

- Staff does not know whether the water board will find that the project, as now proposed, will be able to meet its *revised* permit standards.
- Staff does not know what environmental impacts may result if the project needs to be redesigned to meet the more stringent standards and requirements of the revised permit.

II. STAFF CANNOT MEET ITS LEGAL OBLIGATIONS WITHOUT FIRST REVIEWING A DRAFT NPDES PERMIT FROM THE LARWQCB

In the filings submitted to the Committee on March 6, 2002, Staff explained why various legal requirements of the Commission's siting process simply cannot be met based on the current status of this proceeding. *Staff hereby reaffirms all of the points raised in its March 6 filing.*

After the Committee hearing on March 11, the Applicant requested and was granted an opportunity to file additional written material on whether the requirements of the California Environmental Quality Act (CEQA) can be met *without* the issuance of a *draft* revised NPDES permit. For the reasons stated below, Staff concludes it cannot meet its legal obligations under CEQA without first reviewing a *draft* NPDES permit from the regional board.

The Commission's review of all power plant siting applications are subject to the provisions of CEQA (Public Resources Code § 21000 *et seq.*).¹ As part of its certified CEQA siting process, the Commission's regulations require Staff to perform an independent analysis of all environmental issues:

The staff shall present its independent assessment . . . of the adequacy of the measures proposed by the applicant to protect environmental quality and to protect public health and safety. (Cal. Code Regs., tit. 20, § 1723.5(b).)

In the present case, Staff knows that a *revised* NPDES permit will be required before the MPP project can be legally operated. However, without a *draft* NPDES permit to review, Staff does not know what *specific* standards and requirements will be applied to the revised NPDES permit; does not know whether the regional board will find that the project, *as now proposed*, will meet its revised permit standards; and does not know what environmental impacts may result if the project needs to be redesigned to meet the more stringent standards and requirements of the revised permit. Thus, at the present time Staff simply cannot determine whether the measures *currently proposed* by the Applicant are adequate to protect environmental quality and public health/safety, as required by Section 1723.5(b) above.

In addition, Title 20, California Code of Regulations, section 1742.5 requires that:

The staff shall review the information provided by the applicant *and other sources* and assess the environmental effects of the applicant's proposal, the completeness of the applicant's proposed

¹ The Commission's siting program has been certified by the Secretary of the Resources Agency, thereby exempting the Commission from the requirement to prepare an EIR for this project (Pub. Resources Code, § 21080.5; Title 14, CCR section 15251(k)). However, the Commission remains subject to all of the policies and requirements of CEQA from which it is not explicitly exempted. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215 [32 Cal.Rptr. 2d 19]).

mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures. (Cal. Code Regs., tit. 20, § 1742.5(a), emphasis added.)²

Legally, the MPP project cannot be reviewed by Staff for CEQA purposes based on the COB's *existing* NPDES permit standards, because the LARWQCB has clearly informed both the Applicant and the Commission that these are not the water quality control standards that will apply to this project. Staff is legally required to determine a project's compliance with *applicable* LORS (Title 20, CCR, Section 1744), and must base its CEQA assessment, in turn, on the consequences which flow from those *applicable* LORS. The existing NPDES permit does not contain the applicable LORS in this case, and Staff's CEQA analysis cannot be based on it.

Since there is no *draft* revised NPDES permit from the LARWQCB at this time, Staff cannot perform *any* of the assessments legally required by Section 1742.5. Specifically, the environmental effects, completeness of mitigation measures, and need for additional or alternative mitigation measures for compliance with water quality standards are entirely unknown for this project at this time. Thus, for example, a *revised* NPDES permit *might or might not* impose toxics elimination standards that would require the Applicant to utilize a "zero discharge" system, a minimal discharge system (*e.g.*, dry cooling), or some other wastewater treatment/discharge method. This, in turn, *might or might not* require further analyses of the collateral environmental impacts of the water pollution control strategies required to meet the more stringent standards. Even if Staff were to assume that any revised NPDES permit standards would surely improve the quality of the project's water discharge, Staff cannot assume that there would be no collateral impacts from the strategies required to meet the more stringent standards.

Finally, none of the five Energy Commission cases cited by the Applicant in its opening brief are precedents for ignoring the CEQA requirements listed above. The first four cases mentioned by the Applicant involved no waste discharge whatsoever to receiving waters, and required no NPDES permits.³ The Contra Costa Power Plant Unit 8 Project (00-AFC-1) was a modernization of an existing facility which will use only 2 percent of the existing facilities' once-through cooling water flow before discharging into the San Joaquin River. Staff's primary water quality concern pertained to cooling tower concentrations of inorganic constituents. Through coordination with the Central Valley Regional Water Quality Control Board (CVRWQCB), Staff received and reviewed a draft NPDES permit for both California Toxics Rule (CTR) and NPDES purposes. Specifically, the draft NPDES permit concluded that:

Based upon the estimated [maximum effluent concentrations] and comparison of dissolved data with dissolved criteria, *no inorganic pollutants triggered [any] water quality based effluent limitation requirements in the final effluent from Outfall 001 or 002.*

² This requirement applies whether the case is processed as an expedited six-month proceeding or a traditional 12-month AFC. See Title 20, CCR, Sections 2027(a), 2027(b) and 1742.5.

³ The **Sutter** case required zero discharge dry cooling; the **Sunrise** case involved injection into oil field wells, with no environmental issues raised by either EPA or the regional board; and both **Otay Mesa** and **Metcalf** involved interconnection agreements with publicly owned waste treatment plants, not discharges into receiving waters.

Based on discussions with the CVRWQCB staff during review of the draft permit, no change was expected in the final permit and, in fact, this key finding was included in the final NPDES permit adopted by the CVRWQCB on April 27, 2001. In short, the draft NPDES permit in the Contra Costa case provided Staff with precisely the information and certainty of the final project design needed to complete its CEQA and LORS evaluation of the project.

III. CONCLUSION AND RECOMMENDATION

For all of the reasons stated above, the Committee should make it clear in its revised scheduling order that Staff must receive and have adequate time to review and analyze a draft NPDES permit before the MPP project will be scheduled for evidentiary hearings. Staff simply cannot perform its legal duties under CEQA, and other provisions of law, unless this requirement is met.

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Respectfully Submitted

DAVID F. ABELSON
Senior Staff Counsel