

DOCKET

06-AFC-6

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15 **STATE OF CALIFORNIA**
16 **State Energy Resources**
Conservation And Development Commission

17 _____
18 In the Matter of:)

Docket No. 06-AFC-6

19)
20 APPLICATION FOR CERTIFICATION)
FOR THE EASTSHORE ENERGY)
21 CENTER)
22 _____)

CITY OF HAYWARD'S STATEMENT
IN SUPPORT OF REVISED
PRESIDING MEMBER'S PROPOSED
DECISION FOR THE EASTSHORE
ENERGY CENTER

23 **I. INTRODUCTION.**

24 On August 29, 2008, the Siting Committee issued the Revised Presiding Member's
25 Proposed Decision ("RPMPD") for the Eastshore Energy Center ("EEC") pursuant to Title
26 20, § 1753 of the California Code of Regulations recommending denial of Eastshore
27 Energy, LLC's ("Applicant") Application for Certification ("AFC") for the EEC. Pursuant
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1 to § 1754(b), and consistent with the instructions in the August 29, 2008 “Notice of
2 Availability of the Revised Presiding Member’s Proposed Decision and Notice of
3 Commission Hearing” (“Notice”), Intervener City of Hayward (“City”) submits this
4 statement in support of the RPMPD’s recommendation of denial of the AFC and requesting
5 that the Commission adopt the RPMPD as the final written decision in this proceeding.
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7 **II. BACKGROUND.**

8 This proceeding concerns Applicant's AFC to construct and operate the EEC, a 115
9 MW power plant located at the eastern edge of the City’s Industrial Zoning District.
10 RPMPD, p. 2. The proposed EEC site is located approximately one mile south of the
11 Hayward Municipal Airport (“Airport”), adjacent to the downwind departure route for
12 Runway 10R/28L and within the southwest quadrant of the Airport space. RPMPD, p. 358.
13 The EEC is in an area subject to, *inter alia*: (1) the Alameda County Airport Land Use
14 Commission’s (“ALUC”)¹ Airport Land Use Policy Plan,² (2) the City’s Airport Master
15 Plan,³ and (3) the City’s Airport Approach Zoning Ordinance (“Airport Ordinance”).⁴
16 RPMPD, p. 358. The EEC is also subject to the City’s general land use and zoning
17 requirements, including applicable General Plan policies and provisions of the zoning
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20 ¹ The ALUC is responsible for guiding airport land use for all of the airports in Alameda
21 County, i.e., the Airport, Oakland International Airport (“OAK”) and Livermore
22 Municipal Airport. Ex. 535.

23 ² The State Aeronautics Act, Public Utilities Code §§ 21670-21679.3, requires CalTrans to
24 develop an Airport Land Use Planning Handbook to create guidance to establish
25 operational, safety and traffic zones around airports. Ex. 414. Consistent with the
26 Handbook, the ALUC and the City have developed the Airport Land Use Policy Plan.
27 The Airport Land Use Policy Plan includes designations for and the Airport Influence
28 Area, also referred to as the Airport Hazard Prevention Zone. Ex. 535.

³ The Airport Master Plan includes designations for the Airport Safety Zones, Airport Area
Airspace and Airport Airspace. Ex. 410.

⁴ The Airport Ordinance implements the City’s obligations pursuant to federal and state
requirements. Ex. 411.

1 ordinance requiring a conditional use permit (“CUP”) for locating a power plant in the
2 Industrial zone. RPMPD, p. 320, 331.

