STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification of the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

COMMENTS OF INTERVENOR ENVIRONMENTAL HEALTH COALITION ON THE PRESIDING MEMBER'S PROPOSED DECISION AND ERRATA

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The Environmental Health Coalition ("EHC") appreciates this opportunity to address all members of the California Energy Commission regarding the Presiding Member's Proposed Decision and Errata (together the "PMPD") for the Chula Vista Energy Upgrade Project ("Project").[1] The PMPD correctly concludes that the Application for Certification ("AFC") for the Project should be denied. The Commission therefore should adopt the PMPD as its final decision in this proceeding.

As the PMPD properly finds, the Project is fatally inconsistent with the plain text of local laws, ordinances, regulations, and standards ("LORS") set forth in the General Plan and zoning ordinance of the City of Chula Vista ("City"). The Project—which would be located about 350 feet from a residential neighborhood—clearly conflicts with

[1] These comments supplement the comments EHC submitted in advance of the April 13, 2009 Committee Conference on the PMPD. (Comments of Intervenor Environmental Health Coalition on the Presiding Member's Proposed Decision, Docket Log No. 50515 (March 16, 2009); Reply Comments of Intervenor Environmental Health Coalition on the Presiding Member's Proposed Decision, Docket Log No. 50726 (March 30, 2009).) Those comments are incorporated herein by reference.

a General Plan policy establishing a 1,000-foot buffer zone between power plants and homes. The Project also conflicts with land use standards restricting the Project site to "limited" industrial uses—uses that do not include power plants.

In seeking this Commission's approval of the Project, the Applicant, Energy Commission Staff ("Staff"), and City employees have offered a series of increasingly tortured interpretations of local law. These interpretations, however, contravene the plain meaning and clear intent of the General Plan and zoning ordinance and are entitled to no deference here. The Applicant and Staff also have failed to seriously consider a reasonable range of alternatives to the Project, and have failed to demonstrate that the few alternatives they did examine are infeasible. Indeed, the evidence in the record demonstrates that there may well be more appropriate and feasible alternative sites for the Project as well as feasible alternative generation technologies.

The approval that the Applicant seeks cannot be granted. The Project's conflicts with local LORS and the existence of potentially feasible alternatives together mean that the Commission cannot make the findings required for approval under the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, and the Warren-Alquist Act, Public Resources Code § 25000 *et seq*. The PMPD's analysis of local LORS conflicts and alternatives is legally sound and amply supported by the evidence. EHC therefore urges the Commission to adopt the PMPD as its final decision.[2]

[2] In requesting that the Commission adopt the PMPD, EHC does not waive the alternative arguments for denial of the AFC raised in EHC's briefs on the merits and prior comments on the PMPD.

I. The PMPD Correctly Found that the Project Conflicts with Local Land Use LORS.

A. The Project Violates the Clear Buffer Zone Established by General Plan Policy E 6.4.

The Project facially conflicts with General Plan Policy E 6.4. This policy was adopted in 2005 during the City's General Plan update process, in conjunction with the City's groundbreaking effort to incorporate environmental justice principles into its fundamental planning documents. (See Ex. 608 at p. 4; Ex. 626.) Policy E 6.4 requires the City to "[a]void siting new or repowered energy generating facilities and other major toxic air emitters within 1,000 feet of a sensitive receiver." (Ex. 620 at p. E-32.) As the PMPD correctly points out, Policy E 6.4 was adopted in response to the City's approval of the existing peaker plant on the Project site, and was intended to establish a clear, non-discretionary buffer zone between power plants and homes. (See Errata at pp. 22-23 & fn. 61.) This Project is located within about 350 feet of homes, well within the buffer zone established by Policy E 6.4.

The Applicant, Staff, and the Assistant City Manager have all offered interpretations of Policy E 6.4 that conflict with its plain language, defy its documented purpose, and threaten to rob it of any meaning. The PMPD correctly rejects these interpretations. For example, the Applicant and Staff have argued that this policy applies only to new major sources of air pollutants as defined under the federal Clean Air Act. This interpretation, however, has no support in the record and no basis in the text of the General Plan. Indeed, this interpretation would all but strike the words "new or re-

powered energy generation facilities" from the policy, and—as the PMPD correctly found—render the policy effectively meaningless. (See Errata at pp. 22-23.)

