

DOCKETED

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Comment Received From: Jane E. Luckhardt, Day Carter Murphy LLP

Submitted On: 11/17/2014

Docket Number: 14-OII-01

Post Workshop Comments on Title 20 Process and Procedure Regulations

Additional submitted attachment is included below.

November 17, 2014

Karen Douglas
Lead Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: 2014 Revisions: Title 20 Commission Process and Procedure Regulations
Post Workshop Comments (Docket No. 14-SIT-OII-1)

Dear Commissioner Douglas:

These further comments are provided on issues discussed during the October 17, 2014 workshop. These comments focus on three items: 1) the document to use as the California Environmental Quality Act (CEQA) equivalent document, 2) communication between parties, and 3) the time to complete review of an application. We appreciate your consideration of our comments and look forward to the next revision of the draft regulations.

Sutter Power Plant Project

During the workshop I noted the California Energy Commission (“Commission”) had taken action on a Presiding Member’s Proposed Decision to allow a local agency to rely upon the California Energy Commission’s document to satisfy the local agency’s obligations under the California Environmental Quality Act (CEQA). I agreed to find the details of that siting case and present those to the committee. One case where this situation occurred is the Sutter Power Plant Project.

According to the Revised Presiding Member’s Proposed Decision on the Application for Certification of the Sutter Power Plant Project, Docket No. 97-AFC-2, dated March 1999 (Publication No. P800-99-005) (the “Sutter Revised PMPD”), the Sutter Power Plant Project (“Sutter Project”) needed a general plan amendment and a zoning change. (Sutter Revised PMPD PDF page 6.) The Sutter Revised PMPD provided the following description of the situation:

... the evidentiary record is undisputed that the proposed project does not conform with applicable Sutter County land use plans and therefore requires a General Plan amendment and rezoning in order to proceed.

...

The Sutter County Board of Supervisors intend to rely upon the final Decision of the Energy Commission as the county's environmental documentation for the project. Accordingly, they will not take up the Calpine appeal until after the Energy Commission makes its final Decision.

(Sutter Revised PMPD PDF at 82-83.) According to the Business Meeting Minutes on March 17, 1999 the Commission approved the Revised Presiding Member's Proposed Decision in the areas of environmental, engineering, need conformance, health and safety. (See Attachment 1; State of California, California Energy Commission, Business Meeting Minutes of March 17, 1999, Item 10.) The Commission did not grant a license to construct and operate the project at this Business Meeting due to nonconformance with the Sutter County General Plan. (*Id.*)

According to the Commission Adoption Order for the Application for Certification for the Sutter Power Plant Project, Docket No. 97-AFC-2 (Order No. 99-0414-013, "Commission Adoption Order", at 1) the Sutter County Board of Supervisors adopted a general plan amendment, zoning change and ferrying charge condition on March 30, 1999 all in reliance upon the Commission's March 17, 1999 action on the Sutter Revised PMPD. This action by Sutter County allowed the Commission to find on April 14, 1999, "the project complies with local land use requirements." (Commission Adoption Order at 2.) Thus, the Commission approved and granted a license to construct and operate the Sutter Power Plant Project on April 14, 1999. (See Attachment 1; State of California, California Energy Commission, Business Meeting Minutes of April 14, 1999, Item 13.)

Although effective, the process used for the Sutter Project required bringing the project before the Commission twice. A more streamlined approach would be to have the Committee make this finding through an action on the proposed decision.

The Commission through the general counsel's office has also authorized local agencies to use the Final Staff Assessment as the Final Environmental Impact Report equivalent document. Specifically Bill Chamberlain found the "FSA is a legally sufficient document for the City of San Jose to use in its entitlement actions." (See Attachment 2.) Mr. Chamberlain concluded the Commission does not need to issue or certify an environmental impact report citing California Public Resources Code §25519(c).

Since there is some confusion on behalf of local entities regarding upon which document to rely, I would recommend specifying the proposed decision in § 1742(c) as the document upon which local agencies could rely as they would a final environmental impact report. If necessary, the committee could take a specific action to "certify" the proposed decision for such use. A

specific action to approve the proposed decision as the final environmental impact report may give local agencies assurance that they can rely upon the proposed decision when taking their action on issues such as local land use plan amendments.

