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06-AFC-6
DATE JUL 15 2008
RECD. JUL 15 2008

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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

17
18 In the Matter of:

19
20 **Application for Certification For the**
Eastshore Energy Center

Docket No. 06-AFC-06

**CHABOT-LAS POSITAS COMMUNITY
COLLEGE DISTRICT INTERVENORS'
COMMENTS IN SUPPORT OF
PRESIDING MEMBER'S PROPOSED
DECISION RECOMMENDING DENIAL
OF EASTSHORE ENERGY CENTER'S
APPLICATION FOR CERTIFICATION**

Dates: July 21, 2008
CEC: Jeffrey D. Byron
Commissioner and Presiding
Member

Hearing Officer: Susan Geffer

1 **TO THE COMMISSION, PRESIDING MEMBER AND COMMISSIONER**
2 **BYRON, HEARING OFFICER GEFTER, AND THE PARTIES AND THEIR**
3 **ATTORNEYS OF RECORD:**

4 Intervenors Chabot-Las Positas Community College District (“District”) and Chabot
5 Faculty Association (collectively “Chabot Intervenors”) hereby submit their comments to the
6 Presiding Member’s Proposed Decision, issued on or about June 20, 2008, for the Eastshore
7 Energy Center (06-AFC-06). The Chabot Intervenors respectfully request that the Commission
8 approve and adopt the Presiding Member’s proposed decision’s recommendation that the
9 Application for Certification submitted by Applicant Eastshore Energy Center (“Applicant”) be
10 *Denied*. The Chabot Intervenors agree with the PMPD’s ultimate recommendation, but briefly
11 request some modifications and prospective changes to the Commission staff’s approach to the
12 environmental justice (“EJ”) analysis and the recognition of a community college district as an
13 interested local governmental agency, entitled to direct notice and the opportunity to submit
14 comments and analysis.

15 **I. COMMENTS ON “ENVIRONMENTAL JUSTICE”**

16 As an initial matter, the Chabot Intervenors join in the County of Alameda’s (County)
17 Comments in support of Presiding Member’s Proposed Decision, filed on July 14, 2008. In
18 addition, the Chabot Intervenors agree with the County that including the entire analysis of
19 environmental justice in its own topic section instead of piecemeal at the end of the other topics
20 would facilitate a more comprehensive analysis of the outstanding issues.

21 **A. Methodology**

22 As the County points out, the intervenors collectively raised concerns about the standards
23 and methodology employed in assessing environmental justice issues. In particular, the
24 intervenors dispute that a general determination of no significant adverse impact automatically
25 translates into a determination that there will be no minority or low income populations
26 disproportionately impacted by the proposed facility. (See PMPD, at pp. 446-451.)

27 As all parties and the Committee recognize, the purpose of EJ analysis is to ensure the
28 “fair treatment of people of all races, cultures, and incomes with respect to the development,

1 adoption, implementation, and enforcement of environmental laws, regulations, and policies.”
2 (Gov. Code, § 65040.12, subd. (e); see Exh. 200, at p. 2-4; PMPD, at p. 442; Staff’s Opening
3 Brief, at p. 10; Applicant’s Opening Brief, at pp. 41-42.)

4 The Chabot Intervenors respectfully request the Commission to reconsider the manner in
5 which the Commission staff applied the EJ analysis here, as well as any future siting projects.
6 The process utilized is inadequate and does not reflect that the staff utilized the legally required
7 process. The process contains a fundamental flaw because the staff never engaged in a
8 disproportionate impact analysis, as required in step 5 of the impact assessment test. (PMPD, p.
9 447.)

10 The PMPD quotes the U.S. EPA guidance, upon which the staff relies, to adopt a
11 truncated approach to the disproportionate impact analysis. (PMPD, p. 449.) The Chabot
12 Intervenors find the staff’s reliance on this quotation misplaced. First, while the federal guidance
13 is persuasive, it is not authoritative. Rather, as this is a California state proceeding, the staff
14 should focus upon the equal protection clauses of the U.S. and California Constitutions,
15 Government Code section 65040.12, and Public Resources Code section 71111, which adopts the
16 Government Code’s definition for EJ, for the legal framework for environmental justice. In
17 particular, the staff should follow its 5 step analytical process. (See
18 http://www.energy.ca.gov/public_adviser/staff_env_justice_approach.html [California Energy
19 Commission Staff Approach to Environmental Justice], administrative notice taken on Dec. 17,
20 2007, TR, at p. 340:20-23 & Exh. 710; PMPD, at p. 447.)

21 Second, the staff takes the quoted portion of the U.S. EPA guidance out of context.
22 (PMPD, at p. 449.) In particular, the staff fails to address the following language under section
23 3.2.1 entitled, “Environmental Justice Screening Analysis” of the same 1998 Final Guidance:

24 “Question 2

25 *Are the environmental impacts likely to fall disproportionately on minority and/or*
26 *low-income members of the community and/or tribal resources?*

27 A positive response should trigger both an enhanced outreach effort to assure that
28 low income and minority populations are engaged in public participation and an

1 analysis designed to identify impacts on both the larger population and on
2 minority and/or low-income members of the population. A positive response
3 could result from any of several factors, including the following: Within a
4 potentially affected area, minority and/or low income populations could be
5 unevenly distributed, thus subject to different levels or intensity of impacts than
6 the larger population. This pattern should cause concern for cumulative impacts.
7 An example would be subsistence dependence on an affected resource by
8 members of a community. The impacts may affect a cultural, historical, or
9 protected (e.g., treaty) resource of value to an Indian Tribe or a minority
10 population, even when the population is not concentrated in the vicinity. . . .”

