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Please find below the response of Los Cerritos Wetlands Land Trust (LCWLT) to the Motion for Summary Judgment submitted by staff on August 31, 2016. We thank the Commission for accepting these comments and recommendations.

First, for the reasons stated below, we disagree with staff's characterization, analysis and conclusions regarding demolition of the existing Alamitos Generating Station (AGS) as not being an integral part of the whole proposed Alamitos Energy Center (AEC) project. The Preliminary Staff Assessment is fundamentally inadequate by failing to provide basic information about how the Applicant will dismantle the AGS and what hazardous materials and other debris will be removed from the site – as well as the severity of the adverse impacts from demolition of AGS and the measures necessary to minimize and mitigate those adverse impacts. And the PSA fails to adequately document when the demolition may occur and how the impacts will compound the concurrent impacts from construction and/or operation of the AEC. Depending on the method and timing of the demolition, the concurrent activities can compound the noise, dust, hazardous materials, traffic, air emissions, lighting and possibly more adverse impacts on the community and wildlife in the vicinity.

Despite these unresolved legal issues, staff is now planning to finalize the Staff Assessment on September 23, a mere four days after replies to the motion are due and, prior to the Committee ruling on the staff's own motion. See Docket Log: "Final Status Report" authored by staff, docketed 9-15-16.

We urge the Committee to rule against the Staff Motion. Further, we urge the Committee to immediately inform staff that the Preliminary Staff Assessment should not be finalized prior to the Committee deciding staff's motion and other questions of legal adequacy of the Preliminary Staff Assessment.

Further, the Commission needs to adjudicate this question in the context of the several other concerns raised in LCWLT's comments on the Preliminary Staff Assessment (PSA). The issues regarding inadequate analyses of numerous potential cumulative

impacts, as well as an inadequate analysis of preferred alternatives, are critical to adjudicating whether or not the demolition of AGS is an integral part of the proposed project, or is to be analyzed as one of several other potential projects contributing to significant cumulative impacts.

We do not request the Committee’s adjudication of the issues below in Section 2 until we submit the Motion with those issues more fully explained. In Section 2 we briefly explain the issues to simply highlight the interconnection of those issues to the question raised in the staff’s Motion. In the coming days, we will submit a Motion for Summary Judgment outlining those concerns and requesting adjudication of the issues and recirculation of an amended PSA. All of the legal issues are interrelated and need to be resolved simultaneously. And the adjudication needs to be resolved prior to finalizing the Staff Assessment and remaining schedule for certification recently outlined by staff.

Furthermore, while we understand a ruling on this motion may result in additional time to ensure the PSA fully meets the legal standards prior to publishing a Final Staff Assessment (FSA), we disagree the compliance deadline in the Once-Through Cooling Policy (OTC Policy) precludes fully informing the Commission’s final decision and the public of the foreseeable impacts, and preferred alternatives, of the proposed development. As implied by AES’s representative at the PSA Public Workshop, the OTC Policy allows the Energy Commission or the Independent Systems Operator to request an extension of the compliance deadline.

Again, we thank the Committee for your careful review of the comments and recommendations below. As we stated in our comments on the PSA, the Commission has a heightened duty to ensure the intent and letter of the California Environmental Quality Act is fully enforced before certifying a project that will impact the environment for many decades to come. California has established new and ambitious standards for addressing climate change and protecting our local and global environment. Now is the time to take the first concrete steps to achieving those goals.

1. THE DEMOLITION OF ALAMITOS GENERATING STATION IS AN INTEGRAL PART OF THE “WHOLE” PROJECT

- a. Proper Read of MOU with the City of Long Beach Makes Demolition Integral to the Proposed AEC

The Staff Motion rightly cites the relevant case law for the legal standard the Commission must follow in this adjudication. (Motion, page 3) *“The [PSA] must include an analysis of environmental effects of future expansion/action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future action will be significant in that it will likely change the scope or nature of the initial project or it’s environmental*

effects.” (Motion, p. 3 – citations omitted). Staff then rightly interprets the standard to mean: “...*where land use activities are a reasonably foreseeable consequence of the initial project approval, later land use activities must be considered as part of the whole project.*” (Id., emphasis in original) But the staff’s Motion errs in the application of that rule to the PSA.

