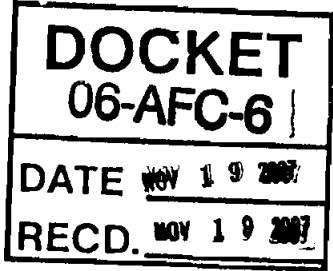


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7 STATE OF CALIFORNIA
8 STATE ENERGY RESOURCES
9 Conservation and Development Commission

10 In the Matter of:
11 APPLICATION FOR CERTIFICATION FOR
12 THE EASTSHORE ENERGY CENTER

Docket No.: 06-AFC-6
GROUP PETITIONERS' PREHEARING
CONFERENCE STATEMENT;
GROUP PETITIONERS' AGREEMENT
WITH CHABOT-LAS POSITAS' AND
INTERVENERS ALAMEDA COUNTY AND
HAAVIK'S REQUESTS THAT EXTENSION
OF TIME NECESSARY

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14
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16
17
18 Presently pending is the petition by petitioners California Pilots Association ("Calpilots"),
19 San Lorenzo Village Homes Association and Hayward Area Planning Association ("Hapa"),
20 collectively referred to as "Group petitioners," to petition to intervene in this proceeding as a
21 group.
22

23 On November 15, 2007, the California Energy Commission ("CEC") issued an order
24 denying interveners County of Alameda and Paul Haavik's request to continue this prehearing
25 conference and evidentiary hearing to allow the parties and public an adequate opportunity to
26 examine the Final Staff Assessment exceeding 700 pages released ten days ago on Friday,
27 November 9, 2007. Today, Chabot-Las Positas College District's request was also denied. Group
28

1 petitioners note for the record that they too agree with Chabot, County and Mr. Haavik's requests
2 that additional time is necessary to examine the FSA in order to address these issues to enable the
3 Commission to make a knowledgeable and informed decision, although the City of Hayward,
4 represented by new counsel, asserted on Friday, November 16, 2007 that the record is complete.
5 Group petitioners understand that the applicant opposes all extensions.

6 Without waiving Group petitioners entitlement to amend or supplement this statement,
7 within the limited time available, Group petitioners respond to the issues raised in the October 16,
8 2007 notice of prehearing conference applicable to the November 9, 2007 prehearing conference
9 as follows:

10
11 **1. Identity of topic areas that are complete and ready to proceed to evidentiary hearing:**

12 Presently group petitioners continue to examine the FSA and at this time unable to
13 affirmatively state what topic areas are complete, but refer the CEC to their response to number 2
14 below and will amend and/or supplement their response once review is complete.

15
16 **2. The topic areas that are not complete and not ready to proceed to evidentiary hearing
17 and the reasons therefore:**

18 One issue not addressed is why this application was not processed together with the
19 Russell City Energy Center as a multi-facility application.

20 Additionally, in light of the undisputed non-conformity with the local ordinances,
21 regulations and standards, the CEC must more completely address why the facility would be
22 "required for public convenience and necessity and why there are not more prudent and feasible
23 means of achieving that public convenience and necessity." (Public Resource Code, sec. 25525.)

24 The number of issues not complete is substantial. The reasons for which they are not
25 complete are reflected in the identity of issues discussed below.

1 **a. Air Quality and Public Health - Health Risk Computation:**

2 The following documentation of the computation of the health risk analysis and screening
3 analysis presently is missing for the following scenarios: EEC normal operation, startup, Russell
4 City Energy Center (RCEC) normal operation, and RCEC warm-start/cold-start to allow an
5 analysis of cumulative normal operation and cumulative startup-

- 6 * Emission factors used
- 7 * Assumptions regarding oxidation catalyst efficiency
- 8 * TACs (Toxic Air Contaminants) included in the hazard index computation
- 9 * All inputs to the air modeling computation
- 9 * All outputs from the air modeling computation

10 Assuming a health risk analysis / health risk screening analysis was not performed for one or more
11 of the above scenarios, an explanation as to why it was not performed needs to be provided.

