

Memorandum

To: Docket 99-AFC-04C

Date: February 9, 2022

From: **Nick Oliver, Staff Counsel**
Office of Chief Counsel
California Energy Commission
715 P Street
Sacramento, California 95814

Subject: Basis for Finding the Approval of the Moss Landing Power Plant Settlement Agreement and Amended Conditions of Certification is Not a Project and Exempt Under the California Environmental Quality Act

I. Introduction.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.; see also CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.) requires that state agencies assess and prepare environmental documents disclosing any significant adverse environmental impacts of discretionary project approvals. However, discretionary approvals that do not fit the definition of a “project” are not subject to CEQA, and, additionally, CEQA designates certain projects exempt from its requirements. Of relevance here and discussed below in relation to the approval of the Moss Landing Power Plant settlement agreement (“Settlement”) and amended conditions of certification (“COCs”) are the exclusion of activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment from the definition of “project” (Cal. Code Regs., tit. 14, §§ 15060(c)(2)-(3) and 15378(a) & (b)(5)), the Class 21 exemption (Cal. Code Regs., tit. 14, §§ 15321; see also 15061(b)(2)), and the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)).

II. The approval of the Settlement and amended COCs is not a project.

CEQA applies to discretionary project approvals, and although a vote to approve the Settlement and amended COCs would be a discretionary act, the Settlement and amended COCs do not meet the definition of a “project” under the CEQA Guidelines (See Cal. Code Regs., tit. 14, § 15378). Under CEQA, the definition of “[p]roject does not include . . . administrative activities of governments that will not result in direct or indirect physical changes in the environment.” (Cal. Code Regs., tit. 14, § 15378(b)(5)). CEQA Guidelines sections 15060(c)(2)-(3) and 15378(a) further reinforce that CEQA does not apply activities that will not result in a direct or reasonably foreseeable indirect physical change in the environment.

Approval of the Settlement and amended COCs does not meet the definition of a project because they do not have the potential for resulting in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment (Cal. Code Regs. tit. 14, § 15378(a)). The amended COCs apply only to the reporting and notification of potential violations—they do not modify the design, operation, or environmental impacts of the

Moss Landing Power Plant. Furthermore, the Settlement terms provide for the payment of a civil penalty to settle CEC-alleged violations of the power plant's license—it also does not modify the design, operation, or environmental impacts of the power plant. Accordingly, it is evident that approval of the Settlement and amended COCs does not directly result in any physical change in the environment or any reasonably foreseeable indirect impacts.

III. Even if Approval of the Settlement and amended COCs were a project, the Class 21 exemption and the common-sense exemption would apply.

California Code of Regulations, title 14, section 15321, also referred to as the Class 21 exemption, exempts actions taken by regulatory agencies to “enforce or revoke a lease, permit, license, certificate, or other entitlement for use issued, adopted, or prescribed by the regulatory agency or enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency.” The Class 21 exemption includes the “adoption of an administrative decision or order enforcing or revoking the lease, permit, license, certificate, or entitlement for use or enforcing the general rule, standard, or objective.” Because the CEC's action to approve the Settlement and amended COCs would be an administrative order adopted for the purpose of enforcing the conditions within the Moss Landing Power Plant's license, this exemption is directly applicable. Furthermore, none of the exceptions to exemptions listed in CEQA Guidelines section 15300.2 apply here, and there is no reasonable possibility that the approval will have a significant effect on the environment due to unusual circumstances. For these reasons, this project is exempt from CEQA.

Approval of the Settlement and amended COCs would also be exempt from CEQA under the common-sense exemption (Cal. Code Regs., tit. 14, § 15061(b)(3)). As noted above in Section II, CEQA only applies to projects that have the potential for causing a significant effect on the environment. A significant effect on the environment is defined as a substantial, or a potentially substantial, adverse change in the environment, and does not include an economic change by itself or beneficial changes to the environment (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382). Because this approval concerns the payment of a civil penalty for alleged license violations and the updating of reporting and notification COCs, and it does not provide for any physical or operational changes to the Moss Landing Power Plant, it can be seen with certainty that there is no possibility that the Settlement and amended COCs may have a significant effect on the environment.

IV. Conclusion.

As shown above, approval of the Settlement and amended COCs is a regulatory action that is not a project under CEQA and is an enforcement action by a regulatory agency, consistent with the Class 21 exemption in section 15321 of the CEQA Guidelines. Additionally, the Settlement and amended COCs are consistent with the common-sense exemption under section 15061(b)(3) of the CEQA Guidelines. For these reasons, approval of the Settlement and amended COCs by the CEC would be exempt from CEQA and a Notice of Exemption may be filed with the Office of Planning and Research.