The alternative interpretation of Policy E 6.4 offered in the Assistant City Manager's comments on the PMPD—one that would give the City unfettered, ad hoc discretion to apply or ignore the policy based on a case-by-case review of mitigation measures and health risk assessments—has no basis in the policy's text and directly contradicts its history. In the course of drafting Policy E 6.4, the City Council considered *and expressly rejected* earlier versions of the policy that would have allowed power plants within the buffer zone if impacts were mitigated or satisfactory health risk assessments conducted. (Compare Ex. 626A with Ex. 626E, 626G.) The City Council thus explicitly refused to grant the level of discretion that the Assistant City Manager would claim. For the same reason, the City's side agreement with the Applicant cannot make the Project consistent with the General Plan. (See Errata at p. 24.) The General Plan does not give the City discretion to apply Policy E 6.4 on an ad hoc basis.

At the urging of the community, Policy E 6.4 was adopted by the City Council precisely to ensure that the City would avoid approving this type of project in the future. The PMPD has correctly applied the policy's plain language and clear intent, and the Commission should affirm its conclusions.

B. The Project Violates General Plan Policy LUT 45.6 by Authorizing Heavy Industrial Uses in a "Limited" Industrial Corridor.

The PMPD correctly concluded that the Project violates Policy LUT 45.6, which implements the City's goal of maintaining Main Street as a limited industrial corridor.

(Ex. 619 at p. LUT-159.) Although the Applicant and Staff would have the Commission disregard the General Plan's use of the word "limited," this word has meaning. The General Plan explicitly separates "limited" and "general" industrial uses into two different land use designations. (Ex. 619 at p. LUT-53 to LUT-54.) The PMPD correctly concludes that a large peaking power plant is appropriate for the General Industrial designation, not the Limited Industrial designation, and therefore conflicts with Policy LUT 45.6. (Errata at pp. 20-21.)

C. The Project Is Inconsistent with the Site's "Limited Industrial-Precise Plan" Zoning Designation.

The Project is inconsistent with applicable zoning. The zoning designation for the Project site, "Limited Industrial-Precise Plan," does not allow construction of a peaking power plant. Under the plain language of the City's zoning code, power plants are a permitted use in the General Industrial zone. (Chula Vista Municipal Code ("CVMC") § 19.46.020(E).) However, they are neither permitted nor conditionally allowable in the Limited Industrial zone. (CVMC §§ 19.44.020, 19.44.040.) Settled principles of statutory interpretation dictate that the omission of any provision for power plants in the Limited Industrial zone, in combination with the express provision permitting power plants in the General Industrial zone, indicates an intent to exclude this use from the Limited Industrial zone. (See, e.g., *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827.)

Notwithstanding the zoning code's plain text, the Applicant and Staff have argued that the Project must be consistent with local zoning because the City approved a smaller peaker plant on the same site in 2000. The PMPD, however, correctly acknowledges that

this is irrelevant; it is the Commission's responsibility to determine whether *this* Project complies with applicable zoning in 2009. As the PMPD properly concludes, it does not.

The Applicant's and Staff's primary theory for zoning consistency—that the Project could be conditionally approved as an "unclassified" use in the Limited Industrial zone—lacks merit for two reasons. First, as the PMPD recognized, power plants do not meet the basic definition of an unclassified use. Power plants are "automatically" included as permitted uses in the General Industrial zone (CVMC § 19.46.020(E)), while "unclassified" uses are by definition those "impractical" to include "automatically" in *any* defined zone due to their "unique and special characteristics." (CVMC § 19.54.010(A).) Second, the list of unclassified uses in the zoning code does not include power plants.[3] (CVMC § 19.54.020.) The Applicant and Staff point out that unclassified uses include "public/quasi-public" uses (CVMC § 19.54.020(M)), but power plants are not mentioned in the zoning code's definition of these uses. (See CVMC § 19.04.190.) Indeed, as the PMPD correctly notes, the zoning code defines a public or quasi-public use as one maintained by a public or publicly controlled entity. (Errata at p. 32, citing CVMC § 19.47.010.) The Applicant—a privately controlled energy generation company unaffiliated with any regulated utility—does not meet this definition.

