

EVIDENTIARY HEARING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for)
Certification for the) Docket No. 99-AFC-4
MOSS LANDING POWER PLANT)
PROJECT)
_____)

ASSEMBLY ROOM
POWER PLANT
HIGHWAY 1 and DOLAN ROAD
MOSS LANDING, CALIFORNIA

TUESDAY, JUNE 20, 2000

9:00 A.M.

Reported by:
Debi Baker
Contract No. 170-99-001

COMMITTEE MEMBERS PRESENT

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Michal C. Moore, Associate Member

STAFF PRESENT

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1 P R O C E E D I N G S

2 9:05 a.m.

3 PRESIDING MEMBER KEESE: Good morning.

4 I'm Bill Keese, Chairman of the Energy Commission
5 and Chairman of this Siting Committee. On the
6 right of our table is Michal Moore, fellow
7 Commissioner, and the Second Member of this Siting
8 Committee. The hearing formally will be conducted
9 by Gary Fay, our Hearing Officer.

10 This is a continuation of the hearings
11 on the Moss Landing Power Plant.

12 At this time I'd like the participants
13 to introduce their grouping. On behalf of the
14 applicant, please.

15 MR. ELLISON: Thank you, Chairman Keese.
16 My name is Chris Ellison from the lawfirm of
17 Ellison and Schneider, representing Duke Energy in
18 this proceeding.

19 MR. MAXIM: Gregory Maxim, also from
20 Ellison and Schneider, representing Duke, as well.

21 MR. SEEDALL: I'm Mark Seedall, Duke's
22 Director of Modernization of the Moss Landing
23 Project.

24 PRESIDING MEMBER KEESE: Thank you. On
25 behalf of staff.

1 MR. OGATA: Thank you, good morning,
2 Commissioners. My name is Jeff Ogata, I'm Staff
3 Counsel for the Energy Commission.

4 MR. BUELL: Good morning, I'm Rick
5 Buell, the Acting Project Manager.

6 MR. ANDERSON: I'm Dick Anderson, the
7 Staff Biologist.

8 MR. O'HAGAN: I'm Joe O'Hagan, Staff
9 Specialist on Water Resources.

10 PRESIDING MEMBER KEESE: Thank you. Do
11 we have any intervenors here? Would you like to
12 introduce yourself for the record, please.

13 MR. TEXIER: Good morning, Rich Texier
14 with CURE.

15 PRESIDING MEMBER KEESE: Any other
16 intervenors? Do we have any public agencies who
17 are going to participate, and would you identify
18 yourself for the record, please?

19 MR. BOWEN: Yes, good morning. Michael
20 Bowen, California Coastal Commission.

21 MR. MAIN: Yes, Jeff Main, representing
22 Monterey County Planning and Building Inspection
23 Department.

24 MR. CARNEY: I'm Bud Carney, I'm the
25 Consultant Planner for Monterey County Planning

1 and Building.

2 MS. FINN: Michele Finn, Assistant
3 Manager, Monterey Bay National Marine Sanctuary.

4 DR. RAIMONDI: Peter Raimondi
5 representing the Regional Water Quality Board.

6 PRESIDING MEMBER KEESE: Thank you.

7 MR. GILWORTH: Is there still time to
8 intervene?

9 PRESIDING MEMBER KEESE: No, there isn't
10 time to intervene.

11 MR. GILWORTH: Are you going to be
12 hearing from other --

13 PRESIDING MEMBER KEESE: We will be
14 hearing
15 from -- you're just about five seconds ahead of me
16 here.

17 We're now on the record. We will be
18 allowing the public to comment, and that would
19 include any organizations you represent here.

20 What we're going to do here, we have two
21 documents that have been submitted recently,
22 errata. And the parties, the applicant and the
23 staff would like to spend a few minutes, they
24 indicated to us about 45, in a public workshop
25 working out details of the language in those

1 documents.

2 So, what we're going to do momentarily
3 is take a break of about 45 minutes and allow that
4 workshop to take place in here. The Commissioners
5 will be leaving during this process.

6 If there are members of the public in a
7 representative capacity who, for one reason or
8 another, have a time limitation, you're welcome to
9 make a statement at this time. We would welcome
10 you also staying for our hearing, and commenting
11 at the appropriate time, then, also. But if you
12 have a time constraint and have to make a
13 statement now, we will receive it before we take
14 our 45-minute break for a workshop.

15 Are there any members of the public in
16 that position?

17 All right, Mr. Fay, we have three who
18 are -- four -- one, two, three --

19 AUDIENCE SPEAKER: Just a question.
20 There's no agenda, so how long is this going to
21 go?

22 PRESIDING MEMBER KEESE: Mr. Fay is
23 going to give a brief -- we're going to allow the
24 public testimony after Mr. Fay gives a brief
25 explanation of what we're going to be doing today.

1 Mr. Fay.

2 HEARING OFFICER FAY: Good morning. The
3 agenda is as per the public notice. It was mailed
4 out on this. We will be handling substantive
5 areas in this order: first, biological resources,
6 then soil and water resources, and then project
7 alternatives.

8 But, as the Chairman indicated, I'd like
9 to give a few introductory remarks about the way
10 our process works, and then take comments from any
11 of you who do need to leave.

12 You're all welcome to stay for the
13 workshop. It's a public workshop, there's nothing
14 secret about it at all. It's just that the
15 Commissioners will retire so they can make phone
16 calls that they need to make, but also so that
17 they're not there in the parties' way while
18 they're sort of hammering out the details of
19 language.

20 I understand there's substantive
21 agreement on these changes, but they just need to
22 be sure that the language that the staff had, and
23 the language that the applicant had can work
24 together in some agreed form, and they can submit
25 that to the Committee.

1 The Energy Commission process is at
2 least a one-year long process. That began with
3 the applicant filing an application for
4 certification which then has to be reviewed by the
5 staff, and at some point be determined by the
6 Commission to have been complete and adequately
7 filed.

8 This happened quite some time ago, and
9 since the time that it was accepted as complete,
10 the Commission Staff and the applicant have been
11 working in a series of workshops and having
12 exchange of questions, really, data requests,
13 where the staff will ask the applicant additional
14 information that they do not feel was completely
15 covered in the application for certification.

16 And the applicant then responds and they
17 have workshops about these questions. And
18 eventually the staff produces its preliminary
19 assessment. That has been published and there
20 have been workshops on that.

21 Then the staff issued its final
22 assessment, and that has come out in stages,
23 subject-by-subject. And the third part of the
24 final staff assessment, or FSA as we call it, was
25 issued, I believe, June 8th, and covers the

1 subjects that we're addressing today, biological
2 resources, soil and water resources and
3 alternatives.

4 After today -- and the point of today's
5 hearing is to take formal evidence on these
6 subjects -- after today the parties will submit
7 briefs arguing their point of view on the evidence
8 that's already been submitted in the case. And
9 the Committee will begin drafting its proposed
10 decision, which will come out sometime in the
11 first half of August, I believe.

12 Following publication of that proposed
13 decision, the parties will have a full 30 days to
14 comment on that proposed decision.

15 So, you may comment today, you may
16 submit your comments in writing to the Energy
17 Commission. You may comment on the proposed
18 decision once it comes out.

19 And after that, the Committee will
20 probably issue an errata revision to the proposed
21 decision, which you can see 15 days before the
22 full Commission reacts to the power plant
23 application.

24 And when the full Commission has its
25 hearing to consider adopting what the Committee

1 offers, you can come at that time and address the
2 full Commission. Or submit comments through the
3 Public Adviser.

4 I just noticed that the Public Adviser
5 is here, Roberta Mendonca. I think she just
6 stepped outside. But, she's a petite brunette,
7 and she's been very busy because we have so many
8 power plants going on. I think she just ran down
9 from Metcalf. But if you do need to communicate
10 with the Commission and want to better understand
11 our process, she's the best one to communicate
12 with.

13 Before I take comments from anybody I'll
14 just ask if there's any preliminary remarks from
15 the parties? Mr. Ellison?

16 MR. ELLISON: Just a couple preliminary
17 things in the same vein as your comments, Mr. Fay.

18 The applicant received and the Energy
19 Commission received a letter dated June 16th to
20 Roberta Mendonca, the Public Adviser, from the
21 Center for Marine Conservation, signed by Kaitilin
22 Gaffney, expressing concern about the
23 opportunities for public comment and questioning
24 when the equivalent of the opportunity to comment
25 on a draft EIR would take place in this

1 proceeding.

2 The applicant has submitted a letter to
3 Ms. Gaffney describing some of the public outreach
4 efforts and mitigation measures that have been
5 involved in this process. And I would like to
6 distribute that letter to those who do not have
7 it.

8 I also want to respond directly to the
9 question about how this process compares to the
10 traditional CEQA EIR process, and when the
11 public's equivalent opportunity to comment on what
12 would be the equivalent of a draft EIR would be.

13 The Energy Commission process provides
14 more opportunity for public comment than would be
15 the case in a traditional CEQA process. What
16 you're seeing today is the process of gathering
17 information, which will then be used to prepare
18 what is the equivalent of the draft EIR.

19 That document is the Presiding Member's
20 Proposed Decision, is the document that would be
21 the analogous document to a draft EIR. As Mr. Fay
22 just described, that document will be released
23 sometime in August. And there will be a 30-day
24 comment period during which time any member of the
25 public can submit comments to the Commission on

1 that Presiding Member's Proposed Decision. You do
2 not need to be an intervenor to do that.

3 So, the direct answer to the question
4 posed in this letter of when that opportunity
5 would be, would be several weeks from now during
6 August, during the 30-day comment period.

7 I would also want to point out that the
8 Regional Water Board is in the process of
9 reviewing the project for the purposes of
10 determining compliance with the Clean Water Act,
11 and for the issuance of a new NPDES permit; and
12 there remains a future opportunity to comment to
13 the Regional Water Board on the draft NPDES permit
14 that's out there.

15 So, we'd be happy to meet with any
16 members of the public or any organization that has
17 any questions or concerns about this project. We
18 welcome that opportunity. We look forward to your
19 participation today.

20 But I do want to make clear to everyone
21 that this is not the last opportunity to present
22 comments, nor is this the equivalent of the CEQA
23 draft EIR comment opportunity.

24 We do have a couple of housekeeping
25 matters related to exhibits, but I think I'll

1 defer those until we return.

2 HEARING OFFICER FAY: Thank you.

3 Anything from the staff?

4 MR. OGATA: No, we have nothing to add.

5 HEARING OFFICER FAY: Okay. At this
6 time, in deference to people who may have to leave
7 early, before we go into the workshop format I'd
8 just like to take comments from the public, people
9 who have indicated they'd like to speak.

10 And I see that the staff has both a
11 recording mike and a public address system mike
12 here at this corner, so if you'd please come up to
13 this corner. Either scoot up a chair, or stand,
14 whichever you're more comfortable with. If the
15 folks right there could make room for people to
16 come up and speak.

17 We'd ask you to please state your name
18 for the record, and then make your comment.

19 MS. GAFFNEY: Good morning, my name is
20 Kaitilin Gaffney and I'm speaking on behalf of the
21 Center for Marine Conservation.

22 And I want to start by thanking the
23 previous two speakers for explaining the process a
24 little better. I think that assuages some of my
25 concerns, and I apologize for the note of panic in

1 my letter and email of last week.

2 I have been trying to follow this
3 process for the last several months. We're an
4 organization that is focused on marine
5 conservation issues, so specifically interested in
6 the water quality and marine biology impacts.

7 And when those sections became available
8 on June 9th, dated June 8th, but I got the web
9 notice on June 9th, I downloaded those materials,
10 took them home, reviewed them, was out of town for
11 a few days and found that I had missed the public
12 workshop that happened essentially two business
13 days after release of the document.

14 So, I became very concerned that the
15 public workshop really wasn't an opportunity for
16 public participation because of that compressed
17 timeframe.

18 I do feel somewhat better hearing that
19 there are going to be numerous opportunities for
20 additional public participation in the future. I
21 guess I still have some concern that we are moving
22 forward in developing, for example, a mitigation
23 package without an opportunity for public input
24 into those early stages.

25 And that we will end up further down the

1 line, it will be a disturbance to the process to
2 have the public comment on an input after the
3 package has essentially already been developed.
4 And I think it would be more useful to have a
5 truly public process earlier on.

6 With that said, I do appreciate that
7 there will be further opportunities for public
8 comment.

9 I wanted to raise a couple of
10 substantive issues also. Unfortunately, I have
11 not had a chance to read over the errata. I just
12 got it last night. It was faxed to my office at
13 6:00 last evening. So I haven't had a chance to
14 review it. So these comments are based on the
15 earlier form.

16 And they go to two things. One is
17 discussion of avoidance of significant impacts.
18 There is some discussion of best technology
19 available; it was in the final staff assessment
20 part three. It doesn't appear as if those
21 technologies are going to be applied, or at least
22 are being recommended to be applied to this
23 project. And yet there was not a discussion as to
24 why they were not being applied.

25 I believe CEQA has a preference for

1 avoiding impacts as opposed to just compensating
2 through payment of funds. So, I'd like to see
3 more discussion of why the BTA's are not being
4 applied.

5 And then the second point I wanted to
6 make has to do with mitigation. It appears as if
7 at the public workshop that was held on the 13th a
8 mitigation package was discussed by the agencies
9 present.

10 I'm concerned about that package. And
11 the reason I'm concerned is I've heard that a
12 figure has been adopted, and yet I have not seen
13 any real substantive reasoning behind that figure.

14 And my concern is this: If we are
15 making the assumption that we can mitigate the
16 loss of productivity caused by the intake for the
17 once-through cooling system here by restoring
18 wetlands, we need to be sure that we have -- if we
19 are going to be using compensation instead of
20 avoidance, we need to be sure that we have
21 sufficient compensation to actually replace that
22 productivity.

23 So, it's one thing to throw out a
24 number. And I know there has been reasoning
25 that's gone into that number, but I am not

1 convinced that we will actually be able to
2 mitigate the loss of productivity with the amount
3 of funding that has been agreed upon.

4 And I'm not saying we can't, what I'm
5 saying is that I haven't seen the reasoning that
6 will convince me or will convince other members of
7 the public that we will actually be able to
8 mitigate the significant adverse impacts
9 associated with this project.

10 So, I would suggest that the final staff
11 assessment perhaps needs a little more work
12 explaining that to the public, and maybe some of
13 that is in the errata, and I will be more
14 convinced once I've had a chance to read it.

15 But I think we need to make the
16 connection and have the reasoning provided in the
17 document so the public can comment on it.

18 Thank you.

19 PRESIDING MEMBER KEESE: Thank you.

20 HEARING OFFICER FAY: Thank you, Ms.
21 Gaffney. And what I'd like the parties to do is
22 please take note of the concerns and questions
23 that are being asked. And while we won't address
24 them right now, we'd like to get all public
25 comment on the record.

1 We do expect that the parties will
2 address them during the hearing. And if you
3 cannot answer the questions then make it
4 explicitly clear why you're not able to.

5 The transcript, I believe, will be
6 available on the web in a couple weeks. And so if
7 somebody does have to leave, it's our hope that
8 their question will be answered later today and
9 they can see that answer in that published
10 transcript.

11 Anybody else who would like to make a
12 comment? Yes, sir.

13 MR. SHIMEK: I want to echo Kaitilin's
14 approval of being able to sit down in this
15 process, this is great.

16 PRESIDING MEMBER KEESE: Your name?

17 HEARING OFFICER FAY: Could we get --

18 MR. SHIMEK: Yes, my name is Steve
19 Shimek, S-h-i-m-e-k, for the recorder. I am
20 Executive Director of a nonprofit organization
21 called The Otter Project. The Otter Project is a
22 research focused sea otter organization, and so we
23 basically fund and support research.

24 What I want to first of all say is that
25 generally in concept I'm supportive of this

1 project, so I am not a person that's here to try
2 and throw logs in front of the wheels of this
3 project and disagree really in any way.

4 What I also am, though, is I'm kind of a
5 stickler for process. And I think we are
6 following process here. And I have been reassured
7 by some of the things that you've said, as far as
8 what this process is.

9 The biological resources report is the
10 important, you know, chunk to me. So, in other
11 words, when Duke responded that boy, there's been
12 all this public process, none of that really
13 matters to me as a biologist because, you know,
14 coming to an open house and being able to see
15 models and plans are not as important as being
16 able to look at the biological resources report,
17 read it, analyze it, and try and see what the
18 impacts will be.

19 And so that's really important that
20 there be adequate time to look at that. And I'm
21 starting to be more and more assured that there
22 will be time.

23 There are some red flags, though. And I
24 want to also share some of the burden here. In
25 other words, it's my job to keep up with some of

1 these things that are going on. And sometimes I
2 don't because I'm busy. Okay, so part of this
3 burden is on me to better keep up here.

4 But when I looked at the biological
5 resources report there were some red flags. One
6 of the things says that sea otter counts by
7 California Department -- I'm reading from page
8 8 -- sea otter counts by California Fish and Game
9 and U.S. Fish and Wildlife Service indicate that
10 observed numbers of sea otters have shown an
11 increase in trend from the mid '80s to '90s.
12 Declines in the sea otter population in the
13 southern part of its range do not appear to be
14 occurring in the Capitola/Seaside area.

15 That's not accurate. And that's off-
16 base. And there's also new information that needs
17 to be looked at.

18 We've got serious -- for a four-year
19 period there were serious declines in this part of
20 the range. And in Monterey and in this particular
21 piece of the range. So, we should not try and
22 just gloss over the sea otters saying oh, it's not
23 a problem because it's decreasing everywhere else
24 and it's not here, so everything's okay. That's
25 not true.

1 We also do, as I said, have some new
2 information in the last sea otter count that the
3 population may be, in fact, turning around a
4 little bit. So we'll see.

5 There are serious sea otter problems in
6 Elkhorn Slough, very serious. We have boat-strike
7 problems, and I've never seen anything -- today,
8 again, maybe this is partly my fault that I
9 haven't kept up, but is there anything in the
10 construction or in the wetlands restoration or
11 anything like that that will increase load
12 traffic? If there is I want to know about it.

13 Is there anything that will disturb
14 soils and increase sediment load into the slough?
15 Contaminants are a serious problem for the sea
16 otter, and contaminants are of particularly
17 concern in Elkhorn Slough.

18 We had a couple of cases of sea otters
19 showing up for rehab at Monterey Bay Aquarium
20 which had a parasite. And it was concurrent -- we
21 don't have enough data, because it's two data
22 points -- but it was concurrent with resumption of
23 dredging operations in the slough.

24 So, in other words, we have concern
25 anytime we're stirring up the mud, all right. Is

1 there anything in this project that will do that?

2 I want to know about it.

3 And I don't see that in this. And maybe

4 it is somewhere else, in some other documents.

5 And if it is, I really want to know about it, and

6 I really want the opportunity, the time to review

7 that.

8 So, thank you.

9 HEARING OFFICER FAY: Thank you, Mr.

10 Shimek. Other commenters?

11 MS. FINN: Hello, my name's Michele

12 Finn. I'm the Assistant Manager at the Monterey

13 Bay National Marine Sanctuary.

14 This morning it became obvious to me

15 that there might be some confusion between what's

16 Elkhorn Slough and what's the Monterey Bay

17 National Marine Sanctuary.

18 So I want to just let you know that the

19 Monterey Bay National Marine Sanctuary is managed

20 by NOAA, the National Oceanic and Atmospheric

21 Administration, which is a federal agency. And

22 the sanctuary jurisdiction is from the Highway 1

23 bridge eastward, all the Elkhorn Slough waters.

24 And from the col reg line, which for those of you

25 that aren't familiar with col reg lines, it's

1 basically just a small buffer that's set up
2 outside seaward boundary of the harbor. Out, you
3 know, many many miles out to sea, 5300 square
4 miles of ocean out there from north of San
5 Francisco all the way down to Cambria. So, this
6 basically does impact the National Marine
7 Sanctuary.

8 We consider the Elkhorn Slough to be the
9 center of the Monterey Bay National Marine
10 Sanctuary. The Sanctuary has a broad legislative
11 mandate to provide resource protection and
12 facilitate research throughout the whole
13 sanctuary, as well as provide education and
14 outreach to the local communities.

15 Since the potential impacts will affect
16 sanctuary resources, we feel that it is critical
17 that the sanctuary be a member of the mitigation
18 team. The bottomline, we need assurance that the
19 sanctuary is involved with the shaping of the
20 mitigation package and how the funds are spent.

21 It's important that the mitigation
22 package address this restoration of sanctuary
23 resources, and also that the restoration
24 mitigation package doesn't further detrimentally
25 impact sanctuary resources.

1 If you allow for additional public
2 comments on the mitigation package, we'd really
3 appreciate it if you'd involve us in a decision-
4 making role.

5 There's been a lot of new material in
6 the last couple of days, and Kaitilin indicated
7 that we really haven't had a chance to look at it.
8 But I did take a really quick look at it last
9 night, and I have a few comments that hopefully we
10 can address in the hearing.

11 The first is that there is no mention of
12 the National Marine Sanctuaries Act or any of the
13 sanctuary regulations. I brought a copy of our
14 regs here to you in case you're interested in
15 looking at them. So that's my first comment.

16 The second comment is just on first
17 glance the mitigation package seems to be
18 inadequate. Looking at table 3, it's really
19 unclear what the \$7 million addresses; whether
20 it's just procurement of land or the actual
21 restoration. Or whether that actually includes
22 the management of the actual package, the
23 administration of funds.

24 But one thing is clear, that this
25 package appears to miss entirely the impacts in

1 the near-shore marine environment. And does not
2 address any long-term studies that would analyze
3 potential impacts from the project, itself, or
4 assess the success of the restoration mitigation
5 package. So, that's just a comment there.

6 I looked at the errata and it looked to
7 me that there were, you know, any range from
8 between \$7 million and \$260 million. So we would
9 like for that to be looked at again.

10 We're also unsure about some changes,
11 and this might also be addressed in the public
12 workshop, but I want to bring it to your
13 attention. On page 10 the first sentence of the
14 second paragraph says: Impacts associated with
15 the thermal discharge and impingement are not
16 considered to be significant; however, entrainment
17 losses of marine and estuarine species due to the
18 once-through cooling water system are considered
19 to be significant.

20 And then further down in the paragraph,
21 there's a contradictory statement there that says:
22 Neither the thermal discharge or impingement are
23 considered to be significant impacts, but added to
24 the entrainment losses, the overall losses will be
25 significant.

1 I think we really need to address all
2 three as a combined package. So, I'd like to
3 offer that up as an idea.

4 We feel that you're on the right track
5 with this mitigation package by identifying local
6 resource management groups to administer it. We
7 would like to have you consider our sanctuary
8 foundation as another entity to help manage
9 whatever funds, whether they be \$7 million or you
10 know, if it's deemed appropriate, more than that.

11 But we feel like you're on the right
12 course with keeping it in the local community, and
13 with groups that are familiar with protecting the
14 resources that will be impacted by this project.

15 Thank you.

16 HEARING OFFICER FAY: Thank you for your
17 comments. Any further comments? Yes, sir.

18 MR. CURLAND: My name is Jim Curland and
19 I'm the Science Director for Friends of the Sea
20 Otter. And I'm not going to echo a lot of what
21 Steve Shimek said related to otters.

22 But one of my concerns was that Friends
23 of the Sea Otter wasn't aware of this process,
24 being one of the key organizations involved with
25 an animal that resides in the Moss Landing Harbor,

1 as well as the Elkhorn Slough.

2 Another concern is one of our attorneys
3 who works on a lot of the state water quality
4 issues was completely unfamiliar with this whole
5 situation. And certainly we would appreciate
6 getting more informed on this.

7 We were a little bit -- our concerns
8 were assuaged that, like Kaitilin said earlier,
9 that the process is going to go on a little bit
10 longer. But we still have concerns about the
11 section 7 consultation under the Endangered
12 Species Act, and if that was properly engaged in
13 with U.S. Fish and Wildlife Service.

14 And just basically I'll make it short is
15 that we want to be kept informed and want to
16 continue to be part of the process.

17 HEARING OFFICER FAY: Thank you, Mr.
18 Curland. Before we go to the next speaker I just
19 want to -- Ms. Mendonca is here. If you could
20 wave your hand?

21 That's Roberta Mendonca. She's our
22 Public Adviser, and I strongly recommend all the
23 groups who are represented here today to please
24 give her your name and address so that she can
25 assist you in staying informed of our process.

1 And I also encourage you to keep tabs on
2 our webpage, because the Moss Landing portion of
3 that webpage will keep you somewhat up to date.
4 It does not have all the documents in the case,
5 but it does have a significant Commission
6 notification such as the staff's final staff
7 assessment and the errata, and eventually the
8 transcripts from today's hearing.

