STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:

Application for Certification
for the Chula Vista Energy Upgrade Project

Docket No. 07-AFC-4

DOCKET
07-AFC-4
DATE MAR 16 2009
RECD. MAR 16 2009

ENERGY COMMISSION STAFF'S RESPONSE AND COMMENTS TO THE PRESIDING MEMBER'S PROPOSED DECISION

On October 3, 2008, the evidentiary hearing in the matter of the Chula Vista Energy Upgrade Project (CVEUP) was held in Chula Vista, California. The disputed technical areas were identified as Air Quality, Public Health, Socioeconomics, Noise and Vibration, Land Use, and Alternatives. The hearing was conducted, with witnesses from all parties testifying in their respective areas of expertise in disputed areas. The hearing concluded following a lengthy period of extensive public comment.

On January 23, 2009, the committee assigned to hear this matter filed the Presiding Member's Proposed Decision (PMPD). Among other things, the PMPD recommends denial of the CVEUP. Staff respectfully disagrees with this recommendation and certain aspects of the legal and factual analysis of the PMPD, as well as with certain proposed findings.

Staff's comments on the PMPD in the areas of Air Quality, Geology and Paleontology, and Power Plant Efficiency focus on corrections and clarifications. Staff has more extensive comments in the areas of Alternatives and Land Use based on staff's disagreements with the conclusions and findings in the PMPD. Staff understands the concerns raised in the PMPD relative to the proximity of the existing power plant or the proposed power plant to local residences. However, staff disagrees with the conclusions reached in the PMPD that the proposed project does not comply with all applicable Land Use Laws, Ordinances, Regulations, and Standards (LORS). Additionally, staff believes the findings in the Alternatives section that dismiss the sufficiency of staff's alternatives analysis misapply criteria under the California Environmental Quality Act, and are contrary to the evidence, statutory authority, caselaw, and the 2007 Integrated Energy Policy Report (IEPR).

Staff's continuing position is that, based on the evidence, the CVEUP complies with all applicable LORS and causes no significant environmental impacts with the imposition of staff's recommended conditions of certification.

DATED: March 16, 2009

Respectfully submitted,

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STAFF PMPD COMMENTS

AIR QUALITY

Please revise the PMPD text with the following revisions:

Page 123, first sentence of third paragraph:

In addition to the emission reduction mitigation measure **AQ-SC6**~~**AQ-SC7**~~ recommended by Staff and agreed to by the Applicant;...

Page 125, paragraph below AIR QUALITY Table 13:

The total incremental emissions value shown in the table and recommended in **AQ-SC6** is 10.86 tons, which is 2.11 tons greater than the Applicant's estimate of 8.75 tons. Additionally, staff has recommended the use of the current, or future as applicable, Air Resources Board Carl Moyer Program Guideline cost effectiveness cap level as the mitigation fee basis, which reduces the pollutant mitigation cost per ton and very slightly reduces the total recommended mitigation fee from the applicant's recommended level of $210,000 to a staff recommended value of $208,512. **AQ-SC6** has also been designed to allow other public agency administered emission mitigation fee programs or traditional emission reduction credits (ERCs) from the District bank to be used to meet the emission mitigation requirement of the condition.

Page 141, FINDINGS AND CONCLUSIONS, Item 3:

3. SDAPCD is a nonattainment area for both the federal and state ozone standards and the state PM10 and PM2.5 standards

Page 141, FINDINGS AND CONCLUSIONS, Item 4:

4. Potential impacts from power plant construction-related activities will be mitigated to insignificant levels with implementation of a Construction Mitigation Plan that specifies fugitive dust control, dust plume control, and offroad diesel engine emissions ~~particulate~~ reduction measures.

Page 142, FINDINGS AND CONCLUSIONS, Item 6:

6. Project operation is limited to 4,400 hours per year but is expected to be less than 1,200~~1,000~~ hours per year.

[note: staff is suggesting this revision to conform with the mitigation basis used by staff and approved by the committee in AQ-SC6; where staff revised the applicant's 1,000 hour basis to 1,200 hours, that included 1,000 hours of normal operation and 100 hours of startup and 100 hours of shutdown operation]

ALTERNATIVES

Please revise the PMPD text with the following revisions:

Page 31, 1st full paragraph, line 4 and line 6, respectively:

After "Plant would," delete "probably"

After "would," delete "likely"

The AFC states: *"Given the "no project" alternative, the existing Chula Vista Power Plant would continue to operate, using older and less efficient technology that produces much higher concentrations of air pollutants than the proposed plant."* [Exhibit 1, page 6-3]

The applicant/operator has stated for the record that the existing power plant would continue to operate if the proposed Chula Vista Energy Upgrade Project is not approved. There is nothing in the record that shows otherwise.

