LIVINGSTON & MATTESICH

JOHN MCKINSEY
ATTORNEY AT LAW

August 23, 2004

VIA HAND DELIVERY

William J. Keese, Chairman, Presiding Member
James Boyd, Commissioner, Associate Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

LIVINGSTON & MATTESICH
LAW CORPORATION
1201 K STREET, SUITE 1100
SACRAMENTO, CA 958[illegible]-3938
FACSIMILE: (916) 448-[illegible]09
E-MAIL: JMCKINSEY@LVCLAW.NET
TELEPHONE: (916) 44-[illegible]11 EXT. 3032

Re: El Segundo Power Redevelopment (00 AFC-14)
Request for Final Decision on the
Revised Presiding Member's Proposed Decision

Dear Chairman Keese and Commissioner Boyd:

On April 16, 2004, this Committee released a Revised Presiding Member's Proposed Decision ("RPMPD") on the El Segundo Power Redevelopment ("ESPR") project's Application for Certification ("AFC"). Though the RPMPD was scheduled for a final vote by the entire Commission on May 5, 2004, the agenda item was removed, with no explanation, from the calendar the day prior (May 4th). The RPMPD is a complete and accurate proposed decision; one that complies with all laws, ordinances, regulations, and standards, and one was acceptable to the applicant, El Segundo Power II LLC ("ESP II") with a few corrections and changes. Nonetheless, no action has been taken to complete the AFC process – specifically, the RPMPD has yet to be approved by the full Commission.

This submittal responds to the perceived Coastal Commission jurisdictional issue that ESP II believes is at the root of the delay. In that regard, this letter provides a clear path to follow so that the Committee may rapidly complete the approval of ESPR. It is important to note that ESP II remains committed to obtaining this permit, which will permit the construction of valuable, additional and efficient electric generation in the Los Angeles load center with minimal environmental effects. Moreover, ESP II offers herein to add even more substance to Condition of Certification, Biology 4 ("BIO-4") in an effort to help this process come to a swift and agreeable resolution.

Further, ESP II provides comments made in the Morro Bay Power Plant proceeding ("Morro Bay"), which resoundingly establishes why the decision in Morro Bay clearly defies the Public Resources Code. Even more telling, is the enclosed opinion letter by the Legislative Counsel of California, which concludes that Public Resources Code section 30413(d) does not apply in AFC-only proceedings; a conclusion ESP II has asserted many times over.

ESP II also submitted a set of proposed changes on May 3, 2004 that are attached herein. The changes were to BIO-2 and BIO-3 continue to be necessary for a sound decision and should be integrated into the final decision. At the April 29, 2004 Committee Workshop on the RPMPD, parties also agreed to add a school fee condition as SOCIO-1 and to leave out "excursion" language regarding NOx from Air Quality conditions. In addition to those changes discussed and/or agreed to by the parties in April and May, ESP II, below, suggests changes to BIO-4 that provide further enhancements to the project.

ADDITIONAL ENHANCEMENTS PROPOSED IN BIO-4

While it is clear that the California Energy Commission ("CEC") is not compelled to incorporate "requirements" suggested by the Coastal Commission, the additional enhancements to BIO-4, proposed herein, go further towards meeting Coastal Commission comments. Moreover, the changes to BIO-4 raise ESP II's future obligations to virtually equal what the CEC Staff has sought all along. In summary, these enhancements include:

1. A firm schedule for the study to be conducted under the new NPDES regulations (as set forth in section 316(b) of the Clean Water Act);
2. Submittal of money in trust for use in reducing entrainment effects;
3. Flow limits in place until study and mitigation or enhancement is completed.

To elaborate on and clarify these proposed enhancements, ESP II would place $7 Million in trust for the Los Angeles Regional Water Quality Control Board's ("LARWQCB") ordered entrainment reducing technology or operational controls, and/or restoration measures. Further, should the total required to meet LARWQCB directives not utilize the full $7 Million, the project owner will be required to submit the remaining funds to the Santa Monica Bay Restoration Commission or another

suitable organization focused on Santa Monica Bay resources. This $7 Million commitment represents a fair estimate of the expected compliance costs under the new 316(b) regulations for ESGS.

