

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: )  
)  
Application for Certification )  
For the San Francisco )  
Electric Reliability Project )

Docket No. 04-AFC-01

REPLY BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO

|                 |                    |
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## **I. Introduction.**

The City and County of San Francisco (the City or CCSF) respectfully files this reply brief on its application for certification for a 145 MW simple-cycle combustion turbine generating plant, the San Francisco Electric Reliability Project (SFERP).

Opening briefs were filed by Intervenor Robert Sarvey, CALifornians for Renewable Energy, Inc. (CARE) and California Energy Commission (Commission or CEC) Staff. CEC Staff's opening brief supports licensing the SFERP and documents Staff's position that, with the conditions of certification that have been agreed to by the City and Staff, the SFERP will comply with all applicable laws, ordinances, regulations, and standards (LORS) and will not cause significant impacts. The City agrees with the discussion in Staff's Opening brief.

Mr. Sarvey and CARE oppose licensing of the SFERP on a variety of grounds, all unfounded. The majority of Mr. Sarvey's and CARE's arguments were anticipated and addressed in the City's Opening Brief. In this reply brief, the City briefly responds to some of the detailed arguments set forth in the Sarvey and CARE Opening Briefs regarding air quality, biological resources, cumulative impacts analyses, hazardous materials, on-site contamination, interconnection requirements, the need for the SFERP, and procedural due process.

## **II. The SFERP Will Not Have a Significant Air Quality Impact.**

In his opening brief, Mr. Sarvey implies that continued operation of Potrero Unit 3 is environmentally beneficial to the Southeast San Francisco community he claims to represent. In support of that argument, he alleges that Potrero 3 is a cleaner plant than SFERP on a per megawatt-hour basis. In addition, Mr. Sarvey alleges that the background air quality data was not appropriately evaluated and that the proposed

mitigation is inadequate. Finally, Mr. Sarvey contends that the full impacts of the SFERP were not considered.. Mr. Sarvey's allegations are unsupported by the record, and his conclusions regarding SFERP are incorrect on all counts.

**A. Background Air Quality Data Have Been Properly Evaluated.**

Mr. Sarvey argues that the background air quality data at the BayCAMP monitoring station are 5% to 10% higher than those measured at the SFERP Arkansas Street station, and therefore should be used to evaluate background air quality. Sarvey Opening Brief at 4-5. He also argues that the BayCAMP station measured the highest ozone level during the last 10 years "in the project area." Id. Finally, Mr. Sarvey argues that, based on his first two arguments, the BayCAMP monitoring station "experiences higher pollutant levels than have been assessed by Applicant and Staff." Id. Mr. Sarvey's arguments are either incorrect or are irrelevant to the conclusions in this proceeding.

First, as CCSF's air quality witness testified, the 5% to 10% difference cited by Intevernor Sarvey only relates to one pollutant: PM<sub>2.5</sub>. Measurements of other pollutants are significantly higher at Arkansas Street as compared with the BayCAMP station. In addition, the purported 5% to 10% difference with respect to PM<sub>2.5</sub> is not significant within the context of the measurement accuracy of the instruments. 5/22 RT (Rubenstein) at 261: 2-16 and 233:7-13. Furthermore, the values presented by Mr. Sarvey himself show that the average of the highest daily levels for PM<sub>2.5</sub> during the four month period presented are the same at both monitoring stations. Using the data in Exhibit 68, the following table compares the monthly maximum 24-hour average PM<sub>2.5</sub>

values measured by the beta attenuation monitors (BAMs) at the San Francisco Arkansas Street station and the BayCAMP station shown as “SF - Hunters Pt.”

| <u>Monthly Maximum 24-Hour Average PM<sub>2.5</sub> Concentrations (µg/m<sup>3</sup>)</u> |                        |                |
|---|------------------------|----------------|
| <u>Month</u>  | <u>Arkansas Street</u> | <u>BayCamp</u> |
| November 2004   | 47                     | 51             |
| December 2004   | 33                     | 34             |
| January 2005  | 41                     | 41             |
| February 2005   | 44                     | 38             |
| Average of<br>Maxima for Period   | 41                     | 41             |

Thus, over the four month period for which data were presented by Mr. Sarvey, there is no significant difference in the highest 24-hour average PM<sub>2.5</sub> values reported for the BAAQMD’s Arkansas Street and BayCAMP monitoring stations.

Second, with respect to the high ozone level, Mr. Sarvey selectively presented to the Committee a sheet of paper from the California Air Resources Board’s web site showing that the maximum hourly ozone level measured at the BayCAMP monitoring station in 2004 was 0.096 parts per million – just above the cutoff level of 0.095 parts per million for the state air quality standard.<sup>1</sup> CCSF asks the Committee to take official notice, from the same California Air Resources Board's web site referenced by Mr. Sarvey, that on exactly the same day when the BayCAMP monitoring station recorded a value of 0.096 parts per million, the measurement at the BAAQMD Arkansas Street station was 0.093 parts per million – almost the same value as was recorded at the BayCAMP station.<sup>2</sup> Moreover, if one compares the two highest values for the years

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<sup>1</sup> The state 1-hour average ambient air quality standard for ozone is 0.09 ppm; a measured value of 0.095 ppm or higher can constitute an exceedance of the standard.

<sup>2</sup> <http://www.arb.ca.gov/adam/cgi-bin/db2www/adamtop4b.d2w/Branch>

2004 and 2005 measured at the BayCAMP station with the corresponding values from the Arkansas Street station, the numbers are not appreciably different:

| <u>Highest Daily Maximum Hourly Ozone Measurements (ppm)</u> |                        |                |
|--|------------------------|----------------|
| <u>Month</u>   | <u>Arkansas Street</u> | <u>BayCamp</u> |
| October 12, 2004   | .093                   | .096           |
| September 5, 2004  | .065                   | .067           |
| March 13, 2005   | .058                   | .058           |
| March 12, 2005   | .057                   | .055           |

The differences in ozone concentrations between these two sites simply are not meaningful, particularly in the context of a regional pollutant such as ozone.

Finally, CCSF took into account available data from the BayCAMP station in determining the maximum background concentrations used in the air quality impact analysis, and cumulative air quality impact analysis, for SFERP. Exh. 15 at 8.1-43.

Mr. Sarvey's claims that the BayCAMP monitoring station recorded higher values than those relied upon by either CCSF or the Staff, or that the air quality impact analyses of SFERP are, for some reason, inadequate, are purely a function of the narrow filter through which he views the data. The analyses prepared by both CCSF and the CEC Staff are adequate to support the conclusion that SFERP will not result in any significant, unmitigated air quality impacts.

**B. CCSF's Proposed PM<sub>10</sub>/PM<sub>2.5</sub> Enhanced Street Cleaning Mitigation Program is Adequate and Effective.**

In his opening brief, Mr. Sarvey suggests that the estimate of the benefits of CCSF's enhanced street cleaning mitigation program is overstated because CCSF fails to account for the effects of seasonal rainfall. Sarvey Opening Brief at 5. This is not correct. As shown in Exhibit 38 at 4-5, footnote 2, Tables 1-2, the calculation of the uncontrolled emission factors for road dust, used as the basis for the mitigation benefits

calculations, was based on the methodology contained in the EPA reference document AP-42, Section 13.2.1. This methodology takes into account the frequency of rain.<sup>3</sup> Mr. Sarvey's allegations that the proposed street cleaning program will be ineffective "when it is needed most" during the winter, because the street cleaning benefits will be diminished on rainy days, is oxymoronic: there is nothing in the record that suggests that PM<sub>10</sub> mitigation is "most needed" on rainy days and, in fact, it is not. As noted by CCSF's witness: "In addition, by maintaining the streets at a lower dust level you're going to insure that year-round the PM<sub>10</sub> and PM<sub>2.5</sub> levels are going to be reduced to the extent possible." 5/22/06 RT (Rubenstein) at 252: 19-22.

**C. AQ-SC12 is Adequate and Appropriate as a Backup Mitigation Measure.**

Mr. Sarvey suggests that the provision of SO<sub>2</sub> emission reduction credits under AQ-SC12 will be ineffective in mitigating local PM<sub>10</sub>/PM<sub>2.5</sub> impacts associated with SFERP. Sarvey Opening Brief at 5-6. However, Mr. Sarvey's suggestion ignores the City's proposed PM<sub>10</sub> mitigation/community benefits package and Staff's testimony.

The mitigation plan proposed by CCSF is comprised of the enhanced street cleaning measure, in combination with the community benefits package that focuses on tree planting and indoor air quality. Exh. 38; 5/31/06 RT (Rubenstein) at 109-110. This mitigation/benefits package will have significant air quality and public health benefits. Exh. 38. The additional mitigation set forth in proposed conditions of certification AQ-SC11 and AQ-SC12 is intended to address the CEC Staff's concerns. 5/22/06 RT (Rubenstein) at 225-226. The AQ-SC12 provisions are intended as a backup, in the event

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<sup>3</sup> Applicant asks the Committee to take official notice of the relevant chapter of the EPA AP-42 document at <http://www.epa.gov/ttn/chief/ap42/ch13/final/c13s0201.pdf>.

the primary CEC Staff mitigation measure – a wood stove and fireplace retrofit program – proves to be impractical. 5/22/06 RT (Rubenstein) at 226:5-12.

Mr. Sarvey quotes testimony from BAAQMD witness Bateman as supporting his position. During the May 22 hearing, Mr. Sarvey suggested to Mr. Bateman that the District's emission reduction credit program was not intended to address localized air quality impacts. Mr. Bateman agreed. 5/22/06 RT (Bateman) at 312: 5-10. However, this question and response have nothing to do with the question of whether the surrender of emission reduction credits serve as adequate mitigation from the perspective of the CEC Staff. To this latter question, the CEC Staff responded, consistently, "yes". 5/22/06 RT (Ngo) at 298:7-13.

Thus, both CCSF and Staff are in agreement that the combination of mitigation measures proposed will result in no significant, unmitigated air quality impacts associated with the SFERP.

**D. SFERP Will Improve Air Quality as Compared with Continued Operation of Potrero Unit 3.**

In his opening brief, Mr. Sarvey proposes the novel theory that the SFERP will have greater air quality impacts than Potrero 3. Sarvey Opening Brief at 7. "Under the applicants [sic] testimony in the environmental justice section page 3-7 its [sic] demonstrates that the projects [sic] PM 2.5 impacts will be twice the impacts per megawatt hour for the SFERP over the Potrero 3 unit..." Sarvey Opening Brief at 7.

The data cited by Mr. Sarvey is actually found in the Purpose and Need Section of Exhibit 15, and not the Environmental Justice Section. In any event, the data presented at page 3-7 do not discuss PM<sub>2.5</sub> air quality impacts; rather, the data compare the maximum allowable PM<sub>10</sub> emission rate from SFERP (which, at the time was 3.0 lbs/hr) with the

typical average emission rate of that pollutant for Potrero 3. There are no data in the record to support Mr. Sarvey's claim that SFERP will have PM<sub>2.5</sub> air quality impacts that are twice those of the existing Potrero 3 power plant. There is evidence in the record that the *average* PM<sub>10</sub>/PM<sub>2.5</sub> emissions from Potrero 3 in the 2001-2003 period were 15 tons per year, roughly the same as the *maximum* allowable PM<sub>10</sub>/PM<sub>2.5</sub> emissions from SFERP. Exh. 15, Appendix 8.1F, at. F-15; Exh. 48, revised Air Quality Table 3. In addition, Mr. Rubenstein testified that he expected the PM<sub>10</sub> emissions from the SFERP would be the same or lower than those from Potrero 3 on a pounds per megawatt hour basis. 5/22/06 RT (Rubenstein) at 272: 9-19 and 274:1-8. Further, Mr. Rubenstein testified that the annual PM<sub>10</sub> emissions from the SFERP would be much lower than those from Potrero 3 because the SFERP is a much smaller plant and, as a peaking unit, could be expected to operate fewer hours of the year and at lower loads than Potrero 3. 5/31/06 RT (Rubenstein) at 29: 11-25.

