

STATE OF CALIFORNIA

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of:
The Application for Certification
for the CHULA VISTA ENERGY
UPGRADE PROJECT

Docket No. 07-AFC-4

DOCKET 07-AFC-4	
DATE	SEP 16 2008
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**PREHEARING CONFERENCE STATEMENT OF INTERVENOR
ENVIRONMENTAL HEALTH COALITION**

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STATE OF CALIFORNIA

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In response to the August 22, 2008 Notice of Prehearing Conference and Evidentiary Hearing and Prehearing Conference Order, and in response to the September 12, 2008 Committee Request for Further Analysis, this statement preliminarily identifies issues intervenor Environmental Health Coalition (“EHC”) intends to raise at the public evidentiary hearings for the Chula Vista Energy Upgrade Project (“CVEUP” or “Project”). EHC submits this statement preliminarily and subject to change because EHC does not yet know what additional evidence or argument the City of Chula Vista (“City”), Commission Staff, or the Applicant may present in prehearing conference statements or at the prehearing conference. Accordingly, EHC reserves the right to supplement and/or amend this statement as necessary to address any such evidence or argument.

The Prehearing Conference Order identified eight topics to be addressed in each party's prehearing conference statement. Each topic is addressed below.

I. Topic Areas That Are Complete and Ready to Proceed to Evidentiary Hearing.

As of September 16, 2008, EHC does not object to a finding of completeness and readiness to proceed to evidentiary hearing for any topic area except those discussed in Section II below.

II. Topic Areas That Are Not Complete and Not Yet Ready to Proceed to Evidentiary Hearing.

EHC shares the Committee's concern that the Land Use and Alternatives topic areas may not be ready to proceed to evidentiary hearing. As the Committee correctly observed in its September 12, 2008 Request for Further Analysis, neither the City nor Staff have fully addressed whether the Project is consistent with local laws, ordinances, regulations, and standards ("LORS"), including all applicable General Plan policies and zoning provisions. As EHC has maintained throughout this process, the Project is inconsistent with local LORS as a matter of law. We do not believe that additional analysis by the City and Staff of General Plan and zoning provisions, or additional modifications to the conditions of certification, can resolve these inconsistencies. Moreover, it is EHC's position that because there are more prudent and feasible alternative means of achieving public convenience and necessity, the Commission cannot override these inconsistencies under Public Resources Code section 25525. Although EHC

would be prepared to offer evidence in support of its position at the scheduled evidentiary hearing, EHC also would support a continuance of the hearing in order to better develop evidence and analysis responsive to the Committee's specific concerns regarding alternative sites.

Moreover, the Alternatives topic area is not ready to proceed to evidentiary hearing for an additional, independent reason. The 851-hp "black start" diesel generator proposed in the AFC has been deleted from the project description.¹ EHC in no way suggests that the black start engine—which would increase air pollution associated with the Project—should be added back to the Project description. We merely point out that analysis of this change in the Project must be complete before the application is ready for evidentiary hearing.

For example, Staff's analysis of the "no project" alternative in the FSA contends that approval of the Project would be an "integral step" toward enabling the California Independent System Operator ("CAISO") to remove the "reliability must-run" ("RMR") designation from the South Bay Power Plant ("SBPP").² In support of this contention, Staff's testimony cites a letter from CAISO dated July 24, 2008.³ The letter from CAISO, however, states that suitable generation alternatives must not only replace SBPP's local generation capacity, but also "replace or obviate the need for" SBPP's black start and dual-

¹ See Preliminary Staff Assessment ("PSA") at 4.1-22; FSA at 4.1-34 (Table 20, fn. a), 4.1-63.

² FSA at 6-15.

³ FSA at 6-22, citing letter from CAISO to MMC Energy, Inc., re: MMC Chula Vista and Reliability Must-Run Status of the South Bay Power Plant, (July 24, 2008).

fuel capabilities.⁴ As the record stands, there is insufficient evidence that the Project—which now lacks black start capability—will be able to replace or obviate the need for these services, as CAISO requires. EHC’s position is that SBPP should be released from RMR status and closed permanently. However, Staff’s testimony that the Project will contribute to that outcome is unsupported, absent additional evidence regarding the implications of the Project’s lack of black start capability.

