



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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**APPLICATION FOR CERTIFICATION FOR THE
EASTSHORE ENERGY CENTER IN HAYWARD
BY TIERRA ENERGY**

**DOCKET No. 06-AFC-6
(AFC ACCEPTED 11/8/06)**

**ORDER DENYING APPLICANT'S MOTION TO
REOPEN THE EVIDENTIARY RECORD**

On July 16, 2008, Applicant Tierra Energy filed a Motion to Reopen the Evidentiary Record on the topic of Traffic and Transportation. Applicant requests the opportunity to provide additional evidence based on a new flyover test to measure thermal plume velocity at a facility similar to the proposed Eastshore Energy Center (EEC). Applicant asserts that the purpose of the new flyover test is to address the "deficiencies" of its previous flyover test as discussed in the June 20, 2008, Presiding Member's Proposed Decision (PMPD). Applicant proposes to coordinate the new flyover test with the Federal Aviation Administration (FAA) and the California Department of Transportation (Caltrans) Aeronautics Division.

The evidentiary record already includes results of Applicant's November 2007 flyover test at the Barrick power plant near Reno, Nevada. (Ex. 20.) Applicant claims that its new flyover test would persuade the Committee that the EEC's thermal plumes do not constitute an aviation hazard.

Upon consideration of Applicant's rationale for the Motion, its Supplement to the Motion, the Intervenors' arguments opposing the Motion, and Staff's response to the Motion, the Committee finds that (1) due process does not require us to reopen the record, (2) Applicant has not shown good cause to reopen the record, and (3) even if good cause had been shown, the Committee still would not exercise its discretion to grant the Motion. The Motion is therefore denied for the reasons discussed below.

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Background

The PMPD concludes that the EEC creates significant, adverse, unmitigable impacts to Hayward Executive Airport airspace in violation of the California Environmental Quality Act (CEQA), the City of Hayward's Airport Approach Zoning Regulations, and the Alameda County Airport Land Use Plan. (PMPD, p. 324 et seq. and p. 354 et seq.) The PMPD also concludes that the EEC does not comply with the City's requirements for a Conditional Use Permit under its zoning ordinance. The PMPD further finds that the EEC does not conform with the City's 2002 General Plan policy to transition from a manufacturing-based economy to an information-based economy in industrial areas. (PMPD, pp. 315-324.) Despite the project's violations of CEQA and other applicable laws, ordinances, regulations, and standards (LORS), Applicant requests that the Commission exercise its override authority to allow certification of the project in the interest of public convenience and necessity. (Pub. Res. Code § 25525.) The PMPD concludes that override is not appropriate in this case because the project's benefits do not outweigh its risks to aviation safety nor its nonconformance with local LORS. (PMPD, pp. 428-441.)

Applicant's Motion

Applicant proposes to conduct a second flyover test during summer months at either the Barrick power plant where the first test was conducted, or at the Plains End plant in Arvada, Colorado.¹ Applicant asserts that a second flyover test could potentially prove that no aviation safety hazard exists, and that concerns regarding aircraft traffic patterns would be alleviated. According to Applicant, if the second flyover test shows that aircraft would not be affected by the project's plumes, there would be no need to see and avoid flying over the project and there would be no effect on aviation traffic patterns. (Applicant's 7/28/08 Supplement to Motion, p. 3.)

Applicant justifies its Motion because it is "surprised" that data from the first flyover at the Barrick plant was "dismissed so abruptly" and it "strongly disagrees" with Staff's modeling analysis. (Motion to Reopen, p. 3.) Applicant claims it had "insufficient time before conducting the Barrick flyover test to solicit comments from the other parties or

¹ The Barrick plant features the same Warsila engines proposed for the EEC, but the engines are arranged in a different configuration; the Barrick site is in a remote location about 15 miles from the nearest airport, while the EEC site is within one mile of Hayward Executive Airport and seven miles from the Oakland International Airport. The PMPD found that the Barrick flyover test presented technical and operational deficiencies, which failed to replicate worst-case conditions for thermal plume velocity to affect aircraft at the EEC site. (PMPD, pp. 354-356.) Applicant states that the Plains End plant in Colorado has the same configuration of engines as the proposed EEC (Motion to Reopen, p. 3) but does not indicate whether the Colorado site presents meteorological conditions and aircraft traffic comparable to the EEC site.

the aviation safety agencies." According to Applicant, it could not have properly prepared for and conducted a flyover test during the summer of 2007 because (1) the Preliminary Staff Assessment (PSA), where the aviation impacts became an issue significant enough to warrant a flyover test, was not released until mid-August 2007, and (2) the Final Staff Assessment (FSA), where Staff revised its aviation impact analysis, was not published until November 2007, long after the opportunity to conduct a warm-weather flyover test in the summer had passed. (Supplement to Motion, p. 4.)