The Project also conflicts with other provisions of the City's zoning ordinance. For example, the PMPD correctly concludes that the zoning designation for the Project

[3] Unclassified uses are not a catch-all category of unspecified activities, but rather encompass a limited and carefully defined list of specific land uses that may be authorized with a conditional use permit. (See CVMC § 19.54.020 [designating, for example, campgrounds, cemeteries, hospitals, and shooting clubs as "unclassified uses"].)

site requires preparation of a precise plan governing various aspects of Project design. (Errata at pp. 25-26.) A precise plan has not been prepared here. Furthermore, the PMPD correctly observes that a gas-fired peaker plant is not similar to any of the the light manufacturing uses permitted in the Limited Industrial zone, but rather more closely resembles the heavy "smokestack" industrial uses that are *prohibited* in the Limited Industrial zone. (Errata at p. 28; see also EHC PMPD Reply Comments at pp. 24-25.) Although the PMPD does not make a specific finding on this point, its discussion nonetheless supports the conclusion that this Project is incompatible with the existing Limited Industrial zoning on the site.

D. The Assistant City Manager's Opinions in this Proceeding Are Not Entitled to Deference.

In its written and oral comments to the Committee regarding the PMPD, the Applicant argued that the Commission is required to defer to the Assistant City Manager's opinions about City land use policies. The argument lacks merit.

The Applicant contends that sections 1714.5(b) and 1744(e) of the Commission's regulations require the Commission to accord "due deference" to the City's comments here. These sections, however, require Commission *Staff*, in preparing the Final Staff Assessment, to accord "due deference" to the comments of agencies that normally would have jurisdiction over particular aspects of a project. (20 Cal. Code Regs. §§ 1714.5(b), 1744(e).) The Commission, in contrast, has exclusive jurisdiction over power plant siting decisions, and has sole statutory and regulatory authority to determine in the first instance whether a project actually is consistent with local LORS. (See Pub. Res. Code §

25523(d)(1); 20 Cal. Code Regs. §§ 1752(a)(3), (k), 1755(a).) Indeed, as the PMPD points out, City officials have emphasized throughout this proceeding that it is the Commission's responsibility—not the City's—to determine whether this Project complies with local LORS. (See Errata at p. 30.) The regulations cited by the Applicant do not compel deference.

Even if the Commission were inclined to accord whatever deference is "due" here, the opinions expressed by the Assistant City Manager—both in the August 7, 2008 letter discussing the City's side agreement with the Applicant and in comments on the PMPD—would merit none. First and foremost, these opinions warrant no deference because they contradict the plain text of the General Plan and zoning ordinance. (See, e.g., *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 640-42 [holding that city's view of general plan "coordination" requirement conflicted with term's plain meaning]; *Stolman v. City of Los Angeles* (2004) 114 Cal.App.4th 916, 930 [holding that zoning administrator's interpretation of zoning ordinance "contradicts the plain language of the provision and cannot stand"].) As discussed above, the Assistant City Manager's interpretation of General Plan Policy E 6.4 would allow City personnel to exercise a degree of discretion that was considered, and expressly rejected, by the City Council during the drafting process. (Ex. 626A, 626E, 626G; see also Errata at pp. 22-23.) An interpretation that enlarges the terms of the statute at issue—particularly where the legislature has rejected the very terms that the interpretation would add—merits no deference. (See *Traverso v. People ex rel. Dept. of Transportation* (1996) 46 Cal.App.4th 1197, 1206-10.) The Commission need not, and

indeed must not, defer to an interpretation that conflicts with the plain meaning of local LORS.

