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

APPLICATION FOR CERTIFICATION FOR THE CHULA VISTA ENERGY UPGRADE PROJECT	DOCKET NO. 07-AFC-4 (AFC Filed 8/10/07)

MMC CHULA VISTA'S REPLY BRIEF ON REQUESTED BRIEFING TOPICS

November 19, 2008

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Pursuant to the Notice of Evidentiary Hearing Date and Hearing Order (dated September 22 and 24, 2008, respectively) and the Briefing Order (dated October 10, 2008), MMC Energy, Inc. (MMC) hereby files its Reply Brief on Requested Briefing Topics ("Reply Brief"). This Brief responds to statements made by California Energy Commission ("Commission") Staff ("Staff"), the City of Chula Vista ("City") and Environmental Health Coalition ("EHC") in their opening briefs regarding the three briefing topics contained in the Briefing Order: 1. Laws, ordinances, regulations and standards (LORS); 2. California Environmental Quality Act (Cal. Pub. Resources Code §§ 21000 et seq.) (CEQA); and 3. Environmental Justice.

I. MMC HAS MET ITS BURDEN TO PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT CERTIFICATION

As MMC demonstrated in its Opening Brief on Requested Briefing Topics ("MMC's Opening Brief"), the record clearly shows that MMC has presented substantial evidence demonstrating the proposed design, construction and operation of the Chula Vista Energy Upgrade Project (CVEUP) is consistent with applicable laws, ordinances, regulations and standards (LORS) and will not create significant adverse environmental impacts. MMC has proposed specific mitigation measures and accepted additional mitigation measures proposed by Staff to address potential impacts from CVEUP. These mitigation measures ensure CVEUP will be constructed and operated to protect environmental quality and assure public health and safety.

The primary opponent to CVEUP, EHC, has submitted various arguments to attack this evidence, but all of these arguments fall flat. This Reply Brief explains why each argument is groundless.

Because CVEUP satisfies the applicable legal standard under section 25525 of the California Public Resources Code, MMC respectfully requests that the Commission certify CVEUP.

I. CVEUP COMPLIES WITH LAND USE LORS

This section addresses EHC's Opening Brief arguments related to the project's compliance with LORS. Specifically, MMC replies that CVEUP will fully comply with the land use policies of the City of Chula Vista General Plan ("General Plan") and with its Zoning Ordinance ("Zoning Ordinance"); that no feasible alternatives meet the objectives of the project and eliminate any nonconformance with land use LORS; and that the Commission would be able to exercise its override authority if it were asked to do so, even though an override is not necessary.

In general, EHC expresses concerns with the air impacts associated with the project. This is the primary thread running through its comments, whether they take place in the context of the sections involving LORS, Air Quality, Public Health or Environmental Justice. Yet EHC almost wholly fails to acknowledge the fact that a less-efficient power plant is already located on the exact same site proposed for this project, and fails to acknowledge that operations at the site and at the nearby South Bay Power Plant (located less than five miles away), would likely have to increase operations to meet demand if this project is not approved. Both of these plants are less efficient and emit pollutants at a higher rate than CVEUP.

In essence, EHC stresses form over substance, arguing that general plan policies enacted because of air quality concerns should prevent the siting of a project that would help address air quality concerns in the region.[1]

As discussed more fully below, MMC notes that:

- While CVEUP meets each specific policy of the General Plan, MMC notes that it is well settled in the law that "perfect conformity" is not required. This is why the general plan is described in terms of "goals" and "policies."
- After careful analysis and after requesting and receiving changes to the project and additional mitigation measures, the City has determined that CVEUP complies with the City's General Plan. The courts have held that this determination is entitled to "great deference."
- While EHC spends some 30 pages in its opening brief discussing land use issues, it is telling that it failed to provide a single land use witness to discuss its position at the evidentiary hearing. There was no opportunity for the Commission or MMC to cross examine EHC on its position.

[1] Fortunately, CEQA requires that the evaluation of any project must take place within the context of what is already going on at the place proposed for the development (baseline) and what will occur if the project is not approved (no project alternative). EHC's analysis is fundamentally flawed in that it fails to evaluate the project within the context of the baseline and a no project alternative.

- While EHC notes that a single General Plan policy has changed since the existing power plant was approved in 2000, it fails to acknowledge that the existing power plant was approved under multiple General Plan policies and Zoning Ordinance sections that have not changed since that time. EHC cites a number of cases for the proposition that precedent can not "bind" the City or the Commission. MMC is not suggesting that the Commission is bound by determinations made in 2000. However, it is strongly suggesting that the City's interpretation of its own General Plan and Zoning Ordinance, both now and in 2000, is significant and is entitled to great deference.

