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April 28, 2004

Commissioner William J. Keese, Chair
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Commissioner James D. Boyd
Commissioner John L. Geesman
Commissioner Jackalyne Pfannesnstiel
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Comments on 2nd Revised Presiding Member's Preliminary Decision (PMPD) for the Morro Bay Power Plant Project (April 16, 2004) and the Revised PMPD for the El Segundo Power Redevelopment Project (April 16, 2004).

Dear Commissioners:

This letter provides comments on two documents issued recently pursuant to the Energy Commission's AFC proceedings – the 2nd Revised PMPD for the Morro Bay Power Plant Project and the Revised PMPD for the El Segundo Power Redevelopment Project, both published in April 2004. The two documents contain substantial procedural and substantive flaws that result in an inadequate legal basis for their findings and conditions. Further, the proposed decisions do not adequately address the significant environmental impacts that would be caused by both of the proposed projects. Approval of the documents in their current form by the full Commission would almost certainly lead to legal challenges that would delay construction of the two projects.

Our comments apply largely to both of the documents, since they share many of the flaws mentioned above. We address separately, however, at the end of this letter several specific concerns with the proposed biological conditions for the El Segundo facility.

These comments are provided for your consideration in advance of the El Segundo Committee hearing scheduled for April 29, 2004, with the hope that the Committee will recognize these significant procedural and substantive errors, and will then postpone the hearing scheduled for the full Energy Commission on May 5, 2004. This would allow the Committee and the Commission to consider our comments and recommendations and make necessary changes to both Revised PMPDs before they are presented to you for approval. Please note, too, that because the Committee for each of these AFC proceedings consists of the same two Commissioners, we have referred to the Committee in the singular rather than the plural in our comments, primarily for ease of reading.

The two documents share the following significant flaws, each of which is discussed in greater detail in our attached comments:

I. First, the Committee's findings and declarations ignore existing law. The law is unambiguous in providing the Coastal Commission a specified role in the Energy Commission's NOI and AFC proceedings. That role requires the Energy Commission, pursuant to section 25523(b), to consider provisions in the report provided by the Coastal Commission pursuant to section 30413(d) in both types of proceedings, including AFC proceedings not preceded by an NOI.

II. Second, rather than conform its determinations to the unambiguous requirements of the law, the Committee purports to discern a level of ambiguity in the relevant requirements, and as a result, both misinterprets the law and legislative intent. As stated above, we assert that there is no ambiguity; however, in response of the Committee's findings, we provide additional analysis to show that if there is any ambiguity, it is necessary to resolve it in favor of the Coastal Commission having the role described above. Not only is this analysis supported by a clear and plain reading of the applicable statutes, it is further supported by the clear intent of the legislature in enacting relevant provisions of the Coastal and Warren-Alquist Acts.

III. Third, the Committee's response to this purported ambiguity, to propose new rules governing the relationship of the Energy Commission and the Coastal Commission during AFC proceedings, is both procedurally flawed and represents an unwarranted overreaching of the Commission's authority.

IV. Finally, in both decisions, despite the uncontroverted evidence that the operations of both power plants kill uncountable numbers of marine organisms, the Committee erroneously defers the necessary analysis and the identification of project-related impacts and mitigation measures to some unknown future date with unknown results. This "passing the buck" is inappropriate and creates a clear weakness in the decisions that render them vulnerable to successful legal challenges. It also raises the question of why the Committee is choosing to ignore the substantial weight of evidence provided by scientific experts and making a decision that wastes the considerable time, money, and other state resources expended to gather, evaluate, and submit the evidence.

We have several recommendations as to how the Committee should respond to our comments. First, we believe both documents should be revised to reflect the concerns expressed in our comments. This will require that the Energy Commission postpone the two hearings scheduled for May 5, 2004 to both allow the documents to be revised and to provide the necessary opportunity for public comment on the revisions. Regarding the proposed El Segundo project, which has undergone significant changes since the Coastal Commission provided its 30413(d) report to the Energy Commission, we recommend the Committee provide an opportunity for the Coastal Commission to review changes to the project that were proposed after the Coastal Commission's review. These changes, proposed by both the applicant and by Energy Commission staff, result in a significantly different project than was previously considered by the Coastal Commission, and we believe it would be helpful to all parties to determine whether

the proposed changes would allow the project to conform to Coastal Act requirements. This may help avert the legal challenges, calls for Legislative action, and further delays in project certification that would otherwise almost certainly occur.