9 Ms. Mendonca.

10 MS. MENDONCA: Yes, I'd like the record
11 to reflect that when the Public Adviser's office
12 was given the names of several organizations last
13 Friday we instantly informed them of this meeting
14 and gave them the notice and the agenda and
15 information so that they could participate. And
16 we're here today to let you know of their
17 concerns.

18 HEARING OFFICER FAY: Thank you. Okay,
19 next speaker.

20 MR. GILWORTH: Good morning; my name's
21 David Gilworth. I'm representing two
22 organizations, one is purely environmental; it's
23 called Helping Our Peninsula's Environment, or
24 HOPE. The other one is Responsible Consumers of
25 the Monterey Peninsula. We provide consumer

1 choices through environmental protection.

2 We'll be submitting a letter, and I'm
3 going to read briefly from that and from some
4 other notes that I've made from the few things
5 I've heard so far.

6 We oppose this plant upgrade as proposed
7 because of its potentially significant
8 environmental impacts. Even if it causes only
9 half the expected damage to the fish that was
10 reported in the paper, some 300,000 fish, the
11 crabs and the water temperature, that
12 environmental damage alone is massive.

13 Yet it would potentially if not
14 certainly harm the Endangered Species Act listed
15 southern sea otter, the brown pelican and the
16 tidewater gobies.

17 Monterey County lies within the center
18 of the natural range of the tidewater goby. It
19 was collected from Salinas River Lagoon in 1946
20 and in 1951. And we expect that this project, the
21 temperature impacts from it could prevent the
22 recovery of not just the tidewater goby, but the
23 sea otter and the pelican.

24 As an expert in environmental impacts
25 I'm the one who compiled the impacts database and

1 scientific basis of over 1000 significant
2 environmental impacts. It's my opinion that these
3 impacts are significant.

4 I'm going to diverge from the letter a
5 bit here. I'm disturbed by a couple of things
6 here like Mr. Curland, I believe it was, said that
7 he hadn't heard about this. We've been involved
8 with environmental activities on the Monterey
9 Peninsula for a decade and a half. And this is
10 the first I heard about it.

11 I get the State Clearinghouse
12 Newsletter. I didn't hear about it in there. I
13 get the local EMBAG Clearinghouse Newsletter. I
14 don't remember it being in there, either. And now
15 I find out that it's too late to be an intervenor,
16 something's wrong in this process.

17 This process should be re-started so
18 that we can be intervenors at this time or at a
19 later date when the information is available.

20 And if this Commission is flying under
21 the concept that this is a CEQA-equivalent
22 process, I think we're out of process. We're
23 putting some carts before the horse here.

24 I'm also, if I understood correctly
25 these gentlemen are from Duke Energy, is that

1 correct?

2 HEARING OFFICER FAY: Yes.

3 MR. GILWORTH: Why is it that they're
4 answering the question about the legal basis of
5 the procedure, rather than your staff attorney?
6 That's improper. These are the applicants. It's
7 supposed to be somewhat of a hostile or a not a
8 friendly basis here. These are not the guys who
9 are supposed to be representing the legal opinions
10 of your Commission.

11 PRESIDING MEMBER KEESE: Let me comment
12 briefly. Ms. Mendonca can explain our process.
13 These are not our attorneys. In this case staff
14 is an adversary, applicant is an adversary, and we
15 are the Commission, the three people you see here.

16 So, this is my attorney, not the staff
17 attorney. The staff is representing the public in
18 this process. The applicant is representing the
19 proponent of the project.

20 That briefly -- Ms. Mendonca can explain
21 the rest of the process, but that's the staff.

22 HEARING OFFICER FAY: And there's
23 certainly nothing improper about any attorney who
24 is an officer of the court taking responsibility
25 for explaining the legal situation to the public,

1 the fact-finders, et cetera.

2 It may be different from a CEQA process
3 that you're familiar with, but it is more generous
4 in terms of public input.

5 I'm baffled why your group and other
6 groups haven't heard about the project in advance,
7 because there has been a great deal of
8 publication. But there is a great deal of time,
9 in fact more time remaining between now and the
10 end of the process, than you would have in a
11 normal CEQA EIR process.

12 So, it's not too late to start digging
13 in and making comments on things you see. And, of
14 course, nothing has been published yet except the
15 applicant's proposal, the staff's counter-
16 proposal. That's what's available.

17 So the Energy Commission has not yet
18 made even a preliminary determination on how this
19 project should be licensed, if at all. And what
20 kind of mitigation should be provided. So there's
21 quite a bit of opportunity left to comment.

22 PRESIDING MEMBER KEESE: To follow on
23 Mr. Fay's comments, I was going to state
24 afterwards, this hearing today is the first time
25 that the Commissioners are hearing testimony on

1 these issues. We have heard some other issues but
2 we haven't heard any, so nobody here is late.
3 This is the start of the process by which the
4 applicant and the staff are going to present to
5 the Commission.

6 So, I really would encourage any of the
7 people who made some very valid statements on
8 their face to be here today to participate in the
9 process when we received our information for the
10 first time.

11 MR. GILWORTH: That amplifies my
12 concern. That doesn't assuage it at all. If you
13 say nobody here is too late, then we should still
14 be able to intervene in this. Something's wrong
15 if this is the first time you've heard this, and
16 this is the first time some of these very active
17 local organizations have heard about it, and it's
18 too late to be an intervenor. Something is wrong.
19 This process should be restarted so that we can
20 intervene properly.

21 I'm not done with my comments. I am
22 also not calmed that you think it's okay for them
23 to represent the CEQA-equivalent process, if
24 indeed -- I still haven't heard whether this is
25 supposed to be a CEQA-equivalent process. I don't

1 know that yours has been certified by the
2 Secretary of Natural Resources.

3 HEARING OFFICER FAY: Yes.

4 MR. GILWORTH: Okay. Well, if it's a
5 CEQA-equivalent process, Mr. Fay, I'd prefer if I
6 hear it from you from now on, rather than from the
7 applicant.

8 If it's a CEQA-equivalent process
9 there's a portion in there that requires that
10 there be provided to the public substantial
11 response to questions. Is that included in this
12 process?

13 HEARING OFFICER FAY: Yes, it is.

14 MR. GILWORTH: Okay, and the responses
15 will be coming from you, not from the applicant.

16 HEARING OFFICER FAY: The responses will
17 be coming from throughout the process, but you can
18 get some responses today during the workshop; you
19 can get some responses during the hearing. You
20 may get some answers to your questions during the
21 hearing. And if you comment on the proposed
22 decision then the Committee is likely to respond
23 to the comments that you gave in writing. And you
24 may also get responses from the Commission if you
25 choose to comment before the full Commission at

1 the end of the process. So there's a number of
2 opportunities left.

3 MR. GILWORTH: So that was a yes?

4 HEARING OFFICER FAY: That's a yes.

5 MR. GILWORTH: We would echo a number of
6 comments made by Ms. Gaffney and Mr. Shimek and
7 the young lady from the National Marine Sanctuary.
8 We're concerned about a number of things here.

9 I'm not sure the consultation has been
10 done properly with National Marine Fisheries and
11 Fish and Wildlife Service. I see nothing in here
12 about biological opinions. When you do a
13 consultation of biological opinion, usually
14 results.

15 I do see just a hint on the Coastal Act
16 here related to local coastal plan of Monterey
17 County, but it doesn't seem to be incorporated
18 into the project and the impacts and the
19 mitigations. The Coastal Act, as you know, was
20 recently strengthened by a court decision called
21 Bolsa Chica, where it essentially said don't touch
22 a hair on a wetland's head. And there appears to
23 be more than a few hairs touched here. It looks
24 like there's going to be wholesale widespread
25 damage to the wetlands and Elkhorn Slough.

1 I have not seen all the documents so I
2 can't comment on whether it adequately addresses
3 the DDT in the silt here. The DDT in the
4 siltation is one of the highest concentrations and
5 one of the most widespread areas of DDT in
6 estuaries in California. And I want to make sure
7 that's addressed properly.

8 And another thing I gather from just a
9 preliminary look at this, again I haven't seen the
10 original documents, if this was a draft EIR
11 process it would be much clearer to me, and
12 probably a number of other people, and probably
13 would assuage some concerns. There's no
14 quantification of impacts, and there's no
15 quantification of the thresholds of significant
16 impact.

17 If you don't quantify them it's an
18 absolutely arbitrary decision. And I can make
19 just as arbitrary a decision as anyone of the
20 experts who are writing this. And I don't make
21 arbitrary decisions. I prefer to make decisions
22 that are based on objective standards and
23 objective reality rather than an applicant who has
24 a financial interest in having there be no
25 significant impacts from this.

1 So, we would like an EIR on this. You
2 say it's an equivalent process, then why not do a
3 draft EIR and put it in a form that's something
4 that's familiar to most of us with the processes
5 of the State of California.

6 And the rest of my letter is to request
7 that you put us on the interested parties list so
8 that we are informed of all things related to
9 CEQA, Clean Water Act, 1601 or 1603 permits, and
10 any water rights permits applications related to
11 this.

12 We are here to throw logs in front of
13 the wheels. This is going too fast in spite of
14 all the time you say that this is going on. I
15 don't think this should be dumped in our lap. The
16 only reason I heard about it was there was an
17 article in the local paper. If it hadn't been for
18 that article in the local paper, I probably
19 wouldn't be here.

20 So, I think there needs to be a more
21 real outreach to the public rather than the, what
22 do you call it, the staff standard operating
23 procedure, because it just isn't working.

24 So, with that, here's our letter, and
25 we'll see you down the road.

1 HEARING OFFICER FAY: Okay, thank you.

2 Other comments?

3 MR. MAIN: Good morning, my name's Jeff
4 Main with Monterey County Planning and Building
5 Inspection Department, representing that
6 department.

7 I want to thank you for coming down on
8 behalf of the County and holding some public
9 hearings here to go over this process. We would
10 hope that some of the other hearings on some of
11 the other topics could have also been held here
12 also, instead of in Sacramento. We have a hard
13 time getting up and the staff that's been working
14 for the County on this project also was able to
15 attend, but we weren't able to make our formal
16 comments on those aspects of the assessment. So
17 that's one comment I have in terms of that
18 participation process. So in the future you might
19 want to think about that.

20 The County Staff is now reviewing the
21 final assessment, and will be putting together
22 comments by the different departments and
23 forwarding a recommendation to the board of
24 supervisors on the 25th of July, whereby they will
25 forward their comments to you. And I know I've

1 talked to Mr. Fay, or left a message to him in
2 terms of getting those comments into the process
3 before the final determination is made. I
4 understand that that will occur.

5 We are currently have three related
6 projects that we're reviewing, as you know. The
7 selective catalytic reduction project, the tank
8 farm demolition project, and the energy center
9 oily separator project, which are related projects
10 to the bigger energy center here.

11 Those projects we reviewed. One of
12 them, the SCR, has, I guess, a EIR that was
13 already prepared for it that we used in our
14 analysis for the use permit.

15 The tank farm demolition and the energy
16 center project we prepared and filed negative
17 declarations for those.

18 All three of those projects will be
19 considered on June 28th before the planning
20 commission for Monterey County. And we will be
21 forwarding you the final staff reports on those
22 projects. So we would hope you would take a look
23 at those.

24 I know that our staff has been working
25 with your staff on a number of the related issues,

1 specifically we have some cumulative impact issues
2 related to air quality and traffic issues that we
3 have been working together in terms of the larger
4 project that is not under our permitting
5 authority. And those projects, so that the
6 impacts will be mitigated.

7 Other issues that we will probably be
8 commenting on or in terms of the assessment they
9 are important to us are the hazardous materials
10 aspect of the SCR, and the aesthetics issues of
11 removing and constructing some of the bigger
12 projects, the bigger energy center, energy-
13 producing project.

14 So with that we would hope you would
15 review our information and we'll be reviewing your
16 information, and take into consideration the
17 comments that will be coming from the board of
18 supervisors the end of July. Thank you.

19 HEARING OFFICER FAY: Thank you. Any
20 other comments? All right, last call. Yes.

21 MS. JOHNSTON: Good morning; my name is
22 Deborah Johnston, representing the Department of
23 Fish and Game.

24 And as stated in the document we did
25 agree that 390 acres is an appropriate replacement

1 value. We did not make any statement as to the
2 dollar amount. Since we are not a permitting
3 agency, it's not appropriate for us to comment on
4 a dollar amount. The \$12,000 per acre is in the
5 ballpark of what may be appropriate for what
6 they're planning to do.

7 However, at this time we have grave
8 concerns that the naming of Elkhorn Slough
9 Foundation to be the recipient of the money, we
10 feel it's premature at this time, as nowhere have
11 we determined who will be the final land manager.
12 And that land manager needs to be involved in the
13 discussion as to which group will be the recipient
14 of the money.

15 Our preference is that the money would
16 go to the Department's nonprofit foundation as the
17 primary area; the Wildlife Conservation Board is
18 the secondary recommendation. Elkhorn Slough
19 Foundation is not our primary recommended agency
20 for deposit of the funds.

21 We want to make sure the funds are used
22 for the losses that occur to the estuary
23 ecosystem.

24 HEARING OFFICER FAY: Thank you. Ms.
25 Johnston, is this the first time these views have

1 been expressed to the Commission or the staff?

2 MS. JOHNSTON: No, it's not.

3 HEARING OFFICER FAY: All right, so
4 there is something in writing in the record?

5 MS. JOHNSTON: Yes.

6 HEARING OFFICER FAY: Okay, thank you
7 very much.

8 Any other comments? Yes.

9 MR. BOWEN: Thank you, Chairman Keese,
10 Commissioner Moore, Mr. Fay. My name is Michael
11 Bowen with the California Coastal Commission.

12 I would like to make a procedural
13 request or reiterate a procedural request.
14 Yesterday we submitted a letter to the Commission
15 asking that the evidentiary record for this
16 hearing be kept open until July 18.

17 The reason we made this request was so
18 that our Commission -- well, first of all, so that
19 our staff has the time and the ability to evaluate
20 the body of information that is now available for
21 this proceeding. And, secondly, to bring a staff
22 analysis and recommendation pursuant to section
23 30413 of the Coastal Act to our Commission for
24 review and action, and approval.

25 Unfortunately, the last workshop

1 conflicted with our last Commission hearing which
2 was held on the 13th, and therefore we were
3 unable, because of scheduling problems, to cover
4 two areas in one hearing.

5 We did resolve the land use portion of
6 this project much to our satisfaction. We felt
7 that it was very productive and useful process.
8 We would like to do the same with biological
9 resources and soil and water quality. And so I'm
10 here to reiterate that request.

11 Also, I'd like to clarify something for
12 the record. The expression in the final staff
13 assessment and the correspondence from Duke to the
14 Center for Marine Conservation stipulating that
15 the Coastal Commission is in support of the
16 mitigation package, enhancement package that was
17 arrived at at the workshop on the 13th.

18 We have not had a full internal review
19 of this package, and therefore it would be
20 premature to suggest that the Coastal Commission
21 supports this package.

22 Thank you very much.

23 HEARING OFFICER FAY: Thank you, Mr.
24 Bowen. All right, any other comments from members
25 of the public or agencies?

1 All right, I see no indication. All
2 right, then if there's nothing further we'd like
3 to adjourn for the public workshop. And I want to
4 emphasize that it is open to the public.

5 We will adjourn the hearing and we'll
6 reconvene at 11:00 for our evidentiary hearing.
7 We're adjourned.

8 (Whereupon, at 10:15 a.m., the hearing
9 was adjourned, to reconvene at 11:00
10 a.m., this same day.)

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AFTERNOON SESSION

1:12 p.m.

HEARING OFFICER FAY: All right, we're
back on the record now.

MR. ELLISON: Thank you. In terms of
recapping the workshop I won't attempt to
summarize all the discussion which took place, but
the Committee should know that what we had
intended to do at the workshop was to discuss some
relatively minor concerns that the applicant had
with the language of the staff errata in light of
the comments that we heard from the Committee this
morning.

And instead, what we chose to do was to
have a question-and-answer session and an
explanation for the public and for the agencies
that expressed concerns this morning about the
biology issues, marine biology issues, and the
terrestrial biology issues.

So the time that we have spent this
morning has been presenting the information and
accepting questions from the public with respect
to those issues.

We are prepared to proceed to the taking
of evidence, as planned in the hearing this

1 afternoon. We think that's the appropriate
2 measure. We made clear to members of the public
3 that there will be downstream opportunities for
4 public comment, including comments on the PMPD.
5 And Duke would certainly support, if the Committee
6 wishes, to hold a PMPD comment hearing down here,
7 that we would support that.

8 There would be additional opportunities
9 for people to present comments at least through
10 that time, if not beyond that time. We also
11 emphasized that there is a comment opportunity to
12 the Regional Water Board on these same issues.
13 And Mr. Thomas described the deadlines for that,
14 which I believe the 30 days is going to run
15 September 14th, is that what I heard?

16 MR. THOMAS: We'll get a draft permit
17 out this week and there will be a board meeting on
18 September 15th. And when the permit goes out this
19 week that begins the 30-day comment period.

20 MR. ELLISON: Okay. There have been
21 some concerns expressed this morning about
22 understanding the \$7 million mitigation figure,
23 which is contained in the staff errata, and which
24 Duke and several agencies agreed to at a public
25 workshop of June 13th.

1 Our presentation this afternoon will
2 honor our agreement to that \$7 million figure.
3 But I do want to emphasize to the Committee, as I
4 did in the workshop, that Duke's agreement to that
5 figure is very much a compromise from what we
6 thought the actual impacts would require. And was
7 agreed upon with an explicit understanding that
8 this would satisfy the concerns of all the
9 agencies with whom we thought, at that time, had
10 an interest in the project.

11 If that figure is going to be reopened
12 we would certainly reserve the right to present
13 evidence that the number should be much lower than
14 \$7 million. But, again, we will honor our
15 commitment to the \$7 million this afternoon.

16 MR. OGATA: I just want to add a couple
17 of things to what Mr. Ellison just said. This is
18 Jeff Ogata, CEC Staff Counsel.

19 I think there were three main issues
20 that I'd like to highlight that I think came out
21 of the workshop. One is there was a lot of
22 concern on behalf of a number of agencies and the
23 public that they did not receive notice of these
24 proceedings.

25 And they felt that there was very little

1 time to absorb and read all of staff's analyses.
2 And therefore it's very difficult for them to come
3 prepared today to offer anything more than just
4 kind of their first reactions to what was there.

5 And so, I think that's an issue that is
6 going to be very difficult to address, but it's
7 something that I think you should be aware of.

8 Secondly is the schedule for the
9 remainder of the proceedings. There's been some
10 indication from some of the agencies that they
11 would like to have an opportunity to do some
12 additional workshops to talk about the impacts and
13 mitigation which is then, I think, the third issue
14 is the actual mitigation package.

15 Just thinking about this in the last
16 couple of minutes, I've got just a suggestion
17 which I'm just going to throw out off the top of
18 my head. It may be a really bad idea, but that's
19 never prevented me from saying things in public
20 before.

21 With respect to trying to accommodate
22 all these things, the Coastal Commission has
23 already requested that the record be left open
24 until at least July 18th, I believe, when the
25 Coastal Commission is going to meet.

1 And so I guess my thought on that is if
2 the Committee was willing to entertain that
3 motion, that the record stay open on this
4 particular issue until that time, that would allow
5 members of the public and other agencies to also
6 file written comments on this particular issue by
7 that time.

8 What we could do to accommodate, maybe
9 facilitate some resolution is to perhaps hold some
10 staff workshops between now and then, in which we
11 would help the agencies better understand what
12 we've done, the analysis that went into staff's
13 recommendation, and hopefully would allow these
14 agencies and the public to offer comments that
15 would be based upon as much information as we
16 have, as opposed to having them go through all the
17 staff documents and other documents on their own,
18 which may be a very time-consuming process.

19 I would not propose that the evidentiary
20 record be reopened, or left open for that purpose,
21 in terms of taking testimony. Just that they
22 would be allowed to offer written comments, and
23 then close the record on that aspect.

24 Then, of course, there would still be
25 opportunity for the public agencies and everyone

1 else to offer comments along the way that you've
2 already indicated would be done with respect to
3 our formal process.

4 PRESIDING MEMBER KEESE: Mr. Ogata,
5 which issues were you referring to? Is this
6 strictly biological resources?

7 MR. OGATA: Yes, strictly biological.
8 And I believe specifically mitigation. Well,
9 that's what I'm hearing today. I don't know if
10 there are other issues that the public may just
11 like to address, but --

12 PRESIDING MEMBER KEESE: So, well,
13 preliminarily we would close soils and water
14 resources and alternatives? Is that --

15 MR. OGATA: We didn't really get into
16 that. I think we could close those areas, yes.
17 But I guess you need to hear from the public and
18 Coastal Commission on that --

19 PRESIDING MEMBER KEESE: Okay, well, I'm
20 not expressing an opinion, I'm just trying to
21 clarify --

22 MR. OGATA: I understand. I think Mr.
23 Bowen from the Coastal Commission has something he
24 wants to say.

25 HEARING OFFICER FAY: Would you come to

1 a mike?

2 To be sure we get your statements on the
3 record we need you to speak into the microphone.
4 Thank you.

5 MR. BOWEN: Just to clarify, thank you,
6 Jeff. Our specific request was to retain both
7 biological resources and soil and water quality,
8 just to clarify.

9 HEARING OFFICER FAY: Let's go off the
10 record for just a moment.

11 (Off the record.)

12 HEARING OFFICER FAY: We do want to --
13 the evidence, as previously noticed. I did want
14 to ask, though, if -- Ms. Finn, could you come up
15 to one of the microphones? I wanted to ask about
16 the status of your agency.

17 Now, who do you represent?

18 MS. FINN: Monterey Bay National Marine
19 Sanctuary. The Monterey Bay National Marine
20 Sanctuary.

21 HEARING OFFICER FAY: The sanctuary,
22 itself?

23 MS. FINN: That's right, --

24 HEARING OFFICER FAY: It's not a
25 foundation in support of --

1 MS. FINN: No. I'm a federal employee.

2 HEARING OFFICER FAY: Okay, so this is
3 an arm of NOAA?

4 MS. FINN: That's correct.

5 HEARING OFFICER FAY: And they
6 administer the whole sanctuary --

7 MS. FINN: That's correct.

8 HEARING OFFICER FAY: -- from San
9 Francisco down to Cambria?

10 MS. FINN: That's correct.

11 HEARING OFFICER FAY: So, as a federal
12 agency you can certainly ask questions of the
13 witnesses just as Monterey County can, and the
14 Coastal Commission and the Air Resources Board,
15 sort of thing.

16 MS. FINN: Okay.

17 HEARING OFFICER FAY: So, if you do have
18 questions today, feel free to ask --

19 MS. FINN: I appreciate that.

20 HEARING OFFICER FAY: Okay, I wanted to
21 clarify that.

22 Mr. Ellison, are you prepared to start.
23 And if the order that we have in the notice is
24 something that you're still comfortable with, we'd
25 be starting with biological resources.

1 COMMISSIONER MOORE: He said he had
2 housekeeping items.

3 MR. ELLISON: I do have a housekeeping
4 item. It's been called to my attention that on
5 our exhibit list, exhibit number 5, the
6 application for certification, includes thereafter
7 a number of specified sections of the AFC.

8 And I would ask, with the Committee's
9 permission, to modify that. Exhibit number 5
10 should be the entire AFC, and not some specified
11 portions of it. We've been admitting into
12 evidence pieces of it as we go along, but the
13 exhibit number, itself, should identify the entire
14 application.

15 HEARING OFFICER FAY: All right. By the
16 way, what he's referring to is something entitled
17 Appendix C, applicant's exhibit list. This was
18 offered by the applicant, and we're using it as a
19 draft to identify exhibits, some of which have
20 been previously received into evidence. We have a
21 few copies of that available, I believe, if any of
22 the parties feel that they need one. Do you have
23 a few copies available? This is mainly for
24 housekeeping and identification purposes.

25 Go ahead.

1 MR. ELLISON: You know, since we've been
2 talking about marine biological issues, and there
3 may be people with constrained time, why don't we
4 take the marine issues first.