Moreover, if one looks at the broader air quality impacts from Potrero 3 (all pollutants, not just PM<sub>10</sub>/PM<sub>2.5</sub>), the benefits are even clearer: SFERP will result in a 73% reduction in ozone precursor emissions and a 67% reduction in PM<sub>10</sub>/PM<sub>2.5</sub> precursor emissions, even when *maximum* allowable emissions from SFERP are compared with *average* historical emissions from Potrero 3, and even taking into account the reduced NO<sub>x</sub> emissions associated with the retrofit of selective catalytic reduction to Potrero 3 last year.<sup>4</sup> When the SFERP's emissions are reviewed in the context of

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<sup>4</sup> Exh. 15, Appendix 8.1F, pp. F-14 to F-16; Exh. 48, revised Air Quality Table 3. Ozone precursors include NO<sub>x</sub> and POC. For Potrero 3, ozone precursor emissions are  $169.5 + 8.4 = 177.9$  tons per year; for SFERP, maximum ozone precursor emissions are  $39.8 + 7.7 = 47.5$  tons per year, or 73% lower. PM<sub>10</sub>/PM<sub>2.5</sub> precursors include NO<sub>x</sub>, POC, SO<sub>x</sub>, and PM<sub>10</sub>/PM<sub>2.5</sub>. For Potrero 3, PM<sub>10</sub>/PM<sub>2.5</sub> precursor emissions are  $169.5 + 8.4 + 3.0 + 14.8 = 195.7$  tons per year; for SFERP, maximum PM<sub>10</sub>/PM<sub>2.5</sub> precursor emissions are  $39.8 + 7.7 + 2.7 + 15.2 = 65.4$  tons per year, or 67% lower.

CCSF's objective of shutting down the entire Potrero power plant facility rather than just Potrero 3, the reductions are even more dramatic.

Mr. Sarvey also claims that "[t]he SFERP has greater local impacts than the existing Potrero 3 unit since it is in closer proximity to the Bayview Hunters Point area." Sarvey Opening Brief at 7. Mr. Sarvey provides no evidence to support this contention. Moreover, there is no evidence in the record to support Mr. Sarvey's claim as it pertains to the *actual* emissions from Potrero 3 and SFERP and, as discussed above, the emissions from Potrero 3 are substantially greater than those of SFERP.

**E. The Full Impacts of the SFERP Were Properly Analyzed.**

Mr. Sarvey also argues that "[t]he applicant also fails to analyze and project the projects [sic] true impacts because the project was analyzed with just four hours of startup and shutdown and not the five hours that are allowed in the FDOC." Sarvey Opening Brief at 7. However, as CCSF's witness noted during testimony at the hearing, the BAAQMD made this change to CCSF's proposal and concluded that the impacts would be acceptable regardless of whether the startups during the day totaled four hours or five hours. 5/22/06 RT (Rubenstein) 290:24 to 291:6.

Mr. Sarvey contends that "[p]ollution control devices are not fully operational during startup and shutdowns (RT 5-24-06 p. 288,289) and air dispersion for PM 2.5 is less during startups and shutdowns." Sarvey Opening Brief at 7. Mr. Sarvey here combines two different and unrelated concepts and attempts to weave them into a single misleading conclusion. While it is certainly true that some pollution control devices (such as oxidation catalysts and selective catalytic reduction systems) are not fully operational during startups and shutdowns, there are no such systems used to control

PM<sub>2.5</sub> emissions from SFERP. With respect to the second clause, Mr. Sarvey is also correct; however, it is incorrect to imply that there is therefore some inadequacy in CCSF's analysis.

In fact, as noted in Supplement A and, in particular, Appendix 8.1B to Supplement A, CCSF assumed that this poorer dispersion condition for the turbines' exhaust persisted for an entire 24-hour period when evaluating 24-hour average PM<sub>10</sub> and PM<sub>2.5</sub> impacts, thus rendering moot the issue as to whether the duration of startups is four hours per day or five hours per day; even startups lasting 24 hours per day would not alter the conclusion regarding 24-hour average PM<sub>10</sub> and PM<sub>2.5</sub> impacts. Exh. 15, Appendix 8.1B, at. B-7.

Mr. Sarvey contends also “[i]n addition the projects [sic] operation is limited by its fuel consumption and the project may be able to operate more than 12,000 hours because less fuel is consumed during startups and shutdowns. (RT 5-24-06 p. 289).” Sarvey Opening Brief at 7. This is a correct statement. However, it is unrelated to any conclusions regarding the significance of project impacts or the adequacy of the mitigation proposed.

### **III. SFERP's Biological Resource Impacts Related to Nitrogen Deposition are Fully Mitigated.**

In his opening brief, Mr. Sarvey suggests that SFERP's potential impacts on biological resources related to nitrogen deposition are not fully mitigated because: (1) NO<sub>x</sub> emission reduction credits were not intended to mitigate such impacts; and (2) ammonia emissions were not accounted for in the analysis. Sarvey Opening Brief at 7-8.

Once again, Mr. Sarvey mixes and matches inapposite concepts to reach incorrect conclusions.

While it is certainly correct that the Bay Area AQMD did not design its emission reduction credit program to address nitrogen deposition impacts, this is not relevant to the issue at hand. Both the CEC Staff and the US Fish and Wildlife Service have determined that the surrender of oxides of nitrogen emission reduction credits result in programmatic reductions in NOx emissions, which serve to reduce nitrogen deposition on a regional basis. Exh. 46 at p. 4.2-13. Although Mr. Sarvey refers to nitrogen deposition impacts as “local,” in fact, nitrogen deposition is a result of atmospheric processes that occur over a number of hours. Exh. 15, Appendix 8.2C at pp. 8.2C-2 to 8.2C-3. Furthermore, the issue of mitigation for SFERP’s potential impacts are addressed both by the surrender of ERCs, and by the reduction in nitrogen-bearing emissions from other power generation sources in San Francisco. Exh. 15, Appendix 8.2C, Table 8.2C-4; Exh. 46 at p. 4.2-13. Moreover, the calculation of both SFERP’s potential nitrogen deposition rate, and of the mitigation value of the ERCs and expected future operation of the Potrero and Hunters Point power plants, reflect SFERP’s ammonia emissions, contrary to Mr. Sarvey’s assertion. Exh. 15, Appendix 8.2C, Tables 8.2C-3, 8.2C-4.

**IV. The Record and Case Law Support the Conclusion that the Extensive Cumulative Impacts Analyses Undertaken for the SFERP Are Adequate.**

Intervenor Sarvey provides legal citations in an attempt to support his contention that the cumulative impacts analysis in this case was inadequate. A fair reading of the record of this case, CEQA Guidelines and the cases set forth in Mr. Sarvey's brief, in combination with a broader survey of CEQA case law, leads to the opposite conclusion.

Mr. Sarvey's brief cites portions of Section 15130 of the CEQA Guidelines to support his argument that the City improperly failed to analyze the impacts from future developments at the Southern Waterfront. Mr. Sarvey's brief ignores key facts and also leaves out important portions of the Guidelines. For example, Section 15130 states that:

When the combined cumulative impact associated with the project's incremental effect and the effects of other projects is not significant, the EIR shall briefly indicate why the cumulative impact is not significant and is not discussed in further detail in the EIR. The lead agency shall identify facts and analysis supporting the lead agency's conclusion that the cumulative impact is less than significant.

14 CCR § 15130(a)(2). In addition, Section 15130 provides:

An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable.

14 CCR § 15130(a)(3).

**A. The Factual Record Supports the Conclusion that the Cumulative Impacts Analyses for the SFERP Are More than Adequate.**

Viewed against the rule of reason set forth in the CEQA Guidelines, the record supports the conclusion that the cumulative impacts analyses<sup>5</sup> undertaken for the SFERP were more than adequate. Mr. Sarvey uses the Supplemental Environmental Impact Report prepared for the Southern Waterfront as his trump card to "demonstrate" that the cumulative impacts analyses for the SFERP are deficient. He does not describe which potential impacts between the SFERP and the Southern Waterfront projects could be cumulative or how the evidence shows that they are. In fact, a review of the record

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<sup>5</sup> Mr. Sarvey consistently refers to the cumulative impact analysis for SFERP as if a single analysis were prepared. As discussed herein, the City and Staff have each prepared a number of cumulative impact analyses in the areas of air quality and public health.

regarding the cumulative impacts analyses for SFERP undertaken for air quality, public health and water quality – the areas in which there may be a colorable argument of overlapping impacts -- indicates that the analyses and conclusions of no significant impacts are amply supported.

**1. The Air Quality Cumulative Impacts Analyses Properly Considered the Projects Set Forth in the Southern Waterfront EIR.**

With regards to air quality, the City undertook a thorough air quality analysis, consistent with the BAAQMD CEQA Guidelines, which included four different cumulative impacts analyses; these are described in the City's Opening Brief at pages 42-46. Furthermore, as is documented in Staff's Opening Brief, Staff went beyond the requirements of CEQA by preparing both a "summary of projections" *and* a "list of projects" cumulative impacts analysis under CEQA Guidelines Section 15130(b)(1). See Staff Opening Brief at 15. Mr. Sarvey has not established that these analyses improperly failed to include any relevant project set forth in the Southern Waterfront SEIR since, as is described in the City's Opening Brief, every one of the projects in the Southern Waterfront SEIR would fall into one of three categories and would have been treated accordingly and appropriately by the City's cumulative impacts analyses. See City Opening Brief at 44.

It is important to recognize that Mr. Sarvey's arguments are based on a five-year-old document, while the cumulative impacts analyses prepared by both Staff and the City are based on more recent data – including background ambient air quality data from 2003-2004, and a review of recent projects performed by the BAAQMD in 2004. Exh. 15, at 8.1-43; Exh. 46, at 4.1-10 to 4.1-12; Exh. 56, January 16, 2004 letter from BAAQMD to Sierra Research. In addition, the record demonstrates that many of the

projects discussed in the five-year-old Southern Waterfront Supplemental EIR have already commenced operation (and hence are reflected in the analyses performed by CCSF and the CEC Staff), or have been sufficiently delayed so as to no longer be reasonably foreseeable. 4/27 RT (Flores) at 158-161.

Moreover, the evidentiary record supports a conclusion that there are no significant cumulative impacts, even if one simply adds the results from the Southern Waterfront SEIR to the results of the cumulative impacts analyses undertaken by the City. Consistent with CEQA Guideline subsections 15130(a)(2) and (3), City Air Quality witness Mr. Rubenstein explained on the stand why adding the results from the Southern Waterfront SEIR would not change his conclusion that there are no significant cumulative impacts. He noted that adding the emissions from the Southern Waterfront projects would not meaningfully increase background air quality, and he stressed that in any event, the City is fully mitigating the SFERP's impacts. See 5/31/06 (Rubenstein) at 33-35.

**2. The Record Indicates That Even Considering the Impacts of the Southern Waterfront projects, There Are No Significant Cumulative Public Health Impacts.**

Similarly with regards to public health, Staff undertook a thorough and innovative public health impact study. See City Opening Brief at 65. Furthermore, on the stand, Mr. Rubenstein explained why the results from the Southern Waterfront SEIR did not change the conclusions of City's public health witnesses that there would be no cumulative public health impacts. Mr. Rubenstein explained that the risks set forth in the Southern Waterfront SEIR are related to diesel emissions, which are reflected in the background risk numbers considered by Mr. Lowe, and that these risks have actually been decreasing because of the Air Resources Board's diesel risk reduction program. See

5/31/06 RT (Rubenstein) at 285-6. CCSF's public health witness Mr. Lowe also concluded that the SFERP would not result in a significant cumulative public health impact. 5/31/06 RT (Lowe) at 85:11 to 86:13. Staff's public health expert, Dr. Greenberg, reached the same conclusion on the basis of an innovative and exhaustive cumulative impacts analysis. 5/22/06 RT (Greenberg) at 302: 6-11.

Moreover, the SFERP will only have diesel emissions during construction, projected to take place in 2008. Table D-7 of the Southern Waterfront SEIR contains the diesel cancer risk per million from the Southern Waterfront projects. Numbers are set forth only for the years 2003 and 2015. If one assumes that the change in diesel cancer risk from the Southern Waterfront projects is approximately linear over time, the cancer risk from diesel particulates associated with these projects in 2008 would be approximately 8.1 in a million.<sup>6</sup> Exh. 92, Table D-7. During construction, the SFERP is projected to have a cancer risk of 0.7 to 1.1 in one million. Thus, if one combines the interpolated value of 8.1 in one million for 2008 from the Southern Waterfront SEIR, with the highest of number in the SFERP range, one would get 9.2 in one million, which is below the 10 in a million cancer risk standard established by the BAAQMD for a *single* project, even though the SFERP and the myriad projects from the Southern Waterfront SEIR are included.