Communication between the Parties

I would like to reiterate the importance of allowing the parties to talk with each other including the Commission Staff. The prohibition upon communication extends the length of the proceedings by forcing all information into a formal mechanism when a simple explanation of what additional information a party may need is sufficient. In addition, the parties need to be able to discuss solutions to issues, mitigation or conditions to facilitate timely resolution of issues and concerns.

12-Month Process

Finally, I agree with Mr. Wheatland's comments during the workshop. The Commission needs to return to the presumption that the siting process will be conducted within 12 months.

Should you have any questions regarding the above comments and recommendations, please do not hesitate to contact me.

Very Truly Yours,

DAY CARTER & MURPHY LLP



Jane E. Luckhardt

Cc: Jared Babula
Docket Office, 14-SIT-OII-1

Attachment 1

STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

Business Meeting Minutes

of

March 17, 1999



Business Meeting Minutes of March 17, 1999

The meeting was called to order by Vice Chair Rohy at 10:07 a.m.

Pledge of Allegiance was led by Commissioner Sharpless.

William J. Keese	Present (Arrived at 11:12 a.m.)
David A. Rohy, Ph.D.	Present
Jananne Sharpless	Present
Michal Moore	Present
Robert Laurie	Present

1. CONSENT CALENDAR. (Items on the consent calendar will be taken up and voted on as a group. A Commissioner may request that an item be discussed and may be moved to later on the agenda.)
 - a. COMMISSION CO-SPONSORSHIPS. Possible approval of two co-sponsorship requests for which the Energy Commission will lend its name and include promotional material with regularly scheduled mailings.
 - Earth Day 1999, April 25, 1999, Concord Pavilion, Concord, California.
 - Energy and Environmental Planning in China Conference, April 18-25, 1999, Sacramento.
 - b. MIDWAY SUNSET COGENERATION. The Midway Sunset Cogeneration Project owner proposes an amendment to the air quality conditions of certification. The amendment would remove the requirement to maintain quiet combustion burners with steam injection so that a newer, less polluting technology, Dry Low Nox burners, may be installed.

Commissioner Sharpless moved and Commissioner Moore seconded approval of the Consent Calendar. The vote was unanimous. (4-0)

2. SOUTHERN CALIFORNIA EDISON COMPANY. Possible approval of Contract 300-98-003 to receive \$157,250 from the Southern California Edison Company to support the transportation modeling objectives of the California Energy Commission-Southern California Edison collaboration begun under Contract 300-93-020 (TAMOS: Transactions & Activity Mobility Simulator)
 - a. ROBERT CENZER CONSULTING. Possible approval of CMAS Contract 300-98-004 for \$102,000 to assign Census tract designations and SIC Codes to the vehicle records of the Department of Motor Vehicles data base.
 - b. REGENTS-UNIVERSITY OF CALIFORNIA, DAVIS. Possible approval of Contract 300-97-009 Amendment 1, for a \$40,000 augmentation and six-month time extension to procure student assistance in support of the transportation modeling and data preparation for the SCE Study Area project.
Contact: Leigh Stamets, 654-4510.

Commissioner Sharpless moved and Commissioner Moore seconded approval of Contracts 300-93-020, 300-98-004 and 300-97-009 Amendment 1. The vote was unanimous. (4-0)

3. RENEWABLE ENERGY MARKETING BOARD (REMB). Possible adoption of Contract 500-98-057 for \$1,200,000 to administer a portion of the Renewable Technology Program's Renewable Energy Consumer Education Marketing Plan as it relates to the green renewable energy market.

Commissioner Moore moved and Commissioner Sharpless seconded approval of Contract 500-98-057. The vote was unanimous. (4-0)

4. CITY OF SAN DIEGO. Possible approval of Contract 700-98-005 for \$125,000 to develop the technical capability and perform GIS assessments of the Mid-City PLACE3S energy efficient Smart Growth project.

Commissioner Laurie moved and Commissioner Sharpless seconded approval of Contract 700-98-005. The vote was unanimous. (4-0)

5. TAHOE TRANSPORTATION DISTRICT. Possible approval of Contract 500-98-056 for \$40,000 for the purchase of ground support equipment to support a CNG Tube Trailer. The \$40,000 was left over from the recent Alternative Fuel Infrastructure PON.

