

COMMITTEE CONFERENCE
REVISED PRESIDING MEMBERS PROPOSED DECISION
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification) Docket No.
for the El Segundo) 00-AFC-14
Modernization Project)
_____)

CITY COUNCIL CHAMBERS
EL SEGUNDO CITY HALL
350 MAIN STREET
EL SEGUNDO, CALIFORNIA

THURSDAY, APRIL 29, 2004

1:10 p.m.

Reported by:
James Ramos
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman, Presiding Member

James D. Boyd, Associate Member

HEARING OFFICER AND ADVISORS

Garret Shean, Hearing Officer

Scott Tomashefsky, Advisor to Chairman Keese

Michael Smith, Advisor to Commissioner Boyd

STAFF AND CONSULTANTS PRESENT

David Abelson, Senior Staff Counsel

James W. Reede, Jr., Project Manager

Caryn Holmes, Staff Counsel (teleconference)

Rick York (teleconference)

Joe Loyer (teleconference)

Alvin Greenberg (teleconference)

PUBLIC ADVISER

Nick Bartsch

APPLICANT

John McKinsey, Attorney,
Livingston and Mattesich

Ron Cabe, Project Manager
David Lloyd, Secretary
El Segundo Power II LLC
NRG Energy, Inc.

Tim E. Hemig, Manager, Environmental Services
NRG Energy, Inc.

INTERVENORS

Paul Garry
Carl Jacobsen, Councilman
John Gaines, Mayor Pro Tem
City of El Segundo

Robert V. Wadden, Jr., City Attorney
City of Manhattan Beach

Charles B. Turhollow, Assistant Division Manager
Department of Public Works
City of Los Angeles

Richard G. "Nick" Nickelson

Craig Shuman, Staff Scientist
Heal The Bay

Bob Perkins
Michelle Murphy
Murphy/Perkins

Tracy Egoscue
Santa Monica Baykeeper

ALSO PRESENT

John Bowers (teleconference)
California Coastal Commission

John Yee (teleconference)
Ken Coats (teleconference)
South Coast Air Quality Management District

Scott Valor
Santa Monica Bay Restoration Commission

Bill Eisen
Residents for a Quality City

Bob McKenzie
Applied Utility Systems

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P R O C E E D I N G S

1:10 p.m.

PRESIDING MEMBER KEESE: We are going to call this meeting of the El Segundo Power Redevelopment project, revised Presiding Member's Proposed Decision, to order. I am Bill Keese, Chairman of this Committee. Joined by Commissioner Boyd, the Associate on this Committee. Garret Shean is our Hearing Officer. Scott Tomashefsky to my left is my Adviser. And Mike Smith on the right is Commissioner Boyd's Adviser.

We have a time constraint we've been notified of, which is the Coastal Commission representative will only be able to stay on for about another 20 minutes. And we'd like to get there, but we do have to identify the parties before we get started. And I understand the City Councilwoman would like to make a brief statement, also. I would like everybody to keep in mind that we're going to try to get the Coastal Commission on the record, subject to staff's willingness to defer to them, while they are on the phone. They're an important party to this proceeding.

Mr. Shean.

1 HEARING OFFICER SHEAN: Good afternoon.
2 Our intention today is to run through comments
3 from the parties. Let me indicate so far we've
4 had the following filings from the Commission
5 Staff, from the Coastal Commission, from the
6 California State Lands Commission, from the United
7 States Department of Commerce, the National Marine
8 Fisheries Service and now from the Santa Monica
9 Baykeeper. As far as I know there are no other
10 submitted written filings, is that correct?

11 All right. In addition to that -- and
12 from the City of El Segundo. We also have parties
13 here who -- actually many of the parties here have
14 also submitted comments in writing.

15 What we'd like to do now is have those
16 parties who are present identify themselves. And
17 after the people who are physically present here
18 in the hearing, we'll go to you folks on the phone
19 and ask you to identify yourselves, please.

20 So, with that, we'll go to the applicant
21 first.

22 MR. MCKINSEY: Thank you, Hearing
23 Officer Shean. My name is John McKinsey; I'm the
24 counsel for the applicant, El Segundo Power 2 LLC.
25 With me in the audience I have quite a few

1 members. I don't know that any of them are going
2 to speak but I'd like to introduce David Lloyd
3 from NRG Energy, and Ron Cabe from West Coast
4 Power and El Segundo Power 2 LLC. In addition we
5 have other individuals that I think we've had here
6 before, but that's all I'll introduce now.

7 HEARING OFFICER SHEAN: Staff.

8 MR. ABELSON: Thank you, Officer Shean.
9 My name is David Abelson; I'm the attorney for
10 staff on this particular matter. And sitting to
11 my right is the project manager, James Reede.
12 There are other staff people present, but I think
13 they're primarily on the phone and probably -- or
14 may not be actively participating in the hearing
15 today.

16 HEARING OFFICER SHEAN: All right. How
17 about any parties in the audience? We do have the
18 Santa Monica Baykeeper, associated also with Heal
19 The Bay.

20 MS. EGOSCUE: Good afternoon. Tracy
21 Egoscue, Executive Director, Santa Monica
22 Baykeeper. Also with me today to speak is Craig
23 Shuman from Heal The Bay.

24 HEARING OFFICER SHEAN: Thank you.

25 MR. GARRY: Could I identify myself?

1 HEARING OFFICER SHEAN: Sure, why don't
2 we just have a little parade up to the podium
3 here.

4 MR. GARRY: Paul Garry with the City of
5 El Segundo, intervenors.

6 HEARING OFFICER SHEAN: Thank you, Mr.
7 Garry.

8 MR. VALOR: I'm Scott Valor with the
9 Santa Monica Bay Restoration Commission.

10 MR. EISEN: Bill Eisen, Residents for a
11 Quality City, a local neighborhood group; and I
12 filed papers before on this, and I will be filing
13 some further papers on this.

14 HEARING OFFICER SHEAN: Thank you.

15 MR. EISEN: I'd like to speak today,
16 too. Thank you.

17 MR. WADDEN: Robert Wadden; I'm City
18 Attorney for City of Manhattan Beach, who are
19 intervenors.

20 MR. TURHOLLOW: Chuck Turhollow with the
21 City of Los Angeles Department of Public Works,
22 Bureau of Sanitation.

23 MR. JACOBSEN: Carl Jacobsen,
24 Councilman, City of El Segundo. We also have John
25 Gaines , Mayor Pro Tem of El Segundo.

1 MR. NICKELSON: Nick Nickelson; I'm a
2 resident of Manhattan Beach, and also an
3 intervenor.

4 HEARING OFFICER SHEAN: All right. Let
5 me introduce to you our Associate Public Adviser
6 over here, Mr. Bartsch.

7 MR. BARTSCH: Nick Bartsch, representing
8 the Energy Commission's Public Adviser's Office.

9 HEARING OFFICER SHEAN: We have several
10 blue cards indicating people who would like to
11 speak. If there's anyone who would like to do
12 that, he has some additional cards which, if you
13 will fill them out, he will hand up to us.

14 Also, if you are not receiving regular
15 notice of these proceedings, there will be a place
16 on the blue card where you can put an email and
17 postal address, and you will then be put on our
18 distribution lists.

19 DR. REEDE: Excuse me, Hearing Officer
20 Shean. We haven't introduced the people on
21 teleconference.

22 HEARING OFFICER SHEAN: Right, we're
23 getting to them. Now we'll go to the people on
24 the phone. And let's start with you, Mr. Bowers.

25 MR. BOWERS: John Bowers representing

1 the California Coastal Commission.

2 HEARING OFFICER SHEAN: Mr. Yee.

3 MR. YEE: John Yee and Ted Coats
4 representing South Coast AQMD.

5 HEARING OFFICER SHEAN: And how about
6 other members of the Commission Staff, if you'll
7 just identify yourselves, please.

8 MR. YORK: This is Rick York
9 representing biological resources at the Energy
10 Commission.

11 MR. LOYER: And this is Joe Loyer for
12 air quality at the Energy Commission.

13 DR. GREENBERG: This is Alvin Greenberg
14 representing waste management for the Energy
15 Commission.

16 HEARING OFFICER SHEAN: All right, is
17 there anyone else on the phone that wishes to
18 identify him- or herself?

19 MR. MCKENZIE: Yes. My name is Bob
20 McKenzie representing Applied Utility Systems.

21 HEARING OFFICER SHEAN: Thank you, sir.
22 Now, as a courtesy to the City, who are our
23 gracious hosts, we want to thank you once again
24 for allowing us to use your facilities here. And
25 also be here on market day, which we always enjoy.

1 We'll ask Mr. Jacobsen, who has requested an
2 opportunity to speak to us, to come forward,
3 please.

4 COUNCILMAN JACOBSEN: Thank you. Carl
5 Jacobsen, Councilman, City of El Segundo. We
6 appreciate you being here. We appreciate this
7 project. We are on record of asking you to
8 approve. And we would ask that it be done in a
9 timely manner so we can get the plant back online
10 for us.

11 Thank you.

12 HEARING OFFICER SHEAN: Thank you, Mr.
13 Jacobsen.

14 COMMISSIONER BOYD: Thank you, Mr.
15 Jacobsen. Please note we've spent money in your
16 community already, but I apologize for eating in
17 front of you, but they kept our airplane on the
18 ground in Sacramento an extra half hour due to Los
19 Angeles air traffic.

20 COUNCILMAN JACOBSEN: Thank you.

21 COMMISSIONER BOYD: So, thank you.

22 HEARING OFFICER SHEAN: All right. With
23 that we'll get to the comments from the parties.
24 Why don't we, just as a matter of courtesy here
25 for the Coastal Commission, go to you, Mr. Bowers,

1 and take your comments now.

2 MR. BOWERS: Okay. Could you tell me if
3 there's a time limit?

4 HEARING OFFICER SHEAN: Something
5 reasonable, I think, is our time limit. We've
6 received and read the written comments that were
7 filed by Mr. Douglas.

8 MR. BOWERS: Yes.

9 HEARING OFFICER SHEAN: And so those
10 have all been read and considered.

11 MR. BOWERS: Okay. Thank you. I should
12 be able to complete everything I have to say in
13 about five minutes.

14 HEARING OFFICER SHEAN: That's great.

15 MR. BOWERS: Okay. Chairman Keese,
16 Commissioner Boyd, Hearing Officer Shean, I
17 appreciate the opportunity to speak to you today
18 through the wonders of modern technology. I'm
19 sorry I can't be there personally, and I'm also
20 sorry that I'm going to have to leave you very
21 soon after completing my remarks. But those are,
22 unfortunately, the constraints that I am subject
23 to.

24 We have submitted to you our written
25 comments. And I'm not going to go over those

1 comments, at least no more than is absolutely
2 necessary. But what I want to do in my oral
3 comments is to address what I think are some of
4 the broader implications of the legal
5 interpretations of the statutory provisions that
6 govern the relationship between our two agencies
7 that are contained in the proposed PMPD.

8 And I use that term in the plural
9 although this is only a proceeding with respect to
10 the El Segundo facility. But the same issues
11 arise with respect to the PMPD that has been
12 proposed for the Morro Bay facility.

13 I want to urge you, with all the powers
14 of persuasion that I can muster, to back away from
15 the precipice over which you are about to take all
16 of us. And in order to understand what I am
17 asking you to do, I think we need to start with a
18 look at the history of the regulations of the
19 electrical generation industry under the Coastal
20 Act.

21 And when one looks at that, one realizes
22 that the electrical generation industry is
23 singularly treated more favorably than virtually
24 any other industrial activity that occurs in the
25 coastal zone.

1 And by that I mean that the electrical
2 generation industry is completely exempted from
3 the requirements to which it would otherwise be
4 subject to obtain a coastal development permit
5 under the Coastal Act. And it is also exempted
6 from the jurisdiction that the Coastal Commission
7 would otherwise have the ability to exercise over
8 these facilities under federal law, and that is
9 the Coastal Zone Management Act.

10 And that is despite the fact that these
11 facilities raise some of the most significant
12 regulatory concerns of any economic activity or
13 development activity that occurs in the coastal
14 zone. And I don't have to belabor what those
15 regulatory concerns are, because the Legislature
16 has listed them for us in section 30413 of the
17 Coastal Act.

18 Now, it is important to recognize that
19 this favorable treatment that the Legislature
20 accorded the electrical generation industry in the
21 Coastal Act, that that favorable treatment came
22 with a quid pro quo. And that quid pro quo was
23 that all concerned parties, including the Coastal
24 Commission, the Energy Commission and the
25 proponents of generation facilities, adhere to a

1 set of rules that the Legislature set forth to
2 govern what is, in effect, a division of
3 regulatory responsibility between our two agencies
4 for facilities located within the coastal zone.

5 Now, it has become apparent to us that
6 the applicant in this proceeding, as well as in
7 the Morro Bay proceeding, are not happy about
8 adhering to those rules that the Legislature gave
9 us in 1976. And that is perhaps not a matter of
10 any great surprise.

11 What causes us grave concern, however,
12 are the indications in these PMPDs that the Energy
13 Commission is also resistant to the idea of
14 adhering to the rules that were established by the
15 Legislature back in 1976.

16 We have indicated in our written filing
17 why we believe that the interpretations that are
18 set forth in these PMPDs are not legally
19 supportable. But what I want to emphasize, in
20 addition to that, is that if the Energy Commission
21 proceeds to adopt these interpretations, certain
22 consequences are reasonably foreseeable.

23 The first consequence is that the
24 Coastal Commission will, in all likelihood,
25 interpret the adoption of these interpretations,

1 proposed interpretations, as constituting an
2 almost complete breakdown of the decisionmaking
3 framework that was established by the Legislature
4 back in 1976.

5 And what is also reasonably foreseeable
6 is that the Coastal Commission will seek some kind
7 of relief. And that relief will, I would imagine,
8 at least in part, take the form of going back to
9 the Legislature and informing the Legislature that
10 the division of regulatory responsibility that it
11 established back in 1976 has suffered or
12 experienced an almost complete breakdown.

13 And at the top of the list of the
14 potential remedies for that situation is, I think,
15 going to be a proposal to give to the Coastal
16 Commission the plenary regulatory authority over
17 these kinds of facilities that the Legislature
18 elected not to give it back in 1976.

19 So, that is the -- those are the broader
20 implications. If that is the direction that we
21 are heading towards, then so be it. But I think
22 if you give careful considerations to the
23 arguments that we have made in our written
24 comments, you will see that the direction that you
25 are proposing to go in is of questionable legal

1 supportability.

2 And I also think that you will agree
3 that for the other reasons that I've indicated
4 that the course of action that you have set forth
5 in your PMPD is ill-advised from a number of other
6 perspectives.

7 So that concludes my remarks and I would
8 be happy to answer any questions that you might
9 wish to pose to me in the brief time that I have
10 remaining to be with you.

11 PRESIDING MEMBER KEESE: This is Bill
12 Keese. You feel that there is no ambiguity
13 created by the disappearance, essentially, of
14 NOIs?

15 MR. BOWERS: I think, as we indicated in
16 our written comments, we think that the intent of
17 the Legislature was very clear when it enacted
18 these provisions, both the Coastal Act and the
19 corresponding provisions of the Warren Alquist Act
20 were all enacted by the same legislation.

21 PRESIDING MEMBER KEESE: Correct. You
22 know, I accept that. And I think that's --

23 MR. BOWERS: And so at that point in
24 time there was no -- there's no such thing as a
25 stand-alone AFC proceeding. All AFC proceedings

1 were preceded by NOI proceedings.

2 PRESIDING MEMBER KEESE: Correct. And
3 at the same time wasn't the intent of the
4 Legislature that the Coastal Commission input to
5 the Energy Commission be at the earliest possible
6 time? That is, in the NOI process.

7 MR. BOWERS: That's correct.

8 PRESIDING MEMBER KEESE: So, we have
9 here input that did not come in at the earliest
10 possible time, but came in essentially after the
11 bulk of the testimony had taken place, which puts
12 us in some kind of a quandary here as to how we
13 handle it.

14 MR. ABELSON: Mr. Chairman, I would like
15 the statements between Morro Bay and El Segundo --
16 Because Morro Bay may have had the problem you
17 just described, that is not the case in El
18 Segundo, which is the case --

19 MR. MCKINSEY: And I would disagree with
20 that, so if we want to start interrupting and
21 speaking out of turn, we can. But I'm willing to
22 wait till we have the time to speak.

23 PRESIDING MEMBER KEESE: I think, you
24 know, we do have competing jurisdictions here.
25 One of the things that troubles me is we're in the

1 fourth year of a siting process that the Energy
2 Commission is charged with doing in one.

3 When this application was filed in
4 December of 2000 there was a study that was
5 completed and accepted by the Regional Water in
6 June of that year. I guess I wish we had gone to
7 the mat right then to find out, was that study
8 unacceptable. Were we rejecting what the Regional
9 Water Board had said was acceptable in June when
10 the applicant filed this application? Would that
11 be your opinion? That the study approved by the
12 Regional Water Board in June was invalid in
13 December?

14 MR. BOWERS: Chairman Keese, I'm not in
15 a position, unfortunately, to be able to address
16 that specific issue. What I do want to say,
17 though, is that we, at the Coastal Commission,
18 have always been willing to sit down with the
19 Energy Commission and establish rules for
20 participation, or that would guide the Coastal
21 Commission's participation in the Energy
22 Commission's proceedings to the extent that the
23 Legislature hasn't already provided us with those
24 rules.

25 And I am the first to admit that in this

1 kind of proceeding we are not governed by clearly
2 established rules, timing and process. And I am
3 perfectly willing, and I think everybody else at
4 the Coastal Commission is perfectly willing to sit
5 down and try to figure out, you know, what
6 standards should apply to the Coastal Commission's
7 participation in these kinds of proceedings.

8 But none of that comes even close to
9 what the Committee is proposing to do in its PMPD
10 in this proceeding, and in the Morro Bay
11 proceeding, which is to completely deviate from
12 the substantive standards that the Legislature has
13 provided us for how the Energy Commission is to
14 consider the Coastal Commission's recommendations
15 and comments.

16 COMMISSIONER BOYD: Mr. Bowers, this is
17 Jim Boyd. You probably know this, but for your
18 benefit and for certainly the audience's benefit,
19 this is my first hearing on this power plant. I
20 stepped in to replace Commissioner Pernell, whose
21 term expired here at the beginning of the year.

22 And the logic of my being on this power
23 plant siting case was because I, with Chairman
24 Keese, sat on the Morro Bay Power Plant siting
25 case. And they are suddenly getting awfully

1 similar in terms of the issues we're dealing with.
2 Although, as just pointed out by perhaps staff
3 attorney, there are somewhat different
4 circumstances.

5 I'm a little blurry-eyed, but you can't
6 see it over the telephone, from reading and re-
7 reading piles of papers till the wee hours of this
8 morning so that I could be totally up to speed and
9 assure myself that I was on the issues that we're
10 addressing here today, and the entire background
11 of this particular power plant siting case.

12 And I appreciate your comments, and I
13 appreciate the written testimony of the Coastal
14 Commission. And I recognize that in your views,
15 failing to move us you might feel compelled to
16 have to go to the Legislature. But you know what
17 kind of a crap shoot that is, so perhaps we all
18 would like to avoid that.

19 It's unfortunate, but I appreciate it.
20 As a long-time bureaucrat, myself, the demands on
21 the limited staffs that we all have here. It's
22 unfortunate you can't be with us. I hope somebody
23 on your staff may monitor this hearing to see how
24 it turns out at the end of the day.

25 The comments I want to make are the fact

1 that it's painfully evident to me that while we
2 are guided by laws that are interpreted for us by
3 lawyers, and I'm not one, maybe one of the few in
4 the room here, but there can be widely differing
5 opinions on the application of the law.

6 And for the past several weeks I've seen
7 the results of that vividly with regard to this
8 case, if not others. And how we interpret the law
9 and the intent of the Legislature. And I want to
10 assure you I think this subject's going to get a
11 very fair hearing today. And I know it will get a
12 fair hearing from Chairman Keese because he is a
13 lawyer; and it will be a fair hearing from me
14 because I'm the new Commissioner on this
15 assignment. And I have a long-standing reputation
16 of being very concerned about California's
17 environment.

18 And so, no matter which course of law
19 and which law we're governed by, I think we all
20 want to see that protected. I'm saying this
21 because you won't be here at the end to maybe hear
22 me say something like this after I absorb all that
23 I expect to absorb, in addition to what I've read.

24 I'm quite aware of the meet-and-confer
25 contingencies that exist for our two agencies. I

1 know we've had discussions like this in the not-
2 too-distant past. And I think we're all open to
3 perhaps resolving some of these issues, and not
4 collectively going over the precipice.

5 So, because you won't be with us, and
6 I'm not sure anybody will be monitoring, I wanted
7 to at least let you leave knowing that there's
8 going to be a fairly open review of the issues
9 today, if not in the future, as well.

10 So, thank you for your testimony.

11 PRESIDING MEMBER KEESE: This is Bill
12 Keese again. We did have a discussion of this, I
13 believe, in the context of Morro Bay with Peter
14 Douglas. And we both agreed that we should have a
15 process by which the Energy Commission can give
16 full credence to what you aptly describe as the
17 legislative intent of the Coastal Act and its
18 interrelationship with the Energy Act. And that's
19 for the future.

20 What this Committee has to do is wrestle
21 with the situation we're in at this time. We
22 obviously are going to hear from a number of other
23 parties regarding what you've filed and what
24 they've filed back and forth. Is there any
25 possibility that you're going to be able to join

1 us later and assist us in perhaps answering a few
2 more questions at the end? The Coastal Commission
3 is an extremely important participant in this
4 process.

5 MR. BOWERS: I wish there was a way for
6 that to happen, Chairman Keese. Mr. Luster, my
7 colleague here at the Agency, is not available.
8 He's not even in the office today. And I have
9 some meetings that I am just absolutely unable to
10 relieve myself of the responsibility to be at.

11 So, I apologize. This is going to have
12 to represent the extent of our participation,
13 direct participation in this proceeding.

14 PRESIDING MEMBER KEESE: Okay.

15 HEARING OFFICER SHEAN: Mr. Bowers,
16 Garret Shean here. If I understood you correctly
17 you said one of the potential remedies, should
18 these Presiding Member's Proposed Decisions be
19 enacted, was that the Coastal Commission would
20 seek an amendment of the jurisdiction over the
21 licensing of coastal power plants to switch from
22 the Energy Commission to the Coastal Commission,
23 is that correct?

24 MR. BOWERS: No, no, that's not what I
25 was trying to suggest.

1 HEARING OFFICER SHEAN: No. Oh, all
2 right.

3 MR. BOWERS: I mean the Coastal
4 Commission's regulatory authority exists side-by-
5 side with the regulatory authority of a number of
6 other state, local and federal agencies. And so
7 what we would be talking about would be if we
8 simply deleted the very few phrases from the
9 Coastal Act that currently exempt the electrical
10 generation industry from the regulatory authority
11 of the Coastal Commission, we would simply make
12 that industry subject to the regulatory authority
13 of the Coastal Act, in common with virtually every
14 other economic activity that occurs in the coastal
15 zone of the State of California.

16 And I assume that we would be exercising
17 our regulatory authority concurrently with the
18 regulatory authority of your agency, as well as
19 with that of other regulatory agencies, the water
20 boards, the air boards and so forth.

21 HEARING OFFICER SHEAN: All right. I
22 just wanted to clarify that. Thank you.

23 All right, I don't believe, Mr. Bowers,
24 anybody else has any other questions. And we'd
25 like to thank you for your participation. And we

1 hope this accommodation has been sufficient for
2 you, and I think it's been sufficient for us.