SETTLEMENT AGREEMENT
CALIFORNIA ENERGY COMMISSION and MOSS LANDING POWER
COMPANY LLC

The California Energy Commission (Energy Commission or Commission) and Moss Landing Power Company LLC (Moss Landing or MLPC) as owner of the Moss Landing Power Plant (MLPP or facility), enter into this Settlement Agreement (Agreement).

I. INTRODUCTION

1. Pursuant to California Public Resources Code section 25500, the Energy Commission "shall have the exclusive power to certify all sites and related facilities in the state." A "facility" includes any thermal power plant with generating capacity of 50 megawatts or more, and any facilities appurtenant thereto." (Pub. Resources Code §§ 25110, 25120.)
2. The Moss Landing Power Plant Final Commission Decision (Commission Decision) was issued on October 25, 2000, certifying the power project. The Commission Decision governs the construction, operation, and decommissioning of the MLPP.
3. Pursuant to Public Resources Code section 25532, the Energy Commission has established a monitoring system to assure that any facility certified by the Commission is constructed and operated in compliance with conditions specified in the Commission Decision.
4. Pursuant to California Code of Regulations, title 20, section 1770, the Energy Commission is to provide adequate monitoring of all conditions and measures set forth in the Final Decision required to mitigate potential impacts and to assure that facilities are constructed and operated in compliance with all applicable laws including, but not limited to, air quality, water quality, and public health and safety laws, ordinances, regulations, and standards (LORS).
5. Pursuant to Public Resources Code section 25534, subdivision (b), the Energy Commission may after notice and a hearing administratively impose a civil penalty against a facility owner for reasons that include significant failure to comply with the terms or conditions of approval of the application for certification, as specified by the Commission in its written decision. Any civil penalty shall be imposed in accordance with section 25534.1 and may not exceed seventy-five thousand dollars (\$75,000) per violation. A civil penalty may be increased by an amount not to exceed \$1,500 for each day the violation occurs or persists, but the total per day penalties may not exceed fifty thousand dollars (\$50,000).
6. Energy Commission staff investigated an alleged failure to report a Citation and Notification of Penalty that the California Division of Occupational Safety and Health (Cal/OSHA) issued the facility (OSHA Citation) on February 1, 2019. The investigation included an August 7, 2019 visit to the MLPP, calls and discussions with MLPP personnel and a review of all relevant documents.
7. On November 18, 2020 Energy Commission staff sent MLPP a Notice of Violation alleging noncompliance with the compliance reporting provisions of the Final Decision which appear in Section II below.

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COMPANY LLC

II. SUMMARY OF PERTINENT FINAL DECISION PROVISIONS

The Commission Decision contains a Compliance Monitoring Plan, including General Conditions and Closure Plan and includes the following compliance reporting language (Compliance Reporting Provisions):

1. Compliance Reporting, subsection Annual Compliance Report, states "Each Annual Compliance Report shall identify the reporting period and shall contain the following: A listing of complaints, notices of violation, official warnings, and citations received during the year; a description of the resolution of any complaints which have been resolved, and the status of any unresolved complaints (Commission Decision, 2000; page 34); and
2. Reporting of Complaints, Notices, and Citations states "[i]n addition to the monthly and annual compliance reporting requirements described above, the project owner shall report and provide copies of all complaint forms, notices of violation, notices of fines, official warnings, and citations, within 10 days of receipt, to the CPM. Complaints shall be logged and numbered. Noise complaints shall be recorded on the form provided in the NOISE conditions of certification. All other complaints shall be recorded on the complaint form which follows" (Commission Decision, 2000; page 35).

III. INVESTIGATION FINDINGS

1. On August 6, 2019, a manager at the MLPP facility informed Energy Commission staff by email that Cal/OSHA had issued the facility a Citation and Notification of Penalty (OSHA Citation) on February 1, 2019. Energy Commission staff opened an investigation.
2. Energy Commission staff's investigation indicated that the OSHA Citation concerned an incident that occurred at the facility on August 15, 2018 in which electrical contractors were injured.
3. Energy Commission Staff reviewed the facility's 2018-2019 Annual Compliance Report (received August 1, 2019) and determined that the OSHA Citation had not been reported as required by the facility's Compliance Reporting conditions listed above. Staff's review also determined that the facility had not reported an April 6, 2020 audit conducted by the California Public Utilities Commission as required by the facility's Compliance Reporting conditions. The facility had reported other citations to the CEC, however.
4. Energy Commission staff also reviewed a November 7, 2018 agreement reached between the Energy Commission and the MLPP facility to settle alleged violations of the Compliance Reporting conditions that occurred under a predecessor owner concerning the facility's failure to report notices of violation it received from the Monterey Bay Unified Air Pollution Control District.