Commissioner Sharpless moved and Commissioner Laurie seconded approval of Contract 500-98-056. The vote was unanimous. (4-0)

6. GENERAL ATOMICS CORPORATION (GAC). Possible approval of a \$500,000 grant novation agreement for the 15kV High Temperature Superconducting Fault Current Limiter (FCL) Project. The grant was previously approved by the Energy Commission on April 26, 1995 through the Defense Conversion Matching Grant Program and was awarded to the Martin Marietta Corporation (MMC). MMC subsequently became the Lockheed Martin Corporation that has sold and transferred its legal responsibility for this project to GAC, effective September 1, 1998.

Commissioner Laurie moved and Commissioner Moore seconded approval of a grant novation agreement for the 15kV High Temperature Superconducting Fault Current Limiter Project.

7. SAN DIEGO REGIONAL CLEAN CITIES COALITION. Possible approval of a \$10,000 expansion of an existing \$250,000 grant, to expand the Educational Curriculum Development for the Alternative Fuel Vehicle Education, Sales, Service and Refueling Center in San Diego. Funding is provided by USDOE as part of the 1998 State Energy Program Special Projects Activities: Transportation Technologies: Clean Cities/Alternative Fuels solicitation.

Commissioner Sharpless moved and Commissioner Laurie seconded approval of an expansion of an existing grant to expand the Educational Curriculum Development for the Alternative Fuel Vehicle Education, Sales, Service and Refueling Center in San Diego.

8. TEJON RANCH/PASTORIA POWER PROJECT. Possible adoption of the Committee's Proposed Decision on the Tejon Ranch/Pastoria Power Project's request for exemption from the Notice of Intention requirements under Public Resources Code section 25540.6. (Docket No. 99-SIT-1).

Commissioner Laurie moved and Commissioner Moore seconded approval of the Committee's Proposed Decision on the Tejon Ranch/Pastoria Power Project's request for exemption from the NOI requirements. The vote was unanimous. (5-0)

9. 1998 ANNUAL REPORT REGARDING PUBLIC INTEREST ENERGY RESEARCH PROGRAM (PIER). Possible adoption of the 1998 Annual Report regarding PIER. As required by Public Resources Code 25620.8, the 1998 Annual Report provides project-specific information and recommendations for future program directions and will be submitted to the State Legislature upon adoption by the Energy Commission.

Vice Chair Rohy moved and Commissioner Sharpless seconded approval of the 1998 Annual Report regarding PIER. The vote was unanimous. (5-0)

10. SUTTER POWER PROJECT. Commission consideration and possible adoption of Revised Presiding Member's Proposed decision on the Sutter Power Plant Project (Docket No. 97-AFC-2). This Committee document recommends approval of the environmental, engineering, need conformance, health and safety analysis of the project. The document does not recommend granting a license to construct and operate due to the project's present nonconformance with the Sutter County General Plan. It is anticipated that at the March 31, 1999 Business Meeting, the Commission will consider the determination of Sutter County on its pending General Plan amendment and then consider a license to construct and operate the Sutter Power Plant Project.

Commissioner Moore moved and Chairman Keese seconded approval of the Revised Presiding Member's Proposed decision on the Sutter Power Plant Project. The vote was four to one with Vice Chair Rohy dissenting. (4-1)

11. Approval of Minutes

There were no minutes to approve.

12. Commission Committee and Oversight

Mr. Tim Schmelzer brought forth two bills. SB 110 would eliminate the notice of intention to file provisions from the power facility siting process. It also moves the requirement for an applicant to provide information in their application for certification, demonstrating their compliance with the Energy Commission's integrated assessment of need.

Commissioner moved and Vice Chair Rohy seconded approval of a motion authorizing the documents be transferred to the Legislature upon consent or review by Resources. The vote was unanimous. (5-0)

SB 280 would require, beginning January 1, 2002, new and existing state buildings be designed, constructed and equipped to exceed the minimum Building Energy Efficiency Standards.

Commissioner Sharpless moved and Commissioner Moore seconded approval of a motion authorizing the documents be transferred to the Legislature upon consent or review by Resources. The vote was unanimous. (5-0)

12. Chief Counsel's Report

No report was given.

13. Executive Director's Report

No report was given.

13. Public Adviser's Report

No report was given.

14. Public Comment

No public comments were received.


