

Memorandum

Date: June, 19, 2002
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To : William J. Keese, Presiding Member
James D. Boyd, Associate Member
Major Williams, Hearing Officer

From : California Energy Commission - Robert Worl
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Subject: LOS ESTEROS CRITICAL ENERGY FACILITY PROJECT STAFF COMMENTS
(01-AFC-12)

On May 30, 2002, the Presiding Member's Proposed Decision (PMPD) was issued for the Los Esteros Critical Energy Facility Project (LECEF), 00-AFC-12. California Energy Commission staff were directed to submit their comments on the PMPD no later than June 19, 2002. Staff has included comments where we believe that clarity and accuracy of the record are enhanced. Staff offers the following comments on the Los Esteros PMPD.

Attachment

cc: Proof of Service

STAFF COMMENTS ON THE PRESIDING MEMBER'S PROPOSED DECISION FOR THE LOS ESTEROS CRITICAL ENERGY FACILITY PROJECT (01-AFC-12)

SUMMARY OF STAFF'S COMMENTS

The California Energy Commission staff appreciates the opportunity to provide the Committee with our comments on the Presiding Member's Proposed Decision (PMPD) for the proposed Los Esteros Critical Energy Facility Project (LECEF), 01-AFC-12. Staff comments address a range of issues believed necessary to ensure clarity and enforceability of the Conditions of Certification should the Commission approve the proposed power plant.

FACILITY DESIGN

Page 58, **GEN-7**, take out the first sentence: "The project owner shall keep the CBO informed regarding the status of engineering and construction". This is already included in the General Conditions section of the PMPD.

Page 63, paragraph No.5, first line, change "structure" to "structural" (should be "...covering other structural activities...").

TRANSMISSION SYSTEM ENGINEERING

Page 82, Findings and Conclusions 5: the permanent interconnection length should be 250 feet.

AIR QUALITY

Page 133, **AQ-8**: the first sentence should read "The number of firing hours of S-1, S-2, S-3, and S-4 gas turbines without abatement by SCR or CO systems shall not exceed a total of 100 hours during the commissioning period."

PUBLIC HEALTH

Page 156, second paragraph, second bulleted item: the notation for footnote 72 should be moved from its current location to the previous sentence, after "...recommended:" Its current placement makes it a part of the stated formula for cancer risk factor. The correct risk factor is $3 \times 10^{-4} (\mu\text{g}/\text{m}^3)^{-1}$.

HAZARDOUS MATERIALS MANAGEMENT

Page 166, first sentence: replace the word "disposal" with "storage".

Page 166, second paragraph, second sentence: replace the phrase "...appropriate local authorities," with "the Energy Commission,".

Page 167, third sentence: replace "biodegradable" with "easily cleaned up".

Page 167, fifth sentence: add the words “lack of” in front of the words “environmental mobility”.

Page 167, bottom of page, footnote 80, fourth sentence: place the word “or” between “stored” and “used”, and delete the words “or transported”.

Page 175, **HAZ-2**, second sentence: add after the last words “...prior to construction” the phrase “...of hazardous materials storage and containment structures.”

WORKER SAFETY AND FIRE PROTECTION

Page 178, last line of Footnote 89: delete the words “...pertaining to the California Fire Code”.

Page 182, **Worker Safety-1**: The first sentence should read “The project owner shall submit to the CPM a copy of the Project Construction Safety and Health Program containing the following:” and also;

Page 182, **Worker Safety-1**: “Construction Injury and Illness Prevention Program” should be the first bulleted item under this COC.

BIOLOGY

Page 186, Footnote 94: The footnote incorrectly identified Coyote Creek as part of the Don Edwards NWR and as an area of expansion for the refuge. Staff suggests replacement of footnote with: "About two miles downstream from the site, Coyote Creek flows into part of the Don Edwards NWR. Artesian Slough, which would receive the proposed project's wastewater, is an area designated to be part of the refuge in the future. (Ex. 1A, p. 4.2-21.)"

