

1 safety of the Hayward Municipal Airport ("Airport") and (3) results in a significant impact
2 under the California Environmental Quality Act ("CEQA"), Pub. Res. Code §§ 21000-
3 21178. The EEC's noncompliance with LORS and significant environmental impacts
4 cannot be mitigated. For these reasons, the California Energy Commission ("CEC")
5 Committee ("Committee") overseeing the Application for Certification ("AFC") for the
6 EEC should deny certification.

7 **I. BACKGROUND**

8 The EEC is proposed as an 115 MW power plant, located at the eastern edge of the
9 City's Industrial Zoning District. Exh. 200, p.1-1. The EEC first came to the City's
10 attention in 2006, well after Eastshore Energy L.L.C. ("Eastshore") had entered into a
11 contract with PG&E to construct the EEC at the proposed location. Exh. 310, p. 6. As
12 early as their first meeting, the City informed Eastshore that the proposed location of the
13 EEC was problematic because of its proximity to homes, schools, commercial businesses
14 and the fact that it would not be in harmony with these uses. Exh. 310, p. 7; 1/14/08 RT,
15 pp. 209-211.

16 Based on information from Eastshore, including visual simulations, on March 13,
17 2007, the City Council voted unanimously that the EEC would be inconsistent with
18 applicable zoning and land use standards. Exh. 404. The City has consistently maintained
19 this position in all its comments and letters to CEC Staff. The CEC Staff, as described by
20 the Final Staff Assessment ("FSA"), agrees that the EEC is incompatible with the
21 applicable LORS, will result in a significant impact under CEQA, and cannot be mitigated.
22 Exh. 200, pp. 4.5 et. seq., 4.10 et. seq.

23 The CEC Staff, the City, Alameda County, the Federal Aviation Administration
24 ("FAA"), the California Department of Transportation, Division of Aeronautics
25 ("Caltrans"), Chabot College, the California Pilots Association, City of Hayward Mayor
26 Michael Sweeney, State Senator Ellen Corbett, State Assembly Member Mary Hayashi and
27 the residents of the City have all recommended that the AFC for the EEC be rejected.

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1 Because the EEC does not comply with LORS or CEQA, in many significant and serious
2 respects, it should not be certified.

3 **II. THE EEC WILL BE A HAZARD TO THE HAYWARD MUNICIPAL**
4 **AIRPORT**

5 The Hayward Municipal Airport ("Airport") is located approximately 5,606 feet
6 from the EEC. Eastshore Energy Center – Distances in Question, Prepared by CEC Staff as
7 of February 4, 2008 ("CEC Distances"), p.3. The EEC is in an area subject to: (1) the
8 Alameda County Airport Land Use Commission's ("ALUC")¹ Airport Land Use Policy
9 Plan,² (2) the City's Airport Master Plan,³ (3) the City's Airport Approach Zoning
10 Ordinance ("Airport Ordinance"),⁴ (4) Airport Noise Abatement Procedures, and (5) the
11 Airport Traffic Pattern Zone.⁵ Exhs. 200, Traffic and Transportation Figures 4A-7, Land
12 Use Figures 3-6; 409; 410; 535. The standards contained in these applicable requirements
13 do not permit the EEC at its present location. If the CEC were to approve the EEC, the City
14 and its citizens could suffer irreparable harm.

15 As the applicant, Eastshore has the burden to demonstrate that the EEC will comply
16 with LORS and not have a significant impact on the environment. 20 Cal. Code Regs.
17 § 1723.5(a). Rather than meet this burden, Eastshore submitted flawed studies and relied

18 ¹ The ALUC is responsible for guiding airport land use for all of the airports in Alameda
19 County, i.e., the Airport, Oakland International Airport ("OAK") and Livermore
20 Municipal Airport. Exh. 535.

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

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

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

⁵ The EEC site is approximately 279 feet outside the official boundary of the Airport
Traffic Pattern Zone. CEC Distances, p.3.

1 on incorrect premises and limited data. In contrast, the CEC staff, the City and other
2 interveners submitted evidence based on actual operation of this and other airports as well
3 as expert testimony from the FAA and Caltrans. The great weight of the evidence
4 demonstrates that the EEC poses a hazard to the airport and should not be certified.

5 **A. Federal Standards Compel Disapproval of the EEC**

6 The FAA has granted the City the “responsibility and authority to promote safety at
7 Hayward Executive Airport as well as to protect the airport from interference and hazards
8 that may arise from incompatible activities near the airport.” Exhs. 416; 713. Federal law⁶
9 requires the City to implement zoning laws and other practices to restrict the use of lands in
10 the vicinity of airport so as not to create an airport hazard. Exhibit 411, pp. 19-20. Because
11 the EEC will be in conflict with the LORS and safety standards of the Airport, and the City
12 will suffer the negative consequences, the City urges the Committee to deny certification.

13 1. **Land Use Requirements Imposed by the FAA Require Disapproval of the**
14 **EEC**

15 The FAA has granted the City the responsibility, as owner of the Airport and the
16 land use authority for the Airport, to ensure that all flight paths remain unrestricted by
17 exercise of the City’s zoning laws and practices. Exh. 411. The FAA has advised the City
18 that because of the City’s obligations to ensure safe operation of the Airport, the City
19 should “seek to have the power plant located elsewhere.” Exhs. 203; 204; 416. Should the
20 City fail to comply with FAA standards, the Airport could revert to the federal government
21 with adverse consequences detailed below. Exh. 713.

22 In 1947, the Federal government deeded the Airport to the City subject to the
23 condition that the City would “prevent any use of land either within or outside the
24 boundaries of the airport . . . which would be a hazard to the landing, taking-off, or
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26 ⁶ “Responsibility to ensure compliance with airport owner obligations is vested in, or
27 imposed on, the FAA by law or through FAA contractual authority.” Exh. 411; *see also*
28 Federal Aviation Act of 1958.