THE FOLLOWING STAFF COMMENTS ON THE ALTERNATIVES SECTION OF THE PMPD FOCUS ON THE GENERAL CONTENT AND CONCLUSIONS.

With respect to alternatives, CEQA requires an analysis of "a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the *significant* effects of the project ...." (Cal. Code Regs., tit. 14, § 15126.6, subd. (a), emphasis added.) Many of the concerns raised in the PMPD on the Alternatives analysis stem from what staff believes is the PMPD's incorrect conclusion in the Land Use section that the proposed project is inconsistent with LORS. Even if one assumes the inconsistency, the PMPD makes no finding that the environmental effects caused by the proposed project and site are significant. The CEQA Guidelines defines "effects" as being interchangeable with "impacts." (Cal. Code Regs., tit. 14, § 15358.) In either case, as analyzed under CEQA, "they must be related to a physical change." (*Ibid.*)

There are no findings that the proposed mitigation or conditions of certification recommended by staff are insufficient to avoid or minimize significant adverse environmental impacts in air quality, public health, traffic and transportation, or the other technical areas where the effects of physical changes were analyzed. Given sufficient mitigation of the project's potentially significant effects (those that would significantly change the physical environment if left unmitigated), the range of alternatives identified by staff is reasonable. A broader range would not have substantially added to the discussion of mitigating or avoiding *significant* environmental impacts.

The Alternatives analysis was completed based on Energy Commission staff's conclusion that the project has no significant environmental impacts: the expanded review of alternative sites by staff was prompted by public concern, not a LORS inconsistency.

Another aspect in arriving at a reasonable range of alternatives is identifying the "basic objectives of the project." (Cal. Code Regs., tit. 14, § 15126.6, subd. (a).) One of the project's basic objectives is to provide 100 megawatts of peaking capacity. The PMPD in overlooking this basic objective mistakenly considered photovoltaic (PV) generation, among other renewable resources, as an alternative that should have been included in the range of alternatives for analysis. For reasons discussed below, staff respectfully disagrees.

Page 30, 1st paragraph, starting on line 8:

> *"Mr. Powers acknowledged on cross-examination that the solar peak does not match the demand peak, but testified that storage technologies exist which could be used to manage this. The essential points in Mr. Powers' testimony about the costs and practicality of PV were uncontroverted."*

As staff has stated on the record, peaking generation projects are recognized by the Energy Commission as necessary to support the shift to large-scale renewable baseload generation (2007 IEPR). However, staff disagrees with the language in the PMPD that seems to indicate that PV could replace quick-start peaking generation. On the contrary, quick-start peaking generation facilities such as the proposed CVEUP are required to support large-scale renewable generation from sources such as "rooftop" PV. The opinion expressed in the PMPD fails to acknowledge the different, but important, role peaking facilities have in integrating renewable resources into the electricity system.

Additionally, there is insufficient evidence in the record regarding the cost or practicality of PV to justify this as a feasible alternative to peaking generation. Mr. Powers's testimony, based on broad concepts, included little detail and left more questions than answers. Unanswered questions include: the costs, availability, and practicality of energy storage technologies associated with PV; the costs and practicality of obtaining site control over the large number of residential rooftops, business and government rooftops, and parking lot space necessary to construct the required number of PV units; the feed-in tariffs associated with bringing PV power to the grid; and the relationship between solar peak and demand peak.

In looking at alternative sites or alternative technologies, staff considered both the availability of sites and the possibility of site control. The information provided by Mr. Powers was addressed in staff's filed testimony, the cross examination of Mr. Powers by both MMC Energy and Energy Commission staff counsel during the Evidentiary Hearing, and in MMC Energy's Reply Brief. Mr. Powers' testimony was in fact controverted, and the PMPD's statement should be revised to reflect this.

Moreover, under CEQA Guidelines Section 15126(f)(3), staff was not obligated to consider "an alternative whose effect cannot be reasonably ascertained and *whose implementation is remote and speculative*." [Emphasis added.] Absent much more additional information from Mr. Powers, the suggestion that rooftop PV be considered as an alternative to the project must be rejected as remote and speculative, and infeasible, given the current relationship between renewable generation and quick-start peaking generation.

