

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

**APPLICATION FOR
CERTIFICATION FOR THE
EASTSHORE ENERGY CENTER IN
HAYWARD BY TIERRA ENERGY**

DOCKET NO. 06-AFC-6
(AFC Accepted 11/8/06)

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**EASTSHORE ENERGY LLC'S COMMENTS ON THE
REVISED PRESIDING MEMBER'S PROPOSED DECISION**

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October 1, 2008

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Pursuant to Title 20 of the California Code of Regulations Section 1749(b) and the Notice of Availability of the Revised Presiding Member's Proposed Decision and Notice of Commission Hearing, Eastshore Energy Center ("Eastshore") hereby files these Comments on the Revised Presiding Member's Proposed Decision ("Revised PMPD").

I. INTRODUCTION

Eastshore urges the Energy Resources Conservation and Development Commission ("Commission") to reject the Committee's continued recommendation for denial of the Application for Certification of the Eastshore Energy Center ("AFC"). As demonstrated by the extensive exhibits, including written and verbal testimony presented by Eastshore for this proceeding, the Committee's "revised" recommendation continues to reflect an incomplete, distorted and inappropriate view of the record. The Commission cannot reasonably rely upon flawed Staff calculations and overlook actual overflight measurements and technical complete modeling that demonstrates there is no aviation safety risk. Eastshore has been the only party to offer actual data regarding the alleged aviation safety risk. Eastshore's Plume Overflight Study offered the only scientific evidence upon which to render a decision in this matter. The Commission must also not defer its reasoned, independent judgment for the biased decision-making of the City of Hayward ("the City"), who has reached inexplicable and opposite conformity determinations for two power plants in very close proximity to each other.

Were the Commission to adopt the Committee's Revised PMPD, it would not be within the Commission's regular pursuit of its authority because the Commission would be ignoring the

substantial evidence in the record. (California Public Resources Code § 25531(b)). The evidence in the record does not support the conclusions in the Revised PMPD, and rather supports a decision approving the Application for Certification.

Eastshore respectfully urges the Commission to reject the Committee's preliminary decision and draft in its place a decision approving Eastshore's AFC.

II. DISCUSSION

A. The Project Poses No Risk to Aviation Safety And No Significant Unmitigated Environmental Impacts.

The Committee ignored the extensive technical information regarding aviation safety presented by Eastshore throughout the proceeding, including Eastshore's offer to conduct a second flyover test that would address the Committee's concerns about the first flyover test. Eastshore presented substantial evidence, supported by thermal plume modeling and a detailed protocol involving the flyover of the Barrick facility, clearly demonstrating that thermal plumes from the Eastshore project will not present an aviation safety risk. The Commission cannot reasonably adopt a flawed Staff evaluation simply because it is labeled as conservative, when the Staff's analysis is without any technical merit. The Commission should reject the ill-informed emotion reflected in testimony fueled by misinformation provided in a flawed Staff analysis. Were the Commission to ignore Eastshore's extensive technical data and actual evidence, as did the Committee, the Commission would fail to regularly pursue its authority pursuant to California Public Resources Code § 25531(b). No substantial evidence in the record can support the Committee's findings with regard to the project's purported impacts on aviation. Rather, the record supports Eastshore's conclusion that there is no potential for thermal plumes to impact aviation safety.

The Committee ignored the following key points set forth in evidence provided by Eastshore:

- Commission Staff plume calculations are inherently flawed. This fundamental point was never rebutted; rather, Staff cobbled together an incorrect and incomplete screening level procedure and then incorrectly applied it to screening level criterion from the Australian Government Civil Aviation Safety Authority's Advisory Circular (CASA Advisory Circular). The modeling evidence relied upon by Staff and the Committee is inaccurate and unreliable, due to its inaccurate and incomplete nature. Staff only conducted a screening-level analysis for the

Eastshore project where a full protocol analysis was necessary, requiring detailed modeling once the threshold conditions were met. The full analysis includes the complete Katestone Environmental analysis of both calm and varied weather conditions. This means not simply looking at the calm case scenario but also including meaningful weather data for various other wind and temperature scenarios. The CASA Advisory Circular specifically states that a model cannot rely on a calm case scenario alone, but must take into account the full analysis, which includes all weather data for various conditions. (Ex. 26 at 4-5.) This is because calm weather conditions rarely occur in the field. In addition, Staff inaccurately assumed no separation between the stacks and between the fans. Thus, Staff's findings are based upon flawed and inappropriate use of data inputs and criteria to reach unsupportable results and unsubstantiated conclusions, as is more fully discussed below. Staff's erroneous calculations severely overestimated vertical velocity and plume height.

- The Committee ignores the fact that Eastshore performed detailed modeling *in addition to* performing *actual* overflight measurements. Eastshore relied upon well-documented and technically supported modeling performed consistent with the CASA Advisory Circular for the Russell City Energy Center ("RCEC"). This modeling was accepted by the same Siting Committee as part of the RCEC proceedings. The RCEC modeling concluded that thermal plume impacts from RCEC would be remote. Eastshore applied the accepted RCEC modeling procedures to the Eastshore engines, demonstrating that thermal plumes posing an aviation risk were an even more remote possibility from Eastshore than they were from RCEC. Eastshore's showed that a 4.3 m/s plume will not reach more than 330 feet AGL, that 99.9 percent of the time the calculated plume height will be lower, that the lowest recorded overflight of Eastshore at 330 feet is below the legal minimum of 393 feet and should be therefore viewed as a rare exception, and that for fixed wing aircraft, the lowest level an aircraft should fly over Eastshore in a circling pattern around the airport is 493 feet above ground level.
- Despite the definitive nature of the Barrick flyover test, Eastshore attempted to dispel any remaining doubts on the part of the Committee about its Barrick overflight test by offering to conduct a second overflight test. The second overflight test was designed to incorporate the concerns of the Committee and the other parties, as well as alleviate any zoning and general plan consistency implications due to aviation impacts. However, the Committee rejected Eastshore's offer to provide further actual evidence and instead chose to rely upon modeling and arguments in briefs.
- Eastshore also demonstrated that 0.01% of flights from the Hayward Executive Airport would fly over the Eastshore site, and, of this small number of flights, the lowest observed flight (at an altitude that is below the acknowledged legal minimum) was above an altitude where Eastshore plumes would dissipate. (Ex. 20 at 12.)

- Because there is an extremely remote possibility of flights over the site and all flights are above the level of plume dissipation, there is **no** possibility that the Eastshore project would cause an aviation hazard.
- B. The Project Will Comply With All Applicable Laws, Ordinances, Regulations and Standards (“LORS”).