Thank you for your attention to these comments. I look forward to working with you to resolve these issues.

Sincerely,

PETER DOUGLAS
Executive Director

Cc: Energy Commission Service List for 00-AFC-14 and 00-AFC-12

April 28, 2004

COASTAL COMMISSION STAFF COMMENTS ON 2ND REVISED PRESIDING MEMBER'S PRELIMINARY DECISION (PMPD) FOR THE MORRO BAY POWER PLANT PROJECT (APRIL 16, 2004) AND THE REVISED PMPD FOR THE EL SEGUNDO POWER REDEVELOPMENT PROJECT (APRIL 16, 2004).

I. The law is unambiguous in providing the Coastal Commission a specified role in the Energy Commission's NOI and AFC procedures.

The statutes that apply to these AFC proceedings clearly establish that the Coastal Commission is to provide a report to the Energy Commission, and that the Energy Commission is to adopt provisions provided in that report unless the Energy Commission determines they are infeasible or would cause greater adverse environmental harm.

A. Applicability to AFC proceedings of P.R.C. section 25523(b).

Section 25523(b), which applies to the Energy Commission's AFC process, states

> *In the case of a site to be located in the coastal zone, specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible.*

This is in addition to the separate and distinct requirement in section 25507(a) that requires the Coastal Commission provide a report during an NOI process.

On its face, section 25523(b) applies to all AFC proceedings, and does not make a distinction between "stand-alone" AFCs and those preceded by an NOI proceeding. Further, the reference in section 25523(b) to section 30413(d) does nothing to change this, since section 30413(d) applies "whenever" the Energy Commission carries out its siting authority for proposals in the coastal zone (see below)[1].

[1] The Committee also references in the Revised PMPDs P.R.C. section 25540.6. This section identifies the types of proceedings that are exempt from the NOI process. Since, pursuant to section 25523(b), the Coastal Commission report is to be considered in AFC reviews regardless of whether they are preceded by an NOI proceeding, section 25540.6 has no bearing on the role of the Coastal Commission in the two present AFC proceedings or on future AFC proceedings.

B. Applicability to AFC proceedings of P.R.C. section 30413(d).

Section 30413(d), which sets forth the Coastal Commission's responsibilities with respect to both NOI and AFC proceedings, states:

> *"Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the commission shall participate in those proceedings and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in that notice...*

This section requires the Coastal Commission to submit the report identified therein "whenever" the Energy Commission exercises its Chapter 6 siting authority. This includes both the NOI and the AFC processes.

II. The ambiguity erroneously perceived by the Committee results in a misapplication of law and strays from Legislative intent as well as principles of statutory interpretation.

A. Any ambiguity is due only to the Committee's inappropriate editing of an applicable statute.

The Committee claims in both Revised PMPDs that section 25523(b) does not apply to the Energy Commission's AFC proceedings not preceded by an NOI proceeding. They cite as support for this erroneous conclusion, for example on page 236 of the Morro Bay document, the applicant's argument that section 30413(d) applies only in an NOI proceeding, and follows with an edited quotation of that section that purports to provide support for an interpretation of this provision that is entirely different than that which derives from a complete, unedited quotation. The PMPDs quote section 30413(d) as follows:

> "Whenever... the...Energy...Commission exercises its siting authority...with respect to any thermal power plant...within the coastal zone, the [Coastal] commission shall participate in those proceedings and shall receive from the...Energy...Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The [Coastal] commission shall analyze each notice of intention and shall, prior to completion of the preliminary report [now summary and hearing order] required by Section 25510, forward to the...Energy...Commission a written report on the suitability of the proposed site and related facilities specified in that notice..." [The section then continues to describe issues evaluated in the report.]

The Committee then states, "Since on its face P.R.C. section 30413(d) expressly relates *only* to the Notice of Intention, the Coastal Commission has no legal mandate to prepare such a report, and the Report does not apply to a stand-alone AFC. (Emphasis added.)"