5 The applicant's witness on marine
6 biological resources is Dr. David L. Mayer.

7 HEARING OFFICER FAY: Please swear the
8 witness.

9 Whereupon,

10 DAVID L. MAYER

11 was called as a witness herein, and after first
12 having been duly sworn, was examined and testified
13 as follows:

14 DIRECT EXAMINATION

15 BY MR. ELLISON:

16 Q Dr. Mayer, would you please state --

17 HEARING OFFICER FAY: Excuse me. Mr.
18 Ellison, you need both mikes.

19 Q Dr. Mayer, could you please state and
20 spell your name for the record.

21 A David L. Mayer, M-a-y-e-r.

22 Q Where are you employed and in what
23 capacity?

24 A I'm the President of an environmental
25 firm. The name of it is Tenera Environmental,

1 LLC, and it's located in San Francisco,
2 California.

3 Q And what is your relationship to the
4 Moss Landing Power Plant modernization project?

5 A Myself, along with our firm, has been
6 retained to perform various environmental sampling
7 and monitoring activities.

8 MR. ELLISON: At this time I'd like to
9 identify for the record as exhibit number 3 all of
10 the applicant's testimony filed on June 8, 2000.
11 A portion of which is entitled, marine biological
12 resources, which I'll refer to as the marine
13 biological resources portion of exhibit 73.

14 BY MR. ELLISON:

15 Q Dr. Mayer, do you have a copy of the
16 marine biological resources portion of exhibit 73
17 before you?

18 A I don't, actually.

19 (Laughter.)

20 DR. MAYER: I was looking, I have it
21 over here. Yes.

22 BY MR. ELLISON:

23 Q Do you have any changes or corrections
24 you'd like to make to this exhibit?

25 A I don't.

1 Q Was this exhibit prepared by you or at
2 your direction?

3 A It was prepared by me.

4 Q Are the opinions contained in this
5 exhibit your own?

6 A Yes, they are.

7 Q And are the facts set forth in this
8 exhibit true and correct to the best of your
9 knowledge?

10 A To the best of my knowledge.

11 Q Do you adopt the marine biological
12 resources portion of exhibit number 73 as your
13 sworn testimony in this proceeding?

14 A Yes.

15 MR. ELLISON: I would move the marine
16 biological resources portion of exhibit number 73,
17 which incorporates by reference, portions of
18 exhibit number 5, exhibit 29 and exhibit 57 -- I
19 would move that portion of exhibit 73, as well as
20 the exhibits incorporated therein into evidence.

21 HEARING OFFICER FAY: Any objection?

22 MR. OGATA: No objection.

23 HEARING OFFICER FAY: So directed.

24 BY MR. ELLISON:

25 Q Dr. Mayer, let me begin by asking you if

1 you could summarize what the relevant changes that
2 would be physical changes to the existing Moss
3 Landing Power Plant that are relevant to the
4 marine biological resources, what changes will
5 occur as a result of the modernization?

6 A Well, I would separate those into two
7 categories, one related to the intake of cooling
8 water, and the other to the discharge cooling
9 water for the new facility.

10 The discharge cooling water will involve
11 the discharge of elevated water temperatures to an
12 offshore ocean outfall located just outside of the
13 Moss Landing Harbor. and that plume, thermal
14 plume which rises from the discharge would
15 possibly come in contact with the shoreline, both
16 at the beach area, and/or the breakwater area.

17 The intake aspect of the power plant
18 involves taking in of large volumes of cooling
19 water, and there are two steps to kind of looking
20 at the impact or effects of the cooling water
21 system, intake system.

22 One is related to the organisms that are
23 small enough to pass through the traveling, intake
24 screens, which are roughly 3/8 inch in diameter.
25 And the other is related to those organisms too

1 large to pass through the traveling screens and
2 are retained on the screens, themselves.

3 In both of these areas of activities of
4 cooling water intake involves some potential loss
5 or effect to organisms involved with that part of
6 the cooling water system.

7 Q The modernization project is intended to
8 replace existing units 1 through 5 with new units
9 1 and 2, correct?

10 A Correct.

11 Q And existing units 6 and 7 will continue
12 to operate, correct?

13 A Correct.

14 Q Could you describe the arrangement of
15 the cooling water system for existing units 1
16 through 5, and how it will be changed by its
17 replacement by units 1 and 2, new units 1 and 2?

18 A Yes. In general terms the existing
19 cooling water intake system involves a shoreline
20 intake located just slightly north of the unit 6
21 and 7 intake.

22 It has a long approach tunnel; has some
23 headworks that are located on the harbor, itself,
24 to keep out large floating objects. It has an
25 inverted -- associated with it, a long tunnel

1 approximately 300 feet that the water going to the
2 power plant travels through before it gets to the
3 intake screens, which are actually located up on
4 the property, itself.

5 There are a number of things that are
6 going to be altered in the current configuration
7 for the benefit of reducing the intake effects.
8 Probably the most significant of which is the
9 removal -- well, I should say the removal of the
10 tunnel, but moving the traveling screens to the
11 head end, or the shoreline end of the tunnel to
12 avoid fish and other organisms going into this
13 long intake tunnel and getting trapped.

14 We have seen a lot of other power plants
15 where that is, in fact, a significant and
16 characteristic effect of having an approach
17 tunnel.

18 The second change to the intake
19 structure will be to install a new design of
20 traveling screens. The traveling screens are
21 going to be inclined, the traveling screens are
22 more of a continuous screening material, all of
23 which tend to increase the total effective area of
24 the screen.

25 And as the effective area of the screen

1 is increased, the velocity through the screen,
2 holding the water going constant, goes down. So
3 we generally expect a reduction in impingement
4 effects as the velocity or approach velocity to
5 the screens or through the screens goes down.

6 So that's of potential benefit to reducing
7 impingement effects.

8 On the discharge side the current
9 configuration is at the power plant, units 1
10 through 5, the discharge goes into the Elkhorn
11 Slough. That's been discontinued for some years
12 now. But the new design will re-plumb, if that's
13 the correct term, the power plant cooling water
14 system to have that discharge now combined with
15 the unit 6 and 7 discharge, and it will travel to
16 an offshore location, outside the Elkhorn Slough
17 in the harbor, out into the current discharge
18 location of 6 and 7 where there are abundant
19 supplies of ocean cooling water and depth. And
20 out from the shoreline to avoid shoreline contact.
21 And I consider that to be a significant benefit to
22 the new design.

23 Q Dr. Mayer, the existing units 1 through
24 7 have been in operation at this site for
25 approximately 50 years, correct?

1 A Well, I think units 1 through 5 were
2 first constructed in about 1950, and 6 and 7 were
3 added about 1960. So, over that period of time,
4 about 50 years.

5 Q After the addition of units 6 and 7, and
6 with the full operation of units 1 through 7,
7 could you compare what the cooling water volumes
8 of the existing project that I just described are
9 to what the new modernized project will be?

10 A The expectation if you compare the two
11 volumes that would result, total volumes of the
12 two configurations would result in about a 34
13 percent reduction in the amount of cooling water
14 going into the facility.

15 Q So, the new project would have a 34
16 percent reduction in cooling water volumes
17 compared to full operation of units 1 through 7,
18 as historically?

19 A Correct.

20 Q Given that we have had that operating
21 experience, could you summarize what we have
22 learned, what studies have been done and what has
23 been learned about the impacts of use of those
24 volumes of cooling water that have historically
25 occurred at the site?

1 A The studies which we did just recently
2 that were related to the permitting certification
3 of the new units were also performed for units 1
4 through 7. And in a fairly extensive set of
5 studies looking at both the entrainment effects
6 and impingement effects and other studies in the
7 region of the thermal effects of the power plant,
8 both in the Elkhorn Slough and offshore discharge,
9 the study findings concluded that there were no
10 significant effects or impacts.

11 Now, there are questions that as we
12 change our methodology of studying things, and
13 conditions change in the way we analyze them, that
14 today we might have looked at it differently than
15 they did then.

16 So that would be fair to say. But the
17 conclusions at that time were that the plant was
18 operating, had operated safely in that sense. It
19 was protecting -- uses, and the intake systems
20 represented best technology available.

21 I'd add, in addition to that, the
22 certain historical or anecdotal evidence that in
23 that period of time, 50 years that the plant has
24 been on site operating, at various operating
25 loads, that we have not noticed, and it's not been

1 reported to us, a decline in any one of these
2 populations of species that we find, or we believe
3 to be typical of either the harbor or the slough,
4 Elkhorn Slough area.

5 So, it appears that if there -- there
6 certainly are entrainment of organisms into the
7 power plant, that those entrainment losses have
8 not resulted in a long-term decline, and there
9 certainly would have been enough time, over 50
10 years, for that to have occurred; that we haven't
11 seen that take place.

12 Q Dr. Mayer, when this application was
13 filed, new studies were embarked upon to analyze
14 the impact of the existing project and proposed
15 project, correct?

16 A Correct.

17 Q Could you briefly describe those
18 studies?

19 A The studies that were required and were
20 performed, as I said, were related to looking at
21 both aspects of the power plant cooling water
22 system, both at the intake and at the discharge
23 side.

24 On the discharge side of the existing
25 facility in preparation for the new discharge from

1 the new combined cycle units, a number of field
2 studies were performed to look at the existing
3 thermal plume, using aerial imaging and a number
4 of field recording and boat surveys, to gather
5 information about temperature, patterns of
6 dispersion, the existing thermal discharge plume.

7 Using that information, then, as a way
8 to scale up to what was expected in terms of
9 discharge size and the line of dispersion, with
10 the combination of the new combined cycle units
11 with the existing 6 and 7.

12 And those studies were combined with
13 also, at the same time, those were representing
14 sort of the physical conditions and projections of
15 the new unit were combined with some biological
16 literature review of laboratory studies, thermal
17 information to make projections about the likely
18 outcome of this, or potential of the new combined
19 cycle discharge.

20 On the intake side of things we, in
21 essence, repeated the entrainment studies which
22 were performed earlier for the units 1 through 7.
23 And in doing so we changed slightly the
24 methodology from then to today, partly on the, you
25 know, what had been done in other power plants

1 recently along the coast. Also with a fair amount
2 of input recommendation from other scientists who
3 have looked at these recent studies of entrainment
4 effects and approaches to doing both the
5 measurement and as well as the analysis of
6 projection of potential impacts.

7 So, we tailored the study to come up to
8 date in terms of methods of both measuring and
9 analyzing the effects.

10 Studies were performed in the Elkhorn
11 Slough, the Moss Landing Harbor, the entrance to
12 the harbor, and offshore in the Monterey Bay
13 waters. Those areas we refer to as source water
14 to the power plant.

15 Then additional studies, or studies in
16 conjunction were performed at or in very close
17 proximity to the intakes areas, both of where the
18 new project intake was going and where the
19 combined cycle -- excuse me, the existing 6 and 7
20 intake was operating.

21 The approach in doing the entrainment
22 studies was to compare the number of organisms
23 that would be entrained into the power facility
24 and compare that, in essence, to the supply of
25 those organisms out there in the source water.

1 And by doing that we form a proportion
2 between what's likely to be entrained in the new
3 project to what was sort of a standing prop, if
4 you will, or the supply of organisms out there.

5 The studies only looked at larval forms.
6 So, it's important to keep in mind when you'll see
7 tables about losses of fish and et cetera, that in
8 some cases what we actually studied was the larval
9 form of that species. That there are many many
10 steps to get from a larval fish of any species to
11 an adult form.

12 So we did a number of things again with
13 good input from scientists and other people who
14 have done this kind of work to make those
15 conversions from the number of larvae to the
16 number of adults, as well as working with
17 proportions of what was entrained, and what was,
18 you know, out there in the source water.

19 It basically involved a year-long study,
20 and we collected samples, as I said, intensively
21 in front of the existing intake and where the
22 combined cycle intake is going to be located, as
23 well as doing source water studies on a monthly
24 basis.

25 The entrainment studies were done weekly

1 and they were performed over a 24-hour period to
2 take into account what we know to be fairly
3 significant changes in larval densities from day
4 to night.

5 And we tried to do, as best we could, to
6 look at it that way in the source water with some
7 constraint that the Elkhorn Slough is a very
8 shallow place, and not safely sampled at night.
9 So we had to limit some of our survey work.

10 The results of those studies involved a
11 lot of lab analysis in converting that into
12 multiplying the density or concentration of larvae
13 by the amount of water that was going into the new
14 facility, and estimates of the amount of water and
15 the source water, gave us the ability to form
16 these proportions.

17 And as we have heard earlier some of
18 these proportions then were used in making
19 estimates of what the impacts might be to the
20 resources.

21 Q These studies measured the impacts of
22 the full amount of projected cooling water flow
23 through in the new facility?

24 A That's correct. We basically -- the
25 study results from the field are brought into a

1 formula which gives us the projected line of the
2 new facility, multiply that times the
3 concentration of the larvae in order to come up
4 with an estimated or a projected number of larvae
5 that would be entrained by the new facility.

6 Q So the studies do not attempt to
7 identify the incremental change that would result
8 from modernization, but rather the full amount of
9 losses that would result from cooling water at
10 this site?

11 A Correct.

12 Q Dr. Mayer, are you familiar with or are
13 you a member of the so-called technical working
14 group?

15 A Yes.

16 Q Could you please describe what the
17 composition of that working group is, and what
18 it's purpose is, and how it conducted its
19 business?

20 A Yes. The technical working group is an
21 acronym or a name given to a set of scientists and
22 agency representatives that were formed to meet on
23 a fairly regular basis. As it turns out, I think
24 we met from the beginning of the study in March of
25 last year nearly on a monthly basis. There was

1 something in the neighborhood of 13 meetings.

2 The attendance varied somewhat according
3 to people's schedules and availability, but as
4 generally were expected, members of that team were
5 Mike Thomas representing the Regional Water
6 Quality Control Board; Pete Raimondi, Dr. Raimondi
7 was retained as their expert to consult to the
8 Board; Michael Bowen from the California Coastal
9 Commission; John Dixon I think accompanied Michael
10 on several occasions, also from the California
11 Coastal Commission.

12 Deborah Johnston from California
13 Department of Fish and Game; Joe O'Hagan for the
14 California Energy Commission; and Dick Anderson
15 from the Energy Commission; Marc Sazaki, who
16 retired somewhat a couple months ago from the
17 project -- from the agency.

18 The California Energy Commission and
19 their staff retained Mike Foster, Dr. Mike Foster,
20 a Professor at Moss Landing Marine Lab as an
21 expert to their review of the project.

22 Then myself and Carol Rascenter from our
23 organization. Jeff Paduan was a fairly regular
24 attendee from the Naval Post Graduate School.
25 Jeff's background and expertise was in the

1 oceanography and thermal plume studies.

2 Brian Waters from Duke Energy; Wayne
3 Hoffman, and John Torre, and I think Kirk Marple
4 maybe on an occasion.

5 Q And was there also a Mr. Greg Kayai
6 involved?

7 A Yeah, left Greg off. Yes. I'm going to
8 regret that.

9 (Laughter.)

10 DR. MAYER: Dr. Greg Kayai, also
11 Professor of ichthyology at Moss Landing Marine
12 Lab, as a consultant to the Regional Water Quality
13 Control Board.

14 BY MR. ELLISON:

15 Q What was the purpose of the technical
16 working group?

17 A My understanding of the purpose of the
18 group was to meet together with people
19 representing both agency needs and requirements
20 for studies related to the licensing of the
21 project, as well as people from the scientific
22 community or with specialized expertise or
23 backgrounds that could contribute to designing of
24 studies to meet those information needs;
25 overseeing those studies as the work was done;

1 and I think believed involved in sort of
2 finding -- in pulling together the findings and
3 looking at ways to evaluate the results.

4 Q Would it be fair to say that the studies
5 were designed by the technical working group and
6 the results of the studies validated by the
7 technical group?

8 A I would say so, it was a collaborative
9 effort. We had study plans that were drafted and
10 distributed to everybody for comment, and took
11 comments back. And we were generally faithful, as
12 the person in charge of doing study plans, to
13 respond to those comments and suggestions.

14 Q At the conclusion of these studies,
15 these studies were submitted to the California
16 Energy Commission and they're publicly available,
17 correct?

18 A That's correct.

19 Q And you have reviewed the final reports
20 on these studies?

21 A I have reviewed the final reports.

22 Q I know you've discussed a little bit the
23 results of the studies. Just for the sake of
24 clarity could you very briefly summarize what, in
25 your professional opinion, these studies tell you?

1 A Well, again, I think I would divide it
2 into the questions of the intake and the discharge
3 studies.

4 On the intake side of the studies, and I
5 would want to make clear to everybody so there's
6 no misunderstanding, of the previous studies we
7 did not repeat an impingement study, so we relied
8 on historical data for that assessed in our
9 assessment.

10 There are also, -- you know, we tried to
11 look at the entrainment studies and make
12 comparisons. In general we found the easiest
13 composition, although numerical abundances change,
14 to be very similar to studies that were completed
15 earlier.

16 There were a number of other studies
17 performed in the Elkhorn Slough in the area from
18 other researchers. And species composition of the
19 larval fish that we collected in our entrainment
20 studies seemed to be fairly common, or typically
21 similar to what they had reported.

22 There were changes that we noted in the
23 source water body in terms of species composition
24 that others have reported to be associated with
25 the changes in hydrography of the slough related

1 to marsh restoration. So there have been some
2 changes over time that we found in the source
3 water compared to the studies we completed last
4 year and the first part of this year.

5 The entrainment studies, when we looked
6 at those, also seemed, in general, to be similar
7 to those reported from the previous studies.
8 There were some species of fish that did not occur
9 in large numbers, had been changed over that
10 period of time. But, in general, what we found
11 were the large gobies were the most common taxa
12 out there. They're small fish, you know, they're
13 generally found in harbors and sloughs. And they
14 represented a very large fraction of the fish that
15 we saw out there.

16 In general, the diversity of larval fish
17 species was low in the area. This is not atypical
18 of this kind of environment, harbors and sloughs.
19 And the few species we had occurred in fairly
20 large numbers in the entrainment.

21 The thermal discharge side of things,
22 the studies found that the plume was similar or
23 typical to the one that had been described from
24 previous studies. And that our looking at the
25 thermal effects potential from the new project

1 thermal plume, that the laboratory tests would
2 suggest that there wouldn't be expected effects
3 from the plume.

4 Q That there would not be?

5 A Would not be expected.

6 Q You mentioned that you did not repeat
7 the earlier impingement studies. Was that a
8 decision endorsed by the technical working group?

9 A Yes.

10 Q And could you briefly describe the basis
11 for the decision not to repeat the impingement
12 studies?

13 A Well, from my recollection, in part, the
14 impingement from the previous studies was a fairly
15 low number of fish. It wasn't compared to other
16 sites along the coast, but I'd say more
17 importantly the plans to alter the new intake
18 configuration would produce such different
19 impingement rates that it didn't seem a good way
20 to project from a design that had been done in the
21 past with a design that was going to be so
22 differently configured for the new facility.

23 Q For the sake of clarity, am I right in
24 looking at the impacts on marine resources you're
25 looking at essentially three things: thermal

1 effects, the impingement and entrainment?

2 A I think that's, you know, yes.

3 Q Okay. Could you briefly, just again for
4 the sake of clarity, thermal effect would be the
5 effect of the temperature change resulting from
6 the discharge water from the facility?

7 A Correct.

8 Q And could you briefly define for the
9 Committee's benefit, impingement?

10 A Impingement would be effects on
11 organisms, fish and crabs, and there might be
12 invertebrates of other kinds, that are too large
13 to fit through the screens for the intake. And
14 that the impingement of these organisms, if they
15 were there long enough would probably eventually
16 lead to their death on the screens. Or they would
17 be lifted out of the distilling wells up into an
18 area of the power plant where they would be put
19 into a refuge area.

20 So, in general the impingement effects
21 only occur for those organisms which are unable to
22 escape the intake structure and the traveling
23 screens were operated in order to keep that
24 structure clean.

25 Q And could you briefly define and

1 contrast entrainment? Contrast it from
2 impingement.

3 A From impingement. The entrainment is
4 the passage of organisms through the traveling
5 screens into the cooling water intake system. And
6 for the purposes of this study we assume that all
7 of those organisms, that would be generally the
8 marble fish small enough to fit through the 3/8-
9 inch screen that we assumed in this study, that
10 100 percent of them were lost in their transit of
11 the cooling water system.

12 Q Do you believe that that assumption of
13 100 percent loss is conservative?

14 A It is. We have evidence from other
15 power plants, different settings but similar
16 species, for instance in the San Francisco Bay,
17 that the survival of plant passage, if you were,
18 passage in the cooling water system, could be
19 anywhere from as much as 30 percent to 70 percent.
20 But it is species-dependent.

21 Q With respect to the thermal effects
22 you've already described, the study that was done
23 and your conclusion, or at least the study's
24 conclusion that there was not a significant
25 effect, you've described that a new impingement

1 study was not done.

2 What is your professional opinion about
3 the significance of the impingement impacts of
4 this project?

5 A Well, I, as I said in the beginning, I
6 think that the redesign, reconfiguration of the
7 intake system for the new combined cycle unit will
8 significantly reduce impingement effects that we
9 saw at that same location in the past.

10 And I think it will be a large
11 improvement over even existing, you know, intake
12 screens. So I would expect the impact to be not
13 significant from impingement.

14 Q Is the threat of impingement in part a
15 function of the velocity of the water going
16 through the screens?

17 A In part. There's evidence now from
18 other studies that maybe a larger factor is
19 related to the amount of debris that actually
20 begins to accumulate on the screen.

21 There might be several reasons for this.
22 One is that the debris forms a substrate for fish
23 and crabs to become entangled in. And makes it
24 more difficult for them to find their way out.

25 The second is debris can actually build

1 up on the screens and increase the velocity. So a
2 clean screen has a design velocity based on
3 surface area and water flow. As kelp or plants or
4 any of that sort of material builds up on the
5 screen, it restricts the cross-sectional effective
6 screen area, and velocities can go up creating hot
7 spots.

8 So there may be some secondary effect
9 from that kind of debris loading.

10 Q Let me ask you then about this question
11 of debris building up on the screens. The new
12 screens are designed to prevent that, isn't that
13 correct?

14 A The design is intended to maintain a
15 much cleaner screen, cleaner intake area. As the
16 water comes in there's a forebay behind the
17 shoreline structure, but in front of the traveling
18 screens. And that's typically where debris will
19 begin to build up.

20 In fact, with vertical traveling
21 screens, which are customary installations, it
22 begins to kind of churn this debris into a ball.
23 And many screens aren't really effective at
24 listing up out of this forebay.

25 With the new screens we're expecting,

1 because there's an opportunity for gravity to make
2 the screens more effective in lifting it out, that
3 they will maintain themselves in a cleaner state.
4 And I believe reduce the potential for
5 entanglement.

6 Q What is the design velocity of the
7 modernized power plant?

8 A The current number I've seen is .448
9 feet/second -- .4 -- yeah, okay, 4. Almost half a
10 foot a second, 4.8.

11 HEARING OFFICER FAY: .48?

12 DR. MAYER: .48 feet per second.

13 HEARING OFFICER FAY: Okay.

14 BY MR. ELLISON:

15 Q At that velocity what is the ability of
16 marine biological resources to escape the
17 impingement effect of the screens?

18 A That is -- the design velocity for most
19 applications of intake cooling water, or intake
20 water screens is .5 feet/second. That's a
21 velocity that's commonly applied and recommended
22 by other agencies that are involved with water
23 diversions or intake screening.

24 Q So is it your professional opinion that
25 marine biological organisms will be able to

1 tolerate that velocity?

2 A I believe so. I think we're -- when you
3 asked the question about impingement effects you
4 probably need to separate fish from crabs, which
5 don't swim the same way fish do. But, in general,
6 as we keep the velocities down in the neighborhood
7 of 5 feet per second we seem to notice that
8 there's not much of a relationship between flow or
9 velocity and impingement.

10 So it suggests that we're below some
11 sort of threshold, and it's protective of
12 resources.

13 Q Let me ask you the subject of sea otters
14 has come up, but what about the ability of sea
15 otters to tolerate that velocity of cooling water
16 intake combined with the new screens?

17 A Well, sea otters certainly are very
18 strong swimmers and have no difficulty in escaping
19 that kind of velocity. And I wouldn't imagine
20 that they would become involved in a serious way
21 with the intake structure, itself.

22 It's not a complicated structure. I
23 think reducing, as I said earlier, these long
24 tunnels certainly takes away the possible risk of
25 them getting lost by pursuing some path up these

1 tunnels. So I think that's a very good
2 improvement.

3 There are other facilities where we have
4 long offshore intakes where marine mammals do get
5 confused and get into these intake systems.

6 So, I think this facility goes as far as
7 you can to remove that possibility.

8 Q Are you aware of any other measures that
9 could be reasonably undertaken that have not been
10 proposed by Duke to reduce impingement or
11 entrainment?

12 A Well, in all the documents that are
13 referenced in my testimony and the discussions
14 that we've had and review of alternatives, I don't
15 think there are other feasible and effective
16 alternatives to reduce that.

