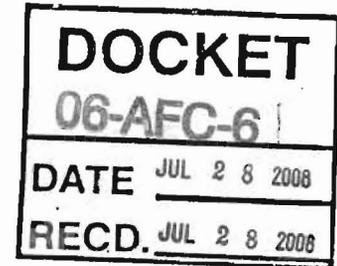


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STATE OF CALIFORNIA
State Energy Resources
Conservation And Development Commission

17 _____
18 In the Matter of:)
19)
20 APPLICATION FOR CERTIFICATION)
21 FOR THE EASTSHORE ENERGY)
22 CENTER)

Docket No. 06-AFC-6
CITY OF HAYWARD'S STATEMENT
IN SUPPORT OF PRESIDING
MEMBER'S PROPOSED DECISION
FOR THE EASTSHORE ENERGY
CENTER

23 I. Introduction.

24 On June 20, 2008, the Committee issued the Presiding Member's Proposed Decision
25 ("PMPD") for the Eastshore Energy Center ("EEC"), which provides that final written
26 comments on the PMPD be submitted by July 28, 2008. Pursuant to the Committee's
27 request, Intervener City of Hayward ("City") submits this brief supporting the PMPD's
28

1 recommended denial of the Application for Certification (“AFC”) and responding to certain
2 arguments made by Applicant Eastshore Energy Center LLC (“Applicant”) in its
3 “Comments on the Presiding Member’s Proposed Decision” (“Applicant’s Comments”).
4 Applicant argues that the City has somehow treated the EEC project inconsistently and
5 unfairly. As discussed below, Applicant’s claim is founded on nothing but inference, and
6 must be rejected based on the facts and the law.
7

8 Separately, Applicant has challenged the validity of the Committee’s determination
9 that the EEC would pose a significant and unmitigable risk to aviation safety, as well as
10 argued that the Committee improperly applied the “public convenience and necessity”
11 standard when concluding an override is not warranted in this proceeding. These
12 arguments should be rejected because substantial evidence in the record supports the
13 PMPD’s conclusions.¹
14

15 **II. The City’s Interpretation of Its Land Use Policies Did Not “Reveal a**
16 **Preference” for the Russell City Energy Center and Was Not Arbitrary and**
17 **Capricious.**

18 Applicant argues that City has treated the EEC and the Russell City Energy Center
19 (“RCEC”) inconsistently, and that this alleged inconsistent treatment “where equal
20 conditions exist” indicates the City has acted in an arbitrary and capricious manner in
21
22
23

24 ¹ As stated at the June 21, 2008 Committee Hearing on the PMPD, the City also
25 recommends against the Committee’s adoption of any of Applicant’s proposed “edits” or
26 “corrections” to the Land Use, Traffic and Transportation, and Override sections of the
27 PMPD. These proposed edits merely represent Applicant’s proposed modifications to the
28 PMPD to reflect Applicant’s preferred outcome to this proceeding. Since the City
recommends the PMPD be submitted to the full Energy Commission without
modification, we think Applicant’s changes are unnecessary.

1 violation of due process. Applicant's Comments, p. __.² Applicant's argument is factually
2 and legally erroneous.

3 Factually, Applicant's assertion that "equal conditions exist" between EEC and
4 RCEC is simply inaccurate. While the proposed locations of the EEC and RCEC are both
5 zoned "Industrial", the EEC is located approximately 3,000 feet to the east of the RCEC
6 site closer to the Hayward Executive Airport. Ex. 200, p. 4.10-21, note 6. The EEC
7 location is just outside the airport Traffic Pattern Zone ("TPZ") (Ex. 200, 4.5-21), and
8 evidence in the record demonstrates that aircraft regularly fly over the EEC site, which is
9 located approximately 400 feet from the traffic pattern for Runway 10R/28L. Ex. 200, p.
10 4.5-20. This undeniable physical distinction between EEC and RCEC belies Applicant's
11 claim that "equal conditions exist" between the two facilities, and warrants close scrutiny
12 under the City's Airport Approach Zoning Regulations (Hayward Municipal Code
13 ("HMC") § 10-6.00) and the Alameda County Airport Land Use Policy Plan ("ALUPP").³
14 In addition, as the PMPD notes, the EEC's location within the Airport Influence Area
15 ("AIA") raises concerns about aviation safety that could be mitigated in the RCEC siting
16 procedure but cannot for EEC. PMPD, pp. 329-330, n. 112.