A. The Evidence In the Record Demonstrates that CVEUP is Consistent with the City's General Plan

1. State Law Does not Require Perfect Conformity with a General Plan

EHC states that a project cannot be consistent with an entire general plan if it conflicts with a policy that is "'fundamental, mandatory, and clear,' regardless of whether it is consistent with other general plan policies." (EHC's Opening Brief at 4, citing *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782-783; and *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-42) ("*FUTURE*").) But EHC takes this sentence out of context. First, the *Endangered Habitats League* decision says nothing about a project being inconsistent due to a conflict with one general plan policy "regardless of whether it is consistent with other general plan policies." (EHC's Opening Brief at 4, emphasis added.) EHC also neglects to state that the *Endangered Habitats League* decision poignantly declares within the same paragraph: "Perfect conformity is not required, but a project must be compatible with the objectives and policies of the general plan." (*Id.* at 782, citing *FUTURE.*) As stated in MMC's Opening Brief, the law does not require perfect conformity with each individual policy. Rather, the whole of the general plan must be considered together, not just individual policies. "No project could completely satisfy every policy stated in the [General Plan], and state law does not impose such a requirement. . . ." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719.)[2]

Because perfect conformity between a proposed project and the general plan is not necessary, the local jurisdiction must find a balance that weighs the pros and cons to achieve an acceptable mix. (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807 at

[2] MMC's Opening Brief also cited *Greenbaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406, 407; and *Corona-Norco Unified Sch. Dist. v. City of Corona* (1983) 17 Cal. App. 4th 985, 994.

817 and 822.) This allows local officials flexibility and is the reason why general plans ordinarily do not state specific mandates or prohibitions but instead state "policies" and set forth "goals." (*Id.* at 817, emphasis added).

The City has unambiguously declared that CVEUP would be in harmony with the General Plan. In its August 7, 2008 letter to the Commission (which contains the City's August 4, 2008 Agreement with MMC), the City noted that:

> A project need not be in complete conformity with each and every policy of the General Plan to be deemed consistent with the General Plan because it is likely that no project would completely satisfy every policy stated in the General Plan. ... Based upon the preliminary analyses and requirements presented by Staff in the Preliminary Staff Assessment . . . and the specific benefits and mitigation described above, we believe that the City will find that the Project is in harmony with and therefore, consistent with the General Plan.

(Ex. 803 at 3.) The City again referred to its letter in its opening brief, which also expressed the City's support of Staff's determination that CVEUP is in compliance with all applicable LORS. (City's Opening Brief at 2 and Attachment A (previously submitted as Ex. 803).) The City reaffirms its support of these mitigation measures in its opening brief providing: "[s]ecuring the implementation of these measures as conditions to the AFC is fundamental to addressing community concerns." (City's Opening Brief at 3-4.)

2. The City's Interpretation of Its General Plan Must be Given Great Deference.

EHC understates the deference that should be given to the City's determination as to the project's conformity with the General Plan. It is well-settled in the law that the City's determination must be given great deference. "When we review an agency's decision for consistency with its own general plan, we accord great deference to the agency's determination." (*Save Our Peninsula Comm. v. County of Monterey* (2001) 87 Cal.App.4th 99, 142.) "A governing body's conclusion that a particular project is consistent with the relevant general plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 357.)

3. CVEUP is Consistent with the General Plan Limited Industrial Land Use Designation

EHC claims that CVEUP is incompatible with the General Plan's limited industrial land use designation, noting that the designation is "intended for light manufacturing; warehousing; auto repair; auto salvage yards; and flexible-use project that combine these uses with associated office space." (EHC Opening Brief at 5 citing General Plan p. LUT-53, emphasis added.) In contrast, EHC notes that the general industrial designation allows" heavier manufacturing, large-scale warehousing, transportation centers and public utilities."

However, as discussed above and in MMC's Opening Brief, the City's interpretation that CVEUP is consistent with the General Plan must be given great weight. Moreover, when reviewing the proposed project as to its impacts, CVEUP is much more consistent with the light industrial zone than the general industrial zone. In particular, "large scale warehousing and transportation centers" implicate projects with high traffic impacts. CVEUP is much more consistent with the limited traffic associated with the light industrial zone. (Ex. 200 at 4.10-1.) EHC's emphasis on "public utilities" is also misplaced. "Public utilities" may encompass a broad array of projects, including such uses as water and sewer treatment facilities, cable facilities, and traffic-intensive postal facilities. It would be wildly out of place to have a general prohibition on all facilities related to public utilities without an analysis as to the actual facilities proposed.

EHC misunderstands the purpose of a general plan, which is to provide general policies and goals. Again, they urge an approach that emphasizes form over substance.

4. CVEUP is Consistent with General Plan Policy E6.4

EHC's primary argument is that CVEUP is inconsistent with General Plan Policy E6.4 which provides that the City should:

> Avoid siting new or re-powered energy facilities *and other* major toxic emitters within 1,000 feet of a sensitive receiver.

(General Plan Policy E6.4, emphasis added.)

EHC states that the City determined that the project would not be consistent with Policy E6.4 based on its Comments on the Preliminary Staff Assessment. (EHC Opening Brief at 7, 8.) This is simply untrue. EHC correctly cites the City's earlier remarks on the Preliminary Staff Assessment (PSA), but EHC fails to state that the City has since changed its position as a result of negotiations with MMC that culminated in the August 4, 2008 Agreement between the City

and MMC. (Attachment A to the City's Opening Brief.) As stated above, the City declared in the August 4, 2008 Agreement and on several recent occasions: "we [City] believe that the City will find that the Project is in harmony with and therefore, consistent with the General Plan." (Ex. 803 at 3, see also City's Opening Brief at 2, citing the Final Staff Assessment (FSA), and Attachment A.) EHC mischaracterizes a previous statement by the City that is inapplicable and no longer valid. In fact, the City's evaluation process reflects what would occur during a planning and review process if the Commission did not have jurisdiction here. A project proponent like MMC would present its project, the City would comment as it did on the PSA, MMC would respond with revisions to the project or mitigation measures and eventually these negotiations would lead to an agreement between the City and project proponent, as it did here. Thus, EHC and the Commission should not rely on an outdated comment, but should instead look to the City's current evaluation of the project and to the actual language of Policy E6.4.