3 In considering these plans and policies, the RPMPD concludes that construction and
4 operation of the EEC would result in direct, indirect and cumulative land use impacts, and
5 cumulative aviation safety impacts, and therefore does not comply with applicable laws,
6 ordinances, regulations, and standards (“LORS”), in five specific areas:
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- 8 1. The facility would cause a significant cumulative public safety impact on the
9 operations of the Airport by further reducing already constrained air space and
10 increasing pilot cockpit workload.
- 11 2. The thermal plumes from the facility would present a significant public safety risk
12 to low flying aircraft during landing and takeoff maneuvers due to the close
13 proximity of the Airport.
- 14 3. The facility would be inconsistent with the City’s Municipal Zoning Ordinance
15 requirements for a CUP since the project “would not operate at a minimum of
16 detriment to surrounding properties.”
17
- 18 4. The facility would be inconsistent with the City of Hayward’s Airport Approach
19 Zoning Regulation and incompatible with the ALUPP.
- 20 5. The facility would be inconsistent with the City’s “General Plan 2002 Update” Land
21 Use Policy 7.
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23 RPMPD, p. 1-2. The RPMPD further concludes that the EEC does not satisfy the statutory
24 criteria for an override of the LORS inconsistency finding because the EEC is not “required
25 for public convenience and necessity.” RPMPD, pp. 456-458.

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1 **III. The Evidence in the Record Supports the RPMPD's Conclusion that the**
2 **Proposed EEC Does Not Comply with LORS.**

3 The RPMPD found the AFC deficient in five areas that cannot be mitigated at the
4 proposed EEC site. As discussed below, ample evidence supports the Committee's
5 conclusions regarding the Application's deficiencies.
6

7 A. The facility would cause a significant cumulative public safety impact on the
8 operations of the Airport by further reducing already constrained air space
9 and increasing pilot cockpit workload.

10 The RPMPD rightly concludes that "the mere presence of the power plant creates a
11 safety hazard" because of its effect on airspace congestion. RPMPD p. 374. "The project's
12 proximity to the traffic pattern for the Hayward Executive Airport and the downwind
13 departure route for Runway 28L would unreasonably complicate aircraft maneuverability.
14 The site location would also limit the airspace available for aircraft transit, maintenance
15 flights, training procedures, and normal departures and arrivals that currently occur within
16 this portion of the Hayward airport airspace." RPMPD p. 374, citing Ex. 20, p. 4.10-21 and
17 Ex. 203. Based on Federal Aviation Administration ("FAA") and California Department of
18 Transportation ("CalTrans") recommendations, the Committee rejected a proposed "see and
19 avoid" mitigation measure as ineffective given the limited air space due in part to the
20 imposition of a similar mitigation measure on the Russell City Energy Center. RPMPD p.
21
22 381 (citing 12/18/07 RT 113:17-25 – 115 and Ex. 416).

24 B. The thermal plumes from the facility would present a significant public
25 safety risk to low flying aircraft during takeoff and landing maneuvers due to
26 close proximity of the Hayward Executive Airport.

27 The RPMPD correctly concludes that the thermal plumes from the fourteen EEC
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1 stacks would present a significant health and safety risk. The evidence demonstrates that
2 the turbulence-causing thermal plumes from the EEC are likely to rise to an altitude in the
3 range of 400 feet, and that aircraft are likely to fly over the site at an altitude of 300 to 400
4 feet. RPMPD p. 361 (citing Ex. 200, p. 4.10-20; Ex. 208; 12/18/07 RT 120-122). The
5 RPMPD concluded that CEC Staff's modeling was appropriately conservative given the
6 public safety concerns related to potential aircraft upset in close proximity to high velocity
7 plumes, and refused to second guess the FAA's acceptance of CEC Staff's modeling "as a
8 valid representation of hazardous exhaust velocities." RPMPD pp. 370-372 (citing, *inter*
9 *alia*, Ex. 200, p. 4.10-20; Ex. 39, pp. 6, 16-17; Ex. 416). Finally, the Committee's rejection
10 of the Applicant's Barrick Power Plant Flyover Report as representative of the worst-case
11 conditions that will exist at the EEC site is wholly supportable give that not all engines at
12 the Barrick plant were operating on the day of the flyover test (*see* Ex. 20), the cold
13 conditions on that day reduced radiator fan use (12/18/07 RT 260:11-14, 62:23-25, 73:12-
14 16) and the presence of wind meant that weather conditions were not worst case (12/18/07
15 RT 240-260; Ex. 20). RPMPD pp. 370-372.