1 maneuvering of aircraft at the airport, or otherwise limit its usefulness as an airport.”
2 Exhs. 410, pp. 1-3, 1-4; 713, Grant Deed, p. 6. Additional financial grants from the FAA to
3 the City in recent years have included similar restrictions. Exhs. 411; 713. The FAA
4 recently reminded the City of its obligations: “[it is the City’s duty to] restrict the use of
5 land adjacent to the airport to activities that are compatible with normal airport operations. .
6 . . The proposed energy plant . . . will likely be a hazard to aircraft and aviation.” Exh. 416.
7 Oversight of the City’s operation of the Airport is directly overseen by the author of that
8 letter, Mr. George Aiken, FAA Manager, Safety and Standards. Therefore, the City may
9 lose vital federal funding, and possibly endanger the continuing viability of the Airport if
10 CEC approves the EEC at the proposed location. Exh. 402, p. 7; 12/18/07 RT, pp. 144,
11 208-212.

12 While the City must conservatively protect a wide area around the airport, the FAA
13 controls Airport flight paths and aircraft traffic patterns. Therefore, if the FAA determines
14 that a certain use will negatively affect unrestricted use of the airspace, the City must
15 prevent that use. Exhs. 409; 411; 416; 713. The FAA has made that determination with
16 respect to the EEC. Exhs. 204; 416. Thus, the CEC has placed the City in the untenable
17 position of being in noncompliance with its responsibilities as the Airport land use
18 authority, but having no power to deny approval of the EEC.

19 2. FAA’s Study on Thermal Plumes Compels Disapproval of the EEC

20 In January 2006, the FAA published a report titled “Safety Risk Analysis of Aircraft
21 Overflight of Industrial Exhaust Plumes” (Hereinafter referred to as “FAA Report”). Exh.
22 39. The EEC relied on this study to support its position that thermal plumes do not pose a
23 danger to aircraft. Exh. 20. However, this report is not a scientific study of the effect of
24 thermal plumes on aircraft, but instead merely a data analysis of the accident/incident rate
25 for overflights of plumes. Exhs. 39, p. iv; 204; 12/18/07 RT, p. 115. While the FAA
26 Report concludes that “the likelihood of an accident or incident caused by overflight of a
27 plume is acceptably small,” Mr. David Butterfield of the FAA testified that this conclusion
28 “is not a big leap of faith” because the power plants in existence at the time of the data

1 analysis would have visible plumes that would be avoided, and taller stacks that would have
2 prohibited them from being located near airports. 12/18/07 RT, p. 115.

3 Importantly, the FAA Report's conclusion focuses on recommendations to impose
4 new regulations to prevent overflights of plumes. Exh. 39, pp. 16-17. The FAA Report
5 recommends, in relevant part:

6 (a) . . . overflight at less than 1,000 feet vertically above plume
7 generating industrial sites should be avoided.

8 (b) Publish . . . the position and nature of the present power plants
9 located near public airports . . .

10 (c) . . . [impose] a permanent flight restriction where operationally
11 feasible.

12 (d) Amend FAA Order 7400.2 to consider a plume generating
13 facility as a hazard to navigation when expected flight paths pass less than
14 1,000 feet above the top of the object.

15 (e) [Amend] Advisory Circular 70-7460-2K Proposed Construction
16 of Objects That May Affect the Navigable Airspace . . . [to include] power
17 plants or any industrial facility where exhaust plume discharge could
18 reasonably be expected”

19 Exh. 39, pp. 16-17. The FAA Report makes these recommendations regardless of
20 the characteristics of the particular generating facility and the associated thermal plume.
21 Exh. 39; 12/18/07 RT, p. 275. While FAA has not yet amended its regulations to include
22 these safety restrictions, if the regulations were in effect, such regulations would preempt
23 the Committee from approving the EEC. Pub. Res. Code § 25525. FAA's
24 recommendations should be given no less weight at this time and should compel the
25 Committee to disapprove the EEC.

26 Finally, there is no acceptable mitigation that could be imposed to avoid overflight
27 of the EEC, simply because it is too close to the Airport and an overflight restriction would
28 encroach too far into the heart of the existing traffic pattern. Exhs. 203; 204; 205; 517.

1 Eastshore does not dispute this and has not requested an overflight restriction as mitigation.
2 Even if the CEC could reasonably impose such mitigation for the EEC, because the CEC
3 just approved an overflight restriction for the newly approved, nearby Russell City Energy
4 Center ("RCEC"), imposing a second overflight restriction would too severely restrict the
5 airspace and make navigation unsafe. Exhs. 204; 205. Mr. Butterfield testified in support
6 of a letter drafted by him and other FAA officials that concludes, in relevant part:

7 "The primary mitigation for the RCEC near the Hayward
8 Executive Airport is that pilots are expected to see and avoid the site when
9 operating below 1,000 feet above the site. The EEC facility would require
10 the same mitigation. The cumulative effect of both facilities . . . would
11 make the mitigation impractical. Due to the low visual affects of the
12 RCEC and Eastshore plumes, pilots would be required to divert their
13 attention from the traffic pattern and safe operation of the aircraft to
14 acquire visual sighting of both facilities on the ground, then maneuver the
15 aircraft around both [invisible] plumes. The mitigation would be
16 unreasonable and in some cases unattainable.

17 . . . The potential for constraints to airport operations create a
18 tangible impact on the further use of the Hayward Executive Airport if the
19 facility is approved at this location."

20 Exh. 204; 12/18/07 RT, pp. 113-116.

21 In light of such strong opposition by the FAA, the City does not believe the
22 Committee could responsibly take any course of action other than to deny certification to
23 the EEC.