The City’s inconsistent treatment of the Eastshore project and RCEC, which constitute the same type of use in the same land use zone, can only lead to a conclusion that the City exercised its discretion in an arbitrary and capricious manner. (*See Endangered Habitats League v. Orange County (Rutter Development)* (2005) 131 Cal.App.4th 777, 782 (explaining that the arbitrary and capricious standard applies to a municipality’s determination regarding a project’s consistency with the municipality’s general plan).) The City does not have unfettered discretion to apply – or not apply – policies in its general plan. Section 65862 of the California Government Code requires municipalities to treat land uses within land use zones uniformly. Despite the added language in the Revised MPPD, the City’s inconsistent General Plan interpretations are constitutionally infirm. An agency’s inconsistent enforcement of land use laws, where equal conditions exist, is subject to review under the due process and equal protection clauses of the United States Constitution. (*See, e.g., City of Banning v. Desert Outdoor Advertising, Inc.* (1962) 209 Cal.App.2d 152, 154; *Kuzinich v. County of Santa Clara* (9th Cir. 1982) 689 F.2d 1345, 1349.)

Nonetheless, the Committee continues to defer to the City’s interpretation of its General Plan despite the City’s inexcusable application of its General Plan policies in an illogical and inconsistent manner. In interpreting its General Plan in favor of the similar RCEC project but not for the Eastshore project located in the same land use zone, the City has blatantly revealed a preference for the RCEC. As a state agency that must maintain the interests of the State of California as its highest priority, the Commission cannot defer to a city that has so obviously shown a preference for one project over another.

Due to this bias, the City is not capable of rendering an objective interpretation of its General Plan. The Commission should therefore disregard the City’s reading of the General Plan. Further, the Commission cannot show deference to the City’s position which fabricates the existence of a Business and Technology Corridor when none exists, and then applies that fiction

to find Eastshore is inconsistent with local agency LORS, after reaching the exact opposite conclusion for a power plant project nearly five times the size within a matter of weeks.

Furthermore, the Commission's continued deference to the City's unsupported interpretation of its General Plan does not constitute a regular pursuit of its authority and is not supported by substantial evidence in the record.

The Commission should independently evaluate these facts and reach the only logical conclusion – the Eastshore project will comply with all currently applicable LORS, based on the following:

- Deference to a local jurisdiction is ill-advised and unjustifiable when there is a flagrant inconsistency in the jurisdiction's actions that can only be considered arbitrary and capricious. Commission deferral in this case is inconsistent with the fundamental role of the Commission, as a state agency responsible for managing California's energy generation resources, to make an objective decision.
- The presence of a Business/Technology Corridor in the City of Hayward's Industrial Corridor remains just a goal – no such designation has yet been adopted or codified by the City. (See Ex. 401 at 4, 5 and Ex. 406 at 2-6, 2-19.) The City's opposition to the Eastshore project is therefore inconsistent with the appropriate application of City LORS, especially in light of the reverse decision made by the City to support the RCEC. It is only necessary for a project to comply with current LORS, not those that may or may not be adopted in the future. In addition, the City has had significant time between the start of this AFC process and now to adopt a zoning ordinance that conforms to the General Plan's "Business and Technology Corridor" aspirations, but has yet to do so. This fact is highly probative of whether the City truly plans to implement the General Plan's positing of such a Corridor, or rather merely uses the Corridor as a weapon in its opposition to the Eastshore project. More importantly, there is no City action with respect to the still uncoded Business and Technology Corridor to which deference may be given, in light of the lack of adoption – after plenty of time – of an ordinance putting the Business and Technology Corridor into effect. As a result, the Commission's consideration and adoption of the City's flawed interpretation of its General Plan in a final decision would not be within the Commission's regular pursuit of its authority and would not be supported by substantial evidence in the record.

Further, the project site is adjacent to the existing Berkeley Farms milk processing facility, which stores and uses anhydrous ammonia, a more potent and hazardous product than the aqueous ammonia proposed for the Eastshore project. Yet the Berkeley Farms facility has not been claimed to be inconsistent with the purported effort to attract high tech and information-based businesses to the currently-nonexistent Business and Technology Corridor. (Ex. 200, p. 4.5-11.) The presence

of the Eastshore project does not present any more of a deterrent to the future of the “Business and Technology Corridor” than the Berkeley Farms facility.

- The project is located squarely in the center of an existing Industrial Corridor on property that is zoned for industrial use. A full 0.5 mile buffer exists between the site and other properly zoned uses. The few residences and commercial concerns located closer are non-conforming uses that have been allowed within the Industrial Corridor.
- C. The Commission Should Find that Eastshore is Desirable for the Public Convenience and Necessity and Compare the Benefits of Eastshore Consistent with the Commission’s Los Esteros Decision.

In determining that the Eastshore project is not necessary for the “public convenience and necessity” and thereby declining to override, the Revised PMPD continues to ignore the declared statewide need for electricity generation. The Eastshore project was proposed in response to the California Public Utilities Commission’s (“CPUC”) regional and statewide process of electric energy procurement. The Commission and the CPUC issued the Energy Action Plan II (“EAP II”) in 2005 which unequivocally declares the State’s need for new generation. (EAP II, 2005 at 7.) In fact, the CPUC has specifically focused on the urgent need to supply local generation, precisely the sort of generation Eastshore offers (in addition to its statewide benefits). (CPUC D. 06-07-029 at 36, emphasis added.)

Eastshore would further advance the public convenience and necessity by fulfilling the Commission’s own stated need for additional peaking capacity. Eastshore would do more than simply contribute 115 MW of capacity, it would fulfill the Commission-acknowledged need for resources to meet peak demand. (2007 Integrated Energy Policy Report (“IEPR”) at 7.) The Revised PMPD still fails to recognize the fact that the Commission’s own 2007 IEPR specifically calls for increasing the efficiency and flexibility of conventional natural gas powered generation. The 2007 IEPR emphasizes that newer natural gas electricity generation facilities like Eastshore provide efficiency and environmental benefits by reducing greenhouse gas emissions as they reduce the amount of natural gas used. (*Id.* at 239.) The 2007 IEPR favors natural gas peaker plants such as Eastshore because of their efficiency and flexibility, as well as their complementary nature to renewable resources. (*Id.* at 146, 218.)

Although the Committee has acknowledged in the Revised PMPD that its original override analysis in the PMPD (which only relied upon one previous override decision – the

Metcalf Energy Center (“Metcalf”) in laying out LORS override standards) was misleading, it has not revised the language to consider other override decision language. Instead, the Revised PMPD should have cited to the more recent 2006 Los Esteros Decision which presents a more analogous override situation to Eastshore because the two are of similar size, with Los Esteros adding 140 MW to the existing facility, which is comparable to Eastshore’s 115 MW of electrical generation.

D. The Revised PMPD Contains Factual Errors.

Besides the failure of the Revised PMPD in applying the substantial evidence in the record to approve the AFC, the Revised PMPD also contains factual errors requiring correction.

The Revised PMPD continues to refer to “high velocity” plumes arising from the Eastshore project’s exhaust stacks. (See, for example, pages 22 and 23.) The plumes are only relevant as they impact aviation. There is no evidence in the record to support that description in that context. Rather, the record supports only a conclusion that exhaust plumes from the Eastshore plant lack either the size or the velocity to create turbulence at a height above ground that would endanger aviators. (See discussion in Section II.A above.)

