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06-AFC-6	
DATE	JUL 28 2008
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15 **STATE OF CALIFORNIA**
16 **State Energy Resources**
17 **Conservation And Development Commission**

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 OPPOSITION
TO EASTSHORE ENERGY CENTER
LLC'S MOTION TO REOPEN THE
EVIDENTIARY RECORD

23 **I. Introduction.**

24 On July 18, 2008, Applicant Eastshore Energy Center LLC ("Applicant") filed a
25 Motion to Reopen the Evidentiary Record on Traffic and Transportation in order to perform
26 and submit as supplemental evidence an additional flyover test of an energy facility similar
27 to the proposed Eastshore Energy Center ("EEC"). Applicant conducted an initial flyover
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1 test on November 28, 2007 at the Barrick energy plant near Reno, Nevada. See Ex. 20:
2 "Turbulence Felt in Light Helicopter Caused by a Power Plant Thermal Plume: Final
3 Report" ("the Barrick flyover test"). In the Presiding Member's Proposed Decision
4 ("PMPD"), the Committee considered the Barrick flyover test and rejected its conclusions
5 based on several factors the PMPD concluded made the Barrick flyover test
6 "unrepresentative of the worst-case conditions that will exist at the EEC site." PMPD, p.
7 354-355. Applicant now seeks to reopen the evidentiary record and submit a new flyover
8 test that will purportedly cure each of the faults the PMPD found with the Barrick flyover
9 test.
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11 Intervener City of Hayward ("City") opposes the Motion to Reopen the Evidentiary
12 Record for two reasons: (1) The PMPD contains independent grounds upon which to uphold
13 the decision to deny Applicant's Application for Certification ("AFC") irrespective of the
14 results of the Barrick flyover test or any proposed additional test; and (2) Substantial
15 evidence in the record supports the PMPD's recommended denial of the AFC even if the
16 Applicant can "correct" all of the identified flaws with the Barrick flyover test. As such,
17 City requests that Applicant's Motion be denied.
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19 **II. The PMPD Contains Independent Grounds Upon Which to Base the**
20 **Recommended Denial of the AFC and Conclude that an Override is**
21 **Inappropriate, and the Proposed New Flyover Test Will Not Alter These**
22 **Conclusions.**
23

24 The PMPD concludes that, even if it can be demonstrated that EEC's thermal
25 plumes are unlikely to pose a hazard to aircraft, the mere presence of the power plant
26 creates a safety hazard related to increasing the complexity of the airspace around Hayward
27 Executive Airport. PMPD, p. 358 § 3f; pp. 364-365 § 5. The PMPD also concludes that
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1 the location of the EEC is inconsistent with the City's General Plan policies promoting the
2 development of a Business and Technology corridor in the area around the EEC site.
3 PMPD, pp. 328-329. Substantial evidence in the record supports these conclusions, which
4 present independent grounds for denial of the AFC that will not be altered by the
5 introduction of an additional flyover test.
6

7 As to the conclusion that the mere presence of the power plant creates a public
8 safety hazard, both the Federal Aviation Administration ("FAA") and the California
9 Department of Transportation ("CalTrans") – the two agencies with aviation expertise in this
10 proceeding – submitted written opinions supporting this independent ground for denial of
11 the AFC. In its October 9, 2007 letter, the FAA concluded that siting the Russell City
12 Energy Center ("RCEC") and the EEC in such close proximity within the confines of the
13 category B Visual Flight Rules airport traffic pattern would make the proposed "see and
14 avoid" mitigation measure impractical. "[P]ilots would be required to divert their attention
15 from the traffic pattern and safe operation of the aircraft to acquire visual sighting of both
16 facilities on the ground, then maneuver the aircraft around both plumes. The mitigation
17 would be unreasonable and in some cases unattainable." Ex. 204. CalTrans agrees with the
18 FAA's conclusion, stating in its November 11, 2007 letter that the proposed location of the
19 EEC "would only further restrict a pilot's ability to maneuver an aircraft while flying to and
20 from the airport. Aircraft pilots should not be subjected to avoid flying in areas while
21 configuring an aircraft for landing at or departing the airport." Ex. 203.
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23 This conclusion would not change based on results from the proposed new flyover
24 test. Regardless of whether the new flyover test cured the faults of the Barrick flyover test
25 and demonstrated that, in the limited circumstances of the new study, turbulence did not
26 occur when flying over thermal plumes, the Committee would remain justified in
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1 considering the FAA's recommendation that aircraft not fly over vertical plumes at less
2 than 1,000 feet clearance, which is not achievable at the Hayward Airport. PMPD, p. 357
3 (citing Ex. 39, pp. 16-17). The only way to avoid this concern would be the "see and
4 avoid" mitigation measure rejected by both FAA and CalTrans. Thus, as designed, and
5 regardless of the conclusions of the proposed new flyover test, the location of the EEC
6 creates a cumulative impact to air traffic safety that cannot be mitigated to a less-than-
7 significant level.

9 So too (and) the PMPD's conclusion that the EEC is inconsistent with the City's
10 General Plan policies cannot be cured by a new flyover test. Specifically, Land Use Policy
11 7 and Economic Policies 2 and 3 promote the transition of the eastern portion of the City's
12 industrial corridor – the location of the EEC site – to a Business and Technology corridor.
13 The PMPD found that locating the EEC at the proposed site would disrupt the City's future
14 land use planning goals. PMPD, p. 329.