In addition, the deletion of the black start engine from the project description may undercut Staff’s Power Plant Reliability analysis. Without black start capability, the Project not only will be unable to provide on-demand peaking capacity when power from the grid is unavailable, but also will be unable to meet the terms of the request for offers (“RFO”) from San Diego Gas & Electric Company (“SDG&E”).⁵ This may affect the Project’s overall availability factor. In addition, the lack of black start capability may affect the Applicant’s ability to enter into a contract with SDG&E as well as SDG&E’s ability to dispatch the Project at times of peak demand.⁶ Staff should conduct a full analysis of the implications of this change in the Project. Until that analysis has been provided, the Power Plant Reliability topic area is not ready to go to evidentiary hearing.

⁴ Letter from CAISO to MMC Energy, Inc., re: MMC Chula Vista and Reliability Must-Run Status of the South Bay Power Plant, (July 24, 2008).

⁵ See AFC at 1-1 (“The CVEUP also includes ‘black start’ capability *as required by the RFO from SDG&E*. Black start capability allows the CVEUP to start up when the power grid is down and support reenergizing the power grid.”) (emphasis added).

⁶ See FSA at 5.4-6 (“The applicant proposes to provide peaking power and quick start capability *as dispatched by SDG&E* during periods of high demand.”) (emphasis added). The FSA does not consistently address whether or not a contract between the Applicant and SDG&E exists.

Finally, it is EHC's understanding that the Applicant leases, but does not own, the Project site. EHC has not seen evidence of long-term site control over the expected 30-year life of the Project. The Commission should require such evidence.

III. Topic Areas That Remain Disputed and Require Adjudication.

EHC believes that the Prehearing Conference Order's separation of potential disputes into "topic areas" may obscure the overarching environmental justice concerns raised by the Project. Environmental justice issues necessarily encompass multiple topic areas, including but not limited to Air Quality, Land Use, Public Health, Socioeconomics, and Alternatives. Accordingly, although EHC will do its best to comply with the Prehearing Conference Order's direction to address each topic area separately, many of the environmental justice issues identified in this statement implicate multiple topic areas.

Many of the disputed issues identified below are predominantly legal, while others involve both legal and factual disputes. EHC therefore respectfully reserves the right to address each disputed issue, and any other disputed issues identified at the prehearing conference, in briefing following the evidentiary hearing.

A. Air Quality

EHC has identified three main areas of dispute regarding Air Quality. First, the FSA does not satisfy the requirements of the California Environmental Quality Act ("CEQA"). As set forth in EHC's comments on the

PSA, the FSA fails to consistently disclose and analyze the air quality impacts of the Project at its fully permitted capacity. Second, the mitigation measures identified in the FSA are not adequate to avoid or substantially lessen the potentially significant air quality impacts of the Project as required by CEQA. Specifically, the one-time monetary contribution to the Carl Moyer Fund discussed in the FSA cannot legally serve as mitigation for the Project's acknowledged significant impacts. Moreover, there is no evidence that either this monetary contribution or the other mitigation proposals discussed in the FSA will result in measurable, enforceable emissions reductions in the area affected by the Project's emissions. As a result, the FSA fails to comply with CEQA. Third, because the mitigation measures identified in the FSA are legally and substantively ineffective, the Project will result in significant, unmitigated air quality impacts. This is not only an Air Quality issue, but also an environmental justice issue that implicates the Public Health and Socioeconomics topic areas.

B. Land Use

EHC has identified three main areas of dispute regarding Land Use.