The reading suggested by the Committee, that the Coastal Commission has no role outside of the NOI process, is only possible due to editing out key words and phrases, resulting in misplaced emphasis on portions of section 30413(d) and an erroneous conclusion based on this emphasis. Instead, a plain reading of the complete language of section 30413(d) must lead to a conclusion that the Coastal Commission's report is to be provided for any proceedings involving any exercise of the Energy Commission's siting authority under Chapter 6 of the Warren-Alquist Act. The full text of section 30413(d), including in bold some key phrases that the PMPDs either omit or do not address in their quotation and analysis of this section, reads:

> ***Whenever*** *the State Energy Resources Conservation and Development Commission exercises its* ***siting authority*** *and* ***undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15*** *with respect to* ***any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the commission shall participate in those proceedings and shall*** *receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510,* ***forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed*** *site and related* ***facilities*** *specified in that notice. The commission's report shall include a consideration of, and findings regarding, all of the following:*
>
> *(1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.*
> *(2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.*
> *(3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.*
> *(4) The potential adverse environmental effects on fish and wildlife and their habitats.*
> *(5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.*
> *(6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.*
> (7) *Such other matters as the commission deems appropriate and necessary to carry out this division.* [Emphasis added.]

Please note that this section applies "whenever" the Energy Commission exercises its siting authority pursuant to Chapter 6 of the Warren-Alquist Act. The proceedings in Chapter 6 include both the NOI and AFC processes. Please also note that the Energy Commission's "siting authority," as referenced in section 30413(d), is defined in section 25500 to be applicable to both "...a new site and related facilities **or a change or addition to an existing facility.**" (Emphasis added.) Additionally, section 30413(d) refers to "those proceedings", not to just one proceeding or the other. Finally, as noted by Energy Commission staff in its February, 2003, submittal in the Morro Bay AFC proceeding, among the subject areas identified in sections 30413(d)(1)-(7) are many that are specifically relevant to AFC proceedings (as distinguished from NOI proceedings), because they raise issues that extend beyond just the siting of a facility, such as the effects of facility design on fish and wildlife or other coastal resources.

B. The Committee's reliance on section 30413(e) of the Coastal Act is not well-founded.

The Committee erroneously finds additional grounds for ambiguity in relevant statutory provisions in section 30413(e) of the Coastal Act, which authorizes the Coastal Commission to participate in "other" Energy Commission proceedings "pursuant to its powerplant siting authority". The Committee interprets section 30413(e) as referring to, among other proceedings, AFC proceedings under Chapter 6 of the Warren-Alquist Act.

This premise is without merit for at least two reasons. First, as noted above, section 30413(d) applies "whenever" the Energy Commission exercises its siting authority for "thermal powerplants" under Chapter 6 of the Warren-Alquist Act. This includes both the NOI and AFC processes. This is further supported, as noted above, by the requirement of section 25523(b) for the Energy Commission to address during the AFC process the provisions of the Coastal Commission's report. Second, the Energy Commission has numerous proceedings involving powerplant siting that are not a part of Chapter 6 of the Warren-Alquist Act. These include, for example, "hearings and investigations" necessary to carry out provisions of the Warren-Alquist Act (in Chapter 3, section 25210), research and development on improvements in siting (also in Chapter 3, section 25216(b)), expedited siting provisions (Chapter 6.5), and others. Note, too, that section 30413(d) refers to "*thermal* powerplants" (emphasis added), while section 30413(e) refers more generally to the Energy Commission's "powerplant siting authority." As noted, the broader term includes, for example, Energy Commission proceedings described in the wind energy siting provisions of Title 7, section 65892.13, and others not included in Chapter 6. Therefore, it is clear that section 30413(d) refers to all Chapter 6 siting procedures for thermal powerplants in the coastal zone while 30413(e) refers to any of several other powerplant siting proceedings conducted by the Energy Commission.

In sum, the Energy Commission's Chapter 6 siting authority covers both new sites and facilities as well as changes and modifications to existing facilities, and the Coastal Commission is to be involved through section 30413(d) whenever the Energy Commission exercises this authority in the coastal zone.

C. The Committee's conclusions based on the ambiguity it finds in relevant statutory provisions contravene the manifest intent of the Legislature in enacting these provisions and violates generally accepted principles of statutory interpretation. Further, the Committee provides no evidence that its conclusions are either supported by or consistent with legislative intent.

