

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of: ) Docket No. 01-AFC-4  
)  
Application for Certification for the East Altamont )  
Energy Center )  
\_\_\_\_\_ )

**APPLICANT'S SUPPLEMENTAL COMMENTS  
ON  
PRESIDING MEMBER'S PROPOSED DECISION**

June 2, 2003

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The East Altamont Energy Center LLC (“Applicant”) submits these comments on the Revised Presiding Member’s Proposed Decision (“RPMPD”) in this Application for Certification (“AFC”) proceeding.

The Applicant is in substantial agreement with almost all of the changes which have been made in the RPMPD. As explained more fully below, we do have concern with proposed conditions which have been added in the areas of Air Quality and Fire Safety. We also have several suggestions which are minor corrections and clarifications.

## **I. AIR QUALITY**

The Applicant appreciates the Committee’s careful review of the record with respect to air quality and, in particular, the Committee’s recognition of the important role played by California’s air pollution control districts in assessing both LORS compliance and the significance of air quality impacts. In general, the Applicant agrees with the findings and conclusions set forth in the RPMPD with respect to air quality. To ensure that the Commission’s Final Decision is as complete and accurate as possible, the Applicant offers the following clarifications and corrections to the RPMPD.

At p. 127, the Revised PMPD contains the following statement:

“SJVUAPCD’s initial methodology, attached to the AQMA, identifies an interpollutant offset ratio of 1:1 for VOC to NO<sub>x</sub> and a ratio of 2:1 for SO<sub>x</sub> to PM<sub>10</sub>. Had EAEC been in their district, SJVUAPCD rules would have required that interpollutant offset ratios be determined by an air quality analysis. No such analysis was provided.”

The VOC:NO<sub>x</sub> ratio of 1.0:1 is supported by the BAAQMD’s air quality plan, which is the basis for establishing this ratio in BAAQMD Rule 2-2-302.2. This rule is contained in California’s State Implementation Plan, which means that the ratio has been reviewed and approved by the California Air Resources Board and U.S. Environmental Protection Agency. The fact that this ratio has been approved for use throughout the BAAQMD, without the need for additional case-by-case analyses, does not mean that an analysis was not performed. Rather, it means that the BAAQMD’s district-wide analysis was sufficiently compelling as to enable the placement of the ratio in the District’s rules. With respect to the SO<sub>x</sub>:PM<sub>10</sub> ratio, this ratio is, in fact, supported by the interpollutant analysis submitted by the Applicant to the BAAQMD. (Attachment 1 to Ex. 2S) In this instance, BAAQMD increased the ratio from 2.0:1 to 3.0:1 to provide an additional measure of conservatism (FDOC, Ex. 2DD, Appendix C); however, the SJVUAPCD accepted the applicant’s analysis, and ratio of 2.0:1, as consistent in methodology with those previously approved by the SJVUAPCD for other, recent projects (e.g., Tracy Peaker Project, MID Woodland II, Hanford Energy Park).

Consequently, the Applicant recommends that the last sentence of the above-quoted statement be revised as follows:

“No such analysis was provided. These analyses were prepared by and for the BAAQMD, and the SJVUAPCD accepted these analyses as sufficient to support these offset ratios in the AQMA.”

At p. 145, the Revised PMPD contains the following statement:

“Evidence of record discloses that neither Applicant nor SJVUAPCD performed ambient air quality dispersion modeling for ozone *and PM10*. (10/21 RT 181:14-19; 391:19-21.)” (emphasis added)

Ambient air quality dispersion modeling was performed for PM<sub>10</sub> by the Applicant and BAAQMD, and was reviewed by the CEC Staff. (Ex. 2S, p. 5; Ex. 4G, p. 2.1-7; Ex. 2DD, p. 21; Ex. 1, p.5.1-20) Consequently, the Applicant recommends that this sentence be revised to delete the phrase “and PM10”.

At p. 146, the Revised PMPD recommends that the Applicant and CEC Staff meet in an attempt to resolve the remaining issues related to proposed Conditions AQ-SC1 through AQ-SC4. The Applicant and CEC Staff have done so and have reached agreement on all except the provisions of AQ-SC3(n), AQ-SC3(p) and AQ-SC3(q). The Applicant’s proposed revisions to AQ-SC1 through AQ-SC4 are discussed below.

At p. 146, the Revised PMPD contains the following statement:

“With respect to sulfur dioxide emissions, Applicant has accepted Staff’s threshold finding that SO<sub>2</sub> emissions, if not mitigated, represent a significant air quality impact due to their potential contribution to ambient PM<sub>10</sub> levels.”

The Applicant has not accepted Staff’s threshold “finding”. In fact, Applicant has demonstrated that, even if Staff’s threshold conclusion is correct, Applicant has fully mitigated project SO<sub>2</sub> impacts. (Ex. 4G, p. 2.1-15: “However, even if one were to conclude that the SO<sub>2</sub> increases, if not mitigated, represented a significant air quality impact due to their potential contribution to ambient PM<sub>10</sub> levels, the CEC Staff has, in past cases, accepted reductions in other PM<sub>10</sub> precursors (such as direct PM<sub>10</sub> emissions, oxides of nitrogen emissions and, in some cases, POC emissions) as suitable mitigation.”) For this reason, Applicant recommends that the above sentence be replaced with the following:

“With respect to sulfur dioxide emissions, Staff has argued that SO<sub>2</sub> emissions, if not mitigated, represent a significant air quality impact due to their potential contribution to ambient PM<sub>10</sub> levels.<sup>65</sup> Applicant has disagreed, but has argued that, even if the Staff’s position were correct, Applicant has provided sufficient mitigation to address these impacts. Further, Applicant asserts ....”

At p. 150, the Revised PMPD suggests, in LORS Findings 3 and 7, that the BAAQMD made findings with respect to mitigation. The BAAQMD made findings – including findings related to the significance of air quality impacts – but only in the context of LORS. Because Findings 3 and 7 in the RPMPD are in the context of a discussion of LORS, references to mitigation are not relevant, except in the context of regulatory mitigation – emission offsets.

There is no dispute among the parties but that EAEC has satisfied all regulatory mitigation (offset) requirements. Consequently, Applicant recommends that Findings 3 and 7 be revised as follows:

3. BAAQMD and Applicant maintain that the LORS analysis included all federal and state requirements, and that the FDOC resulted in ~~mitigation of all~~ no significant local ~~and~~ or regional (or cumulative) impacts. (Staff disagrees, maintaining that local air districts such as BAAQMD and SJVUAQMD only consider federal SIP requirements. Staff also disagrees that local and regional impacts were fully mitigated.)

7. In our LORS analysis, we find it difficult to characterize the AQMA. Applicant ~~and BAAQMD~~ maintains that all impacts of EAEC were fully mitigated under the FDOC, without the AQMA. Both Applicant and BAAQMD maintain that there are no significant, unmitigated air quality impacts from EAEC, even absent the AQMA. SJVUAPCD maintains that with the AQMA there is full mitigation to a higher LORS standard (even though theoretical), and the Applicant is in support of that position. (Staff again disagrees.)

At p. 151 of the Revised PMPD, in CEQA Finding 3, there is again the statement that the BAAQMD made findings with respect to mitigation. This is not correct; however, the BAAQMD did make findings with respect to significance.<sup>1</sup> (Ex. 2DD, Appendix E) Therefore, Applicant recommends that CEQA Finding 3 be revised as follows:

3. Similarly, BAAQMD finds that there are no significant, unmitigated ~~all~~ cumulative air quality impacts ~~mitigated through the~~ in the FDOC's ~~ERC offsets~~ and the SJVUAPCD finds any cumulative impacts mitigated through the AQMA. (Staff again disagrees.)

