

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 Response to
Motion for Override of LORS
Noncompliance

I. INTRODUCTION

The City of San Jose ("City") submits this response to correct the factual record put forth by the California Energy Commission ("CEC") staff in its Motion for Override of LORS Noncompliance in this matter. The allegations relating to the events leading up to the so-called "impasse", allegations which cast unwarranted aspersions on the City's actions, its attempts to cooperate, and its legal reasoning, are inaccurate and misleading. The City is thus compelled to address these statements, which both mischaracterize and impugn the efforts of the City to reach a mutually satisfactory resolution that is both expeditious and in compliance with the law.

The City did not create any impasse. The City has sought only to comply with the requirements of the California Environmental Quality Act ("CEQA") in this effort and had been attempting to work in good faith with CEC staff to accomplish the requested rezoning of the project site when the CEC unilaterally decided to bring an end to those efforts and file the present Motion. The City remains willing to diligently work with CEC staff towards a mutually acceptable resolution to the existing noncompliance with the City's laws in a manner that allows the City to also comply with state law.

II. FACTUAL BACKGROUND

In January 2005, Los Esteros Critical Energy Facility, as property owner, and Calpine Corporation, filed an application with the City's Planning Division for a Planned

Development Rezoning ("PD Rezoning") and Planned Development Permit to allow an increase in the generating capacity of and an 18,600 square foot addition to the existing Los Esteros Critical Energy Facility located in San Jose. (This project is hereinafter referred to as "LECEF Phase 2".)

During the application review process, CEC staff proposed that the City use the Final Staff Assessment ("FSA") prepared by CEC staff as the environmental review and clearance document in connection with the City Council's consideration of the PD Rezoning application.

After reviewing the LECEF Phase 2 application, on or about July 13, 2005, the City notified CEC staff that although the City, acting as a responsible agency under CEQA Guidelines Section 15253, still intended to use the FSA, when appropriate, as an EIR substitute in its consideration of the LECEF Phase 2 project, in order to use the FSA, the City needed documentation of the CEC's granting of a discretionary approval for the project and the CEC's findings concerning the project's significant environmental effects, as required by CEQA Guidelines Section 15253(b). Without the CEC taking action on the project or making findings, the FSA remained a draft document and thus could not be used as an EIR equivalent. The City also indicated that if the CEC did not wish to take such action, the City was willing to prepare its own EIR, using the information in the draft FSA or Presiding Members Proposed Decision ("PMPD"), for purposes of considering its discretionary actions related to the LECEF Phase 2 project, specifically its consideration of the PD Rezoning application and related permits.

Even after this notification from the City, the CEC initially responded by continuing to insist that the City use the draft environmental documents prepared by CEC staff such as the FSA or the PMPD. The City again responded that it would be inappropriate and in violation of CEQA, specifically Section 15253 of the CEQA Guidelines, for the City to use a current draft FSA or a draft PMPD as an EIR equivalent document for the LECEF Phase project because neither of those documents constitutes

the final environmental document of the CEC for the project and both documents remain subject to further revision by the CEC. Insofar as Section 15253(c) of the CEQA Guidelines specifies that EIR-substitute documents cannot be used if they are not first acted upon by the certified agency (here, the CEC) and that other agencies shall comply with CEQA "in the normal manner" in that instance, the City also reiterated its willingness to utilize the information in the draft FSA or PMPD to assist the City in preparing an EIR to analyze the environmental impacts resulting from its discretionary rezoning action. The City would then consider and rely on the analysis in the EIR, once certified as complete and prepared in compliance with CEQA through the City's processes, in the City's consideration of the PD Rezoning action.

The CEC ultimately indicated to the City that it was not opposed to moving forward with the project in the manner recommended by the City. City staff anticipated that the process could be completed within 16 to 20 weeks from September 12, 2005, the date of the communication confirming this understanding.