Page 191, Table 4, Item: Stormwater Outfall: The acreage shown in Table 4 of the Staff Assessment and the Supplement (Ex. 1, p. 4.2-17; and Ex. 1A, p. 4.2-23 respectively) was for a stormwater outfall that extends towards the low-flow channel without a concrete apron. Since the issuance of Staff's testimony, the applicant has redesigned the outfall to include a wide, concrete apron along the levee wall (Ex. 4I1, Attachment BIO2), without an extension towards the low flow channel. The stormwater outfall presented into evidence from the applicant (Ex. 4I1, Attachment BIO2) has increased the temporary impact from approximately 0.05 acre to 0.2 acre. No permanent impact in the upland floodplain is expected because the concrete apron is on an existing packed earth road. In addition, construction of the new outfall would occur outside of the dripline of trees. Staff suggests replacement of Table 4 with the following revision showing these corrected values:

**BIOLOGICAL RESOURCES Table 4
Habitat Loss (acreage) from Construction of LECEF**

Project Component	Permanent	Temporary
Power plant	18 (8.5 ¹ + 9.5 ²)	0
Access road and wastewater return line	5 ³	5 ³
Stormwater discharge	0	0.27 (0.20 ⁴ + 0.07 ³)
Parking and construction laydown area	0	20 ¹
Natural gas pipeline	0	1.5 ¹
Temporary Transmission Line	0	3.3 (3.2 ³ + 0.1 ¹)
Recycled water line	(same impacts as access road)	2 ³
TOTAL	23.00	32.07

¹ Agricultural land reverted to disturbed grassland (with ruderal species)

² Lite industrial and residential facilities

³ Agricultural land

⁴ Upland floodplain, outside of the drip-line of trees

Source: (Ex. 1A, p. 4.2-19; and Ex. 4I1, Attachment BIO2)

Page 194, Paragraph 1: Staff suggests replacement of last line with: "Staff has assumed the pulldown sites will temporarily disturb two areas outside of the new transmission line's disturbance: 0.1 acre of disturbed grassland habitat and 0.1 acres of agricultural lands."

Page 194, Footnote 101: To more accurately reflect the applicant's revised outfall design (Ex. 4I1, Attachment BIO2), Staff suggests the replacement of last line with: "No permanent disturbance would result because the concrete apron is on an existing packed earth road (Ex. 4I1, Attachment BIO2)." Staff also suggests changing acreage amounts to reflect Staff's comments on Table 4 (replace 0.05 with 0.2 and 0.12 with 0.27). Staff suggests the addition of the following text at the end of this footnote: "Construction is scheduled from July 1st to October 15th in order to avoid the bird nesting season and this timeframe would also avoid the fall-run chinook salmon and steelhead trout migration periods (Ex. 1A, p. 4.2-12)."

Page 197: Staff suggests replacement the 3rd sentence with: "In addition, Staff did not identify any indirect impacts to plant species identified in *the Recovery Plan for Serpentine Soil Species of the San Francisco Bay Area*."

Page 198, Footnote 109: Staff suggests changes to acreage amounts to reflect Staff's comments on Table 4 (replace 0.05 with 0.2 acre).

Page 199, last bullet: Staff suggests editing the fourth bullet item to read: "Habitat Conservation Plan (HCP) preserves within serpentine habitat of Santa Clara County have been established to ensure that individual development impacts on the bay checkerspot butterfly are lessened, but the plans are not regional in nature. The development of LECEF would not conflict with the provisions of these plans;"

Page 205: Staff suggest editing bullet 8 to show consistency with bullet 9. Staff suggests the new bullet read: "Construction of the stormwater drain to the high flow channel of Coyote Creek does not require permit authorization from the U.S. Army Corps

of Engineers. Applicant has completed the design process for permitting by the Santa Clara Valley Water District."

Page 208, first set of numbered bullets: The number "5" is missing from "Identify whom to contact..."

