

<b>DOCKET</b> 06-AFC-6	
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8 STATE OF CALIFORNIA

9 State Energy Resources

10 Conservation And Development Commission

11 In the Matter of:

Docket No.: 06-AFC-6

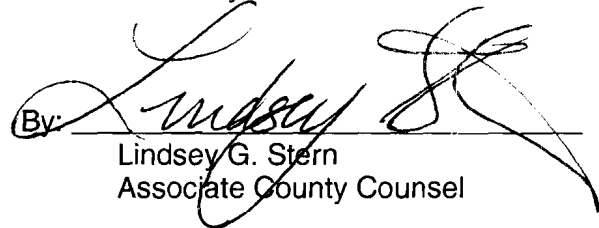
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 13 EASTSHORE ENERGY CENTER,  
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County of Alameda's Comments in  
 Support of Presiding Member's  
 Proposed Decision for the  
 Eastshore Energy Center

15  
 16  
 17 DATED: July 14, 2008

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County of Alameda's Comments in  
Support of Presiding Member's  
Proposed Decision for the  
Eastshore Energy Center

16  
17 On June 20, 2008, the County of Alameda ("the County") received from the California  
18 Energy Commission ("the Commission") the Presiding Member's Proposed Decision for the  
19 Eastshore Energy Center (06-AFC-6) recommending that the Application for Certification be  
20 denied. The County sturdily supports the Presiding Member's recommendation that the  
21 Eastshore Energy Center application be denied.

22 In particular, the County expresses its support for the Presiding Member's determination that  
23 the facility would significantly impact public safety and operations of the Hayward Executive  
24 Airport due to the presence of thermal plumes and reductions in maneuverable airspace. The  
25 County also agrees with the Presiding Member's position that the Commission should not  
26 exercise its override authority relative to either Hayward's Municipal Zoning Ordinance  
27 requirements for a Conditional Use Permit or the Alameda County Airport Land Use Policy Plan.  
28 Moreover, the County joins in the Presiding Member's concerns raised by the recently issued

1 California Air Resources Board report regarding diesel particulate matter, as well as the effect of  
2 the heightened NO<sub>2</sub> standards.

3 The County respectfully provides the following specific comments to the Air Quality and  
4 Environmental Justice sections of the Proposed Decision, as set forth below.<sup>1</sup>

5 **I. Air Quality**

6 The County remains concerned that the Applicant has not met its burden of proving it can  
7 and will obtain the necessary Emission Reduction Credits prior to Certification. The County has  
8 also taken the position that interpollutant trading should *only* be accommodated if the Applicant  
9 has proven that Emission Reduction Credits for Particulate Matter are unobtainable. The  
10 County also believes that the Fireplace/Woodstove retrofit program is not an appropriate  
11 mitigation for a project of this nature.

12 For the sake of brevity, the County will not identify every sentence of the Proposed Decision  
13 that would need to be modified to reflect these concerns. The following are examples of the  
14 suggested changes and comments:

15 **a. Page No. 140:**

- 16 i. ~~Under the foreseeable operating profile, the undisputed evidence indicates that ozone~~  
17 precursor emissions will be fully mitigated by the proposed offsets.
- 18 ii. The Commission will only make a finding that ozone precursor emissions will be fully  
19 mitigated by the proposed offsets when Applicant has met its burden that it has secured  
20 sufficient Emission Reduction Credits (ERC's) to satisfy BAAQMD rules on ozone  
21 precursor requirements.
- 22 iii. The Applicant must provide the required valid emission reduction credits to mitigate the  
23 emission increases for the facility prior to the issuance of the Authority to Construct.  
24 (BAAQMD Reg 2-2-311; Ex. 201, p 21) Staff is unable to analyze the effectiveness of  
25 ERC credits because they have not yet been identified from the bank of credits that may  
26 be available. (RT 12/27/07 33:20-34:3) Because a number of projects may be considering  
27  
28

1 the same credits, identification of those credits, without securing them, is speculative and  
2 insufficient. (RT 12/27/07 175:16-20) Without secured ERCs, the Applicant has not met its  
3 burden of proof that the facility will not cause any significant adverse environmental effects  
4 under CEQA or LORS. (20 C.C.R. § 1748(d).)

5 **b. Page No. 141:**

- 6 i. ~~Staff agreed with Applicant that local or upwind ERCs may not be available at any cost~~  
7 ~~and that interpollutant trading of SO<sub>x</sub> for PM mitigation would be an acceptable alternative.~~
- 8 ii. Applicant has the burden of proving that ERCs for PM mitigation are not available at any  
9 cost. Only if Applicant satisfies this initial burden may interpollutant trading of SO<sub>x</sub> for PM  
10 mitigation be considered an acceptable alternative. No such alternative may be  
11 considered without a finding by the Commission that Applicant has met its burden herein.
- 12 iii. The marginal value of SO<sub>x</sub> reductions is dependent on proximity the facility. The further  
13 away the reduction, the more negligible the offset. At the same time, SO<sub>x</sub> reductions that  
14 are too close to the facility will not provide the proper offset either. (RT 12/27/07 146:3-10,  
15 69:12-13.) While local offsets are more effective than remote offsets, the record also  
16 shows that the SO<sub>x</sub> emission needs to be upwind to convert into PM10 at a particular  
17 location. (RT 12/27/07 65:18 – 66:4)