Applicant argues that the empirical evidence derived from a second flyover test would be more accurate than Staff's conservative modeling analysis, which the PMPD found more compelling than the results of the Barrick flyover test. Thus Applicant contends that a flyover test during summer months would replicate worst-case weather conditions at the proposed EEC site. The new flyover would allow Applicant to correct deficiencies of the first test such as the reduced number of engines and radiator fans operating at the Barrick plant so that all or most of the engines and fans would be running for the second flyover. Further, Applicant would obtain permission from the FAA to use fixed-wing aircraft to better replicate worst-case conditions rather than using the helicopter employed in the first test. (Motion to Reopen, p. 2.)

Applicant offers to prepare a protocol for review by the parties and the aviation safety agencies, conduct the second flyover according to the protocol, and submit the results to the Committee for inclusion in the record. By seeking input from the parties and the aviation-related agencies, Applicant believes it can provide conclusive evidence that flights over the project site would not be affected by thermal plumes. Applicant requests that the record remain open until the end of September 2008 to complete the protocol and the second flyover test. (Motion to Reopen, p. 1; Supplement, p. 3.)

Staff's Response

Staff initially opposed the Motion at the July 21, 2008, PMPD Conference, asserting that even if the new flyover test alleviated some of the concerns about aviation hazards, the Committee would still have to consider override of the project's inconsistencies with the City's General Plan for reasons unrelated to aviation safety. In addition, Staff argued that the new flyover would not alleviate legitimate safety concerns raised by the aviation agencies. In its July 28, 2008, Response to the Motion, Staff offered to support the Motion if the flyover test protocol were coordinated with Staff and approved by FAA and Caltrans Aeronautics. Staff asserts that empirical data would be valuable in refining the analysis of thermal plume effects and proposed a deadline of August 15, 2008, to reach agreement with those agencies on the appropriate protocol. Staff provided no

explanation for changing its position or for choosing August 15 as the date for completing an acceptable protocol for the flyover test.

City of Hayward

The City of Hayward opposes the Motion on two grounds: (1) the PMPD contains independent grounds to deny certification irrespective of the aviation hazards, due to the project's inconsistencies with General Plan policies and zoning laws; and (2) even if the new flyover test could correct the flaws in the Barrick flyover test, the PMPD found that the mere presence of the EEC creates a safety hazard by increasing the complexity of airspace around the Hayward Executive Airport. (PMPD, pp. 357-359.) According to the City, substantial evidence in the record already exists to support the finding of an aviation hazard even if the record were expanded to include the new test results; e.g., testimony of the aviation safety witnesses established that the project's proximity to the airport traffic pattern would unreasonably complicate aircraft maneuverability. (PMPD, pp. 358-359.) The City argues that additional evidence from a second flyover would not change that conclusion and in the interest of adjudicative finality, the record should remain closed. (City's 7/28/08 Opposition to Motion.)

Alameda County

Alameda County argues that Applicant has not shown good cause for its motion since it does not offer "new" evidence but merely "supplemental" evidence to enhance existing testimony in the record. The County asserts that additional flyover evidence would not change the evidence of an adverse effect on congested airspace or inconsistencies with land use policies. The County further asserts that the second flyover would be inherently flawed in any event since it would not replicate the actual climate and aviation conditions at the EEC site and, therefore, it would not be more conclusive than the theoretical worst-case modeling already in the record. The County also contends that the FAA and Caltrans would likely require extensive and rigorous in-flight scientific testing before adopting aviation safety guidelines for flights over invisible thermal plumes, thus extending almost indefinitely the timeline for concluding this case. (County's 7/28/08 Opposition to Motion.)

Chabot-Las Positas Community College District

The College District joined the County in opposing the Motion, asserting that adjudicative finality is appropriate in this case. The District argues that Applicant's new flyover would be an "exercise in futility" since it would represent cumulative evidence of existing data and would have flaws similar to those of the Barrick flyover. The District

also contends that Applicant's dissatisfaction with the PMPD does not warrant additional delay to allow Applicant to continuously enhance the record until it achieves a favorable decision. (College District's 7/28/08 Opposition to Motion.)