The circumstances here meet the test and consequently demand adequate analyses of the project impacts in all the relevant portions of the PSA (eg, noise and vibration, lighting, air quality, hazardous materials, biological resources, etc).

It is important to note at the beginning that adverse impacts from the project are not limited to the time of construction activities – many of the adverse impacts analyzed in the PSA occur long after construction is completed. Likewise, although demolition of the existing Alamitos Generating Station (AGS) may or may not be simultaneous with construction activities, adverse impacts from demolition are part and parcel of the project.

The Memorandum of Understanding (MOU) between AES and the City clearly shows that demolition is “reasonably foreseeable consequence of the initial project approval”, and consequently that “later land use activity must be considered as part of the whole project” – the standard cited in the staff’s motion.

First, the MOU identifies a commitment by AES to demolish the existing AGS. The MOU specifically includes:

AES will demolish the AGS Units once all necessary permits from the City are received, and if required, the final and unappealable approval of the California Independent Systems Operator, the California Public Utilities Commission, the California Water Resources Control Board and/or any other government agency with jurisdiction over the AGS Units and related demolition activities.”

(Attachment 1, MOU at p.2, 2B “AES Performance”)

Second, in exchange for the promise by AES to demolish the existing Units, The City committed to:

*City shall also assist AES in its endeavors to obtain any permits or approvals required from governmental or quasi-governmental agencies having jurisdiction affecting the **development of** or provision of services to **the Project.*** [MOU at p.2, 3A, “City’s Performance” (emphasis added)]

Therefore, the Staff Motion errs in the conclusion that, “*The third-party agreement does not make the demolition of the existing units a foreseeable consequence of the*

construction and operation of the new facility since the new facility is not a necessary precedent for the demolition of the existing facility.” (Motion, page 4) To the contrary, the MOU outlines an agreed upon exchange of commitments that integrates the construction and operation of the AEC with the demolition of the AGS. First, AES has committed to demolish the existing units when there are final approvals from CAISO and CPUC – both of which are dependent upon the AEC being approved by this Commission. Second, and maybe more importantly, AES has committed to demolish the AGS in exchange for the City’s assistance in getting the AEC approved from this Commission – a clear integration of the demolition and the “project.”

Therefore, the Commission must find that the agreements in the MOU clearly meet the standard for finding that demolition is part of the whole project: “*“The [PSA] must include an analysis of environmental effects of future expansion/action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future action will be significant in that it will likely change the scope or nature of the initial project or it’s environmental effects.*” To find otherwise would ignore that the City has assisted AES in its endeavors to get the project approved by this Commission in exchange for a promise to demolish the AGS.

b. Del Mar Terrace is Inapplicable

The Staff Motion wrongly applies *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712 to foreclose consideration of the environmental impacts of AEC construction and operation with AGS demolition. *Del Mar Terrace* concerned cumulative impacts that were speculative -- and whether or not the proposed project would, absent the related projects, come to fruition. The question for the court, in those circumstances, was whether the project would have “independent utility.”

The circumstances here are distinguishable. In *Del Mar Terrace*, the court noted that “The Supreme Court has recognized that an EIR need not contain discussion of specific future action “that is merely contemplated or a gleam in a planner’s eye.” (*Del Mar Terrace*, 10 Cal.App.4th 712, 738, disapproved of by *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 on other grounds.) Unlike in *Del Mar Terrace*, where completion of the highway segment was speculative, the demolition of AGS is more than a mere “gleam in a planner’s eye.” Here, the Applicant has already committed to the demolition of the AGS facility and, by the terms of the MOU, there is no question that the existing units will be demolished as an integral part of the project.

The outstanding questions in this case are:

- **how** will the existing units be demolished and what are the foreseeable impacts;
- **when** will the existing units be demolished, and;

- **what** will the cumulative impacts be?

The question of whether the new facility can operate without demolishing the existing units is irrelevant.

