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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	Docket No. 06-AFC-06
Application for Certification For the Eastshore Energy Center	**CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT INTERVENORS' RESPONSE BRIEF TO APPLICANT'S AND COMMISSION STAFF'S OPENING BRIEFS ON CONTESTED SUBJECT AREAS** Dates: December 17-18, 2007; January 14, 2008 CEC: Jeffrey D. Byron Commissioner and Presiding Member Hearing Officer: Susan Gefter

TO THE COMMISSION, COMMISSIONER BYRON, HEARING OFFICER GEFTER, AND THE PARTIES AND THEIR ATTORNEYS OF RECORD:

Intervenors Chabot-Las Positas Community College District ("District") and Chabot Faculty Association (collectively "Chabot Intervenors") hereby submit their Response Brief to the Opening Briefs, previously filed by the Commission Staff and by Applicant Eastshore Energy Center ("Applicant"). The Commission Staff and Applicant's Opening Briefs evidence that neither of these parties properly analyzed the possibility of disproportionate impacts of the proposed plant on the "environmental justice" community surrounding Eastshore. The Commission should deny certification.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Commission Staff's ("Commission Staff" or "Staff") and Applicant Eastshore Energy Center's ("Applicant") Opening Briefs, themselves, illustrate that the environmental justice ("EJ") analysis utilized for this project was fundamentally flawed. Both Staff and Applicant acknowledge, and cite to, the correct authorities that mandate EJ analysis. However, their interpretation of these authorities exposes the circular reasoning that vitiated the EJ analysis conducted in this instance. Simply put, Staff's and Applicant's Opening Briefs admit that the EJ methodology utilized in this case could never detect the most profound example of disparate impact against an EJ community: one where there is no impact on the general population, while there is a significant impact on the EJ community. Further, it is clear that—*had Staff utilized its own impact assessment process*—this error would not have occurred. The Chabot Intervenors respectfully requests the Commission to deny certification to Eastshore.

II. LEGAL ARGUMENT

A. THE PARTIES AGREE THAT AN ENVIRONMENTAL JUSTICE ANALYSIS IS IMPORTANT AND REQUIRED

There is no dispute among the parties that the proposed Eastshore plant would be situated in an EJ community, and that an EJ analysis is required for this project. (Staff's Opening Brief, at p. 11; Applicant's Opening Brief, at p. 46.) Commission Staff and Applicant also correctly cite to the applicable state law, which sets out the manner of incorporating environmental justice considerations into the plant-approval process. Moreover, in citing to these authorities, both Staff and Applicant concede that the purpose of EJ analysis is to ensure the "fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (Gov. Code, § 65040.12, subd. (e); see Exh. 200, at p. 2-4; Staff's Opening Brief, at p. 10; Applicant's Opening Brief, at pp. 41-42.)

Finally, and most importantly, Staff and Applicant acknowledge that the EJ review process (in particular the impact assessment process) described in Chabot Intervenors' Opening

Brief is *precisely* the process required by law and Staff's own procedures. (Applicant's Opening Brief, at p. 44.) Specifically, Staff and Applicant agree that Staff's process involves (1) public outreach; (2) demographics; and (3) impact assessment. (Dec. 17, 2007 TR at pp. 448:19-451:15, 471:3-472:21; Exh. 710 [California Energy Commission's Staff Approach to Environmental Justice].) Further, they acknowledge that a proper impact assessment involves a five-step analysis:

a. Describe the existing setting.

b. Analyze "unique circumstances," if any, of the affected population.

c. Analyze the project's direct, indirect and cumulative impacts.

d. Assess and recommend appropriate mitigation.

e. Determine whether the project creates an unavoidable significant adverse impact on the affected population and, if so, considers whether the impact is disproportionate.

(Applicant's Opening Brief, at pp. 44, 49; see also http://www.energy.ca.gov/env-justice/staff_env_justice_approach.html, administrative notice taken on Dec. 17, 2007, TR, at p. 340:20-23 & Exh. 710.) Commission Staff witness William Pfanner testified that these five steps accurately described the Commission's environmental justice process and the process that Staff utilized for the Eastshore project. (Dec. 17, 2007, TR, at pp. 471:3-472:22.) However, as discussed below, Staff's and Applicant's briefing also demonstrates that with regard to the Eastshore application, this process was not followed.