At p. 151 of the Revised PMPD, CEQA Finding 4 implies that the CEC Staff has somehow challenged the BAAQMD's methodology in determining appropriate offsets. Although this finding recognizes the distinction between an assessment of the suitability of offsets for LORS purposes and analysis of offsets under CEQA, this finding may not be appropriate in that (1) the CEC Staff does not dispute the BAAQMD's LORS conclusions, and (2) the BAAQMD determined that with the implementation of their proposed conditions there were no significant unmitigated air quality impacts. Consequently, the Applicant recommends that this finding be deleted.

At p. 151 of the Revised PMPD, in CEQA Finding 6, the Committee suggests that Applicant, BAAQMD and SJVUAPCD agree that the project will result in a cumulatively considerable net increase of ozone and PM<sub>10</sub>. The Applicant believes that a better characterization of the SJVUAPCD's position is that SJVUAPCD argued that the project will contribute significantly to an existing violation of an air quality standard. Neither Applicant nor BAAQMD agreed with that conclusion. Consequently, the Applicant recommends that CEQA Finding 6 be revised as follows:

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<sup>1</sup> Indeed, the CEQA Guidelines, Appendix G, expressly authorize the agencies to rely on the Air District's findings of significance in fulfilling their mandate under CEQA: "Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations." (14 CCR Section 15000 et seq., Appendix G.)

6. The SJVUAPCD argued that EAEC will contribute significantly to existing violations of ambient air quality standards within the District's boundaries. (BAAQMD and Applicant disagree; CEC Staff agrees.) All parties are in agreement that EAEC will result in a cumulatively considerable net increase in ozone and PM10 for which both the BAAQMD and SJVUAPCD are in non-attainment. While there were assertions that other CEQA requirements were relevant there was no credible evidence in support. Based on the SJVUAPCD's expertise in this area, we ~~We~~ will therefore proceed to analyze the cumulative impacts of EAEC's ozone and PM10 and Staff's objection to the adequacy of BAAQMD and SJVUAPCD mitigation schemes.

At p. 155 of the Revised PMPD, the Committee suggests that the Applicant has abandoned its concerns with respect to the Diesel exhaust particulate soot filter requirement contained in Condition AQ-SC3. This is not correct. The Applicant expressly repeated its concerns on this issue during its comments on the PMPD during the February 24, 2003 Committee Conference on the PMPD. (2/24/03 RT 10-11) The Applicant did not further address this issue in its supplemental PMPD comments because we believed that the issue was adequately addressed in our comments at the Committee Conference and because the Committee did not request additional comments on this issue. Applicant's concerns, as expressed in its original posthearing briefs and at the Committee Conference, remain in full force. The Applicant respectfully requests that the Committee take note of the precedent-setting nature of this condition (even aside from the pre-emption issue), and the fact that the record is devoid of any evidence indicating that the Diesel exhaust particulate impacts associated with construction of EAEC are so different as to require this unique condition. The Applicant urges the Committee to review how this requirement was addressed in the case of the Tracy Peaker Project, Russell City Energy Center, and other, nearby projects, and urges the Committee to adopt the language proposed by the Applicant in Applicant's PMPD comments as being consistent with past Commission decisions. Specific changes to these provisions are discussed further below.

At p. 155 of the Revised PMPD, in Finding 5, the Applicant recommends that this finding be revised to read as follows to more accurately reflect the record:

5. In the absence of mitigation, EAEC has the potential to contribute significantly to existing violations of ozone and PM<sub>10</sub> standards in both BAAQMD and SJVUAPCD.

At p. 158, with respect to Condition AQ-SC3, Applicant reiterates its concerns, expressed in its PMPD comments, and urges the Committee to apply the same construction mitigation conditions as were required for either the Tracy Peaker Project or the Russell City Energy Center in lieu of the new conditions required here. As requested by the Committee, Applicant has met with the CEC Staff in an attempt to reach a compromise on this (and other remaining related) issues. As a result of this meeting, the Applicant proposes the following changes to Conditions AQ-SC1 through AQ-SC4. These changes have been agreed to by Applicant and staff except for the provisions of AQ-SC3(n), AQ-SC3(p) and AQ-SC3(q). In the case of those three paragraphs, the Applicant has proposed changes intended to address Applicant's concerns while still achieving the Staff's stated objectives. However, in each of those three cases, the CEC Staff has indicated that it has not changed its position. The changes to AQ-SC3 (related to a requirement to halt construction in the event wind speeds exceed 15 miles per hour) are essential if

construction of the project is to proceed in an orderly manner. The CEC Staff's language, if not amended, requires mitigation even in the event there is no impact to be mitigated. Applicant's proposed changes would link the curtailment requirement to an actual impact – the exceedance of the dust opacity requirements of AQ-SC4.

With respect to the soot filter conditions contained in AQ-SC3(p), AQ-SC3(q) and AQ-SC3(r), Applicant restates its preference that the Committee include conditions identical to those imposed in the Russell City and Tracy Peaker cases. Failing that, Applicant proposes the following modifications to the Staff's proposed conditions, as stated in the Revised PMPD. These modifications are intended to explicitly state Staff's assurances that soot filters would not be required in the event such requirement would conflict with state or federal requirements. In addition, these modifications would restate qualifications on the soot filter program, adopted by the Commission in other proceedings, intended to ensure that soot filters would be used in successful applications. The CEC Staff has stated on numerous occasions that it is not their intention to require soot filters in cases where such installations would fail and thereby damage broader, state clean air objectives.

The specific language of conditions AQ-SC1 through AQ-SC4 is as follows:

**AQ-SC1** The project owner shall fund all expenses for an on-site air quality construction mitigation manager (AQCMM) who shall be responsible for maintaining compliance with conditions AQ-SC2 through AQ-SC4 for the entire project site and linear facility construction. The on-site AQCMM may delegate responsibilities identified in Conditions AQ-SC1 through AQ-SC4 to one or more air quality construction mitigation monitors. The on-site AQCMM shall have full access to areas of construction of the project site and linear facilities, and shall have the authority to appeal to the CPM to have the CPM stop any or all construction activities as warranted by applicable construction mitigation conditions. The on-site AQCMM, and any air quality construction mitigation monitors responsible for compliance with the requirements of AQ-SC4, shall have a current certification by the California Air Resources Board for Visible Emission Evaluation prior to the commencement of ground disturbance. The AQCMM may have other responsibilities in addition to those described in this condition. The on-site AQCMM shall not be terminated without written consent of CPM.

**Verification:** At least sixty (60) days prior to the start of ground disturbance, the project owner shall submit to the CPM, for approval, the name, current ARB Visible Emission Evaluation certificate, and contact information for the on-site AQCMM and air quality construction mitigation monitors.

**AQ-SC2** The project owner shall provide a construction mitigation plan, for approval, which shows the steps that will be taken, and reporting requirements, to ensure compliance with conditions AQ-SC3 and AQ-SC4.

**Verification:** At least sixty (60) days prior to start any ground disturbance, the project owner shall submit to the CPM, for approval, the construction mitigation plan. The CPM will notify the

project owner of any necessary modifications to the plan within 30 days from the date of receipt. Otherwise, the plan shall be deemed approved.