Page 213, item number 9, first sentence: should read "Inspect trenches for entrapped animals every 6 hours and prior to the beginning of construction in an area that has been unattended for over 3 hours during the night."

Page 214, **BIO-11**, first sentence: remove the words "...20 days..."

Page 214, **BIO-11**, Verification section, delete the first sentence, and substitute the following two sentences: "Burrowing owl surveys shall be conducted 20 days prior to any project-related ground disturbance activities. At least 15 days prior to project related ground disturbance the project owner shall provide the CPM and CDFG with the burrowing owl survey results and identify any lands proposed for mitigation (if applicable)."

CULTURAL RESOURCE

Page 223, last paragraph in the Mitigation section, third sentence: the phrase "...will ensure that the resources are protected" should be replaced with "will ensure that impacts are reduced to less than significant."

The following edits to Conditions of Certification reflect changes made in the Supplement to the Staff Assessment, page 4.3-1:

Page 225, **CUL-1**, Verification 1.: should read, "At least 30 days..."

Page 226, **CUL-2**, Verification 1.: should read, " At least 30 days..."

Page 230, **CUL-5**, Verification 3.: the first two sentences should read: "Within 24 hours of recognition of a non-compliance issue, the CRS shall notify the project owner and the CPM by telephone of the problem. The project owner shall provide an e-mail or fax detailing the non-compliance issue and the measures necessary to achieve resolution of the issue within 24 hours of the CRS notification."

Page 230, second paragraph of **CUL-6**, the first sentence should read: "If any cultural resources are encountered, the project owner shall notify the CPM within 24 hours unless those resources are excluded by programmatic treatment."

GEOLOGY AND PALEONTOLOGY

Page 235, first sentence should read as follows: "This section addresses potential impacts from geological hazards, and on geological and paleontological resources."

Page 238, Findings and Conclusions, item 1.: strike "Geological and", then capitalize "P" in "Paleontological".

The Compliance Unit and the technical staff have suggested the revision of two conditions of certification, **PAL-1**, and **PAL-4**, to be consistent with current standard conditions. **PAL-1** clarifies the approval process to be followed for approval of Paleontological Resource Monitors. **PAL-4**, clarifies monitoring requirements, and provides for reduction of monitoring with CPM approval.

Page 238, Conditions of Certification, replace **PAL-1** with the following:

PAL-1 Prior to ground disturbance, the project owner shall ensure that the designated paleontological resource specialist approved by the CPM is available for field activities and prepared to implement the conditions of certification.

The designated paleontological resources specialist shall be responsible for implementing all the paleontological conditions of certification and for using qualified personnel to assist in this work.

Protocol: The project owner shall provide the CPM with the name and statement of qualifications for the designated paleontological resource specialist.

The statement of qualifications for the designated paleontological resources specialist shall demonstrate that the specialist meets the following minimum qualifications: a degree in paleontology or geology or paleontological resource management and at least three years of paleontological resource mitigation and field experience in California, including at least one year's experience leading paleontological resource mitigation and field activities.

The statement of qualifications shall include a list of specific projects the specialist has previously worked on; the role and responsibilities of the specialist for each project listed; and the names and phone numbers of contacts familiar with the specialist's work on these referenced projects.

If the CPM determines that the qualifications of the proposed paleontological resource specialist do not satisfy the above requirements, the project owner shall submit another individual's name and qualifications for consideration.

If the approved, designated paleontological resource specialist is replaced prior to completion of project mitigation, the project owner shall obtain CPM approval of the new designated paleontological resource specialist by submitting the name and qualifications of the proposed replacement to the CPM, at least 10 days prior to the termination or release of the preceding designated paleontological resource specialist.

Should emergency replacement of the designated specialist become necessary, the project owner shall immediately notify the CPM to discuss the qualifications of its proposed replacement specialist.