BETTY McCANN
Secretary to the Commission

STATE OF CALIFORNIA
CALIFORNIA ENERGY COMMISSION

Business Meeting Minutes

of

April 14, 1999

APPROVED
BY
THE STATE
ENERGY RESOURCES
CONSERVATION
AND DEVELOPMENT
COMMISSION
ON 12-1-99

Business Meeting Minutes of April 14, 1999

The meeting was called to order by Chairman Keese at 10 a.m.

Pledge of Allegiance was given by Vice Chair Rohy.

William J. Keese	Present
David A. Rohy, Ph.D.	Present
Vacant	
Michal Moore	Present
Robert Laurie	Present

1. CONSENT CALENDAR. (Items on the consent calendar will be taken up and voted on as a group. A Commissioner may request that an item be discussed and may be moved to later on the agenda.)
 - a. COMMISSION CO-SPONSORSHIP. Possible approval of a co-sponsorship request for which the Energy Commission will lend its name and include promotional material with regularly scheduled mailings.
 - 18th Annual Utility Energy Forum, May 12-14, 1999, Granlibakken Conference Center, Lake Tahoe.
 - b. GEYSERS POWER COMPANY. Possible approval of an ownership change for Geysers Power Plants Units 16, 17, 18 and 20 (79-AFC-1C, 79-AFC-3C, 79-AFC-5C and 82-AFC-1C). PG&E is finalizing a sale to the Geysers Power Company, a wholly-owned subsidiary company of the Calpine Corporation.
 - c. GEYSERS POWER COMPANY. Possible approval of an ownership change for the Sonoma Geothermal Power Project (80-AFC-1C, formerly SMUDGE). The Calpine Geysers Company, L.P., a subsidiary company of Calpine Corp., is transferring ownership to the Geysers Power Company, another subsidiary company of Calpine.
 - d. PIER 2 CONTRACT NOVATION. October 14, 1998 RLW Analytics was awarded a PIER 2 contract. The key personnel at RLW Analytics, who wrote the contract and would be doing the work, left RLW Analytics and started their own company GeoPraxis. RLW is requesting that the contract be novated to GeoPraxis. The contract has been written (with input from GeoPraxis) and signed by RLW Analytics.

Vice Chair Rohy moved and Commissioner Laurie seconded approval of the Consent Calendar. The vote was unanimous. (4-0)

2. GEORGIA INSTITUTE OF TECHNOLOGY. Possible approval of Contract 500-98-059 with the National Electric Energy Testing, Research and Applications Center to cost-share \$100,000 of an approximate \$375,000 to analyze the power quality impacts of large electrical loads on residential secondary distribution systems.

Vice Chair Rohy moved and Commissioner Laurie seconded approval of Contract 500-98-059. The vote was unanimous. (4-0)

3. CSUS FOUNDATION. Possible approval of Contract 200-96-010 Amendment 2, to extend the student contract, add spending authority of \$1,000,000 for each fiscal year 99/00 and 00/01 and extend the contract term to June 30, 2003, the liquidation period of 00/01 funding.

Commissioner Moore moved and Vice Chair Rohy seconded approval of Contract 200-96-010 Amendment 2. The vote was unanimous. (4-0)

4. MIDWAY SUNSET COGENERATION COMPANY. Commission consideration and possible adoption of the Committee's Proposed Decision on Midway Sunset Cogeneration Company's request for exemption from the Notice of Intention requirements under Public Resources Code section 25540.6 (Docket No. 99-SIT-2)

Commissioner Laurie moved and Vice Chair Rohy seconded approval of the Committee's Proposed Decision on Midway Sunset Cogeneration Company's request for exemption from the NOI requirements. The vote was unanimous. (4-0)

5. CALPINE CORPORATION AND BECHTEL ENTERPRISES, INC. Commission consideration and possible adoption of the Committee's Proposed Decision on the request by Calpine Corporation and Bechtel Enterprises, Inc. for exemption from the Notice of Intention requirements under Public Resources Code section 25540.6 for their Metcalf Energy Center. (Docket No. 99-SIT-3)

Commissioner Laurie moved and Vice Chair Rohy seconded approval of the Committee's Proposed Decision on the request by Calpine Corporation and Bechtel Enterprises, Inc., for exemption from the NOI requirements for their Metcalf Energy Center. The vote was unanimous. (4-0)