1. The Project is Inconsistent with the General Plan.

First, as set forth in EHC's comments on the PSA, the Project conflicts with multiple policies and provisions of the City's General Plan. These policies and provisions include, but are not limited to, the General Plan's "Limited Industrial" and "Open Space" land use designations and Policies E 6.4, E 6.15, E 23.3, and LUT 45.6. Conditions proposed in the FSA do not ameliorate these

inconsistencies. In particular, Condition LAND-1, which attempts to mimic the City's conditional use permit review process, does not address the General Plan at all, and in any event would unlawfully defer a finding regarding LORS consistency until after Project certification: Moreover, although the City has not rendered a final determination regarding the Project's consistency with all potentially applicable General Plan policies, the City has effectively confirmed the existence of a General Plan conflict by negotiating additional concessions from the Applicant that were apparently intended to ameliorate such a conflict. For all of these reasons, Staff's independent conclusion that the Project is consistent with the General Plan lacks both legal and factual support.

In any event, the additional mitigation measures negotiated by the City and the Applicant—the result of a secretive, behind-closed-doors process that never received a proper public hearing—do not resolve the Project's facial inconsistency with the General Plan. Indeed, the City's conclusion that these measures address the Project's General Plan inconsistencies runs counter to the plain language and intent of applicable provisions including Policy E 6.4. Moreover, the City's conclusion regarding General Plan consistency is expressly predicated on incorporating the additional mitigation measures into the conditions of certification for the Project. Nothing in the FSA suggests that this precondition has been met. Accordingly, even if the additional mitigation measures proposed in the City's deal with the Applicant could make the Project consistent with the

General Plan—which they cannot—the Project would remain inconsistent with the General Plan by the very terms of the City’s agreement with the Applicant.

2. The Project Conflicts with Applicable Zoning Ordinances.

Uses proposed for both the Project site and the construction/laydown area are inconsistent with applicable provisions of the City’s zoning ordinance. For example, as discussed in EHC’s comments on the PSA, and as acknowledged by the Committee in its September 12, 2008 Request for Further Analysis, “electrical generating plants” are a permitted use in the City’s “I” (General Industrial) zone, but not in the “I-LP” (Limited Industrial Precise Plan) zone in which the Project site is located.⁷ This demonstrates that power plants are not an appropriate use in the I-LP zone. Accordingly, contrary to Staff’s conclusion in the FSA, the City could not approve the Project with a conditional use permit under existing zoning. Furthermore, the Project’s proposed uses of the construction/laydown area are inconsistent with that parcel’s agricultural zoning.

3. Failure to Respond to Comments.

The FSA failed to provide a reasoned response to significant comments on the PSA. In particular, Staff’s responses to comments in the Land Use section of the FSA did not meaningfully address specific analysis and comments by EHC and Shute, Mihaly & Weinberger LLP regarding the Project’s inconsistency with applicable General Plan provisions and zoning ordinances.

⁷ Compare Chula Vista Municipal Code (“CVMC”) §§ 19.44.020, 19.44.040 with CVMC § 19.46.020(E).

C. Public Health

The Project will cause increased emissions of particulate matter (“PM”) and precursor chemicals. Exposure to PM has been linked to serious public health problems. The FSA has not identified any legally or substantively effective mitigation for the Project’s cumulative contribution to emissions of criteria pollutants in a community already plagued by serious health problems. As a result, the Project will result in a significant, unmitigated cumulative impact on public health. This renders the Project inconsistent with the interpretation of LORS governing environmental justice set forth in the FSA.

D. Socioeconomics

The Project is inconsistent with environmental justice LORS discussed in the Socioeconomics section of the FSA. The Project will add another fossil-fueled electrical generating plant to an area that already contains the highest proportion of fossil-fuel generated megawatts per 10,000 residents in San Diego County. The Project will also continue a pattern of concentrating polluting industrial uses in an area adjacent to established residential neighborhoods and schools. Analysis of the Project’s impacts to date has failed to consider the disproportionate burdens already borne by the affected community, and thus contravenes prevailing environmental justice principles. Staff’s conclusion that the Project will have no socioeconomic impact, and therefore no environmental justice impact, ignores the Project’s other environmental justice impacts and is therefore unsupportable.

E. Alternatives

EHC has identified several areas of dispute concerning alternatives.