Further, as is noted in the City's Opening Brief, the City's public health impacts assessment did not incorporate the effects of all of the mitigation measures to reduce diesel emissions proposed in the FSA and accepted by the City. Finally, as is explained in the City's Opening Brief, public health effects from toxic air contaminants are very

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<sup>6</sup> Interpolating between 7.48 in one million in 2003, and 8.96 in one million in 2015 gives a value of 8.1 in one million:  $(7.48 + (8.96 - 7.48) \times (2008 - 2003) / (2015 - 2003)) = 8.1$ . Exh. 92, Table D-7.

local in nature. Merely adding the worst cancer risk values from the Southern Waterfront SEIR to the risk values from the SFERP is very conservative because it assumes that the worst impacts from all projects would be in the same location.

These facts and analysis support a conclusion that with mitigation there will be no significant cumulative impacts resulting from the SFERP, consistent with CEQA Guideline sections 15130(a)(2) and (3). 14 CCR § 15130(a)(2) and (3).

**3. There Are No Significant Water Quality Cumulative Impacts.**

As was described in the City's Opening Brief, there are no significant cumulative impacts with regard to water quality because the City will participate in the mitigation program developed by the Port as part of the Southern Waterfront SEIR. 5/22/06 RT (Franck) at 188-9.

**B. Case Law Supports a Conclusion That the Extensive Cumulative Impacts Analyses Undertaken for the SFERP Are More than Adequate.**

The cases cited by Mr. Sarvey and recent CEQA case law support the conclusion that the cumulative impact analyses undertaken for the SFERP are more than adequate. Sarvey relies on three cases, all of which can be easily distinguished, to argue that the cumulative impacts analyses of the SFERP are deficient. Sarvey cites *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, for the proposition that "the rationale for the cumulative impact analysis is to provide the decision maker a broad perspective on the overall impact of the project." Sarvey Opening Brief at 4. The City agrees that decision makers must have an adequate cumulative impact analysis in order to make their decision; however, *Bozung* does nothing to support Mr. Sarvey's contention that the cumulative impacts analyses for the SFERP are inadequate. The principal issue in *Bozung* was not whether an adequate cumulative impacts analysis had been prepared, but

rather "whether the California Environmental Quality Act (CEQA) applies to the approval of annexation proposals by a Local Agency Formation Commission (LAFCO), where property development is intended to follow the annexation approval and annexation." *Bozung*, supra, 13 Cal. 3d at 268. All parties in this case agree that CEQA applies.

Sarvey also cites to *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal. App. 3d 151. *Citizens* also is distinguishable. In *Citizens*, the Court found that Inyo County inappropriately segmented a proposal for a 9.1 acre shopping center into two projects and undertook an inadequate analysis of both. The Court noted that it was inappropriate for Inyo County to avoid considering the cumulative impacts of the different steps required for the shopping center development either by assessing the entire project as a whole or, at a minimum, by addressing the cumulative impacts of the segments of the project. The Court also observed that the analysis in both cases was rudimentary, involving primarily checklist initial studies.

This case is different. The City could not have assessed the impacts of the SFERP in 1999 and 2000 when the Southern Waterfront SEIR was prepared because, at that time, the possibility of the SFERP was only just emerging and the location was still unknown. The environmental impacts of the Southern Waterfront projects were extensively assessed and documented in the Southern Waterfront SEIR. Similarly, the impacts of the SFERP have been extensively studied and reported. Where cumulative impacts could occur between the SFERP and the Southern Waterfront projects, City witnesses, in response to Mr. Sarvey's questioning, reviewed the information from the Southern Waterfront SEIR in combination with the information from the assessment of the SFERP

and concluded that there would be no significant cumulative impacts. Thus, this case is completely different from *Citizens*, where no such cumulative impacts analysis was performed.

Finally, Sarvey cites to *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App. 3d 421. *Ojai* does at least substantively address the sufficiency of a cumulative impacts analysis. However, *Ojai* is distinguishable. In *Ojai*, the County of Ventura certified an EIR for an oil refinery expansion project that contained "a brief discussion of cumulative air quality impacts which concluded the impact was not significant." *Id.* at 425-27. In making that determination, the EIR relied entirely upon a prior analytical model undertaken by the County's Air Pollution Control District that projected future air quality, but did not evaluate the onshore effect of outer continental shelf emissions, which were relevant to the project. The *Ojai* Court determined that the EIR for the refinery was inadequate with respect to its analysis of cumulative impacts of air emissions because, while it recognized the potential for onshore effects of outer continental shelf emissions, it completely failed to address them.

In the instant case, City and Staff witnesses did indeed consider and address the projected impacts from projects identified in the Southern Waterfront SEIR. As the Court stated in *Ojai*: "[a]n EIR need not contain a full-blown cumulative impacts discussion if the impacts are found to be insignificant. Where a particular effect is found insignificant, an EIR must *briefly* indicate the reasons for determining that the effect is not significant and therefore not discussing it in detail. (See Pub. Resources Code, §§ 21061, 21100, 21151; Cal. Admin. Code, tit. 14, § 15128.)" *Ojai* at 429; emphasis added. The testimony by the City witnesses explaining why the Southern Waterfront

SEIR results did not change their conclusions was sufficient to meet the requirements of CEQA.

The instant case is much more like the recent case *Sierra Club v. West Side Irrigation District et. al.* (2005) 128 Cal. App. 4<sup>th</sup> 690, than any of the cases cited by Mr. Sarvey. In *Sierra Club*, the Sierra Club challenged the sufficiency of the cumulative impacts analysis in two negative declarations, by the simple artifice of listing other projects that it claimed would result in overlapping impacts, without any detailed analysis or presentation of supporting evidence, much as Mr. Sarvey does in this case. See *id.* at 701-2. The Court admonished: "Merely listing, as the Sierra Club does, other projects occurring in the area that may cause significant cumulative impacts is not evidence that the assignments will have impacts or that their impacts are cumulatively considerable." *Id.* at 702.

**V. The Assessment of the SFERP was More Than Adequate is Not Affected by the Environmental Law and Justice Center's Critique of the Southern Waterfront SEIR.**

Mr. Sarvey devotes 5 pages of his 20-page opening brief to cutting and pasting comments made by the Golden Gate University Environmental Law and Justice Center (ELJC) on the Draft Supplemental Environmental Impact Report for the San Francisco Southern Waterfront Project (Southern Waterfront Draft SEIR). These comments were cosigned by Ms. Anne Eng, one of the City's environmental justice witnesses in this case. The ELJC comments do not undermine the record in this case which demonstrates that:

- 1) exhaustive cumulative impacts analyses for air quality and public health undertaken by

City and Staff witnesses are adequate; and that, 2) with the proposed conditions of certification, the SFERP will not cause significant impacts.<sup>7</sup>

Mr. Sarvey's reasoning appears to be that the ELJC's comments suggest that the impacts of the projects included in the Southern Waterfront SEIR were higher than reported in that document and that, thus, the conclusion of City witnesses that these impacts, in combination with the SFERP's impacts, are not significant cannot stand. However, the ELJC comments do not prove that the Southern Waterfront SEIR underestimated the impacts of the subject projects in a manner that is relevant to the adequacy of the analyses for the SFERP. The SFERP was not discussed or analyzed in the Southern Waterfront SEIR. The evidence in the record of *this* proceeding is that the analyses of the SFERP are adequate, and the SFERP will *not* result in unmitigated significant adverse environmental impacts. Mr. Sarvey pastes into his brief those aspects of the ELJC comments that could raise a concern regarding the analysis of the Southern Waterfront projects, but leaves out the details and the evidence in the record of the SFERP proceeding that show that any such concern with respect to the SFERP is misplaced.

In response to questions by Mr. Sarvey, Ms. Eng herself testified that while, at the time she submitted the ELJC comments, she was concerned about the impacts of the proposed activities on the communities of southeast San Francisco, recent air monitoring data has shown that the air quality in southeast San Francisco is not as bad as had been perceived. 5/31/06 RT (Eng) at 170-1. Ms. Eng testified that many of the projects assessed in the Southern Waterfront SEIR have been in operation in the southeast area

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<sup>7</sup> The ELJC comments focus on air quality and public health impacts. See Exh. 92 at C&R 84-11.

and noted that the addition of concrete crushing operations, or concrete manufacturing operations, have not resulted in the high levels of particulates throughout the year in the neighborhood that she anticipated when she filed her comments on the Draft SEIR. *Id.* at 171-2.

Ms. Eng also testified that the Port is mitigating the particulate emissions from the projects discussed in the Southern Waterfront SEIR. *Id.* at 174: 7-11. The Southern Waterfront SEIR sets forth the mitigation measures related to air quality on pages 146-149. Exh. 92 at 146-9. These include:

- installing water spray systems;
- maintaining fine aggregate material with a moisture content of approximately 5%, because such material with a moisture content of 4.5% or more produces virtually no fugitive emissions;
- maintaining coarse aggregate material damp on the surface;
- storage of materials in bunkers at ready-mix and asphalt plants rather than in open piles;
- installation of BACT dust collection equipment to accommodate truck and rail transport and use of pneumatic equipment to control dust emissions during the transfer of fly ash;
- a requirement that asphalt plants include controls on drum mixers, including fabric filters (which can achieve control efficiency of greater than 99 percent) and use natural gas to fire such mixers;
- a requirement that the Port 1) direct its tenants to make good faith efforts to engage in operational practices sensitive to the environment and the neighboring communities; 2) contribute towards the incremental cost of adopting such practices; and 3) establish a schedule for reporting on such progress;
- when projects generating more than 100 daily vehicle trips are approved, development of a Transportation Systems Management Plan and potentially a Transportation Management Agency to reduce single-occupancy vehicle automobile traffic and encourage other forms of travel to and from work;
- a requirement that the Port include maximum allowed production volumes in leases for concrete or asphalt batching operations; and

- a requirement that the Port direct construction contractors to implement a dust abatement program.

Id.

Moreover, Ms. Eng noted that the PM<sub>10</sub> mitigation proposed for the SFERP will also help address particulate emissions from the Southern Waterfront SEIR projects since the enhanced street cleaning will affect impacts from these other facilities on neighborhood streets. Id. at 174:12-20.

Finally, key concerns set forth in the ELJC comments were addressed in the Southern Waterfront SEIR and/or are addressed by the cumulative impacts analysis undertaken for the SFERP.

One major concern of the ELJC in commenting on the Southern Waterfront SEIR was that the estimates of concrete and asphalt production were unduly low. In response to this concern, in the Final SEIR, the City added the requirement that the Port limit the maximum production volumes in its leases for concrete or asphalt batching operations. Id. at 147a; and C&R 98.

Another question was whether the truck travel (and hence emission) estimates were too low for trucks traveling in the southern direction. Exh. 92 at C&R 90. The Final Southern Waterfront SEIR explains why the analysis was consistent with CEQA and conservative. Exh. 92 at C&R 99.

Finally, the ELJC comments argue that the cumulative impacts analysis in the Southern Waterfront Draft SEIR inadequately considered major sources of air pollution in the southeast San Francisco neighborhoods. Exh. 92 at C&R91-3. This comment is irrelevant for purposes of determining the adequacy of the City's cumulative impact analysis for the SFERP. As long as the SFERP's cumulative impact analysis properly

assessed either 1) a list of past, present and probable future projects or 2) a summary of projections that has been adopted or certified, the analysis is adequate. See 14 CCR §15130(b)(1).