6. CALPINE CORPORATION AND BECHTEL ENTERPRISES, INC. Commission consideration and possible adoption of the Committee's Proposed Decision on the request by Calpine Corporation and Bechtel Enterprises, Inc. for exemption from the Notice of Intention requirements under Public Resources Code section 25540.6 for their Newark Energy Center. (Docket No. 99-SIT-4)

Commissioner Laurie moved and Vice Chair Rohy seconded approval of the Committee's Proposed Decision on the request by Calpine Corporation and Bechtel Enterprises, Inc., for exemption from the NOI requirements for their Newark Energy Center. The vote was unanimous. (4-0)

7. NEW RENEWABLE RESOURCES ACCOUNT. Possible adoption of a New Renewable Resources Account Project Award Package conditionally accepted as eligible for funding under Notice of Auction (NOA) 500-97-506 on July 10, 1998, as required in Assembly Bill 1890 (Chapter 854, Statutes of 1996) and mandated by Senate Bill 90 (Chapter 905, Statutes of 1997).

Commissioner Moore moved and Vice Chair Rohy seconded approval of a New Renewable Resources Account Project Award Package conditionally accepted as eligible for funding under NOA 500-97-506 on July 10, 1998, as required by AB 1890. The vote was unanimous. (4-0)

8. 1998 NET SYSTEM POWER REPORT. Possible approval of the 1998 Net System Power Report for use in the power content label as required by SB 1305.

Commissioner Moore moved and Commissioner Laurie seconded approval of the 1998 Net System Power Report for use in the power content label as required by SB 1305. The vote was unanimous. (4-0)

9. REGIONAL POWER SOURCE TRACKING. Possible approval of Energy Commission positions on issues before the Committee on Regional Electric Power Cooperation. Issues include: labels, data sharing, model rule and a proposed certificates system.

Chairman Keese moved and Vice Chair Rohy seconded approval of the Energy Commission positions on issues before the Committee on Regional Electric Power Cooperation. The vote was unanimous. (4-0)

10. THREE MOUNTAIN POWER PROJECT. Possible approval of the Executive Director's data adequacy recommendation for the Three Mountain Power Project Application for Certification (99-AFC-2).

Vice Chair Rohy moved and Commissioner Moore seconded the Executive Director's Data Inadequacy recommendation on the Three Mountain Power Project Application for Certification. The vote was unanimous. (4-0)

11. THREE MOUNTAIN POWER PROJECT. Possible Committee assignment for the Three Mountain Power Project Application for Certification. (99-AFC-2)

This issue was put over until the application, Three Mountain Power Project is deemed data adequate.

12. AMENDMENT TO INTEGRATED ASSESSMENT OF NEED AND THE "NEED CAP" OF ER 96. Presentation by the ER 96 Standing Committee and possible approval of their recommendation regarding the amendment to the ER 96 Integrated Assessment of Need (IAN). On January 6, 1999, the Energy Commission adopted principles amending the IAN conformance criteria. The Committee will present their refined documentation of changes and their rationale for consideration by the full Commission. (Docket No. 95-ER-96A)

Commissioner Laurie moved and Vice Chair Rohy seconded approval of the ER 96 Standing Committee's recommendation regarding the amendment to the ER 96 Integrated Assessment of Need. The vote was unanimous. (4-0)

13. SUTTER POWER PLANT PROJECT. Receipt of the determination of Sutter County and consideration of the determination of Sutter County on its pending General Plan Amendment and then consider a license to construct and operate the Sutter Power Plant Project. (Docket

Commissioner Moore moved and Commissioner Laurie seconded approval of a motion (1) recognizing the determination of Sutter County to amend its General Plan to allow the proposed power plant project to be consistent with the General Plan and (2) granting final approval of a license to construct and operate the Sutter Power Plant Project. The vote was unanimous. (4-0)

14. Approval of Minutes

There were no minutes to approve.

15. Commission Committee and Oversight

RD&D COMMITTEE REPORT ON PIER. The Energy Commission's six project leads for managing EPRI research targets will present status reports and the benefits derived from membership and participation in these areas.

The RD&D Committee Report on PIER was moved to the April 28, 1999 Business Meeting.

SITING COMMITTEE REPORT ON NOI EXEMPTION PROCESS.

The Siting committee Report on the NOI Exemption Process was moved to the April 28, 1999 Business Meeting.