As more fully explained in MMC's Opening Brief, close inspection of Policy E6.4's language reveals that it does not apply to CVEUP. (See MMC's Opening Brief at 9-11.) Policy E6.4 is intended only to recommend against the placement of a new or re-powered energy facility that is *also* a major toxic emitter within 1,000 feet of a sensitive receiver. No other interpretation makes sense.

As set forth in MMC's Opening Brief, the term "major toxic emitter" is not defined in the City's General Plan but both the Clean Air Act and the San Diego Air Pollution Control District (SDAPCD) regulations provide definitions for "major source" of hazardous air pollutants.[3] CVEUP does not meet either definition and therefore should not qualify as a "major toxic emitter." (Ex. 5 at 3.) Also, as noted in MMC's Opening Brief, the Public Health section of the FSA has also concluded that potential exposure risks to residents due to toxic exposures are well below significance levels. (Ex. 4.7-12, 13.)

In addition, in using the word "avoid" instead of "shall not" or "prohibit," the General Plan allows discretion in siting new or re-powered energy facilities. MMC has complied with this policy of "avoidance" in that MMC surveyed other potential sites in the area but ultimately determined that the most environmentally sound option was to recycle and reuse the existing site, a decision in accord with the no project alternative discussion within the FSA. (See the

[3] See definition of "major source" and "hazardous air pollutant" at 42 USC § 7412; and definition of "major stationary source" at SDAPCD Rule 20.1(c)(35).

Alternatives discussion at section VI.H. of MMC's Opening Brief for a more detailed discussion.)

EHC speculates that Staff "misapprehends the place of the zoning ordinance in the hierarchy of planning law." (EHC's Opening Brief at 10.) To support its argument, EHC misstates, once again, that the City found the project inconsistent with the General Plan. (EHC's Opening Brief at 10, citing the City's former and inapplicable Comments on the PSA.) Again, as noted above, the City has since determined that the project is consistent with the General Plan. In fact, in describing Staff's FSA analysis as "unsupportable," EHC conveniently chose to leave out Staff's reference to the City's August 4, 2008 Agreement which declares that the City finds the project consistent with the General Plan. (Ex. 200 at 4.5-16.)

EHC's Opening Brief also attributes comments to Staff where none existed. EHC tries to characterize Staff's testimony as relying on a "fall back" argument because Staff supposedly realized that its explanation of CVEUP's conformance with Policy E6.4 was "unworkable." (EHC's Opening Brief at 9.) This assumption is simply groundless. Instead, Staff has correctly noted that EHC's interpretation of Policy E6.4 is unworkable because it would make it inconsistent with other elements of the General Plan, (which are largely unchanged since the 2000 approval). (Staff's Opening Brief at 6.) "Specific sections of the General Plan should be read in harmony with each other." (Staff's Opening Brief at 7.)

a. The City's Agreement with MMC is Relevant to CVEUP's Determination of Consistency

As discussed above and in MMC's Opening Brief, CVEUP is consistent with Policy E6.4. EHC's Opening Brief asserts that the City's August 4, 2008 Agreement with MMC "does not resolve the Project's inconsistencies with the general plan . . . ." (EHC's Opening Brief at 11.) EHC cites the *Endangered Habitats League* case for the statement that deference is due to an agency unless "no reasonable person could have reached the same conclusion on the available evidence." (EHC's Opening Brief at 11.)

Deference is due to the City. Several "reasonable persons" have concluded that the project is consistent with the General Plan, most notably Staff. Again, not only do reasonable persons support this interpretation, but EHC failed to even provide a witness to support its contrary conclusion.

EHC also attempts to characterize the Agreement between the City and MMC as an illegitimate "off-line settlement agreement." (EHC's Opening Brief at 12.) This could not be further from the truth. The City and MMC, at the behest of Staff, were encouraged to work between themselves to resolve what differences they could. (City's Opening Brief at 3.) The Agreement is simply a culmination of those efforts and sets forth additional mitigation measures to be provided by MMC, as well as the City's opinion that the project is consistent with the General Plan. These types of agreements between local jurisdictions and project developers are common in the land use arena. The Agreement reflects a mutual understanding and compromise between the City and MMC.

The City's Agreement with MMC is highly relevant, and the City's determination of CVEUP's consistency with the General Plan should be given great weight by the Commission.

5. CVEUP is Consistent with General Plan Policies E6.15 and E23.3

EHC reiterates its assertion that CVEUP would frustrate the General Plan's Air Quality and Environmental Justice objectives and policies contained in Policies E6.15 and E23.3. (EHC's Opening Brief at 13-14.) This claim is not supportable. (See MMC's Opening Brief at 14-17.) Not building CVEUP would in fact worsen air quality in the region, thereby frustrating the intent of Policies E6.15 and E23.3. As stated in the Alternatives section of MMC's Opening Brief, the "No Project" alternative is inferior to the project and would preclude the City from realizing CVEUP's numerous environmental benefits. The older and less efficient Chula Vista Power Plant and South Bay Power plant would continue to operate and likely increase operations, producing higher levels of air emissions. (Ex. 200 at 6-14.) There is simply no guarantee that other project proponents would propose and permit other power plants to serve the demand that CVEUP is intended to meet, nor that these other plants would operate more efficiently than CVEUP.

