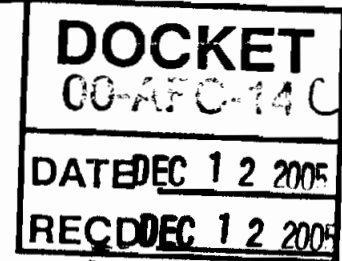


SANTA MONICA BAYKEEPER



December 12, 2005

Mr. Joe Desmond, Chairman
Mr. James Boyd, Commissioner
Mr. John Geesman, Commissioner
Ms. Jackalyne Pfannenstiel, Commissioner
Dr. Arthur Rosenfeld, Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512



**Re: Failure to Meet Conditions BIO-1 and BIO-4 in the El Segundo Power
Redevelopment Project (00-AFC-014C)**

Dear Chair Desmond and Commissioners:

Santa Monica Baykeeper and Heal the Bay, Intervenors in the certification proceedings for the El Segundo Power Redevelopment Project (00-AFC-014), urge the California Energy Commission ("Commission") to revoke the certificate granted by the Commission to El Segundo Power II, LLC ("Applicant" or "ESP") due to violation of conditions BIO-1 and BIO-4 in the Final Decision. The actions of the Applicant, starting several months ago and continuing today, bring up one central questions:

Are Conditions of Certification mere suggestions, or are they genuine legal obligations incurred by an Applicant?

In its Order on Reconsideration in this matter, the Commission stated that the validity of the certificate was predicated on "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." (See Order on Reconsideration, January 14, 2005) Without formal action here, the Commission risks condoning future violations of the Conditions of Certification and encouraging other regulated entities in other proceedings to be equally irreverent.

Until now, the Commission has been very lenient on the Applicant as to compliance with BIO-1 and BIO-4. The Applicant has not responded in good faith to this leniency, and harsher measures are now warranted. The Commission should revoke the Applicant's certificate, or at the very least impose stiff fines. Fines should reflect the strong financial standing of the two out-of-state publicly traded corporations that own the facility.

Violations of BIO-1

BIO-1 requires ESP to pay \$5 million to the Santa Monica Bay Restoration Commission (SMBRC), beginning with four payments of at least \$250,000. Commission staff computed the first payment due date to be September 30, 2005. On that date, ESP ignored the payment deadline and instead attempted to collaterally attack the Commission's Decision through a petition for modification. The Commission rejected this petition at its November 3, 2005 business meeting, without specifying any changes to the payment schedule. Without any public direction from the Commission, staff apparently recomputed the due date for the first payment to be December 3, 2005. ESP again ignored this payment deadline, and instead has declared a need for a memorandum of understanding before making the payment.

It is clear that BIO-1 does not require any memorandum of agreement or memorandum of understanding prior to ESP making the required payment. Moreover, the SMBRC is able to accept payment without such a document. ESP's insistence on such a document is simply another delay tactic designed to avoid the Conditions imposed by the Commission.

In addition, the Commission should demand that remaining payments are made on the original timeline set forth. Thus, the second payment of at least \$250,000 is due by December 30, 2005, a third payment of at least \$250,000 is due by March 30, 2006, and the fourth payment of at least \$250,000 is due by June 30, 2006. Given the repeated delays caused by the Applicant, the Commission should demand the remaining \$4 million in one lump sum to be paid by September 30, 2006. This schedule will allow the SMBRC to catch up to the schedule the Commission had originally intended for the project.

Violations of BIO-4

As we stated in a letter to the Commission on November 1, 2005, ESP was and continues to be in noncompliance with Condition BIO-4. In its verification provisions, BIO-4 requires that the "[p]roject owner shall consult with the LARWQCB, the Coastal Commission, Energy Commission staff, Santa Monica Bay Restoration Commission, and the Santa Monica Bay Keepers to develop the appropriate design for any 316(b) study." Thus far, the project owner has failed to consult with Santa Monica Baykeeper on its 316(b) study design. We are unsure whether the project owner has consulted with the other parties (other than the L.A. Regional Water Quality Control Board) specified in BIO-4's verification provision. Although ESP recently submitted what it considers to be a "Final Proposal for Information Collection" to the L.A. Regional Water Quality Control Board, and it might be argued that this constitutes the "study design" for BIO-4 purposes, ESP never consulted with Santa Monica Baykeeper (and perhaps none of the other listed parties) in developing this document.

Regardless, both Santa Monica Baykeeper and Heal the Bay have strong objections to that document serving as the project's study design, in that it does not comply with EPA's Phase II rule nor will it provide the data necessary to determine how the project's cooling water impacts can be minimized. The Commission should thus direct Staff to refashion these verification

provisions under this condition as permitted by title 20, section 1770 of the California Code of Regulations.

Conclusion

It has almost been one year since the El Segundo Redevelopment Project was originally certified, and five years since the application was submitted. It is increasingly obvious that ESP is not acting in good faith toward the Commission and that this pattern will only continue. We urge immediate action on behalf of the Commission.

Sincerely,

/ss/ Tracy J. Egoscue

Tracy J. Egoscue, Esq.
Executive Director
Santa Monica Baykeeper

/ss/ Heather Hoecherl

Heather Hoecherl, Esq.
Science and Policy Director
Heal the Bay

cc: Mr. Marc Pryor, Compliance Project Manager (via email)
Energy Commission Service List for 00-AFC-14 (via email)