Mr. Schmelzer from the Office of Governmental Affairs presented two items of Legislation for Commission consideration.

SB 110-would eliminate the integrated assessment of need function and its link to the power plant siting process. The bill would also extend the exemption from the notice of intention process to all natural-gas fired power plants. The Legislative Committee recommends an "Oppose unless Amended" position.

Commissioner Moore moved and Commissioner Laurie seconded approval of "Oppose unless Amended." (The vote was 3-1 with Vice Chair Rohy opposing).

SB 1253-would direct the Energy Commission, in consultation with the California Air Resources Board, to prepare an inventory of greenhouse gas emissions from all sources located in California. The bill requires the Commission to provide state, regional, and local agencies with information regarding cost-effective and technically feasible methods for reducing those emissions. The Commission would be required to update its inventory every five years, starting in 2000. The Legislative Committee recommends a "Support if Amended" position.

Commissioner Moore moved and Vice Chair Rohy seconded approval of "Support if Amended." The vote was unanimous. (4-0)

Commissioner Laurie introduced Scott Tomashefsky to give a brief update on the PUC DG OIR. Mr. Tomashefsky informed the Commissioners that the OIR called for a collaborative effort between the CPUC, the Energy Commission and the Oversight Board to look at developing a framework for dealing with these issues in the future. The Commission has been put on record as the Agency with distributed generation technical expertise. The timeline of events has been posted on the Web and updates will continue to be placed there.

16. Chief Counsel's Report

Mr. Chamberlain introduced Mr. Ed Boullion who issued a memo to the Commissioners late yesterday regarding the Intervention issue. Mr. Boullion described some of the problems trying to reconcile the Commissioner's legitimate need to know about the positions that are being taken with the demand of the Open Meetings Act. Mr. Boullion noted that in many of these proceedings, Administrative Law Judges and CPUC Commissioners put unreasonable demands on parties to come up with positions within three to five days.

17. Executive Director's Report

No report was given. An Executive Session was requested by Commissioner Laurie, however, given the time of day, the request was withdrawn.

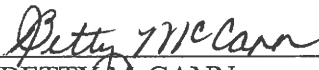
18. Public Adviser's Report

No report was given.

19. Public Comment

No comments were received.

The meeting was adjourned at 1:40 p.m.


BETTY McCANN
Secretary to the Commission.

Attachment 2

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

(916) 654-4001

November 13, 2000

The Honorable Ron Gonzales
Mayor, City of San Jose
City Hall
801 North First Street
Suite 600
San Jose, California 95110

Dear Mayor Gonzales:

We, the Committee conducting licensing proceedings on the Metcalf Energy Center, have asked our Chief Counsel to prepare an Opinion regarding the City's use of the Final Staff Assessment for the City's forthcoming entitlement actions. This Opinion is attached.

We agree with our Chief Counsel's Opinion. Accordingly, we urge the City of San Jose to use the Final Staff Assessment as the environmental document of record in your proceedings.

Respectfully submitted,

ROBERT A. LAURIE, Commissioner
Presiding Committee Member
Metcalf AFC Committee

WILLIAM J. KEESE, Chairman
Associate Committee Member
Metcalf AFC Committee

Proof of Service (Revised _____)
Original mailed from Sacramento
on 11/14/00

TO: Robert A. Laurie
Presiding Member, Metcalf AFC Committee
William J. Keese
Associate Member, Metcalf AFC Committee

November 13, 2000

FROM: William M. Chamberlain *WMC*
Chief Counsel

RE: Use of Final Staff Assessment as CEQA Environmental Document

You have asked me to provide an opinion whether the City of San Jose may legally use the Commission's Final Staff Assessment (FSA) in the Metcalf Energy Center proceeding as the CEQA-required environmental analysis supporting rezoning, general plan amendments, and annexation requests that the City will be acting on in the near future. As you are probably aware, the Energy Commission staff has worked closely with City staff in an effort to ensure that the FSA would provide the environmental assessment that the City needs for these entitlement actions. This was confirmed in a September 8, 2000, letter from Mr. James R. Derryberry, Director, Department of Planning, Building, and Code Enforcement, concluding that the Final Staff Assessment would be the environmental document used by the City of San Jose for the City's entitlement actions regarding the proposed Metcalf Energy Center. The Final Staff Assessment for the Metcalf Project was released on October 10, 2000. I understand that now the City has questioned whether it can use the FSA before the Energy Commission has certified it or adopted it as a Commission document. For the reasons stated below, I find that the FSA is a legally sufficient document for the City of San Jose to use in its entitlement actions.