Approximately eight weeks thereafter, right in the middle of this effort, on November 10, 2005, the CEC's Deputy Director and Chief Counsel met with the City's Planning Director and City Attorney, at which time the CEC proposed the preparation of an addendum to the original EIR (prepared for the rezoning of Phase 1 of the Los Esteros project) as another option for the City to use for CEQA clearance for the PD Rezoning. The City agreed to pursue this course of action, assuming that the City could determine that the proposed expanded power plant will not result in any new significant environmental effects or a substantial increase in the severity of previously identified significant environmental effects, which are the requirements for use of an addendum under CEQA. See CEQA Guidelines, §§15162 and 15164. The City requested that Calpine's consultants prepare the relevant analysis for the City to review in this regard to expedite the environmental review process.

Calpine's environmental consultant prepared an Initial Study dated January 9, 2006. The information contained in the Initial Study and provided by the CEC revealed that the LECEF Phase 2 project will result in increased emissions, when compared with LECEF Phase 1, of certain criteria pollutants. Specifically, the LECEF Phase 2 emissions represent an increase that exceeds the applicable Bay Area Air Quality Management District (BAAQMD) thresholds for Nitrogen Oxides (NOx) and Reactive Organic Gases (POC). BAAQMD thresholds for these two criteria pollutants are **80 lbs/day** and **15 tons/year**, respectively. A significant impact occurs when either the daily or annual emissions criteria is exceeded.

With respect to NOx emissions, information submitted to the City indicates that LECEF Phase 2 would generate 1009.6 lbs/day and 98.6 tons/year versus LECEF Phase 1 which generates 821 lbs/day and 74.9 tons/year. The LECEF Phase 2 project would result in increased emissions of **188.6 lbs/day** and **23.7 tons/year**, respectively, when compared to LECEF Phase 1. Therefore, the LECEF Phase 2 project's incremental increase in emissions would exceed both the daily and annual emissions thresholds for NOx.

With respect to POC emissions, information submitted to the City indicates that LECEF Phase 2 would generate 320.8 lbs/day and 28.3 tons/year versus LECEF Phase 1 which generates 113 lbs/day and 20.8 tons/year. The LECEF Phase 2 project would result in increased emissions of **207.8 lbs/day** and **7.5 tons/year**, respectively, when compared to LECEF Phase 1. Therefore, the LECEF Phase 2 project's incremental increase in emissions would exceed the daily emissions thresholds for POC.

Based on the information in the Initial Study and CEC documents, the City's Director of Planning determined that, for purposes of environmental review required under the provisions of CEQA, the increased emissions identified, in the absence of emission reduction credits, represent a substantial increase in the severity of previously identified significant air quality impacts and that mitigation is required to reduce those

impacts to a less than significant level where feasible. The City informed the CEC that the substantially increased impact and need for mitigation measures preclude the use of an addendum to a previous EIR under CEQA Guidelines Sections 15162 and 15164. The City, however, remained open to completing a supplemental EIR as earlier agreed to.

CEC staff thereafter filed the present Motion for Override of LORS Noncompliance.

III. RESPONSE

The City concurs with CEC staff that under state law, the CEC is the licensing authority for the Los Esteros Energy Facility and LECEF Phase 2 and that the CEC is and should be the lead agency under CEQA for the LECEF Phase 2 project, responsible for analyzing and evaluating the environmental impacts of this proposed energy facility project. Under the provisions of CEQA, the City of San Jose is a responsible agency in connection with this project in that the City is being called upon to consider and take a discretionary action related to this project, most immediately, the legislative act of rezoning the real property upon which the project is situated to allow for the proposed project.

There is no disagreement that the proposed rezoning of the LECEF Phase 2 site constitutes a project under CEQA and that the City is required to comply with CEQA in connection with any rezoning action taken on the site. The disagreement centers around what the City's obligations are under CEQA.

Contrary to the CEC's disparaging characterization of the City's thinking as "muddled and mistaken," the City's position on its environmental review obligations is based on the requirements of CEQA. The City could not in good faith abandon those legal obligations simply to appease CEC staff who had a different opinion on how to streamline CEQA review.