12 Mitigations for air quality allow for purchase of SO2 credits to substitute for the purchase
13 of PM10 credits. Not stated or explained is why SO2 credits are an adequate substitute and what
14 is the availability of PM 10 and SO2 credits. Additionally not included, such as at page 4.1-46-47,
15 is the number of fireplaces, which would have to be retrofitted to achieve the stated mitigation.

16 **b. Air Quality and Public Health - Acrolein Emission Factors:**

17 Presently unsupported is the following statement on page 4.7-20 of FSA "However, limited
18 source test data for these engines was provided as confidential information by Wartsila; although
19 the exact results cannot be released, staff can assure the public that the emission levels of the
20 contaminants tested are less than or equal to the emissions used in the HRA."

21 In order to rely on those assurances, the following information is required and whether it
22 was provided under circumstances, which would satisfy applicable evidentiary criteria:

- 23 * List of TACs tested by Wartsila
- 24 * List of TACs required to be tested under AB 2588 but not tested by Wartzila
- 25 * Test methods used determine emission factors
- 26 * Operating conditions used for test performance
- 27 * For each TAC, a reference to the CARB or EPA test protocol the test complied with
- 27 * Whether the information constitutes an enforceable guarantee by Wartzila
- 28 * The applicable penalties provided by law if the information later proves to be significantly

1 incorrect.

* The reasons and conditions behind the confidentiality agreement

2 * Whether the CEC would be willing to provide this information to the parties under a protective
3 order to enable the parties to properly examine this information in order to analyze the overall
4 project.

4 **c. Air Quality and Public Health - CARB Recommendation against use of EPA database:**

5 Page 4.7-20 of FSA states the following: "Staff used data from the CATEF database of
6 similar but not the same engines, a practice routinely used in California for regulatory purposes
7 and supported by the Air Resources Board [or CARB] and local air districts. Staff renders no
8 opinion on whether one data set is significantly better than another data set as that is left for the
9 staff of the ARB to decide and they have indicated that they are comfortable with the CATEF
10 database." Presently not included is the following information:

12 * The name and capacity of the person or persons in CARB upon whom CEC staff relied in
13 deciding to use the CARB database over the EPA database for the Eastshore engine type, and
14 specifically for the compound acrolein.

* Documentation of the statements and communications between CEC and CARB regarding this
15 matter.

* Staff and/or CARB's reason for using the CARB database for an emission factor of acrolein
16 instead of the EPA's database, in direct contradiction to CARB's statement, on the front page of
17 that database, that the acrolein factors should *not* be used due to an "in doubt" sampling method.

* Reasoning by CARB and/or CEC as to why the EPA AP-42 database is not suitable to provide
18 the acrolein emission factor for a natural gas fired reciprocating internal combustion engine, 4
19 stroke, lean burn, >650 horsepower.

19 **d. Air Quality and Public Health - Requirement to Source-Test for Acrolein**

20 In the FSA, staff recommends as a condition that the applicant test for acrolein, in addition
21 to other TACs. Presently missing is the following material information:

22 * What test method is being proposed to be used

* CARB or EPA test protocol to be followed

23 * Contingency plan to meet the condition if BAAQMD does not test for acrolein, as is the case
24 under current BAAQMD policy.

25 **e. Air Quality, Public Health and Environmental Justice- Analysis of Eye Irritation**

26 On page 4.7-21, the FSA states that the Reference Exposure Level (REL) for acrolein is
27 based on a study that reported eye irritation experienced over a 5-minute exposure, and that such

1 an effect is not "serious".

2 Based on Group petitioners continuing review, it appears that staff may have discounted
3 the significance of concentrations of acrolein in exceedance of the Reference Exposure Level
4 (REL). Given that the project's acrolein emission factors and enforceability of the measurement
5 condition remain incomplete, please provide the following documentation, which is critical to
6 determine the project health risk if acrolein emissions are higher than initially predicted.