**AQ-SC3** The on-site AQCMM shall submit to the CPM, in the monthly compliance report, a construction mitigation report that demonstrates compliance with the following mitigation measures:

- a) All unpaved roads and disturbed areas in the project and linear construction sites shall be watered ~~until sufficiently wet~~ for every four hour of construction activities, or until sufficiently wet to comply with the dust mitigation objectives of Condition AQ-SC4. The frequency of watering can be reduced or eliminated during periods of precipitation.
- b) No vehicle shall exceed 10 miles per hour within the construction site.
- c) The construction site entrances shall be posted with visible speed limit signs.
- d) All vehicle tires shall be washed or cleaned free of dirt prior to entering paved roadways.
- e) Gravel ramps of at least 20 feet in length must be provided at the tire washing/cleaning station.
- f) All entrances to the construction site shall be graveled or treated with water or dust soil stabilization compounds.
- g) No construction vehicles can enter or exit the construction site unless through the treated entrance roadways.
- h) Construction areas adjacent to any paved roadway shall be provided with sandbags to prevent run-off to the roadway.
- i) All paved roads within the construction site shall be swept twice daily.
- j) At least the first 500 feet of any public roadway exiting from the construction site shall be swept twice daily.
- k) All soil storage piles and disturbed areas that remain inactive for longer than 10 days shall be covered, or be treated with appropriate dust suppressant compounds.
- l) All vehicles that are used to transport solid bulk material and that have potential to cause visible emissions shall be provided with a cover, or the materials shall be sufficiently wetted and loaded onto the trucks in a manner to provide at least one foot of freeboard.

- m) ~~All construction areas that may be disturbed shall be equipped with windbreaks at the windward sides prior to any ground disturbance. Wind erosion control techniques, such as wind breaks, water, chemical dust suppressants and vegetation, shall be used on all construction areas that may be disturbed. The Any windbreaks used to comply with this condition shall remain in place until the soil is stabilized or permanently covered with vegetation.~~
- n) Any construction activities that ~~can~~ cause fugitive dust in excess of the visible emission limits specified in Condition AQ-SC4 shall cease when the wind exceeds 15 miles per hour and one or more legitimate complaints have been made to the AQCMM and/or CPM regarding fugitive dust, until water, chemical dust suppressant, or other measures have been applied to reduce dust to the limits set forth in AQ-SC4.
- o) All diesel-fueled engines used in the construction of the facility shall be fueled only with ultra-low sulfur diesel, containing no more than 15-ppm sulfur.
- p) All large construction diesel engines, which have a rating of 100 hp or more, shall meet, at a minimum, the 1996 ARB or EPA certified standards for off-road equipment, unless certified by the on-site AQCMM that a certified engine is not available for a particular item of equipment.
- q) All large construction diesel engines, which have a rating of 100 hp or more, shall be equipped with catalyzed diesel particulate filters (soot filters), unless certified by engine manufacturers or the on-site AQCMM that the use of such devices is not practical for specific engine types. For purposes of this condition, the use of such devices is “not practical” if, among other reasons:
- i) there is no available soot filter that has been certified by either the California Air Resources Board or U.S. Environmental Protection Agency for the engine in question; or
  - ii) the construction equipment is intended to be on-site for ten (10) days or less.
- The CPM may grant relief from this requirement if the AQCMM can demonstrate that they have made a good faith effort to comply with this requirement and that compliance is not possible.
- The use of a soot filter may be terminated immediately if one of the following conditions exists, provided that the CPM is informed within ten (10) working days of the termination:
- a. The use of the soot filter is excessively reducing normal availability of the construction equipment due to increased downtime for maintenance, and/or reduced power output due to an excessive increase in backpressure.
  - b. The soot filter is causing or is reasonably expected to cause significant engine damage.

- c. The soot filter is causing or is reasonably expected to cause a significant risk to workers or the public.
  - d. Any other seriously detrimental cause which has the approval of the CPM prior to the termination being implemented.
- r) All diesel-fueled engines used in the construction of the facility shall have clearly visible tags issued by the on-site AQCMM that shows the engine meets the conditions AQ-SC3 (p) and AQ-SC3 (q) above.

**Verification:** In the MCR, the project owner shall provide the CPM a copy of the construction mitigation report and any diesel fuel purchased records, which clearly demonstrates compliance with condition AQ-SC3.

**AQ-SC4** No construction activities are allowed to cause visible dust emissions at or beyond the project site fenced property boundary. No construction activities are allowed to cause visible dust plumes that exceed 20 percent opacity at any location on the construction site. No construction activities are allowed to cause any visible dust plume in excess of 200 feet beyond the centerline of the construction of linear facilities.

**Verification:** The on-site AQCMM shall conduct a visible emission evaluation at the construction site fence line, or 200 feet from the center of construction activities at the linear facility, each time he/she sees excessive fugitive dust from the construction or linear facility site. The records of the visible emission evaluations shall be maintained at the construction site and shall be provided to the CPM on the monthly construction report.

At pp. 159-60 of the Revised PMPD, the Committee proposes its own formulation of Condition AQ-SC5. As noted earlier, the Applicant is tremendously appreciative of the effort and attention paid by the Committee to this important issue. However, Applicant has several concerns regarding this condition, as discussed further below.

First, Applicant objects to the provisions that require the payment of additional funds if necessary to ensure that 66.8 tons/year of reductions are obtained for several reasons. Such a requirement fails to acknowledge that the AQMA already provides for a two-fold safety margin in the amount of mitigation funds required. As shown in the AQMA (Ex. 4G3, p. Exhibit A-2 thereto), the actual amount of emission reductions calculated to be required are 33.4 tons per year. This value was multiplied by two to add an additional measure of conservatism, and to ensure adequate funding for mitigation as determined by the SJVUAPCD. The Applicant believes it inappropriate to now mandate this two-fold safety margin with respect to the tons of reductions actually achieved. (The Applicant has no objection to the use of the safety factor for determining the magnitude of the mitigation fee to be paid, as it serves to provide an additional margin of certainty to ensure that the tons of reductions required are actually achieved.) This issue is of particular concern because the CEC Staff will certainly be involved in commenting on the specific measures to be implemented, and has previously demonstrated in this proceeding a preference for mitigation measures that are much less efficient in reducing emissions (e.g., the installation of solar panels at the Mountain House school). Whether the CEC's role is advisory

(as recommended by Applicant) or regulatory (as currently provided for in the verification for AQ-SC5), Applicant is seriously concerned about the potential for the diversion of funds from their most beneficial uses.

Applicant also objects to this requirement as inconsistent with the Commission's actions in two similar cases. In both the Otay Mesa and Palomar cases, the Commission has required the payment of mitigation fees without any requirement that the fee amount be recalculated if sufficient reductions were not achieved. While the CEC Staff, in its comments on the EAEC PMPD, has argued that the Otay Mesa precedent is not relevant because San Diego has better air quality than the San Joaquin Valley, this argument is specious. In both the EAEC and two San Diego project cases, the CEC Staff argued (and the Commission agreed) that project impacts have the potential to result in significant, cumulative air quality impacts under CEQA, and that additional mitigation was therefore required. The calculation of the amount of mitigation required is certainly a case-specific determination; however, there can be no rational argument that the method for ensuring that adequate mitigation is provided should be different depending on the region's air quality. The mandating of such a requirement in the EAEC case, while failing to impose similar requirements in other cases, would impose an inequitable competitive burden on Applicant. For this reason, Applicant respectfully requests that paragraphs 2 and 3 be deleted from Condition AQ-SC5. In the event the Committee does not delete these two paragraphs, Applicant requests that the value be changed from 66.8 tons per year to 33.4 tons per year for the reasons stated above. In proposing this change, Applicant is not seeking to change the amount of the mitigation fee that is to be paid to the SJVUAPCD.