The court in *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214 set out three items to be used to determine what constitutes the whole of a project: (1) relationship in time, (2) physical location; and (3) the entity undertaking the action. (Id. at 1227.) Application of these factors to the construction of AEC and the demolition of AGS demands consideration of these activities as integral parts of the same project. The construction and/or operation of AEC and demolition of AGS will occur concurrently and/or consecutively on the same site, causing adverse air quality, dust, noise, polluted runoff, hazardous waste, and other adverse impacts to the surrounding community and biological resources in the vicinity of the project. One entity, AES, is responsible for both activities. Finally, as discussed further below, nothing prevents simultaneous construction and operation of different portions of AEC with demolition of AGS.

c. Timing of Demolition Argues for Revised PSA

The Staff Motion properly states that, “There is no concrete date in which demolition may occur except some time after 2020.” (Motion at p.4, para. 3) But this ambiguity, or lack of a “concrete date”, is no excuse for avoiding a thorough analysis of impacts related to demolition – it simply underscores the need for a revised PSA. Further, as noted below, it requires the Commission to simultaneously rule on all the issues raised in our comments on the PSA.

The date of demolition is defined in the MOU as: “...once all necessary permits from the City are received, and if required, [final approval by other agencies].” (MOU at p.2, 2B)

First, timing of the application for City permits to demolish the existing AGS is controlled by the Applicant. Surely the Commission cannot find that the Applicant’s refusal or failure to apply for permits is reason to avoid a reasonable analysis of the impacts from demolition. Further, the MOU explicitly requires the Applicant to apply for the permits prior to or at the time the AGS Units stop operating permanently, which, as explained below, may or may not be determined by a more rigorous analysis of Alternatives to the proposed project. The Commission must require AES to supply a demolition plan and timeline for use by CEC staff in revising the project description and the impacts analyses from demolition activities.

The PSA must, at a minimum, define whether demolition will occur when construction of the project is still in progress and there are adverse impacts from simultaneous

construction, demolition and/or operation. Or alternatively, the PSA must verify that demolition will not begin until all construction is complete and the AGS is permanently retired. In this scenario the impacts would only be from simultaneous demolition of AGS and operation of the new AEC facility.

However, this second alternative needs evidentiary proof in the PSA to show that the AEC couldn't be partially constructed, and AGS decommissioned and permanently discontinue operation, prior to completion of the entire project. That is, given that the current project description is for 1040MW generation capacity, and the CPUC has only found a "need" for 640MW, it is unclear when, if ever, the entire project will be completed. But it seems reasonably foreseeable that the first phase could be finished and AGS will permanently discontinue operation, triggering the terms of the MOU to demolish the existing structures some time prior to the second phase of AEC being completed.

If the timing of demolition is truly speculative, and, given that AES controls both construction of AEC and demolition of AGS, the PSA must fully analyze the environmental impacts of simultaneous operation of the 640 MW, the construction of any additional generation capacity, and the demolition of the existing AGS units.

Even if the Commission were to treat demolition of AGS and construction of AEC as separate projects for purposes of environmental review in the PSA, the impacts of simultaneous construction, operation, and demolition are reasonably foreseeable. CEQA requires analysis and mitigation of all of a project's direct, indirect, and cumulative impacts.

Equally important, the PSA must describe how the demolition of the existing units and removal of the debris will be accomplished. For just a simple example, arguably there would be significant differences in the amount of noise, dust, vibration and more if AES were to use explosives to demolish the units as compared to mechanically dismantling the structures. But the time involved and the scope of adverse impacts can only be thoroughly analyzed when AES supplies the demolition plan – and the PSA cannot avoid this analysis simply because the Applicant refuses to supply a plan to analyze.

