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ORDER ON RECONSIDERATION

**EL SEGUNDO POWER REDEVELOPMENT PROJECT
APPLICATION FOR CERTIFICATION
DOCKET NO. 00-AFC-14**

On December 23, 2004, the Commission granted certification of this project as set forth in an Adoption Order dated and executed on December 23, 2004. Pursuant to Public Resources Code section 25530, which allows the Commission to reconsider its decision on its own motion within 30 days, the Commission heard a motion to reconsider by Commissioner Geesman on January 19, 2005 and voted to reconsider the decision. Upon reconsideration, the Commission readopts its decision granting certification but adds override findings pursuant to Public Resources Code section 25525 to make the resolution of Coastal Act issues consistent with our decision in the Morro Bay Application for Certification. As set forth below, the effect of this reconsideration is to extend the period in which parties may petition for reconsideration or seek judicial review of this new decision.

The Commission adopts this Decision on the El Segundo Power Redevelopment Project and incorporates the Presiding Member's Proposed Decision, as amended by the errata that are attached to this order. The attached errata include items proposed by the Committee at the December 23, 2004 adoption hearing as well as items proposed by commissioners in their discussion of the matter on December 23rd and, in addition, the Commission's findings under Public Resources Code section 25525. This Decision is based upon the record of the proceeding (Docket No. 00-AFC-14).

The Commission hereby adopts the following findings in addition to those contained in the accompanying text:

1. The Conditions of Certification contained in this Decision, if implemented by the project owner, ensure that the whole of the project will be designed, sited and operated in conformity with applicable local, regional, state, and federal laws, ordinances, regulations, and standards, including applicable public health and safety standards, and air and water quality standards.
2. Implementation of the Conditions of Certification contained in the accompanying text will ensure protection of environmental quality and assure reasonably safe and reliable operation of the facility. The Conditions of Certification also assure that the project will neither result in, nor contribute substantially to, any significant direct, indirect, or cumulative adverse environmental impacts.

3. Existing governmental land use restrictions are sufficient to adequately control population density in the area surrounding the facility and may be reasonably expected to ensure public health and safety.
4. The record does not establish the existence of any environmentally superior alternative site.
5. The analysis of record assesses all potential environmental impacts associated with the project.
6. This Decision contains measures to ensure that the planned, temporary, or unexpected closure of the project will occur in conformance with applicable laws, ordinances, regulations, and standards.
7. The Commission finds that the recommendations of the California Coastal Commission, pursuant to Public Resources Code section 30413(d), to adopt the staff-proposed Hyperion wastewater cooling alternative or, alternatively, to conduct a Section 316(b) study of the intake of this facility prior to licensing, would result in greater impact to the environment compared to the proposed project with the conditions which are incorporated in this Decision (including but not limited to the funding of a Bay-wide study of the environmental conditions in the Santa Monica Bay and potential implementation measures to enhance and restore its biological health).
8. In recognition that the Coastal Commission and other parties have asserted that, notwithstanding our finding the contrary, the project will not comply with the Coastal Act and the Local Coastal Plan, the Commission finds, pursuant to its authority under Public Resources Code section 25525 and based on the record in this proceeding, that the project is required for the public convenience and necessity and that there is no more prudent and feasible means of achieving that public convenience and necessity. To the extent that there is any inconsistency between the project as conditioned in this decision and the Coastal Act or the Local Coastal Plan, we expressly override those LORS.
9. The proceedings leading to this Decision have been conducted in conformity with the applicable provisions of Commission regulations governing the consideration of an Application for Certification and thereby meet the requirements of Public Resources Code, sections 21000 et seq., and 25500 et seq.

Therefore, the Commission **ORDERS** the following:

1. The Application for Certification of the El Segundo Power Redevelopment Project in El Segundo, California, as described in this Decision, is hereby approved, and a certificate to construct and operate the project is hereby granted.
2. The approval of the Application for Certification is subject to the timely performance of the Conditions of Certification and Compliance Verifications enumerated in the accompanying text. The Conditions and Compliance Verifications are integrated with this Decision and are not severable therefrom. While the project owner may delegate the performance of a

Condition or Verification, the duty to ensure adequate performance of a Condition or Verification may not be delegated.