Second, Applicant objects to the verification language that requires that the AQMP be approved by "the CEC" prior to the commencement of construction. It is not clear whether this reference to the CEC was intended to be a reference to the CPM or to the full Commission. Inasmuch as the Committee has heard extensive testimony on, and has reviewed in detail, the AQMP, Applicant respectfully submits that no purpose will be served by requiring a second review of the AQMP by either the CPM or the full Commission prior to construction. Instead, the Applicant proposes that the AQMP be approved by the Commission in its initial licensing decision, and that only changes to the AQMP be subject to additional approval by the Commission.

In the event that the Committee chooses to require a second post-certification review of the AQMP by the CPM it will be critical that the decision carefully specify the purpose and limit of such review. The CEC Staff has made abundantly clear its objection to the AQMP; therefore, the decision should expressly state that the responsibility for review of the AQMP rests with the SJVUAPCD, in consultation with the CPM. In addition, if the CPM is to play any role in the review of the AQMP, the decision should state that the purpose of review by the CPM is solely to determine that the AQMP is consistent with the terms of the decision, and is not an opportunity for the Staff to relitigate, modify or impede the scope and terms of the AQMP.

Applicant's proposed revisions to Condition AQ-SC5 are as follows. These changes include minor corrections intended to make the condition consistent with the terms of the AQMA.

AQ-SC5      In order to enhance air quality in the Northern San Joaquin Valley Air Basin in general, and near the project in particular, the project owner shall fund a program designed to achieve reductions in emissions of ozone and PM10 precursors.

The ~~project owner~~ program shall be designed to provide emissions reductions locally equivalent to 66.8 tons of NOx.

These emission reductions may be generated through a combination of mobile and/or stationary source emission reduction programs with best efforts made to achieve the reductions in the northern San Joaquin Valley. Emission reductions will be obtained through:

1. Implementation of measures identified in the Air Quality Mitigation Measure Plan (AQMP), as identified in paragraph 3 of the AQMA between Applicant and the SJVUAPCD. Pursuant to paragraphs 5 and 12 of the AQMA, the AQMA is incorporated within this Condition and shall be enforceable against any EAEC successor project owners. The AQMP dated July 19, 2002, referenced as Exhibit 2CC in this proceeding, is approved and shall constitute the AQMP approved by the Commission for the purposes of paragraph 3 of the AQMA.
- ~~2. Providing supplemental funds to the SJVUAPCD to implement additional measures identified in the AQMP as may be necessary to achieve the emissions reduction identified above.~~
- ~~3. Applicant may opt to provide ERCs in lieu of additional funding beyond the \$1,002,480 under the AQMA to achieve the emissions reduction identified above in the event that the programs funded by the AQMA fall short of these goals.~~
4. If it proves to be infeasible to obtain the reductions in the northern San Joaquin Valley, the reductions shall be obtained in other parts of the SJVUAPCD. To the extent possible, the Applicant shall ensure that full ~~Full~~ mitigation ~~is shall~~ be completed prior to the start of commercial operation.
5. Under the provisions of paragraphs 1 and 2 ~~1 and 2 -4~~ of the AQMA, ~~prior to the commencement of construction~~ not later than 30 days after physical delivery of the first combustion turbine generator to the Project site, the project owner shall pay to the SJVUAPCD the sum of \$1,002,480, which funds shall be deposited by the SJVUAPCD into an account dedicated to the implementation of emission reduction measures designed to mitigate the impacts of the EAEC project within the San Joaquin Valley Air Basin. The SJVUAPCD shall expend the funds consistent with the AQMP (as provided for in paragraph 3 of the AQMA), as approved by the CEC upon licensing of the EAEC. The AQMP shall be formulated in a manner designed to maximize the emission reductions achieved through such expenditures, and shall give preference to cost-effective measures, which

reduce emissions in or near the city of Tracy, San Joaquin County, and the Northern Region of the San Joaquin Valley Air Basin.<sup>2</sup>

**Verifications:**

1. ~~An~~ The AQMP shall be submitted to and approved by the CEC prior to construction of the EAEC by the Applicant on July 19, 2002, referenced as Exhibit 2CC in this proceeding, shall constitute the AQMP approved by the Commission for the purposes of the AQMA. At any time during implementation of the AQMP, the SJVUAPCD may request that the CPM approve expenditures for measures not included in the approved EAEC AQMP. Such request(s) shall be accompanied by:
  - a description of the additional emission reduction measures;
  - their anticipated costs and emission reductions;
  - supplemental documentation containing a level of detail comparable to that contained in the original and approved EAEC AQMP, which was submitted and approved pursuant to this ~~condition~~ decision.
  
2. The project owner, annually, shall provide to the CPM a report containing information detailing:
  - the purchase of additional ERCs;
  - tons of emission reductions of NOx and VOC secured from the AQMP.

The report shall contain, but not be limited to:

- the total ERCs secured and surrendered, and
  - the status of any supplemental CEC-approved emission reduction programs designed to achieve the required emissions reductions ~~equivalent to 66.8 tpy~~ of NOx and/or VOC, combined to benefit the Air Quality in the Tracy/Livermore region.
3. ~~At least~~ Within 10 days prior to the commencement of construction of the date required under the AQMA in paragraphs 1 and 2 of the AQMA, the project owner shall submit to the CPM evidence of payment of the AQMF under the AQMA to the SJVUAPCD. Not more than 60 days after the end of each calendar year, commencing with the calendar year in which the AQMF payment is made, EAEC shall, ~~with the endorsement of~~ based on information provided by the SJVUAPCD, submit to the CPM a report containing the following information:
    - List of all projects funded through the EAEC AQMA's air quality benefit program (AQB) during the prior calendar year;

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<sup>2</sup> In the event the Committee rejects Applicant's proposal to delete paragraphs 2 and 3 in their entirety, Applicant proposes the following alternative language:

2. Providing supplemental funds to the SJVUAPCD to implement additional measures identified in the AQMP as may be necessary to achieve ~~the an~~ emissions reduction identified above locally equivalent to 33.4 tons of NOx.
3. Applicant may opt to provide ERCs in lieu of additional funding beyond the \$1,002,480 under the AQMA to achieve the 33.4 ton emissions reduction identified above in the event that the programs funded by the AQMA fall short of ~~these goals~~ this goal.

- Incentive payments and/or costs for each project funded during the prior calendar year;
- Estimated annual emission reductions for each project funded during the prior calendar year;
- Estimated cumulative annual emission reductions for all projects funded through the end of the prior calendar year.

Such reports shall continue to be filed at the end of each calendar year, with the last report due after the end of the calendar year in which the last of the available mitigation funds have been expended.

At p. 168, of the Revised PMPD, there is a typographic error in the on-line version of Condition AQ-18. The cited regulatory basis for this condition should be “PSD for NOx”, as is shown in the FDOC.

## **II. WORKER SAFETY AND FIRE PROTECTION**

The RPMPD contains significant changes to the discussion, findings and conditions regarding “Worker Safety and Fire Protection”. While the Applicant strongly supports the goal of the RPMPD to ensure that the EAEC will be constructed and operated in a safe and reliable manner, we believe that the newly proposed condition “Worker Safety-4” will not help to achieve this goal. Instead, as we explain below, Worker Safety-4 is contrary to existing law, unnecessary, unsupported by the evidence of record and may, in its practical effect, actually impair emergency response to the project.

The Committee states that the risks associated with the construction and operation of the EAEC need to be acknowledged, managed and properly mitigated. (RPMPD, p. 206) The Applicant agrees. Moreover, we believe that the evidence of record in this proceeding strongly supports a finding that these hazards are acknowledged and mitigated through measures, equipment and training which reduce these risks to a level of insignificance.