3 So, thank you, sir.

4 MR. BOWERS: Thank you for the
5 opportunity.

6 HEARING OFFICER SHEAN: All right. Now,
7 we have a choice between the staff or the
8 applicant, or do you want to follow all the other
9 parties, given that they've already started here?
10 why don't we do it in that fashion. We'll go to
11 the Commission Staff.

12 MR. ABELSON: Good afternoon, Chairman
13 Keese, Commissioner Boyd, Advisers, Officer Shean,
14 as I indicated earlier my name is David Abelson
15 and I'm the attorney representing the Energy
16 Commission Staff in the El Segundo matter.

17 Staff would like to thank the Committee
18 for affording us this opportunity to present
19 comments on the revised PMPD in this proceeding,
20 particularly since Commissioner Boyd has not had
21 an opportunity to hear directly from staff in this
22 case. And as I indicated a moment ago to Chairman
23 Keese, the El Segundo case differs in many
24 important respects from the Morro Bay case, which
25 this same Committee is obviously presiding over.

1 As indicated in our written comments,
2 staff has a number of serious disagreements with
3 the revised PMPD concerning the topic of
4 biological resources because we believe the
5 proposed decision contains findings and rulings
6 that are unlawful, remain unprecedented in Energy
7 Commission practice, and are completely
8 unnecessary, in our view, from the standpoint of
9 trying to assure that the state has an adequate
10 reserve of energy resources, which all of us are
11 dedicated to, as an agency.

12 I'd like to address each of these areas
13 of disagreement further in just a moment, but I
14 would like to begin by noting a headline in last
15 week's Sacramento Bee that was entitled, "U.S.
16 Ocean Study Sees a Tidal Wave of Woes." And the
17 article under that headline begins with Retired
18 Admiral James Walkins, former Energy Secretary,
19 now heading President Bush's Commission on Ocean
20 Policy stating that, "our oceans, bays and coasts
21 are in real trouble."

22 Commissioners, this is certainly the
23 case for Santa Monica Bay, which is a body of
24 water, the evidence in this case of which
25 overwhelmingly proves, is experiencing severe

1 ecological decline across a wide range of marine
2 resources throughout the entire Bay area.

3 For example, critical zooplankton and
4 food organisms in Santa Monica Bay have declined
5 by almost 90 percent from the levels that existed
6 in this Bay just 50 years ago. And, in addition,
7 numerous commercial and noncommercial fish species
8 are experiencing steep and continuing declines in
9 the Bay, as well. This being caused, at least in
10 part, by industrial development such as power
11 plants.

12 The revised PMPD would allow the El
13 Segundo project to withdraw approximately 127
14 billion gallons of water from Santa Monica Bay
15 each year for once-through cooling of the project.
16 This is enough water to submerge the entire City
17 of Los Angeles a foot deep in water, every single
18 year.

19 This withdrawal will entrain and
20 destroy, literally, trillions of marine organisms
21 from the Bay every year that this project operates
22 thereby continuing and adding to the biological
23 degradation of Santa Monica Bay.

24 Now, I indicated that we have concerns
25 in the area of law, in the area of precedent and

1 in the area of necessity. Turning to the area of
2 law, staff believes that the PMPD is unlawful as
3 currently drafted in several important respects.

4 In this case it is important for the
5 Committee and for the Commission to again remember
6 that there are two important sets of legal
7 requirements, at a minimum, that this project must
8 comply with under the Warren Alquist Act before it
9 can be lawfully licensed by the Energy Commission.

10 The first of these requirements is under
11 the California Environmental Quality Act, which we
12 serve as the lead agency for, to insure that the
13 project will not significantly increase the harm
14 above circumstances that are currently existing
15 out there.

16 The second obligation, under the
17 California Coastal Act, requires that the project
18 must go further. It must not only maintain the
19 exiting environment, not make it worse, but it
20 must, in addition, restore and, where feasible,
21 enhance the marine resources of Santa Monica Bay,
22 while at the same time, and again, quoting from
23 the Coastal Act, minimizing the adverse effects of
24 entrainment to the extent feasible.

25 Unfortunately, this project, as

1 currently proposed in the RPMPD, will do neither,
2 which we find to be unlawful for the following
3 reasons. Number one, the RPMPD improperly
4 transfers Energy Commission responsibilities to
5 the Los Angeles Regional Water Quality Control
6 Board. The RPMPD, as we read it, attempts to
7 address many of the serious marine resource
8 concerns raised by the staff, by the California
9 Coastal Commission, by the California Department
10 of Fish and Game, by the National Marine Fisheries
11 Service and by various intervenors in this case,
12 by requiring the applicant to complete a federal
13 316(b) entrainment study, and then comply with
14 related requirements of the Los Angeles Regional
15 Board before commencing operation.

16 I want to be clear, that while this
17 LORS, L-O-R-S, while this LORS compliance
18 requirement is absolutely essential, it is not
19 sufficient to address the serious marine resource
20 problems caused by this project for three
21 different reasons.

22 The first reason is that under
23 California law -- and the Sundstrom case is the
24 case that we've cited; there are numerous other
25 cases we could cite, as well -- it is clear that

1 the Energy Commission is not allowed to transfer
2 its legal obligations to protect the environment
3 to another agency as the RPMPD now proposes to do.

4 While it is true that the Regional Water
5 Board is properly responsible for enforcing
6 federal NPDES requirements, such as the 316(b)
7 rules, it is the Energy Commission that is
8 responsible for issuing the main license for this
9 power plant, and it is the Energy Commission, not
10 the Water Board, that must meet the requirements
11 of the Warren Alquist Act, the Coastal Act and
12 CEQA in order to properly issue that license.

13 Moreover, it is important to recognize
14 that unlike the situation in Morro Bay, the
15 Regional Water Board in this case has expressly
16 stated in writing that it is fully aware of the
17 serious once-through cooling concerns that have
18 been raised in this case; and it has no objection
19 whatsoever to the Energy Commission carrying out
20 its complete responsibilities under the Warren
21 Alquist Act and under the California Environmental
22 Quality Act.

23 The second problem with the transfer
24 that's being proposed is this. This transfer of
25 responsibility, as now written, will effectively

1 deprive the Energy Commission of all jurisdiction
2 over the entrainment study that's being ordered,
3 and the mitigation that may or may not occur
4 regardless of what the Regional Board subsequently
5 does. Thus, if the Energy Commission disagrees
6 with what the Regional Board subsequently does,
7 whether we disagree with it as a matter of law,
8 whether we disagree with it as a matter of fact,
9 whether we disagree with it as a matter of policy
10 regarding the nature of the entrainment study or
11 the mitigation that they may elect to impose,
12 under the RPMPD there will be absolutely nothing
13 more that the Energy Commission can do about this,
14 as a matter of law.

15 Finally, and I think this is extremely
16 important to emphasize because there are a lot of
17 LORS involved in this case, and there is a lot of
18 law involved in this case, but underneath is the
19 concern, as Commissioner Boyd stated a moment ago,
20 that the environment be protected in accordance
21 with the requirements of law. And staff does not
22 believe that the transfer of responsibility
23 proposed in the RPMPD will properly protect the
24 environment for the following reasons:

25 It is absolutely essential for the

1 Committee and the Commission, as well, to
2 understand that the responsibilities which the
3 Energy Commission has under the Warren Alquist Act
4 are overlapping the responsibilities of the
5 Regional Board. But they are not concentric with
6 the responsibilities of the Regional Board. They
7 are not identical.

8 For example, under the Clean Water Act
9 section 316(b) the Regional Board is only required
10 to reduce entrainment and impingement impacts if
11 there is a feasible technology fix or some
12 equivalent offsite mitigation that's available.
13 In this case the evidence has already begun to
14 establish in various ways that there may well be
15 no feasible technology fix. And the courts, as
16 recently as two months ago, have declared
17 officially that offsite mitigation is not a lawful
18 remedy under 316(b).

19 What this means --

20 HEARING OFFICER SHEAN: Let's make
21 clear, that's phase one applying to new --

22 MR. ABELSON: That's correct, --

23 HEARING OFFICER SHEAN: -- facilities.

24 MR. ABELSON: -- that's correct, Officer
25 Shean, and let me join on that if I could and just

1 add they did say indicta, but they felt the same
2 would apply for existing facilities and lawsuits
3 are in the process of being filed to confirm
4 whether that's correct or not. But certainly the
5 indications from the court are that offsite
6 mitigation is not within the scope of 316(b)
7 remedies.

8 So, at best, under 316(b) we might get a
9 60 to 90 percent impact reduction against a
10 vaguely defined, unmitigated technology, which we
11 don't know what that is. Whereas, under the
12 Coastal Act and the Warren Alquist Act, all
13 restoration and enhancement that is feasible is
14 required. There is no prohibition against using
15 offsite mitigation, if that's the only fix that we
16 have in this case. There is no prohibition
17 against a 100 percent solution, if indeed it is
18 feasible.

19 And I really want to emphasize that
20 sending it to the Water Board will not provide the
21 same scope of environment protection that we would
22 get under our own laws.

23 In short, the Regional Board's authority
24 is not equivalent to the Energy Commission's. And
25 given the problems that might exist with the

1 technology fix and the possible limitations that
2 may exist with the offsite mitigation fix, it's
3 entirely possible there will be no solution at all
4 under 316(b).

5 Now, the second area of legal concern --

6 PRESIDING MEMBER KEESE: May I?

7 MR. ABELSON: Absolutely.

8 PRESIDING MEMBER KEESE: We will hear,
9 I'm sure, from the applicant about what their plan
10 is for June of '05 when they have to have another
11 316(b) study. Your assumption is the next 316(b)
12 study is going to be better than the last one?

13 MR. ABELSON: I have no assumption at
14 all because I have, quite honestly, no knowledge
15 as to what's going to be required or when. But I
16 do think that it is well established in our
17 evidentiary record that the science that's out
18 there today for determining entrainment and
19 impingement impacts is light years beyond what
20 existed 20 years ago and 50 miles away when the
21 studies were done that were submitted in this
22 case.

23 So, I think, since we know that's true,
24 and since undoubtedly the Water Board knows that
25 it's true, and EPA knows it's true, as well, I

1 would imagine that there will be an attempt to
2 make the studies more current in terms of their
3 science.

4 PRESIDING MEMBER KEESE: I would agree
5 with you. I don't think there's any way that what
6 was accepted in June of 2000 is going to be close
7 to what will be acceptable down the road. The
8 plant is operating, however, under the June 2000.

9 MR. ABELSON: Actually the plant is not
10 generating any electricity at all at the moment.
11 It was closed down permanently about a year and a
12 half ago under air quality rules. There may be
13 some amounts of water being withdrawn for purposes
14 of keeping the pipes clean, but it's not for
15 cooling water purposes.

16 PRESIDING MEMBER KEESE: Yes. But if
17 there were Regional Water 316(b) would apply to
18 the plant; there is one out there.

19 MR. ABELSON: Sure. The second area of
20 legal concern --

21 HEARING OFFICER SHEAN: Before you get
22 off that point maybe -- so we can try to keep
23 these --

24 MR. ABELSON: Sure.

25 HEARING OFFICER SHEAN: -- compacted.

1 If I understood you to say you felt that the
2 jurisdictions here were overlapping and not
3 concentric, my question is are they hierarchal?

4 MR. ABELSON: Well, I don't see them as
5 that. I basically believe the Energy Commission
6 has very express responsibilities under the Warren
7 Alquist Act. I don't know whether they are sister
8 responsibilities or parent/child responsibilities.
9 I wouldn't want to characterize them either way.

10 What I do know is they're not identical
11 responsibilities.

12 HEARING OFFICER SHEAN: Okay. Well, we
13 know that in federal/state relationships in terms
14 of regulating in areas that have a federal
15 jurisdiction and a state jurisdiction that both
16 the state and federal can regulate unless and
17 until the federal government essentially occupies
18 the entirety of that field and preempts any state
19 regulation. As a general premise that's correct,
20 isn't it?

21 MR. ABELSON: I think that's a correct
22 basic statement --

23 HEARING OFFICER SHEAN: Okay.

24 MR. ABELSON: -- of federal preemption.

25 HEARING OFFICER SHEAN: Then the

1 question here is whether such a case exists with
2 respect to the licensing of intake and outfall
3 structures and addressing their effects. Do you
4 have an opinion with respect to whether or not the
5 federal government, with its current 316(b)
6 regulations, is occupying the field, and thus
7 preempting state regulation of that?

8 MR. ABELSON: I see no indication of
9 that. For many years the Energy Commission has
10 been enforcing Coastal Commission responsibilities
11 and working with its sister agency at the Water
12 Board, as well. And I've not heard of any cases
13 that I know of, of the feds saying you have no
14 business, Energy Commission, regulating in this
15 field because we've preempted the field.

16 HEARING OFFICER SHEAN: Okay. Then let
17 me ask you what's the meaning and significance of
18 the provisions of Public Resources Code section
19 301 -- pardon me, 30412, which applies to the
20 relationships between the Coastal Commission and
21 the state and the regional water boards? Are you
22 familiar with that?

23 MR. ABELSON: I am not, Officer Shean,
24 and I would defer that issue, because I don't have
25 personal familiarity, either to my colleague,

1 Caryn Holmes, in the Morro Bay case, if she is
2 familiar with it, to address; or possibly the
3 Coastal Commission, itself, who I am sure is
4 familiar with their own Act.

5 HEARING OFFICER SHEAN: Okay. Mr.
6 Bowers, are you still there? Apparently not.

7 All right, well, just since we may want
8 to discuss this come Wednesday, in subsection (b)
9 it states as follows: The State Water Resources
10 Control Board and the California Regional Water
11 Quality Control Boards are the state agencies with
12 primary responsibility for coordination and
13 control of water quality. The State Water
14 Resources Control Board has primary responsibility
15 for the administration of water rights pursuant to
16 applicable law. The Commission" -- and this
17 refers to the Coastal Commission -- "shall assure
18 that proposed development and local coastal
19 programs shall not frustrate this section. The
20 Commission" -- again referring to the California
21 Coastal Commission -- "shall not, except as
22 provided in subdivision (c)," -- which applies to
23 wastewater treatment facilities -- "modify, adopt
24 conditions or take any action in conflict with any
25 determination by the State Water Resources Control

1 Board or any California Regional Water Quality
2 Control Board in matters related to water quality
3 or the administration of water right."

4 And I guess the question there would be
5 whether that section acknowledges the hierarchy of
6 state and federal regulation and basically
7 prohibits, as the apparent language seems to
8 suggest, the state, through the Coastal
9 Commission, taking action on determinations by the
10 Water Board that were made in their federalized
11 capacity.

12 But since you're not familiar with that
13 provision, I don't see that we can go any further
14 today.

15 MR. ABELSON: Thank you. Could I
16 proceed?

17 HEARING OFFICER SHEAN: Sure.

18 MR. ABELSON: Thank you. So, basically
19 recapping quickly, we have three core problems
20 with the transfer of responsibility aspect of the
21 proposed decision.

22 First of all, it appears to us to be
23 just clearly illegal under the Sundstrom and
24 related line of cases.

25 Second of all, it deprives the Energy

1 Commission of all follow-on jurisdiction so that
2 if expectations and hopes that we may or may not
3 have about how the Water Board will or will not
4 perform, if those turn out not to be the case,
5 because the law, the courts, the policies, the
6 facts are such that the Water Board ends up doing
7 something very different than what we had
8 anticipated. For example, imposes a very minimal
9 level of technological restriction because it's
10 infeasible, and then concludes that it can't
11 require offsite mitigation because the courts,
12 perhaps, rule that it's not legal under 316(b), we
13 could end up with a case where there really is
14 very little mitigation at all.

15 And the third point is just that, that
16 the responsibilities that we have under the
17 Coastal Act and under CEQA are overlapping, but
18 they're not concentric. We are not constrained by
19 the offsite mitigation requirement.

20 So, regardless of what the courts may or
21 may not do under the 316(b) case, with regard to
22 existing facilities, this agency, the Energy
23 Commission, still has ample, clear authority where
24 it finds that there is a law it needs to enforce,
25 to use offsite mitigation as a tool within its

1 toolkit.

2 The second area of law that we're
3 troubled by in the RPMPD is that we believe the
4 RPMPD does not address the Coastal Commission's
5 recommendations in a proper manner. You've
6 already heard from Mr. Bowers, and I'm not going
7 to spend a lot of time on the issue of what I call
8 the standard of review for Coastal Commission
9 recommendations in this case. Suffice it to say
10 that staff reads the statute as clearly requiring
11 this agency to adopt Coastal Commission
12 recommendations unless found infeasible or will
13 cause greater environmental harm, period.

14 We've provided our brief on it. There
15 will be additional briefs filed in the Morro Bay
16 case by my colleague, Caryn Holmes. I would not
17 like to represent to you that I am, in any sense,
18 a legal expert on this issue because it has only
19 been raised in this case for the first time in the
20 RPMPD.

21 The issue of NOI-AFC simply has not been
22 an issue in the El Segundo case up to now. So I
23 would defer to my colleague, Caryn, in the Morro
24 Bay case, and the comments that I am sure she will
25 be filing, I believe it's required on Friday, the

1 30th.

2 The Coastal Commission, I have had an
3 opportunity to review what they filed, in fact in
4 both cases, this morning. And they've addressed
5 the issue extensively, and we've tried to
6 summarize our view in staff's comments.

7 So I'll let the standard of review
8 issues go and move on to the notion that even if
9 the standard is correctly developed, as we see it
10 to be, which is feasibility of greater
11 environmental harm, the RPMPD in the El Segundo
12 case still errs. And it errs as a matter of law,
13 and it errs as a matter of fact.

14 It errs as a matter of law because there
15 is no finding anywhere in this decision that the
16 Coastal Commission's recommendation that the El
17 Segundo intake needs to be studied and mitigated
18 before licensing by the Energy Commission. There
19 is no finding that that recommendation is either
20 infeasible or will cause greater environmental
21 harm.

22 With regard to the Coastal Commission's
23 other recommendation, which is that the Hyperion
24 wastewater cooling alternative is feasible, we
25 acknowledge and recognize that the decision

1 reaches a different conclusion. It concludes that
2 it is infeasible.

3 But we believe that the basis for that
4 conclusion as an evidentiary matter is entirely
5 unsubstantial on the record. The notion that
6 there's a 20 degree thermal rise in temperature is
7 simply an incorrect reading of the law. And all
8 the notion about the huge pipes and the enormous
9 volumes of water that would be required, the fact
10 that the project would never operate most of the
11 time is built on a house of cards. It's built on
12 a faulty legal premise. That is not the law of
13 thermal discharge for a discharge occurring five
14 miles out in the federal waters.

15 There are other problems of fact on the
16 issue related to the fact that chlorine has never
17 been a problem of any kind when requiring
18 wastewater treatment in numerous other cases that
19 we're looking at. There's nothing unique about
20 this case. And nothing in the evidence to suggest
21 there's anything unique about this case.

22 The notion that this project will
23 somehow cause greater environmental harm because
24 if it's not built because we impose the wastewater
25 treatment alternative we'll lose some of the

1 positive aspects of the project, is an incorrect
2 reference point.

3 The reference point is not to the no-
4 project alternative. The reference point is to
5 the project being proposed. What's out there
6 right now isn't drawing any water at all for
7 cooling water purposes.

8 So, there are numerous evidentiary
9 flaws, if you will, on the wastewater alternative.
10 We've highlighted them repeatedly in our original
11 briefs, our original sets of comments. And we've
12 documented where you can find evidence in the
13 record on these. So I won't go through them
14 further.

15 But we believe the Coastal Commission
16 summary has made two sets of recommendations. One
17 is do the wastewater treatment cooling option. We
18 believe that the record does not support the
19 finding of infeasibility on that.

20 Two, the Coastal Commission said, in the
21 alternative complete your study, find out what the
22 impacts are, and impose your mitigation before you
23 license -- there's no finding of infeasibility and
24 there's no finding of greater environmental harm.

25 So in that respect the decision errs.

1 The third area where we believe the
2 decision --

3 PRESIDING MEMBER KEESE: May I?

4 MR. ABELSON: Sure.

5 PRESIDING MEMBER KEESE: Are we talking
6 about a 316(b) study as required by the Regional
7 Water Board?

8 MR. ABELSON: No, we've never thought of
9 it in precisely those terms. It is, in effect, a
10 316(b) because it will study entrainment and it
11 will study impingement. I think everyone fully
12 anticipates that it would be and should be fully
13 coordinated with the Regional Board so the study
14 can serve both purposes. And I don't think anyone
15 has a problem, you know, doing that.

16 But, strictly speaking, the requirement
17 would be not for compliance with 316(b) -- the
18 Water Board will take care of that under LORS
19 compliance; that will be done. What we need is to
20 insure that we are meeting CEQA and we are meeting
21 the Coastal Act's obligation to restore and
22 enhance where feasible. And we can't answer those
23 questions if we don't know what the nature of the
24 harm is.

25 PRESIDING MEMBER KEESE: Well, it sounds

1 to me like using 316(b) as the shorthand, that
2 leads us astray then. Because you're saying we
3 should -- that that's a separate responsibility of
4 the Regional Water Boards, to do a 316(b); what we
5 want is something else.

6 MR. ABELSON: No, no, that's not quite
7 correct, Chairman. We have used the term
8 throughout the proceeding, a 316(b)-like study.
9 And I have gotten shorthanded today. I apologize
10 for confusing you if I did.

11 PRESIDING MEMBER KEESE: Defined by
12 either the Coastal Commission or the Energy
13 Commission or --

14 MR. ABELSON: Yeah, and undoubtedly in
15 complete and full coordination with the Water
16 Board, as well. I mean nobody's looking to have
17 two sets of studies done. But we do need the
18 information for two different purposes. Back to
19 my point about overlapping and not concentric.

20 We need it for work we have to do as
21 part of the Energy Commission's licensing
22 proceeding. They need it for part of what they
23 will have to do undoubtedly as part of their
24 316(b) procedure, as well.

25 HEARING OFFICER SHEAN: And can we just

1 get a clear statement of the purpose? Is the
2 purpose of this 316(b)-like study on behalf of the
3 Coastal Commission to gather sufficient
4 information to determine whether or not further
5 mitigation is necessary than is provided for in
6 the federal permit? Is that essentially it? Or,
7 I'll let you say it.

8 MR. ABELSON: The Coastal Act requires
9 that any facility being located in the coastal
10 zone must maintain, restore and, where feasible,
11 enhance marine resources. Okay.

12 In order to determine what needs to be
13 restored and enhanced, we need to understand --
14 I'm going to go into jargon now, not literal -- we
15 need to know whether there's trout or bass out
16 there; whether there's thousands of them or
17 millions of them that are being killed. Because
18 that will determine how big the hatchery has to
19 be, how many acres of offsite mitigation you need
20 to procure.

21 We can't do the Coastal Act's
22 requirement without having the science in front of
23 us. The Water Board can't do its 316(b) best
24 technology without having the science in front of
25 them.

1 So the science is, indeed, needed for
2 both purposes. But it is different purposes.
3 They're not concentric.

4 HEARING OFFICER SHEAN: What you're
5 saying is, if I heard you correctly, is if
6 whatever is done by the Water Board under its
7 316(b) study and its jurisdiction, is, in the mind
8 of the Coastal Commission, insufficient to fulfill
9 the maintain, restore and, where feasible, enhance
10 or minimize entrainment, if they feel that then
11 the purpose of the study they're proposing is so
12 that they may implement further mitigation, is
13 that --

14 MR. ABELSON: Well, I don't know whether
15 it has any relationship directly to what the Water
16 Board is or isn't doing. They have an obligation,
17 under the Coastal Act, to do their duty. And
18 their duty has been delegated into our process,
19 subject to the constraints that we are advocating
20 with regard to the standard of review.

