

**CALIFORNIA COASTAL COMMISSION**

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December 22, 2004

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California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814-5512

RE: Comments on 2<sup>nd</sup> Revised Presiding Member's Proposed Decision (PMPD) 00-AFC-14 –  
El Segundo Power Redevelopment Project

Dear Commissioners:

This letter responds to the November 23, 2004 2<sup>nd</sup> Revised PMPD for the proposed El Segundo power redevelopment project. This latest PMPD reflects many of the same shortcomings we have identified in previous communications on prior versions of the PMPD. As with those previous versions of the PMPD, we have significant concerns with this current Revised PMPD, and we hope the full Commission can correct the substantial legal, jurisdictional, and environmental shortcomings of the proposed decision before concluding its review of this proposed project.

We believe that adoption of this error-filled PMPD is unnecessary. The Committee has been presented for several years with feasible, credible, and legally required provisions and recommendations that would allow the facility to be upgraded and operate in accordance with applicable statutes and in a way that would minimize its adverse environmental effects. As we have previously noted several times in our comment letters, we recognize California's need for reliable electrical supplies, and we support projects that are built and operated in a manner that conforms to applicable statutes and regulations. This proposed decision, however, will not result in such a project. In our judgment, the Committee is proposing you adopt a legally unsupportable and fatally flawed project that violates applicable legal requirements in a number of critical respects.

The single most critical missing component of this AFC review, and the one necessary to correct most of the current shortcomings, is the need for the Applicant to perform an entrainment study and for the Committee to use results of that study to establish a project baseline and determine necessary project modifications and mitigation measures. This necessary study is essentially the same type the Energy Commission has required on all its other recent coastal power plant projects. We note that each of those recent studies performed during the Energy Commission's review of proposed upgrades to existing power plants has identified substantial adverse impacts caused by the power plant's use of ocean water for cooling, regardless of whether the proposed use was higher or lower than a baseline or a previously permitted flow level. We note, too, that the Energy Commission has required as part of each of its AFC approvals mitigation measures

based on the results of these studies. In failing to require such a study as part of this AFC review, the Committee has ignored the plain requirements of several statutes, has dismissed the long-standing precedent established in other AFC proceedings, and has selected a proposed decision that is based on little or no evidence. This issue is of particular concern given that the proposed project would use hundreds of millions of gallons per day of ocean water from an impaired water body that provides significant habitat to marine organisms and substantial value to the people of California. Despite the proposed project's potentially significant adverse impacts to these environmental and economic resources, the Committee's proposed decision is based on no credible data about what is likely to happen to these resources.

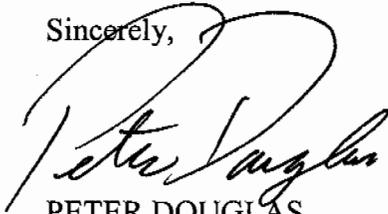
Our several concerns with the Revised PMPD are described in more detail below, and include the following:

- I. The Revised PMPD improperly ignores or misconstrues the requirements of the Warren-Alquist Act and the Coastal Act regarding the Coastal Commission's findings and specific recommendations.
- II. The Revised PMPD improperly relies on uncertain future actions of other agencies to identify project-related impacts and necessary mitigation.
- III. The Revised PMPD erroneously relies on an environmental baseline that does not provide the level of information needed to ensure conformity to CEQA or Coastal Act policies.
- IV. The Revised PMPD imposes conditions based on inadequate evidence and without any certainty as to how or whether they will actually mitigate for potential project impacts.

As noted above, the Coastal Commission and its staff have provided a number of reports and letters during the course of this AFC review, all of which have been docketed as part of the record. These documents provide much more detail about the concerns we continue to express in this letter, and we direct your attention in particular to those provided on the following dates (in reverse chronological order): September 17, 2004, April 28, 2004, March 1, 2004, February 20, 2004, February 10, 2003, November 6, 2002, October 8, 2002, April 9, 2002, October 4, 2001, March 6, 2001, and February 14, 2001. You may note that our recommendations have been consistent throughout our lengthy involvement in your AFC process and have additionally been supportive of promulgating a feasible and defensible decision to allow the project to be built. Included with those letters is the first one we provided for this proposed project (from February 14, 2001), which was written in response to the Issues Identification stage of your AFC review nearly four years ago. You may note in that letter that we asked for the same study we and other parties (including continued requests from the Energy Commission staff) have continued to ask for during the full course of this review. Had your Committee heeded those requests, you would likely now have before you the data and information required for a fully supportable AFC decision. Instead, you have a severely flawed proposed decision that if implemented, would most certainly result in unmitigated adverse environmental impacts to Santa Monica Bay.

