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

Re: El Segundo Power Redevelopment (00 AFC-14)
Applicant's Comments to the Revised
Presiding Members Proposed Decision

Dear Chairman Keese and Commissioner Boyd:

El Segundo Power II LLC ("ESP II") provides the following comments to the Revised Presiding Members Proposed Decision ("RPMPD"). ESP II finds the RPMPD to have resolved most issues raised by all parties regarding the previously released Presiding Members Proposed Decision ("Proposed Decision"). The addition of the new biological condition of certification, BIO-4, is also generally acceptable to ESP II. However, ESP II has several comments regarding the biological conditions, which are significant and require careful consideration by the Committee. Additionally, ESP II provides general comments regarding the biological resources section of the RPMPD that challenges the validity of the false, misleading, and specious criticisms leveled upon it by some parties. Since nearly all currently sitting Commissioners arrived at the Commission long after El Segundo Power Redevelopment ("ESPR") project's permitting process began, it is important to provide a "refresher" on the complete history and character of this project.

The RPMPD proposes a legally solid decision that incorporates the comprehensive and agreed-to conditions that has resulted from more than three (3) years of productive dialogue with all parties to this proceeding. ESPR ("ESPR") is supported in its entirety by the City of El Segundo and supported by all other parties to this proceeding in all areas except biological resources. However, as explained below, the

biological resources section of the proposed decision is fundamentally compliant and sound; the criticisms and attacks upon the RPMPD by several parties are not supported by law or facts. Moreover, the entire thrust of the criticisms and attacks are fueled by myths. Exposing these myths eliminates the criticism and confirms a sound, well written, and legally complete RPMPD.

ESPR incorporates so many enhancements and benefits to the community that it is difficult to state and explain them all. Beyond being a replacement project that improves the efficiency of natural gas consumption and provides new and increased generation, the project also has many environmental and community based positive attributes. Some of these include:

1. Setback of fences, landscaping, and a sea wall along the bike path;
2. Removal of fuel oil storage tanks;
3. Perimeter landscaping to improve the visual character of El Segundo Generating Station ("ESGS");
4. A landscaped berm to further enhance views of ESGS from the south;
5. Reduction of lighting and noise emanating from ESGS;
6. Significant reduction in use of potable water at ESGS;
7. A one million dollar donation to advancing the health of the Santa Monica Bay; and,
8. Elimination of the discharge of sanitary wastes to the Santa Monica Bay from ESGS.

Taken collectively, these and other more positive attributes describe a project that is a net benefit to its host community. The RPMPD approves a project that will have a net positive affect on the environment of the State of California and for that reason the Commission should have no hesitation in accepting this RPMPD.

ESP II has anticipated the final decision on this project for quite some time. The project is on the Governor's radar screen and he is acutely aware of the benefits the project will provide to the Los Angeles load center and to his energy initiative effort to attract new business to California. This project provides vitally needed generation in a load center that has experienced very little new generation approval. That same load center has demonstrated its vulnerability to blackouts and shortages in recent months. Time is of the essence with this project.

Furthermore, ESP II provides herewith a letter to the Committee regarding the

commitment of the project owners to complete this project. This letter is provided in response to the Committee's inquiry at the April 29, 2004 Workshop regarding such commitment. The Commission's approval of this project on Wednesday, May 5, 2004 is a critical milestone that will allow the project owners to complete contractual and financial arrangements to proceed with the completion of this project in a timely fashion.

Biological Myths Surrounding This Project

The controversy over marine biology in this project is not driven by factual analysis; it is driven by the desire of several individuals to force the applicant to perform an unnecessary entrainment study. The controversy has been fueled by several myths regarding biology that are not supported by fact or law.

Myth #1: The project and decision are unprecedented;
Myth #2: The effects of Intake #1 are not understood; and,
Myth #3: Intake #1 could have a significant adverse effect on the aquatic marine environment.