1. The Committee's conclusions contravene the intent of the Legislature. The Committee's dismissal of the views of the Coastal Commission (as expressed in its 30413(d) reports during AFC review of these two proposed projects) is based on an interpretation of relevant statutes that the Coastal Commission's report issued pursuant to section 30413(d) is not required during an AFC proceeding not preceded by an NOI proceeding. This interpretation violates the intent of the Legislative as clearly expressed in both the Warren-Alquist and Coastal Acts. Thus, the Committee's adoption of this interpretation contravenes the intent of the legislature.

The Committee notes what appears to be some discomfort with its decisions. It states, for example, on page 237 of the Morro Bay Revised PMPD, "It may appear somewhat incongruous that the Legislature would have created a powerful role for the Coastal Commission in AFC proceedings for which there was an NOI, and a lesser role in AFC proceedings for which there was no NOI". We suggest to the Committee that the reason it appears incongruous is because it is incongruous – the Legislature intended something else entirely, as is clear from a full reading of the applicable statutes.

Section 30413(d) establishes that the Coastal Commission's is required to submit its report whenever the Energy Commission exercises its siting authority for thermal powerplants located in the coastal zone. Its reference to the NOI process for the purpose of establishing the timing for the submittal of the Coastal Commission's report is understandable given the original two-phase review process initially established in the Warren-Alquist Act. The Committee notes this fact in footnote 50 on page 238 of the Morro Bay Revised PMPD, where it explains the original requirement in the Warren-Alquist Act for all proposed facilities to go through a two-phase process – first the NOI, then the AFC. With such a process, there was no need for the Legislature to establish a separate timing requirement for stand-alone AFC proceedings, since at the time of the enactment of section 30413(d) there was no such process.

In the PMPDs the Committee adopts the position of the applicants that sections 25523(b) and 30413(d) are inapplicable to the respective proceedings because section 30413(d) requires the Coastal Commission to submit its report during a proceeding (NOI) from which the subject projects are exempt. Generally accepted principles of statutory interpretation reveal a complete lack of merit in this conclusion. Sections 25523(b) and 30413(d) were enacted as part of the same legislation (Stats. of 1976, Ch. 1330) and took effect simultaneously on January 1, 1977. At the time of the enactment of these provisions all thermal powerplant projects that the Warren-Alquist Act required to undergo an AFC proceeding also had to undergo a NOI proceeding. In other words, in 1976 there was no such thing as a "stand-alone AFC proceeding" to which the Committee now says sections 25523(b) and 30413(d) are inapplicable. In 1978, through the enactment of section 25540.6 of the Warren-Alquist Act, the legislature for the first time created for certain types of thermal powerplant projects an exemption from the previous, universally applicable requirement to undergo an NOI proceeding. However, in 1976 it was completely consistent with, and reflective of, an intent and expectation on the part of the legislature that

sections 25523(b) and 30413(d) would apply to all thermal powerplant projects in the coastal zone to require the Coastal Commission to submit its report during an NOI proceeding because at that time all such projects were required to undergo such a proceeding.

The intent and expectation of the legislature that all thermal powerplant projects in the coastal zone will be subject to the NOI process in the Warren-Alquist Act is also reflected in section 30264 of the Coastal Act, which requires that in order for any "new or expanded [a category within which both the Morro Bay and El Segundo powerplant projects clearly fall] thermal electric generating plant "to be "constructed in the coastal zone" the Energy Commission must make certain findings as part of the Warren-Alquist Act's NOI process.

The Committee's interpretation of section 25523(b) infers an intent on the part of the legislature to limit the scope of section 25523(b) so it would not apply to "stand-alone AFC proceedings" when it amended the Warren-Alquist Act to add (and to subsequently amend) section 25540.6. However, under generally accepted principles of statutory interpretation, when the legislature fails to change the law in a particular respect when the subject is before the legislature and changes in other respects are made, such a failure is indicative of an intention to leave the law unchanged in that respect. (*State v. Superior Ct.* (1984) 159 Cal.App.3d 331.) Here, the failure of the legislature to make any changes to sections 25523(b) or 30413(d) when it enacted section 25540.6 reflects an intent on the part of the legislature to leave the scope and applicability of sections 25523(b)/30413(d) unchanged. Neither this Committee nor the Applicants have identified any evidence of any different intent on the part of the legislature in enacting section 25540.6.