7
8 * The acrolein concentration which staff considers "significant", if the concentration is maintained
over a 24 hour period.

9 * The acrolein concentration which staff considers "serious", if the concentration is maintained
over a 24 hour period.

10 * Staff's opinion on whether eye irritation is a public nuisance, if such irritation persists for several
hours.

11 * Staff's opinion on whether eye irritation is detrimental to quality of life, if such irritation persists
for several hours.

12 * An analysis of the Environmental Justice impacts of acrolein related eye irritation over a
sustained exposure period of hours or days.

13 * An analysis of the effects of eye irritation on the ability of school children, college students and
the general public, including persons working at a computer (such as those employees employed
14 by nearby businesses) to perform everyday tasks such as reading and operating computers.

15 * An analysis of the effects of eye irritation on the ability of pilots to safely operate aircraft.

16 * How the CEC will ensure that the public will not be burdened with eye irritation caused by the
Eastshore project, should it be determined that acrolein emissions are higher than predicted.

17 **f. Air Quality, Public Health and Environmental Justice- Background Toxic Air
18 Contaminant (TAC) Analysis**

19 Staff provides an analysis of cumulative and individual effects of the plant in relation to
20 background levels of criteria pollutants. However, presently excluded is the necessary analysis of
21 TACs. Needed is the summary of the background levels of TACs regulated by the AB 2588 "Hot
22 Spots" program at the project's points of maximum impact, the hazard index for each TAC due to
23 background levels, and the relative increase of each TAC over the background levels as a result of
24 the project, particularly with respect to acrolein.

25 If, however, such an analysis has not been completed:

26 * an explanation as to how the CEC's consideration of the Environmental Justice topic can be
27 complete without an analysis of background TAC levels;

28 * factors preventing the CEC from imposing a condition of certification that requires pre-

1 construction ambient air monitoring to determine the baseline TAC inventory in order to protect
2 public health;

3 * factors preventing the CEC from imposing a condition of certification that requires ambient air
4 monitoring during plant operation to determine whether ambient TAC concentrations exceed
5 healthy levels in order to mitigate plant emissions during periods of high local TAC burden.

6 **g. Impacts on Aviation And Compliance With Hayward Airport's Noises Abatement
7 Procedures Regarding Width Of Thermal Plume And Cumulative Impact Combined With
8 The Impact Of The RCEC 1,000 Foot High Thermal Plume.**

9 Not stated in the FSA is the anticipated "width" of the EEC thermal plume in relation to
10 the "width" of the RCEC thermal plume. Group petitioners recognize that these thermal emissions
11 will differ between plants in velocity, however, this information is necessary in order to analyze
12 any effectiveness of any proposed mitigations given pilots would be expected to avoid these
13 plumes, which according to the FSA are "at times" invisible.

14 Also not included is the impact on the ability of pilots to comply with noise abatement
15 procedures. Likewise, not discussed are how pilots are expected to address wind shear or vortices
16 warnings when aircraft departs Hayward's runway 28-L caused by incoming commercial and
17 cargo carriers approaching Oakland runway 29.

18 **h. Explanation Concerning Why Approval Would Not Violate City And FAA Grant
19 Assurances Incorporating Federal Regulatory And Statutory Law As Incorporated In City
20 And FAA Grant Agreements.**

21 Under Land Use, pages 4.5 -28. the FSA states the following:

22 **Public Comment**

23 Staff has been advised by the California Association of Pilots
24 that they are concerned about the Eastshore project site being
25 within one mile of the Hayward Airport (staff believes its just
26 outside a mile) and it would limit airspace use. They are also
27 concerned that the project would violate the city of Hayward's
28 agreement to keep the airport free of hazards as noted in two
grant assurances with the FAA. These involve hazard removal,
mitigation and compatible land uses. These issues were discussed
in the Alameda County LUPP and Hayward General Plan
sections of this analysis.