On page 319, the Revised PMPD misrepresents the geographical setting of the Eastshore project, failing to state that the project is located in the center of the eastern Industrial Corridor, a location which provides a buffer of 0.5 mile from residential, public and commercial zones.

Also on page 319, the Revised PMPD fails either to acknowledge or to take into account the fact that Life Chiropractic College West does not serve young, school-age children.

The reference on page 325 to a letter from Fremont Bank (Ex. 302) is inaccurate as respects the City’s purported effort to attract information-based businesses. That letter contains no reference to an “information-based” economy or a disruption of the City’s future planning goals.

The purported erosion of visual integrity, discussed on page 325, conflicts with the Findings and Conclusions on visual resources on pages 437-38, paragraphs 1, 7, and 12.

At page 361, the Revised PMPD states that “more than 45 times per month” aircraft fly within 974 horizontal feet of the site and at altitudes below 1,000 AGL. This statement, while

accurate, is prejudicially incomplete. The record shows the number of flights per month arriving and departing the Hayward airport total 10,000.

Footnote 138 on page 378 is factually inaccurate. The tolerance of up to 100 feet is only allowed on pilot check rides, and thus to state that pilots on any flight are given such tolerance is misleading.

E. Specific Comments by Issue Area are Attached in Attachment 1.

Eastshore addresses specific comments by specific issue areas contained in the Revised PMPD in Attachment 1. These specific comments demonstrate, in more directed detail, why the Commission should reject the PMPD.

III. CONCLUSION

California needs generation, a fact repeatedly recognized by this Commission. This includes local peaking capacity as well as capacity generally. The record establishes that the Eastshore Energy Center will provide capacity and will do so within applicable Laws, Ordinances, Regulations, and Standards and without any significant unmitigated environmental impacts. The Commission should reject the Revised PMPD and instead issue a final decision approving the Application for Certification.

DATED: October 1, 2008

DOWNEY BRAND LLP

By: _____

Jane E. Luckhardt
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ATTACHMENT 1

Specific Comments on the Revised PMPD

The following specific comments have been prepared so that the issue area and Revised PMPD page number is referenced for each comment.

Committee Recommendation, pg 1-2:

Because the record supports the determination that the Eastshore Energy Center will comply with applicable LORS and be mitigated to insignificant impact levels, the Commission should reject the Revised PMPD and grant certification of the proposed Eastshore project.

Land Use, pg 6-7:

The Eastshore site is consistent with the City's Airport Approach Zoning Regulations as well as the Conditional Use Permit ("CUP") requirements because the project's thermal plumes would not cause turbulence to aircraft flying at low altitude over the project site. The project would not create a safety hazard within the airport zoning area since aircraft do not regularly fly over the Eastshore site at an altitude where thermal plumes would have a significant effect on aircraft.

The Revised PMPD adds that the "EEC is also inconsistent with Land Use Policy 7 of the City's General Plan 2002 Update, which promotes the transition of the eastern portion of the Industrial Corridor from heavy industry to information-based technology." This is an erroneous conclusion because it references only the General Plan. Land Use Policy 7 means nothing without a proper zoning ordinance. All zoning laws must conform to adopted general plans (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183) and no current City zoning ordinance exists that is designed to transform the Industrial Corridor into a Business and Technology Corridor.

Indeed, Commission Staff has recognized that "although General Plan policies are important, **without consistent zoning to implement development in accordance with the General Plan, the intent of those policies cannot be accomplished.** Zoning is the legal method by which local jurisdictions can implement development." (*Chula Vista Energy Upgrade Project Final Staff Assessment* Response to Comments at 4.5-45, emphasis added.) The reliance in the Revised PMPD on the City's General Plan, in the absence of a zoning ordinance, is inconsistent with this statement by Staff, which in turn is consistent with law. Such reliance is not within the Commission's regular pursuit of its authority.

Further, the State of California General Plan Guidelines set forth that "[w]hen a new element or major revision to a general plan is adopted, the zoning scheme should be thoroughly reviewed for consistency. It must be amended if necessary to ensure that it is adequate to carry out the new element or revisions." (2003 State of California General Plan Guidelines, Governor's Office of Planning and Research at 165.)

What is more, while Mr. Rizk indicates that the City is in the process of implementing this objective (Ex. 401 p. 4, 5 and Ex. 406 p. 2-6, 2-19), there is no evidence of any discrete City actions to designate a Business and Technology Corridor in this portion of the Industrial Corridor or elsewhere in the City. The City's reference to the Fremont Bank letter provides no support for its declared objective. The Fremont Bank letter contains no reference to an "information-based" economy or a disruption of the City's future planning goals. The bank's reference to hazardous materials concerns are specious given its chosen location directly adjacent to the Berkeley Farms

milk processing facility where more potent and hazardous anhydrous ammonia is in use. All the perceived concerns identified in the bank's letter have been addressed in the original PMPD and impacts have been mitigated to insignificant levels.

Therefore, there is substantial evidence in the record to support the determination that Eastshore will comply with applicable LORS and be mitigated to insignificant impact levels, and a lack of substantial evidence to reach the conclusion reached in the Revised PMPD. If the Commission chooses to adopt the City's erroneous interpretation of its LORS in a final decision, despite the substantial evidence presented by Eastshore, it would not be within the Commission's regular pursuit of its authority.

Traffic and Transportation, pg 7-8:

The record supports a determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels.

The Revised PMPD references Eastshore's November 2007 flyover test at the Barrick facility and Eastshore's request to reopen the evidentiary record to allow a second flyover test. The Committee rejected Eastshore's efforts to provide actual evidence based on a belief that "[s]ubstantial evidence on the record establishes that the project location itself creates an unmitigable adverse impact . . ." and because Eastshore and the Russell City project would result in a cumulatively considerable adverse impact on aviation safety.

The Revised PMPD erroneously concludes that evidence from a second flyover test would not change its findings. Eastshore is the only party to this proceeding that has provided both detailed modeling *and* actual overflight measurements, as opposed to Staff and intervenors, who supplied only flawed modeling results. These arguments and modeling results fail to rebut Eastshore's record evidence demonstrating that thermal plumes from the Eastshore site will not cause an aviation risk. Therefore, the Committee has erred in continuing to adopt Staff's flawed evaluation in the Revised PMPD and the Commission would not be within the regular pursuit of its authority if it adopted the Revised PMPD in a final decision.

Override, pg 8-9:

The record supports a determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels. As a result, there is no need for a Commission override. Nonetheless, the following findings support an override.

As stated above in the accompanying Comments on the Revised Presiding Member's Proposed Decision ("Comments"), the Commission should compare the benefits of Eastshore consistent with the Commission's previous decision in the Los Esteros siting case, and not simply rely on the Metcalf decision.