6. State Law Requires General Plan Internal Consistency

EHC would have the Committee believe that each General Plan policy should be interpreted in a vacuum. But California statutes and caselaw require that all elements of a general plan must be consistent. (Cal. Gov. Code § 65300.5.) "The Legislature intends that the general plan and elements and parts thereof comprise an integrated, internally consistent and compatible statement of policies for the adopting agency." (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96-97.)

Thus, EHC's claim that CVEUP is inconsistent with General Plan Policies E6.4 is insupportable. Policy E23.3 provides that the City should "[a]void siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools and residential buildings." Yet EHC urges an interpretation of Policy E6.4 that would make power plants inconsistent with the general plan regardless of whether they were toxic emitters or otherwise posed a significant hazard to human health.

A proper interpretation of the cited General Plan policies is that Policy E6.4 only applies to power plants that are *also* major toxic emitters. (See MMC's Opening Brief at 9-11.) Such an interpretation would allow Policy E6.4 to be consistent with Policies E23.3 and E6.15 because all three would then work in conjunction to protect public health and air quality.

7. CVEUP is Consistent with General Plan Policies LUT 45.5 and 45.6

EHC's Opening Brief claims that CVEUP will "interfere with the City's vision for the Main Street corridor." (EHC's Opening Brief at 14-15.) This assertion is unsupported. In finding that the pre-existing peaking plant on the site conforms with the General Plan, the City has implied that such a use conforms with its vision for the Main Street corridor. (See MMC's Opening Brief at 13-14.) The same holds true of the City's more recent determination that CVEUP would be consistent with its General Plan. (Ex. 803 at 3.) Thus, the City has twice established that a peaking power plant use on the proposed site conforms to the General Plan and therefore with its vision for the Main Street corridor.

B. CVEUP Complies with the City's Zoning Ordinance

1. EHC Mischaracterizes Applicable Caselaw Regarding the Deference That Should Be Accorded to the City's Zoning Consistency Determination

EHC's Opening Brief discussion on CVEUP's compliance with the Zoning Ordinance begins with a statement that an agency's interpretation of its own zoning code is only entitled to "some deference." (EHC's Opening Brief at 15, citing *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928.) What EHC fails to acknowledge is that the case they cite actually states: "'an administrative interpretation . . . will be accorded great respect by the courts and will be followed if not clearly erroneous.'" (*Stolman* at 928 quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 6-7, emphasis added.)

This is not the first instance within its opening brief that EHC has chosen to present half-truths and misquotes. As set forth above in this Reply Brief, EHC misconstrued the *Endangered*

Habitats League decision and falsely presented the City's "determination" of General Plan consistency without stating that the City had since changed its position.

Furthermore, Commission regulations and California caselaw provide that the City's interpretation of its own Zoning Ordinance should be followed. Section 1744(e) of the Commission's regulations requires Staff to give due deference to comments and recommendations on matters within that agency's jurisdiction. (Cal. Code Regs., tit. 20, § 1744(e).) The decision in *Craik v. County of Santa Cruz* dealt with a zoning administrator's grant of a variance and definition of the term "disparity" and set forth: "[t]he point here is that plaintiffs define disparity in one way and defendant defines disparity in another way. Neither construction is unreasonable. We therefore defer to defendant's [the County's] construction." (*Craik v. County of Santa Cruz* (2000) 81 Cal.App.4th 880, 890.) The *Craik* decision reiterated that it would defer to the County's "construction of its own ordinance." (*Id.* at 891.) Yet another case addressed a city's interpretation of its rent control laws and found: "[t]he Board's interpretation of Carson's rent control laws merits great weight." (*Carson Harbor Village v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 290.) In addition, the California Supreme Court has opined on the matter and has stated that "the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor." (*Associated Home Builders of the Greater Eastbay, Inc. v. Livermore* (1976) 18 Cal.3d 582, 604-605.)

The *Stolman*, *Craik*, *Carson Harbor Village* and *Associated Home Builders* decisions' reasoning can be equally applied here. The City's interpretation that the existing Chula Vista Power Plant is a conditionally permitted use within the Limited Industrial zone is reasonable and therefore should be given great weight.

2. The Fact that Electrical Generating Plants are a Permitted Use in the General Industrial Zone Does Not Preclude Such Use in the Limited Industrial Zone

EHC restates its belief that because electrical generation is a permitted use in the General Industrial zone, it is a prohibited use in the Limited Industrial zone. As stated in MMC's Opening Brief, the fact that a use is permitted in one zone, is irrelevant, "if something is not listed as a permitted use, it doesn't necessarily mean it's a prohibited use or only permitted in other zones." (10/2/2008 RT: 20-23.)

EHC uses the case *Jones v. Robertson* (1947) 79 Cal.App2d 813 to support its contention. (EHC's Opening Brief at 17.) However, the *Jones* case was not based on a distinction between specific designations *within* general zoning districts (i.e., general industrial, light industrial, limited industrial etc.) but instead distinguished between a commercial use in a residential district, two zones with entirely different characters. CVEUP would be an industrial use within an industrial district and therefore permissible, according to the reasoning in *Jones*.