Additionally, ESP II proposes a firm and specific schedule for the study and resulting compliance work. The schedule, included in the attached proposed, revised BIO-4, cites events or steps required by the new 316(b) regulation. ESP II has also revised language to require ESP II to work with the Coastal Commission, in addition to the CEC, to develop the study protocol.

A review of the record will show that these changes essentially address specifically what CEC staff has sought from the applicant in this proceeding. ESP II makes these commitments based upon the expected compliance process under the new 316(b) regulations as they apply to ESGS. Moreover, the owners of ESGS are preparing an application at this time to begin the process of applying the new regulation requirements to ESGS.

In addition to addressing CEC Staff's recommended requirements, the proposed changes to BIO-4 bring the project closer to addressing all that the Coastal Commission sought as well. Though ESP II continues to heavily oppose the Hyperion wastewater cooling concept and permanent flow caps, these BIO-4 additions provide a specific schedule for the 316(b) study and require payment of funds well in advance of any potential increase in flow as a result of ESPR. Even better, these funds are committed even if the study and resultant entrainment reductions do not reach the estimated cost level.

If this Committee were to accept BIO-4 as proposed herein, the only remaining Coastal Commission issue is the timing of the study. To that end, below ESP II reiterates why performing a pre-certification study is neither merited nor required. Nevertheless, the BIO-4 enhancements essentially address the Coastal Commission issue, as the proposed schedule would require the study be completed before any new generation becomes operational and available to sustain needed demand in the Los Angeles load center to be served by ESP II. Moreover, the funds are specifically required to be submitted half way through the construction process. Given the excellent understanding of the effects of intake #1, and the fact that the Coastal Commission has no legal standing to require a pre-certification study, these BIO-4 enhancements are more than a fair concession to the wishes of the Coastal

Commission - such that the CEC should feel very comfortable with rapidly completing the approval process of ESPR's AFC.

NO REASON OR LAW TO REQUIRE A PRE-CERTIFICATION 316(B) STUDY

With ESP II's proposed enhancements to BIO-4, there is not a single reason left to delay permitting this project. Despite the rhetoric that loudly accuses otherwise, ESPR is an excellent example of how California can obtain much needed electric generating capacity by intelligently repowering or adding to existing power plants with no significant adverse effects, as recently studied and reported. ESPR, by virtue of its design, concessions, and location actually provides many benefits and enhancements, while avoiding risk of harm to the aquatic marine environment. Unlike Morro Bay, the permitted once- through cooling system at the El Segundo Generating Station ("ESGS") is located in a vastly more open marine environment and is very well understood. No recertification entrainment study is needed or required because:

1. The LARWQCB does not require the applicant to conduct an additional study;
2. There are numerous studies that conclude and/or support the same finding. That is, 208 MGD through ESGS Intake #1 will not cause significant, adverse harm to the environment;
3. No study or specific information indicates that Intake #1 is causing or can cause significant, adverse harm to the environment. All previous scientific studies would have to be wrong by ***three or four orders of magnitude*** to raise effect levels to a threshold that could even possibly be considered significant;
4. Intake #1 at ESGS has been operating legally according to the laws of California and the United States since 1953 and will not be changed by ESPR.
5. The Coastal Commission cannot compel the CEC to order a study because ESPR is an AFC-only proceeding, clearly obviating any Coastal Commission control under Public Resources Code 30413(d).
6. Even if a 30413(d) report were submitted in this proceeding (which there cannot be under the law), there is no explanation or supporting law that would require an entrainment study be completed for this project immediately prior to the filing of the AFC. Moreover, the Biological conditions of certification in the RPMPD, especially with ESP II's proposed enhancement to BIO-4, meet the pre-certification study request by the Coastal Commission to the ***maximum extent feasible***.