Moreover, as the PMPD astutely notes, the record is devoid of any evidence that the City Council took any formal action interpreting or applying relevant local LORS to this Project. (Errata at p. 29.) Absent such formal action, the August 7, 2008 letter and the City's comments on the PMPD merely reflect the opinion of the Assistant City Manager—an opinion of a single official that, standing alone, warrants no deference. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13; *Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, 470, fn. 4; see also *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 246 [declining to defer to memorandum by senior city planner interpreting zoning scheme].) Put another way, the August 7, 2008 letter and the Assistant City Manager's comments on the PMPD are not formal interpretive rules with broad application, but rather are mere litigation positions developed for this particular matter. (See *Yamaha*, *supra*, 19 Cal.4th at p. 9; *Culligan Water Conditioning of Bellflower, Inc., v. State Bd. of Equalization* (1976) 17 Cal.3d 86, 93; *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1266, fn. 6.) The PMPD correctly refrained from according deference to these positions.

II. The PMPD Correctly Found that the Applicant and Staff Failed to Adequately Consider Feasible Alternatives to the Project.

As the PMPD suggests, the discussion of alternatives to the Project in both the AFC and the Staff assessments falls far short of legal requirements. As a result, the Commission cannot make the findings necessary to approve the Project.

The PMPD correctly concluded that the Applicant defined the Project objectives so narrowly as to preclude compliance with CEQA. (See PMPD at p. 26.) CEQA requires analysis of a reasonable range of potentially feasible alternatives that could avoid the Project's significant impacts. (14 Cal. Code Regs. ("CEQA Guidelines") § 15126.6(a), (f)(2)(A).) Indeed, the Applicant's witness effectively admitted at the evidentiary hearing that the Applicant did not seriously consider *any* alternative locations for the Project because, "by definition," no other site met all of the Applicant's objectives. (See Reporter's Transcript of Evidentiary Hearing, October 2, 2008 ("RT") at pp. 350:24-353:7; see also Ex. 5 at p. 25.) CEQA, however, requires analysis of alternatives even if they "would impede to some degree the attainment of project objectives, or would be more costly." (CEQA Guidelines § 15126.6(b).) The Applicant improperly disregarded this requirement.

The Applicant and Staff also failed to provide evidentiary support for the conclusion that Staff's "Alternative C" is not feasible . The Alternative C site is located adjacent to an existing landfill gas generation facility near the Otay Landfill. The site is more than 1,000 feet from homes and zoned General Industrial, which could eliminate the Project's major conflicts with the General Plan and the zoning ordinance. Staff and the Applicant rejected this alternative, however, based solely upon speculation about the cost of transmission and potential engineering constraints. CEQA requires quantitative, comparative evidence that an alternative is economically impracticable before it can be dismissed as infeasible. (See, e.g., *Save Round Valley Alliance v. County of Inyo* (2007)

157 Cal.App.4th 1437, 1461-62.) General speculation that an alternative might be somewhat more expensive does not meet this requirement.

Staff and the Applicant also improperly rejected alternative generation technologies—specifically rooftop and parking lot photovoltaic generation—as infeasible. Expert testimony in the record demonstrated that distributed, thin-film photovoltaic generation could reduce demand by about the same number of megawatts that the Project would generate, during roughly the same periods when peaking generation is most needed, for about the same cost per megawatt. (See Ex. 616 at pp. 11-15; see also RT at pp. 381:3-384:25, 402:15-408:22.) Once again, Staff and the Applicant failed to introduce evidence showing that this alternative is economically or technologically infeasible. Indeed, the PMPD correctly concludes that expert testimony concerning the feasibility of solar generation was essentially uncontroverted. (PMPD at pp. 29-30.) The PMPD properly found the analysis of solar alternatives inadequate.

Finally, the PMPD correctly concludes that Staff's discussion of the "no project" alternative is unsupported by the evidence. (PMPD at pp. 30-32.) The PMPD properly characterized as speculative Staff's conclusion that a dirtier plant would be built somewhere else if this Project were not approved. The PMPD also correctly found, based on uncontroverted evidence in the record, that the Project would not contribute significantly toward removal of "reliability must-run" status from the South Bay Power Plant.