EHC also uses the opinion in *Gikas v. Zolin* (1993) 6 Cal.4th 841 for the proposition that "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Id.* at 852.) Once again, EHC declines to provide the Committee the complete picture. The *Gikas* case borrows that quote directly from *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d. 1379. The *Dyna-Med* decision specifically points out that the quoted "doctrine" of statutory construction, among others, "are mere guides and will not be applied so as to defeat the underlying legislative intent otherwise determined . . . ." (*Id.* at 1391, emphasis added.) The City's intent to allow peaker plants in the Limited Industrial zone was expressed when it permitted the Chula Vista Power Plant. (See MMC's Opening Brief at 20-22.) If it were not for the Commission's jurisdiction here, the City and MMC would be working to site CVEUP through the CUP process. Thus, EHC is attempting to force a new and unwarranted provision upon the Zoning Ordinance where none exists. The *Dyna-Med* case expressly warns against such undermining of legislative intent.

3. The City's Approval of the Existing Chula Vista Power Plant Indicates Electrical Generation is a Conditionally-Permitted Consistent Use and Consistent with Limited Industrial Zoning

The City's prior approval of the Chula Vista Power Plant as a conditionally permitted use within the Limited Industrial zone provides strong support that CVEUP is also consistent with the Limited Industrial Zone.

The Chula Vista Power Plant was permitted through the Special Use Permit (now known as a CUP) process. (See Ex. 802 and MMC's Opening Brief at 20-22.) The fact that the City granted the Chula Vista Power Plant a CUP reflects the City's intent to establish electrical generation uses as conditionally permitted within the Limited Industrial zone. It is an established principle of zoning law that CUPs are meant to allow a particular use or activity not allowed as a matter of right within a zoning district. It is an administrative method of providing zoning relief

and flexibility from the strict terms of a comprehensive zoning ordinance. The purpose of a CUP is aptly summarized in *Upton v. Gray* (1969) 269 Cal.App.2d 352, 357:

> The device of providing for the issuance of a special use permit is well recognized as a legitimate zoning procedure. It permits the inclusion in the zoning pattern of uses considered by the legislative body to be essentially desirable to the community, but which because of the nature thereof or their concomitants (noise, traffic, congestion, effect on values, etc.), mitigate against their existence in every location in a zone, or any location without restrictions tailored to fit the special problems which the uses present.

That is precisely what occurred here. Electric generation was not listed as a permitted use within the Limited Industrial zone, but it was also not listed as a prohibited use (see MMC's Opening Brief at 22-23), so the CUP process was used to provide the City the necessary flexibility. By issuing a CUP, the City is not setting a precedent to allow automatic entrée to all power plants within the Limited Industrial zone, as EHC argues. (EHC's Opening Brief at 18.) Rather, the issuance of a CUP simply means that the City will look to all applications on a *case-by-case basis* for future electrical generation projects in the Limited Industrial zone with the same scrutiny as it did with the Chula Vista Power Plant. The City's prior comments on the PSA questioning CVEUP's conformance with the General Plan and the subsequent Agreement with MMC rectifying those problems, represents precisely what the CUP process is designed to do.

The City even testified that it would issue a CUP for CVEUP if it were subject to the City's permitting process. Specifically, Mr. Scott Tulloch stated: "[I]t's [the City's permitting process] is pretty consistent with what you've heard. And that is that the unclassified use category gives the city flexibility where they haven't either prohibited or specifically allowed a use. It gives them the flexibility to go through that process to determine a specific basis for a specific project." (10/2/2008 RT 336: 1-8, emphasis added.) EHC attempts to play off this statement by Mr. Tulloch by portraying it as an "offhand comment." (EHC's Opening Brief at 17). But as the Assistant City Manager (and current Interim City Manager) in charge of Development and Public Works, Mr. Tulloch is expected to possess intimate knowledge of the City's Zoning Ordinance and overall development process. Therefore, his statement during the evidentiary hearing can in no way be characterized as "offhand."

The fact that the City does this through a "catch-all" provision within its ordinance dealing with permitted uses is irrelevant. The import of this section of the ordinance is that it

will allow the City to review projects on a case-by-case basis for zoning consistency, and that applicants may be required to modify their projects to meet a consistency determination.

Neither has Staff suggested that the City "relinquished its police power" by previously approving the Chula Vista Power Plant. (EHC's Opening Brief at 19.) Accordingly, its reliance on *Laurel Hill Cemetery v. City and County of San Francisco* (1907) 152 Cal. 464 is misplaced. MMC is not suggesting that the Commission is bound by determinations made in 2000. (EHC's Opening Brief at 19.) Accordingly, EHC's reliance on cases supporting that proposition are irrelevant. However, MMC strongly suggests that the City's interpretation of its own General Plan and Zoning Ordinance, both now and in 2000, is significant and is entitled to "great deference."

4. The City Would Be Able to Conditionally Permit CVEUP as an Unclassified Use

As stated in MMC's Opening Brief, CVEUP would also qualify as an unclassified use and would, therefore, be subject to the CUP process pursuant to the Zoning Ordinance through that process. (MMC's Opening Brief at 24-25.) The inclusion of an unclassified use provision within the list of conditional uses at section 19.44.040(J) of the Zoning Ordinance lends further credence to MMC's argument. As stated above, the CUP process grants the City the flexibility it needs to permit proposed projects on a case-by-case basis that do not neatly fit within the list of permitted, conditional or prohibited uses for a specific zone. The unclassified use provision grants the City further permitting flexibility.