17 Q Let me ask you then about -- well,
18 first, let me ask you about protected species.
19 We've already mentioned the sea otter, but let me
20 broaden it to all protected species.

21 What is your assessment of the impacts,
22 whether it be through thermal effects, impingement
23 or entrainment? What is your assessment of the
24 effect of the modernized power plant on any
25 protected or listed species?

1 A I have had a great difficulty finding
2 any connection between any of those species that
3 are listed and in the area where they might be
4 affected.

5 The one that we watch for very closely,
6 of course, where there would be a potential effect
7 would be the entrainment of larvae from the
8 tidewater goby, and we did complete, a year's
9 worth of very extensive field sampling.

10 The larvae is readily identifiable. In
11 fact, we've run DNA tests on the specimens we have
12 just to confirm the fact that our identifications
13 are correct.

14 So, where there was a possibility that
15 they might have been entrained and, of course,
16 would have constituted an effect on a protected
17 species, it just didn't occur during the course of
18 these studies.

19 Q So when you referred earlier to the
20 entrainment study having identified gobies, were
21 you referring to the tidewater goby?

22 A No. In fact, most of the fish that we
23 entrained are in a broad category in the family
24 referred to as gobidity, and it includes a lot of
25 species that are common or typical of harbors,

1 bays and estuaries.

2 The one that we're unable to identify,
3 and it actually constituted the largest number of
4 larvae that were entrained, we believe might be
5 *Clevelandia ios*, which is a goby common to the
6 sloughs and estuaries certainly here, and in other
7 places along California.

8 There are other gobies included in that
9 larger category, longjawed mudsucker is another
10 goby, and that was a species that we collected and
11 identified in our studies. There's a bay goby
12 that's common to our samples; and a blackeye goby.

13 So, in general, it would be easy to say
14 that gobies are the name of the game in
15 entrainment of the Elkhorn Slough and harbor
16 species.

17 Q Is it a fact that some of the goby
18 species you referred to as unidentified suggest
19 that those unidentified gobies might be the
20 endangered tidewater goby?

21 A Well, as I say, we're very confident and
22 certain of our ability to identify tidewater goby
23 larvae. And we've confirmed our method of
24 identification. I see no possibility that they
25 would be included in that unidentified category.

1 I would mention, too, our
2 identifications have been confirmed by outside
3 experts who perform quality assurance and quality
4 control identifications in our work.

5 Q So, to summarize, are you aware of any
6 adverse impact that the modernized project would
7 have on any protected species?

8 A No, I'm not.

9 Q There was a public workshop on June 13th
10 on this project. Did you attend that workshop?

11 A Yes, I did.

12 Q And the outcome of that workshop was an
13 agreement on mitigation for entrainment, is that
14 correct?

15 A That's correct.

16 Q And the agreement is reflected in the
17 staff's errata to the final staff assessment,
18 which to summarize, includes the payment by Duke
19 of \$7 million, as mitigation, is that a fair
20 summary?

21 A Yes.

22 Q Could you describe to the Committee the
23 basis for that \$7 million figure?

24 A As I understand the calculation was made
25 using the proportion of larval fish lost due to

1 entrainment, and that, as a proportion of the
2 source water supply of a number of species of
3 larval fish.

4 And that each species where we were able
5 to measure and calculate that proportion were
6 averaged into a total average for all the species.
7 And it included, as we discussed earlier,
8 primarily species from the Elkhorn Slough and
9 harbor. And the total did also include two or
10 three species which are more typical of the
11 Monterey Bay, white croaker, staghorn sculpin and
12 there's probably one other I'm forgetting,
13 herring. Thank you.

14 So the list is a composite, the average
15 is based on the list and it represents a
16 compositing of the proportions of losses. And it
17 yielded a number of 13 percent. And that number
18 then, 13 percent, was multiplied times -- as a way
19 to convert those losses of larvae to habitat, was
20 multiplied by an estimate of the total acres of
21 the wetted surface area of the Elkhorn Slough.

22 And I think that we've agreed that
23 that's about 3000 acres. And that that number
24 produced the 390 acres roughly that is considered
25 to be an appropriate offset to those entrainment

1 losses of larvae.

2 And the use of estimates of land value
3 or cost or restoration were multiplied then times
4 392 acres.

5 Q Dr. Mayer, if I could ask you to refer
6 to page 13 of your testimony, the marine
7 biological resources portion of exhibit 73, there
8 is a discussion in that prefiled testimony of
9 mitigation measures, do you see that?

10 A Yes.

11 Q In there you describe a submission by
12 Duke of an environmental enhancement program. Can
13 you describe Duke's submission of an environmental
14 enhancement program?

15 A I think that the environmental
16 enhancement program was a package of various
17 approaches to offsetting both entrainment and
18 impingement, I suppose, at some time in the
19 future, and any thermal effect loss in the form of
20 habitat or environmental improvement in targeted
21 mostly for the Elkhorn Slough, Moss Landing Harbor
22 area. Packaged, as I understood, identified,
23 having worked with and talked to a number of
24 people managing resources of this area, about
25 various different and appropriate and effective

1 ways to offset some of these losses.

2 Q Your testimony goes on to describe the
3 method for identifying appropriate mitigation
4 levels for the modernized project, correct?

5 A Correct.

6 Q And since your testimony is already
7 filed and in evidence I won't ask you to summarize
8 it in all its details, but could you tell me what
9 is the dollar amount mitigation that this
10 methodology would result in that I could compare
11 to the \$7 million figure?

12 A Approximately \$100,000.

13 Q So I take it then that would it be fair
14 to say that you believe the \$7 million figure is
15 conservative? In other words that it's more than
16 adequate to mitigate what you perceive as the
17 impacts of this project?

18 A Well, yes, in direct answer to that. I
19 do want to qualify my estimate of the losses was
20 based on the species that we best knew, and their
21 relationship to the habitat that would best offset
22 or mitigate these losses.

23 So there may be other considerations for
24 species that didn't have -- that we don't know as
25 much about or as well known about the

1 relationship.

2 So, I would say certainly between my
3 estimate based on this one species, and the \$7
4 million, there's very comfortable room to believe
5 it to be a very conservative dollar amount.

6 And certainly converted to acreage,
7 suitable for replacing the losses associated with
8 the new facility.

9 Q The \$7 million figure is driven, in
10 part, by the 13 percent loss calculations, is that
11 correct?

12 A Yes, from my following of the
13 discussions at the meeting, it was based on that.
14 It's also included some consideration of potential
15 thermal effects. And it also considered the idea
16 that it was an existing facility operating at the
17 site.

18 Q Is the 13 percent loss figure in your
19 view conservative? And if so, why?

20 A The 13 percent came from an estimate we
21 were asked to calculate the entrainment losses of
22 the power plant compared to the source water.

23 We were asked to bracket potential loss
24 by computing the volume of the source water two
25 different ways. And the 13 percent is based on

1 the smallest source water one, so that therefore
2 the proportion would be the highest. And it
3 represents a conservative value, conservative
4 estimate. Certainly the upper range, and maybe in
5 between would be a more appropriate range.

6 Q Dr. Mayer, then let me just summarize
7 and then conclude this questioning by asking you a
8 couple of final conclusion questions.

9 In your professional judgment, based
10 upon all the information that you have reviewed,
11 is it your opinion that the modernized project
12 will be using the best technology available, as
13 that term is used in the Clean Water Act?

14 A It is.

15 Q And with the \$7 million mitigation
16 figure agreed upon by Duke and the various
17 agencies, is it your opinion that the project will
18 mitigate all impacts on marine biological
19 resources to insignificance?

20 A It is.

21 MR. ELLISON: That concludes my
22 examination of Dr. Mayer. He's available for
23 questioning.

24 HEARING OFFICER FAY: Thank you. Mr.
25 Ogata, do you have cross-examination of the

1 witness?

2 MR. OGATA: We have no questions.

3 HEARING OFFICER FAY: All right.

4 EXAMINATION

5 BY COMMISSIONER MOORE:

6 Q Dr. Mayer, you indicated that there was
7 an alternative analysis or supplemental analysis
8 that was done on your work by an independent
9 laboratory, is that correct?

10 A Independent what?

11 Q Laboratory or --

12 A Yes.

13 Q Can you tell me who those folks were?

14 A If I could get that list here, I don't
15 have them on top -- but they were people
16 recognized in the field to be experts in certain
17 taxonomy of larval fish.

18 Q At the university?

19 A One was located at UCLA. And a number -
20 - I'd have to check and see where we actually sent
21 those --

22 Q Maybe we can put the names of the
23 individuals and/or laboratory on the record at a
24 later time?

25 A I'll do that.

1 Q Thanks.

2 A I want to be accurate about which ones
3 actually ended up doing the work for --

4 Q Clearly.

5 A Okay.

6 HEARING OFFICER FAY: I think we can
7 just put that in the form of an order and, Mr.
8 Ellison, you can just be sure that there's a memo
9 informing the record?

10 MR. ELLISON: We will do that.

11 HEARING OFFICER FAY: Okay. Just a few
12 questions, Dr. Mayer.

13 BY HEARING OFFICER FAY:

14 Q I think you indicated that there is some
15 lack of total certainty regarding the impact of
16 the thermal plume. And I just wondered if there
17 is a plan to do follow-up monitoring of those
18 impacts after the project's completed?

19 A I don't believe there is. The
20 temperature monitoring will continue. That is,
21 there are temperature recorders that have been
22 placed in the field in and around the discharge
23 area and in areas that are outside there.

24 And so the actual monitoring of the
25 temperature of the discharge will continue.

1 There were no plans as of our meeting on
2 Wednesday, or again during this other period of
3 mitigation discussions and the technical working
4 groups, to carry forward any sort of a biological
5 field monitoring program to look at effects.

6 And I think there was discussion this
7 morning, Dr. Raimondi certainly touched on a
8 number of the subject areas that caused us to
9 forego the need for monitoring studies out there.

10 Probably the most significant, in my
11 thinking, is that the discharge to the Elkhorn
12 Slough which creates actually warm water, as it's
13 heated every day, going in and out across the
14 discharge area, coming in contact with many of the
15 same areas that the thermal plume would contact,
16 in addition to. at least in the short term, fairly
17 dramatic impacts resulting from the discharge of
18 dredge soils on the beach and in that same area
19 would make it, I think, very very difficult to
20 design a study to detect these changes resulting
21 from thermal plume from the new facility.

22 I would say on top of that, there's just
23 one more point there is that looking at both the
24 temperature of the expected discharge and what we
25 know about the thermal tolerance of the species

1 that we know to be living out there, it's such a
2 small increase in temperature we wouldn't expect
3 to see that kind of a change, knowing something
4 about the biology of the organisms.

5 Q What is the increase over the current
6 discharge?

7 A In terms of the contact, I'm thinking
8 now in terms of its contact with the shoreline
9 where we would be looking at biological impacts,
10 it's less than 4 degrees above ambient.

11 BY COMMISSIONER MOORE:

12 Q And it degrades at a predictable lineal
13 rate?

14 A No, I wouldn't say predictable or
15 lineal, but it's something that we can model by
16 case example, and that's what was done in this
17 case. The discharge, itself, is a two-port
18 discharge. There's actually two structures on the
19 ocean bottom.

20 And there's Jeff Paduan from the Naval
21 Post Graduate looked at this, and there's a lot of
22 mixing between these two ports.

23 Q So you don't get an isolated thermocline
24 of any kind, a stratification? You get a mixing
25 as opposed to --

1 A There's a great deal of mixing from the
2 ocean floor up to the surface, and then it can't
3 mix completely because the distance is not long
4 enough for that to happen. So you do end up
5 producing a thermal plume at the surface that has
6 thickness to it. And then it, of course, is
7 buoyant, and it continues to rise by its buoyancy,
8 and disperses. And there's a great deal of
9 currents, wind, et cetera, in the discharge area
10 that really aid the dispersion -- distribution and
11 dispersion of that plume.

12 There's a lot of evidence both from the
13 aerial survey work that was done last year using
14 infrared that the plume thicknesses was relatively
15 thin a short distance from the discharge.

16 We have aerial photos that show boat
17 wakes, you know, boats, and the churning of just
18 the propeller is enough to break up the thermal
19 plume. And you see the cold plume of the wake.
20 So, just to characterize it, it's a deep
21 discharge, it's vertical, there's a lot of
22 turbulence and a lot of mixing. And it disperses
23 quite rapidly.

24 BY HEARING OFFICER FAY:

25 Q Do you have experience with other power

1 plant thermal plumes?

2 A Yes, I do.

3 Q And what projects?

4 A It's quite a few. San Onofre unit 1 and
5 San Onofre units 2 and 3; Huntington Beach
6 Generating Station; Long Beach Generating Station;
7 Mandalay Generating Station; Orem Beach Generating
8 Station; the Al -- Haynes Alamitas Generating
9 Stations, which are located on the San Gabriel
10 River. Diablo Canyon. Most recently and for
11 quite a few years Morro Bay and Moss Landing,
12 because I worked here some years ago when the
13 first studies were done, too, at the time.

14 And then going up the coast, Potrero at
15 Hunter's Point, studied those; Contra Costa and
16 Pittsburg.

17 Q So, your testimony and your professional
18 opinions include your understanding of the
19 behavior of the plume and its impact on the
20 environments on those other power plants?

21 A It does. I tell you I'm not a physical
22 oceanographer, and I don't professionally
23 participate in modeling thermal plumes of that
24 nature. But my experience is gained from
25 combining that with the biological aspects of

1 thermal effects reports and studies over those
2 number of years at those power plants.

3 Q And do any of those plants have the same
4 thermal change, or a similar thermal change as is
5 experienced here, that is the difference between
6 the temperature of the outlet water and the
7 temperature of the ambient ocean?

8 A They do. And I don't know the
9 explanation, except to say that probably many of
10 the PG&E facilities were designed by the same
11 people who decided what, you know, kind of delta
12 T's are most efficient for the condensers.

13 But the delta T's are very similar to
14 the ones that were operated by Southern California
15 Edison in the south.

16 Q The delta T refers to that --

17 A The delta T.

18 Q -- difference between the outlet
19 temperature and the ambient --

20 A And the, yeah, the inlet and the outlet.
21 And it is a -- I mean it's a very important
22 engineering consideration because it really
23 determines the efficiency across your condenser.

24 There are other power plants that I'm
25 aware of back east where they've taken a different

1 approach and they've made that delta T extremely
2 high. It increases your efficiency, it floats the
3 thermal plume to the surface very rapidly and
4 dissipates it. And with the theory that the
5 ultimate heat sink is the atmosphere for the waste
6 heat.

7 And so the theory there is to get it up
8 and into the atmosphere as rapidly as possible, as
9 opposed to other discharges where they tend to
10 diffuse it and mix it into ocean water.

11 So the answer to your question, the
12 delta T is generally about the same along the west
13 coast here.

14 Q And I wanted to ask you, is it --

15 A Oh, the new facility, though, does go
16 lower, you know if you just looked at the combined
17 cycle, because of their technology. They're able
18 to go to a cooler discharge, the delta T, because
19 less of the facility -- still using the steam
20 cycle, but they're able to do it in more
21 efficiently. And achieve a lower delta T
22 efficiencies.

23 Q So why do you have a net increase of 4
24 degrees?

25 A Because -- well, they're combining --

1 well, there's still the delta T. I'm just saying
2 as opposed to the current technology, which has
3 slightly higher delta T's. The new facilities,
4 they will achieve a lower delta T.

5 Q Okay.

6 A Yeah.

7 Q You addressed impingement, and how some
8 species can be drawn top and I guess essentially
9 trapped in the screen. Can't that be a source of
10 attraction to sea otters? And if so, does that
11 have any risk to that species?

12 A To the sea otter?

13 Q Um-hum.

14 A Well, it's a hypothetical. I haven't
15 seen that. I will say that we have video
16 photographs -- or video footage of very very small
17 fish, rock fish, sitting on the frame of these
18 traveling screens with a power plant operating
19 wide open, with, you know, approach velocities in
20 the .7 to .8 feet/second. These little fish get
21 up and move in and out at will.

22 All I can say is I think the fish that
23 end up on screens are the one that are either
24 somewhat sickly or injured, or maybe even
25 moribund. They arrive already dead.

1 Does that attract an otter to come in
2 and see a fish in that condition? I'm not an
3 expert on otter feeding, but I don't think they go
4 after -- that'd be called carrion. I think
5 they're basically pursuing live prey.

6 Could they get attracted and get lost in
7 there? I don't think they'd get lost. I think
8 they could easily get in and out at will.

9 So, I understand the hypothetical, but I
10 don't think that it would really either one very
11 commonly happen, if ever at all, and it really
12 doesn't represent a risk to the otter.

13 HEARING OFFICER FAY: All right, thank
14 you very much.

15 (Pause.)

16 HEARING OFFICER FAY: Before we move to
17 staff, what I'd like to do, so that --

18 MR. ELLISON: Mr. Ogata already said
19 they didn't have any questions.

20 HEARING OFFICER FAY: Right, but before
21 we move to their direct testimony I'd like to ask
22 just so the people don't lose their train of
23 thought, if any of the agencies have questions of
24 this witness that they'd like to ask. And if so,
25 would they please come up and ask them here at the

1 table.

2 Let's go off the record a moment.

3 (Off the record.)

4 MR. THOMAS: I'm Michael Thomas with the
5 Regional Water Quality Control Board, San Luis
6 Obispo.

7 I have a question about the volume
8 reduction that you were talking about earlier, Mr.
9 Mayer. I think it was said that there's a 34
10 percent reduction. And isn't that comparing the
11 old units that are no longer in operation to the
12 new units?

13 DR. MAYER: Correct.

14 MR. THOMAS: It's not a total reduction
15 of the total power plant historically versus the
16 new power plant that's going to be operating in
17 the future, it's just those units that have been
18 taken out versus the new units that are coming in?
19 I think the -- I didn't see the written -- I think
20 the --

21 DR. MAYER: I'm not sure what the
22 testimony was. You said it was for the whole --

23 MR. THOMAS: I think what you were
24 saying is there's 34 percent reduction in volume,
25 the cooling water volume. But, that's comparing

1 the old units that are no longer in service, 1
2 through 5, to --

3 DR. MAYER: To the new units.

4 MR. THOMAS: -- the two new units that
5 are coming on line?

6 DR. MAYER: Correct.

7 MR. THOMAS: Okay. I just wanted to
8 clarify that. It's not the total power plant that
9 you're talking about?

10 DR. MAYER: Correct.

11 MR. THOMAS: If we look at the total
12 power plant, the reduction is actually lower than
13 that. I think it's around 13 percent.

14 DR. MAYER: That sounds about right. As
15 I said, most of the focus of all the study and
16 reporting that we did was all on the new project,
17 so.

18 MR. THOMAS: And just one other thing.
19 On the number that we used for the fractional loss
20 of wetlands, I believe you said it was 13 percent,
21 which is the number staff used?

22 DR. MAYER: Um-hum.

23 MR. THOMAS: And you folks used it. And
24 I used it, as well.

25 DR. MAYER: Um-hum.

1 MR. THOMAS: That's just for the new
2 units?

3 DR. MAYER: Correct.

4 MR. THOMAS: It's not for the total
5 power plant?

6 DR. MAYER: It's based on the -- fish
7 losses projected for the new units.

8 MR. THOMAS: The new units.

9 DR. MAYER: Right. At full load, with
10 -- oh, yeah, yeah, full load, all the pumps
11 operating, load doesn't really matter, but all the
12 pumps are operating, and with the smaller source
13 of water volume estimate.

14 MR. THOMAS: That's all.

15 HEARING OFFICER FAY: Thank you. Any
16 other questions from agencies?

17 MR. BOWEN: Yes. Michael Bowen of
18 California Coastal Commission.

19 The first question I have is I think my
20 most important, and that is to return to an
21 earlier question as to whether the evidentiary
22 record will be kept open.

23 Because that will have a great deal of
24 bearing on my testimony today, and any information
25 or additional information --

1 HEARING OFFICER FAY: This is the first
2 I've heard about testimony --

3 COMMISSIONER MOORE: Testimony, yes, I
4 didn't know that you were being asked to testify.

5 MR. BOWEN: Oh, excuse me, not testimony
6 but --

7 COMMISSIONER MOORE: If you have
8 questions you should ask them. If you have good
9 questions you should ask them right now.

10 MR. BOWEN: Okay.

11 COMMISSIONER MOORE: Because frankly I
12 don't know what the Committee will conclude at the
13 end of this. A lot is going to depend on what we
14 find out. So, it's simply not possible to answer
15 the question whether this record will be left
16 open.

17 If you've got a good question don't hold
18 back.

19 MR. BOWEN: Right. Well, the purpose of
20 our request for maintaining the evidentiary record
21 open was to conduct a thorough staff analysis
22 based on the available body of information.

23 It is our conclusion that that is not
24 possible at this time, given the timing of this
25 procedure. And, therefore, it's important from an

1 agency standpoint, to have an understanding of
2 whether or not that will occur.

3 COMMISSIONER MOORE: Can't answer your
4 question.

5 HEARING OFFICER FAY: Let's go off the
6 record a minute.

7 (Off the record.)

8 HEARING OFFICER FAY: As I discussed
9 with you, I don't think there will be a problem in
10 receiving a report that is indicated in the
11 statute that the Coastal Commission delivers to
12 the Energy Commission.

13 But this is the time and place for
14 presentation of evidence in our, formal part of
15 our process. I think you should use it to ask all
16 the questions that you have. And then that's
17 pretty much the evidentiary record.

18 With the exception that the comments or
19 the advice that comes from the Coastal Commission
20 will certainly be considered by this Committee.
21 But we don't envision holding another hearing like
22 this, for instance, where you might bring in
23 additional witnesses or anything like that.

24 So, we want to be clear on the terms, in
25 terms of keeping the record open, what I

1 envisioned when I spoke to you was for the fairly
2 narrow purpose of keeping it open to receive that
3 report from the Coastal Commission.

4 MR. BOWEN: I understand. The purpose
5 of section 30413 of the Coastal Act, as I
6 understand it, I have to say we're sort of
7 inventing a new process as we go, to a certain
8 extent in this particular proceeding, due to the
9 timeline.

10 But my understanding is that the purpose
11 of that report is to review the project in its
12 entirety and to provide our recommendations or
13 comments on the project's consistency with the
14 Coastal Act.

15 And it's very difficult to do that in a
16 given moving target, if you will, of the
17 evidentiary body. Therefore, that is why we have
18 asked for additional time for staff to analyze the
19 available body of information. And to advise our
20 Commission accordingly on the available body of
21 information.

22 So before I embark on a round of
23 questions to the witnesses, it would be helpful to
24 know whether the evidentiary record would be kept
25 open.

1 COMMISSIONER MOORE: Wait. I'm losing
2 touch with this. If you've got a series of
3 questions that ought to be asked, my suggestion to
4 you is exactly as I said before, ask them.

5 It's really not clear to me why asking a
6 set of questions in that manner wouldn't be
7 relevant to the staff's report that you folks are
8 doing, unless it's already done.

9 If it isn't already done, then it seems
10 to me it would be imprudent of us to hold this up
11 to ask questions at a later date. If you've got
12 timely questions that will underlie the kind of
13 staff report that you're doing, and will, in fact,
14 help your Commissioners to write us a clearer,
15 more timely, more efficient report, then this is
16 the time and place to do them.

17 So, if you've got your questions I
18 suggest to you this is the time and place to ask
19 them.

20 MR. BOWEN: Okay, then in that case I
21 will defer with the understanding that Mr. Fay has
22 indicated that a strong likelihood the evidentiary
23 record will be kept open, and that the Commission
24 Staff will have the ability and the time to fully
25 analyze the available body of information

1 presented, to digest it internally, and then
2 provide it to our own Commission.

3 HEARING OFFICER FAY: And that body of
4 information is -- I think I understand the concern
5 you're expressing. The body of information is the
6 official record we're compiling now. So, you
7 have, I hope, the testimony provided by the
8 applicant and the staff and their revisions.

9 And the only thing you don't have is
10 what the Committee determines out of that. But I
11 understand the parties have come together pretty
12 much.

13 So I guess what I would assume the
14 Coastal Commission would do is react to that, to
15 that body of information, as to whether or not
16 it's acceptable or not. And then advise the
17 Committee accordingly.

18 But, you know, I understand it's a
19 moving target, but we all have to focus on a
20 certain point in the process. And what the
21 Committee does, is receive all the evidence, as
22 well as agency comment. And then produces a draft
23 decision for the Commission.

24 So, I think that's where we need the
25 Coastal Commission to come into the process, to

1 advise the Committee on what it thinks of the
2 evidentiary record.

3 And with that in mind I don't see
4 anything that's incompatible with you either
5 asking today, or just relying on the record as it
6 is compiled.