24 In approving the nearby RCEC, the CEC imposed mitigation to alert and discourage
25 pilots "from flying over or in the proximity to the RCEC" to respond to concerns raised by
26 CEC Staff and the FAA. Russell City Energy Center, Final Commission Decision,
27 01-AFC-7C, Oct. 2, 2007 ("RCEC Decision"), TRANS-10 pp. 190-191. The CEC
28 determined that approval of the RCEC, with this mitigation, was appropriate because "[t]he

1 FAA does not complain about the loss of navigable airspace; as the agency responsible for
2 the designation of air routes and air traffic control, its lack of concern in this regard is
3 telling.” RCEC Decision, p. 186. Here, in contrast, the FAA has repeatedly and
4 consistently advised the City and the CEC that it recommends disapproval of the EEC due
5 to significant and unavoidable impacts, and that an overflight restriction for both the RCEC
6 and the EEC would be “unattainable.” Exhs. 204; 416. The FAA has also advised that
7 because it is not a land use agency, it does not have the authority to stop a project from
8 being built. 12/18/07 RT, p. 279.⁷ Therefore, the FAA has exercised as much authority as
9 it can to urge the CEC to disapprove the EEC at its proposed location. Standing alone, the
10 evidence tendered by the FAA, and the consequences to the Airport and air traffic that may
11 stem from approval, provide the Committee with substantial evidence to deny certification.

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13 **B. State and Local Standards Compel Disapproval of the EEC**

14 The City owns and operates the Airport as a proprietary enterprise. All of the
15 various State, regional and local plans and regulations listed above, as well as the
16 overarching federal requirements, work in concert to ensure development in the Airport
17 area is compatible with airport safety zones in order to protect people and property. Exhs.
18 402; 409; 410; 535.

19 For purposes of this proceeding, one of the most relevant airport zones is the Traffic
20 Pattern Zone. The Traffic Pattern Zone approximates where the majority of aircraft will be
21 located in and around the Airport. These are aircraft whose pilots are already fully engaged
22 as they are focused on take-off or landing procedures, instructions from the tower and

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27 ⁷ Therefore, none of the parties will be able to point to a specific federal statute or
28 regulation that preempts the CEC’s authority.

1 observation of other aircraft in the Traffic Pattern Zone. 12/18/07 RT, pp. 149-150.⁸ The
2 tower controlling flights at the Airport does not operate between the hours of 9:00 pm and
3 7:00 am. Exh. 402, p. 4-5. Therefore, during those times, pilots must broadcast their
4 intentions to other pilots in the area and use visual separation for safe flying. The Airport
5 also has extensive noise abatement procedures that instruct pilots to avoid certain flight
6 paths and abide by certain take-off procedures in order to reduce noise. Exh. 413. Finally,
7 as mitigation for the thermal plumes created by the RCEC, pilots must see and avoid flying
8 over the RCEC. These are all concerns that the pilots must heed as they fly in and around
9 the Airport.

10 The EEC is proposed approximately 279 feet from the official boundary of this busy
11 Traffic Pattern Zone. Exh. 200, Land Use Figure 5; CEC Distances, p. 3. However,
12 according to actual airport data, approximately 50 aircraft that are using the Airport fly over
13 the EEC each month. Exhs. 208; 417; 418. Further, air traffic is growing at the Airport,
14 and as the Airport traffic expands, the Traffic Pattern Zone will increase in order to
15 accommodate increased air traffic. Exh. 410; 12/18/07 RT, pp. 141-142. Because the EEC
16 is so close to the busiest area of the Airport, mitigation to avoid overflight is infeasible.
17 Exhs. 204; 416. Such mitigation would be disruptive and dangerous to the existing Traffic
18 Pattern Zone and would likely prohibit expansion of the Traffic Pattern Zone in the future.

19 Given these facts, the City's Airport Ordinance would prohibit the City from
20 approving the EEC because the EEC will affect Airport traffic. Exhs. 402, pp. 6-7; 409.
21 The Airport Ordinance limits development surrounding the Airport, prohibiting any use

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23 ⁸ Dave Needle, Commissioner for the ALUC testified as to his concern for pilots in the
24 Traffic Pattern Zone should the EEC be approved: "We also take a look at the larger
25 situation. The pilot that has been spoken of in all of these discussions regarding his or her
26 particular issue with turbulence is only half of it. There are other pilots in that flight
27 pattern. And more than one pilot will be consumed with the details of doing that takeoff
28 or landing. And when one of them wiggles in the sky and another pilot sees that, that
continues down the chain. So it is not just whether or not one particular pilot has an
issue, it is the cumulative effect as to how that ripples through." 12/18/07 RT, pp. 149-
150.

1 within an “airport approach zone, airport turning zone or airport transition zone in such a
2 manner as to . . . impair visibility in the vicinity of the airport or otherwise endanger the
3 landing, take off or maneuvering of aircraft.” Exh. 409, § 10-6.35. Based on CEC Staff
4 analysis and independent input from the FAA and Caltrans, the City believes that the EEC
5 will “endanger the landing, take off or maneuvering of aircraft.” Exh. 402, pp. 6-7.
6 Because the effects of the EEC plume would physically impact the Airport airspace, the
7 EEC would also be an “Airport Hazard.” Exhs. 402, pp. 6-7; 409, § 10-6.12. An “Airport
8 Hazard” is defined as “any . . . use of land which obstructs the airspace. . . .” Exhibit 409,
9 § 10-6.12. While the extent of the impact of thermal plumes and other turbulence⁹ that may
10 result from an industrial facility is uncertain, it is clear to the City that the EEC will
11 generate turbulence. Exhs. 20, 200; 12/18/07 RT, pp. 122-124, 100-109. It is also clear
12 that such turbulence will obstruct the airspace and/or endanger aircraft.