The Energy Commission's power plant siting process is a certified state regulatory program under the California Environmental Quality Act (Public Resources Code, § 21080.5; California Code of Regulations, title 14, §§ 15250-15253.) As such, it is exempt from the procedural elements of CEQA, specifically the Environmental Impact Report (EIR) process. The Commission is not required to issue or certify an EIR. However, the Energy Commission staff prepares a comprehensive environmental document, the Final Staff Assessment, in accordance with Public Resources Code sections 25500 et seq. The FSA is substantively similar to an EIR, in that it is an independent assessment of the project's potentially significant effects on the environment, effects on public health and safety, and conformance with all applicable laws, ordinances, regulations and standards. This assessment also includes recommended conditions of certification to mitigate potential impacts of the project.

Section 25519(c) of the Public Resources Code provides the authority use of the FSA by the City. Section 25519(c) states, in pertinent part:

(c) The commission shall be the lead agency as provided in Section 21165 for all projects which require certification pursuant to this chapter and for projects which are exempted from such certification pursuant to Section 25541. . . . If the

commission prepares a document or documents in the place of an environmental impact report or negative declaration under a regulatory program certified pursuant to Section 21080.5, any other public agency which must make a decision which is subject to the California Environmental Quality Act, Division 13 (commencing with Section 21000), on a site or related facility, shall use the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency. (Emphasis added.)

The City's new concern—that the FSA is a staff document when the statute refers to a document “prepared by the commission”—is misplaced. Section 25519(c) is but one example of several instances in which the Warren-Alquist Act refers to “the commission” without distinguishing between the decisionmakers who are appointed by the Governor and the staff that serves them. However, to make the siting process set forth by the Warren-Alquist Act consistent with other state laws, it is necessary to make this distinction and to assign some tasks to the Commissioners and others to the staff. Preparation of the FSA is a function that is implicitly delegated to the Staff by the Commission's siting regulations. (See, e.g., § 1742.5.) Such delegation is a legal necessity in a state licensing proceeding subject to the adjudicatory provisions of the state's Administrative Procedure Act (APA). These provisions of the Government Code require a “separation of functions” between agency investigatory/advocacy staff and the agency decision-makers. (See Govt. Code, §§ 11400 et. seq.)

The APA makes a clear distinction between the “agency head” (or decisionmaker) and the staff that presents cases to it. See Gov't Code § 11405.40. The Commissioners, as the “agency head,” are required by the APA to issue a written decision on a record. This summary document will come at the conclusion of the proceeding. But that document could not be the one referred to by section 25519(c) because the Warren-Alquist Act requires that document to determine whether the proposed facility will comply with state and local requirements. Plainly, in a case such as Metcalf, the Commission cannot make that determination until local agencies respond to requests for rezoning and other entitlements. Thus, if section 25519(c) were interpreted to refer only to the Commission's final decision document, we would have a chicken and egg problem: The City could not act without the Commission's decision, but the Commission's decision requires knowledge of the City's action.

Indeed, the Warren-Alquist Act provides that if the Commission finds that there is a noncompliance with local requirements, “the commission” is required to “consult and meet with” the local agency whose requirements are not met in an effort to find a way to resolve the noncompliance. Both the APA and the State Open Meetings Law (Gov't Code §§ 11121 et seq.) make such a requirement impractical if it is interpreted literally to require the members of the Energy Commission to conduct such consultations and meetings personally. Thus it is necessary to recognize that the Legislature must have meant that the Commission's staff would undertake this consultation and meeting process. Similarly, I conclude that in section 25519(c) when the Legislature refers to a document “prepared by the commission,” it means a document prepared by the

Commission staff as an integral part of the Commission's certified regulatory program. The FSA is such a document, and because it contains all of the substantive analysis the City requires, the City should not hesitate to rely upon it for CEQA purposes.

In summary, the FSA is the appropriate environmental document regarding the requirements of Section 22519(c) and is legally sufficient for the City's use in its entitlement actions associated with the Metcalf Energy Center.