Myth #1

The argument that ESPR and the RPMPD are unprecedented with regard to the handling of biological resources is incorrect. It is incorrect because the RPMPD does nothing more than recognize ESPR's compliance with Laws Ordinances Regulations and Standards ("LORS") and satisfaction of the California Environmental Quality Act ('CEQA"). This myth has been partly founded upon the argument that ESPR is comparable to the Moss Landing or Morro Bay projects. In fact, while Morro Bay and Moss Landing involve locations with mostly enclosed bays containing a relatively small amount of water and little circulation of plankton, ESPR involves a sandy bottomed open embayment with a continuously flowing, large volume of water. In fact, while Moss Landing and Morro Bay are located in sensitive habitats with a dense and rich mixture of plankton, ESPR is located on an exposed coastline with a passing current containing a thin density of plankton. In fact, while many studies, both old and new, find that Moss Landing and Morro Bay potentially entrain large quantities of plankton from a very limited source area, no study, neither old nor new, has ever found anything other than insignificant levels of entrainment at ESGS.

Furthermore, ESPR is uniquely situated and is very different from other coastal projects, and should not be aggregated into that argument. For that reason, the "one

size fits all" permit for coastal projects does not fit ESPR. ESPR is unlike other coastal projects the CEC has handled, has no LORS compliance or CEQA related problems, and does not require mitigation for its cooling system operation. Thus, it is incorrect that ESPR is unprecedented.

Myth #2:

The notion that the effects of Intake #1 at ESGS are unknown is also incorrect. The intake structure, as well as the habitat from which it draws cooling water, have been studied for decades. They have been studied for this particular project and they have been studied for the immediately adjacent Scattergood Generating Station. Moreover, they have been studied continuously for decades through a myriad of ongoing monitoring, sampling, and testing. Santa Monica Bay is probably one of the most studied regions of the ocean. Additionally, Intake #1 has been operating for nearly 50 years and its owners have provided decades of data in compliance with various legal and environmental requirements. The responsible agency for permitting and regulating the intake structure, the Los Angeles Regional Water Quality Control Board ("LARWQCB") required and obtained a 316(b) study for this intake structure and found the study to demonstrate that the ESGS intake structures were not adversely affecting the aquatic environment.

Though CEC Staff and other parties claim the 316(b) study is invalid, neither the age nor the distance of the sampling location harm the validity of the 316(b) study. The study used methods, such as Adult Equivalent Losses ("AEL"). These methods are, today, accepted and preferred for the evaluation of entrainment effects. The study also sampled larvae in a comparable setting contained within in the source water for ESGS. The study is approved and accepted by the LARWQCB. There are many more studies, all in the record for this project, including the Scattergood 316(b) study, the 1997 Scattergood 316(b) update study, the King Harbor larval sampling program conducted by the Vantuna Research Group, and the King Harbor study prepared by ESP II during this permitting project. Scientists, foundations, universities, and other groups have continuously and extensively studied all parameters of the Santa Monica Bay such that the database is extensive and current. The effects of Intake #1 are extensively studied and well understood.

Myth #3:

Finally, it is also incorrect to assert that Intake #1 could have a significant adverse effect on the aquatic marine environment. There is significant and compelling

evidence that refutes this assertion and finds that Intake #1 has an *insignificant* effect on the aquatic environment. Every study conducted on Intake #1 and on ESGS has found insignificant impingement, entrainment, and thermal effects. In fact, every study on the immediately adjacent Scattergood facility has found likewise. The ESGS 316(b) study, the Scattergood 316(b) study, the 1997 Scattergood update 316(b) study, and the 2001 King Harbor study all consistently found similar, insignificant levels of entrainment. Even simple calculations focused on proportions of water entrained find the same small and insignificant levels of entrainment. Intake #1 has been in place and operating for nearly 50 years and in all those years, no study has found significant impacts associated with entrainment.

Facts Surrounding This Project

The key facts relevant to the Biology analysis of ESPR are:

1. ESPR utilizes an existing, operating, and permitted cooling system without increasing its capacity or otherwise effecting marine biology in an adverse manner.

