BAAQMD has adopted its Revised San Francisco Bay Area Ozone Attainment Plan for the 1-Hour Ozone Standard ("OAP"), supplementing its previously adopted Bay Area 2000 Clean Air Plan ("CAP"). These publicly available documents were adopted by the agency's Board of Directors, and provide a detailed program directed toward achieving compliance with the federal standard. Offsets are an essential part of these adopted plans. BAAQMD includes banked ERCs as "ongoing emissions" in its planning emissions inventories for future years, so the effect of future new sources that rely on ERCs have already been accounted for in its air quality attainment plans. (Metcalf Final Decision, p. 133.) Thus, new stationary source projects that rely on banked ERCs have already been mitigated programmatically, and do not detract from BAAQMD's attainment strategy. (*Ibid*.) Stated differently, ERCs provide "contemporaneous" mitigation for a new stationary source (a federal EPA-required criterion) because the mitigating reduction has *already* occurred when the offset was "banked."

3. CEQA Recognizes the Efficacy of Programmatic Air District Mitigation for Cumulative Impacts, Such as Those of Criteria Pollutants.

California has an elaborate, layered, and complex regulatory structure for the protection of air quality. The medium is regulated by extensive state and federal law, including comprehensive regulation by U.S. EPA and CARB. Under both state and federal law, the local air districts play the critical role in regulating air quality. Both U.S. EPA and CARB have oversight role for the air districts. The approach to air regulation addresses nearly all aspects of both mobile and stationary emissions. In sum, it is a huge, complex, programmatic approach to improving air quality by addressing a multitude of what CEQA terms "cumulative impacts." Cumulative impacts are impacts

that would, taken alone, be minor or inconsequential, but when considered in aggregation can be significant. (See CEQA Guidelines § 15355.)[3]

Air districts are required to adopt air attainment plan permit regulations and to develop elaborate State Implementation Plans ("SIP") to meet federal air quality requirements. These are in turn submitted to U.S. EPA for approval. The goal of these "SIP" plans is the attainment of air quality standards by addressing impacts, and particularly cumulative impacts, in a comprehensive way.

These programmatic approaches (which include the requirements for offsets for major emission sources) are fundamental CEQA mitigation. The CEQA Guidelines have long acknowledged that the "only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations rather than the imposition of conditions on a project-by-project basis." (CEQA Guidelines, § 15130(c).) The reason is obvious: cumulative impacts with as many sources as those that define air quality can only be effectively addressed by a comprehensive regulatory program. Air quality regulation is a good example of this programmatic approach to mitigation. The CEQA Guidelines further recognize and encourage a programmatic approach to cumulative impact mitigation, providing as follows:

> A lead agency may determine that a project's incremental contribution to a cumulative impact is not cumulatively considerable [i.e., significant] if the project will comply with the requirements in a previously approved plan or mitigation program which provides specific requirements that will avoid or substantially lessen the cumulative problem (e.g., water quality control plan, **air quality plan**, integrated waste management plan) within the

[3] Although air quality impacts may also be "direct impacts," the impacts of modern gas-fired power plants are normally significant only as "cumulative impacts" as the term is defined by CEQA. Emissions from such facilities do not normally, by themselves, violate even the most stringent health-based air quality and toxics standards. For example, California's exceedingly stringent PM10 24-hour standard is 50 ug/m3 (the federal standard is 150 ug/m3); worst case dispersion modeling for modern gas-fired facilities (including Phase 2) typically indicate a highest point of impact of less than 5 ug/m3. The Commission has repeatedly heard undisputed expert testimony that downwind air quality monitors would not normally be able to detect a difference in criteria pollutant measurements when the power plant is running as opposed to when it is off-line. Considered alone, modern gas-fired power plants would impose no health threat. It is their contribution to the background air situation, with myriad emission sources, that can make their impacts **cumulatively** significant.

> geographic area in which the project is located. (CEQA Guidelines, § 15064(h)(3) [emphasis added].)

The above section, added by the 1998 revisions to the CEQA Guidelines, was intended to clarify the ways in which agencies may find that cumulative impacts have been adequately addressed. (See Remy & Thomas, *supra*, p. 242.) It clearly contemplates that the mitigation for a significant cumulative effect is compliance with the rules of an air district's attainment plan. (*Ibid*.) Thus, local agencies such as the City may legally find that compliance with BAAQMD's rules, as evidenced by the FDOC, mitigates air quality impacts such that they are less than significant.