7. Ordering an entrainment study when the LARWQCB does not require one is not only duplicative of the LARWQCB's jurisdiction, it is also wasteful and harmful to the environment. All studies of the aquatic marine environment require killing species and damaging habitat. Conducting an entrainment study prior to certification of this project will cause more harm than good to the environment because the same or similar impacts of a study will be felt yet again when a second study is completed at the LARWQCB's direction. Moreover, no study is required by the responsible agency, the LARWQCB, to construct ESPR. Thus, the study's effects will only accomplish duplication of previous and later studies required by the authoritative agency, the LARWQCB, as well as the unnecessary killing of species and damaging of habitat.

The RPMPD recognizes most, if not all, of these points and is a sound decision. The RPMPD filters through the emotional character of the testimony and rests solidly upon science and law. It rejects the empty and unsupported call for a pre-certification 316(b) study and recognizes the benign character of ESGS Intake #1, as well as the responsibility of the LARWQCB to permit and oversee once-through cooling systems in the Santa Monica Bay.

COASTAL COMMISSION HAS NO FORMAL ROLE OR JURISDICTION IN AFC-ONLY PROCEEDINGS

The CEC has taken a position completely contrary to the law regarding its jurisdiction and authority. Despite the fact that the Public Resources Code very clearly specifies the responsibility of the CEC, the Morro Bay decision violates the Public Resources Code by giving away authority to the Coastal Commission. Put simply, the Morro Bay decision recognizes an illegal doctrine that the CEC must adopt, "findings" made by Coastal Commission in AFC-only proceedings, unless the CEC finds them infeasible or finds them to do greater harm than good. The misconstrued authority for this position is that documents in AFC-only proceedings from the from the Coastal Commission that purport to be pursuant to Public Resources Code section 30413(d) are indeed actually pursuant to section 30413(d). This is patently false, because section 30413(d) is express and clear that it applies only to a Notice of Intention filing. Because the Energy Commission is tasked with making all decisions in AFC-only proceedings not otherwise given to another agency, the Morro Bay decision incorrectly applies the Public Resources Code and reflects and illegal doctrine.

Fortunately, the outcome in the Morro Bay decision would have been the same even if the law had been followed. ESP II carefully explained the problems with the Morro Bay decision to the full Commission in writing prior to and in person at the CEC Special Business Meeting, August 2, 2004, at which Morro Bay was approved. No Commissioners spoke about this issue and Chairman Keese promised several times ESP II that the Morro Bay decision was "not precendential." ESP II understands this promise to mean that the law will be applied correctly in the ESPR proceeding.

To further support ESP II's position and interpretation of the law, attached with this filing is a legal opinion provided to Assemblywoman Patricia C. Bates from the Legislative Counsel of California. This binding, legal opinion reaches the very same and very obvious conclusion regarding the 30413(d) provisions:

> "...the statutory requirement that the Energy Commission include such provisions in its decision on an AFC ... **is inapplicable** in an AFC-only procedure established under Section 25540.6." *(Emphasis added).*

Moreover, the California Legislative Counsel found that:

> "The report made by the Coastal Commission pursuant to subdivision (d) of Section 30413 is **submitted only in response to a NOI**..." *(Emphasis added)*

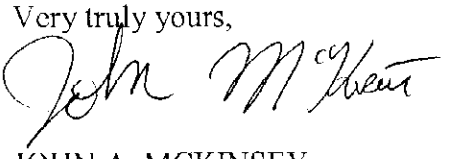
Not only does the Morro Bay decision openly and plainly defy this plain law, it also makes the siting process vastly more complex and grants the Coastal Commission the ability to compel virtually any specific requirement in a power plant that it chooses. The Coastal Commission's participation siting processes to date has been anything but effective. In Morro Bay, the Coastal Commission would have required dry cooling towers when there was not sufficient space and the towers would have clearly caused significant, adverse environmental effects. In the ESPR proceeding, the Coastal Commission has persistently insisted that the waste water cooling proposal is feasible. ESP II does not understand why the CEC has chosen to attempt to illegally burden the siting process with such Coastal Commission authority, when the siting process already appears to be failing to meet the needs of the State of California.

Because the CEC does not have the authority to make such changes to the siting process, ESP II respectfully urges this Committee and the full Commission to correctly apply California Law as its responsibilities demand. ESP II further requests that you retain intact the treatment of Coastal Commission authority as written in the RPMPD for ESPR.

