

STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:)	Docket No. 00-AFC-14
)	
Application for Certification)	
of the EL SEGUNDO POWER)	STAFF’S REPLY BRIEF
REDEVELOPMENT PROJECT)	
)	
_____)	

In accordance with the “Briefing Order” issued by the assigned Committee in this siting case proceeding (Commissioner Robert Pernel, Presiding, and Commissioner William Keese) on March 19, 2003, the Energy Commission Staff hereby tenders its Reply to the Opening Briefs filed by the Applicant, the Santa Monica Baykeepers/Heal The Bay, the Murphy/Perkins, and the City of El Segundo.

I. STAFF’S REPLY TO THE APPLICANT’S OPENING BRIEF

In its Opening Brief, the Applicant (El Segundo Power II LLC) has made several legal, factual, and/or policy arguments in support of its position concerning the issues of “Biological Resources” and related “Alternatives” in this case. As explained below, the Applicant’s arguments on these issues are simple, short, and wrong.

A. The Applicant’s Legal Arguments Are Contrary To The Law In California

1. The California Coastal Act Legally Applies To The Proposed Project

In its Opening Brief, the Applicant asserts as a matter of law that “first and foremost, it is not clear at all that [Sections 30230 and 30231 of the California Coastal Act] even apply to the repowering of an existing facility” such as the proposed project. (See Applicant’s Opening Brief at p. 5). The provisions of the California Coastal Act to which the Applicant refers provide, in pertinent part, that:

“Marine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance” (Public Resources Code Section 30230).

“The biological productivity and the quality of coastal waters . . . shall be maintained and, where feasible, restored through, among other means, minimizing the adverse effects of . . . entrainment . . .” (Public Resources Code Section 30231).

There are many reasons why the Applicant’s argument concerning the non-applicability of the California Coastal Act lacks legal merit, including the following:

- First, there is no factual dispute that this project lies within the California “coastal zone” and is therefore subject to the relevant provisions of the California Coastal Act. (RT 2/18/03, Mr. Luster, at p. 187). Moreover, the marine waters and related biological resources impacted by this project are located offshore, in an area within the “retained jurisdiction” of the Coastal Commission. Thus, contrary to the Applicant’s argument (at p. 6 of its Opening Brief), marine resource determinations, if any, under the Local Coastal Plan (LCP) are either legally irrelevant and/or completely superceded by the determinations of the California Coastal Commission. (See RT 2/19/03, Mr. Luster, at pp. 152-153).
- Second, on its face the provisions of Sections 30230 and 30231 expressly apply without limitation to the type of project in question. Nowhere does the plain language of these statutes state that the provisions apply only to “new” projects, or that “modifications” of existing projects are excluded from these provisions, as the Applicant now tries to argue.
- Third, the California Coastal Commission is the primary agency responsible for interpreting the California Coastal Act, and “due deference” must be given to its interpretations of these laws in CEC proceedings. (See Title 20, Cal. Code Regs., Section 1714.5). In this particular case, the Coastal Commission has reviewed the proposed project on several occasions and determined that it does not conform to and is not consistent with the California Coastal Act because it will not “maintain, enhance, and where feasible restore” the marine resources of Santa Monica Bay, nor will it maintain or restore where feasible the biological productivity and quality of coastal waters by “minimizing the adverse effects of . . . entrainment,” as required by Public Resources Code Sections 30230 and 30231.
- Fourth, the Applicant has not appeared before nor presented any objections to the California Coastal Commission concerning that agency’s determination of project non-compliance with the Coastal Act. (See RT 2/18/03, Mr. Luster, at pp. 189-190 and 192).
- Fifth, the Applicant has not cited any court rulings, legislative history, or other provisions of law to support its novel claim that Sections 30230 and 30231 of the California Coastal Act do not apply to major power plant projects such as this one.

- Finally, the Energy Commission has never found that these provisions of the California Coastal Act do not apply to major power plant modifications, such as the one proposed in this proceeding.

For all of these reasons, there is no legal basis to support the Applicant's argument that Sections 30230 and 30231 are not applicable to this proposed project.