The PRS shall obtain qualified paleontological resource monitors to monitor as necessary on the project. Paleontologic resource monitors (PRMs) shall have the equivalent of the following qualifications:

- 1) BS or BA degree in geology or paleontology and one year experience monitoring in California; or
- 2) AS or AA in geology, paleontology or biology and four years experience monitoring in California; or
- 3) Enrollment in upper division classes pursuing a degree in the fields of geology or paleontology and two years of monitoring experience in California.

Verification: (1) At least 60 days prior to the start of construction (or a lesser number of days mutually agreed to by the project owner and the CPM), the project owner shall submit the name, statement of qualifications, and the availability for its designated paleontological resource specialist, to the CPM for review and approval. The CPM shall approve or disapprove of the proposed paleontological resource specialist.

(2) At least 20 days prior to ground disturbance, the PRS or project owner shall provide a letter with resumes naming anticipated monitors for the project and stating that the identified monitors meet the minimum qualifications for paleontological resource monitoring required by the condition. If additional monitors are obtained during the project, the PRS shall provide additional letters and resumes to the CPM for approval. The letter shall be provided to the CPM no later than one week prior to the monitor beginning on-site duties.

(3) At least 10 days prior to the termination or release of a designated paleontological resource specialist, the project owner shall obtain CPM approval of the replacement specialist by submitting to the CPM the name and resume of the proposed new designated paleontological resource specialist. Should emergency replacement of the designated specialist become necessary, the project owner shall immediately notify the CPM to discuss the qualifications of its proposed replacement specialist.

Page 242, PAL-7: Eliminate this Condition. This is addressed in the General Conditions, Closure Plan, which requires analysis of all potential environmental impacts in each resource area.

PAL-4 The PRS and PRM(s) shall monitor consistent with the PRMMP, all construction-related grading, excavation, trenching, and augering in areas where potentially fossil-bearing materials have been identified. In the event that the PRS determines full time monitoring is not necessary in locations that were identified as potentially fossil-bearing in the PRMMP, the PRS shall notify and seek the concurrence of the CPM.

The PRS and PRM(s) shall have the authority to halt or redirect construction if paleontological resources are encountered. The project owner shall ensure that there is no interference with monitoring activities unless directed by the PRS. Monitoring activities shall be conducted as follows:

- 1) Any change of monitoring different from the accepted schedule presented in the PRMMP shall be proposed in a letter from the PRS and the project owner to the CPM prior to the change in monitoring. The letter shall include the justification for the change in monitoring and submitted to the CPM for review and approval.

- 2) PRM(s) shall keep a daily log of monitoring of paleontological resource activities. The PRS may informally discuss paleontological resource monitoring and mitigation activities with the CPM at any time.
- 3) The PRS shall immediately notify the project owner and the CPM of any incidents of non-compliance with any paleontological resources conditions of certification. The PRS shall recommend corrective action to resolve the issues or achieve compliance with the conditions of certification.
- 4) For any significant paleontological resources encountered, either the project owner or the PRS shall notify the CPM immediately (no later than the following morning after the find, or Monday morning in the case of a weekend) of any halt of construction activities.

The PRS shall prepare a summary of the monitoring and other paleontological activities that will be placed in the Monthly Compliance Reports. The summary will include the name(s) of PRS or monitor(s) active during the month; general descriptions of training and construction activities and general locations of excavations, grading, etc. A section of the report will include the geologic units or subunits encountered; descriptions of sampling within each unit; and a list of fossils identified in the field. A final section of the report will address any issues or concerns about the project relating to paleontologic monitoring including any incidents of non-compliance and any changes to the monitoring plan that have been approved by the CPM. If no monitoring took place during the month, the project shall include a justification in summary as to why monitoring was not conducted.

Verification: The PRS shall submit the summary of monitoring and paleontological activities in the Monthly Compliance Report.