The PMPD properly found that the analysis of alternatives in the AFC and the Final Staff Assessment was inadequate. The Commission should affirm this conclusion.

III. The Commission Cannot Make the Findings Necessary to Approve the Project.

In order to approve this Project, the Commission would need to make specific findings under both CEQA and the Warren-Alquist Act. The PMPD's conclusions regarding land use and alternatives confirm that these findings may not be made here.

The PMPD correctly concludes that the Project conflicts with local LORS. (See Pub. Res. Code § 25523(d)(1); 20 Cal. Code Regs. §§ 1752(k), 1755(b).) The PMPD also correctly finds that the Applicant has not demonstrated the infeasibility of alternatives that could avoid these conflicts. Absent a supportable finding of infeasibility, this Project cannot be approved consistent with CEQA. (See Pub. Res. Code § 21081(a)(3); 20 Cal. Code Regs. § 1755(d)(1).)

Because a finding of infeasibility cannot be made, the Commission need not consider an override of the Project's LORS conflicts. The Commission could not make the necessary findings in any event; the PMPD's conclusions regarding the potential feasibility of site and generation alternatives preclude a finding that there are no more prudent and feasible means of achieving public convenience and necessity. (Pub. Res. Code § 25525; 20 Cal. Code Regs. § 1752(k)(2); see also PMPD at p. 360 [noting that "there is insufficient evidence in the record to persuade us that the facility meets the requirements of [Public Resources Code] section 25525"].) The Commission should not entertain any belated plea for an override here.[4]

[4] As the Committee found in denying the Applicant's last-minute request to postpone Commission consideration of the PMPD, the Applicant has failed to provide any additional evidence or analysis supporting an override in the months since the PMPD

IV. Conclusion

This Project is located too close to homes, conflicts with local land use laws, and should not be permitted. The General Plan creates a buffer zone between power plants and homes—a buffer zone that this Project disregards. The City's zoning ordinance also makes clear that this heavy industrial Project is inappropriate in a Limited Industrial area. The PMPD, applying these provisions in accordance with their plain meaning, correctly concluded that the Project is inconsistent with local LORS.

Moreover, despite encouragement from community members and the City itself, the Applicant has thus far declined to give serious consideration to alternative locations or technologies for the Project. As a result, the analysis of alternatives in the AFC and Final Staff Assessment is legally deficient and cannot support the findings necessary for approval.

For the foregoing reasons, and for the reasons set forth in EHC's briefs on the merits and its prior comments on the PMPD, EHC respectfully requests that the Commission adopt the PMPD as its final decision and deny the AFC for this Project.

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was published. (See Order Denying Applicant's Request for a Further Postponement of Full California Energy Commission Consideration of the Presiding Member's Proposed Decision and Denying Applicant's Request to Suspend the Proceeding (June 11, 2009) at pp. 2-3, available at http://www.energy.ca.gov/sitingcases/chulavista/notices/2009-06-11_Order_Denying_Applicant%27s_Request_for_Postponement+Suspension_of_Proceedings.PDF.) EHC's briefs on the merits also discuss why an override is unwarranted here. (See EHC's Opening Brief, Docket Log No. 48912 (November 5, 2008) at pp. 29-36; EHC's Reply Brief, Docket Log No. 49094 (November 19, 2008) at pp. 15-20.)

DATED: June 15, 2009

Respectfully submitted,

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In the Matter of: The Application for Certification of the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4 **PROOF OF SERVICE**

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DECLARATION OF SERVICE

I, Kevin P. Bundy, declare that on June 15, 2009, I served and filed copies of the attached

COMMENTS OF INTERVENOR ENVIRONMENTAL HEALTH COALITION ON THE PRESIDING MEMBER'S PROPOSED DECISION AND ERRATA

The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: http://www.energy.ca.gov/sitingcases/chulavista/index.html. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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I declare under penalty of perjury that the foregoing is true and correct.

/s/ Kevin P. Bundy
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