Pages 30 and 31, 4th paragraph, last line continued to Page 31:

In addition to the applicant stating that the existing plant would continue to operate if the "no project" alternative were selected (Exhibit 1, page 6-3), the PMPD stated:

> *"CEQA Guidelines and Energy Commission regulations require consideration of the "no project" alternative. The "no project" alternative also provides a baseline against which the effects of the proposed project may be compared."*

Given this, staff weighed the potential benefits and impacts of the alternatives sites from the baseline of an existing, permitted 44.5 MW gas-fired power plant on the proposed project site per Cal. Code of Regs. tit. §15126.6(e)(2), (Exhibit 200, page 6-14). There is no evidence in the record that the operation of the proposed project on another site would in any way impact or replace the future operation of the existing 44.5 MW power plant. The correct "no project" baseline must include the existing 44.5 MW peaker, which will continue to operate in the event that the CVEUP is not built, using less clean and less efficient technologies.

Page 31, 2nd full paragraph, starting on line 8:

> *"Although the Applicant states in the AFC that SDG&E recently circulated a Request for Offers (RFO) indicating that additional peak electric generation capacity is needed for the vicinity (Ex. 1, p.1-1), the record contains no evidence that the Applicant has a Power Purchase Agreement with any utility."*

Given that the Legislature abolished the Energy Commission's demand conformance finding entirely in SB 110, Chapter 581, Statutes of 1999, thereby ending the state policy that new power plants must be found to be needed, the assumed significance of a Power Purchase Agreement in the PMPD is questionable, as is its connection to the RFO. This legislation was enacted under the presumption that only the power plant owners would be at financial risk from the new facilities and that the market would drive the development of power plants.

Furthermore, the record shows that the existing Chula Vista Power Plant has been consistently dispatched without a Power Purchase Agreement. Staff was aware of the lack of a Power Purchase Agreement, but instead looked to the RFO solely as evidence that SDG&E recognized the need for additional peak electric generation capacity in the vicinity. Recognizing the need for additional peak electric generation capacity outlined in the RFO and the fact that the existing Chula Vista Power Plant is currently being dispatched without a Power Purchase Agreement, it is unnecessary to focus on the lack of a Power Purchase Agreement with SDG&E.

Page 31, 2nd full paragraph, starting on line 1:

> *"Staff, in the FSA, stated that in the absence of the CVEUP, MMC Energy, Inc. or another power company would likely propose that other power plants be constructed in the project area to serve the demand that could be met with the CVEUP, and that those plants could consume more fuel and emit more air pollutants per kilowatt-hour generated than the CVEUP. This strikes us as purely*

speculative; it seems just as likely that MMC or another operator would continue to operate the existing plant and another plant would not be built instead of the CVEUP."

This statement in the PMPD that refers to staff's position in the FSA is incomplete, and mischaracterizes the issue that staff was addressing. Read in its entirety, it is clear that staff's stated position could not be considered speculative. The section of the FSA quoted in the PMPD above continued to clarify:

> *"In the near term, the more likely result is that existing plants, such as the Chula Vista Power Plant and the South Bay Power Plant, many of which produce higher level of pollutants, could operate more. The existing South Bay Power Plant is an older base-load facility that is now being run as a peaker. The technology and design of the proposed CVEUP is considerably more efficient as a peaking power facility than the South Bay Power Plant, which was designed to operate continuously as a base-load facility. The highest levels of air pollution occur during start-ups, further outlining the inefficiency of using South Bay, with its older air pollution control technology, as a peaker when the proposed project is designed as a cleaner, quick-start peaker facility."*

As described in the AFC and FSA, the LM6000 is considered to be one of the most efficient peak power generators of its size with the lowest air quality emissions. Staff's point that the PMPD overlooks in the FSA is that existing peaking power plants that are substantially less efficient, such as the existing Chula Vista Power Plant, would likely result in increased emissions and lower efficiency than would the proposed project. The primary point in staff's analysis is that the cleaner peaking power from the proposed project could *offset* peaking power from older, less efficient plants with higher emissions, such as the South Bay Power Plant.