1. The FSA Failed to Analyze a Reasonable Range of Alternatives.

CEQA requires analysis of a reasonable range of alternatives that could lessen or avoid the Project's environmental impacts while feasibly attaining most of the Applicant's objectives. The FSA failed to meet this standard for several reasons. For example, the FSA defined the project objectives so narrowly as to preclude proper analysis of alternatives. Moreover, two of the site alternatives proposed by the Applicant and discussed in the FSA would exacerbate rather than reduce impacts on affected communities. Staff's Otay Landfill alternative site, in contrast, would reduce impacts on affected communities; Staff, however, failed to provide sufficient evidence supporting its suggestion that this alternative may be infeasible due to its other impacts. Furthermore, as the Committee noted in its Request for Further Analysis, the Applicant has admitted that there may be additional suitable alternative sites in eastern Chula Vista that were not explored in the AFC or FSA. Finally, Staff's conclusions regarding the infeasibility of meeting peak demand with conservation measures and renewable generation are unsupported by both the law and the evidence.

2. The FSA Failed to Adequately Analyze the "No Project" Alternative.

Staff's analysis in the FSA improperly assumes that approval of the Project will necessarily help facilitate decommissioning of the SBPP by replacing

some of that older plant's capacity. As discussed in Section II of this statement, however, the deletion of the black start engine from the Project description undercuts this assumption. Accordingly, it is inappropriate for the FSA's "No Project" alternative discussion to assume or suggest that the Commission's denial of certification for this Project would impede CAISO's ability to release the SBPP from RMR status.

3. There Are More Prudent and Feasible Means of Achieving Public Convenience and Necessity.

As discussed throughout this statement and in EHC's comments on the PSA, the Project is inconsistent with applicable LORS, including environmental justice standards, General Plan policies, and zoning provisions. Accordingly, in order to certify the Project, the Commission must make the findings required by Public Resources Code section 25525, including a finding that there are no more prudent and feasible alternative means of achieving public convenience and necessity.

It is EHC's position that the Commission cannot make this finding because there are more prudent and feasible means of meeting public demand for the energy that would be generated by this Project. EHC submitted evidence on this issue in connection with its comments on the PSA and intends to offer additional evidence at the evidentiary hearing.

4. Failure to Respond to Comments.

The FSA failed to provide a reasoned response to significant environmental points raised in comments on the PSA. Specifically, Staff responded to EHC's comments regarding the feasibility of peak demand reduction strategies by asserting that the Commission is not required to consider demand reduction alternatives in power plant siting decisions. Staff then used this same rationale to avoid any response to EHC's comments regarding alternative generation technologies. Staff's rationale is legally incorrect; the Public Resources Code section cited by Staff was repealed by the Legislature in 2002. As a result, the FSA failed to address significant environmental points raised during the comment process, in violation of CEQA.

F. Power Plant Reliability

EHC has identified two unresolved reliability issues. First, as discussed in Section II of this statement, the deletion of the black start engine from the Project description violates the terms of SDG&E's request for offers and may affect the Project's availability factor. Second, publicly available financial statements filed by the Applicant indicate that the Project does not have comprehensive flood insurance due to its location in a 100-year flood plain. Staff's analysis of the Project's long-term reliability did not consider the possibility that the Project might suffer considerable uninsured damage due to flooding.

IV. Identity of Witnesses and Summary of Testimony by Topic Area

Diane Takvorian: Ms. Takvorian is the Executive Director of EHC and has nearly three decades of professional experience with environmental justice issues. Her testimony will address the Project's general noncompliance with environmental justice principles, specifically including the topic areas of Public Health and Socioeconomics. EHC anticipates no more than one hour will be required to present Ms. Takvorian's testimony, depending on the amount of cross-examination by other parties.

Joy Williams, MPH: Ms. Williams is EHC's Research Director. She has extensive experience with air quality and public health issues as well as GIS expertise. Ms. Williams' testimony will address Air Quality and Public Health topic areas, specifically including the environmental justice implications of the relationship between air pollution and public health impacts. Ms. Williams also has created GIS maps showing the relative concentration of hydrocarbon-fueled electrical generation facilities in metropolitan statistical areas within San Diego County. EHC anticipates that no more than one hour will be required to present Ms. Williams' testimony, depending on the amount of cross-examination by other parties.