18 C. The facility would be inconsistent with the City's Municipal Zoning
19 Ordinance requirements for a CUP since the project "would not operate at a
20 minimum of detriment to surrounding properties".

22 Relying primarily on its conclusions regarding potential aviation hazards, the
23 RPMPD concludes the EEC is inconsistent with the requirements of the City's CUP
24 findings requiring, *inter alia*, that a project be desirable for the public convenience and
25 welfare and not detrimental to the public health, safety and welfare. RPMPD pp. 326-327
26 (citing Ex. 401, p. 8; Ex. 200, p. 4.5-18). In reaching these conclusions, the Committee
27 properly deferred to the City's interpretation of its land use policies and zoning regulations
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1 (Cal. Code Regs., tit. 20, §§ 1714.5(b) and 1744(e)).

2 D. The facility would be inconsistent with the City of Hayward's Airport
3 Approach Zoning Regulations and incompatible with the ALUPP.

4 The RPMPD concludes that the City's Airport Approach Zoning Regulations and
5 the ALUPP limit development in the vicinity of the airport that endangers the landing,
6 takeoff, or maneuvering of aircraft. RPMPD, p. 331-334, 329-330 (Ex. 535). An airport
7 hazard is defined as "any structure or tree or use which obstructs the airspace required for
8 the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such
9 landing or taking off of aircraft." Hayward Municipal Code ("HMC") § 10-6.12. The
10 uncontroverted evidence in the record demonstrates that aircraft fly over the site at low
11 altitudes where the project's invisible thermal plumes have the potential to cause flight
12 turbulence. RPMPD, p. 360 (Ex. 513; Ex. 200, p. 4.10-20; Ex. 208; 12/18/07 RT 120-122).
13 Further, the Applicant failed to provide substantial evidence that feasible mitigation
14 measures exist to eliminate thermal plumes or prevent the constriction of navigable airspace
15 that would impair the utility of the airport.

18 E. The facility would be inconsistent with the City's "General Plan 2002
19 Update" Land Use Policy 7.

20 The RPMPD included a fifth finding of inconsistency with LORS, concluding that
21 the EEC is inconsistent with the Land Use Policy 7 from the City's General Plan. Land
22 Use Policy 7 designates the eastern portion of the City's Industrial Zone as a Business and
23 Technology Corridor promoting a transition from manufacturing-based to an information-
24 based economy. RPMPD, p. 328-331; see also Ex. 404: City Council Resolution 07-028.
25 The RPMPD concludes that locating a power plant in the heart of this transition zone would
26 not "further the objectives and policies of [its] general plan" because a power plant is not
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1 consistent with an “information-based economy” and would arguably “obstruct the
2 attainment” of the General Plan policies since it could discourage information-based
3 companies from relocating to this portion of Hayward. *Id.* While Applicant has repeatedly
4 asserted that the existence of the City’s Business and Technology Corridor is “a fantasy”
5 because “no such designation was ever adopted or codified by the City,” and therefore the
6 City’s reliance on its policies promoting the development of the Business and Technology
7 corridor is unjustified, the RPMPD rightly rejected this argument as ignoring the
8 fundamental precept of California land use law that land use decisions must be consistent
9 and compatible with the objectives and policies of a general plan and its elements. See
10 *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570; *Corona-*
11 *Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.