BAAQMD's own directives to local agencies that must prepare CEQA documents are entirely in accord with the above. BAAQMD has itself issued "CEQA Guidelines" to assist local agencies in determining whether projects have a significant effect on air quality. (BAAQMD CEQA Guidelines, December 1999.) Consistent with the state CEQA Guidelines set forth above, the BAAQMD Guidelines advise local agencies as follows:

> Sources of air pollutant emissions complying with all applicable District regulations generally will not be considered to have a significant air quality impact. [FN 2: CEQA Guidelines, Section 15064(i) (now 15064(h)(3)] (BAAQMD CEQA Guidelines, *supra,* p. 13.)

The Phase 2 offsets identified by the FDOC and required by the PMPD are in accordance with the air district's adopted air quality plans, which have been made part of the EPA-approved State Implementation Plan. Thus, the City could in an addendum determine that additional Phase 2 impacts are less than "cumulatively considerable" (i.e., less than significant in a CEQA context). The City's decision not to do so has no sound factual, legal, or policy basis.

4. The City's Objection to the Location of ERCs is Meritless.

Ozone, often called "smog," is a pollutant formed in the atmosphere by a photochemical process (involving heat and sunlight) acting on criteria pollutant

"precursors" (e.g., nitrogen oxide, or "NOx" emissions). The photochemical conversion of NOx to ozone depends on the weather, and occurs at a later time after the NOx has been transported downwind from the point from which it was emitted. (FSA, p. 4.1-12.) Thus, the impacts of NOx emissions (ozone or "smog") are often transported far downwind from the origin of the point of emission; in the San Francisco Bay Area, they tend to concentrate "downwind" in the southern and eastern parts of the air basin. (*Ibid.*) Ozone precursors have a multitude of sources but are dominated by mobile sources (CARB, *2005 Almanac, supra,* Tables 4-15 and 4-16 at p. 128), and any regulatory regime to attain the state and federal ozone standards must be regional and must embrace both mobile and stationary sources. Ozone precursors in the San Francisco Bay area have declined significantly over time, and are projected by CARB to continue to do so. (*Ibid.*)

The City's April 13 letter suggests that the air quality mitigation required by both BAAQMD and the Commission is unacceptable because the ERCs are "outside the project area."[4] In subsequent discussions, the City indicated that its concern was about increased NOx emissions, and focused on the ERCs in question—28 TPY of NOx credits to offset the additional Phase 2 emissions of 24 TPY.[5] The City's objections, which echo those previously raised by the City and rejected by the Commission in the Metcalf AFC Decision (Metcalf Final Decision, p. 135), have no legal or logical basis.

Ozone pollution in California is a regional problem. The regulatory structure that addresses it is designed to be comprehensive and is administered for entire "air basins." For this reason BAAQMD merely requires offsets to be within the air basin, and not adjacent or near to the new stationary source. BAAQMD has explained in Commission hearings in the past that even if ERCs are purchased in San Jose for a Pittsburg project, this is acceptable and addresses the overall concern; in the future a San Jose

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[4] Notably, this City objection was raised for the first time in the April 13 letter, despite the City's participation in this siting proceeding for nearly two years.

[5] For comparative context, the Calpine Delta facility in Pittsburg was licensed to emit 238 TPY of NOx, and the Metcalf facility 185 TPY. Of course, these emissions were also mitigated by "ratioed" ozone precursor ERCs.

project may purchase ERCs in Pittsburg, so regional pollution diminishes across the air district over time. The program is programmatic, long-term, and region-based.

This regional programmatic approach has been embraced by all federal and state agencies that regulate air quality. Staff has frequently gone even beyond what EPA, CARB, and the air districts require, in that it has often recommended to the Commission that applicants be required to find ERCs either in general proximity or "upwind" (given a prevailing meteorology) from a new power plant. For instance, in the Metcalf AFC proceeding Staff's position was that ERCs be either in the area or north of the project, since the prevailing meteorology funnels emissions from the Peninsula and East Bay in the direction of San Jose. (See Metcalf Final Decision, pp. 134-135; see BAAQMD CEQA Guidelines, *supra*, Appendix D-2.)