21 And they are trying to do their job.

22 So is the National Marine Fisheries Service;
23 so is the Department of Fish and Game. They are
24 all obligated to try to insure that this project
25 causes the least possible harm. 316(b) is a best

1 technology available specific requirement of the
2 Clean Water Act. It is narrower in scope and has
3 more exceptions in the way of loopholes, if I
4 could call them that in a colloquial sense, than
5 anything that exists basically in the California
6 Coastal Act and in the Warren Alquist Act and in
7 CEQA.

8 So whether or not the 316(b) will cover
9 it is not the issue. They have a legal obligation
10 to do their duty and staff believes the Energy
11 Commission has a legal obligation, unless with
12 substantial evidence it finds the recommendations
13 infeasible or causing greater environmental harm,
14 to do what is recommended.

15 COMMISSIONER BOYD: Mr. Abelson, this
16 colloquy here forces me to ask a question that has
17 been rattling around in my head especially after
18 spending so much time again reading some of this
19 stuff, but certainly reminded me of this.

20 This discussion of a 316(b)-like study
21 and the science that is needed to answer lots of
22 questions leads me back to something that stuck me
23 before, most recently, and that is while people
24 are talking about people erring, and you have very
25 politely put your case, with regard to the

1 findings of this Committee, and the error perhaps
2 that is made, I'm compelled to feel that if this
3 information is so vital, why did not the staff in
4 its findings of data adequacy in the beginning of
5 this process, years ago now, reach this
6 conclusion, and mitigate or, you know, litigate,
7 so to speak, that issue at that point in time.

8 MR. ABELSON: I appreciate the
9 opportunity to answer that. And I think it
10 actually is a critical piece for you to
11 understand. I don't know if the Chairman does
12 fully understand because I don't believe we talked
13 about it in great detail certainly during the
14 comments on the PMPD.

15 But, let me --

16 PRESIDING MEMBER KEESE: You also
17 remember that I was number two on this case --

18 MR. ABELSON: That's true, as well.

19 PRESIDING MEMBER KEESE: -- until the
20 time that --

21 MR. ABELSON: Well, thank you, because I
22 think --

23 PRESIDING MEMBER KEESE: -- Commissioner
24 Boyd joined me --

25 MR. ABELSON: -- it's very important

1 that we get an answer to that, and that it be
2 accurate factually.

3 This is exactly what happened,
4 Commissioner Boyd. This proposal arrived as an
5 AFC in December of 2000. Now I want to have you
6 cast your mind back to what was happening in
7 December of 2000. Lights were flickering off;
8 prices were skyrocketing; the state was in, not
9 approaching, it was in the heart of the energy
10 crisis.

11 The applicant came in with a study that
12 was 20 years old and done 50 miles away. And
13 technical staff said not data adequate. Not data
14 adequate. And applicant said, well, we think it
15 is, but if it isn't there's an emergency. Can't
16 we please start the clock running. The lights
17 were flickering off. And if we haven't got what
18 you need, we'll make it right during discovery.

19 That's what they said. And management,
20 in hindsight, perhaps should have done it a
21 different way, but I think under the
22 circumstances, did it an entirely reasonable way.
23 They said since applicant has represented that
24 they can make it right during discovery we will
25 serve notice we expect it to be made right. But

1 we will let the bell ring, and the games begin.

2 And that is exactly what happened. But
3 from day one, Commissioner Boyd, staff has said
4 and has continued to say for three and a half
5 years, we cannot do our job under the law if you
6 do not provide this agency with reasonable
7 science. Taking the position no data, no problem
8 is not an answer.

9 We are here three and a half years later
10 telling this Committee the same thing that we have
11 been telling the applicant and that we have been
12 telling this Commission from the day this project
13 was filed at the Energy Commission three and a
14 half years ago. So that is the background on the
15 issue.

16 DR. REEDE: May I please add that in
17 every one of the nine status reports that we
18 submitted to the Committee we requested that the
19 Committee order the conduct of a 316(b)-like
20 study. At every opportunity that we had to
21 submit, we stated the applicant needs to do this
22 study, they need to do this study. And it's never
23 been heard and acted upon by the Committee until
24 this point now.

25 MR. ABELSON: Does that answer your

1 question?

2 COMMISSIONER BOYD: Thank you.

3 MR. ABELSON: The third area of law that
4 we're concerned about, in addition to what we
5 believe is the improper transfer responsibility to
6 the Water Board, the improper handling of Coastal
7 Commission recommendations, is we believe that the
8 RPMPD does not correctly address the CEQA issues
9 that the Energy Commission is required by law to
10 take responsibility for.

11 And it errs in this respect in two
12 areas, which we've talked about before, but I'll
13 highlight them again, primarily for the benefit of
14 Commissioner Boyd, and so that there's no
15 misunderstanding as to what staff's position
16 actually is. It has been inaccurately represented
17 in the decisions twice now, so I want to be very
18 very clear about what our position is.

19 First, the PMPD rejects the actual
20 physical conditions that now exist at the El
21 Segundo site. Unlike Morro Bay, well over a year
22 and a half ago the actual physical conditions at
23 the El Segundo site changed markedly and
24 permanently. When the air quality permits for
25 then-existing units 1 and 2 were terminated for

1 failure to upgrade, and power generation from
2 those two units was completely ended, creating a
3 zero baseline, zero baseline for cooling water.
4 As a matter of law and fact, cooling water is not
5 needed to cool anything if you're not generating
6 anything. And they have not been generating
7 anything at units 1 and 2, through intake one,
8 which is the cooling water intake for those units,
9 for almost a year and a half.

10 The RPMPD rejects --

11 COMMISSIONER BOYD: Mr. Abelson, having
12 just read the record and this stuff, they are
13 taking in some water for mechanical reasons with
14 regard to the intake system, are they not?

15 MR. ABELSON: They are, and --

16 COMMISSIONER BOYD: They're doing it
17 legally under their NPDES permit.

18 MR. ABELSON: That is correct. And if
19 you'll permit me just another moment or two I'll
20 address that in further detail.

21 The RPMPD rejects the actual existing
22 conditions as the proper CEQA baseline in this
23 case because it says that this is not what, quote,
24 "the CEC normally does in siting cases."

25 However, the RPMPD offers no evidence to

1 indicate that in the other cases where the
2 conditions at the time the AFC was filed, which
3 under CEQA guidelines is normally the right
4 baseline, the RPMPD offers no proof that the facts
5 in those other cases had changed, as they have
6 done in this case.

7 CEQA says normally the baseline will be
8 the conditions at the time of filing. Obviously
9 that allows that there are circumstances when that
10 will not be the proper baseline. In the other
11 cases where we have used the time of filing, as is
12 our normal practice, there is no indication that
13 the circumstances fundamentally permanently
14 changed afterwards, as is the case here.

15 Hence, we believe that reference to
16 these other cases is not a meaningful
17 justification for using the criteria that the
18 RPMPD is doing.

19 More importantly, the RPMPD does not
20 provide what CEQA requires, which is the fullest
21 possible protection of the environment within the
22 reasonable interpretation of the statute. What
23 the RPMPD will allow is essentially a 25 percent
24 increase in the volume of water withdrawn from
25 Santa Monica Bay over what is actually happening

1 out there today as we speak.

2 Now, I want to add a footnote because it
3 goes to your point, Commissioner Boyd, about what
4 they may or may not be doing with regard to
5 intakes at that area.

6 The record is very very incomplete on
7 that subject. What it indicates is that some of
8 the time they withdraw 50 million gallons a day in
9 order to keep the pipe cleaned out in the event
10 that some time in the future they need to use it.

11 However, on cross-examination the
12 applicant acknowledged that this is not happening
13 every day. And our review of Water Board records
14 over five or six years clearly indicates that
15 there have been weeks, even months at a time, when
16 absolutely no water was ever withdrawn from that
17 facility for any purpose at all. It is not clear
18 that you need 50 million gallons a day in order to
19 keep the pipes cleaned out. The pump happens --
20 they have four pumps out there; they each pump
21 about two million gallons an hour. So if you run
22 them for 24 hours you need about 48- or 50-million
23 gallons. That's the maximum one pump can pump.

24 It's not clear that you need more than a
25 million or two gallons to keep the pipes clean out

1 there today. But let me take the worst case
2 against staff's position that you can defend.
3 Let's say that you take the full 50 million; even
4 though the record says they're not doing it all
5 the time.

6 If you multiply 50 million times 365
7 days, it adds about 18 billion gallons to the 102
8 billion gallons that is the zero baseline. You
9 end up with a number of 120. I've got it in my,
10 you know, in our comments; not the 127, okay, that
11 the Committee has. So that's the situation on the
12 ground as we speak.

13 PRESIDING MEMBER KEESE: Mr. Abelson,
14 give me a moment here. We'll just take a brief --
15 I'm going to ask a question over here.

16 (Pause.)

17 PRESIDING MEMBER KEESE: Okay, we're
18 back. I guess it would be more helpful for me and
19 for Commissioner Boyd if, you know, I can
20 understand circumstances have changed. That the
21 plant isn't operating; it isn't using that much
22 water as it was.

23 When the previous Committee dealt with
24 this issue over the last couple of years, that
25 circumstance wasn't there. And I believe my

1 question to our Hearing Officer was had we issued
2 an order. And we didn't issue an order.

3 We essentially started with staff's
4 recommendation and modified staff's recommendation
5 for how much we were taking slightly. But we
6 essentially felt that we had resolved that issue
7 at that time.

8 Now we're down the pike here. If,
9 pursuant to staff recommendation, you know, we
10 wait another year, let's say everything is shut
11 down. Do we start again with a new zero/zero
12 baseline?

13 MR. ABELSON: No, Chairman, --

14 PRESIDING MEMBER KEESE: What is --

15 MR. ABELSON: -- no, no, and I want
16 to --

17 PRESIDING MEMBER KEESE: -- I mean
18 you're putting the applicant at greater exposure
19 here for anything that they --

20 MR. ABELSON: No, that's not what staff
21 is recommending, and it's not the facts of this
22 case. What staff recommended originally was the
23 normal baseline at the five-year filing because at
24 the time that the case was filed, those were the
25 circumstances.

1 But what I think the Committee needs to
2 appreciate and respect and acknowledge, is that
3 before we ever went to evidentiary hearings the
4 facts changed. They didn't change temporarily.
5 This license is gone. They're not going to start
6 generating out there tomorrow. It's not going to
7 happen.

8 And this is where I want to clarify what
9 staff's position is. Because twice it's been
10 misstated in the RPMPD. Staff has said from the
11 time we filed our briefs and our testimony in this
12 case, given the permanent change in circumstances,
13 given that the case is only arriving now in front
14 of the decisionmakers -- we're talking about a
15 year and a half ago -- the appropriate baseline,
16 the appropriate baseline is what we call the zero
17 baseline circumstance.

18 We acknowledge that CEQA says normally
19 that you use the baseline or the conditions at the
20 time of filing. But when a condition has
21 permanently changed, and it has done so before the
22 evidentiary hearings, which occurred in this case,
23 not after the evidentiary hearings, not late in
24 the process just before the Commission's adoption,
25 these are facts everyone has known about for a

1 year and a half now and that the Committee knew
2 about at the time of the evidentiary hearings, and
3 that staff has been recommending for a year and a
4 half. So this is not new information.

5 And we think that that's not unfair.
6 Where the facts change, and they change
7 permanently, and it's known by the decisionmakers
8 before they make their decision, it's not
9 unreasonable to take note of those --

10 PRESIDING MEMBER KEESE: All right, I
11 think that's the valid way to put it to the
12 Committee to determine. Having looked at it one
13 way, is it fair to now step in. I think fairness
14 has got to come into the equation, and I accept
15 your comments.

16 HEARING OFFICER SHEAN: Mr. Abelson,
17 what do you mean by permanent? Do you mean an
18 irrevocable condition in perpetuity, or something
19 different from that?

20 MR. ABELSON: Well, what I'm saying by
21 permanent is this is not some temporary situation
22 that exists for an hour or a week or a day. This
23 is a condition that exists as a matter of law;
24 these folks do not have a license. They would
25 have to install substantial retrofit technology

1 which takes time, effort, money. And then they'd
2 have to get a permit.

3 So we are years away from this -- under
4 any circumstances -- from this project ever
5 increasing the volumes beyond what's currently out
6 there, what we call the zero baseline.

7 COMMISSIONER BOYD: Mr. Abelson, I'm
8 going to ask you a question that you can defer to
9 the applicant when it's their turn to speak on
10 this very same point. And I'm making assumptions
11 which I need to get cleared up.

12 The applicant chose not to make the
13 investment in upgrades that would be necessary to
14 meet the new requirement that they face, I'm
15 presuming retrofit with SCR, they chose not to
16 make that investment. And thus shut down at the
17 deadline required by the South Coast District.

18 But I'm presuming this is in full
19 knowledge of the fact that they're going through
20 this process that we're still engaged in, to build
21 new facilities. And so, I mean putting myself in
22 their shoes, it's a little bit of a "Catch 22",
23 i.e., why make the investment in an old plant that
24 you hoped you'd maybe shut down under the one-year
25 siting process -- and we're in year god knows what

1 we're in right now, four -- you know, why make an
2 investment in something that you're replacing.

3 So, I mean in terms of fairness and
4 equity it works both ways. This is a little bit
5 of a "catch 22" I'd say. So you can argue that,
6 you know, academically that we'd suddenly go to
7 zero, but you know, sitting up here with my
8 judicial robes on, even though I'm not admitted to
9 the Bar, I got a little bit of equity, too. So it
10 goes both ways.

11 MR. ABELSON: The other area of CEQA
12 that we are concerned about is the area of what's
13 called the monthly caps. Even if the Committee
14 adopts an annual baseline that is appropriate
15 under CEQA, in the sense that it fairly or
16 accurately captures the existing physical
17 conditions, the evidence in this case is not
18 disputed.

19 An annual cap alone will not protect the
20 marine resources of Santa Monica Bay and maintain
21 them at existing levels for this reason. If all
22 you impose is an annual cap, you can easily elect
23 to ramp the machine up above previously existing
24 levels on months when fish are spawning, and then
25 reduce the volumes later on at some other time of

1 the year when business interests and electricity
2 demand justifies a reduction.

3 As a result you can easily increase the
4 impacts that you were having seasonally on fish
5 that are spawning in the Bay. This issue was
6 presented in workshops and the applicant's
7 response was to come forward and say, fine, we
8 understand your point. Here's what we recommend
9 we do. Assuming we've got the correct annual
10 baseline which we're disagreeing on that, but
11 assuming we've got the correct annual baseline, we
12 want to recommend that we not exceed the five-year
13 average annual caps for the months of February,
14 March and April, as well. Because if we keep
15 those months static, if we maintain the status
16 quo, if we don't make it any worse, which is what
17 CEQA's trying to insure you don't do, we should be
18 able to satisfy staff's concerns, scientists'
19 concerns under CEQA.

20 And that's what the applicant proposed.
21 That's what the PMPD adopted. That's what the
22 revised PMPD continues to adopt. It doesn't
23 comport with either the logic or the evidence in
24 the case.

25 The logic is that you need to keep your

1 monthly levels at the equivalent of what they were
2 prior to the project for any given month in which
3 the fish are at risk for spawning out there.
4 That's the logic. And everyone agrees with that
5 logic, that's why February, March and April are
6 offered.

7 The problem is the evidence is
8 undisputed. Santa Monica Bay has fish that spawn
9 in the spring. It has fish that spawn in the
10 summer. It has fish that spawn year-round. And
11 staff's scientists have unequivocally, without
12 reservation, stated if you're going to maintain
13 the status quo ante, if you're going to preserve
14 the baseline so that you can argue that you
15 haven't exceeded CEQA, three months is not enough.
16 You need to do it for each of the months of the
17 year.

18 And we continue to hold to that
19 position, and you know, resubmit it to you folks
20 for further consideration. We've briefed it
21 extensively. The testimony is extensive on it.
22 And we believe that this is an important part of
23 the puzzle.

24 So that concludes my statement on the
25 legal problems with the decision, which are

1 basically in the area of transfer of
2 responsibility, failure to draw up the proper
3 standard or findings for the Coastal Commission's
4 recommendations, and various CEQA issues related
5 to the annual and monthly baselines.

6 I'd like to complete our concerns by
7 emphasizing again for Commissioner Boyd, in
8 particular, because he hasn't heard some of this
9 before, that we're also concerned by the
10 completely unprecedented policies that this
11 decision is basically embracing.

12 The first one is this. This project, if
13 the RPMPD stands, will be approved without this
14 Commission having ever obtained, reviewed any
15 recent scientifically reliable information
16 regarding the adverse resource impacts of the
17 project it is approving.

18 This has never happened before. And
19 even in the case of Huntington Beach, which I know
20 Officer Shean is intimately familiar with because
21 I believe he was the Hearing Officer on that, that
22 case was decided during the height of the energy
23 crisis under a Governor's declaration of
24 emergency. And even there, the Energy Commission
25 required that a sound scientific cooling water

1 study be completed and appropriate mitigation,
2 based on review of that study, be imposed by the
3 Energy Commission before permanent operation of
4 the facility could commence.

5 There was an interim exception for a
6 couple of years. It was an unusual situation. We
7 don't usually cut first and measure later. We
8 usually measure first and then cut. But the
9 situation was a crisis. There was a declaration
10 of emergency. And even there we required the
11 study; we required it be brought back to the
12 Energy Commission. We required that the Energy
13 Commission impose whatever mitigation was
14 appropriate in light of that information before
15 permanent operation could commence.

16 So there's no case -- now, the applicant
17 in one of their filings mentioned the Contra Costa
18 case. I'm not going to spend time on it. That
19 case is not a once-through cooling case, and the
20 facts are just completely different in that case.
21 If you need me to, I will go into it, but I would
22 simply say that the applicant's reference to
23 Contra Costa as precedent is not binding at all.

24 HEARING OFFICER SHEAN: Well, since
25 you've referred to Huntington Beach, do you know

1 the status of the entrainment and impingement
2 studies for --

3 MR. ABELSON: Yeah, my understanding --
4 well, actually Rick York is on the phone, and I
5 would prefer if he would like to answer that
6 question, just let him say --

7 HEARING OFFICER SHEAN: Okay. Mr. York.

8 MR. YORK: Yes.

9 HEARING OFFICER SHEAN: What's the
10 status of Huntington Beach's entrainment and
11 impingement study?

12 MR. YORK: The study has just provided
13 its six-month status report, and we expect final
14 entrainment and impingement data to be collected
15 this summer. And we plan to have the final report
16 for final review some time in the early fall.

17 MR. ABELSON: In addition to approving a
18 project without having ever received or reviewed
19 any sound science, this case would be
20 unprecedented in a second respect, namely that it
21 would be approving the case without any meaningful
22 mitigation.

23 The RPMPD approves this project without
24 requiring any onsite or offsite mitigation or
25 alternatives. Instead the decision does the

1 following things. First, it adopts an annual
2 volumetric entrainment cap that's 25 percent above
3 the existing cooling water volumes that are
4 actually being withdrawn at the site at the
5 moment.

6 Two, it approves the applicant's
7 proposed study of the feasibility of a Gunderboom-
8 like aquatic filter barrier, despite the fact that
9 this technology has never been deployed in open --
10 waters like Santa Monica Bay. And has a very
11 spotty track record in other settings. And all
12 the scientists that are familiar with and
13 testified in this case recommended that basically
14 it be viewed with great skepticism as a likely
15 solution in this case.

16 The decision also approves the
17 applicant's proposed payment of \$1 million to the
18 Santa Monica Bay Restoration Commission, despite
19 the fact that this amount, \$1 million, is far
20 below, far below the \$50- to \$80 million feasibly
21 required to mitigate the adverse cooling impacts
22 of SONGS, the \$67-million feasibly required for
23 cooling system improvements and related mitigation
24 in the Moss Landing case; the \$37.5 million
25 related to cooling system improvements and

1 mitigation proposed by Duke Energy, itself, in the
2 Morro Bay case. In short, at \$1 million, this is
3 surely no Morro Bay case.

4 The third unprecedented aspect of this
5 decision is that the CEC's responsibilities for
6 the first time in the history of this agency be
7 transferred entirely to another entity, to another
8 agency. The RPMPD transfers all Energy Commission
9 responsibilities for once-through cooling to the
10 Los Angeles Regional Water Quality Control Board,
11 including matters concerning the Coastal Act, the
12 Warren Alquist Act and CEQA.

13 The Los Angeles Regional Board may or
14 may not end up imposing any meaningful mitigation
15 under the provisions of the Clean Water Act
16 section 316(b) for the reasons that I went into
17 earlier with regard to the limitations within that
18 law.

19 Regardless of what the Regional Board
20 does, Commissioners, the Energy Commission will
21 effectively lose all jurisdiction over this
22 important issue if the RPMPD is adopted as it is
23 now written.

24 Finally, in the precedent area, we
25 believe that no due deference has been given in

1 this case to other agencies. The PMPD gives no
2 deference whatsoever to the unanimous concerns and
3 recommendations of numerous sister resource
4 agencies, including the Coastal Commission, the
5 California Department of Fish and Game, the
6 National Marine Fisheries Service, but instead
7 relied primarily on recently adopted EPA rules and
8 speculative future Los Angeles Regional Water
9 Quality Control Board actions to address these
10 concerns in some poorly defined way in the future.

11 The Coastal Commission's role in this
12 and all future Energy Commission cases is also
13 weakened substantially by the precedent decision
14 that the Commission proposed to adopt regarding
15 the standard of review for Coastal Commission
16 input.

17 Finally, and this is, I guess, the issue
18 that I feel most passionate about ending with,
19 this decision is unnecessary. If you are
20 concerned, as we know -- staff knows the Energy
21 Commission is, about insuring that adequate energy
22 resources are provided for the state, this
23 decision is not necessary to keep the lights on.

24 First of all, staff is not recommending
25 project denial. We have given two options, two

1 distinct options that would allow this project to
2 proceed. One is to go one mile from here to a
3 sewage treatment plant that's dumping 450 million
4 gallons a day into Santa Monica Bay and bring a
5 pipe one mile and cool the plant with that water.

6 The second option is what we call the
7 fully mitigated or three-legged-stool option. And
8 in that what we've said is leg one, get your CEQA
9 caps right; get the annual and monthly caps right
10 which will allow more than enough power to run the
11 project full out 24/7, duct fired any time they
12 want.

13 Our tightest caps provide an average of
14 277 million gallons a day. Mr. McKinsey, who is
15 not a witness, okay, stated the last time we were
16 here, that the project doesn't need more than 200
17 million gallons a day to run full-out. So, you
18 can run this project 24/7, duct fired, which
19 nobody would do, but you can do it under the caps
20 we're proposing. That's leg number one.

21 Let number two. Get this study done
22 under Energy Commission jurisdiction, as we're
23 doing in Huntington Bay and as we've done,
24 frankly, in every other case we've had. And get
25 the results in to the Energy Commission so that

1 step number three can be completed, which is to
2 direct where the restore and enhancement efforts
3 should be directed.

4 As a prelude to that we suggest that you
5 require the applicant, I've been through this with
6 Commissioner Keese, I know, twice -- forgive me,
7 Commissioner, for going through it again, --

8 PRESIDING MEMBER KEESE: Fine with me.

9 MR. ABELSON: -- but for the benefit of
10 Commissioner Boyd, our recommendation is that you
11 all determine now what is a feasible amount of
12 mitigation money. There's a limit these guys can
13 pay and the law doesn't require them to pay any
14 more. It doesn't require them to pay any more,
15 but it does require them to pay that amount.

16 Let's figure out what that is. Let's
17 put it in a trust fund. Let's complete the study.
18 If the study says there's very little harm
19 occurring, we'll rebate the entire amount to these
20 guys. If the study says that there's \$10 million
21 worth of harm and we've got \$20 million that you
22 all have decided is a reasonable amount in the
23 fund, we'll rebate \$10 million. If the study says
24 there's \$50 million of harm, but you all have
25 determined \$20 million is all these guys can

1 afford, that's it. Otherwise the project ceases,
2 it goes away. That's all we can have.