13 **C. The FSA Recommends Disapproval Based on the Potential Impact of**
14 **the EEC on Aircraft**

15 The FSA is an “objective” analysis of the “project’s consistency with applicable
16 federal, state, and local” laws prepared by CEC Staff. 20 Cal. Code Regs. § 1744. As an
17 objective analysis, the FSA should be given considerable weight.

18 The FSA supports the determination in the FAA Report that aircraft should not fly
19 over thermal plumes below 1,000 feet. Exh. 200, pp. 4.10-20. 4.10-21. However, pilots
20 must fly below 1,000 feet in the area over and around the EEC because the traffic pattern
21 altitude for the Airport is limited to a maximum of 800 feet due to over-flight of aircraft on
22 approach to OAK and San Francisco International Airport (“SFO”). Exh. 200, p. 4.10-19.

23 CEC Staff supported its conclusions with its own analysis of the potential for
24 thermal plumes to create turbulence. Exhs. 200, pp. 4.10-41 – 4.10-45; 209; 12/18/07 RT,

25 _____
26 ⁹ In addition to the thermal plumes from the stacks, turbulence may also result from the
27 EEC’s radiators and fans. 12/18/07 RT, p. 108. The heat from all of these sources may
28 merge and create turbulence with a sum greater than the whole. 12/18/07 RT, p. 109.

1 pp. 100-109. Mr. William Walters testified that he used the same calculation method as
2 Eastshore to estimate the potential for thermal plumes to create turbulence. 12/18/07 RT,
3 p. 91. However, he also testified that his calculations were conservative in estimating the
4 potential impacts in several respects. 12/18/07 RT, pp. 104-109. First, the analysis is based
5 on only 7 of the stacks, not all 14. Second, the calculations did not account for potential
6 turbulence-generating effects of the EEC's radiators, or the cumulative impact of the heat
7 output the entire facility, which would add to the turbulence generated by the plumes.
8 12/18/07 RT, p. 109. Finally, Mr. Walters testified that the plume impact was modeled at
9 100 degrees Fahrenheit, which may have been high, but that 32 degrees Fahrenheit, used
10 for Eastshore's tests, were unrealistically low and that impacts from the plume would
11 increase with an increase in temperature. 12/18/07 RT, p. 105.

12 The FSA also concludes that the EEC would significantly restrict all uses of
13 airspace for "aircraft transit, maintenance flights, training procedures, and normal
14 departures/arrivals" and thus EEC would create a significant adverse impact under CEQA
15 that could not be avoided if the project were developed at the proposed location. Exh. 200,
16 4.10-21. In addition, the cumulative affect of the EEC and the RCEC projects on the
17 Airport airspace "increases the potential for serious impairment to the utility of the airport
18 by increasing the complexity of the airspace." Exh. 200, 4.10-1. This also is a significant
19 adverse impact under CEQA that cannot be mitigated and the EEC should therefore be
20 denied certification.

21 **D. Eastshore's Airport Studies Supporting Safe Overflight of the EEC are**
22 **Flawed**

23 The studies submitted by Eastshore purport to demonstrate that the EEC will not be
24 a hazard to the Airport. However, the expert testimony provided by Eastshore relies on
25 factually incorrect assumptions regarding the flight patterns for the Airport and are
26 inconsistent with expert testimony provided by CEC staff, the City, the County, pilots,
27 Caltrans and the FAA. Because of the significant factual inaccuracies underlying
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1 Eastshore's evidence, it has not satisfied its burden to demonstrate that the EEC should be
2 approved.

3 1. Dr. Graves' Conclusions Are Based on Incorrect Factual Assumptions

4 Eastshore presented testimony by Dr. Marshall Graves regarding the potential for
5 the thermal plumes from the EEC to affect Airport air traffic. Exh. 20. Dr. Graves'
6 testimony relies on factually incorrect assumptions regarding the altitude that aircraft will
7 fly over the airport as well as the potential numbers of aircraft that fly over the proposed
8 site. For these reasons, Dr. Graves' conclusions that the EEC will not impact aircraft are
9 without merit.

10 Dr. Graves repeatedly asserts that the EEC is in a "congested area, where minimum
11 flights altitudes of 1000 feet are required." Exh. 20, pp. 4, 9, 10, 11. Dr. Graves apparently
12 performed his analysis without reviewing the standards directly applicable to the Airport,
13 because aircraft flying in and around the Airport must fly below 1000 feet. Exhs. 200, p.
14 4.10-21; 410 p. 1-18. The record refutes Dr. Graves' assumption that aircraft must fly
15 above the facility at greater than 1000 feet. Exhs. 200, pp. 4.10-19, 4.10-20; 203; 208; 417;
16 418; 12/18/07 RT, pp. 120-121, 156, 193, 198. In fact, due to the overlapping airspace for
17 OAK and the SFO, aircraft preparing to enter the Airport's traffic zone are required to fly
18 below 1000 ft. Exh. 200, 4.10-21. Similarly, the data collected by the City, and used by
19 CEC Staff in both the Preliminary Staff Assessment and the FSA, confirm that
20 approximately 50 aircraft fly over the EEC site at altitudes of 300 to 1000 feet each month.
21 Exhs. 208; 417; 418. Only aircraft transiting the area, i.e., going to OAK, SFO or other
22 airports may fly above 1000 feet. Exh. 410, pp. 1-17 - 1-19. This unique restriction exists
23 for this airport because of its proximity to OAK and SFO.

24 Despite the readily available data regarding flight tracks, Dr. Graves maintained that
25 aircraft do not fly over the EEC site.¹⁰ Instead of utilizing actual flight tracks data, Dr.

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27 ¹⁰ It appears that Dr. Graves did examine flight tracks data, but that data was later omitted
28 as an attachment to his testimony. 12/18/07 RT, p. 57. However, Dr. Graves did testify
(continued...)