SOIL AND WATER RESOURCES

Page 247, staff suggests adding a new paragraph between paragraphs 3 and 4:

“The Santa Clara Valley Water District desires that modifications to the existing storm water run-off system be made and used until the project becomes a combined-cycle plant. At that time a permanent outfall into the interior levy wall of the Coyote Creek low-flow channel will be necessary. The proposed interim stormwater outfall to be used during simple-cycle operation will consist of the existing 24” corrugated metal pipe (CMP) placed through the west levee of Coyote creek. This pipe will empty onto a maintenance road located between the levee and the high-flow channel. Outfall protection will consist of a concrete apron, a five-foot wide rip rap transition, and then to a vegetated area within the high flow channel (Ex. 411, BIO2).”

Page 247, paragraph 4: This paragraph should begin “The permanent stormwater outfall system will consist of...” with “A” being changed to lower case.

Page 253, first line: the initials in parentheses should be SFBay RWQCB.

Pages 252-255, in the **Conditions of Certification** section it was noted that changes to COC's **SOIL & WATER 4** through **10** made in the Supplement to the Staff Assessment of February 5, 2002 were inadvertently omitted. These changes reflect important progress made by the project owner, staff, and responsible agencies. These corrections made in the Supplement, pages 4.9-3 to 4.9-5 are reiterated here:

Under **SOIL & WATER-4**, add after the first sentence:

"The data shall include storm water runoff projections based on using HEC1 modeling techniques as requested by SCVWD."

Under **SOIL & WATER 4** – Verification, incorporate the marked change:

"At least 60 days prior to site mobilization in the Coyote Creek levee, the Applicant shall submit all elements required for a Storm Water Discharge Permit to the CPM for review and approval, and to the SCVWD for review and comments.

Under **SOIL & WATER 5**, incorporate the marked change:

SOIL & WATER-5: The applicant shall provide the CPM with all information/data necessary to satisfy the requirements of the Well Destruction Permit for removal and closure following construction of the one remaining water wells, consistent with the requirements of Santa Clara Valley Water District's (SCVWD's) Ordinance No. 90-1.

Under **SOIL AND WATER-6**, insert the underlined phrase in the first sentence:

SOIL & WATER-6: The project owner will install metering devices and/ or utilize meters installed by the City of San Jose in order to record on a monthly basis ..."

Under **SOIL & WATER-7**, incorporate the following changes:

SOIL & WATER 7: The applicant shall provide the CPM with all information/data necessary to satisfy the requirements of the User Agreement for Recycled Water under the South Bay Water Recycling (SBWR) Program.

Verification: At least 60 days prior to initial operation-, the Applicant shall submit all elements required for the User Agreement for Recycled Water to the CPM for review and approval and to the City of San Jose for review and comments.

Under **SOIL & WATER-9**, incorporate the following changes:

SOIL & WATER-9: The project owner shall provide the CPM with evidence of submitting an accepted Engineer's Report for Title 22 Reclamation Requirements to the CA Department of Health Services, as applicable for obtaining unrestricted use of recycled water.

Under **SOIL & WATER-10**, incorporate the following changes:

SOIL & WATER-10: The project owner shall provide the CPM with evidence of pre-construction notification and consultation with the Army Corps of Engineers regarding compliance with Nationwide Permit #'s 3 and 7, consistent with Section 404 of the Clean Water Act, if necessary for placement of the storm water outfall and/or the placement of scour armor in Coyote Creek. In association with obtaining authorization for use of Nationwide Permit #'s 3 and 7, the Applicant may be directed to obtain Section 401 Water Quality Certification from the State Water Resources Control Board.

Verification: At least 60 days prior to construction of the storm water outfall, the project owner shall submit to the CPM evidence of consultation with the Army Corps of Engineers (ACOE) and authorization from the ACOE regarding Nationwide Permits #'s 3 and 7 as needed to comply with Section 404 of the Clean Water Act. If Nationwide Permits #'s 3 and 7 are required, at least 30 days prior to construction of the storm water outfall, the project owner shall submit evidence to the CPM regarding Section 401 Water Quality Certification from the State Water Resources Control Board.

NOISE

Page 289, third paragraph, second sentence: delete the word “park” after “mobile home”.