3 That's the three-legged stool. It lets
4 you site the power plant. It lets you meet CEQA.
5 It lets you protect the environment. And it lets
6 all of us, at some point, go home.

7 So, I guess in summary that's my pitch.
8 And I'm happy to answer any questions you folks
9 may have about our position.

10 HEARING OFFICER SHEAN: How would we
11 determine that amount of feasible money?

12 MR. ABELSON: Well, I think that --

13 HEARING OFFICER SHEAN: Just based on
14 their ability to pay, or --

15 MR. ABELSON: I think --

16 HEARING OFFICER SHEAN: -- what you
17 anticipate in potential mitigation?

18 MR. ABELSON: I think the ability to pay
19 is absolutely a critical element. I think that if
20 one were to order them to pay, to make an absurd
21 number, I believe the project is a \$350 million
22 project or thereabouts in capital costs. If we
23 were to say that just to be on the safe side we'd
24 better put \$350 million additional in the trust,
25 now just in case it turns out they're really

1 doing, you know, complete devastation out there, I
2 mean it doesn't take a rocket scientist to
3 recognize that they're going to look at your and
4 say, end of project.

5 And I cannot suggest to you in good
6 faith, Officer Shean, exactly how this issue is
7 resolved. You're a master of arbitration and
8 mediation, and to some degree these are issues
9 that people of good faith, understanding that you
10 do not get out of jail free if you're hurting the
11 environment, need to sit around a table, I think
12 to use your phrase from one of our casual
13 conversations, sit around a roundtable, I believe
14 it is, as opposed to a square table, right, and
15 try to figure out, okay, what is a reasonable
16 amount that the applicant can pay, is able to pay.

17 We'll put it in trust. If it turns out to be too
18 much, we'll rebate the difference. If it isn't
19 enough because there's even more environmental
20 harm, too bad, that's it. They have a number;
21 they know what the number is so they can go to
22 their bankers. They know they're not stuck for
23 more than that.

24 You could even arrange a situation where
25 they posted a 10 percent bond as a way to secure

1 it, if that was an issue. I mean there's ways to
2 structure this. This is a business deal, this
3 part of it. And I don't know the right answer.
4 But I suggest to you that if we do the right
5 answer we will have finally done our job in this
6 case the way we should have all along.

7 Thank you.

8 HEARING OFFICER SHEAN: So, what you
9 envision, by your three-legged stool, however is
10 certification, followed by this 316(b) or (b)-like
11 study, am I correct in that?

12 MR. ABELSON: The two things -- the
13 three things that you need up front is you need
14 the caps; you need the money determined prior to
15 certification and put in trust. The study can be
16 completed after the fact because that will
17 determine what you're going to spend it on
18 precisely and whether or not any of it needs to be
19 rebatated because you've taken more than the harm
20 they're actually doing.

21 HEARING OFFICER SHEAN: Okay, thank you.
22 All right.

23 COMMISSIONER BOYD: Mr. Abelson, let me
24 say, while they're conferring here, just in
25 closing, I appreciate your taking a little extra

1 time to catch me up to speed on some of these
2 issues, although it's very fresh to me. And I
3 should say I've known Mr. Abelson for a long time.
4 He probably knows my career pattern -- my career
5 path, that having been a former Assistant Director
6 for Department of Fish and Game, and Deputy
7 Secretary at the Resources Agency, a lot of this
8 stuff is awfully familiar when it comes to marine
9 biology. So, thank you.

10 PRESIDING MEMBER KEESE: We're going to
11 take five minutes, please.

12 HEARING OFFICER SHEAN: And then we'll
13 come back --

14 PRESIDING MEMBER KEESE: Come back right
15 away.

16 (Brief recess.)

17 HEARING OFFICER SHEAN: Let me just note
18 for the record that our long-time and very ably
19 involved intervenors, Michelle Murphy and Mr. Bob
20 Perkins, are here. And we'll go now to the Santa
21 Monica Baykeeper, Ms. Egoscue, please.

22 MS. EGOSCUE: Good afternoon, Chair
23 Keese, Commissioner Boyd, Energy Commission Staff.
24 I'm appearing today as an environmental intervenor
25 in this case. I'm also appearing as the Executive

1 Director of an organization that, combined with
2 Heal The Bay, who is also an intervenor,
3 represents almost 14,000 members in Los Angeles
4 County.

5 We have also been very involved with
6 this case. I replaced my predecessor. I've only
7 been here for six months, but I've already been
8 able to have the privilege to comment on the
9 proposed decision and now this revised decision.

10 We filed our comments this morning, so I
11 will not go into great detail. I have two major
12 points I would like to attest to. Dr. Craig
13 Shuman from Heal The Bay will follow me and talk
14 about biology and further to our comments.

15 Thank you for this opportunity. Before
16 I go into my comments I would like to, if I may,
17 as a former attorney for the Water Board and the
18 State Board and the Regional Board, just speak to
19 the question that the Committee had about federal
20 jurisdiction with the Water Board.

21 The State of California passed the
22 Porter-Cologne Act before the federal Clean Water
23 Act. And after the federal Clean Water Act was
24 passed, the State of California entered into a
25 memorandum of understanding with the federal

1 government that basically said as long as the
2 State of California fulfilled the requirements of
3 the federal Clean Water Act, or was more
4 stringent, then the federal government would let
5 the State of California do the job. So I hope
6 that that's of some help.

7 PRESIDING MEMBER KEESE: And who are you
8 speaking of, as the State of California in this
9 case?

10 MS. EGOSCUE: I am speaking as a former
11 attorney --

12 PRESIDING MEMBER KEESE: No, no, when
13 you say as long as the State of California
14 fulfilled its --

15 MS. EGOSCUE: The Water Board.

16 PRESIDING MEMBER KEESE: The Regional
17 Water Board.

18 MS. EGOSCUE: The State --

19 PRESIDING MEMBER KEESE: The State and
20 the Regional Water Boards.

21 MS. EGOSCUE: That's correct. The two
22 areas that cause the most concern for the
23 Baykeeper in this case are CEQA and the Coastal
24 Commission's role. I feel that the staff for the
25 Energy Commission and the Coastal Commission

1 representative both did an able job of
2 representing most of these points.

3 But I feel that my additional points are
4 warranted. Under CEQA is it clear that deferral
5 of mitigation is illegal. The revised proposed
6 decision basically passes the plate for mitigation
7 to the Regional Board. This is not only
8 irresponsible, but it's illegal.

9 As the organizations that have spent the
10 last three years in this case, we have spent
11 countless resources, both time and money on this
12 case, to explain to this Commission in good faith
13 that there is an extreme harm, and it's an
14 irreparable harm, to the Santa Monica Bay
15 resources.

16 If we had thought by any stretch of the
17 imagination that the Commission would have taken
18 their responsibility, and also they're very -- the
19 Commission is very well suited to give mitigation
20 requirements to the applicant in this situation,
21 and that is why, part and parcel, that we have
22 participated in these Commission hearings, and in
23 the evidentiary proceedings.

24 If we had thought for a moment that this
25 would not be something that the Energy Commission,

1 these mitigation requirements would not be
2 something the Energy Commission would do, we would
3 have waited and saved our resources to appear in
4 front of the Regional Board.

5 So, clearly we were following the law,
6 along with the Energy Commission. And at this
7 point we seem to be diverging.

8 My second major problem, and I'm trying
9 to be brief in the interests of everybody else
10 here today, and also an acknowledgement of the
11 fact that I have filed formal remarks, is the
12 Coastal Commission's role.

13 There is a clear misinterpretation of
14 the law. And I think the Coastal Commission very
15 aptly stated it this morning or this afternoon,
16 the first comments that were received, that the
17 Legislature has clearly meant and intended to have
18 the Coastal Commission expertise in this matter.

19 And I believe that if we don't take into
20 account what the Coastal Commission says, and the
21 Coastal Commission stands back on the sidelines
22 and says, hey, Energy Commission, we don't think
23 you're doing the right thing here. And they have
24 indicated that they want to go to the Legislature.
25 I think there's even a faster way to find out if

1 this conflict can be resolved. And that's the
2 California Supreme Court. And that's a clear-cut
3 case for them, which is misinterpretation or a
4 difference of opinion in the law.

5 And we have enough legislative intent
6 and enough history with this Commission to support
7 the fact that the Coastal Commission's report
8 should be taken into account. And as we all know,
9 that deal with agencies, the agency expertise of
10 this Commission should not be ignored.

11 That's all I have, and I'm open for
12 questions.

13 PRESIDING MEMBER KEESE: I'd say it
14 would be hard for me to look at what we've done
15 and say we ignored the Coastal Commission. I do
16 believe we've taken into account many of the
17 things they took.

18 What we're faced with is a conflict
19 here; and that is that the intent, as we discussed
20 earlier, was clearly that we take into account
21 Coastal Commission actions; but it was also
22 clearly that those Coastal Commission actions
23 should be at the earliest stage of our
24 proceedings. And that creates a problem for us
25 that we've attempted to resolve here.

1 If we get something factually, which we
2 have evidence in front of us, that we took in a
3 hearing, and we get a letter afterwards that
4 disputes it, it could be as simple as our evidence
5 indicated that we had five acres of pavement,
6 concrete pavement and we get a letter saying, you
7 should mitigate for that five acres of sand. Does
8 the Coastal Commission make it sand?

9 MS. EGOSCUE: With all due respect, and
10 if I may respond to you, I do believe that you are
11 ignoring the Coastal Commission in your revised
12 proposed decision. I do -- it is my
13 understanding, and it's my understanding from what
14 the staff has said today, that a 316(b)-like study
15 has been asked for in this case from the
16 beginning. And with all due respect to the
17 applicant, if that case had been done, then we
18 wouldn't be standing here arguing about what the
19 Coastal Commission thinks.

20 PRESIDING MEMBER KEESE: We're going to
21 hear from the applicant before we're done here,
22 so --

23 MS. EGOSCUE: I look forward to it.

24 PRESIDING MEMBER KEESE: -- we're going
25 to try to get everything from all the parties

1 participating today. Thank you.

2 DR. REEDE: Excuse me, Chairman Keese.

3 In the case of the Coastal Commission's findings,
4 they were supplied --

5 PRESIDING MEMBER KEESE: No, I was
6 asking --

7 DR. REEDE: -- quite far in advance of
8 evidentiary hearings.

9 PRESIDING MEMBER KEESE: And I realize
10 what --

11 DR. REEDE: At least a year and a half.

12 PRESIDING MEMBER KEESE: I realize what
13 you're --

14 DR. REEDE: Before the hearings.

15 PRESIDING MEMBER KEESE: -- some of
16 their filings have dealt with both cases, so I do.

17 HEARING OFFICER SHEAN: I have a
18 question for you, I guess. When you said you were
19 a former Water Board attorney I thought maybe this
20 is a good opportunity here to ask you a
21 hypothetical question. And it is only
22 hypothetical.

23 If we had a situation where for a
24 facility like this the local board had conducted a
25 316(b) study, and under the new federal rules,

1 assuming, as well, that the restoration provision
2 in the new rules for phase two has not been either
3 stayed or overruled, but that the board issued a
4 new NPDES permit that took into account either
5 applied technology, some sort of operational
6 parameter and some restoration. And that package,
7 then, was the NPDES permit.

8 I'm trying to determine, based upon the
9 relationship of the various agencies, what would
10 be the legal basis for either the Coastal
11 Commission -- I'll just ask it as to the Coastal
12 Commission -- for them to, as a representative of
13 the State of California, impose greater mitigation
14 than what was in that permit?

15 MS. EGOSCUE: That's a more complicated
16 answer than I think I can give you. But I'll give
17 you the quick, you know, quick-and-deadly --

18 HEARING OFFICER SHEAN: The quick-and-
19 dirty.

20 MS. EGOSCUE: Yeah. In this case, first
21 of all, we always look to the law. And if the law
22 is on our side. So I'm going to say that I'm the
23 Coastal Commission. So the law is on my side, and
24 I have a direct -- I mean they have a law that
25 says they have to look at this power plant. And

1 they have to look at what effect this has on the
2 coastal environment.

3 When they look at that law and they say,
4 okay, Energy Commission, here's what we think you
5 need to do. And the Energy Commission looks back
6 at them and says, look, you have -- the Water
7 Board over here has a permit. That's the law.

8 What begins to break down is that this
9 permit is an old permit. The 316(b) regs that
10 came from the federal government, and now is the
11 responsibility of the state, are in place here.

12 We're looking at the 2005 permit, and so
13 the facts start to muddy the water. So the
14 Coastal Commission, in their responsibility, is
15 basically telling the Commission, you are siting a
16 power plant, you are siting new towers, you have
17 got to take into account something that we know is
18 coming down the pike.

19 So, it's a combination of legal and
20 factual. And as we all know, that's how a judge
21 will look at this. They won't just look at the
22 law and say, legally the Coastal Commission is
23 incorrect or correct. They will look at what the
24 Commission here, this Energy Commission, is doing
25 to affect the coastal resources for the next

1 however many years this power plant operates.

2 Is that a good answer for you? Or are
3 you more confused than you were when you started?

4 HEARING OFFICER SHEAN: Oh, I don't
5 think I'm confused. I guess what I'm trying to
6 do, and one of the points we need to get at is
7 this hierarchal relationship, and whether or not
8 the feds have occupied enough of the field that a
9 California agency is limited in applying
10 additional mitigation.

11 I think it's an interesting point that
12 Mr. Abelson made that should the restoration
13 provision in the new 316(b) regs be overturned
14 that then there would be some state authority,
15 because that portion of the field would be
16 unoccupied by the feds.

17 MS. EGOSCUE: That's correct; and also,
18 this is a Second Circuit case that we refer to as
19 the 316 authority. So we haven't heard from the
20 Ninth Circuit and we haven't heard from the United
21 States Supreme Court. And we also don't have
22 phase two regs.

23 HEARING OFFICER SHEAN: Right.

24 COMMISSIONER BOYD: Excuse me, one real
25 quick question. You said that the agreement

1 between the federal government and the state is an
2 MOU. Is that deemed, in effect, the delegation of
3 federal authority as is done in other federal
4 programs? Or is it contractual, an MOU is a
5 contract.

6 MS. EGOSCUE: That's correct, it's a
7 memorandum of understanding. It is contractual.
8 And the federal government, only in very limited
9 cases, revokes responsibility under the Clean
10 Water Act.

11 One comes to mind quite readily is the
12 establishment of TMDLs in Los Angeles region where
13 the state was failing to act. And it's the
14 primary responsibility of the federal government
15 to make sure that the State of California upholds
16 the requirements of the Clean Water Act.

17 So that is correct, it is the state's
18 responsibility to uphold all of the requirements
19 of both the Clean Water Act, which is federal law,
20 and the Porter-Cologne Act, which is state law.

21 COMMISSIONER BOYD: I'm just very
22 familiar with the air quality business, and they
23 do the same thing, but they do it by delegation
24 not by MOU. So I was just curious if there was a
25 difference.

1 MS. EGOSCUE: Well, State of California
2 was one of the first to embrace the ideas and the
3 auspices of the Clean Water Act. So we are
4 privileged to control our destiny when it comes to
5 that.

6 COMMISSIONER BOYD: We control our air
7 destiny, it's just by -- delegation, as well.
8 Thank you.

9 HEARING OFFICER SHEAN: Thank you.

10 MS. EGOSCUE: Thank you.

11 HEARING OFFICER SHEAN: Okay, Dr.
12 Shuman.

13 DR. SHUMAN: Good afternoon, Chairman
14 Keese, Commissioner Boyd, Energy Commission Staff;
15 my name is Dr. Craig Shuman; I'm a marine
16 biologist with Heal The Bay.

17 I'd like to begin by reiterating what
18 has been said many times before, that alternative
19 cooling options must be further explored because
20 they're the only way to eliminate the deleterious
21 impacts associated with once-through cooling.
22 It's an absolute travesty that these options have
23 not been fully explored.

24 If once-through cooling is to be
25 applied, then the conditions should be modified to

1 be most protective of the marine environment. To
2 begin with the Bio-4 condition of a 316(b)-type
3 study, the study must be completed and all
4 mitigation determined prior to certification and
5 commencement of construction. The applicant
6 should not be rewarded for the reluctance to
7 complete the study for the last three and a half
8 years.

9 In addition, we recommend the Commission
10 establish certain conditions that must be applied
11 to the study. These include the determination of
12 the appropriate baseline through a reference-based
13 approach. And that the applicant fund the
14 formation and operation of an independent panel of
15 experts to review the design, implementation and
16 interpretation of the study; and then define all
17 mitigation requirements.

18 The conditions of Bio-1 and -2 were
19 explained by Mr. Abelson previously, so I will not
20 touch on them, as we concur with his statements.

21 However, condition 3, I feel, deserves a
22 bit more of our time. With respect to the flow
23 caps, the annual flow cap does not take into
24 account periods when intake one was not used for
25 cooling purposes. This does not represent

1 existing conditions and therefore does not afford
2 the fullest possible protection to the
3 environment.

4 The monthly flow caps simply are not the
5 caps that are intended, and they do not represent
6 existing conditions at all.

7 The RPMPD incorrectly asserts that
8 annual averaging inherently adjusts for
9 seasonality of egg and larval abundances on page
10 53. This is simply not the case. There's
11 sufficient scientific evidence and evidence in the
12 record that spawning is variable throughout the
13 year for various species. We have warm water
14 spawners, cold water spawners and species that
15 spawn year-round.

16 Recreationally important species, such
17 as the California halibut, would not be protected
18 under the proposed caps of February, March and
19 April. In fact, there is no scientific
20 justification for the timing and flow of these
21 caps, as these caps exceed existing conditions by
22 approximately 1.5 billion gallons each month. And
23 as far as I can tell, coincidentally correspond to
24 historically low levels of energy production, and
25 therefore intake flows due to cooling water

1 system.

2 That concludes our comments. Thank you
3 for your consideration. And I'll be happy to
4 answer any questions you may have.

5 PRESIDING MEMBER KEESE: Do you have any
6 other suggestion on a monthly cap except that it
7 be the same every month?

8 DR. SHUMAN: To establish baseline
9 conditions, and they should be the same as each
10 month, to determine the biological effect we would
11 need the results of a detailed 316(b)-type study
12 before we could really paint a picture of what the
13 impacts would be.

14 PRESIDING MEMBER KEESE: And if that
15 shows some months were worse than others, you
16 would adjust the cap that way?

17 DR. SHUMAN: I think that would be
18 appropriate, yes.

19 PRESIDING MEMBER KEESE: If other
20 mitigation measures, let's say somebody developed
21 an intake that took 60 percent less than current,
22 let's say there is a strategy that reduces
23 impingement by 60 percent. Does that do away with
24 the need for caps?

25 DR. SHUMAN: I don't think that does

1 away with the need for caps, no.

2 PRESIDING MEMBER KEESE: You should
3 still put caps on anyway?

4 DR. SHUMAN: I believe to establish
5 existing conditions for intake velocities, yes, of
6 intake flow volumes, yes. In terms of impacts,
7 we'd have to explore that a bit further.

8 PRESIDING MEMBER KEESE: Okay. You're
9 suggesting monthly caps in order to limit take.
10 And if some other strategies limit take, do they
11 become additive, I guess, is my question. We have
12 other strategies to limit the take and we have
13 caps.

14 Or do we say if there's a need for a
15 greater take we have greater mitigation?

16 DR. SHUMAN: I think as long as we
17 maintain existing conditions, then we would be --

18 PRESIDING MEMBER KEESE: Maintaining the
19 existing conditions. Thank you.

20 HEARING OFFICER SHEAN: Thank you.
21 Okay, we have Scott Valor from the Santa Monica
22 Bay Restoration Commission.

23 MR. VALOR: Thank you. Chairman Keese,
24 Commissioner Boyd, Mr. Shean, I'm Scott Valor; I'm
25 the Director of Government Affairs for the Santa

1 Monica Bay Restoration Commission.

2 I'd like to talk about two things. One,
3 I wanted to re-emphasize the information we
4 provided to you in our February 27, 2004 letter
5 with regard to the role that the Bay Restoration
6 Commission can play, should there be a project,
7 and should there be any mitigation with respect to
8 that project.

9 The Bay Restoration Commission is a
10 nonregulatory entity, state entity, established in
11 state law that specifically addresses
12 environmental impacts on the Santa Monica Bay. As
13 such, we have a governing board that is developed
14 through a wide consensus. The governing board
15 consists of members of state agencies, such as the
16 Resources Agency and Cal-EPA. Members of federal
17 agencies such as USEPA and the Army Corps of
18 Engineers. And a variety of local entities such
19 as the County of L.A., City of L.A., and indeed,
20 the City of El Segundo.

21 The governing board makes its
22 recommendations primarily based on review and
23 consideration by what we call our technical
24 advisory committee, the TAC. The technical
25 advisory committee consists of a variety of

1 educators, scientists, engineers, groups from
2 environmental organizations and, indeed, the
3 project applicant, El Segundo Power.

4 With that in mind, I wanted to refer to
5 pages 47 and page 317 of the RPMPD, in which it
6 was suggested that if there is going to be
7 mitigation for this project, that perhaps the
8 mitigation would be \$1 million directed toward the
9 Bay Restoration Commission.

10 I need to emphasize, as we are a
11 nonregulatory entity, the Commission has not taken
12 any kind of position; has not ratified this
13 project; nor has the Commission ratified any type
14 of mitigation number.

15 As such, staff comments are very very
16 timely with regard to what can we do. If there is
17 going to be a project, what will that mitigation
18 be. What will be the cost of that mitigation.

19 I'm here to present to you that we, the
20 Santa Monica Bay Restoration Commission, are
21 probably the most appropriate entity to engage in
22 those conversations, to engage in that dialogue to
23 determine not only the extent of mitigation that
24 would be for a particular project, but also
25 potential costs.

1 Now, recognizing that there might be a
2 cap on mitigation costs, we would also be prepared
3 that if there is a cap that's determined by this
4 Commission, that we can assist you with coming up
5 with what would be appropriate mitigation with the
6 limited amount of funds available.

7 With that in mind, then, I could answer
8 any questions you might have.

9 PRESIDING MEMBER KEESE: Quickly, are
10 you working with the Huntington Beach project that
11 we heard about earlier, the mitigation project?

12 MR. VALOR: No, sir. This Commission is
13 specifically established to address the Santa
14 Monica Bay watershed --

15 PRESIDING MEMBER KEESE: Santa Monica.

16 MR. VALOR: -- right from the Palos
17 Verde shelf up to Point Doom.

18 DR. REEDE: Excuse me, Hearing Officer
19 Shean, may I ask a question?

20 HEARING OFFICER SHEAN: Yes.

21 DR. REEDE: This letter that you sent,
22 do you have a copy of it? Because staff has never
23 seen this letter, and to whom was it directed?

24 MR. VALOR: The letter was directed to
25 Chairman Keese and the Commissioners, dated

1 February 27th. It is in the record.

2 It's primarily an introductory letter to
3 let you know what we do and why we are qualified,
4 again, to address any kind of mitigation measures.
5 We were quite surprised to see some kind of dollar
6 value and direction to us, should this project
7 take place.

8 So what we wanted to do is make sure
9 that if, indeed, something like that is going to
10 happen, you need to know about us and need to know
11 what we can offer.

12 DR. REEDE: May I request that this
13 letter be sent electronically. And with the
14 Chairman's permission, I'll docket this letter
15 once we get it.