<u>Page 31, 3rd full paragraph:</u>

> *"Nor are we convinced that the CVEUP would be a significant step toward removing the reliability-must-run (RMR) status of the South Bay Power Plant. Llena Green of CAISO, was questioned at length on this point by all parties at the evidentiary hearing. She made it clear that while the CVEUP's addition of 50 MW to the 45 MW of the existing facility would make a contribution toward removal of RMR, this contribution would be small in comparison to South Bay's 690 MW output, and that much more generation capacity would need to be developed to replace South Bay. (10/2/2008 RT 234:4; 235:2; Ex. 20; Ex. 804.) 32*
>
> *Based upon the evidence of record, we find that it cannot be concluded that the "no project" alternative would have serious, long-term adverse consequences. (See also, Ex. 200, p. 6-15.)"*

Although staff agrees that the proposed project, by itself, is unlikely to remove the RMR status from the South Bay Power Plant, the January 28, 2008 letter from the CAISO to the City of Chula Vista stated:

"Given that the Otay Mesa Energy Center is under construction, the future addition of Sunrise Powerlink would satisfy the requirements for removal of RMR designation at SBPP. ***If Sunrise is delayed or not constructed, additional new peaking generation will be required within SDG&E's service territory.*** *The amount of new capacity would be based on the CAISO's existing grid reliability standards, which are analyzed each year. Based on the current status of the previously noted projects, the RMR designation at the SBPP could be removed as early as 2010. However, delays in construction of the Sunrise Powerlink, lack of sufficient new peaking capacity, or delays in the inservice dates in implementing the new Baja Norte natural gas interconnection, would clearly delay this date. Once the RMR designation is removed, there should be no CAISO-related impediment to retiring and decommissioning SBPP."(*Exhibit 804*)* [Emphasis added]

This position by the CAISO was further clarified in the July 24, 2008 letter from the CAISO to Jane E. Luckhardt where Gary DeShazo of the CAISO stated:

*"To set the record straight, consistent with CAISO CEO Yahout Mansour's January 28, 2008 letter to Chula Vista Mayor Cheryl Cox, any new resources, with Resource Adequacy (RA) deliverable capacity, located within the San Diego local area would contribute towards the peaking resources required (including your client's Project) to meet the capacity need for San Diego local area reliability. In other words, in the event either the Otay Mesa Energy Center or Sunrise Power Link Transmission Project is delayed, the capacity of the Project would contribute to meeting San Diego's local reliability requirements provided that sufficient additional new capacity in the San Diego local area was available in order to allow for the entire SBPP to be retired." (*Exhibit 801*)*

Staff understands that while the Sunrise Powerlink Project has been approved by the California Public Utilities Commission, the potential for legal challenges could ultimately delay construction of the project. In addition, it is clear that local, distributed peaking power generation provides more stability to the electrical grid with less infrastructure requirements than large-scale, centralized peaking power generation, which is how the South Bay Power Plant has been operated (FSA, Page 6-15).

<u>Page 32, Finding 2:</u>

Staff requests that Finding 2 be deleted. The evidence demonstrates that staff considered five alternatives sites.

Staff considered not only the two original alternate sites as proposed by the applicant, but also three additional sites as identified by staff, in addition to the "no project" alternative. Under the "rule of reason," staff's discussion of alternatives would be considered adequate "if it provides sufficient information to compare the project with a reasonable choice of alternatives." (*Federation of Hillside & Canyon Associates v. City of Los Angeles* 83 Cal.App.4th 1252.) The key issue is whether the selection and discussion of alternatives fosters informed decision making and informed public participation. (*Laurel Heights Improvement Association of San Francisco v. The Regents of the University of California* (1988) 47 Cal.3d 376.) The evidentiary record reflects that the alternatives discussed by

staff did indeed foster informed public participation, as well as informed decision making, as evidenced by the extensive public comments received.

The PMPD emphasizes that several of the alternative sites were rejected "in the initial screening," asserting that the elimination of those sites resulted in the analysis of a single site. This is incorrect. The screening of the five potential sites was itself a part of the analysis. The fact that several of the sites were ultimately found unsuitable or inferior to the project site by staff was based on the expanded project objectives (as applied by staff), as well as the specific situations presented by each alternate site. "[W]hat is reasonable in one case may be unreasonable in another. It is necessary to examine the particular situation presented to determine whether the availability of other feasible sites must be considered..." *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal.App.3d 1167, at p. 1179. Furthermore, a discussion of site alternatives is not even required if the commission finds that the project has a strong relationship to the existing industrial site and that it is therefore reasonable not to analyze alternative sites for the project. (Public Resources Code Section 25540.6(b))