A. The City Cannot Rely on the FSA or PMPD as an EIR Equivalent Because Neither is a Final Environmental Document Approved By the CEC

CEQA Guidelines Section 15253(b) sets forth the conditions under which a responsible agency, in approving a project, must use the environmental analysis document of the certified or lead agency prepared under a certified program in place of an EIR or Negative Declaration. The relevant required conditions are as follows:

- The certified agency is the first agency to grant a discretionary approval for the project. (§15253(b)(1).)
- The certified agency consults with the Responsible Agencies, but the consultation need not include the exchange of written notices. (§15253(b)(2).)
- The environmental analysis document identifies: (A) The significant environmental effects within the jurisdiction or special expertise of the Responsible Agency. (B) Alternatives or mitigation measures that could avoid or reduce the severity of the significant environmental effects. (§15253(b)(3).)
- The certified agency exercised the powers of a Lead Agency by considering all the significant environmental effects of the project and making a finding under Section 15091 for each significant effect. (§15253(b)(6).)

The CEC initially asked the City to use the draft FSA or PMPD of CEC staff, not the CEC itself, as an EIR equivalent. The City's opinion that it could not do so was based on a sound interpretation of the CEQA Guidelines. The CEC has not yet taken action to certify the FSA or PMPD and grant a discretionary approval for the project. Also, the CEC, exercising its lead agency powers, has not considered all the significant environmental effects of the project and made the findings required by CEQA for each significant effect. The FSA and PMPD thus are still draft environmental documents subject to modification before final acceptance or approval by the CEC. As a result, they are not the equivalent of an EIR under the requirements of CEQA Guidelines Section 15253 and cannot be used as such by the City.

The CEC has argued that the City could well have used the FSA as the City had relied on a combination of the FSA and a prior EIR as its environmental review documents when it approved LECEF Phase 1. At the time that the City was reviewing

LECEF Phase 1, Executive Order No. D-26-01 issued by Governor Gray Davis was in effect. As a result of the state of emergency due to California's electricity shortage, the Governor ordered that any agency that must "make a decision subject to" CEQA related to a proposed power plant "shall use the final staff report prepared for public hearings in the Energy Commission's [certification] process in the same manner as the agency would use an environmental impact report prepared by a lead agency." (Exec. Order No. D-26-01.) The Executive Order has expired and with it the temporary suspension of CEQA regulations applicable to proposed power plants. See *City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 876 (observing that were a state of emergency not in effect the city might prevail in its argument that the FSA was not an EIR equivalent). Thus, the FSA cannot now be used as the environmental document equivalent to an EIR.

Because the City could not act on the a discretionary approval, namely the PD Rezoning, without an adequate environmental document, and because the CEC indicated that it would not finalize, accept or approve an environmental document until the project was considered by the CEC, the City believes that under CEQA, the City would have no choice but to step into the shoes of a lead agency for purposes of the Rezoning and complete a supplemental EIR using the information in the FSA or PMPD, whichever was more complete. The CEC did not oppose this proposal, but months later suggested that the City prepare an addendum to an EIR instead, just because it would take less time than preparing a supplemental EIR. The City agreed to consider preparing an addendum, assuming that the criteria for an addendum were met. On review, however, the City determined that an addendum was not permissible under CEQA given the substantially increased environmental impacts identified in the Initial Study and CEC documents, as described above.

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B. The City Recognizes That the CEC is and Should Be the Lead Agency and Only Sought to Complete an Environmental Clearance Document, With the Concurrence of CEC Staff, in the Absence of an Adequate and Final Environmental Clearance Document Produced By the CEC

Although CEC staff have argued that the City incorrectly believes that it can or should be the lead agency for the project and impose mitigations on LECEF Phase 2, this allegation is patently false. The City recognizes the lead agency status of the CEC and prefers that the CEC would provide to the City an adequate, final EIR-equivalent document that is not in draft form that the City could use in its proposed actions on the project. In the absence of such a document, CEQA contemplates and the City remains willing to comply with CEQA by preparing its own adequate and final environmental document. While CEC staff previously recognized the City's role and obligations in this regard by asking or concurring in the City's decision to either prepare an addendum or supplemental EIR for the City's actions on the project, the CEC staff now inexplicably assert in their moving papers for a LORS override that the City does not understand the CEC's lead agency and licensing status. Nothing could be further from the truth.