2. The existing, operating and permitted cooling system does not have a significant effect on the environment even at its fully permitted capacity of 208 million gallons per day ("MGD"). The facility has been fully studied, continuously monitored, and has insignificant and acceptable levels of impingement, entrainment, and thermal impacts.

    a) The cooling system includes a dynamically engineered, Best Technology Available, velocity cap, which changes the directional flow of water into Intake #1 from vertical to horizontal. This allows fish to sense the current flow direction and swim away from it and thereby avoid being impinged and entrained. When this technology was installed, the impingement of adult fish was reduced to negligible levels. Velocity caps are a recognized best technology and the velocity cap on Intake #1 ensures that impingement levels remain inconsequential. The LARWQCB has repeatedly found and continues to find that impingement effects of Intake #1 are insignificant.

    b) The thermal effects of the discharge for Cooling System #1 have been extensively studied and are also insignificant. The warm discharge

water is discharged in an upward direction from the ocean floor to the surface where the heat dissipates harmlessly. ESPR will actually further reduce the differential temperature of the outfall. The discharge complies with all regulatory requirements and has been repeatedly found to have an insignificant effect on the environment by the LARWQCB.

c) The entrainment effects of Intake #1 are also insignificant. Every study has found that Intake #1 has less than a 1% effect on the larval, plankton and egg resources of the region. Several studies conclude that the levels are less than one tenth of one percent (<0.1%). This includes studies in the immediate vicinity of the intake and studies conducted using recent data. The LARWQCB has repeatedly found and continues to find that entrainment effects of Intake #1 are insignificant.

3. The state agency that applies Federal Laws such as the Clean Water Act, and which is responsible for permitting, regulating, and otherwise determining the requirements of the cooling system, the LARWQCB, has found and continues to find that the cooling system can operate at 208 MGD in full compliance with applicable state and federal laws including section 316(b) of the Clean Water Act and CEQA. The LARWQCB has no issues or concerns with the repowering project.

4. The project includes a facility-wide limit on flows to recent historical levels that would apply when the new facility commences operation. This condition logically refutes any argument, whether contended to be legally supportable or not, that the project will cause an increase in flows that could result in increased entrainment impacts. This flow cap is not necessary to satisfy CEQA but was offered by the applicant and accepted by the Committee as a means of eliminating even the most restrictive CEQA argument raised by parties.

5. Pending requirements of the new Phase II 316(b) regulations by the LARWQCB are now incorporated into the CEC decision through BIO-4. These regulations will require a reduction in flows, entrainment or equivalent offsite enhancements for all existing facilities that use ocean water for cooling purposes including ESGS.

6. The California Coastal Commission ("Coastal Commission") argument that the project fails to comply with the California Coastal Act have clearly shown to be erroneous and misguided. The CEC decision now recognizes this but also provides an override as extra insurance that there are no California Coastal Act complications. The marine biology aspects of the California Coastal Act are complied with because:

   a) There is no mandatory Coastal Commission report under section of 30143(d) of the Public Resources Code that creates a presumption of a Coastal Act violation. There is no mandatory report because the plain and simple language of 30143(d) is not satisfied. There is no legal or practical reason to consider legislative intent regarding reports because there is absolutely no ambiguity in 31043(d). No document submitted by the Coastal Commission was submitted in a Notice of Intent proceeding. No document was submitted early in the ESPR process. No Coastal Commission document contains the required elements of a report under section 30143(d). Thus, none of the requirements of Section 30143(d) are met and there is no Section 30143(d) report in this proceeding.

   b) The CEC Staff's claim that there is a 30143(d) report in this proceeding ignores the very clear and plain language of section 31043 (d) and (e) and equates Coastal Commission "participation" in CEC processes with issuance of a 30143(d) report. Section 30143(e) allows the Coastal Commission to participate like a party in other proceedings and specifically includes AFC proceedings. Section 30143(d), on the other hand, specifically applies only to NOI proceedings and describes a special report that must have specific content and be provided by a very early deadline. Only the report under subsection (d) is referred to in section 25523(b) as requiring an override or compliance. General participation by the Coastal Commission as a party, as allowed by section 310143(e), does not require any more deferential treatment than any other party would obtain. This is the very clear and simple law governing Coastal Commission participation. CEC Staff comments appear to attempt to lead the Committee to believe that the Coastal Commission is refused the ability to participate if its

comments are not treated as official 30143(d) reports, which must be adopted or overridden by the CEC. Not only would such practice by the CEC be a violation of the Public Resources Code, it would also be an abandonment of the CEC's jurisdiction, and destroy the ability of the CEC to permit power plants in the Coastal Zone.