2. The Applicant's Interpretation Of CEQA Is Legally Incorrect

The Applicant also argues that since the proposed project will not withdraw cooling water in excess of its current NPDES permit limit of 207 million gallons per day (mgd) for Intake #1, "the CEC can *legally* approve [the proposed project] . . . *without triggering CEQA compliance issues.*" However, this is not the law in California, and any decision based on such an argument would be subject to legal challenge for all of the following reasons:

- First, in 1998 the Resources Agency amended the CEQA Guidelines to expressly provide that the proper reference point for environmental impact determinations is normally the "physical" conditions (not the permit limits) which exist at the time the AFC is filed. (See Title 14, Cal. Code Regs., Section 15125(a)).
- Second, nothing in the CEQA statutes or guidelines provides that existing permit limits (which in this case were *three-times higher* than what was physically occurring when the El Segundo AFC was filed) are the proper legal reference point for determining whether a CEQA analysis is "triggered" or not.
- Third, California courts have repeatedly ruled that CEQA requires agencies to measure project impacts based on the *physical* conditions that exist when the project is reviewed, not based on some *hypothetical* legal level that does not accurately reflect the actual facts on the ground. (See, e.g., *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, at p. 955, 91 Cal.Rptr.2nd 66, at p. 81; *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, at pp. 186-187 and 190, 228 Cal.Rptr. 868; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, at p. 246, 227 Cal.Rptr. 899; and *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App3d 350 at pp. 352-354, 182 Cal.Rptr. 317).
- Fourth, in this case the Applicant has no "vested right" to withdraw 207 mgd from Intake #1. To the contrary, the existing NPDES permits for both Intake #1 and #2 are "time-limited" on their face, and will expire in May 2005, well before the proposed project can possibly come on line. In addition, the Applicant has no license to commence construction on the proposed project and, accordingly, has not performed *any* substantial construction work on the proposed project to date. Under these circumstances, the District Court of Appeal for the Los Angeles region has clearly ruled that the existence of a prior environmental permit allowing certain adverse impacts to occur provides no legal basis for avoiding the obligations that are

otherwise required under CEQA. (See, e.g., *Security Environmental Systems, Inc. v. South Coast Air Quality Management District* (1991) 229 Cal.App.3d 110, at pp. 125-128, 289 Cal.Rptr. 108, at pp. 115-117).

- Fifth, when the Los Angeles Regional Water Quality Control Board (LARWQCB) extended the existing NPDES permits for Intakes #1 and #2 in May of 2000, it did not prepare an EIR or a Negative Declaration concerning the proposed project now before the CEC. Moreover it did not possess any entrainment data collected directly at the El Segundo intake site when it renewed the existing NPDES permits in 2000, and it has, in fact, never collected, possessed or analyzed any such direct entrainment data for this facility. (See the FSA at p. 4.2-19, footnote #6). It is noteworthy that the LARWQCB was not called by the Applicant to testify, and the agency did not come forward on its own to support the Applicant's legal argument concerning the NPDES permit and CEQA. To the contrary, the LARWQCB formally advised this Commission in writing that it "*has no objection if the CEC elects to make additional factual and legal determinations on [the entrainment impacts] issue pursuant to [the Energy Commission's] responsibilities under the California Environmental Quality Act (CEQA) and the Warren Alquist Act.*" (See the FSA at p. 4.2-38).
- Sixth, neither the CEC nor any other agency has ever reviewed the proposed project for its specific environmental impacts, and many new facts have emerged since the original Ormond Beach 316(b) "proxy" studies were conducted more than 20 years ago. As noted in Staff's Opening Brief, these new facts include the seriously deteriorated biological condition of Santa Monica Bay, the improved accuracy and reliability of recent scientific methods for determining entrainment impacts, and the wide-spread recognition that entrainment impacts from once-through cooling are far more significant than was previously thought. Under these circumstances, the courts have ruled that reliance on prior-issued permits simply does not satisfy the legal requirements of CEQA, even when the proposed project will not exceed the scope of those prior permits. As the District Court of Appeal for Los Angeles expressly stated in *Meridian Ocean Systems v. State Lands Commission* (1991) (222 Cal.App.3d 153, at pp. 164-165, 271 Cal.Rptr.445, at pp. 451-452): "Inherent in the Commission's power to issue permits is the ability to re-evaluate the conditions surrounding their issuance as warranted by changing circumstances By its very nature the protection of the environment to some degree, to a large degree, if not entirely, is a function of the technology that allows us to measure the deleterious effects of any [particular] activity"
- Finally, it is important to note that in its Opening Brief (at pp. 4-5) the Applicant has cited no legal authority nor any CEC decision of any kind to support its argument that the existence of a time-limited NPDES permit is "fundamentally decisive" of the CEQA issue in this case. In fact, neither the courts nor the CEC has ever made such a problematic legal ruling in a case such as this one.