ERCs are normally the only feasible air quality mitigation for a large stationary source. It is uncommon to find such offsets at or adjacent to a new emission source (unless the source is at a refinery or power plant complex). In addition, narrowly defined "impact areas" for ozone precursor emissions is a fallacious concept. Weather is capricious, and varies by season; photochemical changes during transport down wind will vary with the conditions. Thus, there can usually be no complete "match" between new sources and the ERCs that mitigate them. But because the mitigation is for a regional problem, and must be addressed regionally and programmatically, this matters little. (See Metcalf Final Decision, pp. 135-136.) The ERCs for Phase 2 ozone precursors are in the same air basin, are reasonably proximate, and are often "upwind" from the project. They come from banked certificates for emissions in Palo Alto, San Pablo, and San Francisco. (FSA, p. 4.1-7.) Thus, the ERCs not only meet all BAAQMD requirements, but are actually located in areas where emission reductions should be expected to reduce ozone in San Jose.

C. The City Has No Authority to Require Different Mitigation for the Project.

The City's April 13 letter suggests that the City would require new and different mitigation for Phase 2. The letter does not say what that mitigation would be, and the City was unwilling to offer specificity in further discussions with Staff. The City has had two years of participation in the proceeding to consider what further mitigation it thinks **the Commission** should require, but its few late efforts in this regard (prior to or at the evidentiary hearings) lacked both specificity and familiarity with the mitigation already provided.[6]

The City's claim to presume "lead agency" authority to require mitigation for power plant applications within the Commission's jurisdiction is supported by no legal authority. The Commission has the "exclusive" power to license such power plants (Pub. Resources Code, § 25500), and it is by statute designated the "lead agency" for CEQA purposes. (Pub. Resources Code, § 25519(c).) Any effort by the City to impose different mitigation on the power plant under a separate CEQA process is without legal authority or effect.

Thus, the City's proposed solution is no solution at all.

V. THE COMMISSION SHOULD MAKE OVERRIDE FINDINGS.

The long story above describes an impasse. The impasse is based on factual issues regarding the significance air quality impacts and the sufficiency of mitigation that have already been decided by the Committee based on evidentiary hearings in which the City participated. Those issues need not and should not be revisited by the Committee. Instead, the impasse should be overcome by the Commission acting to

[6] At the evidentiary hearings on June 28, 2005, the City's representative requested more biological mitigation based on potential cumulative damage to butterfly habitat from project nitrogen emissions. He was unaware that both Staff and the U.S. Fish and Wildlife Service formulas for mitigation were in agreement that the Phase 1 and Phase 2 projects are already fully mitigated in this regard. A project can only be required to provide its proportional "fair share" of mitigation for cumulative impacts. (CEQA Guidelines, § 15130(a)(3).)

make “override” findings that Phase 2 is “required for the public convenience and necessity and that there are not more prudent means of achieving public convenience and necessity,” as set forth in Public Resources Code section 25525. There is ample basis for such findings.

The San Jose regional transmission system was studied intensively during the Metcalf AFC proceeding in 2000-2001. Both the Cal-ISO and Staff concluded that San Jose is a large load supported by a congested transmission system, with deficient local electric generation. (Metcalf Final Decision, pp. 86-87.) The testimony indicated that the Metcalf site was an ideal location for a baseload power plant; it increased system reliability, reduced transmission congestion, substantially reduced transmission line losses, and thereby reduced the waste of generated electricity those line losses represent. (*Id*. pp. 86-98.) These represent corresponding air quality and environmental benefits. (*Id.* at p. 98.) In the Metcalf alternatives analysis, one alternative site location stood out as being even better, from a transmission planning “local system effects” perspective, than Metcalf—a baseload plant at Los Esteros. (*Id.* at p. 456.) This led the Cal-ISO witness to testify at hearing that ideally San Jose needed two baseload facilities, one at Metcalf and a second one at the Los Esteros site. (*Ibid.*)

Los Esteros was conceived as a project that would become a combined cycle facility and provide the benefits that the Cal-ISO proclaimed. The intent to quickly convert the project to combined-cycle use was indicated by its original AFC application. The questionable conformity of the current site’s zoning is the only issue preventing the permit that would allow for that conversion. The Commission should simply make override findings based on the system benefits so recently studied for Metcalf. Staff will provide testimony that those benefits would still be realized today.

In light of the above, Staff requests that the Los Esteros Committee set a hearing date in June where Staff can present additional evidence in support of

the override findings that are required for Commission approval of LECEF Phase 2.

Dated: May 26, 2006

Respectfully submitted

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