The Eastshore project is in fact necessary for the "public convenience and necessity" based primarily on the statewide need for electricity. This is in addition to the Commission's own stated need for additional peaking capacity in the 2007 Integrated Energy Policy Report ("IEPR") which emphasizes that new natural gas-fired facilities like Eastshore provide efficiency and environmental benefits by reducing greenhouse gas emissions as they reduce the amount of natural gas used. (IEPR at 7.)

Power Plant Site and Facilities, pg 22-24:

The Revised PMPD continues to refer to “high velocity” plumes arising from the Eastshore project’s exhaust stacks. There is no evidence in the record to support that description. Rather, the record supports only a conclusion that exhaust plumes from the Eastshore plant lack either the size or the velocity to create turbulence at a height above ground that would endanger aviators. See discussion in the accompanying Comments concerning the aviation issue.

Project Alternatives, pg 31-32:

The Revised PMPD adds a paragraph pertaining to Eastshore’s terminated Power Purchase Agreement with PG&E. Eastshore’s prudent cancellation of the Power Purchase Agreement does not decrease PG&E’s need for new generation in Northern California. Eastshore cancelled its Power Purchase Agreement with PG&E due to the lack of a timely decision on Eastshore’s Application for Certification (“AFC”). Without knowledge of the eventual decision on Eastshore’s AFC, Eastshore was unwilling to risk millions of dollars in potential damages to maintain the Power Purchase Agreement with PG&E. This discussion is irrelevant to the issue of Project Alternatives and should be removed.

Project Alternatives, pg 39:

Because the record supports the determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels in both the areas of Land Use and Traffic and Transportation, there is no need to determine whether a feasible alternative site is necessary.

Project Alternatives, pg 40:

The final paragraph of the Project Alternatives discussion regarding override should be struck from the Revised PMPD. The record supports a determination that Eastshore will comply with applicable LORS and be mitigated to insignificant impact levels. As a result, there is no need for a Commission override.

Project Alternatives, pg 41:

Finding No. 6 of the Revised PMPD should not reference unmitigable adverse impacts. The record supports the determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels. Therefore, there are no significant adverse impacts to be avoided by the “No Project” alternative.

Land Use, pg. 319:

The Revised PMPD continues to misrepresent the geographical setting of the Eastshore project. To do so in a final decision would not be within the regular pursuit of the Commission’s authority. The Revised PMPD fails to state that the project is located in the center of the eastern Industrial Corridor, a location which provides a buffer of 0.5 mile from residential, public and commercial zones. This section of the Revised PMPD also fails either to acknowledge or to take into account the fact that Life Chiropractic College West does not serve young, school-age children.

The Revised PMPD text is an incomplete version of the cited text that misstates the Staff testimony. These changes, and those specific wording changes set forth in Eastshore's Comments to the PMPD, are necessary to reflect Staff's testimony accurately.

Land Use, pg. 325:

The Revised PMPD's discussion of the Eastshore project's impact on the City's ability to attract "high-tech, information based businesses" to the Industrial Corridor is a misstatement of the law and factual setting and if adopted by the Commission in a final decision, would not be within the regular pursuit of its authority.

First, the project site is adjacent to the existing Berkeley Farms milk processing facility, which stores and uses anhydrous ammonia, a more potent and hazardous product than the aqueous ammonia proposed for the Eastshore project. Yet the Berkeley Farms facility has not been claimed to be inconsistent with the purported effort to attract high tech and information-based businesses to the currently-nonexistent Business and Technology Corridor. (Ex. 200, p. 4.5-11) Therefore, the presence of the Eastshore project does not present any more of a deterrent to the future of the "Business and Technology Corridor" than the Berkeley Farms facility.

Second, while Mr. Rizk indicates that the City is in the process of implementing this objective (Ex. 401 at 4, 5 and Ex. 406 at 2-6, 2-19), there is no evidence of any discrete City actions to designate a Business and Technology Corridor in this portion of the Industrial Corridor or elsewhere in the City. The City's reference to the Fremont Bank letter provides no support for its declared objective. The Fremont Bank contains no reference to an "information-based" economy or a disruption of the City's future planning goals. The bank's reference to hazardous materials concerns are specious given its chosen location directly adjacent to the Berkeley Farms milk processing facility where more potent and hazardous anhydrous ammonia is in use. All the perceived concerns identified in the bank's letter have been addressed in the PMPD and impacts have been mitigated to insignificant levels.

Third, "smart growth" principles and land use policy to develop a "Business and Technology Corridor" promoted by the City's General Plan 2002 Update mean nothing without a proper zoning ordinance to reinforce its requirement. All zoning laws must conform to adopted general plans (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183), and no current City zoning ordinance exists that is designed to transform the Industrial Corridor into a technology corridor.

In fact, the Commission Staff has stated that "although General Plan policies are important, without consistent zoning to implement development in accordance with the General Plan, the intent of those policies cannot be accomplished. Zoning is the legal method by which local jurisdictions can implement development." (Chula Vista Energy Upgrade Project Final Staff Assessment Response to Comments at 4.5-45.)

Furthermore, the State of California General Plan Guidelines set forth that "[w]hen a new element or major revision to a general plan is adopted, the zoning scheme should be thoroughly reviewed for consistency. It must be amended if necessary to ensure that it is adequate to carry out the new element or revisions." (2003 State of California General Plan Guidelines, Governor's Office of Planning and Research at 165.)

It is only necessary for a project to comply with current LORS, not those that may or may not be adopted in the future. In addition, the City has had sufficient time between the start of this AFC

process and now to adopt a zoning ordinance that conforms to the General Plan's "Business and Technology Corridor" aspirations but has yet to do so. This fact is highly probative of whether the City truly plans to implement the General Plan's positing of such a Corridor, or rather merely uses the Corridor as a weapon in its opposition to the Eastshore project. More importantly, there is no City action with respect to the still-uncodified Business and Technology Corridor to which deference may be given, in light of the lack of adoption – after plenty of time – of an ordinance codifying the Business and Technology Corridor. As a result, the Commission's consideration and adoption of the City's flawed interpretation of its General Plan in a final decision would not be within the Commission's regular pursuit of its authority and would not be supported by substantial evidence in the record.

Land Use, pg. 326:

In reference to subsection a's discussion of the "modest benefits of the project," Eastshore responds that the Eastshore facility will not cause significant aviation hazards and will provide local system benefits. It therefore provides desirable public convenience and welfare benefits. The record supports a determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels. As a result, there is no need for a Commission override.

Land Use, pg. 326-327:

Subsection b states that the Eastshore project's exhaust stacks will impair the character and integrity of the zoning district and surrounding areas. The height of the Eastshore stacks is comparable to other industrial/manufacturing structures within 0.5 miles of the proposed project site, including Gillig Inc. and Berkeley Farms, and the proposed stacks are not as tall as the existing Rohm & Haas stack (120 feet) or the twin stacks of the RCEC (145 feet), which the City supports. Furthermore, the project will be located in the Industrial Corridor on property that is zoned for industrial use.