1 Graves instead based his assertions regarding the altitudes of aircraft flying over the EEC
2 site on the assumption that aircraft will not descend into the Airport traffic pattern over
3 EEC. 12/18/07 RT, pp. 222, 223. Dr. Graves assertion is contrary to the data that recorded
4 flights overflying the EEC site and extensive testimony that “a pilot could be as low as 393
5 feet above ground level and still be well within the regulations of operating his aircraft”
6 (12/18/07 RT, p. 121) and “traffic patterns will expand and contract during any given day”
7 (12/18/07 RT, p. 157), so the area comprising the traffic pattern zone is not a bright line.
8 Instead of applying the facts, Dr. Graves based his conclusions on the assertion that the
9 “closest point [of the EEC] is beyond 6,000 feet [from the Airport] and thus EEC is outside
10 of the traffic pattern.” 12/18/07 RT, p. 223. The City, CEC Staff, Alameda County,
11 Chabot College and the Group Petitioners all disagree with this calculation and maintain
12 that the airport is 5,606 feet from the EEC. CEC Distances, p. 3. Regardless of the
13 discrepancies in calculated distances, the facts are clear that aircraft do fly over the
14 proposed EEC site.¹¹ Exhs. 208; 417; 418.

15 In sum, Dr. Graves' testimony should not be given any weight by the Committee
16 because his conclusion that the EEC will not be a hazard to the airport relies on erroneous
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19 (...continued)

20 regarding the flight tracks data for June 2007 that he had reviewed in preparing his
21 testimony. 12/18/07 RT, p. 225.

21 ¹¹ Dr. Graves also limited his analysis to data directly over the EEC and “170 feet laterally
22 from the Eastshore site.” Exh. 20, p.12; 12/18/07 RT, pp. 243, 244. Dr. Graves claims to
23 have used this distance based on the flight test data from the Barrick Western plant. Exh.
24 20, p. 12; Exh. 20, “Turbulence Felt in a Light Helicopter Caused by a Power Plant
25 Thermal Plume (hereinafter referred to as the “Helicopter Test”). First, it is not clear
26 whether Dr. Graves is referring to 170 feet from either side of the line of stacks, the
27 midline of the facility or the fenceline of the facility. Second, even the pilot performing
28 the Helicopter Test, who was purposely trying to fly over the plumes, deviated from his
straight-line path and the plumes themselves drifted as well. 12/18/07 RT, pp. 241, 242.
Finally, Dr. Graves gives no explanation as to why his conclusions are more defensible
using such narrow parameters as opposed to the broader parameters used by CEC Staff
and the City.

1 assumptions that (1) aircraft must fly above the facility at greater than 1000 feet, and (2)
2 that aircraft do not in fact fly over the EEC site.

3 2. Eastshore's Helicopter Flyover Test

4 To provide its own anecdotal evidence that a power plant will not disrupt aircraft,
5 Eastshore commissioned Sonoma Technology, Inc. ("STI") to fly over a power plant that
6 uses the same type of power generating technology as the EEC.¹² STI chose the 118 MW
7 Barrick Western 102 Power Plant, east of Reno, Nevada ("Barrick Plant"). Mr. Don
8 Blumenthal testified regarding the test and the results.

9 There are significant differences between the Barrick Plant and the EEC. First, the
10 Barrick Plant stacks are only 55 feet high, in contrast to the EEC's 70-foot stacks. Exh. 20,
11 STI Report, p.5. The Barrick Plant stacks are also arranged in clusters of three to four
12 stacks instead of being in a line. According to Mr. Blumenthal, this cluster arrangement
13 resulted in more often missing the plumes rather than flying over them. 12/18/07 RT,
14 p. 240-242. At the time of the flyovers, only 11 out of 14 units were operating. Exh. 20,
15 STI Report p. 7. Because the test occurred when the ambient temperature was only 32
16 degrees Fahrenheit, the 430 fans at the Barrick Plant were operating only at approximately
17 45%. 12/18/07 RT, pp. 258; 259. In contrast, if the EEC were operating at ambient
18 temperatures of 70 to 80 degrees Fahrenheit, its 504 fans would be operating at 100% and
19 would generate turbulence. 12/18/07 RT, pp. 256, 257. The Barrick Plant overflight could
20 not have accounted for this turbulence.

21 While the STI report gives the appearance of a "scientific" study, it is hardly a
22 comprehensive examination of the potential effect of thermal plumes on aircraft. The data
23 used for Mr. Blumenthal's conclusions were collected during only 12 passes over the
24 facility made during a forty-five minute period. Exh. 20, STI Report p. 7. Mr. Blumenthal

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26 ¹² Mr. Butterfield testified that the FAA would not accept the data generated by the
27 Helicopter Test to change its recommendation to avoid overflight of a power plant below
28 1000 feet. 12/18/07 RT, p. 254.

1 had never before flown over a power plant to evaluate turbulence. 12/18/07 RT, p. 245. At
2 most, the survey gives us a snapshot of one pilot's experience during specific conditions
3 that are very different from conditions at the EEC. Importantly, regardless of the degree of
4 turbulence the pilot recorded on that day during those conditions, the pilot did experience
5 turbulence due to flying over the power plant. 12/18/07 RT, pp. 77, 248.