1 Comment:

2 There is no consequence listed here i.e. losing or having to refund
3 money to the FAA or not being eligible for funding future project.
4 **No studies have been done to reflect net financial loss of funds to
5 affect safety of airport.**

6 (Emphasis added.)

7 Group petitioners contend that required information to complete the FSA is a study to
8 reflect the net financial loss and overall safety of the airport in light that construction and
9 operation of this plant and the RCEC plant constitute the creation and approval of hazardous
10 conditions.

11 Also unknown is what map system or documents upon which staff bases its belief that the
12 location of this project is "just outside a mile."

13 Not discussed are the FAA 2002 and 2007 Grant Assurances and contract agreements and
14 why any attempt to override lack of conformity with applicable LORs would not constitute a
15 finding in conflict with applicable federal law and/or regulations as set forth in the FAA's Grant
16 Assurances.

17 **i. Alternatives Which Will Achieve Public Convenience And Necessity.**

18 Not adequately explored are the alternatives to achieve public convenience and necessity
19 as required by section 25525 of the Public Resource Code. Further, the analysis needs to address
20 and incorporate the approval of the 300 megawatt plant in San Francisco and a complete basis as
21 to why repowering existing sites will not satisfy that necessity, such as could be explored for the
22 Pittsburg power plant, Delta Energy Center, Moss Landing, and Contra Costa power plants.

23
24 **3. Topic areas that remain disputed and require adjudication, and the precise nature of
25 the dispute for each:**

26 As stated above, Group petitioners reserve the right to amend or supplement this
27 prehearing conference statement and refer and incorporate their responses above. Based on the

1 limited ten day opportunity to review the FSA, Group petitioners contend the following remains
2 disputed:

3 Group petitioners refer to and incorporate their response to question number 2 above.

4 Group petitioners assert that certification must comply with Public Resource Code section 25525,
5 which, based on this present record, certification would violate.

6 Based on the present record, Group petitioners dispute that this project would "decrease
7 fossil fuel use, water use, or air emissions" as set forth on pages 1-9 to 1-10. Further, Group
8 petitioners contend that certification would violate and/or conflict with applicable federal law
9 and/or regulations, including, but not excluding, as set forth in the FAA requirements and federal
10 Air Quality standards.

11 Specifically as an example, among others, Group petitioners refer to their request as to why CARB
12 database for an emission factor of acrolein instead of the federal EPA's database is being used, in
13 direct contradiction to CARB's statement, on the front page of that database, that the acrolein
14 factors should *not* be used due to an "in doubt" sampling method. Further, Group petitioners refer
15 to their request as to why the EPA AP-42 database is not suitable to provide the acrolein emission
16 factor for a natural gas fired reciprocating internal combustion engine, 4 stroke, lean burn, >650
17 horsepower.

18 Additionally, Group petitioners question the proposed mitigations for air quality and
19 specifically the feasibility of the fireplace retrofit program in light of the reliance of this program
20 to address the detrimental impacts of the RCEC project.

21
22
23 **4. Identity of each witness sponsored; topic areas which each witness will present;
24 summary of the testimony; qualifications; and time for testimony:**

25 Without waiving the right to supplement or amend this list, including calling rebuttal or
26 impeachment witnesses, within the limited and inadequate time provided, Group petitioners
27 contemplate presenting the following witnesses:

1 Aviation:

2 David Butterfield, FAA Flight Standards Division;

3 Andy Richards, Bay Area Tower Manager for FAA Air Traffic Control;

4 Carol Ford, Vice President of California Pilots Association and local pilot;

5 Charles Erhard, FAA Compliance with FAA grant assurances;

6 Gary Cathey, Chief of the Office of Airports for the California Department of
7 Transportation's Division of Aeronautics in Sacramento; and

8 Possible other FAA officials on the utility of the Hayward Airport

9 Air And Public Health:

10 Presently Group petitioners are investigating availability of witnesses, but are unable to
11 completely respond to this request given the extreme short notice and limited available time to
12 review the FSA.