The PMPD expresses dissatisfaction with the staff's conclusion that no other site was superior to the proposed location. However, CEQA does not mandate the choice of the environmentally "best" feasible alternative if, through the imposition of appropriate levels of mitigation measures, a project's impacts can be reduced to an acceptable level. (*Laurel Hills Homeowners Association v. City Council of City of Los Angeles* (1978) 83 Cal.App.3d, 515.) As demonstrated by the evidentiary record, there are no unmitigated significant adverse environmental impacts from the proposed project. Thus, staff's expanded alternatives analysis was sufficient to comply with our CEQA equivalent process.

Page 32, Finding 4:

Staff requests that the reference to LORS consistency in Finding 4 be deleted. Please see discussion in the Land Use section below.

Page 32, Finding 11:

Staff requests that Finding 11 be deleted as there is nothing in the evidentiary record that would support a finding that rooftop solar PV is a feasible alternative to a peaking power facility. As discussed above, peaking generation projects are recognized by the Energy Commission as necessary to support the shift to large-scale renewable generation. A finding that would indicate that PV could replace quick-start peaking generation is contrary to the evidence. Quick-start peaking generation facilities such as the proposed CVEUP are *required* to support large-scale renewable generation from sources such as PV. A finding that rooftop PV is a feasible alternative to peaking generation is incorrect and is not supported by the record.

Page 33, Findings 16, 17, and 18:

Staff requests that Findings 16, 17, and 18 be deleted. The findings regarding reliability, need, and the lack of a power purchase agreement are irrelevant to an analysis of alternatives under CEQA, where they are not among the basic objectives of the proposed project and the focus is on minimizing or avoiding significant adverse impacts to the

environment, not on system reliability or the need for new generation. As stated in the CEQA Guidelines, "The purpose of describing and analyzing a no project alternative is to allow decision makers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project." (Cal. Code Regs., tit. 14, § 15126.6, subd.(e)(1).) Under CEQA, "impacts" must be related to physical changes to the environment. (Cal. Code Regs., tit. 14, § 15358, subd. (b)). Those physical changes with and without the proposed project should be the focus of findings regarding the "no project" analysis. As for the topic of "need," in 1999, through the enactment of SB 110, Chapter 581, the Legislature eliminated the requirement that the Energy Commission conduct a needs analysis on new energy generation projects. The evidence does demonstrate, however, that both San Diego Gas and Electric and the CAISO have determined that additional electric generation is necessary in the area [Exhibits 1, 17, 20, and 801]. If the PMPD is to make a finding regarding "need," it should account for the contribution of the proposed project in helping to meet the requirements for local area reliability. In light of the projected need, based on the evidentiary record the "no project" alternative cannot be found to have no adverse impact on local system reliability.

GEOLOGY AND PALEONTOLOGY

Please revise the PMPD text with the following revisions:

Page 255, 1st paragraph, line 8:

After "include," delete "mineral,"

Page 257, first paragraph under "a. Faulting and Seismicity", line 11:

Replace first word "distant" with "distance".

Page 258, second paragraph, line 1:

Replace "Subsidence or settlement may occur" with "Local subsidence (settlement) may occur".

Page 258, third paragraph, line 1:

Replace "Subsidence" with "Regional subsidence".

Page 258, last paragraph, line 2:

After "water line breaks, etc., causes" insert the word "certain".

LAND USE

Page 272, Land Use Table 3 (Zoning Designations and Allowable Activities Within a 1-mile Radius of the Project Site):

Although the Applicant's AFC Table 5.6-2 lists the I-P (General Industrial) zoning designation as occurring within a 1-mile radius of the site, this designation does not occur on AFC Figure 5.6-3 (Zoning Designations Within One Mile of the Project Site). Staff used the data provided on Figure 5.6-3 rather than Table 5.6-2, because Figure 5.6-3 is based on GIS data provided by the City of Chula Vista, whereas the data in Table 5.6-2 does not have a reference. Please delete reference to the I-P zone from PMPD Land Use Table 3, as the I-P zone designation does not occur within a one-mile radius of the site.