3. The Commission hereby adopts the Conditions of Certification, Compliance Verifications, and associated dispute resolution procedures as part of this Decision in order to implement the compliance monitoring program required by Public Resources Code section 25532. All Conditions in this Decision take effect immediately upon adoption and apply to all construction and site preparation activities including, but not limited to, ground disturbance, site preparation, and permanent structure construction.
4. The Commission uses its authority as provided in Public Resources Code section 25523(b) not to include the specific requirements recommended by the Coastal Commission in its report pursuant to Public Resources Code section 30413(d) by finding that the adoption of those provisions would result in greater adverse effect on the environment when compared to implementation of the project, as conditioned in this decision, or would be infeasible.
5. The decision is adopted on January 19, 2005, consistent with Public Resources Code section 25530 and California Code of Regulations, title 20, section 1720.4.
6. Any petition requesting Commission reconsideration of this Decision (or any determination by the Commission on its own motion to reconsider) shall be filed and served on or before February 18, 2005, which is the 30th day after the date of adoption. (Pub. Resources Code section 25530.)
7. Judicial review of certification decisions is governed by Section 25531 of the Public Resources Code.
8. The Executive Director of the Commission or delegatee shall transmit a copy of this Decision and appropriate accompanying documents as provided by Public Resources Code section 25537 and California Code of Regulations, title 20, section 1768.

Dated January 19, 2005, at Sacramento, California.

WILLIAM J. KEESE
Chairman

ARTHUR H. ROSENFELD
Commissioner

JAMES D. BOYD
Commissioner

JOHN L. GEESMAN
Commissioner

JACKALYNE PFANNENSTIEL
Commissioner



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<p>ERRATA TO 2ND REVISED PRESIDING MEMBER’S PROPOSED DECISION</p>
<p>EL SEGUNDO POWER REDEVELOPMENT PROJECT APPLICATION FOR CERTIFICATION DOCKET NO. 00-AFC-14</p>

The El Segundo AFC Committee, after further deliberations, makes the following corrections to the 2nd Revised Presiding Member’s Proposed Decision:

- Page 51: delete the last sentence of the first paragraph;
- Page 54: delete the reference to a now-stricken footnote #2 in the third paragraph;
- Page 60: delete the last sentence of the second paragraph;
- Page 60-61: delete the last paragraph on Page 60 that ends on Page 61;
- Page 70: delete the heading that begins “Environmental Effect ...”; and
- Page 70-71: delete the last two paragraphs of page 70 and the first two paragraphs of Page 71.

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The full commission agrees to these errata. In addition, the full Commission adopts the following additional modifications to the 2nd Revised Presiding Member’s Proposed Decision:

Page 73: Amend the second sentence of Condition BIO-1 as follows: “At least \$1 million shall be provided within 180 days after this Decision becomes final. At least \$250,000 shall be provided within 30 days after this Decision becomes final and an additional sum of at least \$250,000 shall be provided every 90 days thereafter until \$ 1 million has been provided.”

Page 75: Amend Condition BIO-3 to as follows: “Cooling Upon the commencement of commercial operation of Units 5, 6, and 7, cooling water flows for intakes #1 and #2 combined shall not exceed 126.78 billion gallons per year and shall also be subject to monthly flow volumes not to exceed 7.961 billion gallons in February, 8.313 billion gallons in March, and 8.524 billion gallons in April of any year.”

Page 303: Add the following section:

OVERRIDE

Introduction

Public Resources Code section 25523(d)(1) requires the Energy Commission to find whether a proposed facility complies with all applicable laws including, when a facility is proposed in the coastal zone, the Coastal Act and local coastal plans. If the Commission finds noncompliance, then section 25525 requires the Commission to “consult and meet with the [Coastal Commission] to attempt to correct or eliminate the noncompliance.” If, after that, the proposed facility still does not comply, the Energy Commission may certify the facility only if it determines that the proposed facility “is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity.”