Mr. Sarvey's criticism has been that the cumulative impacts analyses for the SFERP did not adequately consider the impacts from the projects assessed in the Southern Waterfront SEIR, not that there was anything else fundamentally wrong with the cumulative impact analyses. This complaint is addressed in section IV, D, 3 of the City's Opening Brief: the City's Air Quality witness testified that even after adding to his cumulative impacts analysis, the projected impacts from the Southern Waterfront SEIR projects as set forth in the Southern Waterfront SEIR, there would be no significant cumulative impacts from the SFERP.<sup>8</sup> 5/31/06 RT (Rubenstein) at 33-35. Since the City did not rely on the Southern Waterfront SEIR air quality cumulative impacts analysis in analyzing the impacts of the SFERP, problems with that analysis are irrelevant to this case.<sup>9</sup>

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<sup>8</sup> As explained in the City's Opening Brief, section IV.D.3, the cumulative impacts analyses to which Mr. Rubenstein added the impacts from the Southern Waterfront EIR projects, already included Southern Waterfront SEIR projects that are currently in place, and future projects from the Southern Waterfront SEIR that have sought permits from the BAAQMD and are not exempt as de minimis. This means that simply adding the impacts from the Southern Waterfront SEIR to the cumulative impacts analyses undertaken for the SFERP would result in double counting of the Southern Waterfront SEIR projects that legitimately should be considered in the analyses. Yet even with this double counting, the cumulative impacts are not significant.

<sup>9</sup> Just after the section that Mr. Sarvey pastes into his opening brief, the ELJC comments go on to explain the particular concern about the cumulative impacts air quality analysis. The comments elaborate that the Southern Waterfront Draft SEIR did not consider the potential that Hunters Point Power Plant would continue to operate and that the Potrero Power Plant would be expanded. Exh. 92 at C&R 92. In fact, however, the CEC recently terminated its proceeding on the expansion of the Potrero Power Plant and the Hunters Point Power Plant has indeed shut down. Furthermore, cumulative impacts analyses prepared for the SFERP explicitly addressed the possible future operations of both the Hunters Point and Potrero Power Plants. Exh. 15, Volume 2, Appendix 8.1F. Thus, to the extent the analysis was inadequate at the time the Southern Waterfront DEIR was prepared, the concern is irrelevant now because the scenario ELJC argued should be analyzed is no longer reasonably foreseeable, and other, similar scenarios have been evaluated in the SFERP proceeding.

Additional concerns set forth in the comments of the ELJC and pasted into Mr. Sarvey's opening brief, such as the level of detail in project descriptions and the comprehensiveness of the discussion of neighborhood pollution sources and public health concerns, go to the adequacy of the Southern Waterfront Draft SEIR and are irrelevant to the adequacy of the analysis undertaken for the SFERP. As discussed in the City's Opening Brief, section VI, the record in this case contains extensive information about pollution sources in the neighborhood, public health concerns, and potential public health cumulative impacts, including a first of its kind assessment by CEC Staff.

**VI. Mr. Sarvey's Argument that There has Been Inadequate Analysis of the Transportation, Storage and Use of Ammonia on Site Improperly Relies on Testimony that is Not In Evidence and is Otherwise Unsupported.**

Mr. Sarvey relies on testimony submitted by the City in the Potrero 7 case to argue that the City has not adequately considered the impacts of using ammonia at the SFERP and its impact on environmental justice. In addition, Mr. Sarvey argues that the modeling undertaken was improper and that there was an inadequate cumulative impacts analysis. All of these claims are misplaced.

**A. Mr. Sarvey's Use of City Documents from the Potrero 7 Case is Contrary to the Hearing Officer's Rulings and Otherwise Improper.**

Mr. Sarvey inappropriately relies on testimony that has not been made part of the evidentiary record to argue that the analyses of the impacts from the transportation, storage and use of hazardous materials at the SFERP are inadequate. In any event, the implication, based on the prior testimony, that the environmental justice considerations of the SFERP and Potrero 7 are the same is incorrect.

Intervenor Sarvey attempted to introduce the City's testimony and pleadings in the Potrero 7 case into the evidentiary record for the SFERP for the purported purpose of

demonstrating the existence of City LORS related to the storage of ammonia. The City objected to these attempts, and ultimately Mr. Sarvey agreed to rely on administrative notice to demonstrate the existence of City LORS.<sup>10</sup> Nonetheless, Mr. Sarvey cites in his brief to the testimony of Mr. Richard Lee, submitted in the Potrero 7 case, which provides that "The CEC should consider the environmental justice implications of transporting and storing large quantities of hazardous materials in Southeast San Francisco an area with significant minority and low income population." See Sarvey Opening Brief at 13-14.

It is inappropriate for Mr. Sarvey to rely on a document that is not in the evidentiary record of this case. The Presiding Member's Proposed Decision must be based exclusively upon the evidentiary record of the proceedings on the application. CEC Rule 1751(a). There are good reasons for excluding the Potrero 7 testimony in this case. The testimony in Potrero 7 was regarding a different facility, 5/31/06 RT (Solé) at 63-64, at a different time, in a different location.

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<sup>10</sup> Mr. Sarvey repeatedly noted that his purpose in attempting to introduce the Potrero 7 testimony was to demonstrate the existence of LORS. 4/27/06 (Sarvey) at 214: 9-16; 5/31/06 (Sarvey) at 64: 4-8. The City repeatedly objected. 4/27/06 (Solé) at 158: 8-9 and 213: 20-21; 5/31/06 (Solé) at 63-64. Mr. Sarvey repeatedly agreed to rely on administrative notice of LORS rather than insist on the introduction of testimony or prehearing conference statements from the Potrero 7 case. 4/27/06 RT (Sarvey) at 215: 5-21; 5/31/06 (Sarvey) at 6-15. Hearing Officer Fay clarified during the April 27 hearing that documents other than Mr. Sarvey's hazardous materials testimony were not received into evidence. 4/27/06 (Fay) at 218:23-4. Hearing Officer Fay also clarified during the May 31 hearing that the Commission could take administrative notice of the City's LORS but not the contents of the Potrero 7 documents. 5/31/06 RT (Fay) at 20-22.

During the April 27 hearing, Mr. Sarvey argued that the Potrero 7 testimony had already been introduced into the record by the City. However, as explained in the City's opening brief, at pages 111-12, footnote 15, the data response in question number 5 was not submitted into evidence by the City and was not otherwise introduced. Earlier that day, the responses to San Francisco Community Power data requests 1 and 3 were admitted into the record as Exhibit 83. 4/27/06 RT 62-63. Mr. Sarvey uses Exhibit 83 to label the testimony of Mr. Lee but Mr. Lee's testimony was provided in response to data request 5 as Mr. Sarvey himself admitted. 4/27/06 RT (Sarvey) at 213: 16-19.

Because Mr. Sarvey raised the argument in his Opening Brief, the City will respond here without waiving its objection to the use of testimony from the Potrero 7 proceeding in the instant case. The truth is that the City has very much considered the environmental justice implications of siting the SFERP (and its associated impacts) in southeast San Francisco. The City's Application for Certification included a section addressing this topic; the City's Supplement A included a section addressing this topic, see Exh. 15 at 4-1 through 4-6; and the City's testimony addressed this topic, see 5/31/06 RT at 139-196. As Ms. Kubick stated "environmental justice is the primary factor for the project to create the opportunity to be able to close down the Potrero facility and improve the southeast community." 5/31/06 RT (Kubick) at 166: 17-20.

As Ms. Eng explained, the SFERP is different from other proposed power plant projects because it is a peaking plant and because it is designed and being pursued in order to provide for the shut down of the Potrero Power Plant. See 5/31/06 RT (Eng) at 145: 8-22 and 157: 7-14. This was simply not the case with regards to Potrero 7. Moreover, as is documented in the SFERP FSA, construction of Potrero 7 would have had the potential for the greatest impacts of all of the alternatives analyzed. Exh. 46 at 6-1. Finally, Potrero 7 involved two 20,000 gallon tanks of aqueous ammonia, almost four times the volume proposed for the SFERP.

Mr. Sarvey argues in his opening brief that "[t]he applicant only considers environmental justice when someone else is transporting hazardous materials through the minority community not when they are." Sarvey Opening Brief at 14. This statement is flatly untrue. The City carefully considered the benefits and downsides with regards to environmental justice issues posed by the SFERP and concluded that the project would

be a net gain. The City's environmental witness testified to this effect. 5/31/06 RT (Eng) at 145: 8-22.

**B. Mr. Sarvey's Claim that Workers at the MUNI Metro East Facility and the Public Will Be Exposed to Undue Risks Misunderstands the Modeling Undertaken by the City And Staff.**

Intervenor Sarvey argues that:

The applicant using the slab model has determined in his offsite consequence analysis that the complete failure of the aqueous ammonia tank would result in ammonia concentrations as high as 2000 ppm approximately 35 feet on to the Muni Maintenance Facility Property. Workers there will be exposed to lethal concentrations of ammonia.

Sarvey Opening Brief at 15.

Intervenor Sarvey correctly restates the information contained in the Hazardous Materials section of the City's Supplement A regarding the hypothetical complete failure of the aqueous ammonia storage tank. However, his conclusion that the Muni workers will be exposed to lethal concentrations of ammonia is contrary to the record. The results of the modeling of the highly unlikely assumed catastrophic instantaneous failure of the entire aqueous ammonia tank does not reflect the passive mitigation that would be provided by a covered sump directly below the tank which would reduce the concentrations to significantly lower levels. The Commission Staff expert Dr. Greenberg made that very point in his testimony. 4/27/06 RT (Greenberg) at 198: 7-14. Dr. Greenberg goes on to point out that under his analysis: "You get, at the most, a couple hundred parts per million right there, you know, if you stood right over the containment, the secondary containment berm." Id. at 198: 21-24.

The City's modeling results of ammonia release demonstrate that the only location where *modeled*, and *unmitigated*, ammonia concentrations exceed 5 ppm is on the Muni Maintenance facility site, where it dissipates from 2000 ppm at 35.7 ft. from the

fenceline, to the Commission's level of interest of 75 ppm at 52.9 feet, to 25 ppm at 61.6 feet. Exh. 15 at 8.12-8. The ammonia tank will have alarms and warnings for ammonia release, and all City workers, both Muni and SFERP alike, will receive emergency training. Exh. 15 at 8.12-1.

Moreover, Staff testified that it used different models than the City and arrived at the same conclusion as the City - that a hypothetical instantaneous release of the entire contents of the aqueous ammonia tank would result in no substantial threat to the public health or safety. Exh. 46 at 4.4-13. The Commission Staff evidence further concluded that the Energy Commission level of significance (75ppm) would not be reached at *any off-site location*. Exh. 47 at 4.4-13.

Intervenor Sarvey incorrectly concludes that the City's results from exercising the RMP\*Comp model of a total failure of the aqueous ammonia tank would subject members of the public to ammonia concentrations of 200 ppm and would be in violation of the HUMPA guidelines.<sup>11</sup>

The City did conduct an example calculation of ammonia release using the RMP\*Comp computer model. Exh. 15 Vol. 2 App. 8:12 at 4. However, Mr. Sarvey's conclusion, based on that calculation, that the public would be exposed to 200 ppm ammonia concentrations is wrong. The RMP\*Comp computer model is a simplified planning model rather than a predictive one. 4/27/06 RT (Greenberg) at 197: 13-16. The Guidelines cited by Intervenor Sarvey provide that other models can be utilized and that the results of an RMP\*Comp computer model exercise can be modified by passive

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<sup>11</sup> See City's Opening Brief: "Intervenor Sarvey's Proposal to Mandate a Standard of 35 ppm Ammonia Concentration at the Fence-line is Unnecessary," at 110-114 for a more comprehensive discussion of this issue.

mitigative devices,<sup>12</sup> an adjustment that was not made in the City's RMP\*Comp analysis. As the calculations using more sophisticated models and including mitigation show, ammonia concentrations will be much lower than 200 ppm even in the event of a catastrophic worst case accident. The modeling undertaken by Staff and the City demonstrates that such concentrations will be well below even 5ppm (the odor threshold) near residences. See Exh. 46 at 4.4-13; exh. 15 at 8.12-26.

Finally, Intervenor Sarvey's contention that there is a legally required 35 ppm standard at the fence line for an ammonia release is incorrect, as explained in the City's Opening Brief at 110. The fact that there is no such legal requirement is supported by the fact that, a modeling analysis of a catastrophic failure of the Potrero Unit 3 20,000 gallon ammonia storage tank using RMP\*Comp results in a 200 ppm ammonia toxic endpoint at 0.9 miles. Exh. 15 at 8.12-30. Yet the Potrero 3 storage tank was put into place and, in March 2005 when Supplement A was prepared, the SFDPH reported that the Risk Management Plan for Potrero 3 had been deemed complete pending a public comment period. Exh. 15 at 8.12-30.