Diana Vera: Ms. Vera is a 45-year resident of Chula Vista who lives in the neighborhood situated closest to the Project site. Her expertise is based on her having lived in the area for decades and her intimate familiarity with the community most directly affected by the Project. Ms. Vera's testimony will address the increasing concentration of industrial facilities in her neighborhood, as well as the community's reaction to the City's offer to purchase home improvements and new appliances for affected residents using funding provided by the Applicant. EHC anticipates that no more than 30 minutes will be required to present Ms. Vera's testimony, depending on the amount of cross-examination by other parties.

Bill Powers, P.E.: Bill Powers is a Professional Engineer with extensive experience in electrical generation, transmission, and renewable energy issues. Mr. Powers' testimony will address the availability of demand reduction and renewable generation alternatives to the Project, including more prudent and feasible means of achieving public convenience and necessity. EHC anticipates that no more than two hours will be required to present Mr. Powers' testimony, depending on the amount of cross-examination by other parties.

V. Cross-Examination

EHC requests the opportunity to cross-examine Staff and Applicant witnesses on all topic areas in dispute. Until we see other parties' prehearing conference statements, witness lists, and exhibit lists, we cannot be certain about the nature or extent of cross-examination. However, EHC anticipates that the scope of cross-examination will include at least the following:

Air Quality: Staff and Applicant witnesses regarding disclosure of impacts and effectiveness of mitigation measures.

Land Use: Staff and City witnesses regarding interpretation of and compliance with General Plan policies and zoning ordinances.

Alternatives: Staff and Applicant witnesses regarding selection, analysis, and feasibility of alternative sites and generation methods.

EHC anticipates that cross-examination will require no more than 30 minutes per witness. Again, however, we cannot be certain how many witnesses will require cross-examination, or how extensive that examination may be, until we have seen the other parties' prehearing conference statements and supporting materials.

VI. Exhibits

A preliminary list identifying exhibits and declarations that EHC intends to offer into evidence, and the technical topics to which they apply, is attached as Exhibit A hereto. EHC will submit a final exhibit list along with its exhibits at the prehearing conference. In addition, EHC intends to seek official

notice, subject to 20 C.C.R. § 1213, of certain documents currently numbered as Exhibits 618 through 627 on the preliminary exhibit list.

VII. Proposals for Briefing Schedules

Due to a scheduling conflict, EHC requests that opening briefs be due no earlier than October 27, 2008, if the evidentiary hearing is held as scheduled on October 2, 2008. If the evidentiary hearing is postponed, EHC respectfully reserves the right to modify this request accordingly.

VIII. Proposed Modifications to Conditions of Certification.

Air Quality: Based on consistency with the evidence, EHC requests that the Commission retain Condition of Certification AQ-SC9. EHC also requests that Staff add a condition confirming that the Applicant will not seek a post-approval amendment to add a black start engine to the Project. Moreover, to ensure adequate mitigation of potentially significant impacts, Condition of Certification AQ-SC6 must be rewritten to provide enforceable, mandatory mitigation measures that will result in measurable, quantifiable reductions of emissions in the geographical areas affected by the Project.⁸

Land Use: For consistency with the evidence, EHC requests a condition specifying that the Applicant will not seek further expansion of the Project in the future.

⁸ EHC notes that references on pages 4.1-40 and 4.1-41 of the FSA to Condition of Certification "AQ-SC7" should refer to "AQ-SC6."

Noise: EHC requests a condition prohibiting operation of the Project between the hours of 10:00 AM and 7:00 PM, to conform to evidence submitted by the City of Chula Vista regarding compliance with local ambient noise thresholds.