As set forth at pages 58-60 of Appendix A to the RPMPD, there is an extensive body of law governing worker health and safety. The uncontroverted evidence of record, as presented by the Applicant, the Staff and Alameda County (the agency with jurisdiction over fire services for this plant) is that the EAEC will be in full compliance with all applicable LORS throughout the construction and operation of the facility. (Ex 4A, p. 8.7-15, Ex. 1, pp. 5.15-5 – 6) The EAEC will be equipped with extensive automated and manual fire suppression systems, alarm systems, onsite storage of fire protection water, redundant fire pumps, and specialized training of plant operating and maintenance staff. (Ex. 1, p. 5.15-11)

The evidence of record also demonstrates that the EAEC will be served by the Alameda County Fire Department (“ACFD”), the agency with jurisdiction over this facility. (RPMPD, p. 198) Both ACFD and the Staff have testified that ACFD will be able to provide adequate fire, EMS and hazmat services to the EAEC, even if the Tracy Fire Department (“TFD”) is unable or unwilling to provide mutual aid. (2/15 RT 85-86, 89) Although TFD and a few individuals have *commented* on this evidence, no party has offered testimony which contradicts the testimony of ACFD and the Staff regarding ACFD’s ability to serve the EAEC.

While it is important that the RPMPD not minimize the risks inherent in the operation of a natural gas-fired power plant, it is equally important that the RPMPD recognize the extensive measures which will be taken by EAEC to address these risks. These measures will meet and exceed all applicable LORS and will be consistent with the measures approved by the Commission in the past. (2/15 RT 82-83, 111) In previous licensing decisions, the Commission has consistently held that this combination of comprehensive Safety and Health Programs, Fire Protection and Prevention Plans, onsite fire protection and suppression systems and outside fire and emergency service resources are adequate to meet project needs and reduce any impact on public health or safety to a level of insignificance. (See, for example Magnolia Power Project Final Decision, arch 5, 2003, p. 159).

**A. Proposed Condition “Worker Safety-4” is Contrary to Existing Law.**

As proposed in the RPMPD, Worker Safety 4 would require the Applicant<sup>3</sup> to enter into an agreement with TFD for the purpose of ensuring that TFD will provide supplemental first response<sup>4</sup> “to EAEC emergency incidents (including fire, EMT and hazardous material), personnel, training and equipment purchase.”<sup>5</sup>

As recognized by the RPMPD, fire, EMS and hazardous material services in Eastern Alameda County are under the jurisdiction of ACFD. The jurisdiction of fire districts such as ACFD and TFD is governed by the Fire Protection District Law of 1987. (Calif. Health and Safety Code Section 13800 et seq.) This law expressly recognizes that “Local control over the types, levels, and availability of these services is a long-standing tradition in California which the Legislature intends to retain.” (*Id.* at § 13801)

Under the Fire Protection District Law of 1987, each fire district is empowered to provide fire protection services, rescue services, emergency medical services, hazardous material emergency response services and ambulance services, within its designated service territory. (*Id.* at 13862) Each district is also authorized to enter into mutual aid agreements with any other federal or state agency, any city, county, or special district. (*Id.* at § 13863)

While each district is also authorized to contract with any person or public agency to provide district services to territory which is outside the district (*Id.* at § 13878), there are two important limitations on this authority. First, TFD must obtain the consent of ACFD. Health and Safety Code Section 13050 expressly provides that “The apparatus, equipment and firefighting force of any public entity may be used for the purpose of providing fire protection or firefighting services... [in] any other public entity with the consent of the chief administrative officer of the office or department authorized by law to provide fire protection in such other public entity.”

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<sup>3</sup> We presume that this reference should be to the “Project Owner”, not the Applicant.

<sup>4</sup> We are not certain what is intended by the term “supplemental first response”. The term appears to be contradictory. First response means the first unit which is dispatched to respond to an incident. When the first unit which is dispatched is not able to respond or requires additional units to also respond, such supplemental service is called mutual aid. Because TFD has already contracted to provide mutual aid, we assume that Worker Safety-4 intends that the Project Owner contract with TFD to provide first response.

<sup>5</sup> We are not certain what is intended by the supplemental phrase “personnel, training and equipment purchase”. It appears that some words are missing in this condition.

Second, TFD may provide new service may be provided by “contract or agreement outside its jurisdictional boundaries only if it first requests and receives written approval from the [local area formation] commission in the *affected* county.” (Government Code Section 56133, emphasis added) Moreover, the LAFCO “may authorize a city or district to provide new or extended services outside its jurisdictional boundaries and outside its sphere of influence to respond to an existing or impending threat to the public health or safety of the residents of the affected territory” only if both of the following requirements are met:

“(1) The entity applying for the contract approval has provided the commission with documentation of a threat to the health and safety of the public or the affected residents.

“(2) The commission has notified any alternate service provider...” (Id.)

The Applicant appreciates the Committee’s desire to ensure that TFD honor its mutual aid obligations, but TFD’s obligations cannot be ensured by ordering the Applicant to contract with TFD for fire services outside the jurisdiction of TFD.<sup>6</sup> TFD may not lawfully perform under such an agreement with EAEC without (1) obtaining the consent of ACFD and (2) seeking and receiving approval from the LAFCO in the affected County.<sup>7</sup> And the LAFCO may not lawfully grant approval of such a contract without first notifying the ACFD and finding, after a public hearing, that such contract is necessary to address a threat to public health and safety. Given the evidence of record in this proceeding that ACFD can serve EAEC without threatening public health and safety, it is unlikely that the LAFCO would find otherwise.

Because the proposed provisions of Worker Safety-4 are contrary to existing law, this condition should be deleted in its entirety.

## **B. Worker Safety-4 is Unnecessary**

Worker Safety-4 appears to be premised upon the assumption that an agreement between EAEC and TFD would improve fire, EMS and hazardous material services to the project. In fact, the Agreement would not necessarily provide any material increase in level of service.

The RPMPD states, without citation to the record, that “it is inconceivable that a hazardous material response coming from San Leandro could be made in 35 minutes...during the height of rush hour traffic. As a result, the Committee concludes that TFD will often need to provide emergency response to EAEC and/or be the first responder.” (RPMPD, p. 206) Putting aside for the moment the reasonableness of estimates of response time for hazardous material incidents<sup>8</sup> and whether such estimated response times provide an adequate level of service<sup>9</sup>, the

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<sup>6</sup> TFD has stated that its concern with the EAEC is only part of a broader political dispute regarding resources which involves issues unrelated to EAEC, such as automatic response to freeway accidents and service to the Tracy Peaker Project. (2/15 RT 164-167) Unlike the EAEC, the Tracy Peaker Project is within the jurisdiction of TFD. In its Decision on the Tracy Peaker Project, the Commission concluded that "The City of Tracy Fire Department will not require additional staffing or equipment in order to provide a first response to a project fire." (Tracy Peaker Project Decision, p. 139) The Tracy Peaker Project was not ordered to make additional payments to TFD in order to obtain fire and emergency services.

<sup>7</sup> On the other hand, a mutual aid agreement between ACFD and TFD does not require LAFCO approval.

fact of fundamental importance is that TFD does not have the capability to provide hazardous material response. (2/15 RT 101) In San Joaquin County, hazardous material response is provided by the San Joaquin County Office of Emergency Services and the closest San Joaquin County hazardous material team is in Stockton, which is even farther away from EAEC than San Leandro. Not only is the hazardous material resources of Alameda County adequate to serve Eastern Alameda County, these resources have also been used to serve Tracy. (2/15 RT 102) Because it is not practical for TFD to be staffed or trained to provide hazardous material services (*Id.*), an agreement between EAEC and TFD would not improve hazardous material services to EAEC.