Group Petitioners

Group Petitioners opposed the Motion and joined Alameda County's arguments.

Discussion

We reviewed applicable legal criteria from three sources:

First, the Commission's regulations do not specifically address the requirements for a motion to reopen the record after a PMPD has been issued. However, Section 1720 allows parties to petition for reconsideration after a "decision or order is final...." A petition for reconsideration "must set forth either (1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case, or (2) an error in fact or change or error of law." (Cal. Code Regs., tit. 20, § 1720.) Section 1754, subdivision (b) of the Commission's regulations provides that the Commission shall not consider new or additional evidence on the PMPD or Revised PMPD unless due process requires or unless the Commission adopts a motion to reopen the record. (*Id.*, § 1754, subd. (b).)

Second, the Commission's *Siting Process Guidebook*² refers to the regulations cited above and states that:

At the conclusion of the formal hearings but before issuance of a decision, a party may file and serve on all other parties a petition to reopen the proceeding for the taking of additional evidence. The request should specify the facts claimed to justify the petition, including material changes of fact or of law alleged to have occurred since the conclusion of the hearings. The petition should contain a brief statement of the proposed additional evidence and explain why such evidence was not previously presented. (*Guidebook*, p. 118.)

² *Public Participation in the Siting Process: Practice and Procedure Guide* (CEC-700-2006-002, December 2006), website: <http://www.energy.ca.gov/2006publications/CEC-700-2006-002/CEC-700-2006-002.PDF> We note that although the *Guidebook* is not legally binding, it provides useful guidance.

Third, statutory and case law dealing with motions for rehearings and reconsideration indicate (1) that an agency may grant such a motion only when the proffered evidence was improperly excluded previously, or could not have been produced previously with the exercise of reasonable diligence, and (2) that even where such good cause may exist, granting the motion is within the agency's discretion. (See Code Civ. Pro., § 1094.5, subd. (e); *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1144; *De Cordoba v. Governing Bd.* (1977) 71 Cal.App.3d 155, 159 ["As a general rule, due process of law does not require that provisions for rehearings be made." {Citation}].) Similarly, to establish "good cause" for a motion for a new trial under Section 657 of the California Code of Civil Procedure, the moving party must show (1) the proffered evidence is "newly discovered," (2) the party exercised reasonable diligence in discovering and producing it, and (3) the evidence is material to the moving party's case. (*Plancarte v. Guardsmark* (2004) 118 Cal.App.4th 640, as modified.) Newly discovered evidence is "material" to a movant's case if it is likely to produce a different result. (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, reh'g den.) Granting a motion for new trial on the grounds of newly discovered evidence is a matter within the sound discretion of the court. (*Candsdale v. Board of Administration [PERS]* (1976) 59 Cal.App.3d 656.)

In the following discussion, we examine (1) whether due process requires opening the record; (2) if due process does not require reopening the record, whether the Applicant has otherwise demonstrated good cause to persuade us that the Applicant's proffered evidence is material and could have been produced with reasonable diligence; and (3) if there is good cause, whether we should exercise our discretion to reopen.

(1) **Due Process.** The Commission's regulations refer to a "due process" objective to warrant reopening the record; this is related to a denial of a party's legal rights to participate in the siting process. The "Administrative Bill of Rights" in the Administrative Procedure Act, which encompasses the minimum requirements of due process in agency adjudicative proceedings such as the Energy Commission's siting cases, does not include the right to reopen the record (or to the similar processes of rehearing and reconsideration). (Gov. Code, § 11425.10 and Law Revision Commission Comments thereto.) Case law is to the same effect. (See *De Cordoba v. Governing Bd.* (1977) 71 Cal.App.3d 155, 159 ["As a general rule, due process of law does not require that provisions for rehearings be made." {Citation.}].) Applicant has not argued that it was denied the opportunity to submit evidence; rather, Applicant contends that the late filing of the PSA and FSA precluded a summertime flyover test prior to evidentiary hearings. Thus, we find there is no due process issue to resolve in this case.

(2) **Good Cause.** We further find that the Applicant has not established good cause for reopening the record. Even if the proffered evidence from a second flyover test could be material (i.e., change the PMPD recommendation), Applicant has not exercised reasonable diligence in producing it: Applicant always had the option to request additional time to obtain input from the parties and aviation agencies before conducting the first flyover test. The schedule for evidentiary hearings was driven by *Applicant's* request to expedite the process.