1. Commission Staff Failed To Apply Its Own Process, Ignoring the Unique Circumstances Of, And Cumulative Impacts On, the Environmental Justice Population

Staff's and Applicant's Opening Briefs confirm what was revealed by Staff witnesses' testimony and the FSA--that Staff ignored its stated procedures for analyzing "impact assessment." Staff explained that "[t]he next step in the staff analysis, which follows the EPA Guidance, was to determine whether the EEC could cause a high and adverse human health or environmental effect in the environmental justice population. . . . Since the EEC will not create

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adverse air quality or public health impacts, there can be no 'disproportionately high and adverse' air quality or public health impacts on members of environmental justice populations." (Staff's Opening Brief, at pp. 11-12.) Nothing in the Staff's 5-step process permits it to assume that a finding of no significant impact on the general population precludes a disproportionate impact on an environmental justice population. Indeed, making such a conclusion inevitably masks precisely the sort of unique vulnerabilities EJ analysis is intended to identify.

Thus, Staff erred by creating a threshold inquiry whether there was a significant environmental impact upon the entire population. Under this approach, because Staff found no significant impact on the general population with respect to public health, socioeconomics, and air quality, Staff stopped its analysis. It *never reached* the question of whether there was a disproportionate impact upon the EJ population. (Staff's Opening Brief, at pp. 11-12; Applicant's Opening Brief, at pp. 46, 50; Dec. 17, 2007, TR, at 450:20-451:15.) This directly opposes the 5-step process that Staff and Applicant have conceded to be the proper implementation of impact assessment. Although the procedure entails five critical steps, the briefing continues to defend the truncated process described by Staff witness Mr. Pfanner--who admitted that Staff used only one combined step. As set out in Chabot Intervenors' Opening Brief, by doing so, Commission Staff ignored the unique characteristics of the environmental justice population that could result in a significant impact on that community. Applicant did the same. (Dec. 18, 2007, TR, at pp. 41:18-42:7.)

Additionally, contrary to Applicant's and Staff's assertions, (Applicant's Opening Brief, at p. 46; Staff's Opening Brief, at p. 12), Staff's analysis with respect to land-use compatibility and aviation safety was also improper. There, Staff determined that there was a significant impact on the entire population and did not proceed to determine whether there was a disproportional impact upon the EJ population. (Exh. 200, at pp. 7-1 to 7-2.) As Applicant explained, "Staff analyzed whether any significant impact would disproportionately affect the environmental justice population. . . . Staff determined that, because the issues of land-use compatibility and aviation safety affect all people, regardless of ethnicity or economic status, the identified impacts would not have a disproportional impact on the environmental justice

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population." (Applicant's Opening Brief, at pp. 46, 50) Again, there is no basis for Staff to neglect its own policy; it was required to conduct the disproportionate analysis. By using faulty methodology, the Staff never reached that step.

2. Dr. Susan Sperling's Expert Testimony is Entitled to Great Weight

Applicant improperly attempts to discredit the testimony of Dr. Sperling, by claiming she is not an expert. The Commission should reject this specious attempt to discredit Dr. Sperling. Applicant voir dired Dr. Sperling at the hearing and unsuccessfully attempted to disqualify her at that time. The hearing officer denied applicant's motion and then recognized Dr. Sperling as an EJ expert. (Dec. 17, 2007, TR, at p. 345:1-346:3.) As the hearing officer recognized, Dr. Sperling is a professional researcher and conducted significant research in the area. (Dec. 17, 2007, TR, at p. 345:18-25; Exh. 605.)

Further, despite Applicant's belated contentions, Dr. Sperling's testimony should be entitled to great weight, including her testimony pertaining to the reports she sponsored, "Opportunities for Environmental Justice in California, Agency by Agency" (Exh. 603) and "Ensuring Risk Reduction in Communities with Multiple Stressors," (Exh. 604; Dec. 17, 2007, TR, at p. 329:2-18.)

Applicant also unsuccessfully attacks Dr. Sperling's testimony with respect to cumulative impacts. Relying upon the National Environmental Justice Advisory Council ("NEJAC") report, (Exh. 604), Dr. Sperling opined that Staff's methodology ignored the impact of multiple stressors and that multiple stressors within a community could not be understood in an additive fashion, as the FSA determined, but rather must be understood in terms of a "synergy." (Dec. 17, 2007, TR, at p. 335:14-21.) Dr. Sperling pointed out that Commission Staff failed to consider the synergistic impact of multiple stressors. (Dec. 17, 2007, TR, at pp. 337:13-338:10.)

Applicant did not introduce any testimony to contradict either Dr. Sperling or the County's expert witness Dr. Sandra Witt on this synergy theory. Their testimony is unrefuted. Further, Staff's witness Dr. Alvin Greenberg *agreed* with the NEJAC report that communities with a population consisting of low-income and minorities, who typically have low access to health care, have difficulty engaging in health care services, and have multiple stressors in their

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lives, making them more susceptible to environmental impacts. (Dec. 17, 2007, TR at 248:1-249:4.)