18 **c. Page No. 143:**

- 19 i. Intervenors and members of the public were similarly skeptical about this program and  
20 Staff therefore recommended that the retrofits and targeted emission reductions be  
21 achieved before EEC begins construction activities.
- 22 ii. We agree with the skepticism and therefore reject the proposed fireplace retrofit program  
23 as a mitigation for the Applicant's ERCs.
- 24 iii. No studies have been conducted to determine whether the community would take  
25 advantage of the fireplace retrofit program. (RT 12/27/07 74:4-8) It is also uncertain  
26 whether the program would be effective in mitigating the Applicant's emissions.

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27  
28 <sup>1</sup> The County hereby reincorporates its previous comments on Conditions of Certification as set forth in its Opening

1 (Applicant's Ex. 55) Thus, Applicant has not met its burden that any measurable offset  
2 would be achieved. (See BAAQMD Regs 2-2-302, 2-2-311) Without secure appropriate  
3 ERCs, the Applicant has not met its burden of proof that the facility will not cause any  
4 significant adverse environmental effects under CEQA or LORS. (20 C.C.R. § 1748(d).)  
5 Moreover, because of the likelihood of an independent BAAQMD fireplace retrofit  
6 program, any benefits experienced would occur regardless of the Applicant's involvement.  
7 The Applicant should not be credited for free-riding on the BAAQMD program.

## 8 II. Environmental Justice

9 Intervenors collectively raised concerns about the standards and methodology employed in  
10 assessing environmental justice issues. In particular, the County disputes that a general  
11 determination of no significant adverse impact automatically translates into a determination that  
12 there will be no minority or low income populations disproportionately impacted by the facility.  
13 Including the entire analysis of environmental justice in its own topic section instead of  
14 piecemeal at the end of the other topics would facilitate a more comprehensive analysis of the  
15 outstanding issues. The County also maintains that further studies are necessary. For example:

### 16 a. Page No. 192:

- 17 i. The risk assessment did not model impacts beyond one mile ~~since~~ risk drops off greatly at  
18 that distance. ~~Accordingly, scientific data supports a finding that actual residents living~~  
19 ~~near the project will not be exposed to health risks due to project-related TAG emissions.~~  
20 ~~We do not believe that the public health analysis ignores the environmental justice~~  
21 ~~demographics in the project vicinity since adverse effects due to TAG emissions will not~~  
22 ~~occur beyond the project fence line or parking lot. Thus, there is no evidence of~~  
23 ~~disproportionate impacts on the environmental justice community.~~
- 24 ii. The risk assessment did not model impacts beyond one mile because Staff opined that  
25 risk drops off greatly at that distance. It is significant, however, that the population living  
26 within a three mile radius of the project is 80% non-white and 20% live in poverty. The

27  
28 Evidentiary Brief.

1 death rate from chronic lower respiratory diseases is 43% higher within the three mile  
2 radius than the County overall. Because of the potential unmeasured synergistic effects  
3 of the emissions on these already overburdened populations, the Commission is not yet  
4 satisfied that the Applicant has met its burden of showing that disproportionate impacts will  
5 not be suffered by the environmental justice community. Moreover, because the TAC  
6 assumptions that were used in determining that no environmental justice issues were  
7 present are questioned by the recent CARB report, the Applicant has not yet met its  
8 burden of showing no project-related disproportionate public health impacts will be  
9 suffered by the environmental justice community. Further studies are necessary to  
10 determine whether the environmental impacts will be suffered disproportionately by the  
11 minority and low income populations surrounding the facility.

12 iii. Staff reasons that the proposed project “would not result in significant air quality impacts  
13 [overall]. Therefore, there would not be a disproportionate impact on an environmental  
14 justice population.” (Ex. 200, 7-1) However, this reasoning puts the cart before the horse  
15 and allows Staff to make its final decision based on potentially erroneous blanket  
16 assumptions that, by their very own nature, would be virtually impossible to overcome.  
17 (See Ex. 601; Intervenor Chabot Post-Hearing Brief, pp 3, 6 – 8; Ex. 532, p. 2-4) Staff’s  
18 conclusion that because no significant impacts were felt by the entire population, there  
19 could be no disproportionate impacts on the environmental justice community, is  
20 fundamentally flawed. (RT 12/17/07, 450:10-451:15) Substantial evidence exists that the  
21 communities surrounding the facility are “environmental justice communities” already  
22 suffering a disproportionate burden of air quality health effects. (See, Ex. 200, 4.7-38: “In  
23 Hayward, the asthma hospitalization rate for African American children and adults is  
24 approximately 1.5 times greater than the rate for White children and adults”; RT 12/17/07  
25 369:16-20.) As such, the unique characteristics of these environmental justice  
26 communities must be given a closer look *separate from* a general decision that the general  
27 populations surrounding the facility will suffer no significant impact. Moreover, the recent  
28 CARB report undermines many of the basic TAC assumptions used in arriving at Staff’s

1 decision. (PMPD, p 198) In all, the methodology is erroneous, therefore undermining all  
2 determinations by Staff that no disproportionate impacts will be suffered by the  
3 environmental justice communities surrounding the facility.