Page 277, first paragraph, first sentence:

Delete the following sentence:

"*We note an apparent inconsistency between Staff's and Applicant's zoning tables; Staff's Table 3, Ex. 200 p. 4.5-7, does not include the General Industrial zone within a one-mile radius of the site whereas Applicant's Table 5.6-2, Ex. 1, p. 5.6-11, does include that designation.*"

Staff's Table 3, Ex. 200 p. 4.5-7 is accurate. The I-P (General Industrial) Zone designation does not occur within a one-mile radius of the project site.

Pages 279 through 285, Item ii (Conflicts with General Plan):

Staff respectfully disagrees that the proposed project is in conflict with General Plan Policies LUT 45.6 and E.6.4. Although General Plan policies are important, those policies do not serve as strict prohibitions. Indeed, a given project need not be in perfect conformity with each and every general plan policy. (*Sequoia Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719.) Zoning is the legal method by which local jurisdictions can implement development in accordance with the policies of the general plan. As stated on page 165 of the State of California General Plan Guidelines, *"[w]hen a new element or major revision to a general plan is adopted, the zoning scheme should be thoroughly reviewed for consistency. It must be amended if necessary to ensure that it is adequate to carry out the new element or revisions."* Here, the City has not found it necessary to amend their zoning code, which remains the governing factor in determining consistency with all applicable LORS.

As stated in the FSA and in oral testimony by staff, when a jurisdictional authority, such as the City of Chula Vista, establishes zoning designations to implement its general plan, it is that agency's responsibility to ensure the compatibility of adjacent zoning and permitted uses and incorporate conditions and restrictions that ensure those uses will not conflict ("minimum of detriment") with surrounding properties. It is reasonable to assume that already permitted industrial uses, sited in the Limited Industrial zone within an Industrial Corridor, are compatible with surrounding uses and zoning districts and that similar projects, such as the proposed CVEUP, proposed in the same Limited Industrial zone, are also compatible so long as they do not introduce significant adverse environmental impacts to the area.

Pages 285 through 287, Item b. Zoning, i. Precise Plan:

The Energy Commission must make findings as to whether a proposed project complies with applicable LORS, but this directive does not extend to findings of whether a local jurisdiction itself complied with applicable LORS with respect to its past actions. (Pub. Resources Code § 25523, subd. (d).) The PMPD, in effect, finds that the City has not complied with its own zoning ordinance by not having required a precise plan for the existing power plant at the site zoned 'IL-P, Limited Industrial Precise Plan." The City instead issued a Special Use Permit. The PMPD concludes, however: "In view of the lack of a Precise Plan [for the CVEUP], we find a LORS violation which must be corrected before certification can be further considered." (PMPD, p. 287.) Even if the applicable ordinance requires a "precise plan," the PMPD need not find a nonconformance, given that the applicant and the staff have provided the equivalent of a "precise plan" in the AFC and the FSA. Both documents together provide information constituting, in fact, a "precise plan" for the proposed site. The evidence thus supports a finding that there is a "precise plan" such as to meet the requirement of the zoning designation, assuming there is such a requirement.

The City used its discretion not to require a precise plan for the existing plant. As noted by staff in the Final Staff Assessment, the proposed CVEUP site does not include a Precise Plan Modifier. This information is based on discussions with City of Chula Vista senior planning staff in January of 2008, as referenced in the Record of Conversation in the **Land Use** section of the FSA. Based on this conversation, the city's Principal Planner indicated that the site does not have a "modifier" on it, because it is currently subject to a Special Use Permit (i.e., the SUP for the existing on-site power plant).

Although the AFC Land Use section indicates that the site is under a Precise Plan Modifier, the city's Principal Planner indicated that the Applicant is incorrect in their interpretation of the site's zoning, and has misinterpreted the SUP as a "modifier." (Ex 200, ch. 4.5, p. 10) Based on the City's application of its own zoning ordinance, there is no LORS violation for the site, because the city issued an SUP for the existing power plant in 2000. Therefore, discussion of a Precise Plan Modifier is not relevant for the project site.

Page 289 through 294, Item iii) Special Use Permit/Conditional Use Permit, a) Electrical Generating Facilities as a Conditional Use:

Section 1714.5 of the Commission's regulations directs staff to give "due deference" to agency comments on the project's conformance with applicable laws, ordinances, and standards under the agency's jurisdiction. (Cal. Code Regs., tit. 20, § 1714.5, subd. (b).) Considering staff's independent assessment, the Commission should also give due deference to a local agency's interpretation of its zoning ordinance as it applies to the proposed site. The PMPD disregards this directive.