Those determinations are solely within the province of the Energy Commission. The Energy Commission gives great weight to the assessment of the Coastal Commission on the compliance of proposed facilities with the Coastal Act (just as the Energy Commission also gives great weight to the assessment of other agencies on the compliance of proposed facilities with the laws that they administer), but the Energy Commission is ultimately responsible for making the determinations, based on the evidence in its record.

As discussed above in this Decision, based upon our independent analysis of all the evidence of record, we have determined that the project, as conditioned, will conform to all applicable land use laws, ordinances, regulations, and standards, including applicable provisions of the Coastal Act and the City of El Segundo’s Local Coastal Program (LCP).

However, to remove all doubt regarding the ability of this Decision to allow the project to proceed and out of an abundance of caution, we also have performed the “override” analysis and made the findings set forth in Public Resources Code section 25525 to specifically override any potential noncompliance with the Coastal Act that would otherwise prohibit construction and operation of the project. Thus in this section of the Decision we find that the El Segundo facility is “required for public convenience and necessity” and that “there are not more prudent and feasible means” of achieving the public convenience and necessity that the facility will serve.

Section 25525

Public Resources Code section 25525 provides in pertinent part:

The commission shall not certify a facility . . . when it finds . . . that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of

the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

Thus where there is LORS noncompliance, section 25525 directs us to determine two things: whether a project is required for "public convenience and necessity" and whether there are "more prudent and feasible means of achieving such public convenience and necessity."¹ These are discussed below.

Public Convenience and Necessity

While there is no judicial decision interpreting section 25525, numerous decisions address the phrase "public convenience and necessity" as it appears in Public Utilities Code section 1001. This phrase is used in a similar context in both statutes and, absent evidence of legislative intent to the contrary, is presumed to have a similar meaning for present purposes. (*Building Material & Construction Teamsters' Union v. Farrell* (1986) 41 Cal.3d 651, 665.) It is well-settled by the judicial decisions interpreting Section 1001 that "public convenience and necessity" has a broad and flexible meaning, and that the phrase "cannot be defined so as to fit all cases." (*San Diego & Coronado Ferry Co. v. Railroad Commission* (1930) 210 Cal. 504, 511.) In this context, "necessity" is not used in the sense of something that is indispensably requisite. Rather, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. It is a relative rather than absolute term whose meaning must be ascertained by reference to the context and the purposes of the statute in which it is found. (*Id.* at p. 512.)

In assessing whether or not the El Segundo Redevelopment Project is required for public convenience and necessity, we must, therefore, first ascertain whether this project is reasonably related to the goals and policies of our enabling legislation. The Warren-Alquist Act expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. Moreover, the statute declares that it is the responsibility of state government to ensure that the state is provided with an adequate and reliable supply of electrical energy. (Pub. Resources Code § 25001.) Obviously, the El Segundo project will generate electricity, which will be available for consumption in the local area.

The statute does not, however, focus on public convenience and necessity solely in a limited geographical context. Rather, the focus is on electricity's essential nature to the welfare of the state as a whole. This logically not only includes a specific area, but also recognizes the interconnected nature of the electrical grid and the interdependence of the people and the economy in one sector of the state upon the people and the economy in the balance of the state. The evidence establishes that the El Segundo project's duct-firing capability will provide the electrical system with flexible peaking capacity that is necessary to keep the electrical grid stable. Furthermore, the Commission's Integrated Energy Policy Report recognizes the need for increased supplies of electrical energy, especially in Southern

¹ Section 25525 specifies that we examine the entire record, "including, but not limited to," the effects of the facility on the environment, consumer benefits, and electric system reliability. We note that we are not limited to only these three factors, and we believe the criteria set forth in the Commission's Decision on the Geysers Unit 16 project remain relevant. (See Docket No. 79-AFC-5, Pub. No. P800-81-007 (Sept. 30, 1981) pp. 104-105.)

California, throughout the state within the next several years. In particular, the retirement of several aging powerplants in the South Coast region – including the very units that the El Segundo project will replace – along with continued economic and population growth, is contributing to a tight supply-demand situation in the southern part of the state. Since the El Segundo Redevelopment Project will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525.