**C. Intervenor Sarvey's Conclusion that the SFERP Should Use a Lower Concentration of Aqueous Ammonia is Unsupported by the Record.**

Intervenor Sarvey asserts that Commission Staff does not use the worst case scenario in its modeling of the consequences of a hypothetical loss of the entire contents of the SFERP aqueous ammonia tank. Without any citation to the record, Intervenor Sarvey opines that because the Commission Staff accounts for the use of a 2 foot drain to the underground storage tank, it does not use the worst case scenario, and therefore

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<sup>12</sup> See for example: Only passive mitigation (e.g. secondary containment, structures, etc.) can be considered in a worst case release scenario. San Francisco Department of Public Health Hazardous Materials Unified Program Agency (HMUPA), Regulated Substances Program Guidance Sec. 6.2.6 Some Parameter Considerations at 6-4.

underestimates the workers' exposure to ammonia concentrations at the Muni Site. Sarvey Opening Brief at 15. Intervenor Sarvey then opines that since the City's analysis is more conservative, the Commission should require SFERP to use a weaker solution of aqueous ammonia or use a urea /ammonia on demand system. Id.

Intervenor Sarvey's conclusions are simply incorrect. Staff did use different models than the City in analyzing the offsite consequences of a total release of the aqueous ammonia from the SFERP storage tank, and included passive systems capabilities in its analysis. See 4/25/06 RT (Greenberg) at 197-9. As noted above, this is an accepted practice.

It is also appropriate to take into account the sophistication of the model and the degree of conservatism included in the analysis in formulating expert judgments concerning the selection of models and the interpretation of results of off-site consequences analyses. Both City and Staff expert witnesses concluded that there was not a significant risk to the public health or safety from the utilization of aqueous ammonia at the proposed concentration level at the SFERP. Exh. 15 at 8.12-27; Exh. 46 at 4.4-1.

Moreover, as set forth in the City's Opening Brief, the City responded in its testimony to Mr. Sarvey's suggestion that the concentration of the aqueous ammonia stored at the SFERP should not exceed 29 percent. City witness Ms. Parker pointed out that there were no benefits, and potential increases in risks and costs, associated with decreasing the concentration level. 4/17/06 RT (Parker) at 166-167. In addition, it was pointed out by Commission Staff that there are no significant impacts from using aqueous ammonia and therefore use of ammonia on demand from urea was not necessary. Exh. 46

at 4.4-15. Finally, as noted by the City, the only available urea-based system, U2A, requires steam for the process to work and the SFERP project will not produce steam. Exh. 15 at 9-20.

**D. Intervenor Sarvey's Argument for a Generic Cumulative Transportation Analysis Disregards the Comprehensive Hazardous Materials Analysis (Including Transportation) Contained in the Record.**

Mr. Sarvey argues that there is no cumulative impact analysis of the transportation, storage, and use of hazardous materials at the SFERP. Sarvey Opening Brief at 14. As is documented in the City's Opening Brief, this statement is simply unfounded. The City undertook an assessment of the cumulative impacts of using ammonia at the SFERP and at the Potrero Power Plant and concluded that there would be no significant impacts. Exh. 15 at 8.12-13. Staff performed an innovative cumulative impacts analysis that assessed the cumulative impacts of storage and use of hazardous materials. Staff reviewed approximately 50-60 facilities within the neighborhood and concluded that there would be no significant cumulative impacts. 4/27/06 RT (Greenberg) at 189-192. The City undertook an assessment of the impacts of transporting aqueous ammonia to the SFERP and concluded that there would be no significant impacts. Exh. 27 at 10, Data Response 1-9. Staff analyzed the cumulative impacts from the transportation of aqueous ammonia both by assessing transportation to the SFERP and to the Potrero Power Plant and by reviewing statistics on accidents involving aqueous ammonia. Exh. 46 at 4.4-23; 4/27/06 RT (Greenberg) at 194-6. Staff concluded that there would be no significant impacts.

Mr. Sarvey complains that "[n]either the Staff nor the applicant has analyzed the transportation of other hazardous materials like sodium hypochlorite or sulfuric acid. The majority of hazardous materials sites in San Francisco are located in the Bayview

neighborhood and environmental justice consideration require that a cumulative transportation risk analysis be performed." Sarvey Opening Brief at 15-16 Mr. Sarvey is wrong.

Simply put, the Staff conducted an unprecedented cumulative analysis of hazardous materials risk in the area surrounding the SFERP. This analysis included transportation. The Commission Staff evaluated a large number of locations that had hazardous materials on site. The Staff combed through data bases, and evaluated each of the amounts and uses. Staff expert Dr. Greenberg testified that, in many cases, the amounts or types of material on hand did not raise a level of concern either individually or cumulatively. See Exh. 46 at 4.4-22-24; 4/27/06 RT (Greenberg) at 189-19; see also the extensive citation in the City's Opening Brief at 104. That is exactly how one conducts a risk assessment.

The Commission Staff in its assessment came to the conclusion that only the SFERP and the Potrero Unit 3 utilization of aqueous ammonia created even the potential of a cumulative interaction and modeled the cumulative impacts from these facilities for both storage and transportation. The fact that the Commission Staff could not find sufficient amounts of hazardous materials use to *model* the other 50 some sites and corresponding supply routes does not mean that they were not *analyzed*.<sup>13</sup>

In sum, Mr. Sarvey's claims are simply incorrect.

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<sup>13</sup> The notion that analysis must include modeling seems to permeate Intervenor Sarvey's thinking. There is no such requirement, either in CEQA or in the Commission's regulations.

**VII. Mr. Sarvey's Attempt at a Cost-Benefit Analysis for the SFERP Is Based on an Inappropriate Comparison of Apples to Oranges, Using Dated and Unsubstantiated Materials.**

Intervenor Sarvey's opening brief repeats the argument from his testimony that the cost of the SFERP will be excessive. Mr. Sarvey's testimony is inappropriate as it compares apples to oranges. In his testimony Mr. Sarvey relied in part on an attempt to calculate the cost per kilowatt hour for the facility. The City's Opening Brief explains, based on testimony by Mr. Flynn, why it is inappropriate to assess the value of peaking, reliability units solely on an assessment of costs per kilowatt hour. Mr. Sarvey's Opening Brief discusses the high cost of the SFERP based on what he terms "the applicants [sic] internal documents provided under data requests by Community Power." Sarvey Opening Brief at 14. This comparison also is inappropriate.

Mr. Sarvey's Opening Brief makes a number of arguments to show that the SFERP will be unduly costly. All of these arguments ignore a fundamental question: what is the cost to achieve the City's key objective for the SFERP, which is to provide the reliability necessary to allow for the shut down of the Potrero Power Plant. As documented in the City's Opening Brief, the record in this case shows that in order to remove the Reliability Must Run agreement for the Potrero Power Plant, the CAISO requires generation in the City. The true measure of whether the SFERP is overly expensive is whether the cost to build a power plant of the general size of the SFERP in San Francisco could be less. None of the arguments or purported facts relied upon by Mr. Sarvey indicate that the cost of the SFERP is excessive evaluated against this measure.

Mr. Sarvey's argument that the cost of the SFERP is excessive relies on a 2003 analysis prepared by HMM Energy Resources, Inc., which at that time estimated the cost

per megawatt hour of a project such as the SFERP to be something in the order of \$115 per megawatt hour. Exh. 81 at 1. This cost is never compared to the cost of a new simple-cycle facility in San Francisco (or any other part of the state for that matter). Instead, Mr. Sarvey compares this figure to a projected average peak energy price of around \$60 MWh for San Francisco set forth in a different document prepared by ICF in 2004. Exh. 82 at 15. By its nature, this average peak energy price figure does not reflect the cost of adding a peaking facility in the San Francisco area. Instead it reflects average market clearing prices in the area taking into account transmission constraints. See Exh. 82. These prices would be a blend of the cost of marginal units during peak hours, including existing and projected new units outside the San Francisco area (when transmission constraints do not limit imports) as well as within the San Francisco area.<sup>14</sup> Thus, the comparison is inappropriate.

In any event, the documents relied on by Mr. Sarvey are neither current nor apt. Mr. Sarvey states that the documents were received from the City in response to a data request from Intervenor San Francisco Community Power. Sarvey Opening Brief at 14. In fact, the documents were provided to San Francisco Community Power (SFCP) and Mr. Sarvey in response to SFCP data request 1 received by the City on July 19, 2004. At the evidentiary hearings, Mr. Sarvey could not remember precisely when he received the document, although he thought it was on September 24, 2004. 4/27/06 RT (Sarvey) at 60: 14-23. In 2004, the City mailed documents responsive to SFCP data request 1 on August 18, September 7, and September 24. All three mailings include an accompanying

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<sup>14</sup> It is not altogether clear from the document whether Hunters Point Power Plant is assumed to be in operation. Page 11 suggests that this is indeed the case. Exh. 82 at 11. This would be just one example of how the 2004 ICF study is not current.

response that states: "[t]he documents provided with these responses are in the City's possession and reflect analyses of different siting options. These documents were found in the files of various City staff and are provided for completeness even though most were not presented to or considered by higher level City policy makers in the context of final determinations on the proposed location to be filed with the CEC." See Exh. 83, August 18, 2004 Responses to SFCP, Set 1, Response 1; September 7, 2004, Further Responses to SFCP, Set 1, Response 1; September 24, 2004, Further Responses to SFCP, Set 1, Response 1. Mr. Sarvey did not have any of the experts available review the studies and confirm that they are either apt or still current. The only thing that is established in the record is that Mr. Sarvey obtained the documents in question from the City – and that the documents were in City files.

The rest of the contentions in Mr. Sarvey's brief regarding costs do nothing to substantiate his claim that the SFERP will be unduly expensive for its intended purpose: to provide the necessary reliability to enable the shut down of the Potrero Power Plant.

### **VIII. The CAISO's Approval of the SFERP's Interconnection to the Grid is Not Contrary to California Law.**

Cobbling together disparate and unrelated pieces of California law, CARE suggests that the CAISO's approval of interconnection by the SFERP to the electric power grid was contrary to state law and "ultra vires." See CARE Opening Brief at 4-7. CARE's attempts to support its arguments point to California Public Utilities Code § 345.5(a) which provides that the CAISO is a nonprofit, public benefit corporation; and California Public Utilities Code § 345.5(c)(1) which provides that the CAISO must "consult and coordinate with appropriate state and local agencies to ensure that the

Independent System Operator operates in furtherance of state law regarding consumer and environmental protection."

These laws do not support a conclusion that the CAISO was required to consult with the SFRWQCB before approving interconnection of the SFERP to the electric power grid. The requirements of California Public Utilities Code § 345.5(c)(1) are general in nature and have never been interpreted to require the CAISO to consult with every state and local agency before making any decision (which is the logically extreme outcome of CARE's argument).

Obtaining approval of an interconnection request is one of several steps that generators must take in the process of developing a power plant. Reviewing and approving interconnections to the electric power grid is a routine duty of the CAISO in the context of its general obligation to provide open access to the electric grid. See Order 2003, 104 FERC ¶61,103 (July 24, 2003) at 3-5. The CAISO's review of such applications is ministerial in nature, as the CAISO cannot deny a request for interconnection unless the interconnection will adversely impact the reliability of the electric grid. *Id.*

Moreover, in the case of the development of power plants over 50 MWs, environmental review is undertaken before the California Energy Commission. Thus, the CAISO does not evaluate the environmental implications of a particular interconnection approach or its alternatives. Rather, that analysis is part of the Application for Certification process. The CAISO submits its findings regarding the reliability of a proposed interconnection to the CEC and allows the CEC to evaluate any environmental aspects of the selected interconnection approach and its alternatives. This approach is

consistent with the Warren-Alquist Act, which provides for one-stop licensing and environmental review for power plants over 50 MW. Cal. Publ. Res. Code § 25120. In contrast, the interpretation given by CARE to California Public Utilities Code § 345.5(c)(1) would have the CAISO duplicate part of the environmental review process undertaken by the CEC each time it reviewed an interconnection request – an outcome that the Warren-Alquist Act was specifically designed to avoid.<sup>15</sup>

In sum, CARE misconstrues California law. The CAISO was not required to consult with the SFRWQCB before approving the SFERP's interconnection to the electric transmission grid. Consultations with the SFRWQCB are appropriately taking place in the context of licensing and the AB 2061 process.