16 MR. VALOR: Sure, --

17 DR. REEDE: Thank you.

18 DR. REEDE: -- if you give me the proper
19 address and --

20 DR. REEDE: Yeah, I'll give you the
21 information.

22 MR. VALOR: Okay. I can do that this
23 afternoon or tomorrow morning.

24 DR. REEDE: Thank you.

25 HEARING OFFICER SHEAN: So do I

1 understand you correctly, then you think that the
2 Commission, in some way, -- well, you overheard
3 the statements by the staff and the other
4 intervenors and the Coastal Commission that
5 there's, perhaps I should just ask this as a
6 question.

7 Did I understand you to say that you
8 felt the Restoration Commission could, in some
9 way, estimate the costs of doing a certain amount
10 of restorative mitigation?

11 MR. VALOR: I believe we could provide
12 as good a value as anyone else. Understanding
13 that what we're specifically doing is looking at a
14 Bay restoration plan. It's a document that exists
15 based on studies, based on current mitigation in
16 other types of projects. We constantly update
17 that plan. We're trying to update it again to
18 present in probably October of this year.

19 So with the number of people that are on
20 our technical advisory committee and on our
21 governing board, we would be prepared to do that.
22 Of course, they are just estimates, but --

23 HEARING OFFICER SHEAN: All right, thank
24 you very much.

25 MR. VALOR: Thank you.

1 HEARING OFFICER SHEAN: Appreciate it.
2 Okay, now Mr. Garry is here from the City of El
3 Segundo. Are you addressing the same general
4 topic we've got going here, or --

5 MR. GARRY: No, actually not.

6 HEARING OFFICER SHEAN: Okay. Just
7 stand by a second, then. Do you want to address,
8 from the applicant's perspective, this material
9 now before we change subjects?

10 MR. McKINSEY: Well, I'm concerned, I
11 don't know how much time I may be taking, and I'll
12 tell you, one of the things I plan on talking
13 about is kind of the history, as well.

14 And one of the histories that has gone
15 on here, for all three years, has been where we've
16 talked an awful lot about a whole bunch of issues
17 that matter a lot to us, especially in Sacramento.
18 And a lot of times we've left the locals, when
19 even though we're coming down here and having
20 these workshops and hearings here, with very
21 little time at the end to discuss some of the
22 issues that pertain particularly to them, as well.

23 And so I would rather allow them to go.

24 HEARING OFFICER SHEAN: Okay. Mr.
25 Garry, then.

1 MR. GARRY: Thank you. First I wanted
2 to thank all the Commission people for holding all
3 the hearings they have in El Segundo over the
4 years. I think the local people appreciate the
5 efforts you've all made to come down here so many
6 times and hold these.

7 And as you know, the City is on record,
8 and our Councilmembers have testified a number of
9 times that the City is in support of the project
10 overall.

11 My April 23rd letter just has two points
12 that we wanted to add to the information. The
13 first one related to that the El Segundo Unified
14 School District recently adopted a school fee
15 program, and we wanted to make you aware of that
16 requirement, which we think the power plant would
17 be subject to.

18 And the second point was a comment on
19 the revised proposed decision related to condition
20 Waste-3. It seemed to us that the L.A. County was
21 suggesting that there was no ability for their
22 hazardous waste landfills to handle any waste from
23 this project. So it seemed to us that to comply
24 with CEQA you might want to add a condition to
25 prevent the applicant from actually trying to send

1 any waste to any of their landfills on the
2 hazardous material side of things.

3 And that was the extent of our comments
4 on the revised proposed decision.

5 DR. REEDE: Excuse me, Mr. Shean. We
6 have a Commission Staff member who is dealing with
7 the waste management issues. I've asked him to be
8 able to give you some feedback on what the City of
9 El Segundo was asking specifically about, the fact
10 that the L.A. County landfills will not be able to
11 take the hazardous materials from the El Segundo
12 project.

13 HEARING OFFICER SHEAN: Mr. Greenberg,
14 are you there?

15 DR. GREENBERG: Yes, I am, sir.

16 HEARING OFFICER SHEAN: Okay. Why don't
17 you go ahead and quickly give us whatever
18 information it is that you have with respect to
19 this.

20 DR. GREENBERG: Well, as the revised
21 PMPD, the AFC, as well as the staff assessment
22 note, hazardous waste, that's class 1 waste, would
23 either be recycled or treated or taken to a
24 landfill outside of L.A. County. There are no
25 class 1 hazardous waste landfills within L.A.

1 County. They are all located elsewhere in the
2 State of California.

3 So I want to reassure the City of El
4 Segundo that no hazardous waste in any event would
5 be taken to a landfill in L.A. County.

6 In regards to class 2 or class 3 waste
7 being sent to L.A. County landfills, I agree with
8 the revised PMPD words on page 215, which
9 essentially states that Waste-3 would require a
10 waste management plan, which the City and the
11 County would have an opportunity to comment on.
12 And which the CEC compliance project manager would
13 review.

14 And if it turns out that there is a
15 shortfall that has not been addressed by L.S.
16 County in regards to class 2 or class 3 waste,
17 that can be addressed by the project owner at that
18 time.

19 However, I have every confidence that
20 the shortfall in L.A. County is going to be
21 addressed by the time this project is generating
22 nonhazardous waste.

23 HEARING OFFICER SHEAN: All right.

24 Thank you, Dr. Greenberg.

25 DR. GREENBERG: You're welcome.

1 HEARING OFFICER SHEAN: Mr. Garry,
2 anything further?

3 MR. GARRY: No.

4 HEARING OFFICER SHEAN: All right, we
5 appreciate it, thank you.

6 All right, --

7 DR. REEDE: Mr. Shean, to Mr. Garry's
8 other issue regarding the school fees. In our FSA
9 -- well, in our PMPD comments that were filed back
10 in February we had put down school impact fees or
11 school fees. However, that particular suggestion,
12 to the best of my knowledge, was not adopted in
13 the socioeconomic conditions.

14 It wasn't added. We had had it in our
15 comments to have school fees, which are
16 appropriate, but it didn't get picked up in the
17 revised PMPD. And staff would agree that school
18 fees are appropriate whenever you have
19 construction.

20 HEARING OFFICER SHEAN: All right, is
21 that Socio-1 on page 171? I mean I don't think
22 there was anything intended by not having it.
23 We've got another electronic file that should have
24 taken care of that.

25 We'll have some discussion with you as

1 to what resource we can use to correct that.

2 All right, our favorite intervenors,
3 Murphy-Perkins.

4 UNIDENTIFIED SPEAKER: You pick
5 favorites?

6 HEARING OFFICER SHEAN: Long-suffering
7 and very patient, that's why they're my favorite.

8 MS. MURPHY: I'm Michelle Murphy; I live
9 next door to the power plant in Manhattan Beach.
10 People in El Segundo -- there's a few people t hat
11 might have some view of it, but we live next door,
12 30 feet away from the border of the power plant.

13 And I was here in December of 2004(sic).
14 Yes, actually I think in December we met with the
15 power plant because we heard that there was
16 something happening and we met with -- yeah, 2000,
17 four years ago -- three and a half years ago.

18 The issues we were concerned with at the
19 time were more things of noise, visual aspects.
20 I'm sort of reminded of something I learned
21 recently and was surprised, that poor people
22 during the Vietnam War were more opposed to the
23 war than rich people were. Because we live next
24 to the power plant, we tend to think it was here
25 first; we can trust our government; we can trust

1 corporations; it'll be all right. Now I'm sort of
2 sorry about that.

3 I'm not an expert on this issue. I just
4 want to tell you what I sort of have gleaned from
5 the last four years of coming to these hearings.

6 Four years ago there was this energy
7 crisis. It was referred to earlier, but my
8 current understanding is that was a fake energy
9 crisis. And we have a clipping from The L.A.
10 Times saying that Dynegy and NRG, the applicant
11 here, are going to pay back some hundreds of
12 millions of -- I understand billions of money that
13 they took from the people of the State of
14 California in this fake energy crisis.

15 But during that time this proceeding was
16 sped up; I don't even remember how; we weren't
17 even told very well. But the Commission said
18 something to speed it up because it's so important
19 to get this energy online. And Huntington Beach,
20 I know at the time, was way sped up.

21 From the very beginning many many times
22 applicant was told you need to do a 316(b)
23 application; you need to do a study. There's
24 never been a power plant approved without a study
25 like this. You're going to have to do a study

1 like this. I've heard it said in this very room
2 many many times.

3 And I don't know why they didn't do it.
4 Seemed to me strange at the time. It's just not
5 my issue. I don't know anything about biology. I
6 mean it is my issue that the ocean stay healthy,
7 but I don't understand it. I'm not an expert; I
8 didn't try to learn about it.

9 They kept not doing it. I don't
10 understand why they didn't do it unless they knew
11 something we didn't know about that ultimately
12 wouldn't be required of them, they don't have to
13 do it. Because apparently now, from what I
14 understand, you're saying, oh, well, it would be
15 unfair to make them do this \$1 million study,
16 costs nothing. Time, they've had four years to do
17 it and they refused to do it for these four years.
18 I think they've refused to do it because they know
19 the answer. If they do it, it'll say that
20 unacceptable numbers of fish will be killed. And
21 that's why they haven't done it all this time.

22 And I sort of think that that's what you
23 know, too, and that's why you're not doing it. I
24 understand why, because you're supposed to be
25 representing the people of California. Me, the

1 few of us that are still here after four years.
2 But for some reason it appears to me that people
3 are saying we don't want to look at the evidence.
4 It's kind of like, you know, weapons of mass
5 destruction, and you know, intelligence issues.

6 I think if you look at it, all the
7 scientists I've heard here, except for the one at
8 applicant's evidentiary hearing, all of them have
9 said if you look at it you're going to be, you
10 know, shocked by the number of fish that are going
11 to be killed. You're not going to look at it; I
12 just don't get it.

13 The other thing is apparently -- I
14 haven't followed this, I haven't even read all the
15 briefs, but one of the things you're saying right
16 now is we're going to wash our hands of it; we're
17 going to give it to the water people.

18 Now, four years we've had hearings on
19 this and talked about this was an issue that you
20 had; that they were in charge of biology. I mean,
21 Doctor, I forget her name, swam out there to look
22 at it. I mean but now you're saying no, we have
23 nothing to do with it, we're going to wash our
24 hands. It's all going to be the Water Board
25 that's going to decide this.

1 And I'm left confused. I'm, you know,
2 I'm a layperson at this point, being confused by
3 what's happening. But that's the way it looks
4 from here is that for four years applicant's been
5 told you've got to do the study. For four years
6 they didn't do the study. Now they're told, well,
7 maybe you don't have to do the study because we're
8 going to wash our hands and let the Water Board do
9 it.

10 I'm bewildered by what's happening and
11 distressed by my government and the corporation
12 that lives next door. Anyway, have any questions
13 about my bewilderment and distress?

14 PRESIDING MEMBER KEESE: It is very
15 confusing, and it's difficult for all of us. But,
16 coastal facilities have to get this permit renewed
17 every five years. And they have to comply with
18 the new conditions that are placed every five
19 years. Not necessarily by the Energy Commission,
20 not by the Coastal Commission, but by the Regional
21 Water Board.

22 So to the extent the Regional Water
23 Board imposes new conditions, anybody on the coast
24 has to meet those.

25 MS. MURPHY: But, again, I don't know

1 the requirements, all I know is that they've been
2 told for four years that they have to do a new
3 study. Not 20 years ago and far away study --

4 PRESIDING MEMBER KEESE: They've been
5 requested to --

6 MS. MURPHY: They were told that it's
7 never happened before in the history of the Energy
8 Commission. You know, that's my understanding.

9 PRESIDING MEMBER KEESE: Well, we're
10 going to hear from the applicant.

11 MS. MURPHY: So you're --

12 PRESIDING MEMBER KEESE: They, you know,
13 and it's my understanding --

14 MS. MURPHY: So you're doing a new thing
15 apparently --

16 (Parties speaking simultaneously.)

17 MS. MURPHY: -- never happened before.

18 PRESIDING MEMBER KEESE: It's my
19 understanding that in order to get their permit
20 from the Regional Water, they have to do this
21 study by next June, by June of 2005.

22 MS. MURPHY: But it was my under --

23 PRESIDING MEMBER KEESE: They must do
24 the study.

25 MS. MURPHY: -- it was my understanding

1 for the last four years that never in the history
2 of the Energy Commission have they allowed a
3 coastal thing like this to build a plant without
4 doing a 316-type, some kind of study. Not a 20-
5 year-old one from far away, which is all they've
6 been relying on. And that apparently is what you
7 people are saying right now, is good enough to go
8 ahead and build the plant.

9 COMMISSIONER BOYD: Let me jump in here,
10 as the new guy, and say in spite of the many
11 allegations today about what's wrong with this
12 document at this point in time, the one thing it
13 doesn't do is say not to do the study.

14 So, I'm confused --

15 MS. MURPHY: Build it first, I know,
16 that's true.

17 COMMISSIONER BOYD: -- by your comment.

18 MS. MURPHY: Well, from my point of
19 view, if they build --

20 COMMISSIONER BOYD: The study is still
21 there and is not -- and I don't believe anybody up
22 here is saying wash their hands of it. I think
23 there was a recommendation for a procedure which a
24 lot of people don't agree with. We have to sit
25 here and litigate that concern.

1 But let me assure you the document
2 doesn't say don't do a 316(b)-like, or if not a
3 pure 316(b) study.

4 MS. MURPHY: But what it does say, and
5 you're right, I'm wrong about that, is that build
6 it first, and at the same time do the study.

7 COMMISSIONER BOYD: No, no.

8 MS. MURPHY: It says we will approve it
9 now and you can do the study later. And that is
10 what has never been done in the history, as far as
11 I understand, of the Energy Commission.

12 COMMISSIONER BOYD: Doesn't say that,
13 either.

14 MS. MURPHY: Doesn't say do it, we will
15 not approve -- I'm sorry, I'm just confused then.
16 It says we will not approve this until you do the
17 study which was required in all other previous
18 times?

19 COMMISSIONER BOYD: Well, they can't,
20 under what's written to this point in time, they
21 can't build it until the study's done. I mean
22 can't operate it. I'm sorry.

23 MS. MURPHY: Yeah. They were going to
24 build it. And once it's built, and they create
25 another fake energy crisis, you know the people of

1 California and the "powers that be" in Sacramento
2 are going to say, okay, you know, kill the fish.
3 You know, let it rip. That's what's going to
4 happen. I mean, be realistic. Once you build it
5 they will come, they will use it.

6 COMMISSIONER BOYD: Well, I'm realistic
7 and my hair is prematurely gray because, like you,
8 I lived through every day of the energy crisis.

9 MS. MURPHY: The fake energy crisis.

10 COMMISSIONER BOYD: And --

11 MS. MURPHY: It was not really an energy
12 crisis. We had enough energy.

13 COMMISSIONER BOYD: -- it won't happen
14 that way ever again, rest assured.

15 MS. MURPHY: Yes, but I have heard from
16 you today, talking, you know, just as you spoke,
17 that you are trying to be fair to the applicant.
18 Well, the applicant is here with dirty hands.
19 They created this energy crisis that allowed this
20 procedure to go through quickly and expedited, and
21 not looking at what they should have been looking
22 at. And because of that now you're saying, oh,
23 we've got to be fair and let you get away with
24 never doing -- or doing the study after you get to
25 build the thing.

1 COMMISSIONER BOYD: I'm remembering one,
2 I'm taken aback by the -- and this is not meant as
3 a criticism, because I sympathize with the
4 difficulty of someone who doesn't live with this
5 every day to understand the complexity of this.

6 I think in one instance, on one point,
7 there was some questioning, some dialogue back and
8 forth about equity and being fair. But that's
9 just a point of -- law. I don't think you can
10 categorically say that the result of today's
11 discussions, so far, would lead one to that
12 conclusion.

13 So I'm just trying to say we have an
14 open mind. We're trying to deal with this. And I
15 know people don't believe --

16 MS. MURPHY: I guess I'm --

17 COMMISSIONER BOYD: -- government these
18 days. And I'm just trying to dissuade some of
19 your concerns.

20 MS. MURPHY: Right. I'm suggesting your
21 mind ought to be perhaps a little shut because you
22 have here an applicant that came here and created
23 this situation where it was sped along; and they
24 were able to say we don't need to find out how
25 many fish we're going to kill because we're in a

1 big hurry because of this energy crisis.

2 And there wasn't an energy crisis.

3 They, among other people, created a fake energy
4 crisis. And I mean I don't think they did it in
5 order to get this plant approved. That would be
6 pretty conspiratorial. But it so happened that it
7 was happening at the same time. And it allowed
8 them to come in and not do what they should have
9 done from the beginning.

10 And now, to be fair you're saying, I
11 think I hear, I feel, maybe I'm wrong -- that
12 well, it's four years now, they ought to be able
13 to build it and then do the thing concurrently,
14 which is the wrong way. It's backwards. You
15 don't know, they don't know, nobody knows the
16 results on the fish until we do the study. And
17 now they're going to be a way without doing the
18 study until after they built it.

19 HEARING OFFICER SHEAN: Thank you,
20 Michelle. We're going to hear from one of your
21 neighbors now, Mr. Bill Eisen.

22 MS. MURPHY: Actually my husband wanted
23 to --

24 HEARING OFFICER SHEAN: Oh.

25 MS. MURPHY: -- one part --

1 DR. REEDE: Excuse me, Hearing Officer
2 Shean, we have the Air District still on board on
3 the phone, and we have Commission air staff. And
4 it is just a small issue that needs to be resolved
5 regarding the revised FDOC and what's in the
6 conditions for air quality.

7 HEARING OFFICER SHEAN: That's fine. I
8 would have thought you would have pulled them in
9 your presentation. If you don't mind, Mr. Eisen,
10 we'll just stand by and go now --

11 DR. REEDE: Mr. John Yee, Joe Loyer and
12 Ken Coats.

13 HEARING OFFICER SHEAN: Gentlemen, are
14 you there?

15 MR. YEE: Yes, we are.

16 HEARING OFFICER SHEAN: All right, do
17 you want --

18 DR. REEDE: We've been waiting for the
19 revised FDOC. After the evidentiary hearings were
20 concluded, the South Coast Air Quality Management
21 District changed the BACT levels for NOx and
22 carbon monoxide. That was conveyed in the PMPD
23 comments to the Committee. And we were waiting
24 for revised FDOC so that everything that's in the
25 revised PMPD could be legitimized.

1 And there's also an excursion allowed.
2 An excursion can be better explained by the air
3 quality engineers, but it's going to either have
4 to be brought into the evidentiary record prior to
5 the vote, or the applicant will have to come back
6 and file an amendment on air conditions.

7 John Yee, would you please explain
8 what's going on, and then Joe Loyer can give the
9 Energy Commission's quandary, because we haven't
10 received it. And what we have at this point is
11 speculative.

12 John Yee.

13 MR. YEE: Yes, James.

14 DR. REEDE: Would you please explain to
15 the Committee this revised FDOC and also what the
16 excursion is?

17 MR. YEE: Yes. What we're doing right
18 now is, like you said, we are revising our
19 engineering analysis, and I guess you would call
20 it, the revised FDOC. It's our third revision to
21 our engineering analysis.

22 Like you just specified earlier, between
23 the time period of when the original -- actually
24 when we had the meeting, or actually the final
25 staff assessment, BACT has changed for large gas

1 combustion turbines. And we noted that when the
2 PMPD came out on January 30, 2004, there was, I
3 guess there was a change in CO level. But then
4 when we took a look at everything we noticed that
5 we only needed to change the levels for NOx and
6 also for CO.

7 And in accordance with this new BACT
8 level when we came out with the BACT level in
9 2003, late in the first quarter, it was based upon
10 a facility located in Massachusetts. And in that
11 we came up with a condition which we had worked
12 through for another project here in the South
13 Coast called Inland Empire, which came up with
14 this, you call it excursion. We call it an
15 explanation for where they couldn't meet the BACT
16 limits for a certain period of time. And that
17 condition goes along with this lower limit.

18 We are currently revising this, and I
19 talked to James before, in order for us to get it
20 actually recorded I have to get this signed
21 through our management staff first. And it's
22 currently in that stage right now.

23 So we anticipate that we would have a
24 revised evaluation for the CEC. We thought that
25 it was going to be earlier than this, but it's

1 taken some time, since we had other pressing
2 issues that we had to take care of.

3 HEARING OFFICER SHEAN: Let me just ask
4 the staff, does this apply to condition AQ-11? Is
5 that this excursion concern of yours?

6 DR. REEDE: Joe Loyer.

7 MR. LOYER: Yes, James.

8 DR. REEDE: Hearing Officer Shean just
9 asked you a question.

10 HEARING OFFICER SHEAN: Does the
11 excursion concern apply to condition AQ-11?

12 MR. LOYER: I believe that would be
13 correct.

14 HEARING OFFICER SHEAN: And that's the
15 only thing that needs to be updated to account for
16 the change that you believe is appropriate as a
17 result of the change in the BACT for CO and NOx,
18 is that right?

19 MR. McKINSEY: Joe, this is John
20 McKinsey. When we looked at it we were thinking
21 that AQ-24 might be a better place to put the
22 excursion information related to NOx, rather than
23 AQ-11. Simply because there's already some of the
24 other material there.

25 COMMISSIONER BOYD: Could I ask

1 applicant by the fact that you reference this, is
2 this something that you're aware of, and have no
3 problems with?

4 MR. MCKINSEY: Correct.

5 COMMISSIONER BOYD: We just have a
6 procedural issue here of getting it in time from
7 the District?

8 DR. REEDE: Yes, and that's been our
9 concern all along, that the information you need
10 to make your final decision has not been delivered
11 to us. And we still had concerns. And I hope,
12 Joe, if you would please give, in plain English,
13 the problems that may arise because of this new
14 excursion-type language related to additional
15 offsets.

16 MR. LOYER: The excursion language, what
17 we are terming the excursion language, is
18 essentially an allowance for the operator to -- or
19 the project to go beyond its proposed 2.0 BACT
20 determination NOx emission limit.

21 There are several instances where this
22 might happen. They're limited to a total of 15
23 per year.

24 The problem with this condition, and we
25 are working with the District to resolve this

1 issue, is one of demonstration of compliance. We
2 have some questions as to how the applicant will
3 demonstrate compliance with certain aspects of the
4 condition.

5 Farther problematic for El Segundo is
6 that the project, while it's allowed to commit an
7 excursion beyond 2.0, it is limited ultimately to
8 25 parts per million for a period that varying in
9 length, but may not exceed two hours ultimately.

10 In order to introduce this condition
11 into the Commission decision, staff feels it is
12 absolutely necessary to provide modeling with it.
13 So it is necessary not only to introduce the new
14 revised FDOC reflecting the new BACT
15 determination, but it is also necessary for staff
16 to provide additional assessment to verify that
17 the 25 parts per million emission level will not
18 cause an impact on the one-hour NO2 standard.

19 HEARING OFFICER SHEAN: Would that be
20 something that the Air District would be doing as
21 part of its conditions on any revised authority to
22 construct?

23 MR. LOYER: Are you referring to the
24 modeling exercise?

25 HEARING OFFICER SHEAN: Well, the

1 determination with respect to the excursions.

2 MR. LOYER: To my knowledge the
3 excursion language will be incorporated in the
4 District's permit to operate.

5 HEARING OFFICER SHEAN: So ultimately
6 any change that appears in the authority to
7 construct that differs from what's in the revised
8 PMPD would have to be rectified through an
9 amendment, is that procedurally correct?

10 MR. LOYER: Yes, that is procedurally
11 correct. Yes.

12 HEARING OFFICER SHEAN: And so is there
13 an urgency to make this change in advance of
14 Commission consideration of this matter on May 5,
15 given that it could be changed by amendment at the
16 time that it actually occurs? I mean after the
17 time it actually occurs in the authority to
18 construct?