As is discussed in other parts of the Decision, the El Segundo project will also serve the public convenience and necessity in several other ways. The project will:

- be located on the site of the existing El Segundo Generating Station and will make use of substantial existing infrastructure;
- reduce the impacts of the existing plant on the El Segundo and Manhattan Beach communities by replacing a 50-year-old facility with a cleaner, more efficient, and less-visually-intrusive project (removal of the existing tank farm, reduction in stack height, and change in equipment location will all reduce visual impacts);
- result in increased revenue to the City of El Segundo and other local jurisdictions from taxes, employment, and sales of services, manufactured goods, and equipment; and
- enhance the biological health of Santa Monica Bay.

More Prudent and Feasible Means

As with the phrase “public convenience and necessity,” there is no simple, one-size-fits-all meaning of “prudent and feasible.” We note first that there appears to be no clear or meaningful distinction between the words “prudent” and “feasible” as used in section 25525.² We note also that under the Warren-Alquist Act, the existence of a “prudent and feasible” means of achieving the public convenience and necessity does not prevent an override; only the existence of a “**More** prudent and feasible” means prevents the Commission from overriding LORS noncompliance.³

In the **ALTERNATIVES** section of the Decision we have already performed the essence of an analysis of whether there are “more prudent and feasible means” of achieving the public convenience and necessity that the El Segundo project will meet. As summarized in the **ALTERNATIVES** section, we have conducted a review of alternative technologies, fuels, and the “no project” alternative and found that no feasible technology alternatives such as

² We note that CEQA defines “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Resources Code § 21061.1; see also, 14 Cal. Code of Regs., §15361 which adds “legal” to the list of factors.) However, even using the CEQA definition, it appears that any “prudent” alternative would have to be “feasible” -- or, in other words, any alternative that is *not* “capable of being accomplished in a successful manner within a reasonable period of time” would not be “prudent.”

³ This is different from the CEQA standard which, as we have explained previously, does not require choice of the *best* project alternative as long as a project is acceptable. In the override circumstance, the statute requires that any alternative means of serving public convenience and necessity be *better* than that proposed.

geothermal, solar, hydroelectric, or wind resources are capable of meeting the project objectives. Moreover, the use of alternative generating technologies would not prove efficient, cost-effective or mitigate any significant environmental impacts to levels of insignificance. Plus, no significant environmental impacts would be avoided under the “no project” alternative. The use of a dry cooling alternative reviewed in our record is infeasible on the project site and would cause greater noise and visual impacts to the neighboring communities.

As discussed in the **BIOLOGY** section, a combination of engineering, environmental, and economic problems associated with the Hyperion Wastewater Cooling Alternative render it infeasible and environmentally more harmful than the project.

The net result of the potential use of any of the alternative sites or alternative cooling options thus appears to us to be reasonably likely to create potential problems at least comparable to or greater than those encountered by the proposed project. On balance, the various alternative proposals do not, in our estimation, equate with a more prudent and feasible means of achieving public convenience and necessity.

Therefore, we specifically override any provisions of the Coastal Act that would prohibit construction and operation of the El Segundo Redevelopment Project at the proposed location.

FINDINGS AND CONCLUSIONS

Based upon the totality of the evidence of record, and specifically considering the factors enumerated in Public Resources Code section 25525, we make the following findings and reach the following conclusions:

1. The El Segundo Redevelopment Project is required for public convenience and necessity.
2. The project will not create significant direct or cumulative adverse environmental impacts
3. There are no more prudent and feasible means of achieving public convenience and necessity similar to that provided by the project.
4. Applicant and Staff have met with representatives of the Coastal Commission in an attempt to resolve any potential LORS noncompliance.
5. We have imposed various measures through the Conditions of Certification contained in this Decision to avoid noncompliances with applicable LORS, to achieve compliance with applicable LORS to the extent feasible, and to bring the project into compliance with applicable LORS.

Therefore, as provided in Public Resources Code section 25525, we conclude that it is necessary to, and we hereby do, override any provision of the Coastal Act that would prohibit construction and operation of the project at the site discussed herein.