There is ample and uncontroverted evidence in the visual resources testimony to conclude that the project will not be visually intrusive and will not erode the character and integrity of the District. The Findings and Conclusions on visual resources at pages 437-438:

1. The EEC site is situated in an area designated by the City of Hayward as the "Industrial Corridor", characterized by existing industrial and commercial facilities, tall tower structures, and utility lines.
7. The project's publicly visible structures and red aviation lights on the 14 exhaust stacks will blend into the general industrial background surrounding the site.
12. Potential cumulative visual impacts will be mitigated to insignificant levels.

These Findings and Conclusions are both correct and supported by substantial evidence in the record.

Land Use, pg. 327:

In reference to subsection c's statement that the City believes the Eastshore project will be detrimental to public health, safety or general welfare due to the project's supposed aviation impacts, Eastshore responds that there is substantial evidence in the record to support the conclusion that Eastshore will not adversely impact aviation safety. See accompanying Comments as well as comments in this attachment on Traffic and Transportation section.

Land Use, pg. 328-334:

Subsection d has been redrafted for the Revised PMPD and addresses the Eastshore project's perceived lack of harmony with applicable City policies and the intent and purpose of the zoning district. The Revised PMPD first looks to the City's General Plan 2002 Update to designate a Business and Technology Corridor, as well as the City's inconsistencies in permitting the RCEC and not Eastshore.

As stated above, the Revised PMPD's discussion of the Eastshore project's impact on the City's "land use goals to develop a Business and Technology Corridor" is a misstatement of the law and factual setting, and as such, it is not supported by substantial evidence in the record. As has been noted previously, there does not presently exist any Business and Technology Corridor. For this reason, there is no requirement that the Commission grant "judicial deference to the agency's [City's] determination." No such deference is due to a non-action.

Eastshore refers the Commission to its prior comments concerning the Land Use section of the Revised PMPD with respect to proximity to the Berkeley Farms milk processing facility, the Fremont Bank letter's failure to support the alleged land use objective to develop a Business and Technology Corridor, the City's failure to adopt a zoning ordinance in support of the Business and Technology Corridor and the fact that substantial evidence in the record supports a finding that Eastshore will not adversely impact aviation safety.

Land Use, pg. 334:

In response to the Revised PMPD's summary of Alameda County and its Airport Land Use Commission's (ALUC) position, Eastshore notes that the ALUC was incorrectly informed by expert agencies and consultants who relied primarily on the Staff technical analysis to reach their conclusions. (12/18/07 RT 266, 269, 274, 275.) Eastshore has demonstrated that Staff's analysis is technically flawed and is therefore unreliable. Eastshore has also demonstrated through modeling and actual measurements that the Eastshore project would not cause an adverse impact to aviation safety.

The record supports the conclusion that Eastshore will not adversely impact aviation safety. Record evidence includes empirical measurements confirming modeling results that demonstrate plume vertical velocities are not hazardous at the traffic pattern altitude and actual overflight measurements of a very similar facility that demonstrate there is little or no turbulence that would impact aviation. See accompanying Comments and comments in this attachment on the Traffic and Transportation section.

Land Use, pg. 335-336, Cumulative Impacts:

Substantial evidence in the record supports the conclusion that Eastshore will not adversely impact aviation safety, while there is a lack of record evidence supporting any other conclusion. Argument and conjecture in briefs are not evidence. An adoption of the Revised PMPD's cumulative impacts discussion by the Commission in a final decision would not constitute the regular pursuit of its authority. See immediately preceding comments, accompanying Comments and comments in this attachment on the Traffic and Transportation section.

Land Use, pg. 336-338, Commission Discussion:

The record demonstrates that the City conducted no discretionary review of the amended RCEC site and its interpretation of its regulations is inconsistent and arbitrary. The City made its

determination without the benefit of any environmental analysis. The City based its determination on zoning consisting of an insufficient amount of information upon which to base a decision of zoning consistency. The City did not even have the benefit of an environmental impact report as most likely would have been prepared but for the Commission's exclusive siting authority. The City made conclusions on impacts such as visual resources without a complete analysis. Therefore, the City was unable to make a fully-informed decision.

In addition, land use decisions for a city are made by elected officials who necessarily must be attentive to voters. On the other hand the Commission is charged to consider state interests in making decisions on a power plant.

Eastshore also refers the Commission to its prior comments on the Land Use section of the Revised PMPD concerning the lack of a current Business and Technology Corridor and the fact that substantial evidence in the record supports a finding that Eastshore will not adversely impact aviation safety.

Land Use, pg. 338-341, Findings and Conclusions:

The Revised PMPD's Land Use Findings and Conclusions should be revised for the following reasons.

First, the Revised PMPD's findings and conclusions fail to recognize that the City's General Plan 2002 Update means nothing without a proper zoning ordinance to reinforce its requirement.

Second, the record demonstrates that the City conducted no discretionary review of the amended RCEC site and its interpretation of its regulations is inconsistent and arbitrary.

Third, substantial evidence in the record supports the conclusion that Eastshore will not adversely impact aviation safety. This evidence includes modeling that demonstrates plume vertical velocities are not hazardous at the traffic pattern altitude and actual overflight measurements of a very similar facility that demonstrate there is little or no turbulence that would impact aviation. See accompanying Comments and comments on the Traffic and Transportation section.

Land Use, pg. 342-343, LAND USE Table 4:

This table should be revised to reflect the above comments and corrections to the Revised PMPD's erroneous interpretation of facts and law. The table will then accurately reflect substantial evidence in the evidentiary record.

Traffic and Transportation, pg . 358, Potential Aviation Impacts:

The Revised PMPD adds a paragraph discussing Eastshore's potential aviation impacts, including turbulence from the invisible plumes, added complexity to the airspace and cumulative impacts with the RCEC project.

The record supports the conclusion that Eastshore will not adversely impact aviation safety. This evidence includes modeling that demonstrates plume vertical velocities are not hazardous at the traffic pattern altitude and actual overflight measurements of a very similar facility that demonstrate there is little or no turbulence that would impact aviation.

Eastshore has provided actual overflight data and accurate modeling results. Despite the definitive nature of this evidence, Eastshore attempted to dispel stated concerns about its first overflight test by offering to conduct a second overflight test. The second overflight test was

designed to incorporate the concerns of the Committee and the other parties, as well as alleviate any zoning and general plan consistency implications due to aviation impacts. However, the Committee rejected Eastshore's attempt to provide further actual evidence and instead erroneously relied upon flawed modeling and arguments in briefs.

Traffic and Transportation, pg. 358 a. The Hayward Airport and the EEC Site:

In referring to the current airspace restrictions around the Hayward Executive Airport, the Revised PMPD errs by not stating that these restrictions are only *potentially* problematic. Substantial evidence in the record supports the conclusion that Eastshore will not adversely impact aviation safety.