7 MR. BOWEN: Oh, okay.

8 HEARING OFFICER FAY: And then do your
9 staff report, get it blessed by your Commission,
10 and then --

11 MR. BOWEN: Right.

12 HEARING OFFICER FAY: -- and then get it
13 into our record.

14 MR. BOWEN: Right, okay. Then I have no
15 questions, and I will just state for the record
16 that at the current time we have not had adequate
17 time to assess the available body of information,
18 and therefore are unable to determine the
19 project's consistency with the Coastal Act,
20 pursuant to section 30413.

21 HEARING OFFICER FAY: And let's narrow
22 that down a little bit, because I think we do have
23 a letter from the Coastal Commission already, as
24 to other aspects of the project. Are you --

25 MR. BOWEN: Oh, yes, I'm sorry.

1 Exclusively in the area of biological resources
2 and soil and water quality.

3 HEARING OFFICER FAY: Okay. And do you
4 anticipate addressing those areas in the timeframe
5 that we've discussed?

6 MR. BOWEN: Yes.

7 HEARING OFFICER FAY: Okay, so when your
8 Commission reacts to the staff report on this
9 project, they will have all the relevant issues in
10 front of them. And so what gets sent to the
11 Energy Commission will be your full expression of
12 concern about the project?

13 MR. BOWEN: Correct.

14 HEARING OFFICER FAY: Okay, fine.

15 MR. BOWEN: Okay, thank you very much.

16 HEARING OFFICER FAY: Thank you. Any
17 other agencies? Okay, nothing from the Monterey
18 Sanctuary?

19 MS. FINN: We just received a copy of
20 revised biological resources --

21 HEARING OFFICER FAY: I'm sorry, we'll
22 have to have you come forward, you're not picking
23 up.

24 MS. FINN: We just received the revised
25 biological resources staff report last night

1 around 7:00 p.m., and quite frankly, I haven't
2 been able to digest it enough to ask any
3 intelligent questions at this time.

4 HEARING OFFICER FAY: Can we invite you
5 to send in written comments to the record on your
6 reaction?

7 MS. FINN: Um-hum.

8 HEARING OFFICER FAY: Thank you. All
9 right, once again, any other agencies? Yes, sir.

10 MR. CARNEY: For the record my name is
11 Bud Carney; I'm the consulting planner for
12 Monterey County, Building and Planning Inspection
13 Department.

14 If I understand everything you just said
15 with regard to Michael Bowen's request and your
16 response, because it applies similarly to Monterey
17 County, it sounds like we would have an
18 opportunity to be able to take a look at the FSA
19 and to submit to our board of supervisors July
20 25th, which Jeff Main indicated earlier today.

21 And if there are any comments or any
22 recommendations that the board would like to
23 forward to the Commission, that that would be
24 appropriate, and that it would be part of the
25 final process that you would go through?

1 Because the steps are a little confusing
2 in terms of trying to understand where we are in
3 the process. Because we do want to have some
4 comments. And we certainly, in looking at the
5 FSA, we wanted to look at the whole body of
6 knowledge before we made any comments to the
7 Energy Commission, realizing that you will be
8 closing your evidentiary hearings. Nonetheless,
9 we still would like to be able to have an
10 opportunity to comment.

11 And my understanding is that we will
12 have that opportunity. It's a matter of if it
13 would be real helpful and perhaps for other
14 agencies, if you could clarify the steps in that
15 process?

16 HEARING OFFICER FAY: Well, what we're
17 doing here is trying to accommodate these other
18 agencies, so that we can get their comments in in
19 a timely way in our process. And yet, it's not at
20 the ideal time.

21 We're trying to keep moving forward and
22 yet, at the same time, try to deal with this
23 problem of some agencies not having had enough
24 time to review the information.

25 COMMISSIONER MOORE: Mr. Carney, I mean

1 clearly it's disconcerting, from the decision-
2 makers' point of view, to be sitting here, we're
3 waiting for the same record that you are in order
4 to make, hopefully, an intelligent decision.

5 So, it's disconcerting to me to hear
6 that a number of agencies are not looking at a
7 full report, or a full record, as we would see it
8 today.

9 At what point did you get the other than
10 errata information? How long have you had to
11 review it?

12 MR. CARNEY: Two weeks ago we received
13 the largest piece, part one. And we sent that out
14 to our other departments. And along with the
15 other two parts, parts one, two and three. And we
16 asked for their comments.

17 And we've given our other departments in
18 the County till tomorrow to get their responses
19 back to us. We will then assemble the information
20 and submit it to the County Board of Supervisors.

21 We also are having a public hearing on
22 the three projects that we're reviewing for
23 Coastal Valley permits on the 28th. We were
24 hoping to do that on the 14th. But that meeting
25 was continued to the 28th.

1 And we were hoping to have all that done
2 so that when we took it to the board, the board
3 would have the full picture.

4 Realizing this is a moving target, and I
5 don't want to give the wrong impression, because
6 we've been working very closely with the staff all
7 along, and they've done an excellent job; and the
8 communication between staff and staff is going
9 very well.

10 But I think in terms of being able to
11 deliver to the Energy Commission from the elected
12 officials of Monterey County, they want to see the
13 full picture, as it sounds like you do, too.

14 But I just want to be certain that when
15 we deliver our report to the board that they will
16 know it's not coming too late, that yes, any
17 comments that they made or any recommendations
18 will be given full consideration by the
19 Commission. That's my main concern.

20 COMMISSIONER MOORE: Well, as a former
21 Monterey County Supervisor, I'm extremely
22 sensitive to what my colleagues on the board might
23 think of as their timeline.

24 So, obviously we're trying to make sure
25 that that does get accommodated. When did you get

1 the errata?

2 MR. CARNEY: For the biologic?

3 COMMISSIONER MOORE: Did you get it at
4 the same time that --

5 MR. CARNEY: Today.

6 COMMISSIONER MOORE: -- sanctuary? So
7 they got it last night.

8 MR. CARNEY: They got it last night, I
9 got it today.

10 COMMISSIONER MOORE: Well, that's
11 preferential treatment. Friends in high places.

12 (Laughter.)

13 COMMISSIONER MOORE: The question -- and
14 Mr. Bowen was interested, in the question of
15 whether or not the evidentiary record would be
16 held open, it isn't a decision that we have made.
17 And we're certainly both members here and
18 listening to this and trying to understand what
19 it's going to take to satisfy this.

20 And clearly, our obligation is to come
21 down on the side of the public interest, to make
22 sure that that gets satisfied first. So we
23 haven't made that decision yet as to whether to
24 hold this piece open or not. And we do depend on
25 your advice as to whether your decision-makers

1 have an adequate time to review this.

2 Is there a subcommittee of the board now
3 set up to hear these matters, or are they hearing
4 it en banc?

5 MR. CARNEY: They're going to hear it at
6 one meeting. They do not have a subcommittee set
7 up.

8 COMMISSIONER MOORE: Thank you.

9 HEARING OFFICER FAY: I'd just add, as a
10 reminder, I think I touched on this earlier today,
11 that while we certainly want your comments before
12 the Committee issues its proposed decision, that
13 that is just one stage of the process.

14 And then that proposed decision is out
15 for 30 days during which time the County and
16 everybody else can react to what this subcommittee
17 of the Energy Commission has done in recommending
18 to the full Energy Commission.

19 And those comments are going to be taken
20 into account, and then when the full Energy
21 Commission addresses the matter you may choose to
22 come up and talk to them about Monterey County's
23 position.

24 So, there will be other opportunities.

25 MR. CARNEY: Thank you very much.

1 HEARING OFFICER FAY: Any other
2 agencies? Questions? Okay, then we'd like to
3 move to staff's -- oh, I'm sorry, Mr. Ellison.
4 Something on redirect?

5 MR. ELLISON: Yeah, we have two things.
6 One, I do have one redirect question, and then
7 also in discussion with the staff we agreed that
8 it's probably appropriate to take the applicant's
9 terrestrial biology witness next. And then, so if
10 I can ask my redirect question then.

11 REDIRECT EXAMINATION

12 BY MR. ELLISON:

13 Q Dr. Mayer, you were asked by the
14 Committee some questions having to do with the
15 thermal effect of the project.

16 Can you compare the temperature
17 differentials that result from the thermal
18 discharge of this power plant to the thermal
19 differentials that naturally occur in the vicinity
20 of this site?

21 A I've made a similar sort of back-of-the-
22 envelope comparison. The temperatures of the
23 Elkhorn Slough on the outgoing tide, where we've
24 taken measurements using these in-place
25 temperature records, we've seen examples where it

1 will see 10 or 12 degrees above the temperature of
2 the Monterey Bay.

3 So, if you imagine that it's a discharge
4 plume entering the Monterey Bay, the Monterey
5 Bay's ambient, then that would be in the
6 neighborhood of double, maybe even three times the
7 kind of delta T that we're expecting to see on the
8 shoreline of the -- from the power plant -- does
9 that make -- does that describe that correctly?

10 The delta T we're talking about from the
11 new project is in the order of less than 4 degrees
12 where it comes in contact, or we expect it to
13 contact the shoreline.

14 The Elkhorn Slough outgoing tide, which
15 can be quite a bit warmer than that, can wrap
16 around and contact those same areas.

17 MR. ELLISON: Okay, that's all I have.
18 Unless there's any further questions for this
19 witness, I would ask that he be excused and we
20 move to terrestrial.

21 COMMISSIONER MOORE: After the staff.

22 HEARING OFFICER FAY: No, --

23 COMMISSIONER MOORE: Oh, I'm sorry, you
24 want to do a panel. Sorry.

25 HEARING OFFICER FAY: Just so everybody

1 understands, the applicant chose to use two
2 witnesses to address biological resources, one for
3 marine resources and another for terrestrial
4 resources. Whereas the staff had one witness to
5 address both areas.

6 So, what we're trying to do is just
7 handle all the applicant's case on biological
8 resources, and then we'll switch to the staff.

9 All right, thank you, Dr. Mayer, you're
10 excused. And, Mr. Ellison, you can call your next
11 witness.

12 MR. ELLISON: Okay, sponsoring the
13 applicant's testimony will be Mr. Wayne Hoffman.

14 HEARING OFFICER FAY: I believe Mr.
15 Hoffman needs to be sworn.

16 Whereupon,

17 WAYNE HOFFMAN

18 was called as a witness herein, and after first
19 having been duly sworn, was examined and testified
20 as follows:

21 DIRECT EXAMINATION

22 BY MR. ELLISON:

23 Q Mr. Hoffman, would you state and spell
24 your name for the record, please?

25 A My name is Wayne Hoffman, H-o-f-f-m-a-n.

1 Q Where are you employed and in what
2 capacity?

3 A I'm employed by Duke Energy. I'm a
4 Regional Environmental Manager.

5 Q For the record there is a portion of
6 exhibit 73 entitled terrestrial biological
7 resources which incorporates by reference a number
8 of exhibits in the proceeding. I'll just name
9 them. They are exhibit numbers 5, 11, 15, 16, 18,
10 27, 28, 30, 47, 50, 52, 54, 55 and 59.

11 Mr. Hoffman, you have before you the
12 terrestrial biological resources portion of
13 exhibit 73?

14 A I do.

15 Q Was this testimony prepared at your
16 direction?

17 A Yes.

18 Q Do you have any changes or corrections
19 to it?

20 A No.

21 Q Are the facts set forth in this exhibit
22 true and correct to the best of your knowledge?

23 A Yes.

24 Q And do you adopt the opinions of this
25 exhibit as your own?

1 A I do.

2 Q And do you adopt the terrestrial
3 biological resources portion of exhibit 73 as your
4 sworn testimony in this proceeding?

5 A Yes.

6 Q Think about it --

7 (Laughter.)

8 MR. ELLISON: I would move the
9 terrestrial biological resources portion of
10 exhibit 73, and the exhibits incorporated by
11 reference therein into evidence at this time.

12 MR. OGATA: No objection.

13 HEARING OFFICER FAY: Before we move
14 that, that was filed under the names of Richard
15 Williams and John Little, correct?

16 MR. ELLISON: That's correct. Because
17 we're not going to do this either by declaration
18 or by having those witnesses here, but rather Mr.
19 Hoffman was the director of this testimony, so
20 we're just going to use Mr. Hoffman.

21 HEARING OFFICER FAY: So ordered. That
22 will be entered at this point.

23 MR. ELLISON: Actually that's all I have
24 at this point. Mr. Hoffman is available for
25 cross-examination.

1 If you wish? Would you like a short
2 summary?

3 COMMISSIONER MOORE: I think that's
4 appropriate.

5 BY MR. ELLISON:

6 Q Mr. Hoffman, can you briefly summarize
7 the issues reviewed and the conclusions regarding
8 terrestrial biological resources?

9 A Yes. The record indicates two expert
10 biologists have made site visits to the power
11 plant site and conducted surveys of both the plant
12 species and wildlife species on site.

13 These were begun last spring. And under
14 the findings of the surveys conducted on the site,
15 no listed or threatened species were identified
16 either in the plant nature or of any wildlife.

17 MR. ELLISON: That's all I have at this
18 point. Mr. Hoffman is available for cross-
19 examination.

20 HEARING OFFICER FAY: Do you want him to
21 summarize? A brief summary.

22 MR. ELLISON: If you wish. Would you
23 like a short summary?

24 COMMISSIONER MOORE: I think that's
25 appropriate.

1 BY MR. ELLISON:

2 Q Mr. Hoffman, can you briefly summarize
3 some of the issues reviewed and the conclusions
4 regarding terrestrial biological resources?

5 A Yes. The record indicates two expert
6 biologists have made site visits to the power
7 plant site, and conducted surveys of both the
8 plant species and wildlife species on site.

9 These were begun last spring and under
10 the findings of the surveys conducted on site no
11 listed or threatened species were identified here
12 of a plant nature or of any wildlife.

13 There was some interest on the part of
14 the wildlife biologists in potential habitat on
15 site for one listed species, the Santa Cruz long-
16 toed salamander. There is a condition in the
17 staff's final staff assessment for a biological
18 proposal for a fence to protect from the potential
19 of this species, which has been found in the area,
20 from venturing onto the site.

21 COMMISSIONER MOORE: Thank you.

22 HEARING OFFICER FAY: Any questions, Mr.
23 Ogata?

24 MR. OGATA: Yes.

25 //

1 CROSS-EXAMINATION

2 BY MR. OGATA:

3 Q Mr. Hoffman, just for the record, are
4 you in agreement with staff's condition regarding
5 the exclusionary fence?

6 A I do have some concerns about it, Mr.
7 Ogata. I believe Mr. Anderson and I spoke about
8 this yesterday and our main concern was that the
9 condition, as written, might not provide the
10 flexibility that's needed both with respect to
11 maintaining consistency with similar type of
12 conditions which are currently part of the record
13 of Monterey County with respect to some of the
14 conditions for the negative declaration for the
15 tank farm demolition.

16 And also just from comments that we
17 received at the workshop on the 13th, which we
18 thought might reflect a little bit more flexible
19 approach in the language.

20 My suggestion was some language to Mr.
21 Anderson which would enable the details of this
22 barrier to be provided, the details as to the
23 exact location and design of the fence to be
24 provided at a later date as part of the biological
25 resource mitigation implementation of monitoring

1 plan which, I believe, is outlined in the current
2 condition BIO-5.

3 Q Does BIO-5 currently reflect the
4 flexibility, or this is your recommendation to
5 change BIO-5?

6 A It's a recommendation to change it.

7 Q Okay. Thank you.

8 (Pause.)

9 HEARING OFFICER FAY: Anything further,
10 Mr. Ogata?

11 MR. OGATA: Yes.

12 BY MR. OGATA:

13 Q Mr. Hoffman, I guess I'm just curious,
14 do you have proposed language that you'd like to
15 have changed in this?

16 A I do.

17 Q I'm referring to BIO-5.

18 A I actually had recommended that to
19 maintain consistency in the bio errata that was
20 released here in the last few days, that the
21 language changes take place both under the
22 mitigation discussion on page 16 of that document,
23 and also on page 24, at least in the numbering
24 that I have.

25 Page 24 would be the actual language

1 that is at the virtual conclusion of BIO-5. Would
2 you like me to provide that at this point, or just
3 give it to you --

4 HEARING OFFICER FAY: If it's your
5 recommendation --

6 MR. HOFFMAN: I actually have copies of
7 it here that I could just leave with you.

8 HEARING OFFICER FAY: I think it would
9 be helpful, if it's brief you could read it into
10 the record, otherwise provide copies.

11 MR. HOFFMAN: Yeah, that's --

12 HEARING OFFICER FAY: Could I ask the
13 staff for copies of the errata so the Committee
14 can have that in front of them.

15 MR. HOFFMAN: Unfortunately, because of
16 our inability to find time to communicate
17 yesterday after we received this, I only have it
18 in a handwritten form.

19 HEARING OFFICER FAY: Can you just -- is
20 it too voluminous to read into the record?

21 MR. HOFFMAN: No, it's just a -- it's a
22 couple sentences.

23 HEARING OFFICER FAY: Okay, why don't
24 you just read the change in.

25 MR. HOFFMAN: Okay. On page 16, this

1 may be a little bit hard to see, the concern we
2 had was about the definition of a perimeter fence,
3 and so the language that we were proposing was
4 that in the first sentence under mitigation on
5 page 16, that the references to perimeter fence be
6 removed. And that the language be changed as
7 written here.

8 The first sentence there would then
9 read, or actually it's the second sentence,
10 beginning with: A salamander exclusion fence,
11 would read: A salamander exclusion fence shall be
12 constructed at the new power plant project in
13 order to inhibit salamander movement onto the
14 site."

15 The next sentence reading: The fence
16 should encircle the entire new power plant" will
17 be deleted, and it will be replaced with a
18 sentence that reads: The details of the fence
19 location and design will be determined in
20 consultation with CEC and/or California Department
21 of Fish and Game biologists, and will be
22 incorporated into the biological resources
23 mitigation implementation and monitoring plan."

24 And I had also suggested that an
25 additional sentence be added stating that design

1 considerations will be consistent with similar
2 conditions in the Moss Landing Power Plant tank
3 demo permit from Monterey County.

4 That was that language. Similar
5 language on page 24 would revise this -- have to
6 deal with my doodles here on the record -- would
7 revise this sentence by removing the term,
8 perimeter and perimeter fence there, and --

9 HEARING OFFICER FAY: Can you reference
10 us where on the page --

11 MR. HOFFMAN: Oh, I'm sorry, it's at the
12 very top of page 24, beginning with: A salamander
13 exclusion fence or perimeter fence addition shall
14 be constructed at the new power plant project in
15 order to inhibit any salamander that may venture
16 onto the site, or any salamander movement onto the
17 site is the way it can be written.

18 The next sentence, which is on page 16,
19 would be removed, that is the fence should
20 encircle. That sentence will be deleted.
21 Inserted there would be the language that a fence
22 location and design will be developed in
23 consultation with the California Department of
24 Fish and Game and/or Energy Commission biologists,
25 and be consistent with Monterey County tank farm

1 demolition permit.

2 HEARING OFFICER FAY: And does the
3 language already exist in the Monterey County tank
4 farm demolition permit?

5 MR. HOFFMAN: It actually is -- Mr.
6 Carney would have to comment on that, but it's
7 being -- it's currently being negotiated, as I
8 understand it.

9 HEARING OFFICER FAY: And, Mr. Carney,
10 can you just confirm that the flexibility is
11 compatible. You're making a reference, I'd just
12 like to know.

13 MR. CARNEY: Mr. Chairman and Members of
14 the Commission, Bud Carney for the record.

15 Yesterday we met with Fish and Game and
16 Duke Energy. We had a very long meeting and we
17 revised our staff report which is almost at print
18 while we talk. It will be out for the public
19 review on Thursday. There are numerous conditions
20 with regard to protecting the biological resources
21 on the plant, and we're real pleased to hear Duke
22 indicate that they would be willing to have those
23 conditions incorporated into your set of
24 conditions. Because we feel that they're very
25 strong.

1 There is a migration corridor southeast
2 of tanks 13 and 14 that we want to see protected.
3 There is the possibility that maybe in the general
4 area the tiger salamander may exist. And we want
5 to see that the fence not only be for salamanders
6 but for any amphibians, so that the corridor
7 between the Elkhorn Slough, which is north of the
8 plant, and the Morro Slough, which is just south
9 of the plant, remains as a viable migration
10 corridor.

11 And I think with the conditions that we
12 completed yesterday, assuming the planning
13 commission adopts those, it will achieve that.

14 HEARING OFFICER FAY: So just to be sure
15 I understand, you're recommending essentially a
16 change, but rather than specify the exact type of
17 barrier, you want to leave this to the
18 professionals who will be closer to what's
19 happening at the site vis-a-vis these sensitive
20 species?

21 MR. HOFFMAN: I would agree with that
22 comment. Not having seen the conditions that Mr.
23 Carney refers to, I guess it would be a bit of a
24 stretch to say that I agree with those conditions,
25 or all that might be in them.

1 what will be the criteria for developing those? I
2 see you recommend they be determined by
3 independent habitat evaluation. Do you have
4 anything more specific than that?

5 A Actually that would be part of the
6 County's process, as I understand it, at this
7 point in time. Those ratios are being determined
8 on the basis of habitat valuations which are
9 currently being conducted as part of that process.

10 So I don't know what those will be.
11 Typically they range from a 1.1 or a one-to-one
12 ratio to a one-to-three or one-to-five ratio,
13 depending on the quality of habitat.

14 Q When will that enter our records? As
15 far as mitigation, how does that get determined?

16 A I don't know that that part of it will
17 be part of this mitigation. It's a part of the
18 tank farm demolition process.

19 Q And is there anything further you can
20 add to your comment on page 3, the third bullet?
21 It says that the mitigation permit will be
22 implemented by Elkhorn Slough Foundation and the
23 Nature Conservancy.

24 Now, does the statement of Fish and Game
25 conflict with that? Or is this particular bullet

1 only regarding the tank farm project?

2 Fish and Game indicated some concern
3 about who would administer mitigation funds.

4 A Are you on page 3 of the --

5 Q Page 3 of your --

6 A -- the errata?

7 Q -- testimony, the third bullet.

8 A This was a recommendation that was made
9 prior to the workshop on the 13th. And the
10 decision on the part of the Water Board and the
11 Energy Commission seemed to narrow that down to
12 the Elkhorn Slough Foundation.

13 When we made this recommendation in what
14 at this time was called the environmental
15 enhancement program, we were just looking for some
16 flexibility there.

17 Q So the recipient has been determined?

18 A Well, at this point -- at the point in
19 time that this was written, it wasn't clear that
20 any wetland mitigation -- and here I would make a
21 distinction between the wetland mitigation
22 referred to in this bullet, and the wetland
23 preservation and enhancement program that was
24 discussed in the workshop this morning, which was
25 pursuant to the Regional Water Board's program --

1 this was a discussion of potential wetland
2 mitigation which has now basically been taken over
3 by the tank demolition process, as I understand
4 it. Mr. Anderson may --

5 HEARING OFFICER FAY: Okay, Mr.
6 Anderson, can -- well, can you just be sure to
7 address that when you testify? Let's just do it
8 that way. Okay, thank you.

9 All right, thanks very much, Mr.
10 Hoffman. Do any of the agencies have questions of
11 Mr. Hoffman regarding terrestrial biological
12 resources?

13 I see nobody indicating any questions,
14 so we're going to move on to the staff. Mr.
15 Ogata, are you ready with your witness.

16 MR. OGATA: With the Committee's
17 permission staff would like to go ahead and also
18 call Michael Thomas from the Central Coast
19 Regional Water Control Board, and Dr. Peter
20 Raimondi, as well, as consultant to the Board,
21 along with Dick Anderson, who's a CEC Staff
22 Biologist.

23 We'll take them as a panel, since the
24 Committee has questions regarding the mitigation
25 program, the folks from the Water Control Board

1 can probably answer a lot of those questions for
2 you.

3 HEARING OFFICER FAY: All right. Does
4 the applicant have any objection to --

5 MR. ELLISON: No objection.

6 HEARING OFFICER FAY: Okay. Then we
7 will proceed with the witnesses as a panel. Would
8 you swear all three witnesses.