**IX. The Proposed Process to Address the Existing On-Site Contamination is Consistent with CEQA.**

CARE's opening brief argues that the proposed approach to address the existing on-site contamination set forth in the City's proposed conditions of certification violates the City's own ordinances and the California Environmental Quality Act (CEQA). CARE Opening Brief at 24. CARE's opening brief does not indicate which of the City's ordinances is violated by the approach or in what way there is a violation. CARE argues that CEQA is violated because the approach constitutes improper "piecemealing." CARE Opening Brief at 25. CARE's argument then "morphs" into a contention that the City should have assessed the SFERP and the construction of the MUNI Metro-East Facility as one project. *Id.* at 27.

The City's Opening Brief lays out in detail the CEQA case law that supports the approach set forth in the City's proposed conditions of certification to address existing

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<sup>15</sup> It is likely that if the CAISO had undertaken such environmental analysis, CARE would complain of inappropriate "piecemealing."

on-site contamination. Two distinct lines of reasoning and case law support the approach. First, reliance on environmental laws and regulatory programs as mitigation of environmental impacts is well supported by CEQA case law. See *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 308; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal. App. 3d 1337, 1355. In the SFERP case, the City's proposed conditions of certification incorporate the requirements of both Article 22A and the process for voluntary clean-ups set forth in AB 2061. The City can properly rely on addressing the existing on-site contamination in accordance with these regulatory programs where, as here, construction and operation is conditioned upon satisfactory compliance with applicable requirements at the appropriate stages of project implementation.

In addition, courts have allowed identification of the specific measures to be used after project approval in cases where: 1) the condition in question has been identified and degree of potential severity understood; 2) the range of potential mitigation measures has been identified and the efficacy of the measures demonstrated; and 3) a predetermined standard has been adopted. See *Sacramento Old City Assn. v. City Council* (1991) 229 Cal. App. 3d 1011, 1028-30; *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal. App. 4<sup>th</sup> 777, 793-6. As set forth in detail in the City's Opening Brief, the record regarding treatment of the existing on-site contamination for the SFERP meets these requirements.

Further, the process set forth in the City's proposed conditions of certification does not constitute inappropriate "piecemealing" as CARE contends. The charge of "piecemealing" is generally leveled in cases where an entity has separately analyzed the

environmental impacts of two aspects of what is, or should in effect be, the same project. For example, in *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 716, the case cited with regards to piecemealing by CARE, the Court determined that an air quality impacts analysis was inadequate. *Id.* The Court explained that the EIR described both on-site emissions from fuel and material handling as well as fuel combustion, and secondary emissions from employee traffic, delivery truck traffic, train delivery of coal and coal handling facilities. *Id.* at 714. The Court noted, however, that the conclusion that there were no significant air quality impacts ignored the secondary emissions. *Id.* at 716-717.

It is unclear what CARE means in arguing that the approach set forth to address the on-site contamination will result in improper "piecemealing." The process to address the existing contamination on-site has been very centrally a part of the environmental analysis of the SFERP and the proceedings before the CEC. Moreover, there is no evidence in the record to suggest that the work required under the proposed conditions of certification, or the possible mitigation measures themselves, will result in environmental impacts that have not been adequately assessed. To the contrary, the City's proposed conditions of certification to address existing on-site contamination, in combination with additional proposed conditions of certification for air quality and soil and water that have been accepted by the City, will ensure that any soil disturbance activities on-site, including activities to address on-site contamination, are subject to stringent dust control requirements and diesel emissions controls, see Exh. 46 at 4.1-34-38, AQ-SC3, AQ-SC4, AQ-SC5; and best management practices for erosion and sediment control, see Exh. 46 at 4.9-37, SOIL & WATER-1.

Finally, CARE's contention that the SFERP and the MUNI Metro East project should be considered a single project for purposes of CEQA borders on absurd. CEQA requires an EIR to analyze the cumulative impacts of the project at issue along with other closely related past, present and reasonably foreseeable future projects as part of its cumulative impacts analysis. 14 California Code of Regulations §§15130, 15355. However, CEQA does not require that multiple projects, which can proceed independently, be analyzed in one EIR. "[W]here the second activity is independent of, and not a contemplated future part of, the first activity, the two activities may be reviewed separately . . . ." See *Sierra Club v. West Side Irrigation District et. al.*, supra, 128 Cal. App. 4<sup>th</sup> at 699. Moreover, "[p]reparation of an EIR need not be interminably delayed to include all potential comments or results of works in progress which might shed some additional light on the subject of the impact statement..." *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 594.

The SFERP and the MUNI Metro East facility are different and independent projects with different timelines<sup>16</sup> and with vastly different purposes: the MUNI Metro East project involves the construction of a facility for the storage, maintenance, and operation of MUNI's new light rail vehicles, exh. 46 at 4.5-6; whereas the SFERP is a power plant undertaken to facilitate the retirement of the Potrero Power Plant. The SFERP is certainly not a contemplated future part of the MUNI Metro East project.

Consistent with CEQA, potential cumulative impacts between MUNI Metro East facility and the SFERP were considered where appropriate, such as with regards to land use, Exh. 15 at 8.4-17 and Exh. 46 at 4.5-6-8; noise and vibration, Exh. 46 at 4.6-13;

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<sup>16</sup> The environmental analysis of the MUNI Metro East facility was undertaken in 1998 as part of the Environmental Impact Report of the Third Street Light Rail Project, of which the MUNI Metro East facility is an integral component. See Exh. 92 at S-8.

visual resources, Exh. 15 at 8.11-19-20; Exh. 46 at 4.12-13; workers safety and fire protection, Exh. 46 at 4.14-14; cultural resources, Exh. 46 at 4.3-28; socioeconomics, Exh. 15 at 8.8-21<sup>17</sup>; and traffic and transportation, Exh. 15 at 8.10-27-28.

Moreover, the City analyzed potential cumulative air quality impacts between the SFERP and the Muni Metro East facility in response to a data request by Mr. Sarvey and concluded that the impacts would be less than significant because: 1) the individual construction impacts of the projects would be mitigated to less than significant; 2) construction impacts are by their nature temporary and extremely localized; and 3) any potential overlap in the timing of the construction activities was speculative. Exh. 27 at 5-6, Response to request 1-6. In fact, Staff public health witness Dr. Greenberg testified that there will not be concurrent site mobilization and soil movement between the SFERP and the MUNI Metro East facility. 5/22/06 RT (Greenberg) at 161-2. Thus, there will be no significant cumulative air quality or soil and water impacts associated with the construction of these projects. Finally, the Southern Waterfront SEIR included the projected impacts from the MUNI Metro East facility. Exh. 92 at S-8. City air quality/public health witness Rubenstein testified that there will be no significant cumulative impacts on air quality or public health even taking into account the impacts described in the Southern Waterfront SEIR. 5/31/06 RT (Rubenstein) at 33-35 and 114-5.

In sum, CARE's contentions are misplaced and unsupported by the record.

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<sup>17</sup> This section indicates that construction of the MUNI Metro East project and certain Port projects would be concurrent with the SFERP. However, at the time Supplement A was written, construction of SFERP was expected to begin in the second quarter of 2006 and to be complete in the second quarter of 2007. See Exh. 15 at 1-4. The SFERP is now scheduled to be in operation by summer of 2008, a full year later. 4/27/06 RT (Flynn) at 30. Thus, the site mobilization and soil disturbance is no longer expected to be concurrent between the SFERP and the MUNI Metro East project.

**X. Contrary to the Assertions of Intervenor Sarvey and CARE, the SFERP is Needed to Achieve the City's Objective of Facilitating the Closure of the Potrero Power Plant and Will Improve Reliability.**

The SFERP is being pursued by the City to reduce the need for existing unreliable and highly-polluting in-City generation while maintaining the reliability of the electric system. Exh. 15 at 1-1. The CA ISO, the entity charged with ensuring the reliability of portions of the California electric grid including San Francisco, has indicated in no uncertain terms that a certain amount of electric generation must be located in the City of San Francisco. Exh. 15 at 3-6; Exh. 50 at Attachment 2: CAISO Revised Action Plan for San Francisco # 11. Thus, the uncontroverted testimony of the qualified experts in this case is that the SFERP is needed to support the retirement of the old and relatively unreliable existing Potrero Power Plant Unit # 3. See 5/1/06 RT (Tobias) at 47:1-4; 5/31/06 RT (Flynn) at 232-3; 4/17/06 RT (Flynn) at 90: 17-22. An additional four transmission upgrades, expected to be in service by summer 2008, will provide the ability to retire the remainder of the Potrero Power Plant when the SFERP is placed in service. 4/17/06 RT (Flynn) at 90: 17-22.<sup>18</sup>

**A. CARE's Assertion that the SFERP is Not Needed is Unsupported by any Credible Evidence in the Record**

CARE in its brief asserts that: "[t]here is no demonstrated need for the SFERP." CARE Opening Brief at 7. This statement is flatly untrue.

CARE's sole attempt at rebutting the City's demonstration of need is the testimony of witness Martin Homec, whose admitted expertise for the purposes of this proceeding was revealed as the ability to read a CPUC transcript and a City data

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<sup>18</sup> As noted in the City's Opening Brief, with the passage of Senate Bill 110 (Stats. 1999, ch. 581), the Commission is no longer required to make a finding of need conformance in the context of licensing a proposed power plant. Thus, the discussion of reliability relates solely to the question of whether there are alternatives to the SFERP that will accomplish the City's key objectives in a manner that meaningfully reduces significant impacts, of which, in the case of the SFERP, there are none.

response.<sup>19</sup> CARE, in its brief, attempted a Herculean effort to convince the Committee that the transcript, Mr. Homec's reading material, is admissible;<sup>20</sup> the City does not concede its admissibility. But in any event, Staff Counsel on cross examination of Mr. Homec demonstrated that Mr. Homec did not know the full content or the meaning of the testimony that he read,<sup>21</sup> a point uncommented upon by CARE in its brief. This point was not missed by the City. The City's Opening Brief demonstrates that the most rational interpretation of the testimony in question is that it discusses the relationship between the Jefferson–Martin transmission line and the closure of Hunters Point Power Plant and has no bearing on the closure of the Potrero Power Plant. See City Opening Brief at 15-16; Exhibit 59 at 471.

Thus, contrary to the contentions of CARE, the expert evidence in the record is uncontroverted that the SFERP is indeed needed to accomplish the City's objective of supporting the retirement of the Potrero Power Plant. The evidence proffered by CARE to the contrary was neither qualified nor credible.

**B. Intervenor Sarvey's Contention that The San Francisco Action Plan Will Decrease Reliability is Similarly Contrary to the Record.**

Intervenor Sarvey's assertion that the CAISO's San Francisco Action Plan (Action Plan) will result both in an over-reliance on imported energy and a corresponding decrease in electricity reliability in San Francisco has no evidentiary support in the record. Intervenor Sarvey argues in his brief that: "The action plan proposes to eliminate

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<sup>19</sup> Staff Counsel Ratliff in a virtual *voir dire* extracted from Mr. Homec the admission that when he worked for the Commission he did not work in the area of transmission engineering, that he had no duties as a transmission engineer when he worked at the CPUC, that he was not an expert in transmission line planning, that he relied solely on the testimony in the CPUC proceeding of PG&E witness Yeung, and that his only transmission experience was from reviewing proceedings. See RT 5/31/06 (Homec) at: 259: 4-25; and 260: 1.

<sup>20</sup> For the City's view of this matter refer to section XI of this reply brief.

<sup>21</sup> RT 5/31/06 (Homec) at 260 -268.

385 MW of in city generation. By eliminating this much in city generation the action plan exposes the City to increased imported generation.“ Sarvey Opening Brief at 14.

Intervenor Sarvey then concludes that: "The over reliance on imported energy will decrease the reliability of the San Francisco electrical system." Id; emphasis added.