The interpretation that the Committees have adopted in their PMPDs of the scope and applicability of sections 25523(b) and 30413(d) establishes a regulatory framework in which the manner the Energy Commission considers the Coastal Commission's report not only nullifies applicable sections of law but varies drastically depending on the totally arbitrary factor of whether or not and AFC proceeding is or is not preceded by an NOI proceeding. Such a result borders on the absurd and cannot be what the legislature intended.

Thus, when the Legislature amended the Warren-Alquist Act to delete the NOI requirement for facilities identified in section 25540.6, it did not change the scope and applicability of sections 25523(b) and 30413(d), since it left intact the requirement in section 30413(d) for the Coastal Commission to provide its report <u>whenever</u> there was a Chapter 6 siting process. It also left intact the requirement in 25523(b) for the Energy Commission to incorporate into its AFC decision the recommendations of the Coastal Commission's report, regardless of whether that process is or is not preceded by an NOI process.

Therefore, even with the later changes in the Warren-Alquist Act leading to the single-phase AFC process, the Legislative intent is clear. The legislative intent behind the applicable law was, and is, that the Coastal Commission submit a report and that the Energy Commission consider this report during its AFC process for proposed thermal powerplant projects in California's coastal zone.

2. The Committee provides no evidence that its conclusions are based on Legislative intent: In contrast to the clear reading of Legislative intent provided above, the Committee identifies in the record no evidence of the Legislature's intent to change the scope and applicability of sections 25523(b) and 30413(d) when it enacted section 25540.6. If the Committee wishes to maintain its current position, it bears the burden, as yet unmet, to provide evidence that the Legislature intended to specifically alter the scope and applicability of the Coastal Commission's role in AFC proceedings.

III. The proposed new rules exceed the Committee's authority and are procedurally flawed.

In both Revised PMPDs, the Committee attempts to create two new rules establishing how the Coastal Commission is to be involved in the Energy Commission's AFC proceedings. The proposed rules are described by the Committee as follows:

> "...we establish, pursuant to our responsibility to harmonize all the applicable statutory provisions, as a precedential decision under section 11425.60 of the Administrative Procedures Act, the following rules for this proceeding and for future AFC proceedings that involve a coastal site for which there is no NOI:
>
> 1. In its AFC proceeding, the Energy Commission will consider the factors listed in P.R.C. section 30413(d).
> 2. With regard to each factor, the Energy Commission will give substantial weight to the timely recommendations of the Coastal Commission following them unless the Energy Commission finds that they would be infeasible, or that they would cause a greater adverse effect on the environment (in comparison to certifying the proposed facility without the recommendations), or that, on the basis of clear and convincing evidence in the Energy Commission's record, they would otherwise be inappropriate."

We believe the Committee in creating these proposed rules makes several grievous errors, both substantively and procedurally. These proposed rules are apparently based on the Committee's erroneous findings that the Coastal Commission has no role in the AFC proceedings. In several ways, the Committee exceeds its authority and ignores procedural requirements for such actions. Regarding the exceedance of authority, we refer to our previous analysis in these comments. Regarding the procedural flaws, we provide the following discussion.

A. Even if the proposed rules were not in excess of the Committee's authority, the procedural flaws in the Committee's establishment of the rules would render them invalid.

There are in addition to the substantive and legal shortcomings in the Committee's decisions several procedural flaws. The Committee is attempting to adopt new rules regarding the relationship between the Coastal Commission and Energy Commission in AFC reviews. Not only is this position without merit, as described above, it was reached inappropriately.

1. The Committee's inclusion of the proposed rules in the latest Revised PMPDs is arbitrary. The question of whether the Coastal Commission is involved in an AFC proceeding was asked and answered by the Committee through briefing by various parties and then a Committee order issued February 20, 2003. The Committee's latest Revised PMPDs reverse that previous order without adequate basis for reversal. The Committee did not ask the question again, did not request to be briefed on the question again, and did not receive new testimony on the question; therefore its new decision is entirely arbitrary.

The document presumably leading the Committee to question the Coastal Commission's role during an AFC proceeding was a January 7, 2003 letter from the applicant in the Morro Bay matter, Duke Energy. In the letter, described by Duke as non-evidentiary, Duke claimed the Coastal Commission's report is not required during an AFC process. In response to that letter and to motions by agencies and parties in the matter, the Committee issued an order on February 20, 2003, stating that it is including the Coastal Commission's report in the record in a manner consistent with sections 25523(b) and 30413(d), and in a manner consistent with the Energy Commission's previous acceptance of the Coastal Commission report in an earlier proceeding, the Moss Landing AFC review (99-AFC-4).