2. THE COMMISSION MUST ADJUDICATE THE ISSUES OF ADEQUATE "CUMULATIVE IMPACTS" AND "REASONABLE ALTERNATIVES" SIMULTANEOUSLY WITH THE QUESTION OF THE DEMOLITION

a. Introduction: Comprehensive Review

Much like the segmentation of the project, the Staff Motion has piecemealed the comments on the PSA submitted by the Los Cerritos Wetlands Land Trust. The comments covered both the inadequacy of the PSA to fully inform the public of the adverse impacts of the whole project (including construction, demolition and operation), as well as inadequate documentation and analysis of the cumulative impacts from several other projects nearby. Further, the LCWLT comments covered the inadequacy of the PSA to fully inform the public of the preferred alternatives to the proposed project.

A robust cumulative impacts analysis and an independent thorough analysis of preferred alternatives must be considered simultaneously. For a simple example, if a reasonable alternative is to downsize the generation capacity, it will impact the analysis of the construction impacts, the impacts from operation of the facility, and the cumulative impacts of demolition occurring simultaneously with construction and/or operation of the new facility.

Consequently, the Committee must judge the merits of the comments by the Land Trust simultaneously with the narrower issue raised in the Staff's Motion. Simply responding to the Staff Motion for Summary Judgment outside the context of all the other legal concerns raised in the comments invites an inefficient, if not potentially biased, adjudication process.

We will submit a Motion for Summary Judgment of the remaining legal questions in the LCWLT comment letter in the coming days.

b. Cumulative Impacts

The omission of an analysis of the demolition integrally linked to the project through the MOU is only one example of a lack of cumulative impacts analyses. The same problem exists with all the projects on the "list."

The PSA admits that: *"If operation and demolition of the AGS or construction and demolition of the Haynes Generating Station or other nearby projects overlap with those of the AEC, cumulative impacts to wildlife from noise, dust, lighting, spread of invasive weeds or stormwater runoff could occur."* But then the PSA, without any evidentiary support, dismisses those cumulative impacts as less than significant because: *"...implementation of Conditions of Certification [w]ould minimize these impacts from the AEC, and the AGS demolition, the Haynes Generating Station and other nearby projects would have similar mitigation requirements to minimize the impacts in the context of human receptors such as residential communities, schools and other sensitive receptors. These measures would also minimize each project's impacts to biological resources in the area."*

These statements and conclusions are inadequate for several reasons.

First, demolition of the AGS is under the control of the applicant. The means of demolishing the structures and the timing of that work is all information that can be gained directly from AES. And yet the PSA does not include any documentation of the plan for demolition, the severity of the types of impacts from the demolition, nor the proposed timing of demolition – neither as a separate project, an integral part of the AEC, nor as a cumulative impact combined with the other listed projects.

CEQA provides that an EIR must include a cumulative impacts analysis, discussing impacts resulting from the project under review in conjunction with other past, present, or “probable future projects.” (Pub. Resources Code, § 21083, subd. (b); *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72-77, 198 Cal.Rptr. 634.) Such a discussion “need not provide as great detail as is provided for the effects attributable to the project alone.” (Guidelines, § 15130, subd. (b).) However, it should “reflect the severity of the impacts and their likelihood of occurrence.” (Ibid.) The cumulative impacts analysis must include a summary of expected environmental effects to be produced by the probable future development, and a reasonable analysis of the cumulative impacts of the relevant projects. (Guidelines, § 15130, subd. (b)(2), (3).)

Finally, the PSA must “examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects.” (Guidelines, § 15130, subd. (b)(3).) The draft PSA does not satisfy this standard.

Second, the same type of information is missing for all the projects on the list.

Finally, and most importantly, it is unacceptable to conflate conditions of certification for the several projects to minimize the impacts to less than significant with the assumption that the accumulated impacts will not rise to the level of significance. That undermines the whole notion of documenting, minimizing and mitigating cumulative impacts.

c. Reasonable Alternatives

The PSA wrongly interpreted and applied the decision by the California Public Utilities Commission (CPUC) as proof that there are no feasible alternatives to the project proposed in the Application for Certification.

The PSA does not consider preferred alternatives to gas-fired generation. The PSA does not consider a smaller sized generating facility – reducing the adverse impacts of gas-fired generation. And ironically, the PSA does not consider an alternative alluded to by

AES – requesting a delay in the Once-through Cooling Policy “compliance deadline” that may allow preferred alternatives to gas-fired generation.