We therefore urge you to not approve the current Revised PMPD, but to instead direct the Committee to do what it should have done all along -- require completion of the necessary entrainment study and use the results of that study to establish appropriate baseline conditions and mitigation measures that will allow this project to be constructed and operated in an environmentally appropriate and legally supportable manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Douglas". The signature is written in a cursive style with a large, prominent initial "P".

PETER DOUGLAS  
Executive Director

Cc: 00-AFC-14 (El Segundo) Service List

**COASTAL COMMISSION STAFF COMMENTS AND RECOMMENDATIONS ON  
THE 2<sup>ND</sup> REVISED PMPD – OO-AFC-14 (EL SEGUNDO GENERATING STATION)**

**I. The Revised PMPD improperly ignores or misconstrues the requirements of the Warren-Alquist Act and the Coastal Act regarding the Coastal Commission's findings and specific recommendations.**

The Revised PMPD cites applicable sections of the Warren-Alquist Act and the Coastal Act that describe the relationship between the Energy and Coastal Commissions during AFC reviews, but then goes on to ignore the substantive requirements of those statutes.

Warren-Alquist Act Section 25523(b) and Coastal Act Section 30413(d): Section 25523 of the Warren-Alquist requires the Energy Commission to include in its decision on a proposed project the provisions specified in a report prepared by the Coastal Commission pursuant to Section 30413(d) of the Coastal Act unless the Energy Commission finds that those provisions would result in greater adverse effect on the environment or that they would be infeasible. Section 30413(d) specifies the content of a report to the Energy Commission including findings on, among other things, 1) whether a proposed new powerplant, or a change or addition to an existing powerplant facility, conforms to Coastal Act policies and standards; and, 2) provisions that would modify the proposed project to mitigate for its adverse effects and thus allow it to conform to those Coastal Act policies.

In 2002, the Coastal Commission provided its 30413(d) report to the Energy Commission, which included findings that the proposed project would not conform to Coastal Act policies and that either of two specific provisions would be necessary for the proposed project to conform to Coastal Act requirements related to protection of marine biology. The two alternative provisions were for the Applicant to use wastewater from the nearby Hyperion Wastewater Treatment facility to cool the power plant, or, if that was not required or was found infeasible, to require the Applicant to perform an entrainment study and use the results of that study to determine project impacts to the marine biology of Santa Monica Bay along with necessary mitigation measures.

The Revised PMPD, however, does not properly or adequately address these provisions. It dismisses the first provision as infeasible and basis that dismissal not on the evidence provided by Energy Commission staff about the actual characteristics of a full or partial wastewater cooling system but on speculation by the Applicant that it might not be able to obtain the necessary permits and approvals for any such system. It then ignores the second provision – that is, it neither adopts it as part of the proposed decision, nor finds that it is infeasible or that it would cause greater adverse environmental harm. Instead, the Committee conjures up proposed conditions (see Section IV below) that are entirely without basis in the record and states, on page 56 of the Revised PMPD, "...we believe that the Conditions in this Decision will both achieve compliance with the Coastal Act and carry out the Coastal Commission's recommendations".

This is beyond the scope of the Committee's discretion and does not conform to Warren-Alquist Act requirements. What the Energy Commission must do is either adopt the Coastal Commission's specific provisions or find they are infeasible or would cause greater adverse environmental harm. It may not, at least for purposes of fulfilling the requirements of section 25523(b), substitute its own conditions for those provided by the Coastal Commission and then determine those newly created conditions result in conformity to the Coastal Act.