Finally, both Applicant and Staff focus upon Dr. Sperling's testimony where she stated "Whether my testimony complies with the narrow, legal recommendations given the CEC is really not my issue." (Dec. 17, 2007, TR, at p. 343:12-14.) Both of these parties take Dr. Sperling's testimony out of context. Dr. Sperling was correct. Dr. Sperling was not offered as a legal expert, and she appropriately responded to questions relating to the law as outside her knowledge. What Dr. Sperling's testimony did demonstrate was that—had Staff properly implemented its own 5-step process and considered the unique characteristics of the EJ community—it would have addressed the methodological flaws that she identified.

B. APPLICANT AND STAFF MISINTERPRET STAFF'S GUIDELINES IN A MANNER CONTRARY TO CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

As noted above, "'environmental justice' means the ***fair treatment*** of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies." (Gov. Code, § 65040.12, subd. (e) (emphasis added).) The legal framework for environmental justice includes the equal protection clauses of the U.S. and California Constitutions, Government Code section 65040.12, and Public Resources Code section 71111, which adopts the Government Code's definition for EJ.

Yet, Staff and Applicant insist that Staff is not required to conduct a disproportionate impact analysis on the EJ population *unless* it first finds a significant impact upon the general population. Chabot Intervenors respectfully disagree. Staff's interpretation conflicts with the plain language of its five step process for impact assessment. The second step requires Staff to "analyze 'unique circumstances,' if any, of the affected population." The affected population is the EJ population, not the general population. The plain language of the Staff's fifth step supports this interpretation: "Determine whether the project creates an unavoidable significant adverse impact on the affected population and, if so, considers whether the impact is disproportionate." (See http://www.energy.ca.gov/env-justice/staff_env_justice_approach.html,

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administrative notice taken on Dec. 17, 2007, TR, at p. 340:20-23 & Exh. 710 (emphasis added).) The entire purpose of EJ is to determine whether there is a disproportionate impact upon the EJ population, which is the "affected" population. The fifth step does not identify two separate populations; it refers to the EJ or affected population.

Chabot Intervenors find further support for this interpretation in the Federal Guidance. It states in relevant part: "Environmental justice concerns should sensitize EPA NEPA analysts to the need to focus analyses on relevant contexts. Focusing the analysis may show that potential impacts, which are not significant in the NEPA context, are particularly disproportionate or particularly severe on minority and/or low-income communities." (Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis, § 3.2.2. (April 1998).) Here, the EPA recognizes that, while there may not be a significant impact on the "general" population, there could still be a disproportionate or significant impact on the minority or low income community and EJ requires a determination of how the minority or low income community is affected by the proposed project. The Staff failed to consider the possibility of this scenario in its analysis.

C. COMMISSION STAFF'S ASSUMPTION OF A "VULNERABLE" GENERAL POPULATION DID NOT CORRECT THE FUNDAMENTAL FLAWS IN ITS APPROACH

Staff attempts to defend its abbreviated EJ analysis by explaining that it measured impacts on "sensitive receptors" (which appear to have been defined as infants, the elderly, and in some cases asthmatics). Under Staff's logic, this use of "sensitive receptors" adequately replaced analyzing the "unique characteristics" of the affected population. (Staff's Opening Brief, at p. 7 ["Using extremely conservative assumptions, staff's analysis demonstrates that members of the public affected by the non-criteria pollutant emissions of this project – including sensitive receptors such as the elderly, infants, and people with pre-existing medical conditions – will not experience any acute or chronic significant health risk . . ."].) However, this definition completely ignored notable, unique characteristics of minorities and low income communities. Indeed, it is based on the premise that EJ communities do not have unique characteristics – an

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assumption diametrically opposed to both the purpose and process for EJ analysis.

As expert witness Dr. Sperling explained, Staff's narrow interpretation of sensitive receptors in terms of infants and elderly individuals in no way captured the myriad ways that the siting of a power plant can significantly impact low income and minority communities. (Dec. 17, 2007, TR, at p. 334:14-21.) Rather, people who fit within the EJ categories (such as those with low income who then have poor access to health care; those whose second language is English, and those who are minorities) are at a special risk and do not have the same thresholds as non-EJ communities. (*Id.* at p. 335:22-336:19.)