Page 289, third paragraph, third sentence: add “temporary” before the words “mobile home”, and eliminate the word “park”.

Page 291, first paragraph, last sentence: After the phrase, “the impact to the mobile home park”, insert a comma and the phrase, “located 0.6 miles southwest of the project site,”.

Page 294, second complete paragraph, second sentence: delete the word “park” after “mobile home”.

Page 295, first paragraph, first complete sentence: delete the word “park” after “mobile home”.

Page 299, first bullet item: replace “...5 percent increase in dBA...” with “5 dBA increase”.

Page 301, Condition of Certification NOISE-4, Protocol B: At the end of the first sentence, insert the phrase, “and the location of the proposed San Francisco Bay Trail”.

Page 302, Condition of Certification NOISE-4, Protocol C: Line 5, after the words “Coyote Creek riparian corridor” insert the phrase “or the location of the proposed San Francisco Bay Trail”.

VISUAL RESOURCES

Page 329, under Methodology, the sentence should be revised and a new sentence added as follows: “The Applicant established two key observation points ...” “At the

request of staff, a third KOP was established to represent views of the project from residences along Grand Boulevard in the Alviso community."

Page 340, paragraph 1, last sentence: "118 feet" and "28 feet" should be changed to "121 feet" and "31 feet" respectively.

Page 342, under LORS Compliance, 1st bullet: replace "two" with "three"

Page 342, under LORS Compliance, 3rd bullet: replace "15" with "14".

Page 350, VIS-3, Protocol, item a): delete the last word "and".

Page 351, VIS-3, Protocol, item b), delete the period (.) and replace with "; and".

Page 351, VIS-3, Protocol, add a new item as follows: "c) a detailed schedule describing when plants will be installed in specific landscape areas, and a discussion which provides the justification for the planting schedule for the specific areas and species proposed."

Page 352, VIS-5, Verification, last sentence: the phrase "installation of the walls and signage" should be changed to "installation of the signage..."

Page 353, VIS-6, Verification, first line: delete the words "power plant", and substitute the words "cooling system".

Staff has testified that its proposed Conditions of Certification VIS-1 through VIS-6 are sufficient to reduce visual impacts to less than significant levels and to achieve compliance with applicable LORS. The Committee disagreed, and looked to the Metcalf decision to craft Condition of Certification VIS-7 to address its concern about compliance with a San Jose General Plan policy relating to architectural design. Since the PMPD was issued, the City of Milpitas and the Applicant have reached a settlement agreement that will require formation of an architectural committee to review landscaping and architectural treatment plans for the facility. While Staff still believes that Conditions of Certification VIS-1 through VIS-6 in the PMPD are adequate to address visual impacts and LORS compliance, Staff considers VIS-7 to provide a useful mechanism for coordinating the implementation of the settlement agreement with the Energy Commission's compliance process.

Staff believes that the specific language of VIS-7 and its verification, which are based on a similar Condition of Certification in the Metcalf decision, may create practical problems in the timely construction of this project. Staff recommends the following language for VIS-7, which achieves the Committee's purpose in adding the condition. This revision is offered to allow the flexibility needed during the compliance process to integrate the requirements of the Energy Commission's decision with the review process in the settlement agreement without hindering the ability of the project to be online by December 31, 2002.

VIS-7 The project owner shall continue to confer with the cities of San Jose and Milpitas to consider additional aesthetic changes that better integrate the project

into the visual environment, and that can be implemented during the post-licensing period.

Verification: The project owner will meet with representatives of the interested cities and provide a report to the CPM on additional measures, including screening, painting, design, or architectural treatment that improve the aesthetic appearance of the project. Prior to commercial operation, the project owner shall submit the report, including 11:x17" high quality color photosimulations of the proposed aesthetic treatment as seen from at least KOPs 1 and 2, to the CPM for review and approval. If approved by the CPM, the project owner shall implement these additional aesthetic measures within 180 days of first turbine roll.