17 Further still, the RCEC siting procedure was commenced prior to the City's
18 adoption of its 2002 General Plan, which included for the first time policies designed to
19 promote the transition of the eastern area of the existing Industrial Corridor to a Business
20 and Technology Corridor. 1/14/08 RT 227-232, 236. Thus, there are not only physical
21 and Technology Corridor. 1/14/08 RT 227-232, 236. Thus, there are not only physical
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23
24 ² Applicant's Comments do not include page numbers, but the arguments to which City is
25 responding in this brief are found on the first four substantive pages of Applicant's
26 submission.

27 ³ Federal laws and Federal Aviation Administration ("FAA") standards require the City to
28 restrict land use in the airport vicinity to prevent airport hazards. Ex. 402, p. 3, citing Ex.
411: FAA Order 5190.6A, pp. 19-20.

1 distinctions between the EEC and RCEC sites, but also relevant policy distinctions as well.

2 This policy distinction is paramount to understanding the City's conclusion that the
3 EEC is inconsistent with its local land use policies, as well as the fallacy of Applicant's oft-
4 repeated argument that the City is acting in an arbitrary and capricious manner. Throughout
5 this proceeding, Applicant has repeatedly asserted that the existence of the Business and
6 Technology Corridor is "a fantasy" because "no such designation was ever adopted or
7 codified by the City," and therefore the City's reliance on its policies promoting the
8 development of the Business and Technology corridor is unjustified. Applicant's
9 Comments, p. __. This assertion misunderstands the nature and importance of General Plan
10 policies in California land use law.

12 The general plan is a comprehensive, long-term plan for the development of the
13 city. Cal. Gov't Code § 65300. The general plan functions as the "constitution for all
14 future developments," and land use decisions must be consistent with the general plan and
15 its elements. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.
17 A "project is consistent with the general plan if, considering all its aspects, it will further the
18 objectives and policies of the general plan and not obstruct their attainment. [Citation.]"
19 *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.
20 Perfect conformity is not required, but a project must be compatible with the objectives and
21 policies of the general plan. *Families Unafraid to Uphold Rural Etc. County v. Board of*
22 *Supervisors, supra*, 62 Cal.App.4th at p. 1336. Although the courts have articulated various
24 standards of review of a local agency's determination that a project is consistent with the
25 general plan, those standards all have in common the affording of great deference to the
26 lead agency's determination.

27 Applicant cites to *Endangered Habitats League v. County of Orange* (Rutter
28

1 *Development*) (2005) 131 Cal.App.4th 777 to support its assertion that the City has acted in
2 an arbitrary and capricious manner in determining that the proposed EEC is inconsistent
3 with the City's General Plan policies.⁴ In *Endangered Habitats League*, the court issued a
4 writ of mandate directing the respondent County to set aside its land use approvals and an
5 environmental impact report for a development project because the Court determined that
6 the County's approval was *inconsistent* with stated General Plan policies related to traffic.
7 *Endangered Habitats League* noted that "decisions regarding consistency with a general
8 plan [are reviewed] under the arbitrary and capricious standard. These are quasi-legislative
9 acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary,
10 capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.
11 (Citations). Under this standard, we defer to an agency's fact finding of consistency unless
12 no reasonable person could have reached the same conclusion on the evidence before it.
13 (Citation)." *Id.* at 782. The court concluded that no reasonable person could have found
14 the proposed project to be consistent with the traffic policies of the County's general plan
15 since all of the evidence in the record demonstrated that the project would have unmitigable
16 impacts on the traffic levels of service inconsistent with general plan policies to maintain
17 that level of service. *Id.*