(3) **Discretion to Reopen.** Even if we concluded that Applicant's "good cause" argument was valid, we still would not exercise our discretion to grant the Motion, for the following reasons:

First, we disagree that the proposed second flyover test would address all of the reasons for which the PMPD rejected the Barrick flyover. For example, even if the second test were at Plains End rather than Barrick, it would still not be at the same altitude with the same atmospheric conditions as the EEC; the Applicant apparently cannot guarantee that all radiator fans will be at full operation (Motion, p. 3: "radiator fans will be at or near full use"); and it would not be representative of all the different types and sizes of aircraft that fly to and from the Hayward Airport. As the Intervenors argue, a second flyover would merely represent conditions at the Plains End or Barrick site, in contrast to modeling already in the record, which was designed to account for the potential worst-case meteorological, locational, and aviation conditions at the EEC site.

Second, even if the proposed second flyover could eliminate all concerns about thermal plumes, it would not address the additional safety concerns, identified by the FAA and Caltrans witnesses, related to airspace congestion and restrictions on pilot maneuverability. (PMPD, pp. 350, 357; Ex. 39, pp. 16-17; Ex. 200, p. 4.10-20; Exs. 203, 204.) Applicant characterizes the PMPD's finding of aviation hazard as related solely to the project's thermal plumes; however, substantial evidence in the record also establishes that the project location itself creates an unmitigable adverse impact on the already-congested airspace near the Hayward Executive Airport.³ Moreover, operation of EEC would also result in a cumulatively considerable adverse impact on aviation safety in conjunction with the Russell City project, which also reduces available airspace near the airport. Evidence from another flyover test would not change those findings.

³ The EEC site is across the street from the boundary of the Airport Traffic Pattern Zone (Ex. 402, p. 6, Ex. 410) and just a few hundred feet south of the downwind departure for Runway 28L, which follows the United Pacific Railway tracks along the site's northern boundary (Ex. 200, p. 4.10-20). It is also just south of the preferred helicopter arrival/departure route. Uncontroverted evidence shows that aircraft currently fly over the site or within a few hundred feet of the site at altitudes below 1,000 feet AGL. (PMPD, pp. 350-352; Ex. 200, p. 4.10-20, Exs. 208, 417, 418.)

Third, the PMPD contains independent grounds, separate from aviation safety, for denial of certification: The PMPD finds that the EEC is inconsistent with land use LORS and it concludes that "override" of the LORS inconsistency is not justified. (PMPD, pp. 329, 434, 439-440.) Thus, even if all of the aviation concerns were eliminated by a new flyover test, substantial evidence in the record would still support the PMPD's recommendation to deny certification. Therefore, even if there were good cause for reopening the record (and there is not), the Committee is not persuaded that it should exercise its discretion to prolong the proceeding to perform what would be an unnecessary expenditure of time and administrative resources to accomplish the same result.⁴

Committee Ruling

Based on the above analysis, the Committee finds that (1) Applicant was not denied due process, (2) Applicant has not shown good cause to reopen the record since to do so would not necessarily cure the deficiencies of the first Barrick flyover nor change the recommendations of the PMPD, and (3) even if good cause were shown, we would not exercise discretion to grant the Motion.

ORDER

The Applicant's Motion to Reopen the Record is **DENIED**.

Dated: August 8, 2008, at Sacramento, California.



JEFFREY D. BYRON
Commissioner and Presiding Member
Eastshore AFC Committee

⁴ Staff's request for the FAA and Caltrans to agree to a flyover protocol by August 15, 2008, is unrealistic. Alameda County's concern that FAA and Caltrans would require extensive scientific review before agreeing to the protocol seems more compelling. Under either scenario, it is more appropriate to design such protocol in a policy proceeding rather than in the context of a particular siting case.



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FOR THE EASTSHORE ENERGY CENTER
IN CITY OF HAYWARD
BY TIERRA ENERGY

Docket No. 06-AFC-6

PROOF OF SERVICE
(Revised 7/31/2008)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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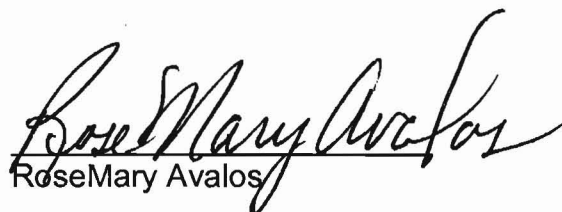
DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on August 8, 2008, I deposited copies of the attached Order Denying Applicant's Motion To Reopen The Evidentiary Record, in the United States mail at Sacramento, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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


RoseMary Avalos