As explained in the LCWLT comment letter, which included the CPUC decision as an attachment, the decision by the CPUC did not conclude preferred alternatives were not feasible. In fact, the CPUC clearly indicated that environmentally superior alternatives were feasible, but that Southern California Edison made a “reasonable effort” in securing offers for the projects in the Long Term Procurement Process – despite changed circumstances allowing preferred alternatives. Unlike the CPUC approval process, there is no rule to allow disregarding “changed circumstances” that occurred prior to the “Notice of Preparation.” (CEQA Guidelines § 15125.) In this circumstance, given the reliance on the findings in the CUPUC approval of the AES-Alamitos contract, the PSA apparently set the date for the baseline of analysis on or after the CPUC decision. The PSA Alternatives Analysis must consider feasible alternatives at that time and cannot discount alternatives because of “changed circumstances” since – as the CPUC did.

Further, the CPUC decision clearly signaled that it is the duty of the California Energy Commission to comply with CEQA requirements and that the CEC compliance effort should not be unduly influenced by the CPUC decision.

As stated above, adequacy of the PSA to meet CEQA standards requires a comprehensive revision of the current draft. The issues of inadequate review of alternatives as well as the issue of inadequate project description and analyses of cumulative impacts must be adjudicated simultaneously. **The Committee must compel staff to seek the evidence needed to adequately analyze the issues, revise the PSA, and re-circulate an adequate PSA for public comment – prior to publishing a Final Staff Assessment.**

3. CONCLUSION

The Commission, the public and parties to the proceeding will be precluded from a meaningful deliberation of the adverse impacts of the proposed project without an adequate scope of analyses – including adequate documentation and analyses of cumulative impacts and reasonable alternatives -- resulting in a recommended environmentally superior alternative.

The Committee must find that the Preliminary Staff Assessment is lacking the mandatory information analyses, and order staff to revise the Preliminary Staff Assessment to meet the relevant CEQA standards.

Only after the Preliminary Staff Assessment is revised and re-circulated for public comment, can the Commission be confident of achieving the intent of CEQA to ensure a sound and fully-formed decision, as well as ensuring public understanding of the

reasoning behind government decisions. (CEQA Guidelines § 15002; *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795; *People ex. rel. Department of Public Works v. Bosio* (1975) 47 Cal.App.3d 495.)

4. REQUESTED ORDER

Los Cerritos Wetlands Land Trust respectfully request the Committee find:

1a. The scope of issues in the Staff Motion for Summary Judgment is too narrow, and adjudication of the Motion is deferred until all the legal issues raised in the Los Cerritos Wetlands Land Trust comment letter can be resolved simultaneously,

or alternatively;

1b. Demolition of the existing AGS Units is part of the whole project and requires: documentation of how the existing units will be demolished, clarification of when the existing units will be demolished, and adequate analyses of what the individual and cumulative impacts will be from the demolition (with notice to CEC staff and parties that further modifications to the PSA may be required after adjudication of remaining legal issues of concern).

2. Staff shall request additional information from AES, and other projects on the list, to better document the individual potential impacts, as well as more robust and comprehensive cumulative impacts analyses – including demolition and construction methods, demolition and construction timelines and impacts in the several disciplines analyzed in the PSA;
3. The staff shall revise the Preliminary Staff Assessment in accordance with the Committee's findings to include robust individual and cumulative impact analyses in the relevant disciplines, and re-circulate the revised PSA for public comment;
4. The staff shall revise the Preliminary Staff Assessment in accordance with the Committee's findings to include a robust Alternatives Analysis -- independent of the CPUC decision -- and re-circulate the revised PSA for public comment;
5. The Hearing Officer shall revoke and/or postpone preparation of a Final Staff Assessment any scheduling orders until after revisions of the PSA are circulated for public comment -- including any order on the timing of opening testimony, rebuttal testimony, pre-hearing conferences, evidentiary hearings, closing briefs and/or the Presiding Members' Proposed Decision.

California Energy Commission
August 11, 2016
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Sincerely,

Original Signed By
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