As seen in section 19.54.020(M) of the Zoning Ordinance, "public and quasi-public uses" are specifically listed as an unclassified use "that may be considered for location in any zone." The Chula Vista Power Plant CUP reinforces the definition of a power plant as a public/quasi-public use by declaring: "The zoning on the currently vacant site (Limited Industrial) allows public and quasi public uses, like a peak load power plant, through a Special Use Permit." (Ex. 802 at 4 and 10/2/2008 RT 341: 23-25 and 342: 1-2.) Thus, EHC's attempt to define "public and quasi-public uses" is unnecessary, as the City has already determined that peak load power plants qualify as such. (EHC's Opening Brief at 21-22.)

Therefore, the City has already made the determination that a peaker power plant is a public/quasi-public unclassified and conditionally permitted use within the Limited Industrial zone. The City reinforced this fact by stating that the City would indeed issue a CUP for

CVEUP if it were subject to the City's permitting process. (10/2/2008 RT 336: 1-8.) As stated above, the City's interpretation of its own Zoning Ordinance must be given great deference.

5. CVEUP Does Not Require Approval of a Precise Plan

Although not raised at the evidentiary hearing, EHC also argues that a precise plan must first be approved for the entire district where the project is located before CVEUP project can be approved. (EHC's Opening Brief at 23-34.) EHC misstates the requirements of the Zoning Ordinance and ignores MMC's obligations to the City under measure LAND-1. EHC's narrow reading of the Zoning Ordinance is also difficult to square with the fact that the entire district is already developed.

MMC first notes that the Zoning Ordinance must be interpreted in the context of the stated purpose for requiring a precise plan, which is to address concerns raised when, for example, the subject property proposed for development is located next to an area with a different zoning designation. (Chula Vista Municipal Code section 19.56.040.) The precise plan can be used to address such things as the "location, height, size and setbacks of structures." (Chula Vista Municipal Code section 19.56.041.) These plans may then be reviewed and approved not just by the Planning Commission or City Council, as suggested by EHC, but also by the City's design review committee. (Chula Vista Municipal Code Section 19.56.581.) The design review committee's responsibility is limited to "review of site plans, landscaping, and the exterior design of buildings, for consistency with city-approved design guidelines." (Chula Vista Municipal Code section 19.56.582(c).)

LAND-1 meets this exact requirement of the Zoning Ordinance in that it requires MMC to "submit a development plan for the site to the City of Chula Vista . . . [which] development plan shall include all elements normally required for review and permitting of a similar project, including site plan, structural dimensions, design and exterior elevation(s)." (Ex. 200 at 4.5-56.)

Accordingly, EHC's reading of the Zoning Ordinance is erroneously overbroad. It also fails to acknowledge that measure LAND-1 requires MMC to submit its development plan to the City for the exact type of review required under the City's precise plan requirements.

6. The Proposed Construction/Laydown Area Is Consistent with the Zoning Ordinance

EHC's arguments with regard to the construction/laydown area miss the point. The Zoning Ordinance is concerned with regulating permanent or long-term uses, not uses of land for

temporary construction use. Acceptance of EHC's argument would essentially prohibit construction per se in agricultural as well in other zones, since under EHC's reasoning, construction would not be a permitted use.

The City has also implicitly supported Staff's analysis that such a use is a permissible accessory use in the Agricultural Zone in its opening brief. The City's Opening Brief specifically confirms that Staff's FSA adequately addresses all LORS-related issues. (City's Opening Brief at 2.) As stated numerous times above, the City's interpretation of its Zoning Ordinance should be afforded great weight. Therefore, the proposed construction/laydown area is consistent with the Zoning Ordinance.

7. Staff Condition LAND-1 Ensures CVEUP's Consistency with LORS

EHC's final LORS argument centers on its opinion that FSA Condition LAND-1 will not "resolve the Project's multiple inconsistencies with the City's general plan and zoning code." (EHC's Opening Brief at 25.) EHC's opinion is not supported by the record.

EHC begins by yet again misquoting and citing the same half-truth it has referred to throughout its reply brief. EHC cites to the City's previous and no longer applicable Comments on the PSA. (EHC's Opening Brief at 25.) As stated above, the City has since reevaluated its position on CVEUP's conformity with the General Plan and now supports the project's LORS consistency. (Ex. 803 at 3, City's Opening Brief at Attachment A and 10/2/2008 RT 336: 1-8.)

In addition, LAND-1 actually complements the requirements of Chapter 19.44 (I-L – Limited Industrial Zone) of the Zoning Ordinance. LAND-1 requires a City site plan review process that insures CVEUP will conform to the City's Limited Industrial zone requirements such as height limits, design and performance standards, and landscaping requirements. (Ex. 200 at 4.5-56 and Zoning Ordinance at 19.44.130 requiring site plan and architectural approval for all uses in the I-L zone.) The City has implicitly granted its support of LAND-1 in its opening brief by stating that Staff's FSA addresses all LORS issues. (City's Opening Brief at 2.)