19 MR. LOYER: The issue, I believe, you're
20 referring to there is not truly one of air quality
21 or procedure. I think it's more of a legal
22 interpretation. And I would prefer to defer to
23 Dave Abelson there.

24 HEARING OFFICER SHEAN: Well, the
25 question is, is there an urgency --

1 PRESIDING MEMBER KEESE: We have to do
2 this by next Wednesday.

3 HEARING OFFICER SHEAN: -- that makes us
4 have to do this by Wednesday versus do it as an
5 amendment at some future time when the District is
6 all done doing what they're doing.

7 MR. LOYER: In many cases we have
8 amended conditions immediately following a
9 Commission decision. But they have been
10 restricted to fairly minor changes in conditions,
11 verbiage changes, things of this nature.

12 What we're talking about here, the
13 excursion language, is not only a new condition,
14 it is a new concept. We haven't seen this in any
15 other projects. The District has never
16 implemented this in any other project, even though
17 it began in Inland, Inland is not completed.

18 It is proposed for El Segundo; it is
19 also being proposed for Mountainview. However, it
20 has not been implemented in any condition for any
21 power plant yet.

22 So, it is a new animal. I would be
23 reluctant to want to put this off to an amendment
24 procedure for an additional reason that we do have
25 prior knowledge of it, prior to the Commission

1 decision.

2 COMMISSIONER BOYD: Let me ask the
3 District. This requirement for modeling -- or let
4 me ask perhaps both the staff and the District, is
5 there some kind of issue associated with that? Or
6 is this, District, presumed to be a routine part
7 of what you're doing anyway?

8 MR. YEE: Although I really don't know,
9 I mean I haven't done the modeling for this one,
10 and I don't presume it to be a significant
11 modeling change, because when they do model, when
12 they have modeled for startups, their startups are
13 generally much greater than 25 ppm on an hourly
14 basis.

15 So, I don't think, although it may be a
16 change, I don't think it's going to cause any
17 exceedances of any state or federal regulations.

18 Now, Joe may have other concerns than I
19 have, but our experience is that -- well, I don't
20 believe it will. But, you know, the numbers will
21 have to prove out whether they can comply.

22 MR. LOYER: In fact, I have completed
23 the modeling assessment and I don't know if I can
24 relay the results, but I do not expect the 25
25 parts per million to cause an impact. The

1 modeling is required, though, as far as air
2 quality staff are concerned for purposes of
3 complying with the requirements of CEQA.

4 PRESIDING MEMBER KEESE: Is the
5 applicant aware of what's going on here?

6 MR. McKINSEY: Yeah, you know, and
7 actually our suggestion, I don't know how staff's
8 position on this is, but I still don't see the
9 problem with saying that this is something we need
10 to do as an amendment.

11 One reason, I think, as Mr. Reede said,
12 at this point it is still conjecture. We don't
13 actually have a revised FDOC that gives us. We
14 think we know exactly what the language is, but --
15 and we've got some disagreement between the staff
16 and the Air District over what's going to be
17 required to implement it.

18 And what we've done, for instance, in
19 Crockett we revised the CO limit down by 4 ppm, as
20 a post-project amendment. I think it's something
21 that's totally capable of being dealt with once we
22 know exactly what we get from the Air District to
23 work it out as an amendment to the project.

24 HEARING OFFICER SHEAN: Right, and is
25 there a good reason that at least the South Coast

1 District wouldn't want to coordinate this with the
2 other two cases, the Inland and Mountainview, so
3 they're basically doing the same, you know, apples
4 and apples and apples?

5 MR. ABELSON: I'm not sure what the
6 needs of the District and technical staff are, but
7 let me float a concept and see whether I'm off
8 base on this. This is a complicated technical
9 area, and so it's easy for any one of us to not
10 get it quite right.

11 What I'm understanding is that the BACT
12 rules have ratcheted down the basic requirement,
13 and that there is an excursion or exception
14 allowed for limited periods of time, but the
15 modeling hasn't been done on the exception, so we
16 really don't know what the results of the
17 excursion are, whether they're acceptable for CEQA
18 purposes or not.

19 The expectation is that they will be,
20 but there's no evidence to that effect. So, if
21 we're going to go the amendment route, my
22 suggestion is to not allow the excursion. And if
23 they can get one through their FDOC, they'll come
24 in and amend.

25 I mean I think that's the way to be

1 completely safe under CEQA and under the air
2 quality rules. If I've got that wrong, then I
3 stand corrected.

4 COMMISSIONER BOYD: But for the record
5 the whole objective of the District's rule change
6 is an improvement in air quality and they're just
7 trying to work the exception -- the District is
8 not trying to backslide, so to speak, in the air
9 quality arena, I take it, from all I've just
10 heard.

11 MR. MCKINSEY: Correct, and indeed,
12 already the RPMPD incorporates the reduction in
13 the limits. So the only thing that isn't in the
14 RPMPD is this excursion language. So, as it's
15 written now it's already got the reductions. And
16 what's not there is the excursion language which
17 we would have to try to introduce.

18 MR. ABELSON: And I guess I'm curious,
19 given the suggestion I just threw out, if
20 applicant would have a problem with just leaving
21 the excursion out for now. And if their FDOC
22 eventually allows it, and they want it for any
23 reason, they'll come back and get the amendment at
24 that point.

25 MR. MCKINSEY: Correct.

1 PRESIDING MEMBER KEESE: Perfect. Done.

2 HEARING OFFICER SHEAN: Done.

3 PRESIDING MEMBER KEESE: Next issue.

4 DR. REEDE: And as one last question,
5 please. John Yee, when will we see the revised
6 FDOC?

7 MR. YEE: Well, that's a good question.
8 We are working through it right now, and given the
9 fact that, you know, -- to be honest with you,
10 when we looked at this and we did it for Inland
11 Empire, we didn't necessarily look at the
12 modeling.

13 Because we looked at this as an event
14 that only occurred 15 times a year, and a very
15 small percentage of the time. Even if that, it
16 wasn't guaranteed that it was actually going to
17 happen.

18 DR. REEDE: Well, when --

19 PRESIDING MEMBER KEESE: You know, we --

20 HEARING OFFICER SHEAN: You can do those
21 communications with him -- this is extremely
22 valuable hearing time that this can be done --

23 PRESIDING MEMBER KEESE: Dr. Reede will
24 be in further contact with you.

25 HEARING OFFICER SHEAN: All right, thank

1 you, Mr. Yee, Mr. Coats, Mr. Loyer, appreciate it.

2 MR. YEE: Okay.

3 MR. LOYER: Thanks.

4 HEARING OFFICER SHEAN: All right. Mr.
5 Eisen.

6 MR. EISEN: Bill Eisen. I'm a resident
7 of Manhattan Beach, over near the northern end
8 near the proposed project. I'm speaking on behalf
9 of myself and a local neighborhood association
10 called Residents for a Quality City. And I did
11 submit a letter to the Commission, a letter dated
12 February 29, '04, which addressed the PMPD. But I
13 will be submitting something on the revised
14 Commission report.

15 You know, I agree with Michelle Murphy
16 who just spoke here a minute ago. Her conclusions
17 that this Commission has been informed, or it has
18 informed the applicant, the El Segundo Energy
19 project, on numerous occasions in my presence
20 about the importance of doing a 316(b)-type study.
21 And I've been to a number of these hearings for
22 the last two or three -- several years. Probably
23 attended a couple dozen of them here.

24 And I recall on many occasions they've
25 said 316(b) study is required, and the data is

1 insufficient. And, of course, we've typically had
2 a nonresponse from the applicant. They have
3 intentionally postponed doing any kind of 316(b)
4 study. This is intentional conduct. It's not
5 that they weren't aware of the necessity of doing
6 a 316(b), they have intentionally not done it.

7 So I can't see why they have any excuse
8 whatsoever for saying, well, we ought to be able
9 to postpone doing the 316(b) study until after
10 certification.

11 the Coastal Commission has recommended,
12 through an appropriate letter, that a 316(b) study
13 be done before certification. And, of course,
14 CEQA generally requires, and I'm very familiar
15 with a lot of cases and I've been in court on CEQA
16 issues before, myself, on several occasions, CEQA
17 generally requires a EIR to be completed before
18 implementation of the project when the EIR might
19 or addresses the issues dealing with whether or
20 not the project will be built or whether or not
21 the project is feasible. And conditions like
22 whether the -- that affect the design criteria of
23 the project.

24 CEQA doesn't require if it's an issue
25 like what color to paint the project, or

1 something. That's an issue that is really not,
2 doesn't affect the design of the project, wouldn't
3 preclude a project from going forward.

4 But if information required by CEQA
5 could conceivably have an effect on the design of
6 the project or even whether or not the project is
7 to be built, CEQA requires that the environmental
8 review done before certification. And this is in
9 numerous cases.

10 One of my main concerns is the
11 jurisdictional dispute, I guess, or the
12 differences in interpretation of the
13 jurisdictional issue about whether or not the
14 Coastal Commission has jurisdiction or the Energy
15 Commission has jurisdiction.

16 The Warren Alquist Act, which
17 established the Energy Commission's jurisdiction,
18 clearly established concurrent jurisdiction
19 between the Energy Commission and the Coastal
20 Commission of a project located within the coastal
21 zone. And I refer you to section 30413(a) of the
22 Coastal Act.

23 And just very briefly it says: In
24 addition to the provisions set forth in
25 subdivisions (f) and various subdivisions, and it

1 says, quote, "the provisions of this section shall
2 apply to the Commission and the State Energy
3 Resources Conservation and Development Commission
4 with respect to matters within the statutory
5 responsibility of the latter." Very clear
6 statement of concurrent jurisdiction.

7 About a year after the Warren Alquist
8 Act was adopted UCLA Law Review discussed the
9 issue of concurrent jurisdiction, and it was cited
10 in my letter, 24 UCLA Law Review, page 313, and it
11 had -- the author had clearly researched the
12 legislative history of the Warren Alquist Act.
13 Thoroughly researched. It's a very long and
14 thorough and in-depth law review article.

15 And it concluded that there was
16 concurrent jurisdiction between the Coastal
17 Commission and the Energy Commission with respect
18 to PRC 30413 and PRC 25523, which requires
19 adoption of the Coastal Commission's findings
20 unless this Commission determines these findings
21 to be -- or these recommendations to be
22 infeasible.

23 This was discussed way way back at that
24 time. So, you can't really argue that this is a
25 new issue. And nobody really in the intervening

1 time, as far as I've been able to research the
2 cases, has really disputed that concurrent
3 jurisdiction.

4 With respect to the NOI, -- just a
5 second here -- on page 61 of the Commission's
6 report it says: It may appear somewhat
7 incongruous that the Legislature would have
8 created a powerful role for the Coastal Commission
9 in AFC proceedings for which there was an NOI and
10 a lesser role in AFC proceedings for which there
11 was NOI, however that is what the Legislature has
12 done in section 25523(b) by requiring the
13 Commission to include in an AFC decision, quote,
14 "specific provisions to meet the objectives of the
15 Coastal Act, and may, as specified in the report
16 submitted by the California Coastal Commission
17 pursuant (d) of that section, but that report is
18 submitted only in NOI proceedings.

19 Then at the bottom of page 61 in a
20 footnote, this Commission says then, quote, "In
21 order to be proposed in an AFC, any coastal site
22 had to be selected as a preferred site in the NOI
23 in the years after the original NOI/AFC
24 combination was established, the Legislature
25 created a single phase AFC which did not require

1 the extensive site selection process contained in
2 the NOI.

3 Well, obviously there's been some
4 changes in procedure since that time. But, you
5 know, if the Legislature had thought or intended
6 to have these changes in procedure to effect a
7 concurrent jurisdiction, they would have surely
8 amended the section 30413. They didn't.

9 So we have some simple changes in
10 procedure and it doesn't affect the -- in my view
11 it doesn't affect the concurrent jurisdiction of
12 the Coastal Commission and the Energy one whit.

13 There's been, I think, within the last
14 year I remember two cases reading in The Daily
15 Journal, that discussed concurrent jurisdiction
16 between two state agencies. I think one of them
17 was the Forestry Service, and I don't know, there
18 was a couple of others.

19 But, in both of those cases the courts
20 found concurrent jurisdiction was acceptable. And
21 was fully, I mean two state agencies had
22 concurrent jurisdiction. So this is not unusual,
23 the issue of concurrent jurisdiction has been
24 before us for years.

25 And, of course, the Water Board has also

1 jurisdiction, and you know, federal jurisdiction.
2 So they have jurisdiction, too. So actually
3 there's three agencies that have some sort of
4 jurisdiction here.

5 But the Coastal Commission clearly has
6 jurisdiction; it's a very minimal amount of
7 jurisdiction, but it does have jurisdiction with
8 respect to 30413(a). And also PRC 25523, which
9 requires the adoption of the Coastal Commission's
10 recommendations, unless determined to be
11 infeasible.

12 It's very minimal amount of
13 jurisdiction, but it is necessarily jurisdiction
14 and it is discussed in this Law Review article
15 back in 1978. What was true then is still true
16 today. There's been no change.

17 I really take exception with the -- and
18 I think this is a rather absurd statement in the
19 revised Commission's report here. It says, quote,
20 "Therefore we specifically override any provisions
21 of the Coastal Act that would prohibit
22 construction and operation of the El Segundo
23 Redevelopment Project at the proposed location."

24 The Energy Commission has no, in my
25 view, no jurisdiction to override any provision of

1 law. The Coastal Act is law. It's not -- you
2 know, you can't -- I don't know, I can't imagine
3 how the Energy Commission can override the Coastal
4 Act or anything done by the Coastal Commission
5 which the Coastal Commission has the legal
6 authority to do it. It's just inconceivable. So,
7 I really object to that statement.

8 Let's see, I'm just about through here.
9 I think that the only other thing I'd like to say,
10 I'm very concerned about this jurisdictional issue
11 and I don't know whether -- I think some of the --
12 I know the Coastal Commission is concerned about
13 it, and Heal The Bay and a number of other people
14 are concerned about it, I'm prepared to litigate
15 this on the jurisdictional issue if it comes to
16 that. I hope that it can be worked out in some
17 sort of manner where the 316(b) study is done, or
18 an alternative closed circulation of water is
19 done. I hope it gets sorted out without having to
20 do to the courts.

21 But I just want to put it on record that
22 I'm prepared to go to court if something can't be
23 worked out, if the other agencies don't come in
24 and take the ball.

25 Thank you.

1 HEARING OFFICER SHEAN: Thank you, Mr.
2 Eisen. All right, -- quickly, quickly.

3 MR. PERKINS: My name's Bob Perkins; and
4 like everybody here, I try to move quickly. I
5 have three things, though, actually.

6 One, mindful that next Monday I have to
7 submit my written comments to the revised PMPD. I
8 remember one of the goals of revision was to get
9 all the steps in line. And I haven't completed my
10 homework, so I want to ask a question of staff.
11 To the best of your knowledge, has that goal been
12 achieved, that the stipulated conditions have now
13 been incorporated in the RPMPD?

14 DR. REEDE: Yes, to the best of my
15 knowledge, the stipulated conditions were brought
16 up into concurrence.

17 MR. PERKINS: Well, I want to thank the
18 Commission for taking the time to get that squared
19 around without unnecessary flailing. If I see
20 something that I think slipped through the cracks
21 I'll bring it to your attention in writing.

22 This is probably wasting your time but
23 I'm going to do it anyway. As you all probably
24 know I no longer practice law so I shouldn't offer
25 you legal opinions, but I have an opinion about

1 this preemption issue, federal preemption issue,
2 which is I don't think it goes anywhere. It's not
3 really the states that create the preemption, it's
4 the feds, as you know. States are supposed to go
5 charging along until and unless the federal
6 government preempts a particular field. Otherwise
7 they govern their citizens.

8 And that hasn't happened here. Every
9 time you guys act on something that involves an
10 environmental issue, or water in particular, every
11 time the Coastal Commission does, and every time
12 that the Water Quality Control Board does
13 something beyond what's required by the federal
14 EPA, all of which have been going on for years,
15 the feds could rise up in wrath if they wanted to
16 and say we preempt. But they haven't.

17 So it seems to me the track record
18 indicates that the agencies still have power to
19 act. The feds are involved in the area, but they
20 have not declared that they've preempted the area.
21 Until they do, or some court tells you they did, I
22 don't think you have either the right or the
23 responsibility to back off.

24 So, in Chairman Shean's particular
25 example, the hypothetical he asked about what if

1 this and that happened, how would be the Coastal
2 Commission's authority for acting, the Coastal
3 Commission's authority for acting is California
4 state law, and in particular, the Coastal Act.

5 And yours is the California state law,
6 and in particular, both the enabling legislation
7 for you and the Coastal Act.

8 So, the bottomline is state agencies
9 should do what they are told to do by the State
10 Legislature. They can't shirk that duty. They go
11 ahead and do it until somebody stops them. It can
12 be the feds. It can be preemption, but that
13 hasn't happened yet.

14 So that's my two cents worth on that
15 topic.

16 Finally, I have another question, and
17 this one's a little rhetorical and a little
18 inflammatory, so I'm going to start by reading to
19 you what The L.A. Times says about our state's
20 government, and in particular the Attorney
21 General, who got \$281.5 million back from these
22 two companies over another joint venture that they
23 owned, as you probably all know.

24 And that settles that particular joint
25 venture's liability, but the Times I will read

1 from now, said the role Dynegy played in the
2 crisis remains of interest to the Attorney
3 General's Office. It is looking into allegations
4 that the Houston-based company engaged in price
5 gouging and made unjust profit from its California
6 operations."

7 And now I'm not quoting the Times, but
8 I'm quoting Bill Lockyer, the State Attorney
9 General, quote, "This settlement provides
10 Californians with a measure of justice from one of
11 the most rapacious pirates of the energy crisis.
12 We will continue in the courts to seek full
13 justice for ratepayers and full accountability for
14 Dynegy."

15 Now, I have what is something of a
16 rhetorical question that comes in two parts. Does
17 it make any difference to this Commission if the
18 people seeking this license are crooks, or in the
19 words of the State Attorney General, rapacious
20 pirates? And if that makes a difference to you,
21 is it perhaps premature to grant them a commission
22 to act in a piratical way towards us -- a
23 certificate to act in a piratical way towards us
24 should they turn out to be such pirates, before
25 you find out the outcome of whether they are, in

1 fact, crooks?

2 So that's a question to you. The first
3 part: Does it make any difference to you, you
4 know, would you willing give authority to build a
5 power plant to people who were rapacious pirates?

6 I guess I don't hear an answer.

7 COMMISSIONER BOYD: You said rhetorical.

8 MR. PERKINS: Aha, I see. Well, let me
9 convert it to one that begs an answer, either
10 today or on the 5th. Because the Attorney
11 General, at least, is asserting not that they
12 might be, but that they are rapacious pirates. He
13 hasn't won in court. He got large numbers of
14 dollars in settlement on one of their activities.
15 He hasn't lost in court, either. And that's the
16 state government, not me, talking.

17 So the real question that needs to be
18 answered is do you listen to that? Do you care?

19 Thanks.

20 PRESIDING MEMBER KEESE: I'm sure the
21 Committee, and following the Committee, the
22 Commission, will make a determination on this case
23 the way we do on all cases, and that is with the
24 record that is in front of us, and the
25 instructions that we've given. Which, you know,

1 protecting the environment, which has been very
2 broadly discussed here, is one of the prime ones.
3 Conserving energy is. Developing energy is one of
4 our charges.

5 MR. PERKINS: Sure.

6 PRESIDING MEMBER KEESE: So, we'll look
7 at that, and we'll look at all the evidence in
8 front of us and come to a conclusion.

9 MR. PERKINS: All right, thank you very
10 much.

11 HEARING OFFICER SHEAN: Thank you.
12 All right, two minutes. Two minutes. Quick
13 break, we'll go off the record.

14 (Brief recess.)

15 HEARING OFFICER SHEAN: Okay, we are
16 ready. Mr. McKinsey from the applicant.

17 MR. MCKINSEY: Thank you, Hearing
18 Officer Shean. I appreciate your patience, both
19 Chairman Keese and Commissioner Boyd, and I also,
20 I think, appreciate, Commissioner Boyd, your
21 willingness to start digging into the meat of the
22 record.

23 And I want to begin by saying that
24 taking comprehensively, especially even after
25 listening to the comments today and reading the

1 comments that have been submitted so far, put
2 really succinctly, we find that the revised
3 Presiding Member's Proposed Decision does an
4 incredibly good job of cutting through myth,
5 noise, hyperbole and getting at some very specific
6 laws and facts, and putting them together.

7 And one of the things that I dealt with
8 throughout this proceeding has been a little bit
9 of differentiating between some unsupported
10 assertions and statements, and some basic
11 different types of motives and things going on.

12 So what I wanted to begin with was kind
13 of similar to Mr. Abelson's history, but adding in
14 a few other key events to help make sure, and I
15 think this really, in one sense, applies to almost
16 the full Commission because this project started
17 so long ago that we have one, or perhaps two at
18 the most, members of the Commission that were here
19 when we submitted this AFC. And fortunately one
20 of them is our Presiding Member, and has been the
21 Associate Member the whole time. And I think
22 that's the one thing that's allowed some
23 continuity.

24 But even myself, when I look back at the
25 history of this project, I found myself recalling

1 things that had happened three and a half years
2 ago that, you know, I had forgotten, but they were
3 very important.

4 The three main myths that I think I need
5 to address and I will do very clearly in this, is
6 the idea that this project and this decision are
7 unprecedented, because they're not, for several
8 key reasons.

9 One of those key reasons is the second
10 myth, and that is that we don't understand the
11 marine biological effects of intake number one.
12 That's a myth.

13 And that, in fact, leads to a third
14 myth, which is that we don't know that the effects
15 could be significant. They're not. And we're
16 very comfortable with that. In fact, that really
17 gives me the starting point for our history of
18 this project, but that's kind of the big picture
19 that has been lost in a tremendous amount of other
20 work we've done on this project; and the
21 tremendous amount of debate we've had over a
22 couple of key issues.

23 And so that's kind of the big picture
24 I'm taking you towards that I want to impress upon
25 you. And I will support that.

1 We began this project in the beginning
2 of 2000, and one of the first things we did is we
3 approached biologists and we said, okay, here's
4 the project, here's the facility, do we have
5 entrainment, do we have impingement, do we have
6 thermal effect issues.

7 As we were preparing that we also had a
8 prefiling meeting with the Energy Commission
9 saying, here is our condition, here is our NPDES
10 permit, here's the parameters of this project,
11 here's the history of it. And we met with, in
12 particular on the biology issue, we met with two
13 biologists and a couple representatives of
14 management. And we said, we've been told by the
15 Water Board that we're not going to be required to
16 conduct a 316(b). That we're going to be able to
17 do this using the existing study and the existing
18 permit. And you normally have a spot on your data
19 adequacy checklist that says did you file a 316(a)
20 and (b) study. Did you complete them. And we
21 want to know if that's going to be needed. And we
22 were told no.

23 And so when we filed the AFC we did it
24 for that very particular reason that we had been
25 told, and not just -- it wasn't something we had

1 bargained for. It had been agreed upon that it
2 made complete sense that we didn't need to conduct
3 the study.

4 In the interim period between the
5 prefiling meeting and the time in which we filed
6 the AFC, the CEC hired other biologists. They had
7 a contract. And these other biologists disagreed
8 with that decision. And thus what it became and
9 the situation was that we had been told, bring it
10 in; it's okay; we agree you don't need another
11 study. We brought it in, and the biologists said,
12 well, hey, we've got a problem here. It says you
13 need a 316(b) study and you don't have a 316(b)
14 study. It wasn't 316(b)-like, it wasn't an
15 entrainment study. It was this spot on the
16 checklist says you have to have a 316(b) study and
17 you don't have one.