Subsequent Committee decisions continued to recognize the Coastal Commission as an appropriate and necessary part of the AFC review. For example, in the Morro Bay proceeding, the first PMPD issued on April 29, 2003 states on pages 228-229, "The Energy Commission is required to incorporate provisions specified in the Coastal Commission's report in its decision, unless the Energy Commission finds the provisions would result in greater adverse effects on the environment or that it would not be feasible (Public Resources Code 25523)." The second PMPD published November 21, 2003 contains the same language on pages 233-234. In the El Segundo proceeding, the Committee present essentially the same position in the PMPD published January 30, 2004, stating on page 53, "The ESGS is within the 'coastal zone' and thus subject to the requirements of the California Coastal Act. Public Resources Code P.R.C. section 25523(b), listing the required contents of the Energy Commission Decision, including provisions to meet the coastal Act as may be specified in a report from the California Coastal Commission, unless the Energy Commission finds such provisions would result in greater impact on the environment or are infeasible."

More recently, the Committee held a hearing to address several other questions regarding the Coastal Commission's role in the Morro Bay proceeding.[2] Notably absent from the three questions was any question concerning whether sections 25523(b) and 30413(d) apply to the proceeding. Rather, the questions that the Committee posed concerned three specific aspects of what the Committee needed to do with the Commission's findings and provisions in the

[2] The Committee's February 5, 2004 "Notice of Public Hearing and Hearing Order" asked that three questions be addressed:

1) May the Committee rely on the City's determination of Project conformance with the LCP?
2) Can the Energy Commission independently determine whether a project complies with the Coastal Act policies or is it bound by the determination of the CCC?
3) What are the appropriate legal and conceptual criteria for the Energy Commission to apply in the event that it finds a non-compliance with Coastal Act and LCP policies and must consider an override of Coastal Commission findings pursuant to Public Resources Code P.R.C. section 25525?

30413(d) report. Presumably, to further emphasize the purpose of the hearing, the Presiding Member stated at the beginning of the hearing, "I don't believe that we need to discuss in an extended fashion the issue that's been raised about the timeliness of the report, or whether the Coastal Commission's report does not have to be delivered because we are in an AFC process and not in an NOI process..."(page 4 of the March 3, 2004 hearing transcript). This statement is supported by the hearings and order issued the previous year, as described above.

Based on over a year of previous Committee decisions and documents, as well as the statement of the Presiding Member mentioned above, it is clear that the Committee had considered resolved the question of whether sections 25523(b) and 30413(d) are applicable to an AFC proceeding not preceded by an NOI proceeding. Although the project applicant raised the question at the hearing, as did the applicant in the El Segundo proceeding during the public comment portion of the hearing, there was no reason for the Coastal Commission to respond to these comments, since the Committee had in its previous order made it clear the question was resolved.

In its PMPDs, the Committee now purports to create new rules that would severely alter the Coastal Commission's involvement under sections 25523(b) and 30413(d) in not only these two AFC proceedings but all future AFC proceedings. The Committee attempts to do so without providing notice that an issue previously ruled upon and thus one that the parties would reasonably assume to be closed and no longer open to reconsideration is in fact being reopened and reconsidered. Not only does the Committee undertake to reconsider the question, it completely reverses its previous determination. In doing so in the manner described, the Committee contravenes fundamental principles of fairness and due process.

IV. The Committee illegally defers the timing of implementing its responsibilities.

California case law prohibits a permitting agency from delegating its environmental review and permitting obligations to a time after its permit decision (see, for example, *Sundstrom v. County of Mendocino (1988)*). However, this is exactly what the Committee attempts to do when it shifts several of its CEQA and Warren-Alquist Act responsibilities to the Regional Board. Along with being contrary to the law, this approach leads to confusion and uncertainty as to whether, how, and by whom various environmentally significant issues will be addressed. Further, not only does the Committee attempt to inappropriately defer its own responsibilities to the Regional Board, it attempts to transfer the responsibilities of a third agency, the Coastal Commission, to the Regional Board.