The evidentiary record clearly shows that CVEUP is consistent with the General Plan and Zoning Ordinance. The opening briefs of the City, Staff and MMC concur. Condition LAND-1 is a means to ensure that CVEUP complies with the more detailed site and development requirements of Chapter 19.44 of the Zoning Ordinance. Instituting a site plan approval requirement after CUP approval is a normal part of the development process.

II. THERE ARE NO FEASIBLE ALTERNATIVES THAT WOULD ELIMINATE ANY NONCOMPLIANCE AND MEET THE PROJECT OBJECTIVES

MMC's Opening Brief discussed at great length the lack of feasible alternatives that would both eliminate noncompliance issues and also meet project objectives. (See MMC's Opening Brief at 26-31 and 88-98.) MMC again emphasizes that CVEUP is not a greenfield development. CVEUP, as proposed, will re-use an existing industrial site already occupied by a peaker power plant. Although stated in MMC's Opening Brief, it is worth re-stating here that any project alternative is effectively a "No Project" alternative because an alternative site would require a new AFC with the inherent associated delays for regulatory approval. The Commission does not have authority to approve an alternative or require MMC to relocate the project to a different project site without a new AFC. (Ex. 200 at 6-1.) Included with the new AFC for an alternative site would be a revised engineering and environmental analysis that more thoroughly assesses the alternative's environmental impacts, conformity with LORS, and potential mitigation measures. (Ex. 200 at 6-2.) This more rigorous AFC-level analysis could reveal significant obstacles to the alternative that were not revealed by the more general alternative analysis presented in the FSA for CVEUP. (Id.) Thus, because relocation to an alternative site does not guarantee that the alternative would ultimately be acceptable and because relocation would require MMC to terminate its current development effort, each alternative constitutes a "No Project" alternative.

The "No Project" alternative is environmentally inferior to the project and would preclude the City from realizing CVEUP's numerous benefits. As discussed in MMC's Opening Brief regarding the Commission's override authority, under the "No Project" alternative the older less efficient Chula Vista Power Plant and South Bay Power plant would continue to operate, producing higher levels of air emissions than would CVEUP. (Ex. 200 at 6-14.) In the long term, other project proponents may propose power plants to serve the demand that CVEUP is intended to meet, but there is no guarantee that these other plants would be built or would consume less fuel or emit less pollutants per kilowatt-hour as compared to CVEUP. (Id.) In addition, CVEUP will provide the City with numerous fiscal benefits. (See MMC's Opening Brief at 91.)

Staff Alternative C, the Otay Landfill site, was one of the alternative sites deemed infeasible by both Staff and MMC primarily due to the need for entirely new linear facilities, as

well as the significant environmental and safety concerns, particularly the danger of siting a fossil fuel-powered plant on an existing methane-producing site. (MMC's Opening Brief at 31-33.) Staff Alternative C is a greenfield site, unlike the proposed CVEUP site. EHC, however, argues that locating CVEUP at the Otay Landfill site would be entirely feasible and would cure supposed LORS inconsistencies.[4]

EHC specifically notes that "it is not even clear from the record that the marginal cost of the linear facilities would even be substantial, much less render the Project impractical." (EHC's Opening Brief at 28.) However, EHC misunderstands a fundamental notion of the California Independent Systems Operator (CAISO) large generator interconnection procedures. The costs of network upgrades, meaning upgrades to the transmission line leaving *from* the Otay Substation to the rest of the grid (the Otay to Otay Lake Tap high voltage transmission line (TL649A)), would be initially born by MMC but it is later repaid over a five-year period. (*See* CAISO Tariff Appendix Y, Large Generator Interconnection Procedures (LGIP).) Whereas the cost to upgrade the transmission line *between* CVEUP and the Otay Substation (TL6929) is entirely born by the applicant (MMC) and is not repaid. (Ex. 9 at 2 and Ex. 7 at 7.) Therefore, the record is clear that the cost of constructing an entirely new transmission line from a greenfield site at the Otay Landfill (Staff Alternative C) to the Otay Substation would be much greater than upgrading the existing transmission line from the CVEUP site to the Otay Substation. The cost associated with entirely new linears, in addition to the uncertainties and significant environmental concerns of building at a greenfield site on top of landfill, renders Staff Alternative C infeasible. Thus, substantial evidence on the record clearly supports a finding of infeasibility for Staff Alternative C.

III. THE CALIFORNIA ENERGY COMMISSION CAN FIND OVERRIDING CONSIDERATION FOR CVEUP

Because no LORS inconsistencies exist (as demonstrated in detail in MMC's Opening Brief at 34-52), no override finding by the Commission is necessary. However, should the Commission choose to engage in an override, it will find that CVEUP's compelling local and statewide benefits dictate that the Commission should override any such inconsistencies.

[4] Due to the short distance (approximately four miles) between Staff Alternative C and the proposed project site, and the regional nature of air pollutant dispersion, the air quality impacts attributed to either site would be similar.