18 We very strenuously objected. We did
19 not try to say that you need to bypass us on a
20 particular requirement because of an energy
21 crisis. We said, we don't have to have a 316(b)
22 study, the Water Board says we do not have to have
23 one. In fact, we don't have to do anything to
24 continue to run this system at 208 million gallons
25 per day. And thus we submitted it that way.

1 And I don't know the decisionmaking that
2 went on with both the staff and their management,
3 and ultimately why they decided to make the
4 decision, and why the Commission agreed to accept
5 it, but one way or another we were accepted as
6 data adequate with the case history, the study
7 history. And it's a very robust study history
8 about the effects of this project.

9 After we introduced it, however, and
10 this is something that I think my opposing
11 counsel, for all of our differences, would agree,
12 that we've been attempting over the last three and
13 a half years, in very good faith, to try to find
14 common ground; to try to provide information. And
15 we found that every attempt we made has resulted
16 in some irreconcilable differences.

17 One of the first things we did is we
18 said, well, you know what, there is something else
19 we can do. Because there's a tremendous study
20 that goes on just down the beach that collects
21 larval data, they tow things through the water and
22 count the larvae. And they've been doing this for
23 a long time. And so it gives us an annual number
24 and an annual picture of the larval
25 characteristics of Santa Monica Bay.

1 And that allows us to do two things.
2 One, it has current numbers. And two, it also
3 allows us to see what has been going on in the 20
4 years since the other study was conducted.

5 And so we attempted to reach some common
6 ground on how we would do that study, and we did
7 not. But we decided we needed to try to bring it
8 in anyway, and so we completed the study and
9 submitted it. Thought I will admit that the staff
10 never accepted it or agreed with it. And for
11 various, once again, ideological and procedural
12 and scientific disagreements between our experts.

13 Following the submittal of that report
14 we went through a significant delay triggered by
15 our friend, the FDOC. And during that period we
16 had a lot of discussions and attempts to try to
17 find common ground. And though they ultimately
18 failed, we noticed something else occurring.

19 We had pointed out that there was no way
20 we could be obligated to do a 316(b) study because
21 we didn't have to do a 316(b) study. The Energy
22 Commission can't order such a thing. That's a
23 section of the Clean Water Act. It's a federal
24 law that's enforced by the Los Angeles Area
25 Regional Water Quality Control Board. The context

1 changed to, well, it needs to be a 316(b)-like
2 study.

3 In the meanwhile the Coastal Commission
4 had gotten involved. And the Coastal Commission
5 had indicated, well, we think you need to do a
6 316(b) study, and then they changed that to say
7 well, it needs to be 316(b)-like, as well.

8 So, a dialogue continued; and finally at
9 one point we realized that we satisfied the Clean
10 Water Act. There can't be any conjecture since we
11 have an NPDES permit that allows us to operate
12 intake number one at 208 million gallons a day.
13 And thus there isn't an issue under complying with
14 the Clean Water Act or the Porter-Cologne Act,
15 because that's enforced by the Water Board.

16 And, indeed, we were satisfied for
17 reasons I will discuss regarding the Coastal
18 Commission that there were not Coastal Act issues
19 associated with this, either. So there were no
20 LORS compliance issues.

21 And what we were left with was whether
22 or not they had adequate information to complete
23 an assessment of whether or not there were
24 significant impacts. We have always clearly
25 believed that we have more than an adequate amount

1 of information to assess the impacts. And,
2 indeed, that's why we have said and we continue to
3 say the effects of intake number one on both
4 impingement, entrainment and thermal are
5 insignificant; and in many cases they're trivial.
6 Trivial. And I'll say that word, because that's
7 the case for many of the characteristics of our
8 effects.

9 So, in the meanwhile, though, once again
10 attempting to try to reach common ground we
11 realize that one way we could eliminate the CEQA
12 argument that said, hey, we don't know what your
13 effects are; we're concerned that you're going to
14 cause a flow increase. And that that flow
15 increase is attributable to this project. Because
16 it's attributable to this project, the effects of
17 it could be significant. And we don't like all
18 your other data; we don't trust what the Water
19 Board has done. We don't trust any of it. We
20 don't know what the effects of the project are.
21 We think they could be significant.

22 And so we offered the flow cap. And we
23 offered the flow cap in a particular purpose. It
24 was not because we believed it was necessary to
25 satisfy CEQA. We offered it because we felt that

1 this eviscerated and destroyed the CEQA argument.
2 Because if we could agree that there is no flow
3 increase and we took on a limit that said there
4 will be no flow increase caused by this project,
5 even using other parties' interpretations of what
6 is the flow increase, then there cannot be an
7 effect. So there is no debate about whether it is
8 significant or not, even using your own logic and
9 your own belief that the project -- that any flow
10 increase, no matter how small, could have a
11 significant effect on the environment.

12 That flow cap has been turned into, in
13 some cases, and often misinterpreted as that's how
14 we're satisfying CEQA. But one of my points of
15 the big picture is we've never been concerned
16 about CEQA. And we've always been confident that
17 the intake structure, intake number one at El
18 Segundo, doesn't have any significant effects.

19 And we can base that on an incredible
20 number of different means. And probably the first
21 and most fundamental one is that the California
22 agency that's responsible for permitting,
23 regulating and determining how and when we can
24 operate the intake structure has decided to allow
25 us to operate it. And has continued to renew our

1 permit when it has come up. And issued us an
2 NPDES permit. And we continue to have that permit
3 to this day. And we continue to have the ability
4 to operate the cooling system.

5 In addition, they required us, when the
6 regulations, at least when the federal Clean Water
7 Act came into place, and there was an attempt to
8 comply, we had to complete, and the owners of the
9 project at that time, Southern California Edison,
10 completed the 316(b) study for this project.

11 That 316(b) study used a methodology
12 called adult equivalent losses. And despite what
13 you may have heard, there's ample evidence in the
14 record that indeed there is specific citations in
15 the phase two regulations proposed that say that
16 adult equivalent losses is still an entirely
17 acceptable scientific methodology, just as is
18 proportional entrainment and fecundity hind-
19 casting, the two models that appear to be heavily
20 endorsed by the staff's biologists.

21 And thus it's not accurate to say that
22 the evidentiary record concludes that the
23 scientific methodology used for our 1979 to '81
24 study is antiquated and that science is light
25 years ahead, because that's just not correct.

1 And, in fact, the federal government, in
2 their regulations, has indicated that that very
3 science continues to be one of the acceptable ways
4 to attempt to estimate what are the entrainment
5 and impingement effects of an operating cooling
6 system.

7 The study, in and of itself, concluded
8 that the entrainment effects and the impingement
9 effects were negligible. Less than a tenth of a
10 percent in most cases, and sometimes 1 percent.
11 And the study, itself, was performed, as has been
12 said so many times I couldn't count them on all my
13 toes and hands, fingers, 50 miles away and 20
14 years ago.

15 And the 20 years ago is not really
16 relevant at all from a scientific basis. It
17 sounds good, but there's a lot of reasons why it's
18 not. One of the reasons is that there's no reason
19 to believe that anything has changed structurally
20 or dynamically that invalidates the study simply
21 because of its age. It's more likely the study
22 could have problems by virtue of the particular
23 period when it occurred. Because every study is
24 just a snapshot into the ocean.

25 And secondly, the distance is also

1 irrelevant, because that was something that was
2 accomplished in the study. They evaluated where
3 was a site where they could conduct sampling that
4 would be representative of the conditions outside
5 the entrance to our facility. And indeed, it is,
6 because that's the current and the path directs
7 plankton and eggs from where it was sampled at,
8 right across the entrance areas of Scattergood and
9 El Segundo Generating Station.

10 And thus there is nothing wrong with the
11 fact that it's 20 years old. And there's nothing
12 wrong with the fact that it was conducted, that
13 the larval sampling was conducted 50 miles away.
14 It was accepted then, it was accepted then by all
15 the responsible agencies, and it continues to be
16 accepted today by the responsible agency that
17 enforces federal and state law, and tells us how
18 and when we can operate the cooling structure.

19 In addition to that, which we think is
20 the fundamental principle why we're comfortable,
21 we conducted the King Harbor study that I
22 mentioned. And we submitted that as another
23 calculation. And it came up with very similar
24 incredibly low numbers. And there's no real magic
25 to this.

1 It's the smallest cooling system
2 operating on the Bay. It operates at 208 million
3 gallons a day, which sounds like a lot of water.
4 But first of all there are 2.1 billion gallons per
5 day of permitted flow on the Santa Monica Bay.
6 And there are literally tens of trillions of
7 gallons of water out there that these cooling
8 systems are pulling from.

9 And, indeed, this is a type of habitat
10 where larval dispersion is very sparse. It is
11 significantly different than a place like Morro
12 Bay or Moss Landing where you have enclosed areas
13 and primary breeding grounds and small bodies of
14 water that intake structures are pulling from.

15 Here you have a cooling system that is
16 pulling from an open embayment with current
17 basically bringing a steady flow of water from the
18 reaches all the way up in the south of Santa
19 Barbara and north of the Santa Cruz Island, all
20 the way down and across Palos Verdes.

21 And it's in that different context that
22 it's not surprising to find that even another
23 study found significantly low numbers.

24 We also submitted, and the staff
25 submitted some calculations that disagreed, but we

1 submitted several different ways that we could
2 show if you just do some crude numbers; if you say
3 how much water are we pulling out of the Bay, how
4 much water is there out there that we're pulling
5 from, what percent is that. Once again, you come
6 up with for that one on the order of a half a
7 percent to a percent.

8 Or another one is how much water is
9 going by the intake structure, and how much
10 compared to how much is going by, what rate are we
11 pulling it out. Same kind of numbers. Very low
12 percentages of water being pulled from the system.

13 We work with the assumption that all
14 that water going through and all the larval
15 substances in it are being entrained. And with
16 that assumption we can still say those are
17 insignificant and trivial numbers.

18 Something that came out a year ago and I
19 heard it a little more today is there could be
20 trillions of larvae being killed; there could be
21 billions were some numbers that were specifically
22 suggested by staff's witnesses a year ago.

23 And yet those numbers mean nothing if
24 you don't put them in context. They sound like
25 very big numbers, but there's plenty of testimony

1 and evidence in the record that suggests that the
2 larval population out there is probably on the
3 order of seven to 15 trillion. Thus a 10 or 20 or
4 30, which is what some of these studies I'm
5 referring come up with for entrainment, are very
6 low numbers compared to those trillions. And it's
7 why the numbers come up saying that this facility
8 doesn't.

9 But there's one more really important
10 and fundamental way that you can understand that
11 this facility does not have a significant effect
12 on the environment, this intake structure. And
13 that is that it has been there for almost 50
14 years. And the one big problem they had early on
15 was impingement of adult fish. A tremendous
16 amount of adult fish were impinged. And they put
17 a velocity cap, which is a plate sitting on top of
18 the upright suction, which redirects the flow from
19 being a downward flow to being a sideward flow.

20 And it worked so good because the fish
21 feel the sideward flow and feel that and swim
22 away, that our impingement numbers went so low
23 that when Mr. Reede first heard them many years
24 ago before he was a doctor, that one year we had
25 impinged 30 pounds of fish in that intake

1 structure, he commented that he could eat that
2 many fish in one year. And that's true. The
3 impingement numbers are incredibly low. There is
4 no impingement issue in our project. And it was
5 eliminated.

6 In the meanwhile, entrainment has never
7 been an issue. And one of the particular reasons
8 why this is so different than Morro Bay and Moss
9 Landing is because of the different environment
10 and the different characteristics of the larval
11 population in the marine environment here. It's a
12 sandy bottom, a little bit of embayment with a lot
13 of water moving through bringing water through at
14 all times.

15 So, in that 50 years this facility has
16 been operating, if this facility at 208 million
17 gallons a day had been having a significant
18 effect, and it was the first one, that intake
19 structure, followed by another 1.9 billion gallons
20 per day of permitted capacity, so by the mid '60s
21 you had 2.1 billion gallons per day, which is all
22 still there, permitted, and has been operating
23 away, it is hard to imagine how, if that was a
24 significant effect using most of the ways in which
25 we define a significant adverse effect on the

1 environment, that there could be anything left in
2 Santa Monica Bay.

3 And though, once again, you've heard
4 today some suggestions that there is nothing left
5 in the Santa Monica Bay, the very comparison here
6 today was a comparison to a place like Morro Bay
7 and Moss Landing, which is an entirely different
8 habitat, an entirely different type of expectation
9 of the density and the frequency you would expect
10 with larval species.

11 Another problem, and it's true the Santa
12 Monica Bay is definitely not what it was before we
13 humans came here, is the fact that there's a
14 tremendous amount of pollution and a tremendous
15 amount of industry and other things that have
16 affected the bottom and the quality of the waters.

17 And certainly a contribution within all
18 of this has to be the cooling systems. But the
19 point being here that this cooling system, at 208
20 million gallons a day, and the total permitted
21 capacity for that entire time has not made this
22 place a desert, so to speak.

23 In fact, I will point out that just two
24 months ago one of these intervenors, Santa Monica
25 Baykeepers, ran a wonderful, one-page ad in Sports

1 Illustrated saying, look what we've accomplished
2 in Santa Monica Bay. Look how it has recovered.
3 Look how healthy it is. And this is a product of
4 the quality work we're doing. It astounded me
5 that the Santa Monica Baykeepers ran an ad in
6 Sports Illustrated about Santa Monica Bay at the
7 same time that they've been intervening in here
8 trying to suggest that it's a desert and that it's
9 a hell and that everything's falling apart.

10 And I don't doubt that their intentions
11 are well intended; in fact, they're doing very
12 good work. And we think that one of the most
13 important things they're accomplishing is the
14 pollution issue within the Bay.

15 So, it's all these reasons that the real
16 big picture is that you're not dealing with a
17 plant that has significant entrainment effects;
18 you're not dealing with a Moss Landing or a Morro
19 Bay.

20 You're also not dealing with a Moss
21 Landing or a Morro Bay in the sense that the Water
22 Board here, unlike Moss Landing and Morro Bay, did
23 not require a 316(b) study; did not require a new
24 NPDES permit; and is completely acceptable to us
25 operating a new facility.

1 And that letter that has been quoted
2 several times is taken incredibly out of context.
3 When you read that L.A. Regional Water Quality
4 Control Board letter completely, you see very
5 clearly that they've indicated they don't have a
6 problem with us building this project on that
7 NPDES permit at all.

8 Then, we leave behind the CEQA issue,
9 and get that myth and that noise filtered out,
10 we've got another couple very important things to
11 deal with. And one of those in particular
12 involves, well, don't you need a study anyway; or
13 why can't you do one. And it's a good question.
14 Why have we, for three and a half years, not done
15 a study. Lord knows we could have finished it;
16 had the results and submitted them.

17 And as we've pointed out several times,
18 one particular reason we haven't a study is
19 because we think that the agency that needs to
20 have us do a study has to be the Los Angeles Area
21 Regional Water Quality Control Board.

22 We've looked carefully at what went on
23 in Huntington Beach. We've looked carefully, and
24 we've asked questions, and we believe that if we
25 do a study directed by the Energy Commission

1 Staff, for all their well intentions, it's not
2 going to be accepted by any of the regulators in
3 any of the general biological scientist population
4 down here in the southern California bight.

5 And that's one particular reason we have
6 no desire to go out and do a study that would
7 unnecessarily kill fish and larvae and drag
8 devices across the bottom and spend a lot of money
9 for something to satisfy what we truly felt was
10 scientific curiosity being driven by a very
11 different viewpoint that the staff biologists have
12 on this project. That's one particular reason.

13 And another is the simple fact that we
14 know we're going to be doing one. That the new
15 phase two regulations are going to be making some
16 tough decisions, and not just for us, and not just
17 for intake number one, but for both intakes at our
18 project, for Scattergood, for Moss Landing, for
19 Morro Bay, for all the projects on the California
20 coast. About 540 plants in the United States are
21 going to have to reduce entrainment or impingement
22 to a certain percentage below their unmitigated
23 levels or they're going to have to reduce flows,
24 or they're going to have to do habitat
25 enhancement.

1 We disagree entirely with the idea that
2 we can say right now that habitat enhancement
3 won't be allowed, but if that's what happens,
4 that's still something we know we have to deal
5 with in the future. And the responsible agency
6 for that is the Water Board.

7 And that leads me into this discussion
8 about who is and how does the Water Board and the
9 Energy Commission get along, and this idea that
10 somehow the Energy Commission is shirking its
11 authority by referencing to the Water Board's
12 process.

13 In fact, it's very clear that the Energy
14 Commission does not permit intake structures. It
15 does not decide how they're going to be designed
16 or operated. Clearly under the California
17 Environmental Quality Act, the Energy Commission
18 has the ability to conclude they want to further
19 constrain the operation and intake structure if it
20 has come under their jurisdiction.

21 But pretty much, and if you look at
22 exactly what happened in Moss Landing and the
23 struggles that you're having in Morro Bay deal
24 with the fact that the Water Board is the
25 responsible agency for the Clean Water Act, the

1 Porter-Cologne Act, and has to really make the
2 decision about what's going to be built there.
3 And no matter what the Energy Commission wants to
4 say, if the Water Board won't let you run it that
5 way or operate it that way, you can't make them.
6 And in that sense they clearly have an authority,
7 to some extent, over what the Energy Commission
8 can have.

9 Clearly the one way the Energy
10 Commission can have more authority is if they
11 concluded there were significant effects, they
12 disagreed with the Water Board's assessment,
13 because the Water Board is the state agency that
14 has to satisfy CEQA every time it issues an NPDES
15 permit, so they would have to disagree with the
16 Water Board, in theory, to order a higher
17 constraint or more mitigation than the Water Board
18 was requiring under their CEQA analysis for the
19 permitting of a power plant.

20 And once again, I take you back to the
21 big picture here, however, is there is not an
22 issue about entrainment and there's not an issue
23 about significant effects caused by this intake
24 structure as part of this project. None. And
25 that's if, I tell you, we calculated at 208

1 million gallons a day and we count all of that
2 flow as an impact. I'm not talking about playing
3 baseline numbers the way we did the flow cap and
4 conceding to the arguments of staff about what
5 ought to be, the way we calculated. I'm saying
6 all 208 million gallons per day. That's what all
7 those studies use. They don't use, well, what was
8 your five-year average, what are your current
9 flows. They use 208 million gallons per day. And
10 they conclude no significant effects.

11 So, the Water Board clearly has some
12 authority and clearly the Energy Commission and
13 all the Water Boards, depending on what project
14 you're dealing with, you need to work with them.
15 And that, in Morro Bay, for instance, has been a
16 difficult task, and it's continuing to be
17 something that we recommend and we've recommended
18 in the past, you really ought to have a memorandum
19 of understanding or some type of agreed-upon
20 process and relationship; especially if you know
21 you have a repowering coming. It's a great time,
22 before the repowering gets there, to make an
23 agreement on a process with the Water Board.

24 The Coastal Commission. The California
25 Coastal Commission is an agency that clearly has

1 some authority. But the idea that there's some
2 vagueness or some ambiguity about what
3 responsibilities the California Coastal Commission
4 has in the permitting of a thermal power plant is
5 nonsensical. There is really no ambiguity at all
6 in the current statutes about what the
7 responsibilities of the California Coastal
8 Commission are.

9 Now, I articulated these at the Morro
10 Bay hearing, and I'm going to state them again
11 very succinctly. Section 30143 recognizes two
12 ways that the Coastal Commission can participate
13 in and AFC process, and, in fact, in the CEC's
14 permitting process. And other than that, the
15 Coastal Act is very clear they don't have any
16 permitting authority. They have none.

17 It's given to the Energy Commission,
18 with the exception of two things. It says that in
19 the NOI phase, that's still in the statutes,
20 there's no ambiguity here, it says in the NOI they
21 can submit a particular report. And that
22 particular report has to be submitted by a
23 particular deadline early on in the NOI process.
24 And it has to have particular content.

25 And if they do that, then the Energy

1 Commission has to treat that fairly deferentially.
2 They can't just treat it as a normal comment.
3 They have to say this is a determination that
4 we're either going to have to go with or override
5 under certain circumstances. And we have to make
6 a finding to do that.

7 Secondly, it says very clearly, that in
8 the AFC process, which in the NOI followed by AFC
9 process, was a later phase, they can participate
10 as a party. It says that very clearly and
11 succinctly. And that has not changed.

12 What has changed is that there's no
13 longer a necessity that we complete an NOI process
14 prior to an AFC process. But that doesn't change
15 what the statutes say. They're still very clear.
16 And this is not an NOI process.

17 As I stated a few weeks ago at the Morro
18 Bay hearing on the Coastal Commission there's
19 still clearly some desire by the Energy Commission
20 to recognize the sister responsibility and the
21 interests that the Coastal Commission has on the
22 coastal resources.

23 But the problem with the idea that
24 you're going to allow the Coastal Commission to
25 issue anything at all that they want to call a

1 report, even if it doesn't meet all the content
2 requirements, and issue it at any point in the
3 process, is going to basically be a turning over
4 of authority to the Coastal Commission when you're
5 not supposed to do that. And that would actually
6 be violative of the statutes.

7 However, we suggested that one thing you
8 could certainly probably get away with doing, and
9 I doubt you're going to get anybody objecting to
10 it, is if you told the Coastal Commission, if you
11 can give us, at the beginning, not prior to
12 evidentiary hearings, but you evaluate the AFC and
13 you tell us very quickly what you think needs to
14 be there, and you meet all the requirements of the
15 report. You tell us what is wrong, and exactly
16 what will satisfy it. So that we can then say
17 okay, we're either going to make that part of the
18 project, and that'll be something that is the
19 dialogue of all the parties through the whole
20 process.

21 But the Coastal Commission doesn't get a
22 chance to come back and redo it. They get that
23 one opportunity to say here's what is wrong and
24 here's exactly what we say will meet the Coastal
25 Act.

1 And then the Energy Commission has a
2 choice of either going along with that or
3 overriding it. And they get a nice long period to
4 decide whether to do one or the other.

5 And this doesn't really, even then we're
6 giving them more than what they would have had
7 under the NOI/AFC process. Because in the NOI/AFC
8 process all they would have had to have submitted
9 their formal report on that you had to give
10 deference to was an NOI. Which wasn't an AFC. It
11 didn't say we're going to put a power plant here;
12 it's going to have exactly this size piping and
13 these effects. It was a very big picture
14 description of the power plant, and a lot of focus
15 on the location.

16 And so most of -- clearly intended by
17 the Coastal Act and the Warren Alquist Act, and
18 it's still there, was to intend the Coastal
19 Commission to have a lot of input focused
20 primarily on location. And perhaps a little bit
21 on the design of the plant. And that was it. And
22 from that point on they participated as a party.

23 And it's for that reason that we don't
24 think there's any issue at all with the way that
25 the revised Presiding Member's Proposed Decision

1 handles the Coastal Commission issues.

2 They find that there is no 30143(d)
3 report. And even if there is, they're overriding
4 it. So, it's covering both arguments. But we
5 don't think the override is even necessary,
6 because frankly, there is no 30143(d) report; they
7 don't meet the requirements of 30143, and they
8 don't meet anywhere close to the timing, even if
9 you kind of treat this process as being an NOI.
10 And finally, they don't tell you what to do.

11 And then I'll even point out, the one
12 thing you've heard from the Coastal Commission is
13 we need to have a 316(b) study, oh, a 316(b)-like
14 study, oh, an entrainment study. It's a dialogue
15 that's changed but there's never been any
16 explanation of exactly how an entrainment study is
17 going to be something that meets the Coastal Act.
18 They just said we need a study. And it was
19 something that originally was the same thing the
20 staff was saying, you don't have a 316(b) study.
21 That's something you have to have.