9 Whereupon,

10 RICHARD ANDERSON, MICHAEL THOMAS and

11 PETER RAIMONDI

12 were called as witnesses herein, and after first
13 having been duly sworn, were examined and
14 testified as follows:

15 MR. OGATA: I'd like to first start with
16 Dr. Peter Raimondi.

17 DIRECT EXAMINATION

18 BY MR. OGATA:

19 Q Dr. Raimondi, could you please spell
20 your last name for the record.

21 DR. RAIMONDI: Peter R-a-i-m-o-n-d-i.

22 MR. OGATA: Could you please state what
23 your profession is?

24 DR. RAIMONDI: I'm a Professor of Marine
25 Biology at UC Santa Cruz.

1 MR. OGATA: And what is your current
2 connection to this particular case?

3 DR. RAIMONDI: I've been hired as an
4 independent consultant by the Regional Water
5 Quality Control Board.

6 MR. OGATA: Have you read or are you
7 familiar with Duke's AFC filing regarding marine
8 biology?

9 DR. RAIMONDI: I am.

10 MR. OGATA: And are you also familiar
11 with the CEC Staff's testimony regarding marine
12 biology?

13 DR. RAIMONDI: I am.

14 MR. OGATA: Do you concur with the
15 findings of the staff in this matter?

16 DR. RAIMONDI: I do.

17 MR. OGATA: Thank you.

18 Mr. Thomas, could you please tell us
19 with whom you are employed?

20 MR. THOMAS: I'm with the State of
21 California, the Regional Water Quality Control
22 Board in San Luis Obispo.

23 MR. OGATA: And what is your position
24 there?

25 MR. THOMAS: I'm an Environmental

1 Engineer and a Project Manager for several power
2 plant projects.

3 MR. OGATA: Have you read or are you
4 familiar with Duke's AFC testimony regarding
5 marine biology?

6 MR. THOMAS: With --

7 MR. OGATA: Duke's testimony in this
8 matter.

9 MR. THOMAS: I didn't get a copy of
10 Duke's testimony, no.

11 MR. OGATA: Are you familiar with the
12 issues with respect to marine biology in this
13 matter? Have you read the CEC Staff's testimony
14 in this matter?

15 MR. THOMAS: Yes.

16 MR. OGATA: And do you concur with
17 staff's findings in this matter?

18 MR. THOMAS: I do.

19 MR. OGATA: Has the Regional Water
20 Quality Control Board provided staff with a copy
21 of its draft NPDES permit?

22 MR. THOMAS: Ask the question again.

23 MR. OGATA: Do we, the CEC Staff, have a
24 copy of the draft NPDES?

25 MR. THOMAS: An initial draft, yes.

1 They do not have a copy of the most recent draft,
2 that will go out this week.

3 MR. OGATA: Are there any major
4 differences between that draft you just spoke of
5 and the draft that staff has?

6 MR. THOMAS: I think the major
7 difference is that the most recent draft they're
8 working on now will include the mitigation
9 language.

10 MR. OGATA: As far as you know right now
11 will there be any major differences between what
12 staff's conclusions are and the final permit?

13 MR. THOMAS: That would depend on public
14 input. The permit will go out this week for
15 public comment, and then we will send a final one
16 out after the 30-day comment period. And there
17 may be changes based on public comment.

18 MR. OGATA: But as far as you know at
19 this time you don't expect any major differences,
20 is that right?

21 MR. THOMAS: I don't expect any.

22 MR. OGATA: Thank you.

23 Mr. Anderson, would you please spell
24 your last name for the record.

25 MR. ANDERSON: A-n-d-e-r-s-o-n.

1 MR. OGATA: Would you please tell us
2 what you do for the Energy Commission?

3 MR. ANDERSON: I'm a Staff Biologist for
4 the California Energy Commission.

5 MR. OGATA: And do you have before you
6 testimony filed on June 8th, which is part of the
7 final staff assessment part three regarding
8 biological resources?

9 MR. ANDERSON: Yes, I do.

10 MR. OGATA: And do you also have
11 biological resources errata dated June 19, 2000?

12 MR. ANDERSON: Yes, I do.

13 MR. OGATA: And did you write this
14 testimony and this errata?

15 MR. ANDERSON: Yes, I did.

16 MR. OGATA: Does this testimony
17 represent your best professional expert opinion?

18 MR. ANDERSON: Yes, it does.

19 MR. OGATA: For the record, Mr. Fay, I
20 believe we need to mark FSA part 3 as an exhibit,
21 as well as the errata. I don't know if it makes,
22 number 74?

23 HEARING OFFICER FAY: I have the next
24 number as 73.

25 MR. OGATA: I was going to ask a

1 question about that. Mr. Ellison, I believe, was
2 referring to an exhibit 73.

3 MR. ELLISON: Yes, we asked that the
4 testimony that was submitted by the applicant on
5 June 8th be identified as exhibit 73. And I
6 referred to it that way. So I think it would be
7 appropriate that this testimony be identified as
8 exhibit 74.

9 MR. OGATA: So we'll mark the FSA part
10 three as exhibit 74 --

11 HEARING OFFICER FAY: Submitted by the
12 staff on June 8th.

13 MR. OGATA: Correct.

14 HEARING OFFICER FAY: And the staff
15 biological resources errata, testimony of Richard
16 Anderson and Michael Foster will be exhibit 75.

17 BY MR. OGATA:

18 Q Mr. Anderson, are there any other
19 changes you would like to make to your testimony,
20 other than the errata that was filed yesterday?

21 MR. ANDERSON: None other than what we
22 just discussed as BIO-5 modifications, Mr. Hoffman
23 discussed. And those modifications are fine. And
24 I talked to Deborah Johnston earlier from the
25 California Department of Fish and Game.

1 We've been waiting to try to come to an
2 agreement of how to mitigate for the Santa Cruz
3 long-toed salamander in terms of the exclusion
4 fence. And I think the wording is exactly what we
5 intended to do. It's just that the last day or
6 two we haven't been able to connect by phone.
7 People have been out of the office.

8 Nothing really changes intent. It's the
9 same. I might take the liberty of editing some of
10 your rewording a little bit, but make sure the
11 intent is just the same.

12 And we'll get Fish and Game involved to
13 make sure that the other part of this project, the
14 tank farm part, and our new project, units 1 and 2
15 power plant, to the extent they can, will reflect
16 the same type of mitigation for the Santa Cruz
17 long-toed salamander.

18 MR. OGATA: Okay, thank you. Would you
19 summarize your testimony for us, please.

20 MR. ANDERSON: Yes, I will.

21 Dave Mayer talked about a lot of the
22 things and probably clarified terms that people
23 may not be as familiar with. Some of you sat
24 through an hour of this type of presentation this
25 morning, and I'm sorry that you're still -- not

1 that you're here, I'm happy you're here, but I'm
2 sorry you have to listen to this again.

3 There are two main categories of impacts
4 that were considered for the Moss Landing Power
5 Plant. One was terrestrial, and the other was
6 aquatic, which would be marine, offshore and then
7 also the harbor and estuarine situation.

8 And in the marine or the aquatic impacts
9 we would break those into three groups which have
10 been discussed. It's the thermal influence from
11 the discharge, which is offshore. And then
12 there's the impingement and the entrainment
13 effects that result from the intake part of it,
14 which is in the harbor.

15 In the initial stages of this project
16 Marc Sazaki was the biologist on the project.
17 Whether -- for whatever reasons, I was going to
18 say whether this project caused it, he retired.

19 (Laughter.)

20 MR. ANDERSON: I came in about two
21 months ago, and picked this up for him. So I
22 wasn't around -- I was around, but I wasn't
23 involved in this project when it first started.

24 But there was this effort that was
25 discussed with the technical working group. Duke

1 and the Regional Water Quality Control Board
2 worked together to make sure that the studies that
3 were going to be done, called 316 A and B studies,
4 for thermal and for entrainment and impingement
5 would be done in a way that wouldn't get
6 criticized at the time the NPDES permit was
7 involved.

8 Our process requires this type of
9 environmental information so we can assess
10 impacts, also. So, when the group was put
11 together the board had two professors involved
12 that were experts in marine ecology of one type or
13 the other. One of them is Peter Raimondi, the
14 other is Greg Calet, who's in Mexico right now.

15 The California Energy Commission has a
16 consultant also a marine ecologist, works at Moss
17 Landing Marine Lab, who is not here this
18 afternoon. And then there were other agencies,
19 California Department of Fish and Game and
20 California Coastal Commission. And some of them
21 have more than one representatives, and some the
22 attendance was more sporadic, and some of it was
23 more common.

24 The Energy Commission attended when
25 possible, but we didn't make all the meetings.

1 Sometimes it was -- in the early days it was Marc
2 Sazaki. Often it was Joe O'Hagan, and in the
3 later days myself and Joe O'Hagan.

4 The group essentially defined
5 objectives, put together sampling design
6 methodology, metrics, the way we were going to
7 compare, like proportional entrainment, fractional
8 losses, some of the terms that you heard spoken
9 earlier.

10 And then how the analysis was done and
11 what the results were. And there was a discussion
12 on all of these issues, but essentially I think
13 overall everybody involved in the project agrees
14 that it was a good effort and the studies have
15 merit. And they're fine for basing our assessment
16 on.

17 So, that's kind of the basis for the
18 information. Now, this information just didn't
19 appear right at the time the project came in. It
20 occurred over a period of about a year.

21 And so we were trying to be cooperative
22 in setting up a schedule that we would receive
23 information in a timeline that would allow us to
24 do our analysis and fit within our process, even
25 though the information was coming in somewhat

1 piecemeal up until several months ago.

2 So, in some regards, we're a little late
3 in some of our, some of the normal process we
4 would have done. For example, we would have held
5 several workshops prior to the FSA, or prior to
6 this hearing. So that we would come to agreement
7 or ironed out the differences to the extent
8 possible, and put that in our FSA.

9 Instead, we're in a position where we've
10 had our first really meaningful workshop after we
11 produced our final staff assessment, the first
12 draft that was released to the public. A week
13 later we had a workshop. That workshop was one
14 week ago. Since then we've filed an errata. So,
15 we've been very active in the last several weeks.

16 When the preliminary staff assessment
17 was filed, we didn't have the information on the
18 marine resources, the intake cooling -- or the
19 once-through cooling system. And so there was no
20 information on the aquatic impacts in there.

21 The public couldn't -- or interested
22 agencies, the parties couldn't really make a
23 determination on what was going on with that
24 project. Information's available now, and we're
25 trying to make up for that time period.

1 Which brings us to today. As a result
2 of our workshop last week we did reach some
3 agreements with the applicant. We've been trying
4 to work very closely with the Regional Water
5 Quality Control Board. They have an important
6 permit in this process, the NPDES permit. We're
7 trying to coordinate so that their permit and our
8 permit look as similar, at least in the area of
9 the mitigation settlement -- or the mitigation
10 agreement. And so far we're there.

11 There's been a lot of discussion this
12 morning about that settlement, but most of it
13 doesn't revolve around the amount. It has to do
14 with how it's used, you know. I'll get to that
15 here shortly.

16 Just to go over a little bit of how we
17 assessed the impacts from this project. We're
18 looking only at unit 1 and 2. We consider unit 1
19 and 2 -- since unit 1 through 5 has been shut down
20 for five years, 1 and 2 does represent a new
21 effect; not an ongoing effect.

22 We don't like to look at this in light
23 of what used to be going on from a plant that was
24 built in 1950 that quit operating because it's
25 essentially obsolete. We're looking at this as a

1 new project, but we're looking at it as itself,
2 except for additive effects from the whole power
3 plant.

4 We used the concept of volume going
5 through the power plant in terms of the
6 entrainment loss. We used fish larvae, and Dave
7 Mayer talked about how we averaged that.

8 We also considered the thermal
9 influence. We felt that the thermal influence,
10 due to the situation as described by Dave Mayer,
11 did not represent a significant impact on
12 biological resources.

13 There's a lot of mixing, a lot of things
14 going on. There was a discussion about how to
15 monitor the thermal effect to see if they were,
16 indeed, having effects on biological resources.

17 Due to a number of confounding things
18 that are going on in there, some of it has to do
19 with the natural heated temperature of the Elkhorn
20 Slough tidal volume going back and forth. The
21 discharge being close to where there's a lot of
22 wave action. And the fact that there's some
23 dredging disposal right on the beach right very
24 close to where we might be able to look at thermal
25 impacts.

1 It was felt that there is absolutely no
2 way to separate out all these other variables, all
3 these other influences from the discharge.

4 And by essentially a consensus of
5 professional opinion of the consultants that were
6 both employed by the Energy Commission and the
7 Board, professional opinion was that this will
8 have an effect, but it's not going to be
9 significant. We agreed with the applicant on
10 that.

11 Impingement concern is that's when the
12 fish are, because of the velocity, speed of the
13 flow of water moving into the power plant cooling
14 system, has the potential of things getting
15 essentially stuck on the screen and not being able
16 to swim away.

17 In this case, as described, a number of
18 things have been done to reduce the velocity. The
19 power plant pumps, in general, pumps about .5
20 feet/ second, .48 was the figure given earlier,
21 which is a speed that's felt that most fish can
22 avoid problems.

23 The impingement studies that were done
24 previously didn't appear to show a problem, since
25 on the unit that's been shut down, which had a

1 higher velocity going into it, and so it was felt
2 that impingement would really not be a significant
3 problem in this case. There would be some
4 incremental effects from it.

5 Entrainment, on the other hand, we felt
6 represents a significant effect. And this is
7 where we used fish larvae. The average fish
8 larvae from the harbor in the slough water body of
9 13 percent running through the power plant on a
10 daily basis, this is just unit 1 and 2.

11 We held a meeting with the agencies to
12 discuss with them how do we deal with the loss of
13 fish larvae. And essentially, fish larvae were a
14 proxy, or something that we used to represent
15 everything that's flaggic, or free-floating in the
16 water volume. Things that can't really swim, at
17 least not well. And they just follow the water,
18 they just move in the water body.

19 These are things that are smaller than
20 the 3/8 to 5/16 inch size in the mesh of the
21 screen. So these things are quite small, and they
22 get carried through the stream. There's no way to
23 screen them out effectively. And the screen mesh
24 gets too small and just gets clogged up. And so
25 there's a size that you really can't go below with

1 any efficiency.

2 So, these things go through the power
3 plant. It's a loss essentially of living things,
4 or productivity in that water body.

5 We also felt that since the majority of
6 the fish and the items of life that were
7 identified were from the slough system, that the
8 impacts really were occurring on the slough. And
9 as you can see, there are a number of entities
10 involved with the slough, and very interested in
11 the slough. It's an important resource on the
12 California coast.

13 So our next step was how do we replace
14 what we're losing, how to replace these small
15 little bits of life, productivity of the slough,
16 the fish larvae, crab, clam. And we decided that
17 by enhancing or improving the quality of the
18 slough, and that could be done in a number of
19 ways. Could be through wetlands, creation of
20 wetlands restoration, enhancement of the existing
21 wetlands, stopping erosion, different things that
22 are degrading the slough. That those methods
23 could be used to enhance and improve the quality
24 of the slough to offset the loss of productivity
25 being taken through the power plant.

1 We still had to figure out how do we
2 relate land to water life in the water volume. So
3 as agencies we decided that a reasonable way to
4 approach this problem would be to look at that
5 apportion of fish that are being lost, being taken
6 to the power plant, and relate that to the surface
7 area of the slough, which is 3000 acres.

8 In the FSA a week or two ago I used 4000
9 acres. Since then I found that that is an error,
10 and it's 3000 acres.

11 Thirteen percent of the 3000 acres is
12 390 acres. So we looked at this as roughly if we
13 could replace 390 acres or something on that
14 order, of wetland, we could improve or enhance
15 productivity of the slough.

16 Since we hadn't actually lost wetlands
17 we weren't really trying to replace 390 acres, but
18 we wanted to replace the productivity that that
19 might represent, and so we looked at a range of
20 costs for wetland restoration. And that range,
21 the range that we finally used, the range that I
22 used in the first FSA was very broad.

23 It included luxury wetlands in southern
24 California and some that were a little more
25 economy type wetlands. It was felt that -- and

1 those numbers range all the way up to \$260,000 per
2 acre down to about \$12,000 per acre.

3 It was felt by Dr. Raimondi, who has had
4 quite a bit of experience with wetland
5 restoration, that probably in the Elkhorn Slough
6 there were a lot of things, a lot of restoring and
7 recreating wetlands that had existed in the slough
8 at one time, in a realistic sense in that \$12,000
9 to \$25,000 range.

10 That range spanned to about \$4.5 million
11 to \$9.5 million. That table is in the errata. In
12 our workshop a week ago we arrived at \$7 million,
13 which is kind of in the middle of the range.

14 I support that figure. I'm happy with
15 that. I think that's a reasonable and a fair
16 amount. That money would be used to do a number
17 of things. There would be some wetland
18 restoration. There would be other things
19 possible, such as erosion control. There may be
20 places where there is existing wetland that needs
21 improvement and enhancement, not actual creation.
22 There could be clean-up, contaminated sites that
23 are running into the slough, degrading the
24 quality. There are a number of things that could
25 be done to improve and increase the productivity

1 of the slough.

2 This was something that Michael Thomas
3 will talk here momentarily. Something the Board
4 agreed to, also. So, we're in agreement with the
5 applicant. I think in concept, some of the other
6 agencies here that were at that workshop also
7 agreed.

8 Where we have run into some problems,
9 there's been a little bit of concern about the
10 amount. I'm still not concerned about the amount.
11 I recommend that amount.

12 There has been concern about who would
13 get the money and how the money would be used.
14 And my condition here has the money going to the
15 Elkhorn Slough Foundation, which is a very
16 credible organization that's been around for
17 awhile. And it has headquarters -- at the
18 headquarters that is in the slough, that Fish and
19 Game and NOAA are involved with this. Fish and
20 Game have head offices there also.

21 Deborah --

22 HEARING OFFICER FAY: I'm sorry, we
23 don't have that. If you would like to make a
24 correction to your testimony, you know, do it,
25 yourself. But, we lost that comment.

1 MR. ANDERSON: All right. Anyhow, I
2 still recommend that Elkhorn Slough get the money.
3 And the way I structured the condition is that the
4 money would be provided, but could not be spent by
5 the Slough Foundation until an agreement was
6 reached by both the Board and the Energy
7 Commission.

8 And that agreement would include how the
9 money could be used. And in working up how that
10 money could be used, we would invite other groups
11 to participate, and try to come up with a
12 consensus, a real good strong way to spend the
13 money for improving the Elkhorn Slough.

14 That information would then be taken by
15 the Slough Foundation, turned into a plan that
16 would come back for approval. Everybody who had
17 been involved would be involved with approving it.
18 Obviously the permitting agencies need to approve
19 it, also.

20 And that's how I envisioned this going
21 forward. In that there would be \$2 million for
22 stewardship or an endowment. That money would be
23 used for short- and long-term administration, and
24 maybe land purchase, or maybe conservation
25 easements involved.

1 There would be maintenance, management,
2 monitoring to make sure that enhancement or
3 restoration or recreation types of activities,
4 erosion control, were successful. And if they
5 weren't, would provide money on an annual basis so
6 that there could be maintenance in reworking these
7 things.

8 This morning I found out that there's a
9 lot of interest in other entities getting, maybe
10 receiving the money. And so although that's my
11 recommendation right now, is the Elkhorn Slough,
12 there could be the possibility of another way of
13 handling this, if need be. But that's my
14 recommendation.

15 Just about done here. Let me explain
16 how the \$7 million would be paid out. It was
17 structured a little differently, it's not all up
18 front. But it was something that I think is very
19 workable, and it was agreed to.

20 The first \$1.5 million would be paid at
21 the time construction starts. The second \$1.5
22 million would be paid when commercial operation
23 starts for both units 1 and 2. And they would be
24 dealt with separately. So if 1 started commercial
25 operation several months before number 2, \$750,000

1 would be provided for unit 1, and \$750,000 for
2 unit 2.

3 I don't know if you really want to know
4 why we did that, but -- if you do, I'll explain
5 it.

6 Then from that point on we deal with
7 units 1 and 2 separately. Because on the first
8 anniversary of commercial operation, each one then
9 would be -- there would be another payment of \$1
10 million per plant. The second anniversary, two
11 years after commercial operation, there would be
12 another \$1 million for each of the plants on their
13 anniversary, for a total of \$7 million.

14 I think this gave Duke a chance to see
15 some income coming in from the project as they
16 were paying the money out.

17 I think I'll stop there and see if there
18 are questions.

19 MR. OGATA: Mr. Anderson, the mitigation
20 proposal that you just discussed is contained in
21 BIO-7, is that right?

22 MR. ANDERSON: Yes, that's correct.

23 MR. OGATA: As part of the condition,
24 you have a description about the agreement in
25 terms of how the money's to be spent. And that

1 discussion includes a number of agencies that will
2 be consulted formulating the use of the money, is
3 that right?

4 MR. ANDERSON: Yes, it does.

5 MR. OGATA: Do you have a problem with
6 including in that list the Monterey Bay National
7 Marine Sanctuary?

8 MR. ANDERSON: No, I don't.

9 MR. OGATA: With the mitigation that you
10 proposed, what is your conclusion regarding this
11 project?

12 MR. ANDERSON: I believe that with the
13 total mitigation involved, which the majority is
14 the \$7 million, that we can reduce the
15 entrainment, -- we can reduce the project impacts
16 to a not -- to the less than significant level, to
17 an acceptable level.

18 MR. OGATA: Thank you. Mr. Fay, at this
19 time I'd like to move exhibit 74 with respect to
20 the biological resources testimony, and exhibit
21 75, the biology errata, be moved into evidence.

22 HEARING OFFICER FAY: Any objection? So
23 ordered.

24 MR. OGATA: And the panel is now
25 available for questioning.

1 HEARING OFFICER FAY: Mr. Ellison?

2 MR. OGATA: I believe Mr. Anderson has
3 one more comment he wanted to make about the tank
4 farm.

5 MR. ANDERSON: Earlier Wayne Hoffman was
6 talking about some ratio of replacement, wetlands.
7 That has to do with the tank farm. That's not
8 considered part of our project.

9 So it's down the line a ways. It's the
10 project of the Monterey County is issuing a permit
11 on. Just wanted to -- so I don't -- I haven't
12 been involved in those discussions.

13 HEARING OFFICER FAY: Could you two
14 share a microphone, and let Chris have the other
15 one.

16 CROSS-EXAMINATION

17 BY MR. ELLISON:

18 Q If I may, in the interests of time, let
19 me address these few questions that I do have,
20 it's not very many, to all of you, as a panel and
21 get just a short answer from each of you, if I
22 may.

23 First, there was some public comment
24 this morning to the effect that the project should
25 be required to reduce its impacts as much as

1 possible, and not be allowed to have any impacts
2 that could be mitigated, physically mitigated, by
3 way of paying money in lieu of physically
4 mitigating the impacts.

5 Assuming that you agree with that point
6 is it each of your opinion that this project has
7 used the best technology available, and has
8 mitigated as much as is reasonable, its impacts on
9 marine biological resources?

10 MR. ANDERSON: I'll start with that.
11 The best technology available might fit better
12 into the water resources section, and for the
13 Board. It's not a term that we use in biology at
14 the California Energy Commission.

15 But I will say that it was felt that
16 since the thermal impacts were not considered
17 significant, that the discharge facility was
18 adequate, or was, you know, Mike may put it in
19 different terms. Also felt that because there
20 wasn't concern for significant effects from
21 impingement that the new structure being built
22 with the traveling screens and the moved out to
23 the harbor, would be acceptable.

24 And we did feel that that, along with a
25 few other things, would not result in significant

1 impacts for impingement. And for me, since
2 they're items considered thermal influence effects
3 or impingement effects, to be significant, I
4 didn't make any recommendations for modifying the
5 technology.

6 For entrainment, I'm not aware of any
7 type of technology that can really change what's
8 going on there. Mesh can only get so small, so
9 that you really can't restrain or stop things that
10 are very small and floating in the water volume
11 through there.

12 And so I think that technology is fine,
13 too. And so we mitigate for the results or for
14 the effects, in this case, with this package.

15 Now, first of all I don't agree with
16 your first statement about money's not mitigation.
17 I don't know where that came from. What's
18 mitigation is the activities that are taken, and
19 almost all of those cost money. So, what's done
20 with that amount of money is what will be the best
21 benefit we can possibly make happen.

22 And that's, we'll bird-dog that; our
23 compliance unit will, in the condition there will
24 be things that are approved, accounting for the
25 money. Everything will be monitored fairly

1 closely. And we will make sure that the best
2 thing that can happen with that money happens.
3 And there will be effective and considerable
4 mitigation possible with that \$7 million.

5 MR. ELLISON: Before the other witnesses
6 respond let me clarify. My question perhaps was
7 not as well stated as it should be. I did not
8 mean to say that money is not mitigation. I did
9 mean to reflect a comment that we heard this
10 morning that Duke should not be permitted, by
11 paying money, to avoid minimizing the impacts of
12 its project. And my question is intended to focus
13 on whether that, in your opinion, is occurring
14 here.