This section also fails to acknowledge that flights over the Eastshore site occur less than 0.01 percent of the time and there is no documented occurrence of an overflight of the Eastshore site below 330 ft.. (Ex. 20 at 12.) Therefore the occurrence of overflights of the Eastshore plume are essentially nonexistent. (12/18/07 RT 225-226.) In addition, for fixed wing aircraft, the lowest level an aircraft should fly over Eastshore in a circling pattern around the airport is 493 feet above ground level. (12/18/07 RT 268.)

Traffic and Transportation, pg . 361, b. Flights Over the EEC Site:

This section of the Revised PMPD states that "more than 45 times per month" aircraft fly within 974 horizontal feet of the site and at altitudes below 1,000 AGL. The Revised PMPD fails to note that the record reflects that those are 45 overflights of a total of 10,000 flights per month arriving and departing the Hayward airport. (Ex. 20 at 12.)

As a result, this statement misconstrues and indeed ignores critical facts and does not present the entire picture. While aircraft may fly over the Eastshore site in the range of 300 to 400 feet AGL, flights between 505 to 919 feet in April 2007, and a single flight at 330 feet AGL in June 2007 (Ex. 200, p. 4.10-20; Ex. 208), represent about **0.01 percent** of the approximately 10,000 flights. Therefore the occurrence of overflights of the Eastshore plume is essentially nonexistent. (12/18/07 RT 225-226.) In addition, for fixed wing aircraft the lowest level an aircraft should fly over the site in a circling pattern around the airport is 493 feet above ground level. (12/18/07 RT 268.)

This section also states that "the Caltrans witness testified that although the Hayward traffic pattern altitude is 650 MSL (600 AGL), pilots are given tolerance to 100 feet deviation from the assigned altitude and in some cases a pilot could fly as low as 393 feet AGL in landing mode (the FAA-approved circling altitude is 493 feet) and still be within legal operating regulations. (12/18/07 RT 120-122)." However, this portion of the Revised PMPD fails to acknowledge that the manager of the Hayward control tower, Sandra Garupto, indicated that arriving aircraft should be at least 1,000 feet above the ground and it is preferred that they be 1,200 feet above the ground. (12/18/07 RT 223.) It also fails to acknowledge that Jay White admitted the lowest level an aircraft should be flying over Eastshore in a circling pattern on approach to landing is 540 feet above sea level or 493 feet above ground level. (See 12/18/07 RT 268.)

Eastshore provides the above comments because they are necessary to present an accurate and balanced citing of the evidence in the record.

Traffic and Transportation, pg . 361-365, c(1). Staff's Plume Velocity Analysis:

The Revised PMPD's "Staff's Plume Velocity Analysis" contains multiple factual errors.

First, the Revised PMPD notes that Staff's Analysis utilized the Katestone Method to model plume velocity and that "Australian aviation authorities have established that an 'exhaust plume' with a vertical velocity in excess of 4.3 meters per second (m/s) may cause damage to an aircraft airframe or upset an aircraft when flying at low levels." The Revised PMPD fails to acknowledge that Eastshore has identified numerous technical flaws in Staff's approach that were not refuted. (See discussion in accompanying Comments.) Eastshore has also calculated that more than 99.9% of time, the plumes would dissipate more rapidly and the 4.3 m/s velocity would be reached at altitudes much lower than 330 feet. Perhaps most startling is that Staff incorrectly applied the 4.3 m/s threshold, a guideline from an Australian Civil Aviation circular that has not been adopted for use in the United States. (Ex. 20, Testimony of Corbin and Darwin 1-18.)

Second, the Revised PMPD summarizes the basis of Staff's modeling result which uses a worst-case (indeed, virtually non-existent) scenario of no wind and merges the plumes of all stacks. This summary presents yet another factual inaccuracy because Staff assumed no separation between the stacks and between the fans. The Revised PMPD's summary of Staff's Analysis also fails to mention that Staff only conducted modeling, did not provide actual overflight data and did not even present any testimony at the evidentiary hearing to respond to Eastshore's overflight evidence. Staff only submitted a response in its post-hearing briefs. Briefs are not evidence, and cannot provide a sufficient evidentiary base on which to establish a proposed decision.

Therefore, the summary description does not reference the incorrect application of the 4.3 m/s threshold, Staff's numerous technical errors or Eastshore's detailed technical analysis which demonstrates that Eastshore's vertical velocities are expected to be very low and below levels of significance below 330 ft. Flights over the Eastshore site occur less than 0.01 percent of the time and there is no documented occurrence of an overflight of the site below 330 ft. (Ex. 20 at 12.)

Traffic and Transportation, pg . 366-370, c(2) Applicant's Plume Velocity Analysis and Helicopter Flyover Report:

This section of the Revised PMPD fails to mention Eastshore's attempt to conduct a second flyover test precisely because the Committee found fault with Eastshore's Barrick flyover test.

Eastshore has provided substantial evidence, both actual overflight data and modeling results. Despite the definitive nature of this evidence, Eastshore attempted to dispel any remaining doubts about its first overflight test at the Barrick facility by offering to conduct a second overflight test. The second overflight test was designed to incorporate the concerns of the Committee and the other parties, as well as alleviate any zoning and general plan consistency implications due to aviation impacts. However, the Committee rejected Eastshore's attempt to provide further actual evidence and instead chose to rely upon flawed modeling and arguments in briefs.

Furthermore, Eastshore points out that this section of the Revised PMPD neglects to accurately state that Eastshore's vertical velocity calculations demonstrate that 330 feet is the highest altitude where a threshold velocity of 4.3 m/s could be reached and that more than 99.9 percent of the time, the altitude would be lower, since there were only 9 calm hours in the 7 years of data examined. (Ex. 20 Testimony of Corbin and Darwin at 6-10.)

Eastshore provides the above comments because they are necessary to present an accurate reflection of the record which shows that Eastshore performed both extensive plume vertical velocity calculations (Testimony of Corbin and Darwin) and actual overflight measurements.

Should the Commission choose to rely on the Committee's Revised PMPD for its final decision, despite the overwhelming substantial evidence supplied by Eastshore showing no aviation safety impact, the Commission would not be in regular pursuit of its authority.

Traffic and Transportation, pg . 370-371, c. 3. Resolution of Dispute on Plume Height:

The Revised PMPD states in this section that the results of Eastshore and Staff's independent plume analyses are "remarkably similar;" that pilots do not always stay within the narrow flight pattern; that plumes will reach into the range of 300 to 400 feet AGL; and for these reasons the Commission cannot rely on Eastshore's Barrick flyover test because it did not represent the worst-case scenario.