4 **b. Page 443**

- 5 i. The Energy Commission staff's ~~environmental approach is consistent with guidance from~~  
6 ~~both the Resources Agency and the federal government.~~ The Staff's approach consists of  
7 (1) specific public outreach to notify, inform, and involve community members, including  
8 non-English speaking individuals; (2) analysis of the applicable demographics to  
9 determine the percentage of minority and low-income population living in the potentially  
10 affected area; and (3) assessing the potential environmental and health impacts of the  
11 proposed project.
- 12 ii. The Energy Commission staff's approach consists of (1) specific public outreach to notify,  
13 inform, and involve community members, including non-English speaking individuals; (2)  
14 analysis of the applicable demographics to determine the percentage of minority and low-  
15 income population living in the potentially affected area; and (3) assessing the potential  
16 environmental and health impacts of the proposed project. However, the approach failed  
17 to link the analysis of minority and low income demographics with the environmental and  
18 health impacts of the proposed project to those environmental justice communities.  
19 Instead, by determining that generally, there would be no significant adverse impacts from  
20 the project, Staff skipped the step and concluded that no populations would experience  
21 such impacts. In so doing, Staff and Applicant have not yet provided sufficient evidence  
22 that environmental justice issues have been addressed, let alone resolved.
- 23 iii. The assessments did not utilize the appropriate unit of geographic analysis, which suggest  
24 defining boundaries by potentially affected populations. (1998 EPA Guidelines, at 2.1.1)  
25 The artificial one-mile radius used by Staff ignores the reality of the population  
26 characteristics. By using the three-mile radius instead, the populations experiencing high  
27 poverty, high minority, and low life expectancy that would disproportionately suffer the  
28 impacts of the facility, are revealed. (Ex. 532, at 2-3; See discussion *supra*, at II(a)(iii).)

1 **c. Page 449**

- 2 i. ~~Even if EJ communities exist beyond the point of maximum impact, Staff's analysis of the~~  
3 ~~project's potential public health impacts is not changed by this information. Staff relies on~~  
4 ~~the US EPA guidance, which does not require further analysis if there are no impacts to~~  
5 ~~the general population."~~
- 6 ii. While overall health risks may decline rapidly at distances beyond the one-mile radius of  
7 the site, because environmental justice communities exist in the immediate area, the  
8 present analysis is inconclusive for purposes of environmental justice assessment. Staff's  
9 reliance on the US EPA guidance to support its conclusion that no further analysis is  
10 required if there are no impacts to the general population ignores the unique  
11 characteristics of the environmental justice communities that may suffer disproportionate  
12 impacts from this project.
- 13 iii. See discussion *supra*, at II(a)(iii).

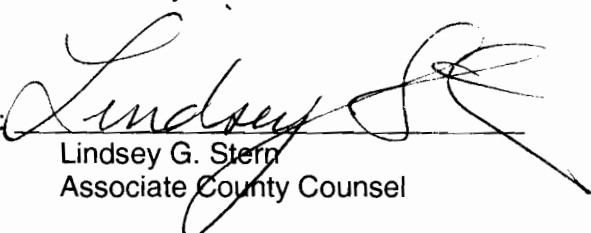
14 **III. Conclusion**

15 Intervenor County of Alameda strongly supports the Presiding Member's Proposed  
16 Decision recommending that the Eastshore Energy Project certification be denied. The County  
17 further appreciates the opportunity to provide these initial comments and looks forward to  
18 continued participation in this process.

19  
20 DATED: July 14, 2008

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION  
OF THE STATE OF CALIFORNIA

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

Docket No. 06-AFC-6

PROOF OF SERVICE  
(Revised 4/21/2008)

**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:

**CALIFORNIA ENERGY COMMISSION**

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**DECLARATION OF SERVICE**

I, Dalia Liang, declare that on July 14, 2008, I deposited copies of the attached County of Alameda's Comments in Support of Presiding Member's Proposed Decision for the Eastshore Energy Center in the United States mail at Oakland, California, with first-class postage thereon fully prepaid and addressed to the those identified on the Proof of Service list above.

**OR**

Transmission via electronic mail was consistent with the requirements of 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.

**OR**

I deposited the same document at a designated place for collection maintained by Federal Express, an express service carrier, with fully-prepaid delivery fees, and addressed to those identified on the Proof of Service listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on this 14<sup>th</sup> day of July , 2008

  
Dalia Liang