20 Far from assisting Applicant's argument, *Endangered Habitats League* actually
21 supports the City's determination that the EEC is inconsistent with its General Plan
22 policies. The case first recognizes that courts must be highly deferential to a local agency's
23

24
25 ⁴ Applicant also cites to *City of Banning v. Desert Outdoor Advertising, Inc.* (1962) 209
26 Cal. App. 2d 152 and *Kuzinich v. County of Santa Clara* (9th Cir. 1982) 689 F.2d 1345.
27 Neither case supports Applicant's argument. In each case, the court rejected the
28 argument that the public agencies enforcement of its ordinance was discriminatory. The
courts presumed that the agencies had acted in accordance with the law and its official
duty in the absence of direct evidence to the contrary.

1 determination of consistency with General plan policies. However, in that case, the court
2 found absolutely no evidence in the record to support Orange County's consistency finding.
3 *Endangered Habitats League* also stands for the proposition that projects must be consistent
4 with General Plan policies in order to be approved. In other words, it is not necessary for
5 those policies to have been adopted or codified in some other component of the City's land
6 use polices, e.g., the zoning code, because any land use decision must be consistent with the
7 general plan policies themselves.

9 Applying the rationale of *Endangered Habitats League* here, it is clear that the City
10 has not acted in an arbitrary and capricious manner. It evaluated the EEC against its
11 adopted General Plan policies, as it must, and found the EEC to be inconsistent with Land
12 Use Policy 7 and Economic Policies 2 and 3. This determination is amply supported by the
13 evidence. The cited General Plan policies promote the transition of the eastern portion of
14 the Industrial Zone from manufacturing-based to an information-based economy. Ex. 404:
15 City Council Resolution 07-028. Locating a power plant in the heart of this transition zone
16 would not "further the objectives and policies of [its] general plan" because a power plant is
17 not consistent with an "information-based economy" and would arguably "obstruct the
18 attainment" of the General Plan policies since it could discourage information-based
19 companies from relocating to this portion of Hayward. *Id.* As the PMPD found, this
20 determination is entirely reasonable since it would disrupt the City's future land use
21 planning goals. PMPD, p. 329.

24 Applicant argues that the normal deference afforded local agency's interpretation of
25 their own policies should not apply here based on what applicant characterizes as "a
26 flagrant inconsistency in the jurisdictions [sic] actions". Appellant's Comment, p. _____. As
27 discussed above, Applicant's claim that the EEC and RCEC present "equal conditions" is
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1 simply without merit given the different locations of the two facilities, the proximity of the
2 EEC to the Hayward Airport, and the 2002 General Policies that apply to the area in and
3 around the EEC site differently than the area around the RCEC site.

4 Equally important, however, as a matter of law and principle, this Committee should
5 reject Applicant's attempt to negatively characterize the City's actions. Public agencies and
6 their officers are legally presumed to have performed their official duties consistent with
7 the law. Cal. Evid. Code § 664. The California Energy Commission has recognized this
8 presumption by requiring due deference to a local agency's comments and
9 recommendations regarding a project's conformance with LORS under that agency's
10 jurisdiction. Cal. Code Regs., tit. 20, §§ 1714.5(b) and 1744(e). In order to overcome this
11 legal presumption and the requirement for due deference, a party must demonstrate bias
12 through more than just inference and mischaracterization⁵, which is all that Applicant has
13 mustered here. The crux of Applicant's argument appears to be that, since the City
14 interpreted its General Plan policies against the EEC, it must be biased against the project;
15 therefore, the City's interpretation must be disregarded. In other words, Applicant appears
16 to be arguing that, any time a local agency exercises its official legislative capacity, e.g. by
17 passing a resolution, expressing an adverse opinion on an energy facility project, then the
18 local agency has expressed bias against the project and its interpretations of its local land
19 use policies must be disregarded.