22 And it's turned into an entrainment
23 study. It's turned into some large issue, when,
24 in fact, it's an absolutely unnecessary thing.
25 And it's something that, in and of itself, would

1 have adverse consequences. And it would also
2 result in the spending of money that is
3 unnecessary.

4 And then I would finish with a
5 particular point that after we proposed the flow
6 cap and we had some dialogue with the staff about
7 the flow cap, we realized that we wanted to try to
8 do something else. And we felt there was still
9 something we could do. And we offered in
10 particular good faith to say, let's give a million
11 dollars to some responsible agency that could do
12 something for the Santa Monica Bay with it, as a
13 further enhancement on this project. We felt that
14 was something that we were deserving of.

15 We never intended that to be some kind
16 of mitigation payment. Because as I've said, this
17 project has no significant effects on entrainment,
18 impingement or thermal effects. It has no
19 significant effects on the environment. The
20 intake structure has none. This is purely an
21 enhancement that we are offering and there are no
22 strings attached to it.

23 And, in fact, the Energy Commission
24 rewrote our proposed condition slightly to try to
25 turn it into a little more particular. They said,

1 well, we want a report from you of what you do
2 with it, and we want copies of any studies. It
3 was never intended to fund a study. And, indeed,
4 we intend to do a study, as ordered by the Water
5 Board, pursuant to phase two regulations, and
6 complete their obligations.

7 And I'd finally finish with you've heard
8 an incredible amount of dialogue today about
9 biology. And to the extent that you've ever had
10 to go through this process before, you would have
11 noticed something you didn't hear. You heard
12 almost no other issues being brought up. And
13 that's because in the three and a half year
14 history of this project there's been an incredible
15 amount of hard work by staff and by us, by all the
16 intervenors, the residents, the cities, to reach
17 agreement on everything else.

18 In other words, this project in this
19 three and a half years has culminated at this
20 point in a revised Presiding Member's Proposed
21 Decision that has only one hotly contested issue;
22 only one contested issue. Everything else is in
23 total harmony.

24 And this project, in and of itself, as
25 we pointed out three and a half years ago when we

1 submitted it, continues to be an incredibly
2 intelligent project. It uses all the existing
3 resources that are already at the facility; it
4 provides all sorts of other enhancements,
5 including the visual concessions that we made to
6 improve the looks of it to the Coastal
7 Commission's desires. It includes the fact that
8 we're removing the truck trips in of ammonia.
9 We're going to bring ammonia in via pipeline which
10 greatly reduces a lot of hazard issues.

11 It improves noise and light conditions
12 at the existing facility. It has resulted in
13 landscaping obligations and an incredibly highly
14 worked on and thought out, and something that I
15 would tell you right now, there's a lot of people
16 that are still nervous about, what we're going to
17 do on the tank farm and what it's going to be like
18 afterwards, but still they're comfortable that
19 they got something in place that's going to allow
20 them to enforce it, particularly using the
21 compliance project manager at the Energy
22 Commission.

23 This is a project with a tremendous
24 amount of harmony here. So don't let these
25 issues, this biological issue confuse you into

1 thinking that this is a contested project. It has
2 a very tough issue. And it has several
3 complexities, but those complexities are
4 distracting from the key point, which is that this
5 is an intake structure that's been operating for
6 50 years. It's been studied heavily. It's
7 permitted and doesn't have any significant adverse
8 effects on the environment.

9 And that really should be your driving
10 point in your comfortability of permitting this
11 project.

12 I have some comments on Bio-3 and Bio-4
13 that we can do in our written just as easily as we
14 can do them here. I'd much rather take your
15 comments and questions on these tough issues.

16 PRESIDING MEMBER KEESE: Okay, I have a
17 few questions. And probably Commissioner Boyd may
18 have some, too. So why don't we see where we go.

19 Are you going to be doing a 316(b) study
20 in conjunction with what I assume is in 2005?

21 MR. MCKINSEY: We've already begun
22 communication with the Water Board. The Water
23 Board is actually currently involved in the Haynes
24 Generating Station, the repowering that LADWP is
25 doing and staying under the Energy Commission's

1 authority through some methods of basically have
2 less than 50 megawatts.

3 They are in a dialogue right now with
4 the Water Board over a similar issue. And indeed,
5 the Scattergood context. Our goal is to do a
6 316(b) study that's combined for both Scattergood
7 and for El Segundo as part of the phase two
8 regulations.

9 PRESIDING MEMBER KEESE: Are those both
10 your projects?

11 MR. McKINSEY: No, Scattergood is LADWP.
12 But, they're considered the same source point.

13 PRESIDING MEMBER KEESE: Okay. Are
14 there other source points? I believe that --

15 MR. McKINSEY: Yeah, other --

16 PRESIDING MEMBER KEESE: -- when the
17 Coastal Commission suggested a 316(b)-like study,
18 they incorporated quite a few point sources.

19 MR. McKINSEY: Well, in terms of impact
20 points on the Bay, there's the Redondo Beach
21 Facility to the south of us, and then there's
22 Scattergood and El Segundo. And that makes up the
23 area.

24 We really couldn't combine with Redondo
25 Beach for a lot of reasons. We would probably do

1 one that is just here; in theory we might be able
2 to, but it's certainly --

3 PRESIDING MEMBER KEESE: They're not due
4 up in 2005 --

5 MR. MCKINSEY: No, I believe they all
6 are in 2005.

7 PRESIDING MEMBER KEESE: Oh.

8 MR. MCKINSEY: They're all pretty much
9 in synch. So that's another reason why --

10 PRESIDING MEMBER KEESE: So there's
11 going to be a lot of information coming out in
12 that --

13 MR. MCKINSEY: And the Water Board's got
14 a lot of 316(b) work to do. And Tony Rizk, Dr.
15 Rizk is becoming the person who is running that
16 show for the Water Board.

17 PRESIDING MEMBER KEESE: Okay, and is
18 June 2005 the timing on that? I mean I understand
19 you got your --

20 MR. MCKINSEY: Well, our goal is to do
21 it as soon as --

22 PRESIDING MEMBER KEESE: -- the last
23 permit in June of 2000.

24 MR. MCKINSEY: The renewal has to occur
25 by then. We don't know how the Water Board is

1 going to approach this. They're going to want to
2 decide upon a protocol, and I don't think they
3 want to rush that, either.

4 One of the concerns we have with Bio-4
5 is that the timing, the first six words of Bio-4,
6 is that we clearly have to comply with the phase
7 two regs, and there are deadlines in the phase two
8 regulations. But ultimately they could take quite
9 awhile from the time we start to the time we
10 finished.

11 And that, of course, as has been pointed
12 out, could be modified by litigation. It could
13 eviscerate the offsite enhancement, for instance.
14 But if we have offsite enhancement, that could
15 actually take, from the time it's finally decided
16 what we're going to do, five or ten years to
17 complete and certify.

18 Likewise, if they order us to install
19 traveling screens, the idea that's being used in
20 Florida, the fine-mesh traveling screens that grab
21 the larvae as they're coming in and dump them into
22 another water source where they go back out,
23 that's something clearly has to be put in in a
24 pilot. Figure out all its kinks. Then make sure
25 it's working in all of them.

1 So, one of the things we're concerned
2 about is how long it's going to take to completely
3 be able to finally say, okay, we're finally done.
4 We've met the requirements of the phase two regs.
5 That's one of the reasons why we have the flow cap
6 in place. It eviscerates this argument that there
7 could be -- it allows you to say, well, there's no
8 CEQA argument, even using the staff's perception,
9 except for this highly contested baseline issue.
10 Because of the fact that the flow cap is in place
11 up until the time that you've completed all this
12 work with the regulations.

13 PRESIDING MEMBER KEESE: Okay. I don't
14 know if you're prepared to answer this question or
15 not. Do you have plans for construction of this
16 project?

17 MR. MCKINSEY: I'll tell you one of the
18 things that I've got quite a few of my client
19 representatives here who are literally chomping at
20 the bit. They've been trying desperately, keep
21 asking me when are we getting this decision.

22 They've been in discussions on the
23 financing on the contract side, and one of the
24 things they've been told over and over again is we
25 need that final decision so that we can really say

1 okay, now we've got something specific.

2 And their goal is to immediately pursue
3 and accomplish that. This facility has a lot of
4 reasons why it's got a lot of economic promise.
5 And it's an existing facility where we have so
6 many of the resources there.

7 We also need to start it right away
8 because it's a very long construction process.
9 But at this point all we have is our official
10 online date of sometime in 2008. That certainly
11 hasn't changed. And our goal is to proceed as
12 quickly as we can.

13 That's driven in part by when we get the
14 decision. And as one of my comments will
15 indicate, you know, what the conditions say that
16 could cause problems for us in the world of
17 financing. But, nevertheless, there's not any
18 hesitancy on our part.

19 PRESIDING MEMBER KEESE: Do you have
20 anybody who would be willing to state that on the
21 record on behalf of the company, of the applicant?

22 MR. MCKINSEY: Well, I think I just did.
23 I could have somebody else state it on the record.

24 PRESIDING MEMBER KEESE: I think that
25 either today or next Wednesday we would like to

1 hear a comment as to the firmness of plans to move
2 forward.

3 MR. MCKINSEY: Okay. We can provide
4 that.

5 PRESIDING MEMBER KEESE: That's my
6 questions. Mr. Boyd.

7 COMMISSIONER BOYD: Well, as I'm the new
8 person here, in reviewing all the record and all
9 the facts, I mean one comes away from studying all
10 the record of the past several years with a
11 realization there's an awful lot of pressure on
12 this Bay in terms of the demand for intake water
13 for various purposes.

14 And it does get one thinking about the
15 representativeness of the studies; and how long
16 those representatives last. Things change. I've
17 been living in a world for a long time now with
18 the ever-accelerating pace of everything. Things
19 change a lot.

20 So, I'm concerned about how fast they
21 have changed, how often you need to take an
22 assessment. And with respect to a CEQA
23 responsibility, the fact that this is a Bay that
24 was wounded, that is healing, which I guess some
25 notice is being taken of a lot of good work. But,

1 you don't just stand still. You try to make
2 incremental progress. I mean I spent 20 years of
3 my life in the air quality business, and I know
4 you look for increments, you look for small
5 increments, and over time you actually make some
6 success.

7 So, I'm struggling with a kind of stuck-
8 in-time view of things, and that we'll take care
9 of it in the future versus a potential ability to
10 deal with something a little more certainty right
11 now. So this long circle back to this idea of
12 representativeness.

13 MR. MCKINSEY: I'd like to comment on
14 that. In particular, most biologists, and this is
15 in our record, will tell you that there's a
16 cyclical behavior, and indeed a lot of the
17 behavior of aquatic populations is something we
18 certainly don't have formulas for, and we don't
19 have to a precision.

20 So that anytime you take a sample, it's
21 literally a single sample point in a spectrum of
22 time. And one of the things that is starting to
23 emerge, it's one of the things we presented quite
24 a bit of information on at the evidentiary
25 hearings a year ago, is a cyclical behavior in

1 different species groups depending on temperature
2 trends. There's a couple of different ways in
3 which they describe the long term on the order of
4 10- to 40-year temperature trends that can drive
5 species populations up and down.

6 And such that in some ways the trend
7 right now is looking like it looked about 40 years
8 ago. And in other ways it's looking like it
9 looked 20 years ago.

10 One of the key pieces of information we
11 have on Santa Monica Bay in particular, but you
12 should understand this isn't an enclosed
13 embayment; it's something that's literally having
14 larvae and eggs being flushed through it
15 continuously. Some are hatched here, some are
16 hatched -- but it's a movement of current going
17 down the southern California bight, is that we've
18 had this study going on continuously, the Van Tuna
19 research study south of us here in Santa Monica
20 Bay that gives us an annual snapshot. And is one
21 of the things we incorporated in the study we
22 submitted back in, near the end of 2001 or
23 beginning of 2002, the so-called King Harbor
24 study, in which we did two things.

25 We used that continuous time to say what

1 has really been changing for the last 20 years.
2 And to that extent, what do we need to do if we
3 use that data then, or the new data, because King
4 Harbor gives us the data for the current years, to
5 attempt to see what's changed.

6 And that study and that information came
7 to the same conclusions. That we're comfortable
8 there aren't any significant effects.

9 The idea that we don't know what's going
10 on in Santa Monica Bay is not accurate. There's
11 certainly a lot of things we totally don't
12 understand about the dynamics of populations, but
13 we have a tremendous amount of indication. This
14 is a very studied Bay particularly because it has
15 groups and research foundations and colleges and
16 universities that are carrying out ongoing and
17 continuous research, data collection and analysis
18 on it, because it's adjacent to such a large
19 population center that's so interested in it.

20 And so if you look at that original
21 study from 20 years ago, in and of itself you get
22 nervous. Well, hey, it was 20 years ago, what has
23 changed. And that's something we looked at
24 carefully with the data before we even went to the
25 Energy Commission and said, hey, here's what we

1 have.

2 It's something we also looked at when we
3 used the King Harbor data and the Van Tuna
4 Research Group's 20-year continuous data set, to
5 once again try to take a good evaluation.
6 Scattergood performs another study that I haven't
7 mentioned that's in the record. It performed an
8 update study, for Scattergood purposes, in 1997.
9 They didn't collect new larval sample, which means
10 that it gets attacked with the same, well, it's 20
11 years away, 20 years ago even if it wasn't 50
12 miles away.

13 But it's interesting that the original
14 Scattergood study, which was conducted right here,
15 and their update both reached the same conclusion
16 we got with the one from 20 years ago and 50 miles
17 away. And the one we did with Van Tuna. The
18 larval concentrations in the water body out where
19 our intake structures are, are this density. And
20 there's this much out there. And the net effect
21 is that the effect is insignificant.

22 And on Scattergood that involved either
23 4- or 600-million, either two or three times more
24 flow rate than our facility. And in fact, we have
25 another cooling system in our facility that has

1 double the flow rate, 400 million gallons per day.
2 And that one is allowed by the Water Board, and
3 has been found by these same studies to be
4 insignificant.

5 And it's the smaller one, the 208
6 million gallon per day one that is part of this
7 facility and this project.

8 So we don't have those concerns for all
9 these reasons. And that's what I was getting at,
10 coming in where you're at, and even just trying to
11 keep up with all this, I'm amazed, myself, at how
12 much information has been in and out of this and
13 dumped into this record over three and a half
14 years that has gotten lost in a lot of very
15 focused efforts between staff and applicant and
16 other parties to try to reach agreement. And that
17 we've introduced other conditions to do other
18 things, and to offer more concessions in
19 agreement.

20 But the big picture and one of our
21 biggest ideological voids continues to be that we
22 believe all this evidence is incontrovertible that
23 there's an insignificant effect. There's no doubt
24 about that, even today. And the staff believes
25 that all that evidence is not reliable and not

1 usable, and therefore we need a study to know what
2 the effects are, because they could be
3 significant.

4 COMMISSIONER BOYD: Okay, let me change
5 to the flow cap that you say you volunteered. You
6 volunteered a seasonal flow cap. And there's been
7 a lot of debate today, or discussion, let's just
8 say, of a monthly flow cap is really necessary to
9 be meaningful. What do you have to say to that?

10 MR. MCKINSEY: We actually disagree
11 entirely with that idea. In fact, I'll go back to
12 one of my points that if we're going to go from an
13 annual to a monthly, why not go all the way to
14 daily. And, in fact, we have a daily limit, 208
15 million gallons per day, and 400-and-something on
16 the other intake structure. We have daily limits
17 at the facility.

18 And we now are talking about having an
19 annual limit at the other end of the time
20 spectrum. So the idea is do we need also to have
21 a monthly limit. And if we did, what should it
22 be.

23 The problem with taking a monthly cap
24 and the reason why we said, well, we have a big
25 problem with it, we can offer it during these

1 months that are some of the months that have a lot
2 of species of concern, because those are free
3 months when we're unlikely to be constrained,
4 because those are the three months that indeed,
5 that's no coincidence, they're low power
6 operations.

7 It was three months when we could offer
8 that as a concession to the staff because it's
9 unlikely that that's going to deter this project
10 from operating. But it's even possible that in
11 those months, February, March and April, that we
12 could be constrained from operating, because those
13 are tight numbers. And that's the whole point of
14 having a daily limit that allows us to use the
15 annual number in a wise way. In fact, we don't
16 have -- limit, we're allowed to run at 208 million
17 gallons per day.

18 Putting it at any other period of the
19 year, using some kind of baseline numbers, is
20 something that's going to prevent this project
21 from meeting the electricity demand of the State
22 of California. Not just this project, the
23 facility. Because you get very small numbers. So
24 if that's a period of time when this project is
25 demanded, we'd be up, you know, in ten days of the

1 month we'd be done. And the other 20 days we'd
2 say, sorry, we can't operate. And there would be
3 no good reason for that.

4 And the reason we concluded that is
5 we've got a daily limit; we're talking about an
6 annual number that's in place until we have our
7 new compliance with the new regulations; and
8 there's no need to do something in the middle of
9 that. Because both of those are founded upon
10 CEQA. And one's founded upon a CEQA argument we
11 disagree with, but we're willing to live with in a
12 short term. And the other one is founded on the
13 Water Board and their permitting and our current
14 NPDES permit.

15 COMMISSIONER BOYD: You didn't venture
16 into baseline, even though the staff did a lot.

17 MR. MCKINSEY: Well, our arguments
18 remain the same. We were asked a month ago what
19 happens if we go from 137 to 126. And we pointed
20 out that as it stands now, the 137 is going to
21 constrain the operation of units 3 and 4.

22 So then the question is, because
23 clearly, you know, if we do the math, even do 208
24 million gallons per day for the new facility, that
25 would use up about 75 billion gallons. And I did

1 the description a month ago, the bucket of our
2 137- or 126-million-gallon bucket of water.

3 We have to pretty much say, well, here's
4 the 208 times 365 days, that's 75 billion for our
5 new facility which is going to be the efficient
6 one that's going to run an awful lot. And then
7 units 3 and 4 are likely going to become peakers.
8 We don't know that for a fact, but they're going
9 to be asked to perform.

10 So if we go to 126 we're left with about
11 50 billion gallons in that bucket of water. And
12 if you just look at the idling levels, when we've
13 had outages and everything else, we're going to
14 use up most of that.

15 We end up with about maybe 10 billion
16 gallons of water to try to maybe -- and we don't
17 know what those numbers means, a lot of guesswork.
18 But very little.

19 We go to 139, we've got about 20 billion
20 gallons of water to run at anything, to actually
21 supply electricity, and still very constraining.
22 And it's a huge concession, and we pointed that
23 out when we made it, to say we're taking on this
24 flow cap, and if we can't come out of the Water
25 Board and we don't follow through with that, and

1 once we completed that we're escaping it. But,
2 until then we're really tying our hands in our
3 ability to operate units 3 and 4, because they
4 take twice the water volume. They take 408
5 million gallons per day to operate at their full
6 power level, so they eat up that bucket very
7 quickly.

8 And so going to 126 is very problematic
9 for us. But, as I pointed out, one of our goals
10 is to complete the obligations under the Water
11 Board, thus lifting the flow cap and allowing us
12 to then no longer have that constraint.

13 And that's our primary means. And we're
14 nervous about the flow cap. We're even more
15 scared and nervous about it using 126.

16 And we don't agree with the baseline
17 numbers. I think that while we've given the
18 concession to the staff, we can't concede to the
19 126 number. It basically conveniently, by using a
20 five-year window prior to the filing, reaches back
21 to two years that were prior to when we owned it,
22 were prior to deregulation, and the facility was
23 very idle. And Southern California Edison was not
24 operating it.

25 You can take all sorts of snapshots of

1 the years since we acquired it in the
2 deregulation. And the facility will come up with
3 very similar numbers. Can come up with 137, 139,
4 138.1. It's amazing how pretty much that 139
5 number is a much more representative and
6 characteristic number for the flow under the model
7 of how the facility is operating in the modern
8 era. And the 126 includes two years that the
9 numbers were very low, and they just drag that
10 down because they're characteristic of an earlier
11 era.

12 COMMISSIONER BOYD: Okay, thank you.

13 I'm going to make a statement now that 's not
14 really a question to you, but it's -- since many
15 speakers have broached the issue of what the law
16 says, and how the law could be interpreted with
17 regard to the responsibilities of the Coastal
18 Commission, the NOI versus AFC, and so on and so
19 forth. There were some very affirmative positive
20 statements made here earlier today about the way
21 the law's interpreted. You had your views upon
22 the law; out staff has, on the law.

23 I want to make a comment to the
24 audience, and that is I've sat in rooms full of
25 lawyers in the past two or three weeks. Many of

1 them with no axe to grind, and not for the
2 applicant, et cetera.

3 With varying positions, I mean different
4 positions, to a person, on how you read the law,
5 and what maybe the Legislature did or didn't do,
6 what the intent was or wasn't, and how they may or
7 may not have messed up something when they
8 modified the law. So on and so forth.

9 I just want to let the audience know
10 that this, you know, from my perspective this is
11 not a simple matter. I've had lawyers say it's
12 51/49 this way; and others say, no, it's 51/49 the
13 other way. So I just want people out there to see
14 that what we have to wrestle with is not a black-
15 and-white situation. There's a lot of agreement.

16 I do want to say with regard to working
17 with sister agencies, and deference to other
18 agencies, that most of you don't know me, but I've
19 been in government for almost four decades, and
20 I'm very high on government agencies working
21 together. That's what the taxpayers expect, et
22 cetera, et cetera.

23 And so, you know, we will wrestle, I
24 will work very hard to see that we work together.
25 I wasn't pleased with the threats of the Coastal

1 Commission this morning to go the Legislature to
2 rectify the situation. But I guess maybe they
3 felt compelled to say that today. They didn't say
4 it in their letter. They did say we all need more
5 time to look at this.

6 I would say that I think -- I know the
7 Chairman and I are, as a result of the long Morro
8 Bay hearing that you attended, and that references
9 all through that as to legal positions of people,
10 but overtures at the end that come, we can work
11 this out together. I take that at face value, and
12 I do think we do not want to go over the precipice
13 together. I don't think the Coastal Commission
14 wants to go to the Legislature to get their
15 appendix out, and maybe lose their lung --
16 process, or vice versa. None of us likes that
17 kind of an approach.

18 So, I'm hopeful we can work this out
19 over the long haul, or maybe over the short haul
20 in terms of reaching some agreements. Overtures
21 were made and I think -- I know the Chairman and I
22 have talked about the need to resolve that, and
23 even a gentleman this morning broached that.

24 So, hopefully things like that will get
25 settled and solved in not only this case, but

1 other cases in the future. Some that are pending;
2 some that may resolve. Because I suspect many
3 people will want to repower over time, power
4 plants. Once we get the energy market
5 straightened out, get the mortgage paid off that
6 we took out to save ourselves from, in my opinion,
7 the lights going out. It's totally screwed up the
8 economy.

9 And remove the chilling effect of a lot
10 of other things. There will be new incentive for
11 efficiency in repowering, what-have-you, and, you
12 know, there are lots of coastal plants that are
13 going to have to deal with this issue.

14 So, we have to take a very long haul.
15 People in individual communities have to look out
16 for the welfare of their community. We have to
17 look out for the welfare of those communities, as
18 well as the needs of the state overall.

19 So, I'm just welcoming you all to the
20 fishbowl in which we find ourselves. Thank you
21 for your testimony.

22 PRESIDING MEMBER KEESE: Thank you for
23 your input. We look forward to all of the written
24 comments so that we can wrestle with this issue
25 again next Wednesday when it's scheduled to come

1 before the full Commission.

2 Thank you, everybody.

3 (Whereupon, at 5:10 p.m., the Committee
4 Hearing was adjourned.)

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CERTIFICATE OF REPORTER

I, JAMES RAMOS, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee Conference; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said conference, nor in any way interested in outcome of said conference.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of May, 2004.

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