There is absolutely no expert evidence supporting these assertions in this case. Intervenor Sarvey attempts to dramatize his argument by his choice of terms: eliminating old plants, over reliance on imported energy, and decreased reliability. The facts in the testimony of the City’s expert Barry Flynn<sup>22</sup> and the CA ISO’s expert Larry Tobias are exactly to the contrary. Exhibit 50. Both have testified that the SFERP will replace old, inefficient equipment and enhance reliability.<sup>23</sup>

The CAISO’s Action Plan, developed after many years of detailed study by PG&E and the ISO, calls for a number additions to be made to the transmission system serving the Peninsula and the City. Exhibit 50. Some of these transmission additions allow the shutdown of the Hunters Point Power Plant. Others, in conjunction with the installation of the City’s turbines, will ensure that the Potrero Power Plant can shut down and the San Francisco and the Peninsula can be served with a higher level of reliability

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<sup>22</sup> Mr. Flynn: If the generation is all of equal individual reliability, meaning they all have the same failure rates, and they’re all of equivalent size, then you’ll always be better to have more generation. However, if you’re talking about the situation in San Francisco where you have very old equipment with a high failure rate, having more of that does not necessarily provide better reliability than less of a new, highly reliable facility. 4/27/06 RT (Flynn) at 90:12-22.

<sup>23</sup> There is a real irony in Intervenor Sarvey’s assertion. On the one hand, his colleague and former organization CARE alleges that CCSF can rely on one new transmission line already in service from Jefferson to Martin to meet all of San Francisco’s physical electricity and reliability requirements, while on the other according to Intervenor Sarvey, CCSF should rely on the retention of the existing Potrero and former Hunters Point Power Plants:

Mr. Ratliff: Can I just interject here? When you say 385 megawatts, you don’t mean just Potrero unit 3, but you mean also the peaker facilities—

Mr. Sarvey: And the Hunter’s (sic) Point, as well.

5/1/06 RT (Sarvey) at 42:10-15.

than has existed in recent years. The CAISO's confidence in this fact is indicated by their recognition of the need to modify the Greater Bay Area Generation Outage Standard, a special generation outage standard that was devised to compensate for the unreliable existing generation in the City, upon fulfillment of the Action Plan. See 5/1/06 RT (Tobias) at 48-49.

Mr. Sarvey, without the benefit of supporting evidence, asserts the general proposition that, at one point or another, presumably each and every unit will trip offline or break down and suggests that this fact alone results in a decrease in reliability from replacement of the Hunters Point and Potrero Power Plants with the SFERP. While it may be true that at some point or another any generating unit will trip offline, it is not true that all are equally likely to or that therefore 385 MW of old generation provides more reliability than 145 MW of new generating capacity. In fact, the record is to the contrary.

First of all, as Mr. Sarvey is quick to point out, and as the City has conceded from the start, the Hunters Point Power Plant is not at issue any more. That plant has been replaced by transmission additions including the Jefferson-Martin line. Second, the Potrero Power Plant has historically had a remarkably high level of unplanned outages. 4/27/06 RT (Flynn) at 89: 23-25 and 90:1-8. Moreover, it is worth noting that the three peaking units at the Potrero Power Plant can only operate 10 percent of the time because of their extremely high emission rates. Exh. 15, Appendix 8.1F at F-13. And the Potrero 3 unit constitutes only one, relatively old, unit which is inherently less reliable than three flexible and highly reliable units such as the SFERP.

Mr. Sarvey then contradicts his own “generating-units-are wont-to-trip-off-line argument”, again without the benefit of facts. In his alternative argument, Mr. Sarvey contends that the majority of outages in San Francisco occur from transmission line failures and suggests that, therefore, the Action Plan will result in decreased reliability. This argument, if it were true, would support the need for reliable in-City generation such as the SFERP, which is highly flexible and reliable.

Intervenor Sarvey then argues that, in the event of an emergency, the Action Plan cannot even ensure the requisite 100 MWs of in-City generation. Sarvey Opening Brief at 15. This assertion is the result of a misunderstanding of the n-1 planning requirements. Mr. Sarvey attempted to hypothesize that a loss of a line and two peaker units resulted in a planning failure. He was advised by CA ISO witness Mr. Tobias that this was not the case as it represented a double contingency (n-2) event which is quite another matter, and requires a different planning response. 5/1/06 RT (Tobias) at 53: 13-18. Intervenor Sarvey further questioned the CA ISO witness, asserting that if one of the in-City units went down there would be a fault in the Action Plan because there would only be some 95 MWs north of Martin. Mr. Tobias testified that in his expert opinion 95 MW +/- was sufficient. 5/1/06 (Tobias) at 64: 13-18.

Intervenor Sarvey then made his concluding argument: that elimination of the Potrero peaking units pursuant to the Action Plan eliminates the fuel diversity of in-City generation and, in the case of a natural disaster such as an earthquake, limits reliability. Sarvey Opening Brief at 15.. Intervenor Sarvey’s argument concerning fuel diversity and reliability in the event of an earthquake was placed into appropriate context by the City’s expert Barry Flynn:

Mr. Flynn: You're assuming it does damage to which part of the infrastructure.

Mr. Sarvey: Natural gas lines.

Mr. Flynn: Then, yes. If it did not damage the fuel tanks, then that would provide some power during the earth quake.

4/27/06 RT (Flynn) at 83: 12-20.

Ms. Solé: And would having an alternative fuel source be an advantage in any type of natural disaster?

Mr. Flynn: Not necessarily. It depends on what happens to the, in this case it would be the natural gas fuel supply.

4/27/06 RT (Flynn) at 90:23-23; 91: 1-5.

Moreover, it is interesting for Mr. Sarvey, who purports to sympathize with the community in Southeast San Francisco, to extol the benefits of peaking units that emit particulates at a rate ten times higher (per megawatt-hour) than the SFERP. Exh. 15 at 3-7. Irrespective of the purported fuel diversity benefits of these units, environmental justice considerations support their replacement.

**XI. CARE's Six Assertions of Procedural Due Process Violations of Its Rights Are Without Merit.**

CARE presents what it alleges are violations of its procedural due process rights in its Opening Brief in the following summary:

Intervener CARE was not given appropriate time to cross examine witnesses, present evidence and have their objections heard while inappropriately granting the Applicant such rights in violation of their due process and equal protection rights. CARE hereby objects to these actions on the basis that these actions constitute a form of retaliation for bringing our June 21, 2003 civil rights complaint (US DOE OCRD file#03-0030HQ) against the Applicant and the CEC with the US Department of Energy (US IOE) Office of Civil Rights and Diversity for actions taken to date to site the three Williams Peakers in southeastern section of San Francisco.

CARE Opening Brief at 13.

In support of its allegations concerning alleged violations of its procedural due process rights, CARE points to a series of six disjointed events, some completely benign, which it claims in some fashion impeded its ability to participate in the AFC process<sup>24</sup>. The City reviews each of these assertions in turn and demonstrates that each and every one is unfounded, unsupported by the record, and without merit. The incidents certainly do not amount to a violation of CARE's due process rights.

CARE provides no legal analysis for its contentions; CARE appears to believe that any disagreement between a judge and a party on a procedural matter gives rise to a constitutional due process claim. This is simply not true.

The Due Process clauses of both the Fifth and Fourteenth Amendments of the United States Constitution protect against the deprivation of "life, liberty or property without the due process of law." U.S.C.A. Const. Amends. 5, 14. Procedural due process refers to the procedures, or procedural safeguards, the government must follow before depriving a person of life, liberty or property. These safeguards consist of some form of notice and hearing. *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.

Analysis of due process violations under the California State Constitution is more liberal than under the Federal Constitution: "application of the due process clauses of the California Constitution 'must be determined in the context of the individual's due process

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<sup>24</sup> CARE's Opening Brief contains little discussion regarding why the rulings by the Hearing Officer in these "incidents" is contrary to the law or an abuse of discretion. CARE implies that it is the number of adverse rulings, rather than their soundness, which creates a violation of due process rights. This is of course absurd. By this measure, a party could create due process violations by the simple artifice of attempting inappropriate introductions of evidence and cross-examination, the more the better, and thus calling upon itself a large number of adverse rulings.

liberty interest in freedom from arbitrary adjudicative procedures." *Ryan v. California Interscholastic Federation-San Diego Section et. al.* (2001) 94 Cal. App. 4<sup>th</sup> 1048, 1069; citations omitted. In assessing due process claims, four factors must be considered:

the private interest that will be affected by the individual action; the risk of an erroneous deprivation of this interest through the procedures used and the probable value, if any, of additional or substitute safeguards; the dignitary interest of informing individuals of the nature, grounds and consequences of the action and of enabling them to present their side of the story before a responsible governmental official; and the government interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 1071.

Nonetheless, "[t]he primary purpose of procedural due process is [still] to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner." Id. at 1072.

CARE presents no due process analysis. CARE's contentions fail to support a conclusion that CARE had inadequate notice or opportunity to be heard. Certainly, there is no claim that CARE had inadequate notice. The discussion below indicates that CARE was afforded an ample opportunity to be heard.

Moreover, in alleging that CARE's procedural disagreements with the Hearing Officer and the Committee amount to due process violations, CARE ignores a well established legal principle that judges (including administrative hearing officers) have the discretion and the responsibility to ensure order and an efficient use of judicial resources. See e.g. Cal. Code Civ. Proc. § 177, 1.

It apparently cannot be repeated too often for the guidance of a part of the legal profession that a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts. Within reasonable limits, it is not only the right but the duty of a trial judge to clearly bring out the facts so that the important functions of his office may be fairly and justly performed. For the same reason the trial judge is not to be unduly or unreasonably hampered in his control and conduct of the trial.

*Rosenthal v. Rosenthal* (1961) 197 Cal. App. 2<sup>nd</sup> 289, at 304-05, citing *Estate of Dupont* (1943) 60 Cal.App.2d 276, 290.

CARE's first complaint relates to a benign exchange in which the Hearing Officer reminded CARE representatives that it was late in the day and they should move along in their cross examination of Staff witness Dr. Greenberg. CARE responded to the Hearing Officer's reminder: "Mr. Boyd: I only have one—should be quick." 5//22/06 RT (Boyd) at 305: at 11-12. CARE proceeded to ask its questions and receive thoughtful answers. See 5/22 2006 RT (Greenberg) at 305-6. CARE, apparently satisfied, concluded: "Mr. Boyd: Okay, that's all I have. Thank you." 5/22/2006 (Boyd) RT at 306: 23.

In pointing out the short time remaining in the day, the Hearing Officer was pointing out the obvious and simply discharging his duty to ensure the efficient use of hearing time. It difficult to see how CARE was prejudiced by an incident in which they were allowed to ask the questions they had, and, at the end of which, they indicated that they had completed their cross examination.

The second complaint regarded an interchange between the Hearing Officer, Staff Counsel, and Intervenor Sarvey. CARE Opening Brief at 14. It is unclear how a ruling on Mr. Sarvey, who claims to be and was treated as a separate party from CARE,

infringes on CARE's due process rights<sup>25</sup>, but in any event this interchange involved a procedural matter. Intervenor Sarvey requested that witness Bateman from the Bay Area Air Quality Management District respond to his question regarding the District Hearing Board's reasoning for not accepting authority over the project's Final Determination of Compliance (FDOC). Mr. Sarvey then answered his own question that the Board ruled they didn't have jurisdiction. Staff Counsel objected to the question on the grounds of relevance. Hearing Officer Fay sustained the objection on the grounds that the decisions of the Hearing Board are a matter of public record. Mr. Sarvey tried to ask the question again. The Hearing Officer again ruled against Mr. Sarvey.

The objection was properly sustained by the Hearing Officer.<sup>26</sup> The ruling by Hearing Officer Fay was appropriate. Decisions of the Hearing Board *are* a matter of

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<sup>25</sup> During the proceedings, CARE and Mr. Sarvey insisted that they were separate parties and, notwithstanding the fact that Mr. Sarvey was the treasurer of CARE, the obvious extensive cooperation among them, and their use of each other as witnesses, they were allowed to proceed as separate parties and obtain two bites at many an apple. Given that CARE and Mr. Sarvey insisted that they are separate parties and were so treated during the proceedings, CARE cannot use perceived procedural violations against Mr. Sarvey to claim that CARE's due process rights were harmed.