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24 ⁵ See e.g., *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205 (to prevail
25 on a claim of bias violating due process, "a party must establish 'an unacceptable
26 probability of actual bias on the part of those who have actual decisionmaking power over
27 their claims.' (See *U.S. v. State of Or.* (9th Cir. 1994) 44 F.3d 758, 772.). **A mere
28 suggestion of bias is not sufficient to overcome the presumption of integrity and
honesty.** (*Brooks v. New Hampshire Supreme Court* (1st Cir. 1996) 80 F.3d 633, 640;
Stivers v. Pierce (9th Cir. 1995) 71 F.3d 732, 74.)." (Emphasis added)).

1 Applicant's argument attempts to invert the nature of local land use decision making
2 to serve its own purposes. There is not a single piece of evidence to suggest that the City
3 decided against the EEC project and then made the findings of inconsistency to support that
4 decision. To the contrary, the City undertook its legal duty to evaluate the proposed project
5 for consistency with its land use policies, found the project to be inconsistent with certain of
6 its policies, and then adopted Resolution 07-028 memorializing that determination.

7 Applicant's unsubstantiated inference that the City is somehow biased and has not acted in
8 accordance with the law must be rejected not only as a matter of law, but as an unnecessary
9 attack on the integrity of the City's and the Committee's procedures.

10
11 **III. Substantial Evidence Supports the Finding in the PMPD that the Thermal**
12 **Plumes From the EEC Would Present a Significant Public Safety Risk to Low**
13 **Flying Aircraft During Takeoff and Landing Maneuvers Due to Close**
14 **Proximity of the Hayward Executive Airport.**
15

16 The Committee correctly concluded that the thermal plumes from the fourteen EEC
17 stacks would present a significant health and safety risk. The evidence demonstrates that
18 the turbulence-causing thermal plums from the EEC are likely to rise to an altitude in the
19 range of 400 feet, and that aircraft are likely to fly over the site at an altitude of 300 to 400
20 feet. PMPD p. 352 (citing Ex. 200, p. 4.10-20; Ex. 208; 12/18/07 RT 120-122). The
21 PMPD concluded that CEC Staff's modeling was appropriately conservative given the
22 public safety concerns related to potential aircraft upset in close proximity to high velocity
23 plumes, and refused to second guess the FAA's acceptance of CEC Staff's modeling "as a
24 valid representation of hazardous exhaust velocities." PMPD pp. 353-357 (citing, inter alia,
25 Ex. 200, p. 4.10-20; Ex. 39, pp. 6, 16-17; Ex. 416). Finally, the Committee's rejection of
26 the Applicant's Barrick Power Plant Flyover Report as representative of the worst-case
27
28

1 conditions that will exist at the EEC site is wholly supportable give that not all engines at
2 the Barrick plant were operating on the day of the flyover test (*see* Ex. 20), the cold
3 conditions on that day reduced radiator fan use (12/18/07 RT 260:11-14, 62:23-25, 73:12-
4 16) and the presence of wind meant that weather conditions were not worst case (12/18/07
5 RT 240-260; Ex. 20). (PMPD pp. 354-356).
6

7 Applicant attacks these conclusions, contending that Staff's modeling analysis is
8 flawed. Applicant's Comments, p. __. This argument has already been considered and
9 rejected by the Committee, however. PMPD, p. 354. The PMPD notes that Applicant
10 criticized Staff's modeling for "incorrectly calculate[ing] the thermal plum's peak velocity"
11 and "for not conducting further analysis", which Applicant contends was necessary because
12 the 4.3 m/s speed for measuring the velocity of the thermal plumes "was designed as a
13 screening level tool to trigger further assessment." *Id.* The Committee rightly rejected
14 these criticisms, finding that Staff used the same modeling in the RCEC proceeding and
15 appropriately made conservative assumptions given the potential public safety impacts. *Id.*
16 at 354, 356. The PMPD also states that the Committee "is unwilling to second-guess the
17 FAA's acceptance of the Staff's modeling 'as a valid representation of hazardous exhaust
18 velocities.'" *Id.* at 356.
19