Similarly, a contract between EAEC and TFD for TFD to provide EMS services would not necessarily improve EMS response times to the project. TFD does not have paramedics on its fire engines; therefore, if TFD, rather than ACFD were to be the first responder to an EMS call, ambulance services would be provided as a contracted service to TFD and the TFD fire units would not necessarily respond to the call.

It is not necessary for the Commission to require EAEC to make additional payments to TFD, because the EAEC – Alameda County Cooperation Agreement already provides a substantial budget for improving services in the Mountain House area. Under Section 6.3 of the Cooperation Agreement, EAEC will pay Alameda County \$500,000 for improved emergency services response. The Cooperation Agreement expressly provides that half of the \$500,000 for improved emergency services will be used to benefit other agencies providing services into the Alameda County Mountain House area: “It is agreed that such plan will expend approximately half of the budget on improving services through the County and half of the budget on improving services either through other agencies or to provide a direct benefit to other agencies who respond to the Mountain House Area.”

Worker Safety-3 references the \$500,000 payment for enhanced emergency services. Instead of a separate payment obligation as proposed in Worker Safety-4, the Applicant recommends that Worker Safety-3 be revised to expressly reference the terms of the Cooperation Agreement which direct that half of the funds will be used to improve services through other agencies who respond to the Mountain House area. According, this condition may be revised to read:

**“WORKER SAFETY–3** The project owner shall enter into an agreement with Alameda County for enhanced fire protection services. This agreement shall provide for the project owner to pay \$2,500,000 for the relocation of Fire

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<sup>8</sup> Applicant, ACFD and Staff agree on the estimate of response times. No other response times have been estimated by the TFD or any intervenors. (2/15 RT 110-111) Although the RPMPD expresses concerns about response times during the height of rush hour traffic on Interstate 580, both staff’s witness and the ACFD Fire Chief have testified to the use of the shoulder of the road when the road is congested. (*Id.* at 102) The ACFD Fire Chief has also noted that there are other routes than Interstate 580 to reach the site. (*Id.* at 110).

<sup>9</sup> The CEC Staff Witness testified “The response time, in my opinion, is more than adequate from all -- the response from offsite fire department is more than adequate. This is a rural location and the response time is actually much quicker than for other rural locations previously certified by the Commission. Furthermore, with the relocation of station 8 from its present location to a new location which would be right at Greenville Road and interstate 580, the response time will decrease.” (2/15 RT 82-83)

Station 8 and \$500,000 for enhanced emergency response services. Approximately half of the \$500,000 for enhanced emergency services will be expended to improve services through the County and half of the budget will be expended to improve services either through other agencies or to provide a direct benefit to other agencies who respond to the County's Mountain House Area."

### **C. Worker Safety-4 Is Not Supported By The Record.**

The new discussion in the RPMPD appears to be based upon (1) the public comments by Chief Fragoso on February 15, 2003, (2) the public comments of various individuals, (3) a comment letter from Chief Estes dated February 20, 2003, and (4) public comment from intervenor Sarvey.

The only *testimony* offered by TFD is a brief statement by Chief Fragoso on February 15, 2003. This testimony was limited to three facts: (1) the distance from EAEC to the future TFD fire station at Mountain House, (2) the distance from the nearest TFD fire station to the Tesla plant, and (3) a conversation with the Commission Staff regarding the Tracy Peaker Project. (2/15 RT 118) However, later on February 15 Chief Fragoso offered additional public comment.

As provided in Section 1702 of the Commission's Regulations, "While the committee or commission may rely in part on any portion of the hearing record in making a finding, only those items properly incorporated into the hearing record pursuant to Section 1212 or 1213 are sufficient in and of themselves to support a finding." As the Committee stated in its October 3, 2002 NOTICE OF EVIDENTIARY HEARINGS and HEARING ORDER, "These public comments will be entered into the record of the proceeding and may be used to supplement or explain the evidence of record. Public comments by themselves, however, are not sufficient to support a finding of fact or a decision on an issue."

The Applicant objects to the Committee's reliance upon any public comments by TFD or others which are not supported by evidence in the record. Specifically, the Applicant is not aware of evidence incorporated into the record pursuant to Section 1212 or 1213 which would support the newly added Finding #9 and establish that Alameda County's provision of EMS services alone would not be sufficient to service the EAEC.<sup>10</sup>

The Applicant also objects to newly added Finding # 10. While the Cooperation Agreement between Alameda County and EAEC provides approximately \$500,000 for enhanced emergency services, of which \$250,000 will be used to benefit agencies in the Mountain House area, we are not aware of evidence in the record to support a finding that value of an agreement between EAEC and TFD would be \$500,000. There is no evidence in the record regarding what costs, if any, TFD might experience if it provides first response services to the project. The only evidence in the record is that the likelihood of a fire at a power plant is minimal. (2/15 RT 82)

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<sup>10</sup> This finding appears to be based solely on Mr. Fragosos's public comment at 2/15 RT 168-169. The Committee will recall that Applicant's counsel sought to question Chief Fragoso regarding his public comments concerning EMS services and that the Hearing Officer ruled that no questions of Mr. Fragoso would be allowed. (2/15 RT 168-169) It would be most unfair for the Committee to consider, much less rely upon, public comments, where the Applicant was precluded from questioning or contesting these comments.

**D. Worker Safety-4 May Actually Impair The Delivery Of Emergency Services.**

While the clear intent of Worker Safety-4 was to enhance the delivery of emergency services to EAEC, the practical effect of this condition may be to impair the delivery of these services. The concept of one fire district serving as first responder to a single customer within the boundaries of a fire district in a different county is so novel that many practical issues of implementation have not been addressed, much less resolved:

- How will TFD be dispatched? Can the Alameda County 9-1-1 system be modified to dispatch neighboring fire districts as first responders on a selective basis, or would EAEC be required to call a different telephone number in San Joaquin County to receive emergency services from TFD?
- Who would have legal responsibility to provide emergency services to EAEC? Would the EAEC/TFD agreement relieve ACFD of the service obligations imposed by statute, and would this be legal?
- Would TFD enjoy the statutory immunities which it has within its service territory for services provided outside its territory?
- Would payment to TFD for service to EAEC threaten or limit ACFD funding from other sources?

**E. Worker Safety-4 and Related Findings Should Be Deleted.**

For the reasons set forth above, Worker Safety-4 should be deleted. In addition, the Committee should delete Findings 9 and 10. The RPMPD may be revised to incorporate the terms of the EAEC – Alameda County Cooperation Agreement which will direct approximately \$250,000 to improve emergency services response in the County’s Mountain House area.

The Applicant respectfully submits that it is not necessary for the Commission to manage the provision of fire services to EAEC. As it has done in every other licensing decision, the Commission should rely upon the judgment of the local agency with direct jurisdiction as to how it will best service the facility. The Commission should honor the clear legislative mandate to retain “local control over the types, levels, and availability of these services”.

**III. WATER QUALITY**

Applicant appreciates the Committee’s effort to revise the PMPD regarding Water Quality. The Applicant would like to suggest two minor corrections:

First, at the end of Finding 28 there is a reference to “the risk of degradation to groundwater”. This reference to the “risk of degradation” should be deleted, or should be qualified to indicate that “in Trimark’s opinion” there is a risk of degradation.

As noted in Finding 26, the RWQCB has ongoing oversight of MHCS D plans for water recycling through landscape irrigation. The RWQCB will exercise this jurisdiction whenever MHCS D seeks a change in permit conditions or a permit renewal (a permit renewal is currently pending). As part of its review process, the RWQCB must establish waste discharge requirements that protect groundwater from potential degradation. Therefore, if we assume that

the RWQCB will properly exercise its jurisdiction (an assumption which is not disputed by any party in this proceeding), there is no potential risk of degradation from any alternative approved by the RWCQB.

