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January 2, 2007

VIA U.S. MAIL

Paul Fanfera, Senior Director
San Diego Unified Port District- Real Estate Division
P.O. Box 120488
San Diego, CA 92112-0488

Re: The Port Commission May Not Approve A Lease-Option Agreement
With LS Power Absent Proper CEQA Review

Dear Mr. Fanfera:

On behalf of California Unions for Reliable Energy (“CURE”), we write to explain why the San Diego Unified Port District (“District”) must defer action on a proposed lease-option agreement between the District and LS Power Generation. The lease-option would grant LS Power exclusive rights to 15.84 acres of District property (“former LNG lands”) proposed for the South Bay power plant replacement project. The District may not act on the lease-option until it completes project-level environmental review of the new power plant pursuant to the California Environmental Quality Act (“CEQA”).¹

Public agencies must conduct CEQA analysis for “discretionary projects proposed to be carried out or approved by public agencies.”² For private projects like the South Bay power plant, approval occurs upon the earliest commitment to issue a discretionary contract, permit, lease, license, certificate or the like.³ The CEQA review must occur *before* the agency takes discretionary action.⁴ CEQA requires agencies to prepare environmental documents “as early as feasible in the planning process to enable environmental considerations to influence project design and yet late enough to provide meaningful information for environmental

¹ Public Resources Code, § 21000 et seq.

² Public Resources Code, § 21080(a).

³ CEQA Guidelines, § 15352.

⁴ *Mount Sutro Defense Committee v. Regents of the University of California* (1978) 77 Cal.App.3d 20. 1933-009a

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assessment.”⁵ Environmental problems must be considered at a point in the planning process “where genuine flexibility remains.”⁶ In this way, CEQA analysis must occur when an agency action is still “discretionary” and not merely “ministerial.”⁷

There is no question that granting a lease-option constitutes a “project” under CEQA. Even actions that might be considered “governmental paper shuffling” are projects under CEQA. For example, a Local Agency Formation Commission’s annexation of a parcel of private land is considered a project under CEQA requiring project-level review.⁸ Moreover, even where an agency decision does not have a “direct effect” on the environment, if it is a necessary step in a chain of events which would culminate in physical impacts on the environment, it is a project.⁹ In this way, the District’s granting of a lease-option would be a significant step towards approving a new power plant on tidal lands on Chula Vista Bay. Because the site is District property, it is the District’s responsibility to perform project-level environmental analysis before it takes this discretionary action.

Here, the Port is proposing to enter into a lease-option contract with LS Power which would confer upon LS Power exclusive rights to construct and operate a power plant on District-managed lands. The District’s action on the lease-option contract requires project-level review under CEQA because the District’s consideration of the contract is the only juncture in the process where actual negotiation can occur, and alternatives and mitigation can be meaningfully imposed. Once the lease-option contract is granted, LS Power would be free to exercise the thirty-year lease as soon as it meets several conditions that are outside of the Port’s control,¹⁰ and the District finalizes its master plan. Because the District’s master plan EIR does not contain project-level review of the former LNG lands, the District is required to conduct such analysis now, before it grants the lease-option, while real land-use flexibility remains at the site.

⁵ CEQA Guidelines, at § 15004.

⁶ *Mount Sutro Defense Committee*, 77 Cal.App.3d at 34.

⁷ A “discretionary project” denotes a decision requiring “the exercise of judgment or deliberation.” Public Resources Code, § 21080; CEQA Guidelines, § 15357.

⁸ *Bozung v. LAFCO* (1975) 13 Cal.3d 263.

⁹ *Kaufman and Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 473.

¹⁰ LS Power must make timely option payments; file an application with the Energy Commission; obtain development permits, project financing, and construction contract; and complete other ministerial actions. Option to Lease Agreement, ¶ 6.

This sequence is required by CEQA. When a proposed project's approval occurs in two steps, as here, and the second step is contingent only on events that require little or no discretion on the part of the acting agency, then project-level review must occur at the first step.¹¹ This makes sense because at this stage of the project, the District still must hold a hearing on the lease, deliberate its merits, and then exercise its judgment. In addition to retaining flexibility over the site, the District also has the added benefit of the general design and planned operations of the proposed project so that full project-level analysis can occur easily and efficiently at this juncture.¹²

Given these circumstances, it is incumbent upon the District to prepare a project-level CEQA document on the former LNG site before it grants the lease-option so that the public and decision makers have an opportunity to evaluate the proposed power plant within the coastal zone, and evaluate whether a new power plant would be compatible with the other proposed residential, tourist, recreational and civic development for Chula Vista Bay contemplated in the District's Bayfront Master Plan EIR. For the District to wait until after LS Power has a 30-year lease would simply be too late because the District will have lost all flexibility at the site.

The DEIR for the Chula Vista Bayfront Master Plan omitted project-level review of the power plant on grounds that the California Energy Commission has exclusive oversight over the project and will thus evaluate the project's potential environmental impacts.¹³ However, the District may not relinquish its responsibility to evaluate the impacts of granting the lease-option. Such a course would conflict with CEQA in two ways: First, as shown above, CEQA analysis on the District's lease-option is required now while the District still retains discretionary control over the project site. And, nothing in the statute allows an agency to avoid its legal duties just because another agency will perform similar CEQA documentation in the future.

Second, and related, the Energy Commission's environmental analysis will have different goals and a much narrower focus than that required of the District right now. The District must analyze the appropriateness of placing a power plant

¹¹ *Citizens for Responsible Govt. v. City of Albany* (1997) 56 Cal.App.4th 1199.

¹² *Id.* at p.1221 ("any later environmental review might call for a burdensome reconsideration of decisions already made and would risk becoming a *post hoc* rationalization to support action already taken.")

¹³ CVBMP DEIR, at p. 3.37.

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on the former LNG lands in the context of all of the other new land use decisions the District and the City of Chula Vista are contemplating for Chula Vista Bay. Only the District can perform this critical analysis. Indeed, the Energy Commission's focus is simply the site itself, and the relative impacts and merits of power generation there. Even the most comprehensive cumulative impacts analysis by the Energy Commission could not satisfy CEQA's requirement that the District conduct its own project-level review of the power plant in the context of its greater master planning process.

For these reasons, CURE respectfully requests that the District not enter into a lease-option contract with LS Power until it has conducted full project-level review of the former LNG site pursuant to CEQA.

Sincerely,

Gloria D. Smith

GDS:bh

cc: California Energy Commission Service List

Docket No. 06-AFC-3 (via email)

cc: City of Chula Vista Community Dev. Dept. (via U.S. Mail)