C. CEQA Does Not Permit an Addendum Where There Are Significant Environmental Effects

CEQA Guidelines Sections 15162 and 15164 set forth the law on when an addendum to an existing EIR may be prepared in lieu of a supplemental EIR. CEQA Guidelines Section 15164(a) states that "[t]he lead agency or responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." Section 15162 in turn provides in pertinent part as follows:

(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR; ...

Relying on the Guidelines, the City appropriately determined that, given the "substantial increase in the severity of previously identified significant effects," an addendum was not appropriate. The CEC argues that mitigations in the form of emission reduction credits (ERC) should be incorporated *before* determining whether there is a substantial increase in environmental effects, essentially calling for a "mitigated" addendum akin to a mitigated Negative Declaration. However, CEQA does not contemplate or allow a "mitigated" addendum. By definition, if mitigations are required to bring an environmental impact to a less than significant level, then the agency cannot resort to an addendum. In other words, ERCs may be a form of mitigation, but the determination of whether an addendum is proper must be made without first incorporating mitigations. Thus, City staff believes that under the current state of the law, if there is a substantial increase, without mitigation, then an addendum is improper and a supplemental EIR or a mitigated Negative Declaration is required.

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D. An Impasse Has Not Been Reached

The City has not declared an impasse nor does the City believe an impasse has been reached. The City continues to assert that there are several possible paths forward that would allow the City to comply with CEQA and consider the rezoning of the site. Two options are as follows:

1) The CEC could take an action to accept its proposed environmental document, but continue its ultimate action on the project itself. If the CEC would simply take some action to finalize its environmental document in a manner that comports with CEQA, the City remains willing to recognize the CEC as the lead agency for the project and use the CEC's environmental document as an EIR-equivalent, all as envisioned under CEQA.

2) If for some reason, the CEC refuses to provide a final EIR-equivalent document to the City for the City's use in the City's discretionary actions related to the project, the City remains willing to follow CEQA's dictates and prepare its own environmental clearance document, such as a supplemental EIR or a negative declaration, as appropriate.

IV. CONCLUSION

Throughout this process, the City has through its words and actions shown a willingness to work cooperatively with the CEC and the applicant in moving forward on the PD Rezoning request 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 and has not caused unwarranted delay. The City's efforts at due diligence however have apparently been misconstrued and drawn the ire of CEC staff. The characterization of the City's actions put forth by CEC staff in its Motion is unfair and

unfounded, and the City requests that factual record be corrected as described in this Response.