6 **E. Eastshore Did Not Satisfy Its Burden to Support Approval of the EEC**

7 As the applicant, Eastshore has the burden to demonstrate that the EEC will comply
8 with LORS and not have a significant impact on the environment. 20 Cal. Code Regs.
9 § 1723.5(a). The studies submitted by Eastshore by Dr. Graves and Mr. Blumenthal do not
10 demonstrate that the EEC will comply with LORS or that the EEC will not have a
11 significant effect on the Airport. On the contrary, Mr. Blumenthal's Helicopter Test
12 provides only limited anecdotal evidence as it was performed under limited conditions.
13 Mr. Butterfield from the FAA testified that such a test would have no influence over the
14 FAA's recommendations against approving the EEC. Dr. Graves' analysis rests on factual
15 assumptions that are so clearly incorrect that his conclusions are essentially meaningless.
16 Finally, Eastshore has not submitted any evidence to demonstrate that the effects of the
17 EEC on the Airport may be mitigated. Therefore, based on the compelling
18 recommendations presented by the FAA, Caltrans, the ALUC, the City and pilots using the
19 Airport, the CEC should deny certification to the EEC.

20 **III. THE EEC WILL NOT COMPLY WITH CITY LAND USE LORS**

21 The EEC does not comply with the Hayward Municipal Code ("Zoning Ordinance")
22 or the General Plan. Were the facility permits within the City's jurisdiction, the City would
23 not grant the Conditional Use Permit ("CUP") that the EEC would need in order to build
24 and operate its facility. As evidenced by the City's recent determination of approval of the
25 RCEC, the City's determination for the EEC does not represent a generalized bias against
26 power plants, but a reasoned decision based on the City's applicable codes and ordinances
27 and the specific circumstances and location of the EEC facility. Contrary to Eastshore's
28 assertion, the City's codes do not require the City to approve the EEC simply because it

1 previously approved the RCEC. Other than relying on the previous approval for the RCEC,
2 Eastshore has submitted no evidence to demonstrate that it meets the requirements for
3 obtaining a CUP from the City.

4 **A. The EEC is not Permitted as of Right**

5 The City's Zoning Ordinance divides the City into specific land use zones and lists
6 uses that are permitted as of right in each zone. The EEC is subject to discretionary review
7 for two reasons. First, the Zoning Ordinance is exclusionary, meaning any use that is not
8 listed as a permitted use is prohibited unless the Planning Department exercises its
9 discretion to allow the use.¹³ The EEC is proposed in the City's Industrial Zone. A power
10 plant is not a permitted as of right in that zone and thus would require approval from the
11 Planning Department to be located in the Industrial Zone. Second, in addition to obtaining
12 approval to be a permitted use, the EEC also must comply with the specific requirements
13 applicable to the Industrial Zone. Exh. 408, § 10-1.1600. The EEC will use Class "B"
14 hazardous materials (i.e., 20,000 gallons of aqueous ammonia). Exhs. 200, p. 4.5-11; 304,
15 p.1; 408 § 10-1.1620. Therefore, pursuant to Zoning Ordinance § 10-1.1615, even if the
16 EEC were permitted as of right (which it is not) the EEC would still be required to apply for
17 a CUP. Exhs. 304; 408.

18 **B. The EEC Does Not Meet the Requirements to Obtain a CUP**

19 The EEC does not meet the City's standards to obtain a CUP. Exhs. 200,
20 pp. 4.5-14 – 4.5-22; 404; 408. In order to grant a CUP, the City must make four findings
21 that serve to demonstrate consistency with zoning and the General Plan. Exh. 408, § 10-
22

23 ¹³ "When a use is not specifically listed in the sections devoted to 'Uses Permitted,' it shall
24 be assumed that such uses are prohibited unless it is determined by the Planning Director
25 or on appeal to the Planning Commission that the use is similar to and not more
26 objectionable or intensive than the uses listed. Further, uses are permitted and conditions
27 to use are established within each district as set forth herein." Exh. 408, § 10-1.140.
28 Determination as to whether a particular use is "similar to and not more objectionable or
intensive than the uses listed" is made on a case-by-case basis. 1/14/08 RT, pp. 210-211,
229-230.

1 1.3200. Because of the location of the EEC, the City Council could not make those
2 findings and unanimously determined that the EEC “is not consistent with the City’s
3 General Plan Policies and Industrial Zone District provisions.” Exh. 404. As explained by
4 City Staff in the Agenda Report for the March 6, 2007 City Council meeting: “Generally,
5 more impacting uses require an administrative or conditional use permit, which allows
6 discretion on the part of the City decision-makers in determining whether or not a use is
7 appropriate. As reflected in the purpose of the [Industrial] district, location is a key
8 consideration in that determination.” Exh. 307, p. 2. As more fully explained below, based
9 on the proposed location for the EEC, the City could not make the necessary findings to
10 support the EEC.

11 1. The proposed use is desirable for the public convenience or welfare.

12 The EEC does not meet this requirement. The City’s evaluation of whether the EEC
13 is desirable is considered from a local perspective. Therefore, even if the FSA concludes
14 that environmental impacts may be mitigated when viewed from a regional perspective,
15 local residents still bear the undue burden of the local environmental impacts. There is no
16 evidence in the FSA or information supplied by the applicant that the EEC is necessary at
17 the proposed location to improve the welfare of the City’s residents. Exh. 200, p. 4.5-16.¹⁴
18 In conjunction with the other negative aspects of the EEC, the EEC at the proposed site is
19 not desirable for the public convenience or welfare of the City. Exhs. 200, p. 1-9; 404.

20 2. The proposed use will not impair the character and integrity of the zoning
21 district and surrounding area.

22 The EEC does not meet this requirement. The proposed location of the EEC is
23 incompatible with the surrounding area. The aesthetic impact of 14 stacks that are each 70
24 feet high as proposed by the EEC would adversely affect nearby residential areas and are
25

26 ¹⁴ The FSA states, in relevant part: “. . . the electricity generated by the proposed power
27 plant will not be solely dedicated to the immediate surrounding area” Exh. 200, p.
28 4.5-16.

1 “not compatible with the heights of other structures in the vicinity.” Exhs. 307; 404. In
2 addition, 90-foot transmission poles, although not pictured in Eastshore’s visual
3 simulations, would also adversely affect the views of nearby residences and commercial
4 buildings. Exh. 307, p. 3. These adverse visual impacts to the area cannot be mitigated.