15 So, the gist of the question is do you
16 feel that, putting aside the \$7 million, do you
17 feel that Duke, as the project is proposed, is
18 taking all reasonable measures to reduce the
19 impacts of its project.

20 So, let me put the question to Dr.
21 Raimondi and Mr. Thomas in that fashion.

22 DR. RAIMONDI: I'm not going to comment
23 for the reasons that Duke stated on the thermal
24 effects.

25 The other two effects, the entrainment

1 and the impingement, I will comment on.

2 For entrainment, Dick's right, there's
3 simply no other available technology that would
4 not add to the environmental concerns. Especially
5 for the cost involved in installing them.

6 For impingement, we spent actually quite
7 a bit of time thinking about this, because there
8 are alternative technologies available that can
9 reduce impingement for power plants.

10 We just got done writing a report, I
11 worked for the Coastal Commission, on a scientific
12 advisory panel for the San Onofre Nuclear Power
13 Generating Station. We just finished a final
14 report on an impingement reduction device, a
15 behavioral barriers device that actually does have
16 quite an impact, a positive impact on impingement
17 rates.

18 But the conditions are very very
19 different between the Songs and Moss Landing.
20 They're much more comparable to Diablo in terms of
21 the velocity rate. And at Diablo there is very
22 little impingement. And the suspicion is, the
23 strong suspicion based upon all scientific
24 evidence is that impingement rate at Moss will
25 even be less.

1 And so based upon other studies that had
2 been done we concluded that there was not a better
3 technology available for reduction of impacts due
4 to impingement.

5 MR. THOMAS: I'd just qualify that I
6 think a little bit by saying that there are
7 technologies that are available, but for us the
8 test is, you used the word reasonable. I think
9 the EPA uses the term wholly disproportionate, is
10 the cost wholly disproportionate to the
11 environmental benefit to be gained. So that we
12 try to think about it in more of those terms.

13 And I would agree that the upgrades that
14 Duke is doing to the intake system is reasonable.
15 And that the other alternatives that are available
16 would probably not meet that wholly
17 disproportionate test. I think they would be far
18 outside that.

19 One thing they could do to make the
20 impacts go away completely are build cooling
21 towers. And I believe from the staff report and
22 from Duke's own report that the value for the
23 cheapest cooling tower, around \$50 million. And
24 that certainly would be outside the range that we
25 would consider reasonable.

1 So, I think as far as the overall
2 package goes, yes, I would agree with you.

3 MR. ELLISON: And then direct this
4 question to Dr. Raimondi and Mr. Thomas. Mr.
5 Anderson has stated that he believes the \$7
6 million figure is fair and reasonable mitigation
7 for the entrainment impacts. Do you agree with
8 that conclusion?

9 MR. THOMAS: I agree with it. We went
10 through a process where we tried to convert the
11 productivity lost caused by entrainment to acres.
12 And then we tried to convert the acres to a dollar
13 amount using a range of values.

14 And there are a great deal of
15 assumptions in both the study that was done and in
16 the percentages that we came up with as far as the
17 percent productivity loss converted to wetlands.
18 And then in the dollar value that we associated
19 with restoration of wetlands.

20 And one can argue either end of those
21 ranges. You could argue the upper end, you could
22 argue the lower end.

23 As Duke pointed out in our meeting that
24 we had when we were discussing this, they pointed
25 out that one could argue that the cost of

1 restoring wetlands can be extremely low if the
2 opportunity presents itself.

3 For instance, if there's a case where
4 you have a berm or a dike that's preventing tidal
5 action in a certain area. By putting a hole in
6 that dike you can restore that area to wetlands,
7 and it might cost you a few thousand dollars to do
8 that. And you might gain hundreds of acres of
9 wetlands.

10 So, you could start out from a very low
11 value per acre up to an extremely high value per
12 acre using the southern California case for San
13 Onofre Nuclear Generating Station, where they are
14 spending upwards of \$50 million to create, I think
15 it's 300 acres --

16 DR. RAIMONDI: One hundred and sixty.

17 MR. THOMAS: -- 160, excuse me, 160
18 acres of wetlands. So, you know, are the values
19 that we chose reasonable? I think they are
20 reasonable for this area. I think it would be
21 very unreasonable to try and argue those upper
22 limits.

23 As I mentioned earlier this morning,
24 Duke came in with a proposal for \$1.8 million. We
25 argued vehemently that it should be higher than

1 that. And we fought it out during the day with
2 the consultants on both sides involved in the
3 arguments. And came up with the figure, and I
4 think it is quite reasonable.

5 DR. RAIMONDI: I'd like to second that.
6 I'd also like to say that for those of you that
7 are wondering about the 13 percent, or the value
8 that we came up with, that this was a culmination
9 as people have alluded to of at least a year's
10 process where scientists on both sides were
11 actually collaborating and discussing and arguing.
12 And came to decisions that I think we all agreed
13 to in the end.

14 But more importantly than that, it
15 wasn't a year that was in isolation. It's a year
16 that follows on from other power plants where the
17 work has been peer reviewed. This has been the
18 case at Diablo Canyon. We've built upon that
19 case, we've built upon a case at Songs.

20 And so this is a culmination of a long-
21 term scientific endeavor. And we're quite
22 confident that we've taken the best approach to
23 estimating the impacts due to the operation of the
24 plant through entrainment.

25 And then the conversion, as Mike says,

1 is based upon lots of assumptions. But again, the
2 bottomline is that I think that both sides think
3 that in some ways they were conservative, and in
4 other ways they were liberal. But on balance it
5 seemed to be a fair decision, the conversion
6 multiplication that we used.

7 And I think that the \$7 million may or
8 may not be the right amount, but the proof of it,
9 whether it's going to be the right amount, is how
10 the money is spent. If the money is well spent,
11 if the decisions are well made, it will be
12 adequate compensation for the losses.

13 And so I think an important decision
14 here is how the money is spent and the decisions
15 that go about coming to an idea of how that money
16 is spent.

17 MR. ELLISON: That's all I have, thank
18 you very much.

19 HEARING OFFICER FAY: I'll just put this
20 out to the panel, especially Dr. Raimondi.

21 EXAMINATION

22 BY HEARING OFFICER FAY:

23 Q Do you believe there's a nexus between
24 the impacts you understand the project will create
25 in the marine environment and the designated use

1 of the money in restoring the Elkhorn Slough
2 environment?

3 DR. RAIMONDI: I do. In fact, we had a
4 long discussion about this when we first were at
5 the workshop. Two weeks ago, I think, we had the
6 first discussion. And we made it clear that we
7 felt that there had to be some sort of nexus
8 between the dollar figure of whatever that dollar
9 figure ended up being, and the impact.

10 And to me the nexus was clear. We spent
11 a long time coming up with this ratio, this rate
12 of loss. And then the matter was how to convert
13 that rate of loss into mitigation, whether it was
14 a nexus and -- just to back up and tell you a
15 little bit about the history.

16 These species that are lost all produce
17 babies. And the babies are actually the
18 individuals that are lost. So we use terms like
19 larvae and spores, we're talking about the babies.

20 The babies are the things that are
21 entrained in the plant and they're lost. And the
22 vast majority of adults that produce those babies
23 come from the wetland, from Elkhorn Slough.

24 And so what the idea was is to produce
25 enough habitat that would produce themselves

1 enough adults that would produce enough babies to
2 completely compensate for the losses due to the
3 entrainment.

4 That figure is a simple mathematical
5 figure, once you believe all the assumptions that
6 go to the two numbers, 3000 acres, 13 percent
7 loss, boom, we've got it, 390 acres. So the
8 nexus, I think, is very very clear.

9 HEARING OFFICER FAY: And regarding the
10 13 percent figure, and perhaps this was answered
11 earlier, does that equal an upper bound, or how
12 would you characterize that assumption --

13 DR. RAIMONDI: There's two things you
14 should know about the 13 percent. That represents
15 the impact due to the new facility. It does not
16 represent, it is not the figure if you put the
17 whole thing together. That's the difference
18 between the two boards and how they look at
19 things.

20 In terms of upper or lower, yeah, I
21 think it represents pretty close to an upper
22 limit. And we -- as Dave Mayer had talked about
23 earlier, there were two ways to calculate the
24 proportion that were lost. One was based upon a
25 volume that was close to the volume of Elkhorn

1 Slough in terms of the source body water. And the
2 other contained a whole bunch of water from
3 Monterey Bay.

4 We chose to use the most conservative
5 approach which would give the highest estimate of
6 loss, and that was in the range of 13 percent.

7 HEARING OFFICER FAY: And again, to the
8 entire panel, but are you comfortable with the
9 design and methodologies of the studies described
10 by Dr. Mayer that were relied upon to get you to
11 this point?

12 DR. RAIMONDI: I was part of that
13 technical advisory group, so I would say yes. But
14 I want to just point out part of the answer I gave
15 earlier, which was this stuff has been peer-
16 reviewed over and over, and so it's not just our
17 belief that it's a scientifically sound way to
18 estimate impacts. This has been something that's
19 been looked at by independent people that are not
20 being paid, that are in the peer-review
21 literature, and they have come up with a
22 conclusion that this is a sound way -- the
23 soundest way probably to evaluate these impacts.

24 HEARING OFFICER FAY: Mr. Anderson, if
25 you can turn to page 22 of your testimony and I

1 may be talking about old information now, because
2 the errata came out so recently, you may have
3 updated it.

4 But I had a question in that first
5 paragraph when you say a complete assessment of
6 the potential impacts of determination of
7 necessary mitigation and/or best technology
8 available alternatives will be considered for the
9 once-through cooling water system. This
10 assessment will be conducted in close coordination
11 with the Central Coast and Regional Water Quality
12 Control Board.

13 When will that take place?

14 MR. ANDERSON: It already has. That was
15 part of our assessment, was to assess the
16 potential impacts, make a determination of
17 necessary mitigation -- am I in the right spot? I
18 was searching while you were talking.

19 HEARING OFFICER FAY: This is the first
20 paragraph on page 22; it's the first partial
21 paragraph, and it begins the sentence with: A
22 complete assessment of potential impacts. Five
23 lines up from the bottom of the paragraph.

24 MR. ANDERSON: Right. And I believe
25 that -- I consider that's what I've done in the

1 FSA. That's been modified in the errata to
2 reflect the workshop and the agreement that the
3 board and us and the applicant have arrived at.

4 HEARING OFFICER FAY: Thank you. And
5 did you review the basis for your acreage offset
6 ratio for wetland restoration. The last paragraph
7 on page 30 of your testimony, I noted your mention
8 of a one-for-one, or acre-for-acre ratio.

9 MR. ANDERSON: I've taken that out for
10 the errata, and it's because it was confusing
11 people. No wetlands acres have been lost due to
12 this project.

13 We're using wetland acres as a way to
14 improve and enhance or create productivity for the
15 slough to replace what was lost.

16 So the acre-for-acre is more like
17 percent fish times surface acres, the 3000 surface
18 acres. I removed that because I've had a couple
19 comments about where did you get that ratio. And
20 it's really not an acre of lost habitat to an acre
21 of replaced habitat.

22 HEARING OFFICER FAY: I believe, Mr.
23 Thomas can answer this, you said the second draft
24 of the NPDES report is due this week?

25 MR. ANDERSON: Yes, we'll send out, I

1 guess we'll call it the official draft permit this
2 week for public comment.

3 HEARING OFFICER FAY: How long is that
4 comment period?

5 MR. ANDERSON: Thirty days.

6 HEARING OFFICER FAY: And then how much
7 longer before you anticipate your final NPDES
8 report?

9 MR. ANDERSON: We'll send out a -- after
10 getting the comments, within a few days we'll send
11 out a final, along with a response to comments.
12 And then the board meeting will be on September
13 15th, and the board will decide at that time
14 whether to adopt the permit or revise it.

15 They can adopt the permit that's
16 proposed, or they can revise it right at the board
17 meeting.

18 HEARING OFFICER FAY: All right. Thank
19 you.

20 All right, that's all I have for the
21 panel, thank you very much. Anything on redirect,
22 Mr. Ogata?

23 MR. OGATA: No.

24 MR. ELLISON: Nothing further.

25 HEARING OFFICER FAY: Any questions from

1 any of the agencies? I see no indication.

2 Let's take a five-minute break. And,
3 Mr. Ogata, before we do?

4 MR. OGATA: Mr. Thomas would like to
5 make an additional comment, I believe.

6 HEARING OFFICER FAY: Okay, please do.

7 MR. THOMAS: I was going to give you an
8 overview of our process and what we went through,
9 but Dick Anderson did that, and I would end up
10 just repeating everything he said.

11 But I wanted to just touch on a couple
12 things I think are real important for us in this
13 project.

14 This permit that we're sending out, it
15 does say that we've addressed the mitigation
16 issue, we settled on a proposed settlement for \$7
17 million, and how it will be distributed. And it
18 will go to the Elkhorn Slough Foundation. The
19 criteria will be developed for how those funds are
20 used. And the criteria will be written by the
21 Energy Commission and by the Regional Water Board
22 and approved by those two agencies.

23 And I wanted to point out that from our
24 legal staff's position or perspective, there are
25 two entities here with permitting authority, and

1 that is the Energy Commission and the Regional
2 Board. And so it is those two entities that must
3 decide how to distribute these funds and how they
4 will be used.

5 Earlier today during the workshop we
6 talked about where the money was going, what
7 entity it was going to, the Elkhorn Slough
8 Foundation, and how those funds would be used.

9 And there was concern about the dollar
10 amount, and as I said, where the money's going and
11 how it will be used. I think we can address each
12 of those.

13 The dollar amount we talked about, so I
14 won't review. I think that is justified.

15 Going to the Elkhorn Slough Foundation I
16 also think that's the best place for the money.
17 Remember that it is not going to an individual or
18 individuals at the foundation, it's going to a
19 group that is then going to use that money
20 according to direction from the Energy Commission
21 and the Regional Board.

22 We chose that group because we feel they
23 are one of the most credible organizations in the
24 area. They have a long history of success for
25 dealing with issues within the Elkhorn Slough

1 watershed.

2 And we have a strong working
3 relationship with that organization. We've
4 granted money to them in the past and had great
5 success with them.

6 I think the third thing about how those
7 funds are used and people wanting to be part of
8 the process, that's something we can address. We
9 could set up a panel, an independent panel made up
10 of the folks that are interested in how these
11 funds are spent, and it could include say the
12 director of the Monterey Bay Marine Sanctuary or
13 someone he appoints.

14 Other people in this area who are
15 interested. And they could be a formal group that
16 reviews how that money is spent and provides
17 recommendations to the Regional Board and to the
18 Energy Commission on how it's spent.

19 And they can also be involved in
20 reviewing how that money actually was spent. Sort
21 of an audit role. We would support that.

22 So I think those are all things that we
23 can deal with. What we need to avoid, though, and
24 I mentioned earlier today during the workshop, is
25 having our process deteriorate to a point where

1 we're extracting as much money as we can possibly
2 get from Duke Energy and then distributing it to
3 folks that want it.

4 As far as I'm concerned, that's not a
5 credible process. But what we have gone through
6 is a credible process. And I hope that you folks
7 would support that.

8 HEARING OFFICER FAY: As a follow-up on
9 that, Mr. Thomas, is there a way now in the
10 condition that's drafted, or is there a way to add
11 it, that would give your agency and the CEC, or
12 whoever's supervising these funds, sort of a
13 formal audit role so that since the funds, as I
14 understand it, will be coming in over time, at
15 least a million a year, that during that time the
16 use to date is evaluated, so that additional funds
17 are not granted to the Elkhorn Slough Foundation
18 if there's reason to think that they're not using
19 them in the best way for the resources?

20 MR. THOMAS: That's definitely
21 reasonable, yes.

22 HEARING OFFICER FAY: Okay, thank you
23 very much.

24 We'd like to take a five-minute break,
25 but our goal is to move to soil and water

1 resources, and then alternatives, and move right
2 along. And I think it will probably go more
3 quickly since this was the most detailed and
4 controversial area.

5 I want to thank the panel for their
6 testimony, and you're excused.

7 (Brief recess.)

8 MR. ELLISON: The applicant's testimony
9 is separated on water and soils issues. We
10 actually have three different pieces of testimony.
11 We have testimony on marine water resources,
12 testimony on water and groundwater resources, and
13 then we combined agricultural and soils.

14 With respect to maybe the most efficient
15 way to handle this is to -- let's take marine
16 water resources first. The applicant's witness is
17 Brian Waters.

18 HEARING OFFICER FAY: Would the court
19 reporter please swear Mr. Waters.

20 Whereupon,

21 BRIAN WATERS
22 was called as a witness herein and after first
23 being duly sworn, was examined and testified as
24 follows:

25 //

1 DIRECT EXAMINATION

2 BY MR. ELLISON:

3 Q Mr. Waters, can you state and spell your
4 name for the record, please.

5 A My first name is Brian, B-r-i-a-n; last
6 name Waters, W-a-t-e-r-s.

7 Q And where are you employed and in what
8 capacity?

9 A I'm a biologist, my title is Senior
10 Scientist. I'm employed by Duke Engineering and
11 Services, which is part of the Duke family of
12 companies. Duke Engineering Services does
13 consulting for Duke Energy North America, as well
14 as a number of other clients.

15 MR. ELLISON: And for the record Mr.
16 Waters' testimony is entitled, marine water
17 resources. It is that portion of exhibit 73 and
18 incorporates by reference portions of exhibit 5,
19 exhibit 29 and exhibit 56.

20 BY MR. ELLISON:

21 Q Mr. Waters, do you have the marine water
22 resources portion of exhibit 73 before you?

23 A I do.

24 Q Do you have any changes or corrections
25 to this exhibit?

1 A I don't.

2 Q Was this exhibit prepared by you or at
3 your direction?

4 A Yes, it was.

5 Q And are the facts set forth in this
6 exhibit true and correct to the best of your
7 knowledge?

8 A Yes.

9 Q Are the opinions contained in this
10 exhibit your own?

11 A Yes, they are.

12 Q Do you adopt this exhibit as your sworn
13 testimony in this proceeding?

14 A Yes, I do.

15 MR. ELLISON: We'd move exhibit 73, the
16 marine water resources portion of exhibit 73 and
17 the exhibits incorporated by reference therein
18 into evidence.

19 HEARING OFFICER FAY: Any objection?

20 MR. OGATA: No objection.

21 HEARING OFFICER FAY: So moved.

22 BY MR. ELLISON:

23 Q Mr. Waters, have you reviewed the
24 conditions of certification proposed by the staff
25 in the final staff assessment for water resources?

1 A Yes, I have.

2 Q And are they acceptable in your
3 judgment?

4 A Yes. The one that's most specifically
5 related to the marine water resources testimony,
6 under the errata it's condition number 4, which
7 basically would require an operational
8 confirmation study of the characterization of the
9 extent and duration of the thermal plume that
10 would exist following completion of the new
11 project and the combined discharge of the two new
12 units and the two existing units.

13 Q Okay.

14 A And that condition has also been
15 proposed by the Regional Water Quality Control
16 Board in a parallel manner as a condition of the
17 NPDES permit.

18 MR. ELLISON: Mr. Waters is available
19 for examination.

20 HEARING OFFICER FAY: Mr. Ogata.

21 MR. OGATA: No questions.

22 EXAMINATION

23 BY HEARING OFFICER FAY:

24 Q Mr. Waters, on page 3 of your testimony
25 you said that the maximum -- this is under B, new

1 discharges, item 3, maximum temperature of thermal
2 discharge will not exceed the natural temperature
3 of receiving waters by more than 20 degrees
4 Fahrenheit.

5 And I believe either in your testimony
6 or elsewhere there's a question raised about
7 whether the project can limit itself to that
8 level. How will it be determined if the project
9 is exceeding that, and how will the conditions
10 address that possibility?

11 A That BE-3 is quoted from the state
12 thermal plan as a requirement for new facilities.
13 And in discussions working with the members of the
14 technical working group and the Regional Water
15 Quality Control Board, we've come up with a method
16 to characterize the natural temperature of the
17 receiving waters at this power plant. And there
18 is required monitoring under the existing permit
19 and there would be, in the future, essentially
20 continuous monitoring of the water at the intake
21 and the water that's being discharged.

22 And basically we've agreed upon applying
23 a correction factor to the temperatures measured
24 at the intake, and then those temperatures would
25 be subtracted from the temperatures measured at

1 the discharge and then those go into the standard
2 monitoring reports.

3 Q All right, so the difference between the
4 intake temperature and the discharge is the
5 measurement between the -- the intake temperature
6 is the same as the ambient temperature, is that
7 right?

8 A Actually, no. When we do our studies we
9 determine that in terms of the long-term average
10 that the intake temperatures are actually about
11 two degrees warmer than the ambient discharge
12 temperatures. So, for purposes of in the future
13 under the permit Duke will be required to add two
14 degrees -- no, subtract two degrees.

15 Anyway, basically they get -- by the
16 two-degree adjustment. They'll have two degrees
17 less flexibility in operations than the existing.

18 Q And what happens if the project is
19 exceeding the 20-degree delta T?

20 A Duke Energy does not plan to operate in
21 noncompliance with its permit.

22 Q All right, thank you.

23 HEARING OFFICER FAY: That's all I have.
24 Anything further, Mr. Ellison?

25 MR. ELLISON: No.

1 HEARING OFFICER FAY: Thank you, Mr.
2 Waters, you're excused.

3 MR. ELLISON: The applicant's witness is
4 Mr. Scott Flake, whose testimony addresses surface
5 and groundwater resources.
6 Whereupon,

7 SCOTT FLAKE
8 was called as a witness herein and after first
9 being duly sworn, was examined and testified as
10 follows:

11 DIRECT EXAMINATION

12 BY MR. ELLISON:

13 Q Mr. Flake, could you please state and
14 spell your name for the record.

15 A Scott Flake, F-l-a-k-e.

16 Q Where are you employed and in what
17 capacity?

18 A I'm employed by Duke -- as an engineer,
19 here at the Moss Landing Power Plant.

20 Q Applicant's exhibit 73 contains a
21 portion entitled, surface and groundwater
22 resources. That testimony incorporates -- which
23 was filed and served on June 8th. That testimony
24 incorporates by reference portions of exhibit 5,
25 exhibit 16, exhibit 30 and exhibit 50.

1 Mr. Flake, do you have that portion of
2 exhibit 73 before you?

3 A I do.

4 Q Was this testimony prepared by you or at
5 your direction?

6 A It was.

7 Q Are the facts contained therein true and
8 correct to the best of your knowledge?

9 A Yes.

10 Q Are the opinions contained therein
11 yours?

12 A Yes, they are.

13 Q Do you adopt this testimony as your
14 testimony in this proceeding?

15 A I do.

16 Q Do you have any additions or corrections
17 to it?

18 A I do not.

19 MR. ELLISON: Move the admission of the
20 surface and groundwater resources portion of
21 exhibit 73, and the exhibits incorporated by
22 reference therein.

23 HEARING OFFICER FAY: Any objection?

24 MR. OGATA: No objection.

25 HEARING OFFICER FAY: So ordered.

1 BY MR. ELLISON:

2 Q Mr. Flake, you reviewed the conditions
3 of certification proposed by the staff in the
4 final staff assessment for surface and groundwater
5 resources?

6 A I have.

7 Q And are they acceptable in your
8 judgment?

9 A Yes, they are.

10 MR. ELLISON: Mr. Flake is available for
11 examination.

12 HEARING OFFICER FAY: Mr. Ogata.

13 MR. OGATA: No questions.

14 HEARING OFFICER FAY: Any questions from
15 any of the agencies? No indication. Thank you,
16 Mr. Flake.

17 MR. FLAKE: Thank you.

18 MR. ELLISON: And the applicant's last
19 piece of testimony on these issues is its
20 testimony on agricultural and soils testimony,
21 which we propose to have admitted by declaration.

22 The applicant's witness is Mr. Demes
23 Padgett. His declaration is included as a portion
24 of exhibit 64, previously filed in this matter.

25 His testimony is contained as the

1 agricultural and soils portion of exhibit 58. It
2 includes, by reference, section 6.4 of exhibit 5.
3 Based upon the declaration of Mr. Padgett we would
4 ask that this testimony be admitted into evidence.

5 HEARING OFFICER FAY: Any objection?

6 MR. OGATA: No objection.

7 HEARING OFFICER FAY: And was that the
8 first filing by the applicant?

9 MR. ELLISON: That's correct, and that
10 was the testimony that was filed and served on May
11 15th.

12 HEARING OFFICER FAY: Okay, thank you.
13 So, that's entered into the record at this point.

14 MR. ELLISON: If there are any questions
15 in that area we have our project manager available
16 to answer them, but we understand that there are
17 not.