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14 **III. The Committee Properly Concluded that the EEC Does Not Satisfy the**
15 **Statutory Criteria for an Override Because the EEC is Not “Required for**
16 **Public Convenience and Necessity.”**

17 Upon finding that the EEC does not comply with the LORS, the RPMPD applies
18 Public Resources Code § 25525 to determine whether “such facility is required for public
19 convenience and necessity and that there are not more prudent and feasible means of
20 achieving such public convenience and necessity.” RPMPD, pp. 450-456. The RPMPD
21 properly rejects Applicant’s criticism that the California Public Utilities Commission
22 (“CPUC”) Energy Action Plan II, as well as the Energy Commission’s 2007 Integrated
23 Energy Policy Report, demonstrate the statewide need for new electricity generation, and
24 specifically the increased efficiency and flexibility of conventional natural gas powered
25 generation facilities, and therefore mandate a finding that the EEC services the public
26 convenience and necessity. The Applicant seems to be implying that this recognized need
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1 for new energy generation means that every proposed energy plant serves the “public
2 convenience and necessity.”⁵

3 However, as the RPMPD discusses, approval of an energy facility is within the
4 discretion of the Energy Commission. RPMPD, p. 450 (citing Public Resources Code §
5 25525). Applicant’s argument would seemingly divest the Commission of that statutory
6 authority by asserting that, in California’s current energy market, every energy project
7 serves the “public convenience and necessity” and must therefore be approved. Clearly, if
8 the legislature had wished to divest the Commission of its statutory discretion to deny siting
9 permits, it could have done so. Absent evidence of such legislative direction, the
10 Commission retains discretion to deny the project.

11 Here, the RPMPD properly concludes that the EEC is not required for public
12 convenience and necessity because by balancing the EEC’s “modest” benefits (RPMPD, p.
13 453) against the unmitigable public health and safety impacts resulting from the EEC’s
14 location near the Airport. *Id.* at 456.

15 We acknowledge that the EEC possesses identifiable electrical
16 system and socioeconomic benefits which, in other circumstances,
17 could prove sufficient to warrant an override. In the present
18 instance, however, as discussed in the **Traffic and**
19 **Transportation** section, we have been persuaded that operation at
20 the proposed site would jeopardize public health and safety by
21 creating hazards to aircraft pilots and other uses of the Hayward
22 Executive Airport. This impact cannot be mitigated. Avoiding
23 this hazard in a heavily populated area, in our judgment, is more
24 beneficial to the public than are the levels of electrical system and
25 socioeconomic benefits which the EEC would provide. The
consequences of LORS override in this instance, i.e., the increased
peril to pilots and others, is a risk we are here unwilling to

26 ⁵ In making these criticisms however, Applicant failed to inform the Committee that it had
27 elected to terminate its Power Purchase Agreement with PG&E, a factor that would seem
28 relevant to the Committee’s consideration of whether the EEC meets the public
convenience and necessity.

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condone. *Id.*

The RPMPD's decision to err on the side of protecting the public health and safety is commendable and is amply supported by substantial evidence in the record.

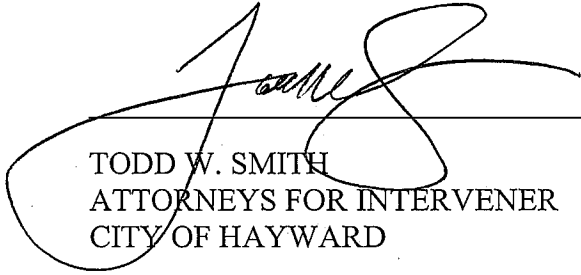
IV. CONCLUSION.

The RPMPD is a well-reasoned decision that more than adequately supports its conclusions that the EEC is inconsistent with LORS and not necessary for the public convenience and necessity. The City supports the RPMPD's recommendation and requests that Commission adopt the RPMPD as its final decision denying Applicant's AFC.

DATED: October 1, 2008

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

Docket No. 06-AFC-6

PROOF OF SERVICE
(Revised 9/11/2008)

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, MICHAEL R. WILSON, declare that on OCTOBER 1, 2008, I deposited copies of the attached CITY OF HAYWARD'S STATEMENT IN SUPPORT OF REVISED PRESIDING MEMBER'S PROPOSED DECISION FOR THE EASTSHORE ENERGY CENTER, in the overnight mail at San Francisco CA, with postage thereon fully prepaid and addressed to the California Energy Commission as identified on the Proof of Service list above.

AND

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.


Michael R. Wilson