Part of the reason for the Committee's error appears to be its misinterpretation that the Coastal Commission's provision applied only to the project "in its original configuration" (from page 58 of the Revised PMPD). It is not clear why the Committee made this error, since the Coastal Commission and its staff have stated repeatedly that an entrainment study is needed for any proposed use of ocean water for cooling, not just for a particular amount that happened to be included in the initial version of this proposed project. In fact, the Coastal Commission stated quite clearly that it expected the ongoing project review to result in changes to the proposed project, either due to additional information being made available about the project and its impacts or through additional proposals by the Applicant. In its November 2002 report, for example, it stated:

"...if the applicant for the AFC declines to incorporate this alternative [i.e., the Hyperion wastewater alternative] into its proposed project on the basis of its infeasibility, the Energy Commission require the applicant prior to project construction to complete the entrainment study described in the FSA using protocols similar to those used during other recent projects subject to Energy Commission review. Results of that study should be used to determine all feasible measures available to avoid, minimize, or compensate for entrainment impacts. If this study is required, the conclusions and resulting mitigation measures will likely affect the project's conformity to Coastal Act policies; therefore, we reserve our right to further review the proposed project at the completion of the study and to recommend additional specific provisions necessary to ensure conformity to the Coastal Act."

It further stated:

"We recognize that the applicant or the Energy Commission may at some point recommend different or additional mitigation measures or provide additional information regarding the feasibility of various proposed measures. We therefore reserve the right to review future submittals for conformity with the Coastal Act pursuant to our authority under sections 30413(d) and 25523(b)."

The Coastal Commission did not in any way limit its findings to one particular version of the proposed project, and in fact, recognized that variations of the proposal were likely to be developed and that these variations would likely require additional review.

Warren-Alquist Act Sections 25523(d)(1) and 25525: In addition to the above, and as part of the same discussion in the Revised PMPD, the Committee misapplies other sections of the Warren-Alquist Act and thereby misses the substance of its statutory requirements. Section 25523(d)(1) of the Act requires that when the Energy Commission finds a proposed project would result in noncompliance with an applicable statute, it must meet with the involved agency to attempt to correct or eliminate the noncompliance, and if the proposed facility would still not comply, may certify the project only if it determines the facility is necessary for public convenience and necessity, pursuant to Section 25525.

By not incorporating the provisions identified by the Coastal Commission as necessary for the project to conform to the Coastal Act, the Revised PMPD, on its face, results in noncompliance with the Coastal Act. However, instead of properly acknowledging this noncompliance and instituting the contact with the Coastal Commission as required by Section 25523(d)(1), the Committee makes up its own conditions that it purports will result in Coastal Act conformity. These conditions would not result in marine biological resources being maintained, restored, and enhanced, as is required by the Coastal Act. Similar to the above issue where the Committee ignores one of the Coastal Commission's specific provisions, it here ignores a clear issue of nonconformity to the Coastal Act, which is not corrected by substituting its inadequate proposed conditions.

Resolution of these Errors: At this point in the proceedings, the flaws in the proposed decision noted above can be corrected only through any of the following:

- By adopting the Coastal Commission's provision that would require the use of cooling water from the Hyperion Treatment Facility;
- By requiring the Applicant to conduct an entrainment study so the results can be incorporated into the AFC decision; or,
- By meeting with the Coastal Commission to determine whether these or other provisions can be incorporated into the proposed decision to allow conformity to the Coastal Act.

These flaws cannot be corrected at this point by finding that the entrainment study is infeasible, since there is no support in the record for a finding of that sort.

## **II. The Revised PMPD improperly relies on uncertain future actions of other agencies to identify project-related impacts and necessary mitigation.**

To determine whether the proposed project will have adverse effects on the marine biology of Santa Monica Bay, the Committee is proposing we rely on a potential future assessment of Santa Monica Bay and potential actions that may improve the health of the Bay that may result through the actions of the Santa Monica Bay Restoration Commission and through the NPDES permit review of the Los Angeles Regional Water Quality Control Board. This approach is inappropriate for the full Energy Commission to adopt in its AFC decision. Applicable statutory requirements and judicial decisions make it very clear that lead agencies may not defer to the future or to other agencies the studies necessary to determine potential environmental impacts. The Coastal Commission and other parties that have long urged the Committee to require the entrainment study as part of this AFC review and have repeatedly called the Committee's attention to the California Court of Appeal's decision in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296.