Under these circumstances, it is clear that the existing NPDES permit limits for Intakes #1 and #2 do not constitute the proper “baseline” conditions for CEQA purposes in this case. To the contrary, as explained and documented in Staff’s Opening Brief, the proper baseline conditions should reflect the actual “physical” conditions that currently exist, namely a “zero” cooling water baseline for Intake #1, and a proper five-year cooling water average (i.e., prior to the filing of the AFC) for Intake #2, as shown in Staff’s Slide #17.

B. The Applicant’s Factual Arguments Are Not Supported By The Evidence

In addition to the legal arguments discussed above, the Applicant’s Opening Brief presents certain factual claims in an attempt to support its position concerning “Biological Resources” and related “Alternatives” issues in this case. The Applicant’s factual contentions also lack merit for the reasons explained below.

1. The Claim Of “No Significant Project Impacts” Is Clearly Contradicted By The Record

In its Opening Brief (at p. 6) the Applicant asserts that “no party has articulated . . . that [the proposed project] has any adverse effects on the marine environment that could or should be enhanced.” This surprising assertion completely ignores all of the extensive written and oral testimony on the project’s serious adverse marine resource impacts and related enhancement needs presented by the CEC Staff, the California Department of Fish and Game, the National Marine Fisheries Service, the California Coastal Commission, and the Santa Monica Baykeepers/Heal The Bay Intervenors in this case. In the Staff’s Opening Brief (at pp. 2 through 23), we discussed and documented in detail the *undisputed* evidence proving that this proposed project will, in fact, cause significant cumulative adverse marine resource impacts. This material will not be repeated here. Instead, we respectfully urge the Committee to review Staff’s Opening Brief on this issue, and then reject the Applicant’s “no significant impact” argument based on the overwhelming evidence in the record which contradicts this claim.

2. The Applicant Has Not Proven That The Wastewater Alternative Is Infeasible

In its Opening Brief (at pp. 2-4) the Applicant also asserts that the Committee should “reject any claims of viability of the . . . alternative [wastewater] cooling option . . . [because of] the inability to discharge the heated water to the ocean in compliance with the California Thermal Plan . . . [and because the] CEC staff has not resolved the tremendous problems associated with installing a massive pipeline from the [Hyperion Treatment Plant] to [the El Segundo Generating Station]” However, the Applicant’s arguments concerning the wastewater alternative are predicated on a series of legal and factual errors and must be rejected for the following reasons.

First, as a matter of law it is important to recognize that the Applicant has the “burden of proof” on this matter, not the CEC Staff or other parties. As the Commission’s siting regulations expressly state, “[e]xcept where otherwise provided by law, the applicant shall have the burden of presenting sufficient substantial evidence to support the

findings and conclusions required for certification of the site and related facilities.” (See Title 20, Cal. Code Regs., Section 1748(d)). Specifically, the “findings and conclusions required for certification” of this project must determine that the proposed alternatives or mitigation measures for reducing the adverse marine resource impacts from the once-through cooling system “would not be feasible.” (See, e.g., Public Resources Code Sections 25523(b)). Thus, contrary to the Applicant’s assertion, the Staff and Intervenor do not have the affirmative legal burden of proving that the proposed alternatives and/or mitigation measures are fully feasible; rather, the Applicant has the affirmative legal burden of proving that the proposed alternatives and/or mitigation measures in this case “would not be feasible.”¹

Second, in an attempt to carry its burden of proof regarding the “infeasibility” of the wastewater alternative, the Applicant has fundamentally misrepresented the applicable law in this matter. Specifically, in its Opening Brief the Applicant has again repeated its erroneous legal claim that discharges using the wastewater alternative “would be limited to 20 degrees greater than the receiving water temperature.” (See Applicant’s Opening Brief at p. 3, note 4). However, as was noted in Staff’s Opening Brief, the Applicant’s legal claim ignores a large number of undisputed facts in this proceeding, including the following:

- The wastewater cooling alternative proposed by the Staff would be discharged well beyond the state’s three mile territorial limit, dispersing into 200 foot deep *federal* waters located approximately five miles offshore. (See, e.g., RT 2/18/03, Mr. Richard Sapudar, at pp. 216-217 and 219-220).
- Federal law, which clearly applies to all discharges beyond the State’s three mile territorial limit, has no quantitative or “prescriptive” 20 degree (F.) standard whatsoever. To the contrary, federal law only contains a qualitative “performance” standard that requires the thermal discharge limit to “*assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on that body of water.*” (See Clean Water Act Section 316(A); RT 2/18/03, Mr. Sapudar, at p. 221; and Staff’s Slide #28).
- State thermal law, if it applies at all in this case, expressly allows a “performance” based *variance* to be granted from the “prescriptive” 20 degree (F.) standard whenever the variance provides for “*adequate protection to the beneficial uses* (including the protection and propagation of a balanced indigenous community of fish, shellfish, and wildlife in and on the body of water into which the discharge is made).” (See, e.g., Staff’s Written Response Testimony, February 10, 2003, at pp. 36-38; RT 2/18/03, Mr. Sapudar, at pp. 225-226; and Staff’s Slide #28).

¹ The only burden which proponents of additional conditions or modifications to protect environmental quality must meet is that of making a “*reasonable showing* to support the need for and feasibility of the condition(s) or modification(s),” and Staff has certainly met that evidentiary burden in this case. (See Title 20, Cal. Code Regs., Section 1748(e)).

- Many power plants throughout California have routinely been granted “performance” based variances from the State’s “prescriptive” 20 degree (F.) thermal standard. (See Staff’s Written Response Testimony, February 22, 2003, at p. 37)
- The State’s basic thermal discharge limit for the existing El Segundo power plant is 105 degrees (F.), as reflected in the NPDES permit granted by the LARWQCB in May of 2000. (See RT 2/18/03, Mr. Richard Sapudar, at p. 216). Moreover, the El Segundo NPDES permit also allows thermal discharges from the power plant to reach 125 degrees (F.) for up to two hours at a time during “heat treatments,” and it allows thermal discharges from the plant to rise even further, to 135 degrees (F.) for up to one-half hour at a time, during “gate adjustments.” (See the FSA at p. 4.2-30). All of these elevated temperature limits were recently granted by the LARWQCB under State law for the shallow, nearshore thermal discharges now occurring at El Segundo. All of these elevated temperature limits are far above the 20 degree (F.) “prescriptive” standard the Applicant claims the wastewater cooling alternative would be required to meet, yet these limits have been determined by the LARWQCB not to impair the beneficial uses of Santa Monica Bay.
- Use of the Hyperion wastewater cooling alternative need not ever produce thermal discharges above 105 degrees (F.) from the proposed project, even under emergency conditions. (See, e.g., RT 2/18/03, Mr. Schoonmaker, at pp. 231-237).
- There is no evidence that thermal discharges from the Hyperion wastewater cooling alternative will actually violate any federal or state thermal “performance” standards (i.e., no impairment of beneficial uses). To the contrary, the only evidence in the record on this matter indicates that the Hyperion wastewater cooling alternative would not violate either the federal or the state thermal “performance” standards. (See, e.g., Staff’s Written Response Testimony, February 10, 2003, at pp. 35-38).

The Applicant has presented no evidence of any kind to refute the facts cited above. Instead, the Applicant has created a legal “strawman” by claiming that it cannot obtain enough wastewater nor build a pipeline large enough to meet a specified 20 degree (F.) thermal discharge standard which is simply not the applicable legal standard in this case.

There are many other reasons in evidence to conclude that the Hyperion wastewater cooling alternative will not encounter any insurmountable practical or legal problems. (See Staff’s Written Response Testimony, February 10, 2003, at pp. 35-38). However, what needs to be emphasized again is that *the Applicant has failed to carry its burden of proving that the Hyperion wastewater cooling alternative “would not be feasible.”*

C. The Applicant’s Policy Argument Is Contrary To The Law and CEC Policy

Having failed to provide any convincing legal or factual arguments to support its position on the “Biological Resources” and related “Alternatives” issues in this case, the Applicant completes its Opening Brief by arguing that “pending [federal] regulations

proposed to modify section 316(b) of the Clean Water Act will likely create the requirements for a new [cooling water impact] study in the near future . . . [and for] that reason, [the Applicant] recommends that the Committee anticipate this regulatory situation by placing appropriate language in its Biological conditions of certification.” (See Applicant’s Opening Brief at pp. 6-7). In effect the Applicant is urging this Commission, as a matter of policy, to grant its request for certification based on a set of *draft* federal regulations which (1) have not been finalized; (2) have not been adopted; and (3) the CEC has no authority to adopt or enforce now, or at any time in the future.