<sup>26</sup> CARE's reference to the Record Transcript was from the second time that the Hearing Officer had ruled that Intervenor Sarvey's questions of witness Bateman concerning the reasoning of the Hearing Board were a matter of public record not within the purview of the witness and therefore sustained objections to the line of questioning. The following is the exchange among the Hearing Officer, Staff Counsel, and Intervenor Sarvey, which immediately preceded the exchange cited in CARE's opening brief:

Mr. Sarvey: Okay. Intervenor CARE appealed to the Bay Area Air Quality Management District Hearing Board. Can you tell us what the outcome of that was?

Mr. Ratliff: Objection on the grounds of relevance.

Hearing Officer Fay: We're not going to allow that question. Move on.

Mr. Sarvey: Not going to allow it?

Hearing Officer Fay: It's a matter of record. We're not going to use our time to go over things that are a matter of public record.

Mr. Sarvey: Okay. The FDOC was appealed to the Bay Area Air quality Management District Hearing Board. What was the reasoning for not accepting authority on the FDOC?

public record. Moreover, it was inappropriate of Mr. Sarvey to ignore Hearing Officer Fay's initial ruling to the same effect. A sound ruling by the Hearing Officer regarding the cross examination undertaken by another party does not constitute a violation of CARE's due process rights.

The third CARE complaint relates to a ruling by the Hearing Officer disallowing questioning on "testimony on alternative mitigation offered up by the Commission staff air quality witness Tuan Ngo during a conference call set up by the Commission Staff and the Applicant which they now characterize as a Settlement Conference despite the clear administrative record that the other Parties where [sic] fully made aware of what was offered up by Commission Staff on his conference call." CARE Opening Brief at 14.

The CARE allegation relates to one point during the proceeding when there were discussions among the parties concerning the possibility of various alternative mitigation stratagems for air emissions. These were discussed among the parties off the record and for the purpose of attempting to come to a settlement. CARE's contention that statements by Staff made in the context of those discussions were "testimony" is simply untrue.

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Mr. Bateman: What was the hearing boards ruling?

Mr. Sarvey: Yeah, the Hearing Board—

Mr. Bateman: Is that the question?

Mr. Sarvey: -- ruled that they didn't have jurisdiction at the CEC –

Mr. Bateman: I think you've answered the question.

Mr. Ratliff: I'm going to object on the grounds of relevance, again.

5/22/06 RT (Bateman) at 313: 8-25; 314: 1-8.

Subsequently, Intervenor Sarvey, during the evidentiary proceeding on May 31, 2006, on multiple occasions attempted to testify on the content of the discussions. The City objected on the grounds that discussions were settlement discussions. The Hearing Officer sustained the objection explaining that the ruling would promote open and free settlement discussions.<sup>27</sup> 5/31/2006 RT (Fay) at 51: 13-25; 52: 1-2.

Without regard to the Hearing Officer's ruling, Mr. Sarvey then attempted to introduce the same evidence by a revised condition AQSC-11, which he attempted to put on the record. After presenting it, he again began to testify about the settlement discussions. The Hearing Officer sustained the ongoing objection. At this point CARE pointed out that they had participated in the discussion and that "San Francisco Power had filed testimony and you accepted it. And so did the Dogpatch group--." 5/31/06 RT (Boyd) at 54: 21-23. The Potrero Boosters Neighborhood Association (PBNA) and Dogpatch Neighborhood Association (DNA) filed a letter subsequent to the discussions indicating their support for the community benefits package proposed by the City and requesting additional time until May 1, 2006 to file testimony to this effect. PBNA/DNA was granted their request for additional time but did not ultimately file testimony. San Francisco Community Power (SFCP) also filed a letter relating to the community benefits package. However, neither the PBNA/DNA or the SFCP letters have been made part of the evidentiary record.

Thus, CARE does not or purports not to understand that the discussions concerning the possibility of a settlement among the parties on additional mitigation are

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<sup>27</sup> Again, CARE attempts to rely on purported procedural improprieties affecting Mr. Sarvey to contend that CARE's due process rights were violated.

not in the evidentiary record. The Hearing Officer appropriately enforced a long standing principle of the evidence code that settlement discussions are not admissible in an evidentiary proceeding. See e.g. Evidence Code Section 1154. There was no prejudice to any party in the proceeding.

CARE's fourth complaint is that the Hearing Officer demonstrated prejudice against CARE by allowing the City an opportunity to conduct redirect examination of its air quality witness at the May 31 hearing, after the City chose not to conduct redirect on May 22. CARE Opening Brief at 15. However, when it occurred, CARE did not object to the redirect examination of the air quality witness. 5/22/06 RT at 26-8. Thus, CARE has no basis to complain now that its due process rights were violated.

Moreover, it is important to note that the May 22<sup>nd</sup> Hearing Agenda had a number of important matters which were the focus of much interaction and that the Staff's expert on the public health impacts of air emissions was not available on May 31<sup>st</sup>. Because the City knew of this constraint; because Mr. Rubenstein, who was the City's air quality witness on the 22<sup>nd</sup>, was scheduled to appear on the 31<sup>st</sup> on the City's panel of experts on the Public Health issues; and because Mr. Sarvey had indicated his intention to ask further questions of Mr. Rubenstein on the 31<sup>st</sup>, City's counsel did not pursue redirect examination of her air quality expert Mr. Rubenstein on the 22<sup>nd</sup>. She subsequently contacted the Hearing Officer concerning the procedural issue of redirect for Mr. Rubenstein and put the matter on the record at the next available opportunity the morning of the 31<sup>st</sup>.

Mr. Sarvey raised objection to the redirect; 5/31/06 RT (Sarvey) at 27: 9-10, he explained that he had wanted to ask additional question on May 22 but was not able to do so because of time constraints. Mr. Rubenstein then went on to provide testimony on redirect examination and he was subject to Mr. Sarvey's recross examination. 5/31/06 RT (Rubenstein) at 40-45. As stated above, CARE did not at that time join in Mr. Sarvey's objections nor has CARE at any time indicated how CARE was prejudiced by the redirect.

Given the circumstances of very tight schedules on the 22<sup>nd</sup> of May and the need to have a full and complete record on the testimony of Staff expert on public health Dr. Greenberg, the actions and decisions of the Hearing Officer in allowing redirect on the 31<sup>st</sup> was reasonable and within his discretion. Moreover, Mr. Sarvey was allowed to undertake extensive cross examination of the City's air quality witnesses and indicated at the conclusion that he could ask his remaining questions to the environmental justice panel -- of which the City's air quality witness Mr. Rubenstein was a member. See 5/22/06 RT (Sarvey) at 292: 4-7. Mr. Sarvey was also allowed to undertake extensive recross examination of the City's air quality witness Mr. Rubenstein and to introduce the entire Southern Waterfront EIR, notwithstanding the City's objection, since Mr. Sarvey indicated that he would have more questions if the entire document were not introduced. See 5/31/06 RT (Sarvey) at 43: 5-22. Thus, neither CARE nor Mr. Sarvey were prejudiced, and CARE certainly has no basis to argue that its due process rights were harmed.

CARE's fifth complaint alleges a double standard for the City's benefit when the City was allowed to redirect its air quality witness while CARE is denied an opportunity "to review the evidentiary codes of evidence which it argues clearly allows the January 12, 2004 transcript in the 230 KV Jefferson Martin transmission project to be admitted in evidence." CARE Opening Brief at 16. The City can find no place in the record where CARE was denied the ability to make its arguments concerning the admissibility of the CPUC Jefferson Martin proceeding transcript. The parties extensively discussed the CPUC transcript's admissibility, and the admissibility of CARE witness Homec's direct testimony (which relied substantially on the content of the transcript). 5/31/06 RT (Fay, Boyd, Solé) at 253-6. CARE witness Homec's prepared testimony, including reliance on the transcript, was admitted in its entirety into the evidentiary record as Exhibit 97 over the objection of City's counsel, and the appended CPUC Proceeding Transcript was admitted in the record for identification purposes as Exhibit 59. *Id.* CARE's allegation of unfairness or a double standard is contradicted on its face by the record of the proceeding.

CARE's sixth complaint is that the Commission Committee allegedly denied CARE and other interested members of the public phone access to the evidentiary hearing on May 1, 2006. Staff provided an adequate response to this contention which discussed the actual telephonic support facilities available on May 1, 2006, and the logistical requirements, notice and lead times needed to have a conference call net work available.<sup>28</sup> As Staff's response details, CARE provided virtually no lead time to the

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<sup>28</sup> The Commission Staff provided a detailed analysis of the occurrence in a formal filing, Commission Staff Response to CARE's Objections and Protest Regarding the May 1, 2006 Evidentiary Hearing, dated May 5, 2006, which was docketed in the administrative record of the case.

Commission Staff in its request for multiple phone lines. Moreover, CARE in fact participated in the May 1 hearing through its witness, Mr. Da Costa, who apparently monopolized the telephonic access that had been created for CARE at Mr. Boyd's request.

CARE contends that the incidents addressed above represent evidence of retaliation for bringing their June 21, 2003 civil rights complaint before the United States Department of Energy (US DOE OCRD file #03-003-HQ). CARE Opening Brief at 13. Further, CARE alleges that the acceptance of the April 17, 2006 Testimony of Lynne Brown into evidence at the May 31, 2006 evidentiary hearing without objection or cross by the City or CEC Staff, waived the rights of the City or Staff to object to these allegations going forward. Because, as is described above, each of the "incidents" set forth above constituted appropriate rulings by the Hearing Officer based on sound law and a sensible exercise of his responsibility to provide for efficiency hearings, there is no evidence whatsoever of any prejudicial conduct by the Committee. CARE carefully neglects to point out the instances in which the Hearing Officer and the Committee ruled in favor of CARE. A few examples follow:

- CARE was allowed to file contamination testimony eleven days after the original deadline. May 17, 2006 Committee Order.
- The Hearing Officer overruled the City's objection to cross-examination questions by Intervenor Sarvey that went beyond the scope of the witness's direct testimony. 4/27/06 RT at 36:25; 4/27/06 RT at 131:21; 5/22/06 RT at 247:4.
- The Hearing Officer overruled the City's objection to identify the entire Southern Waterfront SEIR as an exhibit in the SFERP proceeding. 5/31/06 RT at 43:18.
- The Hearing Officer overruled the City's objection to having Intervenor Sarvey qualified as an expert witness. 5/31/06 RT at 58:14.
- The Hearing Officer overruled the City's objection to the questioning of a City witness regarding comments submitted on the Southern Waterfront SEIR. 5/31/06 RT at 185:4.

- The Hearing Officer overruled the City's objection to the introduction of hearsay evidence by one of CARE's witnesses. 5/31/06 RT at 197:18.
- The Hearing Officer overruled the City's objection to allowing CARE to cross-examine their own witness, who had just testified on behalf of Intervenor Sarvey. 5/31/06 RT at 206:16.
- The Hearing Officer overruled the City's objection that CARE's cross-examination of their own witness went beyond the scope of the witness's direct testimony. 5/31/06 RT at 204:25.
- As noted above, the Hearing Officer overruled the City's objection to one of CARE's witnesses related to the CPUC transcript in the Jefferson Martin case. 5/31/06 RT at 255:11.

Thus, the record clearly shows that the Hearing Officer accorded the Intervenors in this case, including CARE, great deference with respect to enabling their participation. There is no evidence of prejudicial treatment.

The argument by CARE, that the lack of a challenge by the other parties to the testimony of CARE's witness Mr. Brown stating the existence of a civil rights complaint and its grounds somehow creates an admission to the allegations in the complaint, is simply absurd. The City (and Staff) could reasonably determine that the CEC hearings on the SFERP were not the appropriate forum to litigate a civil rights complaint brought before the United States Department of Energy and could rely on the testimony of their own witnesses to rebut the contentions included in Mr. Brown's testimony.

**XII. Conclusion.**

With conditions of certification, the SFERP will comply with all applicable LORS and will not result in significant impacts.

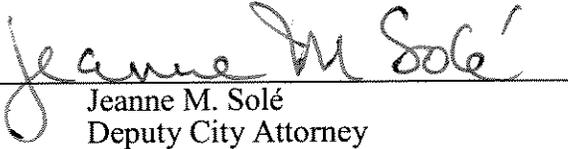
Dated: July 10, 2006

Respectfully submitted:

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