There are more differences than similarities between Staff and Eastshore's analyses, and the differences are stark. The Revised PMPD cannot rely on Staff's assessment because of its numerous technical deficiencies as well as inaccurate assumptions. (See discussion in accompanying Comments.) By contrast, the calculations provided by Eastshore are conservative, not technically flawed, and buttressed by actual overflight measurements that corroborate the absence of significant turbulence over a similar facility.

When the Barrick test was performed not all engines were operating, the cold conditions reduced radiator fan use, and the presence of wind meant that the weather conditions were not worst-case, because plumes rise higher in still air. This is a strength, not a weakness, in the flyover test, because such conditions reflects typical operations. In any event, Eastshore's plume calculations demonstrate that vertical velocities do not reach an altitude of concern.

Furthermore, Eastshore once again points out that it was the only party to offer actual evidence that directly answers the question of plume-related impacts to overflying aircraft. Eastshore has even offered to address the above-noted circumstances present in the Barrick flyover with yet another overflight test, but the Committee rejected Eastshore's offer.

In contrast, Eastshore's criticisms of Staff's modeling are unrefuted and strike to the core of the efficacy of Staff's analysis. While the Revised PMPD acknowledges the FAA's acceptance of the Staff's modeling "as a valid representation of hazardous exhaust velocities. . ." (Ex. 200 at 4.10-20; Ex. 39 at 6), the Commission must discount the FAA's acceptance as the FAA's own witness testified that the FAA performed no assessment of thermal plume velocities and indeed did not even consider thermal velocities in its assessment. (12/18/07 RT 275.) The FAA witness also acknowledged that the FAA's official position that the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation had not changed. (12/18/07 RT 277 – 278.) Because the Revised PMPD cannot rely on Staff's flawed modeling results of a 4.3 m/s plume at 480 feet AGL, the Revised PMPD must rely on Eastshore's assessment that a 4.3 m/s plume will not reach more than 330 feet AGL, that 99.9 percent of the time the calculated plume height will be lower, and that the lowest recorded overflight of the Eastshore project at 330 feet is below the legal minimum of 393 feet and should be therefore viewed as a rare exception.

Eastshore provides the above comments because they are necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore to demonstrate that vertical velocities from the Eastshore project will not reach an altitude of concern.

Traffic and Transportation, pg . 371-372, a. Summary of Plume Height and Hazard to Aviation Safety:

The Revised PMPD must discount the FAA's acceptance of Staff's plume analysis as the FAA's own witness testified that the FAA performed no assessment of thermal plume velocities and indeed did not even consider thermal velocities in its assessment. (12/18/07 RT 275.) The FAA witness also acknowledged that the FAA's official position that the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation had not changed. (12/18/07 RT 277 – 278.)

The Revised PMPD cannot rely on Staff's flawed modeling results of a 4.3 m/s plume at 480 feet AGL. Instead, the Commission should look to Eastshore's assessment that a 4.3 m/s plume will not reach more than 330 feet AGL, that 99.9 percent of the time the calculated plume height will be lower, and the lowest recorded overflight of Eastshore at 330 feet is below the legal minimum of 393 feet and should be therefore viewed as a rare exception.

As noted in Footnote 131, Eastshore offered to conduct a second flyover test in order to remedy any deficiencies in the Barrick flyover test noted by Staff and the Committee. The Committee rejected Eastshore's offer and has instead chosen to rely on flawed modeling results as opposed to actual physical evidence of plume impacts on overflying aircraft.

Eastshore provides the above comments because they are necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore to demonstrate that vertical velocities from Eastshore will not reach an altitude of concern. In its final decision, the Commission should note that the substantial evidence in the record does not support the Revised PMPD's findings and conclusions of the Traffic and Transportation section.

Traffic and Transportation, pg . 372-373, b. Unmitigatability of the Hazard:

In noting that the FAA has recommended that pilots avoid flying over plumes with less than 1,000 feet of vertical clearance, the Revised PMPD does not tell the whole story. Such guidance is advisory only and in fact the approved pattern altitude for the Hayward Airport is 650 ft AGL. Since the maximum height of vertical plumes is much less than this altitude, there is no significant risk that must be mitigated. This is consistent with the FAA's determination that the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation. (12/18/07 RT 277 – 278.)

Therefore, the thermal plumes from Eastshore would not constitute a significant, adverse impact on the environment in compliance with CEQA requirements. (See Cal. Code Regs, tit. 14, § 15000, App. G, Part XV, Transportation/Traffic, Part (c).)

Eastshore provides the above comments because they are necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore to demonstrate that vertical velocities from Eastshore will not reach an altitude of concern. In its final decision, the Commission should note that the substantial evidence in the record does not support the Revised PMPD's findings and conclusions of the Traffic and Transportation section.

Traffic and Transportation, pg . 374, c. Effect of the EEC on Airspace Congestion:

This section should be revised to reflect the evidentiary record and the substantial weight of the evidence submitted by Eastshore demonstrating there is no aviation safety hazard. As shown by Eastshore, because the project's thermal plumes are unlikely to pose a hazard to aircraft, the

mere presence of the power plant does not create a safety hazard. Eastshore will not complicate aircraft maneuverability because there is no need to maneuver the aircraft to avoid the project. Aircraft in this area are already generally above the 1,000 foot FAA guideline level. Eastshore also notes that aircraft training does not occur within the area of the project. (Ex. 20, Testimony of Graves, at 8-15.)

Traffic and Transportation, pg . 375, City of Hayward:

Because the Eastshore project will not create an aviation safety hazard, it therefore does not constitute an obstruction and is consistent with the Airport Ordinance. See discussion in the Land Use section above.

Eastshore provides the above comments because they are necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore to demonstrate that vertical velocities from Eastshore will not reach an altitude of concern. In its final decision, the Commission should note that the substantial evidence in the record does not support the Revised PMPD's findings and conclusions of the Traffic and Transportation section.

Traffic and Transportation, pg . 376, City of Hayward:

The second paragraph on this page states that the "City's witness testified that there is a significant difference between the location of the RCEC, approved with mitigation [temporary Notice to Airmen (NOTAM) with "see and avoid" instructions], and the EEC site."¹¹⁹

The Commission should find this testimony unpersuasive. The RCEC is located 1.5 miles from the Executive Airport, just 0.2 miles further away than Eastshore. Furthermore, Eastshore's impacts to aircrafts overflight are much less than those created from the larger plumes emanating from the RCEC stacks.

The next paragraph goes on to summarize the FAA's views. Eastshore points out that these views are based on the assumption that some restriction of the airspace is necessary. However, this assumption is faulty. The Eastshore plumes will not pose an aviation safety risk and no restriction to the airspace is necessary. The Eastshore project does not require mitigation for aviation safety and is consistent with the Zoning Code, the Airport Ordinance and airport operations.

Eastshore provides the above comments because they are necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore to demonstrate that vertical velocities from Eastshore will not reach an altitude of concern. In its final decision, the Commission should note that the substantial evidence in the record does not support the Revised PMPD's findings and conclusions of the Traffic and Transportation section.