It would be completely contrary to the requirements of California law for the CEC to grant a license for this project based on such speculative and uncertain *future actions* of a regulatory agency over which the Commission has no control whatsoever. (See, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, at pp. 306-307, 248 Cal. Rptr. 352, at pp. 358-359). Moreover, this Commission does not now and has never had any policy of granting a permit based on such circumstances. Thus, Presiding Member Robert Pernelle clearly stated on the record during the public Prehearing Conference in this case on November 7, 2002, that he would not rely *in any way* on such speculative future federal regulations in deciding whether to grant a license in this case.

D. Staff’s Recommendations Concerning “Biological Resources” Issues In This Case

This proposed project will not maintain, enhance and, where feasible, restore the marine resources of Santa Monica Bay as required by law. To the contrary, the project will kill *trillions* of marine organisms, and cause significant adverse cumulative biological impacts, *each and every year* that it operates using the once-through cooling system as proposed by the Applicant herein. Given the law and the facts in this case, Staff concludes that before the Energy Commission can legally certify this project, the Applicant must be required to either: (a) file an amended AFC proposing to implement the Hyperion wastewater cooling alternative; or (b) file supplemental information containing (i) a proper “monthly” cap for *every month of the year*, and (ii) a reliable site-specific entrainment study; and (iii) all feasible avoidance and/or mitigation measures needed to maintain, restore and enhance the marine resources of Santa Monica Bay, consistent with the study’s findings.

II. STAFF’S REPLY TO THE INTERVENOR’S OPENING BRIEFS

Staff has reviewed the Opening Briefs filed by certain Intervenors in this case, namely the Santa Monica Baykeepers/Heal The Bay, the Murphy/Perkins, and the City of El Segundo. We offer the following responses to these Opening Briefs.

A. Staff’s Reply To The Santa Monica Baykeepers/Heal The Bay Opening Brief

The arguments presented by Intervenors Santa Monica Baykeeper/Heal The Bay in their Opening Brief are fundamentally consistent with the CEC Staff’s position

concerning the “Biological Resources” and related “Alternatives” issues in this case, and accordingly Staff supports the Intervenor’s positions therein with one exception. Specifically, on page 16 of their Opening Brief these Intervenor’s state that they “do not believe that it has been demonstrated that dry cooling is an infeasible option for this proposed project.” Staff respectfully disagrees with this claim for the following reasons.

First, when Staff undertook to evaluate various alternatives and/or mitigation to reduce the adverse marine resource impacts of this project, it did so with no preconceived outcome in mind. Rather, Staff looked at each alternative objectively to determine whether there were any “fatal flaws” that would render the option in question “infeasible” in this particular case. Staff found no “fatal flaws” with regard to the reclaimed wastewater option. However, with regard to the “dry cooling” option the evidence in the record clearly states that “dry cooling is not considered [feasible] because it requires a large surface area for the banks of fans, and this space is not available at the [El Segundo site].” (See the FSA at pp.4.2-App.A-3). In addition, Staff’s expert witness on this subject testified that there were noise and visual impact concerns which also rendered the dry cooling option infeasible at this particular site. (See RT 2/18/03, Mr. Schoonmaker, at pp. 198-199).

Second, no party (including these particular Intervenor’s) has presented any evidence, either directly or through cross examination, to dispute Staff’s findings on the dry cooling option. Accordingly, the evidentiary basis for finding dry cooling “infeasible” has been provided, and there is no evidentiary or legal basis on the record for rejecting the conclusion of infeasibility which Staff reached on this particular option.

B. Staff’s Reply To The City of El Segundo’s Opening Brief

In its Opening Brief, the City of El Segundo (COES) has voiced objection to Condition of Certification **Land--9**, as currently proposed by the CEC Staff and fully agreed to by the Applicant in this case. That condition, which was submitted into evidence as an “Errata To the Final Staff Assessment – Land Use” (dated January 6, 2003), provides that:

“LAND—9: The project owner shall provide copies of the final perimeter landscape plans to the CPM pursuant to Condition of Certification VIS—2. ***Said landscape plans shall show and identify the area to be designated for “public use” subject to restrictions for security and public safety as determined by the CPM.*** The project owner shall install park type benches for the public use within the public use area designated on the final perimeter landscape plan.” (emphasis added).