Staff respectfully disagrees with the PMPD's claim that because the City has designated another zone (General Industrial) as explicitly allowing electrical generating plants, the zone for the existing site does not allow such development. The PMPD unilaterally rejects the interpretation that "unclassified use" allowed by the zoning at the proposed site provides the City discretion to conditionally approve an electrical generating facility at that site. As the City Manager, Scott Tulloch explained, the unclassified use designation "gives

the city the flexibility where they haven't either prohibited or specifically allowed a use." (RT 336, lns. 4-6) That is, the zoning for the site has neither prohibited nor allowed an electrical generating plant as an unclassified use at the site. The PMPD's interpretation of unclassified uses as disallowing the proposed project at the proposed site is inconsistent with the discretion that the City has in fact exercised in issuing use permits for unclassified uses (which are set forth in Chapter 19.54 of the City's Municipal Code).

Much of the discussion in the PMPD regarding the Conditional Use Permit involves whether the facility is considered an "unclassified use" under the City of Chula Vista's Municipal Code Section 19.44.040 (J). Applicant, Staff, and most importantly the City of Chula Vista all agree that a peaking power plant would be considered an "unclassified use" within the Limited Industrial Zone designation. However, the opinion in the PMPD concludes that because peaking generation is explicitly allowed in the General Industrial designation elsewhere, it cannot be an unclassified use within any other zoning designation. No authority is cited in the PMPD in support of this opinion. This exceptionally narrow interpretation of what constitutes an "unclassified use" is not supported by the record and is contrary to the fact that the City itself granted a special use permit to the existing peaking plant as an unclassified use. The PMPD's limited interpretation is at odds with the City's own action in 2000 under the same zoning ordinance that the PMPD is interpreting and fails to give due deference to the City's own interpretation of its regulations.

Moreover, in 2001, the Commission itself approved the RAMCO Chula Vista Emergency Peaker (01-EP-3) at the same site.[1] The PMPD overlooks the Energy Commission's own prior action in that matter. The applicant is now seeking a new permit to replace the existing facility and continue in a more efficient manner the conditional use that was previously permitted by the City. The Commission should defer to the City's interpretation of "unclassified use" for the site to allow for the proposed upgrade.

The opinion in the PMPD discounts the fact that the City itself interprets "unclassified uses" (in accordance with Municipal Code section 19.54.010) as including "public and quasi-public uses," which, in turn, the City has used to conditionally permit the existing electric generating facility. The PMPD should give deference to the City's interpretation that, *with respect to the zoning for the proposed site*, the City has neither prohibited nor specifically allowed the use for an electrical generating facility as a "public or quasi-public" use. There is nothing in the record to discredit the City's plausible interpretation. And nothing in the record compels the PMPD's overly restrictive reasoning. Rather than take issue with the City's demonstrated way of interpreting "unclassified uses," the PMPD and the Commission, in light of what has been permitted at the proposed site under the existing zoning ordinance and in the absence of evidence discrediting the City's view, should defer to the City's interpretation of its discretionary powers under its zoning ordinance, especially where it avoids a nonconformity. The fact that the Commission itself permitted the RAMCO Chula Vista Emergency Peaker (01-EP-3) at the same location further supports the City's view as a reasonable interpretation of its zoning ordinance.

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[1] In the RAMCO Chula Vista decision, the Energy Commission approved construction of a 66 megawatt (MW) peaking power plant in *addition* to the 44.5 MW Chula Vista Power Plant approved by the City of Chula Vista, allowing for a total of over 110 MW on the site of the proposed 100 MW CVEUP.

Finally, the staff, the applicant, and the City of Chula Vista all agree that the proposed project is a pre-existing permitted use that will "continue to exist indefinitely." (*Elysium Inst., Inc. v. County of Los Angeles* (2d Dist. 1991) 232 Cal.App.3d 408, 442 (conc. & dis. opn. of Johnson, J.).) As such, it is not considered a nonconforming use. No one has argued that the current facility must cease operating as a nonconforming use under the new General Plan. It may continue running as is. Should the proposed project be permitted at the same site, it also should not be considered a nonconforming use, but one that falls within the discretion of the permitting entity, here the Energy Commission, subject to appropriate conditions, such as those recommended by staff to prevent significant adverse impacts.