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COMPANY LLC

IV.TERMS

To resolve the above-described alleged violations and terminate and settle this matter and, in consideration of Energy Commission staff not pursuing an administrative action under Public Resources Code section 25534 or otherwise filing a legal action against Moss Landing Power Company LLC (MLPC) for the above-described alleged violations, the Energy Commission and MLPC agree as follows:

1. MLPC shall execute the Agreement and provide a copy no later than thirty (30) days after the Energy Commission approves the Agreement at a publicly noticed Business Meeting, to the attention of:

Shawn Pittard
Deputy Director, Siting Transmission and Environmental Protection
DivisionCalifornia Energy Commission
715 P Street
Sacramento, CA 95814

2. MLPC shall submit to the California Energy Commission a payment in the amount of seventy-five thousand dollars (\$75,000) to settle these matters. The settlement payment is due within 14 days after MLPC receives written notification by the Compliance Project Manager (CPM) of the execution of the Settlement Agreement by the Executive Director. Payment shall be made by electronic transfer to the California Energy Commission. Banking information and instructions necessary to complete the electronic transfer shall be provided by the Energy Commission.
3. The Energy Commission staff and MLPC also agree to amend the reporting conditions for the MLPP facility according to Attachment A.
4. If the Energy Commission does not approve the Agreement, it shall become null and void. MLPC further agrees that if this matter comes before the Energy Commission in an administrative adjudication, members of the Energy Commission and the Executive Director shall not be disqualified from participation because of prior consideration of this Agreement.
5. This Agreement shall apply to and be binding upon MLPC and its principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary corporations, and upon the Energy Commission and any successor agency that may have responsibility forand jurisdiction over the subject matter of this Agreement.
6. This Agreement shall constitute the full and final settlement of the matters identified in Section III herein, subject to MLPC's settlement payment of the amount specified in section 2 above.
7. This Agreement does not preclude an action by the Energy Commission under Public Resources Code section 25534 or by other legal action with respect to the matters in this Agreement if, after the Agreement is approved by the Energy Commission and

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COMPANY LLC

executed by its Executive Director, the Energy Commission becomes aware of any material false statements by MLPC or its agents, or any successors thereto, made during the negotiation of, or compliance with, this Agreement or, MLPC fails to complete all of the requirements set forth in this Agreement.

8. This Agreement does not constitute an admission by MLPC that it agrees with the Energy Commission staff's allegations outlined herein, and further does not constitute an admission by MLPC that it violated the Conditions of Certification contained in the Final Decision or any other law, ordinance, regulation or standard applicable to the MLPP. MLPC will report and provide copies of all Citations and Notifications of Penalty issued by Cal/OSHA to the facility or audits by the California Public Utilities Commission in the future, pursuant to the reporting conditions for MLPP, as amended in Attachment A to this Agreement.
9. This Agreement constitutes the entire agreement and understanding between the Energy Commission and MLPC, and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind regarding the matters herein, whether written or oral, between the Energy Commission and MLPC.
10. No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all parties to this Agreement.
11. Each Party to this Agreement has reviewed the Agreement independently, has had the opportunity to consult counsel, is fully informed of the terms and effect of this Agreement, and has not relied in any way on any inducement, representation, or advice of any other Party in deciding to enter into this Agreement.
12. This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice of law rules.
13. Any civil litigation to enforce this Agreement shall be filed in the Superior Court of California, County of Sacramento.
14. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
15. The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision or any other provision of this Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Agreement or otherwise provided by law.
16. This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either Party on the ground that said Party drafted it.

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COMPANY LLC

17. If any public statement is made by either Party about the Agreement or the underlying facts or process leading up to the settlement, to the extent feasible the Party will provide advance notice of the intended public statement to the other Party.
18. The undersigned represent that they have the authority to execute this Agreement.
19. The Parties agree that fax or pdf signatures and multiple signature pages are acceptable for purposes of executing this Agreement.

California Energy Commission

Moss Landing Power Company LLC

By: _____

By: _____

Name: Drew Bohan

Name: Samuel Siegel

Title: Executive Director

Title: Vice President and Associate General Counsel

Date:

Date:

Attachment A

In addition to the monthly and annual compliance reporting requirements described above, the project owner shall report and provide copies to the CPM of all complaint forms, including noise and lighting complaints and any other claims or complaints from members of the public, notices of violation, notices of fines, official warnings, and citations, that concern or may concern a violation of any condition of certification or violation of any applicable law, ordinances, regulations or standard over which the Commission has jurisdiction within 10 days of receipt, ~~to the CPM~~. Complaints shall be logged and numbered. Noise complaints shall be recorded on the form provided in the NOISE conditions of certification.