16 Finally, a new flyover test would not alter the analysis the Committee undertook to
17 conclude that the public health and convenience benefits of the EEC project do not override
18 the identified cumulative impact to air traffic safety, as well as the inconsistency with
19 LORS, resulting from the proposed siting of the EEC. PMPD, pp. 434-439.

21 Since a new flyover test will not cure the separate grounds identified in the PMPD
22 supporting the recommendation for denial of the AFC, there is no need to reopen the
23 evidentiary record to permit Applicant to conduct such a test. Instead, for the benefit of the
24 City and its citizens, the record should remain closed and the PMPD should be submitted to
25 the full Commission for consideration.

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1 **III. Substantial Evidence In The Record Supports the PMPD's Recommended**
2 **Denial Of The AFC Even If The Applicant Can "Correct" The Identified flaws**
3 **With The Barrick Flyover Test.**

4 Even if a new flyover test corrected all of the flaws the PMPD identified with the
5 Barrick flyover test, such a result would not necessarily dictate that the recommended
6 denial of the AFC be different. The Committee has the discretion to weigh the evidence in
7 the record and reject the results of the flyover test in favor of other, substantial evidence.

8
9 Staff performed a Plume Velocity Analysis to determine worst-case plume
10 velocities at different heights above the EEC's proposed stacks and radiators. Ex. 200, p.
11 4.10-41 *et seq.* This modeling was based on an accepted protocol that was also used in the
12 RCEC siting procedure. *Id.*; *see also* Ex. 26: Australian Government Civil Aviation Safety
13 Authority (CASA) AC (2004) 139-05. As the PMPD notes, "the FAA accepted Staff's
14 modeling 'as a valid representation of hazardous exhaust velocities.'" PMPD, p. 356; *see*
15 *also* Ex. 200, 4.10-20; Ex. 39, p. 6.

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17 Further still, the Committee found that, even discounting Staff's modeling results
18 showing thermal plume velocities of 4.3 m/s at 480 feet above ground level ("AGL"), the
19 evidence in the record independently demonstrated that the plumes would reach 300 to 400
20 feet AGL, and that aircraft would fly over the EEC at that height. PMPD, p. 356-357.
21 Based on this finding, as well as the FAA's recommendation that plumes have the potential
22 to be hazardous to aircraft flying less than 1,000 feet above the plume source, the
23 Committee correctly found a risk to aircraft safety that cannot be mitigated. *Id.*

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25 The Committee has the discretion to conclude that this information constitutes
26 substantial evidence to support its decision regardless of any the conclusions of a limited
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1 additional flyover test.¹

2 **IV. Conclusion.**

3 The Applicant's Motion to Reopen the Evidentiary Record should be denied.
4 Independent grounds for denial of the AFC exist that will not altered by the results of a new
5 flyover test. Further, the Committee retains the discretion to weigh the evidence in the
6 record and conclude that substantial evidence already exists in the record supporting its
7 decision regardless of the results of a new – and by no means definitive – flyover test. The
8 PMPD is a well-reasoned decision that more than adequately supports its conclusions that
9 the EEC is inconsistent with LORS and not necessary for the public convenience and
10 necessity. The City supports the Committee's decision and requests that the PMPD be
11 submitted to the full Commission, without modification, recommending denial of EEC's
12 application.
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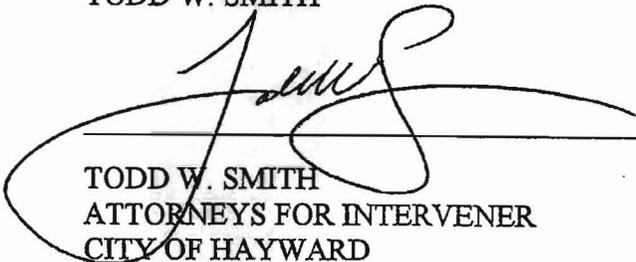
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17 ¹ The City notes that, at the July 21, 2008 Committee Hearing on the PMPD, Staff argued
18 that, if such an additional flyover test were conducted, its value would be dependent upon
19 the protocols for the test established in conjunction with federal and state agencies
20 responsible for aviation safety. City concurs with this argument. It would not be enough
21 for the Applicant to simply conduct another flyover test under different conditions. The
22 Applicant seems to believe that such a test is the only "real" evidence of aviation risk, and
23 that modeling is somehow insufficient for purposes of getting to the "truth" of aviation
24 safety risks. The flaws with this argument are obvious. First, modeling is an accepted
25 scientific method relied upon in multiple areas of environmental review, including for
26 example air quality and traffic. Applicant had no problem accepting the validity of
27 "modeling" in those areas for purposes of this procedure where the conclusions worked to
28 its benefit. Its rejection of modeling evidence in the case of aviation safety is therefore
somewhat disingenuous. Second, the flyover test is at best only a sample test that, much
like modeling, will require the decision makers to extrapolate conclusions from the
results. A new flyover test will only show the results from a representative number of
flights over a similar (but not identical) facility based on one set of weather conditions.
Due to these limitation, there will always be supposition and projection that must be done.
In such a case, the Committee is equally justified accepting Staff's modeling (which has
been endorsed by FAA) rather than the conclusions of a limited flyover test which cannot
possibly account for all circumstances.

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