CONCLUSION

For all these reasons, ESP II requests that you rapidly incorporate ESP II's offered enhancements to BIO-4 by publishing a second RPMPD and then move rapidly to a Final Decision. The new RPMPD should also incorporate the few miscellaneous changes agreed to by the parties at the Committee workshop on the RPMPD.

Very truly yours,



JOHN A. MCKINSEY

JAM:kjh

Encs.

cc: Service List
Dan Skopec, Deputy Cabinet Secretary, Governor Schwarzenegger
Joe Desmond, Deputy Secretary of Energy, Resources Agency

STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:	)	Docket No. 00-AFC-14
	)	
Application for Certification of the	)	
EL SEGUNDO POWER PLANT	)	PROOF OF SERVICE
REDEVELOPMENT PROJECT	)	
	)	

DOCKET UNIT:
California Energy Commission
Docket Unit, MS-4
*Attn: Docket No. 00-AFC-014
1516 Ninth Street
Sacramento, CA 95814-5512

I declare that on August 23, 2004, I deposited copies of the attached correspondence regarding ***Request for Final Decision on the Revised Presiding Member's Proposed Decision,*** in the United States mail at Sacramento, California, with first class postage thereon fully prepaid and addressed to the following:

INTERESTED AGENCIES

Johan Galleberg
California Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
jgalleberg@caiso.com

Marc C. Joseph
CURE
Adams, Broadwell, Joseph & Cardoza
651 Gateway Boulevard, Suite 900
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com

John Theodore Yee, P.E.
South Coast Air Quality
Management District
21865 E. Copley Drive
Diamond Bar, CA 91765-4182
Jyee@aqmd.gov

City of El Segundo
Paul Garry, Senior Planner
350 Main Street
El Segundo, CA 90245
pgarry@elsegundo.org

California State Lands Commission
*Attn: Jane Smith
100 Howe Avenue, Suite 100 South
Sacramento CA 95825-8202
smithj@slc.ca.gov

California State Lands Commission
*Attn: Dwight Sanders
100 Howe Ave, Suite 100-South
Sacramento, CA 95825
sanderd@slc.ca.gov

California Coastal Commission
*Attn: Tom Luster
Energy/Ocean Resources
45 Fremont Street, Suite 2000
San Francisco, CA 94105
Tluster@coastal.ca.gov

INTERVENORS

City of Manhattan Beach
Community Development Dept.
*Attn: Laurie Jester, Sr. Planner
1400 Highland Avenue
Manhattan Beach, CA 90266
ljester@ci.manhattan-beach.ca.us

Robert Wadden, City Attorney
City of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266
Rwadden@ci.manhattan-beach.ca.us

Mark D. Hensley, City Attorney
City of El Segundo
350 Main Street
El Segundo, CA 90245
(310) 524-2304
mhensley@bwslaw.com

James M. Hansen
Director of Community, Economic and
Development Services Department
City of El Segundo
350 Main Street
El Segundo, CA 90245-3895

Richard G. Nickelson
4421 Crest Drive
Manhattan Beach, CA 90266
nicknmf@adelphia.net

William C. Reid
Utility Workers Union of America
Local 246
10355 Los Alamitos Blvd.
Los Alamitos, CA 90720
wmreid@earthlink.net

Robert Perkins
Michelle Murphy
4420 The Strand
Manhattan Beach, CA 90266
murphyperkins@cs.com

Lyle & Elsie Cripe
4421 Ocean Drive
Manhattan Beach, CA 90266
cripe@adelphia.net

Santa Monica Baykeeper
Attn: Tracy J. Egoscue
P.O. Box 10096
Marina del Rey, CA 90295
baykeeper@smbaykeeper.org

Heal the Bay
Attn: Dr. Mark Gold
3220 Nebraska Avenue
Santa Monica, CA 90404
Mgold@healthebay.org

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct, and that this declaration is made August 23, 2004, at Sacramento, California.

CHERYL McNEAL