11 Staff has misconstrued the language in the federal guidance. Under the staff’s truncated
12 approach, the staff never reaches “Question 2.” Yet, the EPA guidance requires staff to
13 distinguish from the EJ population from the general population. The staff did not do so here.

14 To the extent the Commission determines that the staff’s analysis was not inadequate, the
15 Chabot Intervenors urge the Commission to reassess the process. The Chabot Intervenors submit
16 that the current approach to EJ analysis needs improvement in order to account for the “fair
17 treatment of people of all races, cultures, and incomes with respect to the development, adoption,
18 implementation, and enforcement of environmental laws, regulations, and policies.” (Gov. Code,
19 § 65040.12, subd. (e).) The Commission can make this correction by clarifying to staff the need
20 to separate out each step of the 5 step process.

21 **B. Notice Requirements**

22 The Chabot Intervenors disagree with the findings on pages 443-445 of the PMPD that an
23 informational site visit is sufficient as a matter of law to notify a local interested governmental
24 agency. (Pub. Resources Code, § 25519, subd. (k); Cal. Code Regs., tit. 20, § 1714, subd. (c).)
25 The site visit did not provide the direct notice to the District’s administration nor did it seek the
26 same level of comments and analysis that the staff would have sought from an entity it deemed to
27 be a local governmental agency.

28 The Chabot Intervenors do not dispute they eventually learned of the Eastshore

1 application for certification while there was still an opportunity to intervene in a timely manner.
2 However, the interests of the Warren-Alquist Act would have been better served had the
3 Commission staff provided direct notice to the Chabot-Las Positas Community College District's
4 administration and governing body and recognized the District as a local interested agency and
5 solicited comments and input directly from the District. (Cal. Code Regs., tit. 20, § 1714, subd.
6 (c).) The District was entitled to receive proper notice under the EJ analysis. This is especially
7 true in light of its close proximity to the proposed site (approximate 2826 feet or 0.54 miles) and
8 its EJ student population. (See Staff's Feb. 4, 2008 Memorandum by Bill Pfanner, entitled
9 "Comments on Eastshore Energy Center (06-AFC-6) Final Distances Table.")¹

10 To the extent the Commission denies certification to Eastshore, there is no harmless error
11 to the District. However, the Chabot Intervenors propose that, for future siting projects, the
12 Commission and its staff make active efforts not only to reach out to California Community
13 College Districts as part of the public outreach, but also deem California Community College
14 Districts "local governmental agencies" entitled to statutory notice provided to other local
15 interested agencies. (Pub. Resources Code, § 25519, subd. (k)). The District is entitled to the
16 same notice as any other local governmental agencies, including but not limited to cities,
17 counties, special districts, and school districts. As a result, staff should also solicit comments and
18 input from the interested California Community College District.

19 While it is true that community college districts are comprised of various students, staff,
20 and administrators, pursuant to the California Government Code, the legislature recognizes that
21 the proper means of providing a local government agency, such as a community college district,
22 notice is through its local governing body, e.g., the governing Board of Trustees. (See
23 Government Tort Claims Act, Gov. Code, § 915 et seq.) Therefore, with respect to Community
24 College Districts, the Chabot Intervenors recommend that the Commission make the following

25 _____
26 ¹ The Chabot Intervenors object to the PMPD's reliance upon Appendix E for the relative
27 distances stipulated to by Applicant and the City of Hayward. The Chabot Intervenors did not
28 stipulate to this set of distances. Rather, the Chabot Intervenors rely upon and point the
Commission to the staff's "Comments on Eastshore Energy Center (06-AFC-6) Final Distances
Table," filed and docketed on February 4, 2008.

1 prospective change and add the following text to the PMPD on page 446 under the Public
2 Outreach heading: “For future siting projects, the Commission staff should specifically determine
3 whether a community college district exists within the vicinity of the proposed site and deem the
4 district as having a potential interest in the proposed site as any other local agency. The
5 Commission staff shall directly notify not only the Board of Trustees for the District, but also the
6 Chancellor of a community college district consisting of two or more community college
7 campuses or the Superintendent of a district composed of only one college campus. The
8 Commission staff should solicit comments and input from the District as the staff would for any
9 local interested agency in the proposal. The Commission staff is directed to the California
10 Community College Systems Office website <http://www.cccco.edu/> for further information
11 regarding the general operations, location, and contact information of any particular community
12 college district in the proposed site area.”

13 **II. CONCLUSION**

14 For the foregoing reasons Chabot Intervenors respectfully request the Commission to
15 adopt the recommendation of the Presiding Member’s Proposed Decision and deny certification
16 to Eastshore. The Chabot Intervenors request the Commission to correct the approach to EJ
17 analysis so that it is consistent with federal and state authorities, and create a practice of
18 specifically identifying California Community College Districts as interested local government
19 agencies entitled to direct notice and the opportunity to provide comments and analysis.

20 Dated: July 15, 2008

LIEBERT CASSIDY WHITMORE

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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:

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DECLARATION OF SERVICE

I, Ervietta McCullough, declare that on July 15, 2008, I deposited copies of the attached **CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT INTERVENORS' COMMENTS IN SUPPORT OF PRESIDING MEMBER'S PROPOSED DECISION RECOMMENDING DENIAL OF EASTSHORE ENERGY CENTER'S APPLICATION FOR CERTIFICATION** in the United States mail at San Francisco, 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.


Ervietta McCullough