D. NOT ONLY DID COMMISSION STAFF FAIL TO CONDUCT A PROPER PUBLIC OUTREACH, IT FAILED TO GIVE THE DISTRICT THE REQUISITE NOTICE AND OPPORTUNITY TO BE HEARD

Staff and Applicant continue to confuse Staff's responsibilities under the Public Outreach prong of EJ analysis with the statutory requisite notice requirements for local interested agencies, such as the District. Although Staff contends that it may have contacted someone at Chabot College with respect to the Eastshore project at some point in time, (see Applicant's Opening Brief, at p. 44), it provides no specifics as to who at the District was contacted. Commission Staff also points out that an Information Hearing and Site Visit was conducted at Chabot College on January 29, 2007. (See Applicant's Opening Brief, at p. 44.) However, there is no evidence that: (1) the Commission Staff notified District officials regarding the planned project at the same time Commission Staff notified similarly situated interested local governmental agencies; (2) that Commission Staff provided the District the same amount of information it provided to similarly situated interested local governmental agencies; or that (3) it invited input from the District—as an interested local agency. (Pub. Resources Code, § 25519, subd. (k)). Staff does not contend that it provided the District with a copy of the appropriate notice or Eastshore's application. (Cal. Code Regs., tit. 20, § 1714, subd. (c).) As a result, Staff disregarded the plain language contained in its own regulation. Therefore, whether or not the Commission Staff held a site hearing at Chabot College campus is irrelevant; this did not meet the requirements for notice to, and request for comments from, an interested local agency.

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Applicant mistakenly cites to Civil Code section 18 for the proposition that the District had actual notice through the Public Adviser's Office and constructive knowledge of the project as early as January 2007. The Public Resources Code and the applicable regulations do not make an exception for constructive notice. Rather, they are very specific as to the type of actual and direct notice required. (Pub. Resources Code, § 25519, subd. (k); Cal. Code Regs., tit. 20, § 1714, subd. (c).) Again, there is no evidence that the District received the requisite timely notice. Moreover constructive notice cannot possibly meet Staff's duty to solicit comment from interested local agencies.[1]

As noted above, in addition to not providing notice to the District, the Commission failed to solicit analyses, comments and recommendations from the District, as was required pursuant to both Public Resources Code section 25519, subdivision (k) and Title 20, California Code of Regulations, section 1714, subdivision (c). Neither Commission Staff nor Applicant addresses these deficiencies in their Opening Briefs. The Commission Staff failed to invite the District to make analyses, comments, and recommendations. (Cal. Code Regs., tit. 20, § 1714, subd. (c).)

These procedural errors have prejudiced the District. It has not had sufficient time to examine potential concerns, including but not limited to: the impact of air pollution from the Eastshore plant on Chabot College students and employees, given that Chabot College is in the area identified as most highly impacted by the proposed site; the site's effect on Chabot College's staff and student recruitment; and the cumulative effects that Russell City and Eastshore will have on the Chabot College population.

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[1] Applicant also improperly relies upon the findings in the Russell City Energy Commission matter. (Energy Commission Docket No. 01-AFC-7C (Amendment Proceeding).) The procedural history in the Russell City matter was entirely different. There, the issues turned on the timing of the request to intervene. Thus, the applicant's assertion in the Russell City matter was that the District was not entitled to notice because the matter involved an amendment, not an original petition. (Pub. Resources Code, § 25519.)

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III. CONCLUSION

For the foregoing reasons Chabot Intervenors respectfully request the Commission to deny certification to Eastshore. Further, as set out in Chabot Intervenors' Opening Brief, this failure to solicit input from the District was particularly egregious because Staff not only failed to recognize the District as an interested agency, it failed to recognize the District as a public service. As a result, Staff violated its procedures by never considering the potential socio-economic impacts of the plant on the District. The effects of this wholesale exclusion from the process is that the record before the Commission is devoid of information as to how the proposed plant might impact one of the largest public service agencies, employers, and economic contributors to the region. Chabot Intervenors submit that the proposed plant simply cannot be approved with such serious gaps in the record.

Dated: March 3, 2008

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER IN CITY OF HAYWARD BY TIERRA ENERGY	**Docket No. 06-AFC-6** **PROOF OF SERVICE** **(Revised 1/18/2008)**

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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DECLARATION OF SERVICE

I, Ervietta McCullough, declare that on March 3, 2008, I deposited copies of the attached CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT INTERVENORS' RESPONSE BRIEF TO APPLICANT'S AND COMMISSION STAFF'S OPENING BRIEFS ON CONTESTED SUBJECT AREAS in the United States mail at Sacramento, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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

Ervietta McCullough

Ervietta McCullough