20 Further still, the Committee found that, even discounting Staff's modeling results
21 showing thermal plume velocities of 4.3 m/s at 480 feet above ground level ("AGL"), the
22 evidence in the record independently demonstrated that the plumes would reach 300 to 400
23 feet AGL, and that aircraft would flyover the EEC at that height. PMPD, p. 356-357.
24

25 Based on this finding, as well as the FAA's recommendation that plumes have the potential
26 to be hazardous to aircraft flying less than 1,000 feet above the plume source, the
27 Committee correctly found a risk to aircraft safety that cannot be mitigated. *Id.*
28

1 25525). Applicant's argument would seemingly divest the Commission of that statutory
2 authority by asserting that, in California's current energy market, every energy project
3 serves the "public convenience and necessity" and must therefore be approved. Clearly, if
4 the legislature had wished to divest the Commission of its statutory discretion to deny siting
5 permits, it could have done so. Absent evidence of such legislative direction, the
6 Commission retains discretion to deny the project.⁷

8 Here, the Committee properly concluded that the EEC is not required for public
9 convenience and necessity because "the benefits of the EEC are modest at best. There is
10 little public convenience and necessity that would be served by the project." *Id.* at 436.

11 The EEC would provide 115 MW of capacity, approximately one-
12 fifth of one percent of current statewide demand. As a result, the
13 project's electricity system reliability benefits (flexibility in
14 responding to demand), which we discuss in the **Reliability, Local
System Effects, and Transmission System Engineering** sections
15 of this Decision, are commensurately small. This is also true of the
16 consumer benefits of the project. The Local System Effects
17 section shows savings in a range of \$11.4 million to \$16.3 million
18 over 20 years, or an average of approximately \$675,000 per year
spread among all PG&E rate payers. There are no other major
benefits of the project that would serve the public convenience and
necessity. *Id.*

19 In sum, the Committee balanced the EEC's inconsistency with LORS and significant
20 impacts on Land Use and Aviation Safety against the EEC's alleged benefits as proffered
21 by the Applicant, and found the EEC's benefits to be negligible at best compared to the
22 unmitigable impacts. This conclusion is amply supported by substantial evidence in the
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24
25 ⁷ Applicant also argues that Committee should have considered not only the Commission's
26 decision in *Metcalf Energy Center*, but also its decision in the *Los Esteros Energy Center*
27 matter, since the 140 MW addition at issue in the *Los Esteros* is closer to the 115MW
28 capacity at issue with the EEC. However, this argument fails to recognize that the public
convenience and necessity must be weighed against the public health and safety risks, and
that *Los Esteros* did not include unmitigable aviation safety risks.

1 record.

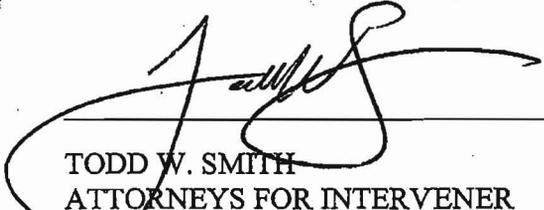
2 V. Conclusion.

3 The PMPD is a well-reasoned decision that more than adequately supports its
4 conclusions that the EEC is inconsistent with LORS and not necessary for the public
5 convenience and necessity. Applicant's arguments that the City's interpretation of its own
6 land use policies is arbitrary and capricious and should be rejected, as well as its claims
7 regarding Staff's plume modeling and the PMPD's override analysis, are without factual or
8 legal merit and should be rejected. The City supports the Committee's decision and
9 requests that the PMPD be submitted to the full Commission, without modification,
10 recommending denial of EEC's application.
11

12
13 DATED: July 28, 2008

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