<i>IN THE MATTER OF:</i>)	DOCKET: 99-AFC-04C
)	
MOSS LANDING POWER PLANT)	ORDER APPROVING
)	SETTLEMENT
MOSS LANDING POWER COMPANY, LLC)	
)	

Moss Landing Power Company, LLC (MLPC) owns and operates the Moss Landing Power Plant (MLPP or “facility”) licensed by the California Energy Commission (CEC) and located in Monterey County, California. The Moss Landing Power Plant Final Commission Decision (Commission Decision) was issued on October 25, 2000, certifying the power project (Docket No. 99-AFC-04C). The Commission Decision governs the construction, operation, and decommissioning of the MLPP.

The Commission Decision contains a Compliance Monitoring Plan, including General Conditions and Closure Plan and includes the following compliance reporting language (Compliance Reporting Provisions):

- Compliance Reporting, subsection Annual Compliance Report, states "Each Annual Compliance Report shall identify the reporting period and shall contain the following: A listing of complaints, notices of violation, official warnings, and citations received during the year; a description of the resolution of any complaints which have been resolved, and the status of any unresolved complaints (Commission Decision, 2000; page 34); and,
- Reporting of Complaints, Notices, and Citations states "[i]n addition to the monthly and annual compliance reporting requirements described above, the project owner shall report and provide copies of all complaint forms, notices of

violation, notices of fines, official warnings, and citations, within 10 days of receipt, to the CPM. Complaints shall be logged and numbered. Noise complaints shall be recorded on the form provided in the NOISE conditions of certification. All other complaints shall be recorded on the complaint form which follows" (Commission Decision, 2000; page 35).

MLPC has worked with CEC Staff since the August 7, 2019 site visit and cooperated with the investigation. MLPC's cooperation and other efforts have saved the CEC time and resources in further investigation and adjudication of the alleged violations.

Given MLPC's continuing and diligent cooperation, CEC Staff and MLPC believe that rather than engaging in formal adjudication, it would be more productive to enter a settlement to resolve this matter.

In developing this settlement, CEC Staff considered the cooperation of MLPC, the specific facts developed by CEC Staff and MLPC during the course of the investigation, the actions and omissions by the prior owners before MLPC's acquisition of the facility, and applied the relevant factors in the Public Resources Code Section 25534.1(e) to determine that settlement, rather than formal adjudication, is a more appropriate use of the CEC's and MLPC's collective resources.

CEC Staff worked with MLPC to develop additional conditions of certification, to ensure the MLPP operates in compliance with all applicable Final Commission Decisions, their respective Compliance Monitoring Plans, and applicable fire codes. The agreed upon Conditions of Certification, are intended to be amendments to the Final Decisions for the MLPP Facility.

The legal requirements at issue, as well as staff's allegations, and MLPC's admissions and denials, are included in the Settlement Agreement, which provides for a payment of \$75,000 by MLPC to the CEC. In addition, changes to the conditions of certification are also included in the Settlement Agreement.

Staff recommends that the CEC approve the Settlement Agreement and changes to the conditions of certification and direct the Executive Director to execute the Settlement Agreement on behalf of the CEC.

II. ENERGY COMMISSION FINDINGS

- 1) Public Resources Code section 25532 requires the CEC to establish a monitoring system to assure that any facility certified by the CEC is constructed and is operating in compliance with air and water quality, public health and safety, and other applicable regulations, guidelines, and conditions adopted or established by the CEC or specified in the written decision.
- 2) Public Resources Code section 25534 empowers the CEC to amend or revoke a license or impose administrative civil penalties.
- 3) Public Resources Code section 25534.1 sets forth factors to consider when determining the amount of an administrative civil penalty.

- 4) In reaching resolution, Staff has considered the factors identified in Public Resources Code section 25534.1, specifically the nature, circumstance, extent, and gravity of the alleged violations, the cost to the state in pursuing the enforcement action, efforts by MLPC to resolve issues, and its overall cooperation.
- 5) The agreed settlement is appropriate and reflects a fair resolution of the issues.
- 6) The settlement also includes amended reporting and notification Conditions of Certification. Upon execution of the settlement agreement, these amended conditions of certification will become part of the facilities' licenses.
- 7) Approval of the settlement, including amending of the licenses with new conditions of certification, is exempt from the California Environmental Quality Act as set forth in the California Code of Regulations Title 14, sections 15060(c)(2), 15060(c)(3), 15061(b)(2), 15061(b)(3), 15321, and 15378(a) & (b)(5).

CONCLUSION AND ORDER

The CEC hereby approves the Settlement Agreement and changes to the conditions of certification and directs the Executive Director or their designee to execute the Settlement Agreement on behalf of the CEC, file a Notice of Exemption with the Office of Planning and Research, and take any other steps necessary to execute the Settlement Agreement.

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretariat to the Commission does hereby certify that the foregoing is a full, true, and correct copy of an Order duly and regularly adopted at a meeting of the California Energy Commission held on March 9, 2022.

AYE:

NAY:

ABSENT:

ABSTAIN:

Liza Lopez
Secretariat