Page 294, Item 5. Compatibility with Existing and Planned Land Uses, last paragraph:

The PMPD notes that staff's testimony provides a "comprehensive description of the existing uses in the vicinity, and mentions only the Otay substation, auto salvage yards, storage, warehousing, and commercial/light industrial businesses." Despite this comprehensive description, the PMPD states that the description "increases our concern over the proposed siting, and also tends to corroborate our finding that the zoning is inconsistent with the proposed power plant use." This proposed finding would appear to be in direct conflict with the evidence.

Staff's description of the surrounding land uses paints a picture of the characteristics of the pattern of development in the project area, and the permitted land uses in the area. The existing pattern of development and existing uses in the area should not be ignored when considering the siting of new development. The fact that some may perceive inconsistencies between applicable adopted LORS and the actual existing physical conditions in the area does not make the existing conditions unimportant. Local agencies, in planning for development, must consider the uses that exist on their lands and attempt to develop plans that are consistent with the pattern of development within their respective jurisdiction.

Page 294, Item 5. Compatibility with Existing and Planned Land Uses, last paragraph, 2nd sentence:

Please delete the word "only" from this sentence as this is an inaccurate statement about the description of uses in the vicinity. Staff provides a detailed description of on-site and surrounding land uses in the Preliminary and Final Staff Assessments on pages 4.5-3 through 4.5-4 under the section entitled **Setting.**

Page 295, FINDINGS OF FACT, Item 5:

Delete Finding of Fact No. 5. As discussed above, a Precise Plan is not necessary because the project site is subject to a Special Use Permit.

Page 296, FINDING OF FACT, Item 9:

Finding of Fact No. 9 states, "The City of Chula Vista included the Unclassified category in the zoning ordinance to cover those uses not specifically permitted or prohibited in the

zoning ordinance." The PMPD acknowledges that the City of Chula Vista staff testified that an "unclassified use" "gives the City flexibility where they haven't either prohibited or specifically allowed a use." (PMPD, p. 292.) The City demonstrated such flexibility in 2000 when it granted a special use permit for the existing power plant as an "unclassified use" in the Limited Industrial zone. Accordingly, the finding should be clarified to read, "The City of Chula Vista included the Unclassified category in the zoning ordinance to cover those uses not specifically permitted or prohibited *in a particular zone, such as the zone for the proposed site.*"

POWER PLANT EFFICIENCY

Please revise the PMPD text with the following revisions:

PMPD, page 79, third full paragraph, line 2: replace "40.3" with "40.5"

CONCLUSION

The proposed CVEUP is consistent with all local Laws, Ordinances, Regulations, and Standards. The evidence demonstrates that the proposed facility would be considered an "unclassified use" within the City of Chula Vista's Limited Industrial zone, and would be eligible for a Conditional Use Permit under the City's zoning ordinance. The Commission should give due deference to the City of Chula Vista in their determination that the project is consistent with LORS.

Furthermore, staff's Alternatives analysis demonstrated that there are no feasible alternatives to the proposed project. The suggestion that "rooftop" solar PV is a viable alternative to peaking generation is incorrect, as solar PV cannot replace quick-start peaking generation. On the contrary, quick-start peaking generation facilities such as the proposed CVEUP are *required* to support large-scale renewable baseload generation from sources such as "rooftop" PV. The Committee should acknowledge this basic difference between these generation technologies and their respective purposes.

The proposed project will have no significant environmental impact. Based on evidentiary record, the Committee should recommend approval of the project as proposed, subject to the Conditions of Certification identified for each technical area.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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Application for Certification For the *CHULA VISTA ENERGY UPGRADE PROJECT*

Docket No. 07-AFC-4

PROOF OF SERVICE
(Revised: 2/10/09)

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DECLARATION OF SERVICE

I, Janet Preis, declare that on March 16, 2009, I served and filed copies of the attached Energy Commission Staff's Response and Comments to the Presiding Member's Proposed Decision,. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[www.energy.ca.gov/sitingcases/chulavista]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

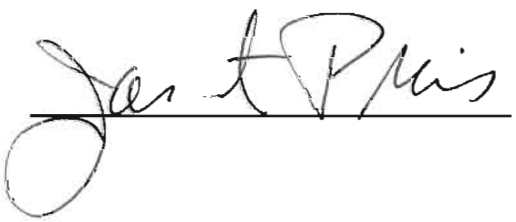
FOR SERVICE TO ALL OTHER PARTIES:

___**x**__sent electronically to all email addresses on the Proof of Service list;

___**x**__by personal delivery or by depositing in the United States mail at Sacramento with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

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