Traffic and Transportation, pg . 378, Alameda County:

Footnote 138 is factually inaccurate. The Commission should make it clear that on **pilot check rides**, pilots are given a tolerance up to 100 feet. To state that pilots on any flight are given such tolerance is misleading. This change is necessary to accurately reflect the evidentiary record.

Traffic and Transportation, pg . 379-380, Cumulative Impacts:

As evidenced in the previous comments, the Eastshore project will not cause an aviation safety hazard and will not further restrict airspace. Therefore there is no cumulative impact on aviation safety from the project.

Eastshore provides the above comment because it is necessary to reflect the evidentiary record and the substantial weight of evidence submitted by Eastshore demonstrating there is no aviation safety hazard.

Traffic and Transportation, pg . 380-381, Commission Discussion:

This discussion should be revised to include a statement that the opinions of the expert aviation agencies are founded on a flawed technical analysis or flawed interpretation of the City's ordinances.

In addition, Eastshore comments that this section should also make it clear that the FAA findings of the Safety Risk Assessment that the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation remain valid. (12/18/07 RT 113:17- 25-115.)

These changes are necessary to make the decision consistent with the evidentiary record and the substantial weight of evidence submitted by Eastshore demonstrating there is no aviation safety hazard.

Traffic and Transportation, pg . 381-384, Findings and Conclusions:

The Revised PMPD's Traffic and Transportation Findings and Conclusions should be entirely revised to reflect the above comments and particularly that the evidence submitted by Eastshore demonstrates that there is no aviation safety hazard.

Override, pg 444:

The opening paragraph to the Override chapter should reflect Eastshore's comments in this attachment concerning the Land Use and Traffic and Transportation chapters. Taking into account those comments, the record supports the determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels.

Override, pg 451:

The Revised PMPD states that it is merely following the City's and County's interpretation of their LORS.

However, as stated above in its comments to the Land Use chapter of the Revised PMPD, such deference is due only when the agency is not acting in an arbitrary and capricious manner. Here, the City has acted in an arbitrary and capricious manner with regard to its decision to permit RCEC but not Eastshore. See accompanying Comments.

Override, pg 452-453, a. Is the EEC "Required for Public Convenience and Necessity"?

The Commission should make certain points of law clear, specifically with regard to the Commission's most recent override decisions.

The Commission should state that, in each of its three most recent override decisions, the Commission has taken as its starting point for finding public convenience and necessity the extent to which a project is reasonably related to the goals of the Warren-Alquist Act, which expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. (Metcalf Commission Decision at 463; El Segundo Commission Decision at 296; and Los Esteros Commission Decision at 367-368.)

In applying section 25525 override criteria, the Commission has consistently held that determining "public convenience and necessity" must rely on the totality of the evidence of

record and consider environmental impacts, consumer benefits, and electrical system reliability – hewing precisely to the criteria set forth in the statute. (E.g., Metcalf Commission Decision at 461.)

The Commission’s broad discretion in deciding whether public convenience and necessity requires a project be built and therefore whether or not to override applicable LORS must be exercised consistently with the policies of the Warren-Alquist Act. The Warren-Alquist Act declares that it is the responsibility of state government to ensure the state is provided with an adequate and reliable supply of electrical energy. (Los Esteros Commission Decision at 368, citing California Public Resources Code § 25001.)

Override, pg 453-454:

This discussion within the Revised PMPD took into account some of Eastshore’s previous comments on the PMPD, but still fails to discuss Eastshore’s contribution to the public convenience and necessity beyond the Hayward area. In order to properly assess the benefits the Eastshore project would provide, the Commission must look to the Hayward area **and** California as a whole. While the Revised PMPD briefly mentions that the Eastshore project would benefit the Hayward area, it still fails to acknowledge that Eastshore will contribute greatly to meet the local demand in the City, in addition to the state as a whole. Eastshore emphasizes that the amount of local demand is not what matters; what does matter is the significance of that demand to the community. The City imports nearly all of its electricity; therefore, on a percentage basis, the Eastshore project would clearly be a significant contributor to the City’s public convenience and necessity. (Eastshore’s Override Rebuttal Brief at 12, 20.)

While the Revised PMPD takes account of some of Eastshore’s original comments on the PMPD regarding the project’s environmental benefits to the state, the Revised PMPD does not fully incorporate them. Although the Eastshore project would indeed provide straightforward and quantifiable benefits, it cannot be considered in that light alone. Instead, it must be viewed in the context of each piece of the California energy policy picture. This section of the Revised PMPD does not fully recognize the fact that bringing Eastshore on line would result in the replacement of aging facilities and provide much-needed peaking power to the California grid. Eastshore would more than simply contribute 115 MW of capacity, it would fulfill the Commission’s stated need for resources to meet peak demand. (2007 IEPR at 7.) The Revised PMPD fails to acknowledge the fact that the Commission’s own 2007 IEPR specifically calls for increasing the efficiency and flexibility of conventional natural gas powered generation. (Eastshore’s Override Brief at 24.) The 2007 IEPR emphasizes that newer natural gas electricity generation facilities like Eastshore provide efficiency and environmental benefits by reducing greenhouse gas emissions as they reduce the amount of natural gas used. (Eastshore’s Override Brief at 25.) Peaker plants like Eastshore also replace aging and inefficient facilities that are being misused as peakers. (*Id.*)

Override, pg 456-457, CEQA Override:

The Commission should revise the language of this section. There is substantial evidence in the record to support the determination that the Eastshore project will comply with applicable LORS and be mitigated to insignificant impact levels.

Override, pg 457-458, Benefits and the Adverse Impacts of the EEC Project:

This discussion should be revised to incorporate Eastshore's comments above regarding the Eastshore project's significant economic benefits and contribution to electric reliability. The Commission should balance the benefits of the project against the perceived adverse impacts to properly address the CEQA override issue. Such balancing will lead the Commission to the conclusion that the adverse impacts touted by the other parties are based on erroneous technical analysis and that the benefits far outweigh the minimal adverse impacts.

Override, pgs 459-460, Findings:

As detailed above, these findings still do not adequately reflect the benefits that would be provided by the Eastshore project. Under the reasoning of the Revised PMPD, no small targeted peaker could ever obtain an override. This is so despite the fact that it is just these types of projects that the 2007 IEPR recognizes are needed.

In addition, the Findings should have included the considerable benefits of the Eastshore project to the local economy described in the Socioeconomic section of the Revised PMPD.

**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
(AFC Accepted 11/8/06)**

**PROOF OF SERVICE
(Revised 9/11/08)**

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:

CALIFORNIA ENERGY COMMISSION

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DECLARATION OF SERVICE

I, Lois Navarrot, declare that on October 1, 2008, I deposited copies of the attached **EASTSHORE ENERGY CENTER'S COMMENTS ON THE REVISED PRESIDING MEMBER'S PROPOSED DECISION** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was 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.



Lois Navarrot