18 HEARING OFFICER FAY: Just for the
19 record, does anybody have any questions regarding
20 the agricultural soils? Fine. If questions were
21 detailed we'd refer them to the applicant and have
22 the return the witness for questioning. But
23 there's no indication of questioning, so we'll
24 move on.

25 Does that conclude your presentation?

1 MR. ELLISON: It does.

2 HEARING OFFICER FAY: All right. Mr.
3 Ogata.

4 MR. OGATA: Staff's witness is Joe
5 O'Hagan.

6 HEARING OFFICER FAY: Please swear the
7 witness.
8 Whereupon,

9 JOSEPH O'HAGAN

10 was called as a witness herein and after first
11 being duly sworn, was examined and testified as
12 follows:

13 DIRECT EXAMINATION

14 BY MR. OGATA:

15 Q Mr. O'Hagan, could you please spell your
16 last name for the record.

17 A Yes, it's spelled O-'-H-a-g-a-n.

18 Q Could you please tell us your job title
19 at the Energy Commission?

20 A I'm an Energy Facility Siting Planner
21 II.

22 Q Do you have before you the soil and
23 water resources errata filed 6/19, testimony of
24 Joe O'Hagan, Dominique Brocard and Jim Henneforth?

25 A Yes, I do.

1 Q Was this testimony prepared by you or at
2 your direction?

3 A Yes, it was.

4 Q Do you have any changes or corrections
5 that you'd like to make to this testimony?

6 A No, I don't.

7 MR. OGATA: Mr. Fay, it's occurred to me
8 that we've been referring to the FSA part three,
9 and these two errata in biology and soil and
10 water. And actually the soil and water and
11 biology errata is complete testimony, by itself,
12 just with changes noted from the FSA section.

13 So, we're moving them both into the
14 record, but probably only the errata, itself, need
15 to be actually part of the record, since it's
16 complete in and of itself. I don't know if you
17 want to handle it --

18 HEARING OFFICER FAY: Why don't we just
19 accept that as the recommendation. We'll take
20 that into account when we evaluate them. I'd like
21 to have an exhibit number on the FSA, as
22 published. But we do need another exhibit number
23 for the soil and water resources --

24 MR. OGATA: I believe the next in line
25 is 76.

1 HEARING OFFICER FAY: Okay.

2 MR. OGATA: The soil and water resources
3 errata will be exhibit 76.

4 HEARING OFFICER FAY: Marked for
5 identified as 76.

6 BY MR. OGATA:

7 Q Mr. O'Hagan, could you please summarize
8 your testimony?

9 A Yes. Based on information supplied by
10 the applicant, other agencies, and information
11 collected by staff, evaluated the potential for
12 the proposed project to accelerate erosion
13 sedimentation adversely affect water supply,
14 degrade water quality and determine compliance
15 with the project with all applicable laws,
16 ordinances, and standards.

17 Briefly, evaluated the potential for
18 accelerated erosion and sedimentation from the
19 project. The project being proposed to be
20 constructed on where three fuel tanks exist right
21 now that are being removed under the County's
22 project.

23 The site will be basically a level site
24 when construction of the project begins. The
25 applicant has identified best management practices

1 for erosion control and storm water management.
2 Proposed a condition that would have the applicant
3 prepare a final detailed erosion control plan
4 prior to any earth-moving activities.

5 That would be reviewed by staff,
6 interested agencies, as well as the chief building
7 official.

8 We also evaluated the potential for the
9 project degrade water quality. Evaluated both
10 storm water runoff of the existing facility, also
11 wastewater discharge to wastewater ponds and
12 through the once-through cooling discharge from
13 the proposed facility.

14 The project's existing information shows
15 that there's been no water quality degradation.
16 And as long as the proposed project complies with
17 its existing and new permits, such as the NPDES
18 permit issued, will not cause any water
19 degradation.

20 I did, reviewing the two permits for the
21 wastewater pond, saw that they didn't specifically
22 deal with the two new units, though the flows and
23 the conditions would certainly cover the new
24 project. So they may need to be updated to
25 reflect that project.

1 I did have one discussion with the
2 Regional Water Quality Control Board and they
3 weren't sure whether that would be necessary or
4 not. So I did include one condition there that if
5 they need to be upgraded they should notify us on
6 that.

7 The other wastewater -- water supply
8 issue was the thermal discharge. The main thrust
9 of our evaluation was whether the proposed project
10 would comply with the California Thermal Plan,
11 which has been discussed before.

12 It basically has for new discharges,
13 which the discharge from the two new units would
14 be, as a delta T of 20 degrees. In other words
15 the discharge shouldn't exceed 20 degrees above
16 receiving water temperature.

17 The applicant has asked the Regional
18 Water Quality Control Board for a variance from
19 this requirement because under certain operating
20 conditions the project will exceed a 20 degree
21 delta T.

22 As you're aware, the existing units 6
23 and 7 are operating under a delta T of 28 degrees.
24 The technical advisory group, which has been
25 discussed today by other witnesses, has evaluated

1 this. They had developed the protocol for the
2 applicant to collect information on thermal
3 loading from the existing facilities and to
4 estimate thermal loading from the proposed unit.

5 This was evaluated and reviewed quite a
6 bit. And based on this evaluation we were not
7 able to identify any biological impacts resulting
8 from the thermal discharge.

9 As I said, it probably would exceed the
10 20 degree delta T on certain periods of basically
11 all four units working maximum. On the other
12 hand, with the addition of the two new units'
13 discharge, probably the thermal loading from the
14 existing facilities will be reduced.

15 So, based on the draft NPDES permit
16 prepared by Michael Thomas and the Regional Water
17 Quality Control Board Staff, they propose to grant
18 the variance to Duke. I concur. I see no impacts
19 occurring from Duke meeting the proposed thermal
20 limits in the NPDES permit.

21 We do have identified a conditions of
22 certification that we require in cooperation with
23 the Regional Water Quality Control Board, Energy
24 Commission Staff, and other agency staff to the
25 applicant to develop a proposal to evaluate, once

1 the project is up and operating, an exact
2 characterization of the thermal plume, so we have
3 a real good idea of exactly what's going on when
4 the facility is operating.

5 The other compliance issue that was of
6 specific interest has also been discussed quite a
7 bit already. And that was the best technology
8 available. And as you've heard, all the other
9 witnesses indicate is that the major concern,
10 under the Clean Water Act, section 316(b), was the
11 entrainment impacts, and whether there was other
12 technology for cooling water intake structures
13 that could reduce those impacts as Dr. Raimondi
14 and Dr. Mayer had indicated that impingement was
15 really not a concern.

16 Staff did evaluate a number of
17 alternative technologies. Some options such as
18 closed cycle cooling facility, such as wet or dry
19 cooling towers were certainly far vastly expensive
20 than was necessary, we felt, to mitigate any
21 impacts from impingement.

22 Most of the alternative cooling water
23 intake structure technology available actually
24 would address impingement, which as we said,
25 wasn't a problem.

1 Based on the proposed off-site
2 mitigation package that staff, the Regional Board,
3 and other agencies and Duke have agreed to, we
4 felt that the impacts from impingement were
5 addressed. And therefore, we determined that the
6 project is, in fact, meeting best technology
7 available. That's said in light of the
8 improvements that they'll be doing to the existing
9 cooling water intake structure.

10 And that concludes my testimony.

11 Q So just for the record, then, you
12 conclusion is that there are no significant
13 adverse effects from this project?

14 A That is correct.

15 Q Okay.

16 MR. OGATA: At this time I'd like to
17 move the soil and water resources section of
18 exhibit 74 and exhibit 76 into the record.

19 HEARING OFFICER FAY: Any objection? So
20 ordered.

21 MR. OGATA: And I would like to point
22 out that, as has happened on several times in many
23 past siting cases, Mr. O'Hagan is the sole water
24 witness, and the applicants always have three or
25 more doing the same technical area as him.

1 (Laughter.)

2 MR. OGATA: And he's available for
3 questioning.

4 HEARING OFFICER FAY: So you can ask him
5 three times as many questions.

6 (Laughter.)

7 MR. ELLISON: Well, I'll hold it to one.

8 CROSS-EXAMINATION

9 BY MR. ELLISON:

10 Q My question concerns your testimony
11 regarding the need for a variance from the thermal
12 discharge requirement.

13 Am I correct in my understanding that
14 the need for a variance results from the existing
15 discharge of existing units 6 and 7 being
16 combined, for permitting purposes, with the
17 discharge from the new units 1 and 2?

18 A Yes, that's correct. If you look at
19 just the new units 1 and 2, they would most likely
20 meet the delta T of 20 degrees all the time.

21 Q Okay. And, but for this project the
22 existing units would be continuing to operate
23 under their prior permit at a 28 degree delta T,
24 correct?

25 A That's right, under the thermal plan

1 they'd be considered an existing discharge, and
2 there's no numerical standard, since the delta T
3 of 28 degrees is what's been applied to the
4 facility, I would imagine that that would
5 continue.

6 Q So, in effect, the need for variance
7 results from the application of a more stringent
8 criteria to the existing units, is that fair?

9 A Yes.

10 MR. ELLISON: That's all I have, thank
11 you.

12 HEARING OFFICER FAY: I have no
13 questions. Any agencies have questions for Mr.
14 O'Hagan? I see no indication. Thank you very
15 much.

16 MR. O'HAGAN: Thank you.

17 HEARING OFFICER FAY: You're excused.

18 We'd like to move now to taking evidence
19 on alternatives. Do you have a witness on that,
20 Mr. Ellison?

21 MR. ELLISON: Yes, we do. The
22 applicant's witness on alternatives is Mr. Mark
23 Seedall. Mr. Seedall is seated immediately to my
24 left, and I won't ask him to move.

25 //

1 Whereupon,

2 MARK SEEDALL

3 was called as a witness herein and after first
4 being duly sworn, was examined and testified as
5 follows:

6 MR. ELLISON: As a preliminary matter,
7 as I mentioned to the Committee previously, we
8 have a legal issue with the staff that we're not
9 going to present as factual testimony, but that we
10 will brief.

11 It goes to whether for a modification of
12 an existing facility, such as this one, whether
13 the Warren-Alquist Act requires that the staff and
14 the Commission examine alternative sites.

15 Obviously a facility can only be
16 modified at a site in which it's located. And our
17 position is that the Warren-Alquist Act recognizes
18 that practical reality and does not require an
19 examination of alternative sites.

20 The staff, nonetheless, has done an
21 examination of alternative sites and has come to
22 the conclusion that there are no preferable
23 alternative sites for this modification, which we
24 agree with.

25 So the issue goes only to the question

1 of the interpretation of the Warren-Alquist Act.
2 But we think this case does present that issue,
3 and it's not discussed in the testimony because
4 it's purely a legal issue. We'll address that on
5 brief.

6 DIRECT EXAMINATION

7 BY MR. ELLISON:

8 Q With that preface, Mr. Seedall could you
9 state and spell your name for the record.

10 A Yes. Mark Seedall, S-e-e-d-a-l-l.

11 Q Where are you employed and in what
12 capacity?

13 A I'm Duke Energy's Director of Electric
14 Modernization, and I'm leading up the project team
15 for the Moss Landing permitting. And I work in
16 Oakland, California.

17 MR. ELLISON: Mr. Seedall's alternatives
18 testimony is the alternatives portion of exhibit
19 73, which was filed and served on June 8, 2000.
20 It incorporates by reference a portion of exhibit
21 5, as well as exhibit 57.

22 BY MR. ELLISON:

23 Q Mr. Seedall, do you have the
24 alternatives portion of exhibit 73 before you?

25 A I do.

1 Q Was this exhibit prepared by you or at
2 your direction?

3 A Yes, it was.

4 Q Do you have any additions or corrections
5 to it?

6 A I do not.

7 Q Are the facts contained in this exhibit
8 true and correct to the best of your knowledge?

9 A They are.

10 Q Are the opinions therein your own?

11 A Yes.

12 Q Do you adopt this testimony as your
13 sworn testimony in this proceeding?

14 A I do.

15 Q Have you reviewed the staff's conditions
16 of certification regarding alternatives in the
17 final staff assessment?

18 Actually that's an unfair question --
19 it's a trick question.

20 (Laughter.)

21 MR. ELLISON: The question is withdrawn.

22 Exhibit 73, the alternatives portion of
23 exhibit 73, I would like to move the admission of
24 that into evidence.

25 HEARING OFFICER FAY: Any objection?

1 MR. OGATA: No objection.

2 HEARING OFFICER FAY: All right, so
3 moved.

4 MR. ELLISON: Mr. Seedall is available
5 for examination.

6 HEARING OFFICER FAY: Mr. Ogata.

7 MR. OGATA: No questions.

8 HEARING OFFICER FAY: Well, thank you,
9 Mr. Seedall, we have no questions.

10 (Laughter.)

11 HEARING OFFICER FAY: Do any of the
12 agencies have questions about alternatives? All
13 right. Thank you.

14 MR. SEEDALL: Thank you.

15 HEARING OFFICER FAY: Now we'll move to
16 the staff witness on alternatives.

17 MR. OGATA: The staff's witness is
18 Richard Buell. He needs to be sworn.

19 Whereupon,

20 RICHARD BUELL

21 was called as a witness herein and after first
22 being duly sworn, was examined and testified as
23 follows:

24 //

25 //

1 DIRECT EXAMINATION

2 BY MR. OGATA:

3 Q Could you please spell your name for the
4 record.

5 A B-u-e-l-l.

6 Q And what is your job title at the Energy
7 Commission?

8 A I'm currently employed as a Senior
9 Mechanical Engineer.

10 Q Do you have before you the testimony
11 entitled, alternatives, testimony of Richard K.
12 Buell, which is contained in the final staff
13 assessment part three?

14 A Yes, I do.

15 Q Was this testimony prepared at your
16 direction?

17 A Yes, it was.

18 Q Do you have any changes or corrections
19 you'd like to make at this time?

20 A Yes. On page 18, at the top of the
21 page, the second bullet that reads: There is a
22 potential for significant adverse biological
23 impacts to protected species including brown
24 pelicans and --," I'd like to delete that bullet.

25 Also, lower on the page, the last bullet

1 before the paragraph entitled conclusions, I'd
2 like to delete that paragraph, also. It reads the
3 same as the first bullet that I recommended to
4 delete.

5 Q Any other changes or corrections?

6 A That's all the corrections I have.

7 Q Do you adopt this testimony as your own?

8 A Yes, I do.

9 MR. OGATA: At this time I'd like to
10 move the alternatives testimony, exhibit 74, into
11 the record.

12 HEARING OFFICER FAY: Any objection?

13 Hearing none, so moved.

14 MR. OGATA: And Mr. Buell is available
15 for questions.

16 HEARING OFFICER FAY: Any questions from
17 the applicant?

18 MR. ELLISON: No questions.

19 HEARING OFFICER FAY: The Committee has
20 no questions, either. Thank you, Mr. Buell,
21 you're excused.

22 That concludes our taking of formal
23 evidence for today and for the case. But the
24 Committee is going to go off the record for a
25 moment to discuss among ourselves, and perhaps

1 with the parties, whether or not we will hold our
2 hearing Thursday.

3 We're off the record.

4 (Off the record.)

5 PRESIDING MEMBER KEESE: We have one
6 question, one question first before we go off.

7 HEARING OFFICER FAY: Yes, one question,
8 yes. Can you just wait until we get back on the
9 record?

10 We're on, go ahead.

11 MR. BOWEN: Michael Bowen with the
12 Coastal Commission. Thanks.

13 The Commission Staff would be unable to
14 attend should a meeting be held on Thursday. But
15 we appreciate the possibility.

16 You indicated that the taking of formal
17 evidence for today and for the case was closed.
18 Does that mean that the end of the evidentiary
19 hearing today represents the closure --

20 HEARING OFFICER FAY: Well, the record
21 is open, as we indicated, to you, to the extent of
22 receiving the report from the Coastal Commission,
23 as we're required to proceed by statute.

24 MR. BOWEN: Right.

25 HEARING OFFICER FAY: I mean that is

1 absolutely locked in. There's no discretion on
2 that. So the Commission has to receive and take
3 account of and seriously deal with the
4 recommendations of the Coastal Commission, that's
5 right in our statutes.

6 MR. BOWEN: I see. And should that --
7 there's nothing I know of that would suggest that
8 this might be the case, but I'm just trying to
9 look ahead and understand, if the staff analysis
10 included information that had not been introduced
11 today, would it be excluded from the evidentiary
12 body?

13 And that was the purpose of our --

14 HEARING OFFICER FAY: No.

15 MR. BOWEN: -- seeking an extension.

16 HEARING OFFICER FAY: No, it would not.

17 MR. BOWEN: Okay.

18 HEARING OFFICER FAY: And I just,
19 perhaps we sliced the term --

20 MR. BOWEN: And I'm sorry to keep
21 dwelling on this, by the way.

22 HEARING OFFICER FAY: Yeah, perhaps we
23 sliced the term evidence too finely. But, the
24 Coastal Commission, under Public Resources Code
25 25523(b) submits a report to the Energy

1 Commission, and the Commission incorporates the
2 comments in the report, unless it finds that the
3 provisions specified in it would result in greater
4 adverse effect on the environment, or that the
5 provisions proposed in the report would not be
6 feasible.

7 So, but for that, the Committee will
8 incorporate the recommendations of the Coastal
9 Commission.

10 MR. BOWEN: Thank you very much for
11 clarifying that. Sorry to keep dwelling on it.

12 HEARING OFFICER FAY: Anything further
13 on this? The indication I get from the audience
14 is that none of the agencies or people present
15 would find a benefit with holding the hearing on
16 Thursday, two days from now, June 22nd, is that
17 correct? Last chance.

18 All right, thank you. We will not hold
19 the hearing on Thursday. While it was noticed, it
20 was noticed as an overflow event, and we've
21 concluded our business.

22 Are there any closing comments for
23 either parties, Mr. Ellison?

24 MR. ELLISON: I do have just a couple of
25 minor housekeeping items, if you'll bear with me.

1 First, we have already moved into evidence
2 virtually all of exhibit 5, which is the
3 application for certification. But in an
4 abundance of caution I would make a motion to
5 admit any portions of the AFC that have not
6 already been admitted.

7 HEARING OFFICER FAY: Any objection?

8 Mr. Ogata?

9 MR. OGATA: No objection.

10 HEARING OFFICER FAY: All right, so
11 moved.

12 MR. ELLISON: And secondly, Commissioner
13 Moore, you asked our witness Dr. Mayer if we would
14 identify for the record the outside expert that
15 reviewed the studies of entrainment impacts. And
16 we have that name. His name is Dr. Johnson Wang,
17 W-a-n-g. We have his address and phone number for
18 the record. I'm not going to read it into the
19 record at this time, but if the Committee's
20 interested in more information than his name, we
21 can get that for you.

22 COMMISSIONER MOORE: Thank you.

23 HEARING OFFICER FAY: Mr. Ellison, are
24 you comfortable that you've moved into evidence
25 all the exhibits on your exhibit list? Or do you

1 believe that you have?

2 MR. ELLISON: I am comfortable that we
3 have moved into evidence all of the exhibits on
4 our exhibit list that we want to move into
5 evidence. There may be a couple that we
6 identified and then decided not to move in.

7 HEARING OFFICER FAY: Okay.

8 MR. ELLISON: There are a couple of
9 documents that the Committee may wish to have in
10 evidence, one of which is the draft NPDES permit.
11 That was another housekeeping matter I wanted to
12 mention.

13 We have a draft, as Mr. Thomas
14 mentioned, and in the next few days there will be
15 a revised draft that will be available. The
16 applicant has no objection to the Committee
17 receiving that document into evidence, somewhat
18 analogous to the air quality final determination
19 of compliance, for example. So for a complete
20 record you might want to do that.

21 HEARING OFFICER FAY: I'd like to
22 identify that second draft that's expected this
23 week as exhibit 77. That would be the most
24 current draft we can get at this point. And we
25 will certainly -- the project will certainly be

1 bound by the final draft, after its comment
2 period. But for the record, we'll identify the
3 second draft of the NPDES permit as exhibit 77.

4 Anything further?

5 MR. ELLISON: No, that's all we have.

6 HEARING OFFICER FAY: Okay.

7 MR. OGATA: Excuse me, Mr. Fay, I had
8 some question, are we going to have briefs on any
9 issues at all, or do you anticipate any further
10 work from us?

11 HEARING OFFICER FAY: The parties do
12 not, at this point, have disputes that I'm aware
13 of between each other. And although I've spoken
14 to Mr. Ellison about briefs, and he's indicated he
15 is interested in preparing some to help the
16 Committee. And that is most welcome.

17 You asked in what areas that could be
18 most helpful, and I think I indicated a few
19 things. One thing I wanted to add was the
20 importance of clarifying the final agreement among
21 the parties. Because since testimony was filed
22 simultaneously there's original testimony and then
23 revisions from each party.

24 And the Committee wants to know where
25 the meeting of minds was. And if there was any

1 fine tuning between those revisions, et cetera,
2 just be sure that's real clear. You can define
3 where that was in the record. It may not be as
4 apparent to us as we pull the record together. So
5 that would be helpful.

6 But, I think, because of lack of
7 dispute, that this is an optional matter. If the
8 staff feels strongly about the dispute on
9 alternatives, they should address that. But I
10 don't think we need to order briefs from the
11 staff. But the applicant addressing especially
12 the more complex issues will be particularly
13 helpful.

14 And what would be a reasonable timeframe
15 since there would be no reply? Can we say three
16 weeks?

17 MR. ELLISON: That's fine.

18 HEARING OFFICER FAY: Give you time to
19 see the transcripts and if that's problematic,
20 please contact me, because there can be delays in
21 getting the transcripts, and it could be as much
22 as two weeks, in which case it might be a little
23 difficult.

24 But, citations to the transcripts are
25 important for us. So, give you time to be able to

1 do that.

2 MR. ELLISON: Three weeks is fine.

3 HEARING OFFICER FAY: Okay.

4 MR. ELLISON: We'll file three weeks
5 from today.

6 HEARING OFFICER FAY: Good, okay.

7 MR. OGATA: And, Mr. Fay, if staff
8 wanted to file a brief with respect to
9 alternatives, should we file that concurrently or
10 can we wait till after we see Mr. Ellison's brief?

11 HEARING OFFICER FAY: Well, I'd like to
12 see you file concurrently. I think that would be
13 a better situation.

14 And give the parties the option of
15 filing a reply brief one week later.

16 MR. ELLISON: And with respect to --

17 COMMISSIONER MOORE: Nice try, Jeff.

18 (Laughter.)

19 MR. OGATA: Well, see, you're assuming
20 that I already know what his brief is going to
21 say, which, in fact, I probably do --

22 COMMISSIONER MOORE: No, I just --

23 MR. OGATA: -- but I thought I'd give it
24 a shot.

25 COMMISSIONER MOORE: You were wondering

1 if anyone was asleep --

2 (Laughter.)

3 HEARING OFFICER FAY: I think he filed
4 his first draft some time ago. You might look at
5 that.

6 MR. OGATA: With respect to the idea
7 that some of these other public agencies that
8 haven't had an opportunity to comment on the
9 marine biology issue, do you just anticipate that
10 they would be allowed to file comments
11 specifically on the PMPD and in our usual process,
12 or do you contemplate any special --

13 HEARING OFFICER FAY: They will
14 certainly be able to file comments on the PMPD. I
15 would encourage them to file, as public agencies,
16 to file comments as soon as possible with the
17 Committee. And I think, if they're, you know,
18 within a three-week timeframe, if possible --

19 COMMISSIONER MOORE: Same time as
20 everybody else.

21 HEARING OFFICER FAY: Yeah, because that
22 would be the most helpful, so that we can
23 incorporate their comments.

24 MR. OGATA: Thank you.

25 HEARING OFFICER FAY: Any other

1 questions?

2 PRESIDING MEMBER KEESE: I would just
3 like to thank both the applicant and the staff for
4 the presentation today on the biological. It was
5 a very difficult issue, and I thought that the
6 clarity of the presentations was certainly
7 helpful. And I'm sure Commissioner Moore and
8 myself, it's difficult to get an understanding of
9 something quite that complex, and I thought the
10 presentations were excellent. Thank you.

11 HEARING OFFICER FAY: Commissioner
12 Moore?

13 COMMISSIONER MOORE: No.

14 HEARING OFFICER FAY: Closing
15 benedictions? All right, please, everybody drive
16 safely. We are adjourned.

17 (Whereupon, at 4:55 p.m., the hearings
18 were concluded.)

19 --o0o--

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CERTIFICATE OF REPORTER

I, DEBI BAKER, an Electronic Reporter,
do hereby certify that I am a disinterested person
herein; that I recorded the foregoing California
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transcribed into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
hearing, nor in any way interested in outcome of
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