c) For the purposes of marine biology, the construction of ESPR will have no effect on the intake structures or the operational characteristics thereof. Therefore, under Section 30412 of the Public Resources Code, the Coastal Commission is prohibited from taking any action that would modify or conflict with any determination made by LARWQCB. This very strong curtailment of Coastal Commission authority prevents the Coastal Commission from using the Coastal Act to call for any changes in the operation of the Intake #1, as ordered by the LARWQCB.

d) The existing, operating, permitted cooling system has been well studied, is monitored and does not have a significant adverse effect on the marine environment.

e) There is no submitted evidence indicating a violation of the Coastal Act. **The Coastal Commission did not provide any expert testimony on biology**. The comments by the Coastal Commission calling for a "316(b) study" or an "entrainment study" have no connection to the Coastal Act because they are not connected to any regulatory authority requiring such a study.

7. The arguments for a "316(b)" study are not supported by law and reflect only an opinion by some intervenors and CEC staff consultants that disagree with established and generally accepted scientific methodologies. There is not a single law cited by any party that calls for an entrainment study in this project. Section 316(b) of the Clean Water Act is enforced by the LARWQCB, which finds that section to be satisfied. CEQA is also satisfied because the intake structure has never and will never have a significant adverse effect. Further, there is robust valid information throughout the evidentiary record that explains the effect of the intake structure. The LARWQCB has found and continues to find that Intake #1 does not have a significant effect on the

environment. CEC Staff began its argument for a 316(b) study with newly contracted biologists who lacked both experience in CEC proceedings and in entrainment studies and effects. These biologists disagreed with the fact that the LARWQCB would not require the applicant to conduct an additional 316(b) study for this project. Over time, the CEC Staff has converted its request for a "316(b) study" to a "316(b)-like study" and finally called for an "entrainment study" as they kept realizing that the law would not support their request. The 316(b) study for ESGS is accepted by the responsible agency, the LARWQCB, is valid and useful regardless of its date of completion and the location of the larval sampling. Moreover, the LARWQCB recognizes that the methods used are preferred today to study entrainment.

8. There is no broad consensus by the scientific community or state and federal agencies that a study must be completed before ESPR can be permitted. CEC staff has cast its request for a study very loudly and broadly. Several employees from other agencies have submitted letters that repeat CEC Staff's mantra, sometimes verbatim, with no new supporting information, testimony, or science. None of those agencies has authority to order or compel a study and none has offered any separate legal justification for ordering a study. Most of the letters reflect only a statement by the person who signed the letter. The single most important agency, and the only agency that regulates and permits intake structures in the Santa Monica Bay, the LARWQCB, directed and continues to accepts the ESGS 316(b) study and does not require an additional study.

9. There is no broad consensus by the scientific community that a new entrainment study is needed to understand the effects of Intake #1. Of the four scientists employed by the CEC, there was not a single larval fishery science focused expert who lived, worked, or specialized in the Southern California Bight. ESP II employed several Southern California Bight-based scientists and consulted with many others. Charles Mitchell, Dan Pondella, Steve LePage, and Milton Love, all fishery scientists with extensive Southern California Bight focus or expertise, prepared the King Harbor Study in 2001, which found trivial and insignificant entrainment levels, like all other studies of ESGS and Scattergood.

Most of the above facts are ignored or rebuffed by staff, its consultants, and other

parties that continue to demand an "entrainment study" and continue to make vague, unsupported insinuations that somehow ESGS Intake #1 is identical or equivalent to all other intake structures in both form and effect, particularly Moss Landing and Morro Bay. The above facts, however, demonstrate that the RPMPD filters out the unsupported arguments, the legally unjustified demands, and the emotional or personal quests of the project's detractors to arrive at a sound, wise and legal decision that is clearly positive to the interests of the State of California, its citizens, and its environment.

Comments on BIO-2, BIO-3 and BIO-4

While ESP II supports the intent and nearly all of the content of BIO-3 and BIO-4, there are several aspects of these conditions that create internal conflict, are unjustified or risk compliance problems. ESP II also has one comment on the body of text in the RPMPD regarding BIO-2. All these comments can be addressed through simple clerical changes to wording in the conditions or within the body of the document. ESP II respectfully urges the Committee to incorporate these minor changes into the Final Decision, which will be presented to the Commission for full approval.