There are a number of problems with the Committee's proposal to turn over many of the Energy Commission's duties to the Los Angeles Regional Water Quality Control Board as the Regional Board carries out its duties to implement its NPDES permit review and determine conformity with section 316(b) of the Clean Water Act. First, the review of cooling water intake systems under NPDES permits is not equivalent to the review required under CEQA, and is in fact, exempt from CEQA. NPDES permit review, pursuant to federal and state water quality standards, is meant primarily to determine whether the existing once-through cooling system at the power plant provides the "Best Technology Available" for power plant cooling. Section 13389 of the Water Code specifically exempts waste discharge requirements including NPDES permits from undergoing CEQA review (except in the case of new sources, which does not apply in this AFC review). The fact that NPDES review is CEQA-exempt, and that it therefore involves a different type of review than the review required under CEQA, is further supported by the recent decision in *City of Burbank vs. State Water Board* (2003) 111 Cal.App.4<sup>th</sup>245<sup>1</sup>. It is therefore not appropriate in this AFC proceeding to use NPDES review to establish baseline conditions for purposes of CEQA compliance.

Additionally, the Committee is contemplating that the Regional Board will do this work under the new 316(b) rules governing cooling water operations such as the one at the proposed project. There is considerable doubt as to how this new rule will be implemented, and the Regional Board has provided no formal guidance as to the scope or protocols that may be used for any studies related to this rule. The Committee expresses far more certainty about implementation of the 316(b) rule than does the Regional Board – we note, in fact, that representatives of the Regional Board expressed at the Committee's most recent workshop (see transcript of 00-AFC-14 workshop from September 20, 2004) no certainty about what, if any, new data the Applicant might have to collect under this new rule, or what, if any, mitigation measures might be required under a new NPDES permit. It is evident, therefore, that the Committee's certainty is misplaced and has no basis in the record.

If the Energy Commission were to approve this proposed approach, not only would it conflict with statutory requirements and judicial decisions, it would raise a question regarding the point of the AFC review and decision-making process – what is the point of the review if it merely results in certain of the most substantial issues related to the proposal being punted to other entities for a decision?

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<sup>1</sup> From p. 20-21 of the decision: "We conclude that Water Code section 13389 not only relieves Regional Board of the requirement to prepare an EIR or cause an EIR to be prepared (pub. Resources code, § 21100, subd. (a)), but also relieves Regional Board of those CEQA obligations that ordinarily are satisfied through preparation and consideration of an EIR, including the obligation to consider potential environmental impacts, project alternatives, and mitigation measures."

**III. The Revised PMPD erroneously relies on an environmental baseline that does not provide the level of information needed to ensure conformity to CEQA or Coastal Act policies.**

CEQA requires that decision-makers establish a baseline to determine what kinds of environmental changes will result from a proposed project<sup>2</sup>. The Coastal Act requires a baseline be established to allow a determination of whether a proposed project will maintain, enhance, and where feasible restore, the marine environment. The baseline proposed in this Revised PMPD does neither. At best, it provides only half of the necessary baseline, which makes it legally insufficient for this proposed decision.

The Committee and the parties involved in this review have put in a great deal of time and analysis to determine the level of cooling water flow that best serves as a baseline. There is considerable controversy among the parties about the appropriate level to use in the baseline – it ranges anywhere from zero to over 605 million gallons per day. The Committee’s current proposal is that the baseline flow level is 126.78 billion gallons per year, which it notes is below the rate currently allowed under the existing NPDES permit. However, regardless of the amount determined to be the appropriate level, establishing the environmental baseline using only the cooling water flows provides no information about the resulting environmental effects, which is the primary point of establishing such a baseline. Because the Committee has refused to require the entrainment study, the Revised PMPD is inappropriately silent on the other significant elements that must be made a part of the project baseline – namely, the types and numbers of marine organisms that will be affected by whatever amount of cooling water is directed through the power plant. Without these data, the baseline is incomplete and the Revised PMPD is indefensible. The Committee’s approach is as if someone were to describe the effects of a proposed project by detailing how many cubic yards of concrete were to be poured in a wetland without any description of the wetland’s plants, habitats, or functions – clearly, that type of approach is inadequate for purposes of either CEQA or the Coastal Act, just as it is inadequate for the work of the Energy Commission under the Warren-Alquist Act. Further, this information is needed, regardless of the flow amount selected.