5 The EEC is also not in conformance with the City’s General Plan. Exh. 401,
6 pp. 4-7. As described in Mr. Rizk’s and Mr. Armas’ testimonies, the Planning Department
7 has been implementing the 2002 General Plan objectives of promoting “transition from a
8 manufacturing-based economy to an information-based economy in the industrial areas.”
9 Exh. 406, p. 2-19; 1/14/08 RT, pp. 140-141, 209-211. From a permitting perspective, the
10 City implements this policy by siting heavy industrial uses, such as the RCEC, in the
11 western portion of its Industrial Zone and lighter industrial uses in the eastern portion,
12 closer to commercial and residential uses. Exh. 401, p.5. The EEC would irrevocably
13 change the character of the surrounding area and all but thwart the City’s attempts to
14 transition its economy. Exh. 401, pp. 4-5.

15 The evidence in the record demonstrates that the EEC would hinder the City’s
16 transition to an information-based economy in this area. Exhs. 302; 311. When questioned,
17 CEC Staff could not testify as to any uses that were eager to site near a power plant.
18 1/14/08 RT, pp. 187-188.¹⁵ Eastshore presented no evidence to demonstrate that
19 commercial uses would welcome locating next to a power plant. To the contrary, the
20 Fremont Bank Operations Center, a 24-hour bank-processing center, has expressed adamant

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23 ¹⁵ The FSA asserts that “Although the proposed project is not an information-based industry
24 and does not directly promote the transition of the Industrial Corridor from a
25 manufacturing base to one based more on information technologies, it would not hinder
26 the transition of other properties in the industrial area.” Exh. 200, p. 4.5-11. However,
27 Ms. Stratten, testifying on behalf of CEC Staff, had no knowledge of any businesses that
28 have requested being sited adjacent to the EEC. 1/14/08 RT, p. 187. Further, Ms.
Stratten did not factor into her analysis the opposition from the Fremont Bank Operations
Center, an existing information-based business located adjacent to the EEC that is
opposed to the EEC. Exhs. 302, 311; 1/14/08 RT, pp. 187-188, 311-324.

1 opposition to the EEC, rather than welcoming it as a potential source of electricity. Exhs.
2 302; 311; 12/18/07 RT, p. 311-324.

3 3. The proposed use will not be detrimental to the public health, safety, or
4 general welfare.

5 The EEC does not meet this requirement. The EEC will emit particulate matter
6 (PM₁₀) that will substantially affect nearby residences, schools and other sensitive
7 receptors. Mitigation through the use of reduction credits from a non-local source may
8 satisfy the standards applied by the Bay Area Air Quality Management District; however,
9 such mitigation does not lessen the local impacts. Exhs. 200, p. 4.1-20; 500, pp. 15-16;
10 12/17/07 RT, pp. 101-102, 135-137.

11 4. The proposed use is in harmony with applicable city policies and the intent
12 and purpose of the zoning district involved.

13 The EEC does not meet this requirement. The proposed location of the EEC is
14 incompatible with City policies regarding the surrounding area. First, the EEC is not in
15 harmony with the City's General Plan. Exhs. 401, pp. 4-5; 406, pp. 2-3 – 2-6, 2-13; 407,
16 pp. 4-2 – 4-5, 4-17. The City is implementing the General Plan objectives of transitioning
17 this area to less intensive industrial uses. Exhs. 406, p. 2-13; 407, pp. 4-5. As Mayor
18 Sweeney testified, locating the EEC at the proposed site would: "violat[e] the fundamental
19 principles of how we have decided to proceed with growth and development in our
20 community. If this Commission approves Eastshore it will irrevocably thwart the City's
21 plans for intelligent, rational and smart growth." 12/18/07 RT, p. 216.

22 Second, as explained in Section II, the EEC is not in harmony with the City and
23 County plans and policies regarding the Airport. The FSA supports the conclusion that the
24 EEC will not be in harmony with applicable City policies and that the detrimental impacts
25 cannot be mitigated. Exh. 200, p. 4.5-19.

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1 **C. Eastshore Would Constitute a Significant and Unavoidable Impact**
2 **Under CEQA**

3 It is the CEC's duty to evaluate a project for compliance with LORS, which
4 includes an analysis of the proposed project pursuant to CEQA. Exh. 200, p. 1-1; 1/14/08
5 RT, pp. 1206-112. CEC Staff determined that "Because operation of the Eastshore Energy
6 Center at the proposed location would preclude, interfere with or unduly restrict existing or
7 future permitted uses it would also constitutes a significant adverse impact under CEQA
8 that cannot be mitigated . . . [and, because of the] proximity with the Russell City Energy
9 Center . . . would also constitute a significant cumulative adverse impact under CEQA that
10 could not be mitigated below significance with the project in the proposed location." Exh.
11 200, pp. 4.5-26, 4.5-27; 1/14/08 RT, pp. 106-107. This conclusion is not based upon any
12 analysis of potential impact of thermal plumes, but based on the fact that the EEC is located
13 inside the Airport influence area. 1/14/08 RT, pp. 109-111. Because the proposed location
14 of the EEC is the fundamental flaw with the project, the only mitigation would be to
15 relocate the project.