The City of El Segundo now argues that, pursuant to Public Resources Code Section 25529, **Land—9** should be revised by the Commission to require the Applicant to specifically dedicate 1.2 acres of its property located on the southwest corner of the powerplant site for “public access . . . established and posted to be consistent with that of the [nearby] public beach and [adjacent] bike path.” The City further asserts that “there are no security or public safety issues” concerning this 1.2 acres, and therefore

the Energy Commission should “require that the applicant leave the area unfenced . . . and direct the City and applicant to resolve any maintenance and operational matters through an appropriate legal instrument including, without limitation, a recreational easement.” (See City of El Segundo’s Opening Brief at pp. 4-7).

However, for the reasons set forth below, neither the law nor the facts support the City of El Segundo’s argument on this Land Use issue at this time. Specifically, Public Resources Code Section 25529 provides in pertinent part that:

“When a facility is proposed to be located in the coastal zone . . . the [Energy Commission] shall require, as a condition of certification . . . that an area be established for public use, as determined by the [C]ommission **subject to restrictions required for security and public safety.**” (emphasis added).

This statute does not require that any *specified amount of acreage* be set aside for “public use”, as the City of El Segundo now appears to argue. However, the statute does require that any “public use” area which is established shall be “subject to restrictions required for security and public safety.”

In this case, the evidentiary record clearly establishes the following undisputed facts:

- First, in the period following the September 11, 2001 attacks on the World Trade Center, government agencies throughout the United States have developed a heightened concern about security issues surrounding large, high-profile facilities such as powerplants.
- Second, in California the Governor has appointed an “Anti-Terrorist” taskforce to establish security guidelines for facilities such as the powerplant at issue in this case.
- Third, as of the date of the evidentiary hearings, this California Anti-Terrorist task force had not completed its work or made any final recommendations concerning security protection for facilities such as the powerplant in question.
- Fourth, at the present time a perimeter fence fully surrounds and protects the 1.2 acres in question, thereby discouraging any improper or criminal behavior from occurring on that portion of the powerplant site.
- Fifth, the City of El Segundo has been unwilling to accept any “public use” condition that would retain a fence and locked gate around the 1.2 acre area in question to better provide safety during periods of heightened security concern, such as late at night.
- Sixth, the Applicant has agreed to dedicate a smaller, unfenced portion of its land immediately adjacent to the bike path for “public use”, and the Applicant will be

required by **Land—9** to provide full landscaping and benches for the public's use and enjoyment on that parcel.

(See RT 2/20/03, Mr. Mark Hamblin, at pp. 48-55).

In short, Condition of Certification **Land—9**, as proposed by Staff and agreed to by the Applicant, fully satisfies the legal requirements of Public Resources Code Section 25529 by expressly requiring the Applicant to identify and provide an area at the powerplant site to be designated for "public use", subject only to reasonable and legally required "restrictions for security and public safety as determined by the CPM." With the recommendations of the California Anti-Terrorist taskforce still pending, and with the City of El Segundo completely unwilling to accept a locked perimeter gate as a condition for allowing "public use" of the 1.2 acres it desires, the CEC Staff is simply not prepared at this time to recommend that this particular acreage be required for public use as a condition of certification. However, it is important to emphasize that **Land—9**, as currently written and agreed to by the Applicant, expressly allows this issue to be further reviewed by the CPM during the compliance process, and if security concerns are fully addressed at that time, Staff would have no objection to the CPM allowing "public use" on the full 1.2 acres in question.

C. Staff's Reply To The Murphy/Perkins Opening Brief

In certain unlabeled papers which Intervenors Michelle Murphy and Bob Perkins (the "Murphy/Perkins") electronically filed with the CEC on May 12, 2003, they voice great dissatisfaction with the Energy Commission's entire siting process, and with certain specific issues concerning Air Quality, Land Use and Visual Resources that have now been publicly agreed to by the CEC Staff, the Applicant, and most other parties in this proceeding. However, as discussed below, the Murphy/Perkins have failed to document that any of the conditions they oppose are either unlawful or unsubstantiated by the evidence in this case.