We provided previously numerous comments on this inadequacy, and we refer you to our other letters, particularly the one of September 17, 2004 for citations and discussions related to the inadequacy of this approach for CEQA purposes. Regarding the Coastal Act, Sections 30230 and 30231 of the Coastal Act require, among other things that marine resources and the biological productivity of coastal waters be maintained, enhanced, and where feasible restored<sup>3</sup>.

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<sup>2</sup> Please note that for purposes of our comments in this and the other letters, our references to CEQA refer to the Energy Commission’s CEQA-equivalent regulatory program as specified in PRC Section 25541.5.

<sup>3</sup> Coastal Act Section 30230: “Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.”

Coastal Act Section 30231: “The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies

The Coastal Commission specifically provided in its 30413(d) report that due to the proposed use of ocean water for cooling, it was necessary for the Applicant to complete an entrainment study in order to determine measures that would allow the proposed project to conform to these sections of the Coastal Act. It is then incumbent upon the Energy Commission, pursuant to Warren-Alquist Act 25523(b), to adopt this "specific provision" of the Coastal Commission's report into its decision, in this instance, for the purpose of establishing the baseline needed to determine conformity to the Coastal Act. Quite simply, to ensure conformity to these sections of the Coastal Act, one must know the existing environmental characteristics that are to be maintained, enhanced, or restored. Without adequate information about those existing characteristics, we have no idea of the extent of a project's individual or cumulative impacts, and a proposed project such as this cannot be found to conform to Coastal Act policies.

Essentially, without recent and credible data about the marine organisms that will be affected by the proposed project, the Committee's selected baseline is indefensible and inadequate, and the erroneous analysis used makes it impossible for the project to conform to the marine biology policies of the Coastal Act.

**IV. The Revised PMPD imposes conditions based on inadequate evidence and without any certainty as to how or whether they will actually mitigate for potential project impacts.**

Of the five proposed conditions related to marine biology, two are essentially superfluous and three are entirely unsupported by the record and do not provide any certainty as to whether they will mitigate for any impact. Further, they do not result in conformity to the Coastal Act's policies requiring that marine resources be maintained, enhanced, and where feasible, restored.

The two superfluous conditions are BIO-4 and BIO-5, which require the Applicant to do something the Applicant is already required to do, namely comply with conditions of an NPDES permit to be issued by the Regional Board. Regarding the other three, BIO-1 would require some unknown amount of money to be spent for as-of-yet unspecified purposes under the direction of entities other than the Energy Commission to achieve results that may or may not be related to the effects of the proposed project on Santa Monica Bay. BIO-2 would require the Applicant to conduct a feasibility study of a mitigation measure dismissed earlier in these AFC proceedings by both the Applicant and other parties as infeasible. We note that if this mitigation measure – an aquatic filter barrier – were to be constructed and operated as a result of this condition, it would involve potentially significant impacts, none of which has been evaluated at this point. Finally, BIO-3 would impose a cooling water flow cap, including seasonal flow caps based on speculation by the Committee that such caps might be appropriate, even though the limited biological data available to the Committee shows otherwise. For instance, the Committee would impose a seasonal cap during the months of February, March, and April, even though the record indicates that there are species that breed in the area year-round. The unfortunate result of the Committee's proposed condition could well be that the proposed project would draw in and kill more organisms during times of the year that are more critical to the functioning of Santa Monica Bay.

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and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams."

These conditions are unsupported by the record, make no sense, and do not result in conformity to the Coastal Act. Further, the evident lack of thoughtful review it took to produce them raises substantial questions about the purpose of the Committee's work over the past nearly four years. This is especially true given the clear direction provided to the Committee by the Energy Commission staff, the Coastal Commission and its staff, and several other parties as to what requirements would be useful, effective, and feasible for determining the adverse effects of the proposed project on Santa Monica Bay and to mitigate for those effects.