16 **D. Eastshore Did Not Demonstrate Compliance with LORS**

17 Eastshore did not submit testimony that would support a determination that the EEC
18 is in compliance with the City's land use LORS. Eastshore relies on City Council
19 Resolutions passed in support of the RCEC in order to support its claim that the EEC
20 complies with City LORS. Exh. 17, pp. 3, 7. Eastshore did not submit testimony that
21 refutes or even mentions the City Council Resolution on the EEC. 1/14/08 RT, pp. 99, 100.
22 As Eastshore is well aware, a CUP is evaluated on a case-by-case and involves a
23 discretionary examination of the localized impacts of a particular facility in a particular
24 location. 1/14/08 RT, pp. 131-133, 226-230. The Zoning Ordinance does not contain any
25 provisions that would lead Eastshore to conclude that simply because a certain non-
26 permitted use has received approval, e.g., the RCEC, that any other similar use will also
27 receive approval without the need for an individualized analysis. Exh. 408, §§ 10-1.1600,
28 10-1.3200.

1 As Eastshore did not submit any evidence that the EEC will comply with the City's
2 LORS, it has not satisfied its burden to demonstrate compliance and thus EEC should not
3 be certified.

4 **IV. It Is Inequitable and Unfair to Site A Second Power Plant in the City of**
5 **Hayward**

6 It is inherently unfair for the City to bear the burden of two new power plants in its
7 City. The cumulative impact of two facilities on the City's air, water, traffic, risks from
8 hazardous materials and the impact of simultaneous construction of two large industrial
9 facilities are not insignificant. The City has borne its fair share of the burden to provide
10 reliable electricity to the State by cooperating in the siting of the 600 MW RCEC power
11 plant. 12/17/07 RT, pp. 13-138.

12 The FSA does not address whether it is fair for the City to bear the sum of the
13 burdens that will be imposed by having two new power plants in its City. The FSA does
14 conclude that the cumulative impacts of the two facilities on the Airport cannot be
15 mitigated and thus the EEC should not be certified. Exh. 200, pp. 4.5-26, 4.5-27, 4.10-28,
16 4.10-29. In part, the issue of the overall burden on the City was not well addressed because
17 it does not fit neatly into the categories that the CEC uses to analyze the impacts of siting a
18 new power plant. CEC Staff may have mitigated most of the environmental impacts of
19 each project, but the impacts have not been completely eliminated. For example, while
20 CEC Staff purports to have mitigated the air quality impacts of each plant, cumulatively,
21 the impacts create an even more substantial burden on the City than would a single plant.
22 The EEC will be especially burdensome because of its location near non-industrial uses. It
23 is unfair to impose the environmental and social impacts of two power plants on a single
24 city. The City worked with the RCEC to site its 600 MW plant in a manner that would be
25 acceptable to the City. Exh. 401, p. 9; 1/14/08 RT, pp. 119-120. The City is not trying to
26 block all power plants from its City, but it has done its fair share and should not have to
27 bear the burden of a second plant that is clearly incompatible with LORS.

28

1 As evidenced by the extensive public comment, public protests and statements given
2 by City of Hayward Mayor Michael Sweeney, State Senator Ellen Corbett, State Assembly
3 Member Mary Hayashi, City Council Member Barbara Halliday, Alameda County
4 Supervisor Gail Steele and former City Manager Jesus Armas, the community is united in
5 its opposition to the EEC. 12/17/07 RT, pp. 130-138, 286-324, 384-444; 12/18/07 RT, pp.
6 214-219; 1/14/08 RT, pp. 131-139, 273-342. Council Member Halliday, who was on the
7 Councils that approved the RCEC and rejected the EEC, gave insight into the Council's
8 decisions:

9 "We looked at this very carefully and it alarms me to think that
10 you would take our position on the Calpine plant [RCEC] and say that that
11 also applies to this plant. They are totally different locations.

12 . . .

13 And you've heard it, there are schools, there are schools right
14 across the street. When we made a decision to put Life Chiropractic there
15 we were changing the nature of this area. We were confirming what we
16 were already seeing in the changing nature of this area. Therefore I think
17 you have to agree that the decision made by the City of Hayward was a
18 valid decision that looked to our general plan and our zoning ordinance
19 and that our decision saying this is not an appropriate use in that location
20 is very consistent with our internal documents."

21 1/14/08 RT, pp. 131-133.

22 Mayor Sweeney also summed up the City's general position regarding the fairness
23 of siting two power plants in the City:

24 "The City found that Russell City is consistent with its general
25 plan and zoning ordinance and it found that Eastshore is not.

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1 There will be effects on our community from Eastshore. And
2 when added to similar effects from Russell City it simply is not fair and
3 equitable for one community to bear that burden.

4 ...

5 And let's be clear, if there is even the possibility of danger [to the
6 Airport], what that means, and it may be a worst case, but what that means
7 is that an aircraft could crash and people could die. Eastshore will require
8 pilots to navigate a maze of horizontal constraints and vertical obstacles
9 and ask the rest of us to pray no one crashes and dies.

10 ...

11 These burdens and risks are just not worth taking for a plant that
12 could reasonably be sited elsewhere.”

13 12/18/07 RT, pp. 215-218.

14 **V. CONCLUSION**

15 Simply put, the EEC is proposed in the wrong location. The EEC is incompatible
16 with the City's Zoning Ordinance, the General Plan, Airport Regulations, FAA and
17 Caltrans safety recommendations for current Airport operations and goals for Airport
18 expansion. The City is bearing its burden to be the site for power generation for the area by
19 working cooperatively with the RCEC although that facility is also not popular with some
20 local residents. However, to impose another facility nearby that has significant and
21 unavoidable noncompliance with LORS is clearly inequitable and unfair. For these reasons
22 and the reasons discussed above, the Committee should deny certification of the EEC.

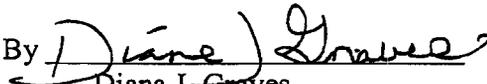
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24 DATED: February 11, 2008

MICHAEL LAWSON,
City Attorney

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26

By 
Diana J. Graves

27

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA

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

Docket No. 06-AFC-6

PROOF OF SERVICE
(Revised 1/18/2008)

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 February 11, 2008, I transmitted copies of the attached Post Hearing Brief via electronic mail 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