To add to the inappropriateness and the confusion, the Committee further complicates matters by simultaneously stating that the Regional Board has sole authority in matters related to the federal Clean Water Act and then imposing on the Board several requirements that would bind the Regional Board's future decision-making capability. In its apparent zeal to be finished with these two reviews, the Committee tries to defer its duties to the Regional Board while glossing this transfer of responsibility by interfering with what it says is the Regional Board's duties. Despite this contortion, the Committee's findings and recommended conditions remain in violation of the law and do not fulfill its obligation to address the underlying significant impacts that would be caused by these two projects.

In one further complication, the Committee dismisses the concerns expressed by the Coastal Commission about once-through cooling and defers resolution of those concerns to the Regional Board, even though all three agencies are subject to the same statute that regulates, in part, the effects of once-through cooling systems. In discussing its deferral of responsibility for this issue (see page 58 of the El Segundo Revised PMPD), the Committee cites California Water Code section 13142.5(b), which requires that new or expanded powerplants use the "best available siting, design, technology, and mitigation measures feasible" to minimize entrainment, and states that the applicant will do an entrainment study pursuant to that statute. We note that section 30412(a) of the Coastal Act also refers to that section of the Water Code, and states that it applies to the Coastal Commission as well as to the Regional Boards[3]. The Coastal Commission has already determined that conformity to the Coastal Act, which includes conformity to section 30412(a), requires the entrainment study be done before the Energy Commission licenses the proposed project. Rather than adopt this provision, the Committee defers it, without providing any justification for reasons of infeasibility or greater adverse impact (pursuant to Water Code section 25523(b)). Therefore, the Committee's deferral of the study is improper.

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[3] Coastal Act section 30412(a) states: "In addition to Section 13142.5 of the Water Code, this P.R.C. section shall apply to the commission and the State Water Resources Control Board and the California regional water quality control boards."

Comments on the proposed Biological Conditions of the El Segundo Repowering Project

We reiterate that neither of the proposed projects conforms yet to policies of the Coastal Act, which include a provision that marine biological resources be "maintained, enhanced, and where feasible, restored". Along with the flaws in the Committee's decisions identified earlier in this document, we present the following concerns with the Biological Conditions proposed by the Committee as being sufficient for the El Segundo Repowering Project.

General Comment:

Few of the Committee's findings and none of its recommended conditions related to marine biology are based on scientifically-acceptable data or analysis, or are based on the full record of the AFC proceeding, and are thus arbitrary. Rather than basing its findings and conditions on the weight of scientific evidence in the record showing that Santa Monica Bay is degraded and that the power plant operations will continue to kill some unknown but significant number of organisms, the Committee either largely defers the studies necessary to determine impacts and mitigation measures or imposes conditions that are either confusing, meaningless, or ineffective in addressing the issues. Further, the Committee's refusal to require the applicant to provide this critical information is then used by the Committee to fault its staff for "asserting" various concerns, such as the need for monthly flow caps to protect spawning periods that occur year-round, without having the necessary information to back up its assertions.

The Committee ignores the requests of its staff and of other agencies to have the applicant perform the study necessary to produce the data needed to address these concerns. It also ignores the precedence established in recent and similar AFC proceedings during which the various Committees properly asserted their authority and obligations by requiring the applicant to complete entrainment studies as part of the AFC reviews.

Specific Comments:

We have concerns about each of the four proposed BIO conditions:

Condition BIO-1 would require the applicant to provide $1 million to the Santa Monica Bay Restoration Commission. The record includes extensive testimony from credible scientific sources about the effects of once-through cooling, the degradation of the Santa Monica Bay ecosystem, and the need to address these impacts through effective mitigation measures. The record does not contain, however, any evidence that these impacts would be addressed by having the Santa Monica Bay Restoration Commission do studies to improve the "understanding of biological dynamics". Further, there is nothing in the record that provides a basis for requiring a $1 million payment, or that $1 million is any more or less appropriate or feasible than $10 million, half a million, or some other figure. While we are not opposed to such studies, we do not see any connection in the record between the specific impacts of once-through cooling and a vague directive to study the Bay's dynamics. For such a condition to be valid and effective, it must be based on the record and must be specific as to what will be done with the money – i.e.,

what impacts will be addressed and what mitigation measures will be implemented. We further note that the condition would allow the money to be used on entrainment studies, which is inappropriate, since it is necessary for the applicant to perform that type of study anyway as part of this AFC proceeding.