Second, in Soils&Water 5, the word “potable” should be replaced with “fresh” to read as follows:

**“SOILS&WATER 5:** Prior to plant operation an 18 inch pipeline to convey recycled water from MHCS D’s treatment facilities to EAEC shall be built. Applicant shall accept all recycled water offered to it by BBID at a cost comparable or lower than the cost of ~~potable~~ fresh water.”

The RPMPD has carefully distinguished between fresh water and potable water throughout the decision. As correctly noted in the verification section, BBID would provide fresh and recycled water service to EAEC, but not potable water. Potable water would only be produced for very limited uses via on-site treatment, as provided in Soils&Water 12. Therefore, in order for Soils&Water 5 to be consistent with the text of the RPMPD and the verification section of Soils&Water 5, the word “potable” should be replaced with “fresh”.

#### **IV. TSE**

Applicant concurs with Staff and the Committee that MID’s proposed condition TSE-4 is unnecessary and that TSE-1 (particularly paragraph 3 of the Verification) provides an appropriate mechanism to resolve any issues within CEC jurisdiction. However, Applicant takes issue with the additional language proposed by staff which adds “MID and TID” to subsection 8 (ii) to read:

“An executed Facility Interconnection Agreement with Western, MID and TID”.

A Facility Interconnection Agreement is a bilateral contract between a party requesting interconnection and the Participating Transmission Owner that owns the transmission facility with which the requesting party wishes to be interconnected. (Cal-ISO Tariff, Master Definitions, Vol. 1, Original Sheet 314-A, Revised Sheet No. 315) A Facility Interconnection Agreement is not a multi-party contract, and the inclusion of other parties would be legally incompatible with the terms and conditions of a Facilities Interconnection Agreement. Pursuant to the terms of the Cal-ISO Tariff, EAEC will execute an agreement with Western alone.

Therefore, EAEC proposes the following changes to the Committee discussion and Conditions.

On page 94, Condition TSE-1 subsection 8 (ii) should be restored to read as it did originally in the PMPD: “An executed Facility Interconnection Agreement with Western”.

If this change is made to TSE-1 subsection 8 (ii), conforming changes should be made to the text as follows:

On page 91, at the end of the fifth full paragraph, the RPMPD states that “We have adopted Staff’s modification of Condition TSE-1.” This sentence should be deleted.

On page 92, the RPMPD states, “ We are satisfied that Condition TSE-1, *as we have clarified it (in subsection 8 ii)*, will provide an appropriate mechanism for the parties to resolve any issues central to resolution of matters within our jurisdiction. In particular, we note that paragraph 3 of the Verification to Condition TSE-1, provides MID an opportunity to present any pertinent modifications to the SIS. Because Condition TSE-1 captures the essence of MID’s concerns as expressed in the comments, we see no need to adopt further changes to our Conditions.” (emphasis added) The italicized language should be deleted.

Finally, on page 95, Condition TSE-3, the final sentence of the Verification paragraph is incomplete and should start as follows: “The project owner shall also transmit to the CPM a statement attesting to....”

## **V. COM-3 AND COM-8**

The RPMPD contains two conditions which require the Applicant to report outage information to the Staff: COM-3 and Paragraph #11 under COM-8. The Applicant requests that these provisions be deleted.

Neither COM-3 nor Paragraph #11 of COM-8 was presented in the Preliminary Staff Assessment. These Conditions were included in the Final Staff Assessment, but without any indication that they were a change or addition to the PSA. Neither provision is a standard Condition of Certification. Both provisions appear to be unique to this proceeding; yet the FSA contained no explanation of the necessity or purpose of these proposed conditions.

As proposed, COM-3 would require the project owner, throughout the life of the project, to immediately report all unplanned outages, via e-mail to the Compliance Program Manager and to the CPM, including the expected duration and reason for the outage. (RPMPD, p. 45) Paragraph #11 of COM-8 would require the Project Owner to include in the Annual Compliance Report “a listing all outages planned for the coming year and a listing of all outages that occurred during the previous year, including the anticipated duration and the reason for each outage occurrence.” (RPMPD, p. 50)

We are not aware of any previous decision which requires the project owner to report outage information to the CEC. Instead, previous Commission decisions, such as the recently adopted final decision for the Magnolia Power Plant, have recognized that “In California’s restructured electric power market, the California Independent System Operator, (Cal-ISO) has the primary responsibility for maintaining system reliability. To provide an adequate supply of reliable power, Cal-ISO has imposed certain requirements on power plants selling ancillary services and holding reliability must-run contracts, such as: (1) filing periodic reports on reliability; (2) reporting all outages and their causes; and (3) scheduling all planned maintenance outages with the Cal-ISO.” (Magnolia Power Plant Decision, p. 84)

Cal-ISO Tariff Section 2.3.3.9.5 requires that “Within forty-eight (48) hours of the commencement of a Forced Outage, the Operator shall provide to the ISO an explanation of the Forced Outage, including a description of the equipment failure or other cause and a description of all remedial actions taken by the Operator.” These reports of forced outages must be made electronically on forms prescribed by the Cal-ISO. Because of the high commercial sensitivity

and market sensitivity of this information, the outage reports are received by the Cal-ISO with the strictest confidence. (Cal-ISO Tariff Section 20.3.1-2)

Because the Cal-ISO has primary responsibility for maintaining system reliability and because outage information will be reported to the Cal-ISO on a timely basis, COM-3 and Paragraph #11 of COM-8 are either duplicative or burdensome<sup>11</sup>. Rather than requiring a duplicative reporting system, the Applicant recommends that the CEC work with the Cal-ISO to obtain any desired outage information directly from the Cal-ISO.

If the Commission has an interest in receiving outage information directly from generating projects, it is critical that the information be collected uniformly from all generators through an appropriate rulemaking proceeding, rather than on an ad hoc basis in individual licensing decisions.

Finally, any information which the CEC seeks to collect regarding plant outages must be handled in the strictest confidence. Incredibly, COM-3 would require the information to be sent by email to the CPM's general email account. If the CPM has a legitimate purpose for receiving this data, there must first be well-tested systems in place for storing and protecting the information and the CPMs must be thoroughly trained in handling such confidential information.

For the foregoing reasons, the Applicant urges the Commission to delete COM-3 and Paragraph #11 of COM-8 until the issues regarding reporting of outage information can be more thoroughly evaluated and more carefully implemented.

## **VI. OTHER CORRECTIONS**

Page 207, Finding 5 has two typographical errors. "Greenhill" Road should be changed to "Greenville" Road.

Page 208

The verification for Condition Worker Safety-1 has been changed to "prior to site mobilization" from the previous language of "prior to the start of construction". This proposed change is a departure from past Commission practice, where the Commission has required the Program to be submitted prior to construction. Compare, for example, Worker Safety-1 at page 133 in Decision on the Russell City Energy Center. It is unclear why the staff wants the earlier term, site mobilization, applied in this case.

Page 219, middle of the paragraph

The strikeout language is incorrect. It should say, "See condition HAZ 8." HAZ 8 is the condition that relates to the delivery of ammonia during fog hours, so the text should not have been corrected there.

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<sup>11</sup> Because COM-3 is vaguely worded, it is not clear how it relates to the Cal-ISO tariff. COM-3 relates to "unplanned" outages (which is undefined), while the Cal-ISO tariff speaks to "forced outages" - a term defined by the tariff. Similarly, COM-3 requires that the information be emailed immediately, without defining that term, while the Cal-ISO prescribes a specific reporting period of 48 hours.