13
14 **5. Topic areas upon which Group petitioners desire to cross-examine witnesses and
15 summary of scope:**

16 Group petitioners reserve the right to cross-examine all witnesses giving testimony.

17 **6. List identifying exhibits and declarations that each party intends to offer and
18 technical topics to which they apply;**

19 2002 and 2007 FAA and City of Hayward Airport Grant Assurances and Contracts

20 CARB emission factor database entries

21 EPA emission factor database entries and background documents

22 Documents pertaining to rulemaking and of an informational nature provided by CARB,
23 BAAQMD and EPA with respect to Toxic Air Contaminants, emission factors, health risk
24 screening protocols and source testing rules.

25 Scientific research articles regarding exposure of populations to and health effects of
26 acrolein and PM2.5

27 Declarations of Carol Ford, Gary Cathey, Andrew Wilson and Jay White, including
28 exhibits, relating to the Russell City Energy Center which the CEC recently approved over Group
petitioners' objections located nearby this facility.

Plume impacts on airspace

1 **7. Proposal for briefing deadlines, vacation schedules, and other scheduling matters.**

2 Group petitioners' agree with interveners the County and Haavik that conducting these
3 proceedings the day after the Thanksgiving holiday and the week immediately prior to the
4 Christmas holidays should be avoided, particularly given the FSA exceeds 700 pages and
5 inadequate time is provided for meaningful review. Group petitioners suggest that these
6 proceedings should be continued into January 2007 so as to not prejudice the CEC, public,
7 participants, interested agencies and interveners.
8

9 Group petitioners understand that the applicant objects to any extensions of time, however,
10 Group petitioners assert that the financial interest of the applicant should not outweigh the CEC
11 and public interest in assuring that procedural due process is followed, the law is not violated and
12 that public health and safety are protected from hazardous public nuisances.
13

14 **8. Review of proposed conditions of certification for enforceability, comprehension,
15 and consistency with the evidence, proposals for modifications.**

16 Group petitioners reserve the right to propose any modifications based on the record
17 presented at the Evidentiary Hearing.

18 The "fireplace retrofit" program is presented as an air quality mitigation but unstated is
19 "how many" additional fireplaces and wood stoves must be retrofitted to achieve that alleged
20 mitigation.

21 Dated: November 19, 2007

Respectfully Submitted,

24 _____
25 Jewell J. Hargleroad, Attorney for
26 Group Petitioners California
27 Pilots Association, San Lorenzo Village
28 Homes Association, and Hayward Area
Planning Association

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7 STATE OF CALIFORNIA

8 STATE ENERGY RESOURCES

9 Conservation and Development Commission

10 In the Matter of:

11 APPLICATION FOR CERTIFICATION FOR
12 THE EASTSHORE ENERGY CENTER

Docket No.: 06-AFC-6

GROUP PETITIONERS' ATTORNEY
13 PROOF OF SERVICE OF PRE-HEARING
CONFERENCE STATEMENT and

14 AGREEMENT WITH CHABOT-LAS
POSITAS' AND INTERVENERS ALAMEDA
15 COUNTY AND HAAVIK'S REQUESTS
16 THAT EXTENSION OF TIME NECESSARY
17

18 **DECLARATION OF SERVICE**

19
20 I, Jewell J. Hargleroad, declare that on November 16, 2007 transmission via electronic mail
was consistent with the requirements of the California Code of Regulations, title 20, sections
21 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of
Service list below.

22
23 I declare under penalty of perjury that the foregoing is true and correct. Executed on this
19th day of November, 2007.

24
25 _____
Jewell J. Hargleroad, Attorney for
26 Group Petitioners California Pilots Association,
San Lorenzo Village Homes Association,
and Hayward Area Planning Association
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PROOF OF SERVICE LIST FOR PREHEARING CONFERENCE STATEMENT

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