Condition BIO-2 would require the applicant to perform an aquatic filter barrier feasibility study. This condition is essentially a deferral by the Committee of its obligation during an AFC proceeding to identify feasible ways to minimize the environmental effects of a proposed project. The study is meant to identify whether an alternative is feasible, which is clearly part of the Committee's CEQA-based responsibilities. Further, the Committee defers its authority regarding the final decision on the results of the study to the Regional Board. We also remind the Committee that while studies are generally needed to determine what mitigation may be necessary for a proposed project, studies themselves are not mitigation.

Condition BIO-3 would impose an annual and seasonal cooling water flow cap. Similar to the issue raised previously in this letter, a problem with any flow cap developed at this point in the project review is that the flow numbers are arbitrary. Other than the generally accepted premise that flow rates correlate to entrainment rates, there is no evidence in the record that the flow cap amounts will result in greater or less entrainment over the course of a year, whether they will cause increased mortality to particularly sensitive species or during critical times of year, or other effects. Also similar to the entrainment study mentioned above, this is the type of information that an applicant is to provide as part of environmental review, not as a post-approval condition.

Condition BIO-4 would perhaps result in the applicant performing an entrainment study sometime in the future. The condition as written is confusing and provides no certainty as to what may result from its implementation. We believe the Committee intended to propose a condition requiring the applicant to conduct a study that will result in operations of the completed project reducing entrainment by at least 60% from a particular level, and that this study be carried out under the auspices of the Regional Board. However, the language of the proposed condition would not necessarily lead to those results. Examples include:

- The condition would require that entrainment be reduced 60% below "unmitigated levels, as directed and required" by the Regional Board[4]. Regarding "unmitigated levels" – is the Committee referring to some particular level identified in the Revised PMPD, such as the annual flow cap, the CEQA baseline level, or another number, and if so, which one? Also, what does it mean for the Regional Board to "direct and require" what the level is to be – is it to be at least 60% reduction regardless of what the Board determines, or could it be something less than 60% if the Board directs otherwise?

[4] On page 53 of the El Segundo Revised PMPD, the Committee states that its selection of a CEQA baseline addresses the need identified by the Coastal Commission's for a 316(b)-like study. This is incorrect. The Coastal Commission stated that such a study was needed not only to establish a CEQA baseline, but also to allow conformity to the Coastal Act.

- The condition would also require this 60% reduction of entrainment (or, as noted above, some other level of reduction) "prior to commencement of commercial operation". Similar to the phrase described above, this language could be interpreted several different ways. Does it mean the applicant must operate the pumps to produce the reduced entrainment rate until the start of commercial operation and then may operate at a much higher level? Alternatively, does it perhaps mean the applicant should operate as a non-commercial entity until entrainment is reduced 60% and then switch back to being a commercial operation?

Further, the Committee's selection of a 60% reduction of entrainment is arbitrary. There is nothing in the record to support a 60% reduction versus a 73% reduction or a 2% reduction or any other percentage reduction in entrainment. This 60% number is presumably taken from the recently adopted federal U.S. EPA 316(b) rule, which requires entrainment to be reduced by 60-90%. The Committee provides no justification for selecting 60% instead of any other number. This is due in part to the lack of scientific evidence as to what level reduction would result in conformity to any of several statutory requirements, and is based on the Committee's decision to completely ignore the advice of commenting agencies and scientists who identified the need for an entrainment study to both identify impacts and feasible mitigation measures.

Additionally, the condition is confusing in that the Committee attempts to both recognize the Regional Board's sole authority over implementation of the Clean Water Act while at the same time would establish a performance standard for the Board to meet as it implements its duties under that Act. By the Committee's own findings, the condition is unenforceable, since it would result in the Energy Commission interfering in the authority granted to the Regional Board.

Therefore, regardless of the Committee's intent, the current wording of proposed condition BIO-4 renders it either meaningless or ineffective.

Docket Optical System - RE: Morro Bay 2nd Revised PMPD

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Subject: RE: Morro Bay 2nd Revised PMPD

Here are the Coastal Commission's comments for the May 5th hearing. This may be a repeat e-mail for some of you -- my apologies.

<<CoastalCommissionCommentsApril2004.pdf>>

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