Page 224—Condition of Certification HAZ-1 has two references to “Appendix C, below”. These references were a carryover from the FSA which contained an Appendix C. Applicant recommends that references to “Appendix C, below” be changed to read “AFC Supplement B, Table HM-2”. This AFC Supplement B table contains the list of hazardous materials to be used at the EAEC and is consistent with FSA Appendix C. Making this change will remove any future confusion that might occur during the compliance phase of the project. HAZ-1, as revised, should read:

**HAZ-1** The project owner shall not use any hazardous material not listed in ~~Appendix C, below~~, **AFC Supplement B, Table HM-2** or in greater quantities than those identified by chemical name in ~~Appendix C, below~~, **AFC Supplement B, Table HM-2** unless approved in advance by the CPM.

**Verification:** The project owner shall provide to the CPM, in the Annual Compliance Report, a list of hazardous materials contained at the facility in reportable quantities.

Page 224—Condition of Certification HAZ-4

Applicant and Staff had agreed to modify HAZ-4 to add the words “if exposed to rainfall” to the second sentence of the Condition. This addition will make it clear that the secondary containment of the ammonia storage facility need only be designed to contain the volume associated with 24 hours of rain assuming the 25-year storm if the storage facility is exposed to rainfall. As revised, HAZ-4 should read::

**HAZ-4** The ammonia storage facility shall be designed to either the ASME Pressure Vessel Code (ANSI K61.6) or to API 620. In either case, a secondary containment basin capable of holding the storage volume of the largest tank plus the volume associated with 24 hours of rain assuming the 25-year storm, **if exposed to rainfall**. The final design drawings and specifications for the ammonia storage tank and secondary containment basins shall be submitted to the CPM.

**Verification:** At least sixty (60) days prior to delivery of ammonia to the facility, the project owner shall submit final design drawings and specifications for the ammonia storage tank and secondary containment basin to the CPM for review and approval.

Page 225—Condition of Certification HAZ-5

-Applicant and Staff had agreed to modify this Condition to state that no combustible or flammable materials shall be stored within 50 feet of the sulfuric acid tank. As currently written, the Condition requires that no combustible or flammable materials be stored within 100 feet of the sulfuric acid tank. Applicant requests that the reference to “100 feet” be changed to “50 feet” to make Condition of Certification **HAZ-5** consistent with Condition of Certification **HAZ-11**. As revised, HAZ-5 should read:

**HAZ-5** The project owner shall ensure that no combustible or flammable material is stored within ~~100~~ **50** feet of the sulfuric acid tank.

**Verification:** At least sixty (60) days prior to receipt of sulfuric acid on- site, the Project Owner shall provide copies of the facility design drawings showing the location

of the sulfuric acid storage tank and the locations where combustible or flammable materials will be stored.

Page 272, Water

Under the paragraph entitled “Reclaimed/Recycled Water,” the principal paragraph states: “Applicant also acknowledged therein that BBID could make recycled water available to East Altamont by the year 2005.” The Applicant is not aware of any statement making this acknowledgement.

Page 280

Footnotes 116 and 117 are exactly the same text. One of the two should be deleted.

Page 301, bulleted items

At a global level, the PMPD seems to compare the needs of water use today by the East Altamont project with speculation about possible future needs of future water users. CEQA does not require such an analysis. Instead, CEQA requires an analysis of reasonably foreseeable projects as part of a cumulative impacts analysis. Speculation as to future uses is inappropriate for determining first the direct impacts of the project, and second, for determination of cumulative impacts unless those future uses are reasonably foreseeable under CEQA.

Beginning at page 304, there is a significant formatting error. Pages 304 through 322 are exactly the same as pages 323 through 341.

Page 341

After the strikethrough text, the RPMPD begins, “Alternative water supply sources and cooling technology.” For clarity, the PMPD should be consulted to ensure that there is no text missing at this point. This is the very end of the formatting error.

Page 343

There are five bullets that are set forth as staff’s finding. In the RPMPD, the Commission agrees with bullets one through four; however it is silent on the fifth bullet. For clarity, an additional bullet should be added to the Committee’s finding that says, “We reject the staff’s position relative to Alternate 1B.”

Page 350, end of first full paragraph

Again, there is a comparison made between the proposed use and potential future use by farmers or residential customers. Specifically the text states: “The proposed use could affect BBID’s current customers and any potential future customers of local fresh water in the area served by BBID.” This sentence should be deleted. CEQA does not require analysis to speculate as to the impacts on potential future users with regard to either direct impacts or cumulative impacts unless those impacts are reasonably foreseeable.

Page 356

The third bullet on the page indicates that the cost of recycled water will be competitive with the cost of fresh water from the Delta. Only one of the three citations in support of this statement actually relate to the relative cost of recycled and fresh water. The citations at RT 115-116 and 184-185 relate to different issues. The citation at RT 290-292 does not establish that the costs will be competitive, but merely repeats hearsay from Mr. Sensibaugh that the costs *would* be

competitive. (2/16 RT 290:14-18) Since Mr. Sensibaugh never testified in this proceeding, it was not possible to test the basis of this hearsay information. The third bullet should be deleted.

Pages 361-362

Finding 26 is a correct statement of facts. Finding 27 contradicts Finding 26. Finding 27 should be deleted.

Page 363

Finding 34 states that dry cooling is not necessary as the project can meet its design capabilities by implementing fresh water savings. This is the wrong standard; the correct standard would be that there are no significant impacts associated with the use of raw water and therefore no need to consider dry cooling as an alternative. The project's design capabilities are irrelevant to this analysis. Finding 34 should be revised to read: "Dry cooling is not necessary as there are no significant impacts associated with the use of raw water and therefore no need to consider dry cooling as an alternative."

Page 368

Condition Soils&Water-9 appears to be the same language that was withdrawn by the staff according to footnote 112. This language should be deleted in it's entirety. Note that this same language appears on page 369 as withdrawn by staff as former Condition 10.

Page 432

The RPMPD modified Condition of Certification **SOCIO-2** by adding the following underlined language:

**SOCIO-2** The Project Owner will be required to pay a one-time statutory school facility development fee of \$0.33 per square foot of principal building to the Tracy Unified School District at the time of filing for the in-lieu building permit with the Alameda County Building Department.

**Verification:** The project owner shall provide proof of payment of the statutory development fee in the next Monthly Compliance Report following the payment.

To ensure that the amount of the fee to be paid is clearly understood, the Applicant requests that **SOCIO-2** be modified to reflect the specific amount calculated in both the AFC (Ex. \_\_\_) and Staff's FSA (Ex. \_\_\_). As revised, SOCIO-2 should read:

**SOCIO-2** The Project Owner will be required to pay a one-time statutory school facility development fee of \$0.33 per square foot of principal building space (which, based on the 51,150 square feet of covered and enclosed space is \$16,879) to the Tracy Unified School District at the time of filing for the in-lieu building permit with the Alameda County Building Department.

**Verification:** The project owner shall provide proof of payment of the statutory development fee in the next Monthly Compliance Report following the payment.

Dated: June 2, 2003

Respectfully submitted by:

ELLISON, SCHNEIDER & HARRIS L.L.P.

By \_\_\_\_\_

Greggory L. Wheatland

Jeffery D. Harris

Attorneys for East Altamont Energy Center LLC

STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

In the Matter of: )  
 ) Docket No. 01-AFC-4  
Application for Certification for the East Altamont )  
Energy Center (East Altamont) )  
\_\_\_\_\_ )

**PROOF OF SERVICE**

I, Ron O'Connor, declare that on June 2, 2003, I deposited copies of the attached *Applicant's Supplemental Comments on Presiding Member's Proposed Decision* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

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

\_\_\_\_\_  
Ron O'Connor

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