1) **ESP II appreciates the Committee's amendment and clarification of BIO-2 and finds the condition acceptable.** However, although the condition itself was modified, the body of the RPMPD still references the previous condition language and its reference to the 2005 NPDES renewal process (see page 69, second paragraph). For clarity, ESP II requests deletion of the reference to the 2005 NPDES permit renewal in the body of the RPMPD as well.

2) **BIO-3 should not apply until the new facility becomes operational.** The function of BIO-3 is to eliminate the flow increase argument advanced by some parties. Since the argued flow increase cannot occur until the new units begin operation, there is no reason to implement the flow cap until then. Because the flow cap will limit the amount of electricity that ESGS can generate, the flow cap should not be arbitrarily applied. Moreover, until the new units are operational, Units 3 and 4 are likely to continue to be in high demand. The cooling system that supports Units 3 and 4 is twice as large as the one supporting the new units and therefore, the annual flow cap volume could easily be consumed even before the peak demand period has passed. Moreover, Intake #1 continues to operate to support plant processes such as

diluting sanitary wastes and providing auxiliary cooling for heat loads and would thus use significant portions of the flow cap volume.

3) **The annual flow cap number in BIO-3 should be returned to 139 Billion Gallons per Year ("BGY").** Even as proposed by ESP II at 139 BGY, the flow cap will constrain the operation of ESGS and will likely prevent it from responding to the potential electricity needs of California. A flow cap of 126 BGY will eliminate more operational time of the units at ESGS, probably peak demand time, and is not needed to eliminate the flow increase argument. The proposed reduced 139 BGY flow represents a very representative and immediate history of the facility as a merchant power plant in the post AB-1890 era. Calculation of most years' flows since deregulation result in volumes near 139 BGY regardless of the years considered. The 126 BGY figure includes 1995 and 1996, which were two very non-representative years that should not be used as part of determining any flow cap. The permitting authority under CEQA has a significant amount of discretion in calculating or determining baselines.

4) **The first six words of the new condition, BIO-4, "Prior to commencement of commercial operation" conflict with BIO-3 and should be deleted.** Because BIO-3 should only apply once the new units are operational, and because compliance with BIO-4 displaces the flow cap provided in BIO-3, the current wording of BIO-4 will eliminate the window of time when BIO-3 will apply. Perhaps even more importantly, depending on what actions the LARWQCB orders ESP II to complete, it may take many years to complete all actions under the new Clean Water Act regulations. Thus, it may not be possible to complete the actions required by BIO-4 prior to commercial operation.

5) **Several portions of the language in BIO-4 specifically conflict or potentially conflict with Phase II regulations.** First, the condition refers to "unmitigated levels," a term not used in the Phase II regulations. Second, the condition specifically requires a certain percent reduction in entrainment and impingement whereas the Phase II regulations embrace a three-fold means of compliance: 1) entrainment or impingement reduction; 2) operational controls *including flow reduction; or, 3) restoration measures including offsite* enhancement to offset entrainment or impingement impacts. ESP II believes

that the phrase "as directed and required by the LARWQCB" is intended to incorporate the three-fold approach embodied in the Phase II regulations, but such incorporation is not obvious or clear. Thus, ESP II recommends that the first paragraph of BIO-4 should read:

BIO-4 ~~Prior to commencement of commercial operation, t~~ The project owner shall reduce entrainment through the ESGS cooling water intake #1 by at least 60 percent and impingement by at least 80 percent, ~~both from unmitigated levels,~~ or implement alternative actions as directed and required by the LARWQCB under section 316(b) of the federal Clean Water Act.

Conclusion

The RPMPD is legally sound and contains all the agreed-to conditions. In the area of Biological Resources, the RPMPD properly recognizes fact and law and imposes the correct and appropriate conditions. Once the minor changes regarding biological conditions discussed above and those other minor changes agreed upon at the Committee Workshop are incorporated, the RPMPD will be entirely correct and sound and completely ready for final approval by the Commission on May 5, 2004.

ESP II appreciates the indulgence of the Committee in this matter and trusts that the foregoing information will eliminate any remaining concerns related to the permit application. Your approval is a requisite and important step in the orderly process of ensuring that the Governor's vision of a healthy and cost efficient electric market will prevail in California.

Very truly yours,

JOHN A. MCKINSEY

Enclosure

cc: Service List

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