First, with regard to the topic area of "Air Quality," the Murphy/Perkins assert that "No one has looked at the big picture . . . for a power plant that will be damaging the lungs of more than 10 million people who will live downwind from it for the next 50 or more years." However, they have cited no laws concerning public health or air quality that would be violated by the proposed project, and the evidence clearly indicates that this project has, in fact, been thoroughly and thoughtfully reviewed by both the South Coast Air Quality Management District (SCAQMD) and the CEC Staff to ensure that it will not cause any unmitigated public health or adverse air quality impacts. Since this issue has been discussed and documented thoroughly in Staff's Opening Brief (at pp. 23-24), it will not be further addressed here.

Second, with regard to "Land Use" issues the Murphy/Perkins assert that the proposed plant "is sited too close to the ocean . . . and [s]omeone, either the Coastal Commission or the California State Lands Commission and ultimately the California Energy Commission as the lead governmental agency, needs to examine this issue." The

Murphy/Perkins apparently want the Energy Commission to order the Applicant to dedicate a portion of its private property for the purpose of providing a public “right of way” around an existing rock revetment that is periodically covered by high tides during the winter months. However, the evidence regarding this matter is *undisputed*. This project will not encroach any further on the waters edge, nor will it violate any applicable law, ordinance, regulation or standard concerning its land use location. The Murphy/Perkins have cited no evidence or law to the contrary, and their concerns in this regard are simply without legal merit.

Third, with regard to “Visual Resources” the Murphy/Perkins object to what they call “a large skirt of ‘masking’ color . . . to cover up the new HRSG’s (sic),” apparently preferring what they describe as “the utilitarian and pleasingly intricate view of [totally unscreened] working machinery” instead.

The CEC Staff certainly recognizes that “beauty is often in the eye of the beholder.” However, in this case the equipment-screening banners which the Murphy/Perkins now object to were initially proposed by the Applicant, as legally required under the California Coastal Act, to enhance the visual impacts of an otherwise totally unscreened major powerplant project located along the scenic coastline of Southern California. The banner-screening proposal was subsequently endorsed by a wide-range of interested parties in this proceeding, including the California Coastal Commission, the City of El Segundo, the City of Manhattan Beach, and the CEC Staff. At the evidentiary hearings, no party presented any evidence opposing Condition of Certification **VISUAL—5**, which requires the visual screening of certain specified equipment, but also provides that “[t]he project owner shall consult with representatives of the Cities of El Segundo and Manhattan Beach to determine if specific [artistic design] treatment or painting options that may improve the aesthetic appearance of the project are desired, and shall provide a report to the CPM.” In short, the Murphy/Perkins have cited nothing in either the law or the evidentiary record to justify any changes to the nine “Visual Resources” Conditions of Certification which the Applicant has fully agreed to comply with in this case.

Finally, with regard to the issue of “Biological Resources” the Murphy/Perkins state that they have “finally decided . . . [that] the Applicant is refusing to do a proper study on marine pollution because it knows as well as the Staff that such a study would show grievous damage to Santa Monica Bay.” While the CEC Staff is not certain about the Applicant’s motivation in this regard, ***it is critically important for the Commission to recognize that this particular project stands alone in failing to provide the type of reliable scientific data that has been provided for and/or required of every other coastal power plant project recently certified by or currently seeking certification from the CEC.*** (See the FSA at p. 4.2-39, footnote 28).

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III. CONCLUSIONS CONCERNING THIS PROPOSED PROJECT

While the proposed El Segundo Repower Project is in compliance with the law concerning most of the subject areas raised by Intervenors in their Opening Briefs, the proposed project does not comply with the requirements of the Energy Commission's CEQA-certified regulatory program, the California Coastal Act or other provisions of law with regard to "Biological Resources" and related "Alternatives". As such, the request for certification of this proposed project cannot be legally granted at this time, and the Applicant should be directed to either: (a) file an amended AFC proposing to implement the Hyperion wastewater cooling alternative; or (b) file supplemental information containing (i) a proper "monthly" cap for *every month of the year*; *and* (ii) a reliable site-specific entrainment study; *and* (iii) all feasible avoidance and/or mitigation measures needed to maintain, restore and enhance the marine resources of Santa Monica Bay, consistent with the study's findings.

Dated: June 9, 2003

Respectfully submitted,

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