Dated: June 22, 2006

Respectfully submitted,

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STANDARD OPERATING PROCEDURES FOR HIRING

- Candidates do not have a right to know the detailed test results (answer sheets, responses to specific questions, etc.). However, when a scored test is used for a particular recruitment, candidates who took and passed the test and were in the qualified group may see, upon request, the final test scores of all candidates who passed the test (this is analogous to candidates being allowed to see their placement on a ranked eligible list).
- Beyond the above release, candidate test results should be shared only with members of the recruitment team (predefined at the outset of the recruitment—see section 2.2). ES must approve release of test results to any other party.
- Standardized tests—used repeatedly by the City (and often by other employers)—are confidential and may not be shared.
- Upon request by a candidate, ES and/or hiring departments will provide general verbal feedback regarding the candidate's test results, but may not release specific information about individual questions. For example, the hiring liaison could indicate which sections of a test the candidate scored lower on, and remind the candidate of the desirable qualifications and job duties of the particular vacancy that relate to these test results.
- In response to a complaint or concern raised by a candidate, ES will determine what additional information, if any, about a recruitment (including assessment criteria, test results, etc.) may be provided to the candidate and to his/her union representative (if requested by the candidate) to facilitate resolution of the complaint.
- The types of information that ES may approve to be released in order to resolve a complaint (based on sufficient cause) may include:
 - Number of candidates who: applied for the vacancy, took the test, passed the test, scored in specific bands/categories, were invited to interview, etc.
 - Names of candidates who were invited to interview or were considered finalists
 - For class-based recruitments, names of candidates in the qualified candidate group
 - Assessment criteria
 - General information about a particular test (vendor, documentation of validity, etc.)
- The types of information that ES will generally not release include (but are not limited to):
 - Standardized tests or subsections of tests
 - Candidates' responses to individual test questions
 - Rater comments/notes (e.g., from oral board interviews, selection interviews)
 - Individual test question responses/scores of other candidates

REFERENCES: Civil Service Rules 3.04.680 and 690, and Hiring Policy 14

2.7 Determine internal or open recruitment

Internal first: The default recruitment approach is that vacancies will be posted as internal (only regular City employees may apply), and will only be posted as open (inviting anyone to apply) after an internal posting fails to produce an adequate qualified candidate group.

As part of selection process design, and before posting the vacancy, the recruitment team defines the "adequate number of qualified candidates."

- "Adequate number" is typically five, but may be more or less depending on the number of vacancies and size of the potential candidate group.
- "Qualified" means candidates who possess the MQs and enough of the key desirable qualifications to potentially succeed on the job.

If the target # of qualified internal candidates is not met, the department has the option to request reposting as an open recruitment.

- There is no requirement to post an open recruitment if the target is not met.
- The ES Analyst/recruiter makes the final decision whether the target has been met or whether an open recruitment is appropriate.
- Documentation that target was not met will be created and retained.

“Internal” means current, permanent City employees:

- “Permanent” means full-time or part-time benefited employees who have passed their initial probation (i.e. candidates who have passed probation in any class may apply for an internal recruitment while they are on probation for a promotion or lateral transfer). Part-time unbenefited employees who have worked at least 1040 hours will be considered internal candidates.
- Employees in the unclassified service with the exception of Temporary Unclassified and Student Interns are considered internal candidates.
- Contract or temporary agency employees are not internal candidates.
- For internal promotional recruitments, candidate must be a current employee at the time of selection for the promotion (i.e., internal candidate cannot separate from City service during the course of the promotional recruitment and still be considered an “internal” candidate); if recruitment is later posted as open, candidate is welcome to reapply
- Temporary Classified employees must have six months of service with the City to apply for internal promotional recruitments
- Former employees seeking re-employment may apply for internal transfer opportunities in a class in which they once held permanent status (or a related lateral or lower class), but not for promotions

When an internal recruitment is re-posted as open, the original internal candidates need not reapply.

Open first: ES determines any exceptions to the internal-first posting standard. Some classifications will be specifically designated as using open recruitments; ES will maintain and make public a list of such classifications, and the list will be reviewed and approved by the Civil Service Commission and by effected bargaining groups. A classification is placed on this list of open recruitments based on ES’s consideration of the following factors that ultimately impact the expected number and qualifications of applicants:

- entry-level
- minimal or no experience required
- special job skills
- history of previous recruitments
- existence of feeder classes
- essential job skills

(See current “open recruitment” list)

If a classification is not on the “open” recruitment list, and a hiring department wishes to post its vacancy as open immediately (foregoing the usual internal-only posting), it may submit a request in writing (email or memo) to ES. ES will use the above criteria and any other relevant information in considering the department’s request. ES will approve or deny the department’s request in no more than five (5) business days. Generally, if ES determines that there are likely to be at least five (5) qualified internal applicants, the request will be denied and the job will first be posted as internal only.

REFERENCES: Civil Service Rule 3.04.610 and Hiring Policy 7 – Internal Recruitments