

STATE OF CALIFORNIA**Energy Resources Conservation and Development Commission**

In the Matter of:

Application for Certification for the
Los Esteros Critical Energy
Facility

Docket No. 03-AFC-2

City of San Jose's Comments on
Revised Presiding Members'
Proposed Decision

On June 22, 2006, the City of San José submitted its comments, serious concerns, and responses to the proposed Motion for Override of LORS Noncompliance in this matter. For ease of reference, City's written testimony submitted in June is attached hereto, resubmitted for your review and consideration, and incorporated herein by this reference as if set forth herein (the "Testimony"). City's Testimony was docketed and formally received into evidence in June. Inexplicably, however, the fact that City submitted written Testimony, as well as the substance of City's Testimony, has been completely ignored in the Revised PMPD. More troubling is the fact that the Revised PMPD contains misstatements of fact and law.

Although City agrees that the proposed project fails to comply with City's existing zoning designation on the subject site, City's Testimony explains in detail that City's more serious concern lies in the fact that in the few conversations had with CEC staff on City's processing of a rezoning proposal to allow for the proposed project, CEC staff exhibited a serious lack of knowledge or sensitivity to City's responsibilities and requirements under the California Environmental Quality Act of 1970, as amended (California Public Resources Code Section 21000 *et. seq.*), together with Guidelines promulgated pursuant thereto (collectively, "CEQA").

For example, as detailed in the attached Testimony, City concluded through its analyses of the increased emissions from the proposed project that, in fact, a substantial increase in the severity of certain previously identified environmental impacts in the area of air pollutant emissions would occur. For this reason, the City was legally precluded under CEQA from following the direction being forced upon it by CEC

staff to simply adopt an Addendum to a previously prepared environmental analysis (see, CEQA Guidelines Section 15164). Although the Revised PMPD indicates that City never explained how long adequate, additional environmental review would take to complete, on page 3 of City's Testimony, it clearly states that, "City staff anticipated that the process could be completed within 16 to 20 weeks from September 12, 2005...."

While City understands that CEC has authority to make a LORS Override finding, City questions and is very concerned by CEC's refusal to allow City to complete its processing of a proposed rezoning that could bring the proposed project into compliance with City's zoning laws and allow City to do so in a manner that comports with the requirements of State law. CEC should not override City's processing requirements mandated under State law, specifically CEQA. City further contends that if CEC should decide to issue a LORS Override in this matter, then such a determination should be based on the totality of the record, including the Testimony and that City's highly relevant Testimony should not be completely ignored and left wholly unaddressed in that decision.

As City has continually stated throughout this process, City has through its words and actions shown a willingness to work cooperatively with the CEC (including CEC staff) and the project applicant in moving forward on the PD Rezoning request that could allow for the proposed project and the City remains willing to do so. The City however also is bound by CEQA to use an appropriate environmental document in taking action on that discretionary approval. The City has simply sought to comply with CEQA's requirements, despite CEC staff's requests that City do otherwise, and has not caused unwarranted delays.

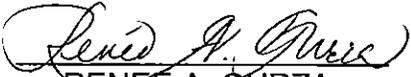
City again requests that it be allowed to complete its rezoning processes in a manner that comports with State law requirements and if the CEC will not allow City to do so, then for the CEC to correct the factual record in this matter in a manner

consistent with this submittal and that the CEC's decision in this matter recognize and include a consideration of City's Testimony and this comment.

Dated: October 6, 2006

Respectfully submitted,

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