Dated: September 16, 2008

Respectfully Submitted,

SHUTE, MIHALY & WEINBERGER LLP



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ENVIRONMENTAL HEALTH
COALITION

EXHIBIT A

Intervenor Environmental Health Coalition
Chula Vista Energy Upgrade Project
Docket No. 07-AFC-4
Preliminary Exhibit List
September 16, 2008

Ex.	Title	Technical Topic(s)
600	Environmental Health Coalition, Comments Re: Preliminary Staff Assessment for the Chula Vista Energy Upgrade Project (07-AFC-4) (with attachments)	Air Quality, Land Use, Environmental Justice, Alternatives
601	Declaration of Joy Williams	Public Health, Environmental Justice
602	Testimony of Joy Williams Re: CVEUP Public Health Impacts	Public Health, Environmental Justice
603	References Cited in Testimony of Joy Williams Re: CVEUP Public Health Impacts	Public Health, Environmental Justice
604	Testimony of Joy Williams Re: Mapping of Generation Infrastructure Distribution in San Diego County	Socioeconomics, Environmental Justice
605	Map: Megawatts Per 10,000 People, by Metropolitan Statistical Area, Natural Gas & Landfill Gas Facilities Only (2000 Census)	Socioeconomics, Environmental Justice
606	Map: Megawatts Per 10,000 People, by Metropolitan Statistical Area, Natural Gas & Landfill Gas Facilities Only (2007 Population Estimate)	Socioeconomics, Environmental Justice
607	Declaration of Diane Takvorian	Socioeconomics, Environmental Justice
608	Testimony of Diane Takvorian	Socioeconomics, Environmental Justice
609	References Cited in Testimony of Diane Takvorian	Socioeconomics, Environmental Justice
610	Declaration of Diana Vera	Land Use, Environmental Justice
611	Testimony of Diana Vera	Land Use, Environmental Justice
612	City of Chula Vista, Letter to Residents Re: "Free Energy and Water Home Conservation Program" (Aug. 18, 2008) (cited in Testimony of Diana Vera)	Land Use, Environmental Justice
613	Declaration of Laura Hunter	Socioeconomics, Environmental Justice
614	Community Statements of Opposition to CVEUP (referenced in Declaration of Laura Hunter)	Socioeconomics, Environmental Justice
615	Declaration of Bill Powers, P.E.	Alternatives
616	Testimony of Bill Powers, P.E.	Alternatives
617	References Cited in Testimony of Bill Powers, P.E.	Alternatives
618	California Air Resources Board, The Carl Moyer Program Guidelines (Rev. 2008) (excerpts)	Air Quality

619	City of Chula Vista General Plan (excerpts)	Land Use
620	City of Chula Vista Zoning Ordinance (excerpts)	Land Use
621	City of Chula Vista, Letter to Christopher Meyer, Cal. Energy Comm'n, Re: Chula Vista Energy Upgrade Project (Jan. 31, 2008)	Land Use
622	City of Chula Vista, Letter to Christopher Meyer, Cal. Energy Comm'n, Re: Chula Vista Energy Upgrade Project (June 13, 2008)	Land Use
623	Pub. Res. Code 25305 (2002) (repealed)	Alternatives
624	Stats.2002, c. 568 (SB 1389)	Alternatives
625	MMC Energy, Inc., Form 10-Q (Aug. 11, 2008) (excerpts)	Power Plant Reliability
626	City of Chula Vista, City Council Agenda Packet (Aug. 18, 2005) (excerpts)	Land Use
627	City of Chula Vista, City Council Minutes (Aug. 18, 2005)	Land Use

P:\EHC\MMC\kpb011 (exhibit list).doc

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AND DEVELOPMENT COMMISSION**

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UPGRADE PROJECT

Docket No. 07-AFC-4

PROOF OF SERVICE

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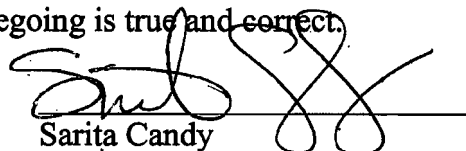
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I, Sarita Candy, declare that on September 16, 2008, I deposited copies of the attached PREHEARING CONFERENCE STATEMENT OF INTERVENOR ENVIRONMENTAL HEALTH COALITION in the United States mail at San Francisco, California, with first class postage thereon fully prepaid and addressed to those on the Proof of Service list above.

--OR--

Transmission via electronic mail was consistent with the requirements of 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.


Sarita Candy