A. Public Convenience and Necessity Require CVEUP Because it Will Provide Extensive Community and Consumer Benefits

Contrary to what is stated in EHC's Opening Brief, CVEUP will provide extensive benefits to the consumers, the local community and the local electric system. These benefits clearly outweigh any purported issues related to LORS nonconformity.[5]

Specifically, the evidentiary record finds that CVEUP will provide the following fiscal benefits to the Chula Vista area:

- CVEUP will provide property and Utility Users' Taxes that will be substantially greater than the current property taxes from the site due to the increased value of the new equipment. (Ex. 1 at 1-1.)
- The project will provide for a peak of approximately 160 construction jobs over an 8-month period. CVEUP will provide about $8.9 million in construction and demolition payroll, at an average rate of $58 per hour, including benefits. (Ex. 200 at 3-5.) It is expected that approximately $8.01 million will stay in the local area during the 8-month construction period.
- The cost of materials and supplies required by the project during construction of CVEUP (and demolition of the existing plant) is estimated at approximately $14.5 million. (Ex. 1 at 5.10-17.) Materials and supplies worth $1.8 million will be purchased locally during construction and demolition. (Ex. 1 at 5.10-17.)
- Operation of CVEUP will generate a small but permanent beneficial impact by creating employment opportunities for local workers. The average salary per operations employee is expected to be $56,000 per year, excluding benefits for two full-time contract employees. There will be an annual operations and maintenance budget of approximately $1.25 million of which $300,000 is estimated to be spent locally. (MMC's Opening Brief at 43.)
- The total local sales tax expected to be generated annually during construction and demolition is $139,500 (i.e., 7.75 percent of local sales). (Ex. 1 at 5.10-18.)
- MMC will provide $210,000 in direct funds to the City, in addition to the funds contributed for local air quality related mitigation. (Ex. 21 at 1.)
- In addition to the direct funds to the City, MMC will also fund the estimated cost of mitigating the air emissions from CVEUP at a 1:1 ratio at the level outlined in the FSA and at the fixed cost of $210,000. (Ex. 21 at 1.)
- MMC's has agreed with the City to provide funding for the equipment, software and installation costs to establish the wireless Evapotranspiration Weather Station. (Ex. 21 at 2.)

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[5] EHC declares that "the Project will result in a net increase in criteria air pollutant concentrations, and a dramatic increase in greenhouse gas emissions, as compared to the existing plant." (EHC's Opening Brief at 31.) EHC once again misrepresents the facts. While this statement may be true if both CVEUP units were to run at full output for 4,000-5,000 hours per year, EHC is not properly comparing impacts from the two facilities. If EHC had compared the Chula Vista Power Plant's current level of operation of 33MW and approximately 200 hours per year of operation to CVEUP, it would have found that CVEUP's air quality impacts would be far lower.

- If the City decides to underground the existing transmission lines on Albany Avenue between Main Street and Orange Avenue, MMC has agreed to pay for half of the additional cost required to place those transmission lines below ground. (Ex. 21 at 2.)

This extensive list of community benefits demonstrates the contribution CVEUP will make to the City and the local community.

CVEUP will also provide the following significant environmental and electrical reliability benefits to both the Chula Vista area and the state as a whole:

- CVEUP will aid in the removal of the reliability must run status for the South Bay Power plant. (10/2/2008 RT 234: 4-7; and RT 241: 24-25.) The evidentiary record directly conflicts EHC's claim. (EHC's Opening Brief at 31),
- CVEUP will replace the existing Chula Vista Power Plant, which is much less efficient and emits much higher concentrations of air pollutants. (Ex. 1 at 1-12 and Ex. 200 at 3-5.) CVEUP will provide additional fast-start and peak electric generation capacity with improved efficiency. CVEUP would do this by reusing existing infrastructure, such as the existing transmission interconnection, water supply, and gas supply. (Ex. 1 at 1-2.)
- CAISO has identified a local reliability area that includes the cities of Chula Vista and San Diego, where power generation is needed to support local demand for electricity. Thus, CVEUP will help to meet identified local generation needs as well as the ability to produce electricity more efficiently than the current plant and thereby further the statewide goals of limiting the environmental effects of power generation. (Ex. 1 at 1-1.)
- San Diego Gas &Electric (SDG&E) circulated a Request For Offers (RFO) stating that additional peak electric generation capacity is needed in the vicinity. CVEUP will provide the fast-start capability that is required by the RFO and necessary to respond to steep increases in power demand. (Ex. 1 at 1-1.)
- The California Public Utilities Commission (CPUC) and the Energy Commission have stated: "Even with the emphasis on energy efficiency, demand response, renewable resources, and distributed generation, investments in conventional power plants will be needed. The State will work to establish a regulatory climate that encourages investment in environmentally-sound conventional electricity." (Energy Action Plan II (EAP II, 2005) at 7.) CVEUP will help satisfy this request.
- The Commission's own 2007 Integrated Energy Policy Report (2007 IEPR) calls for flexible, gas-fired generation to replace aging facilities and to integrate renewables. (MMC's Opening Brief at 48-50.) CVEUP will provide the exact type of generation asked for in the 2007 IEPR.
- SDG&E's Long Term Procurement Plan (LTPP) calls for new peaking capacity as a "prudent hedge against extreme circumstances." (R. 06-02-013.) CVEUP will provide just such a hedge.

- CVEUP will provide a local generation facility. The local area imports the vast majority of its power, resulting in transmission losses, inflexibility, and reliance on older, more polluting, less efficient plants. (10/2/2008 RT 416: 4-19.)

As discussed in the Alternatives discussion above and below (as well as in MMC's Opening Brief), no alternative sites nor generation are feasible. Therefore no more prudent and feasible means of achieving the public convenience and necessity exists.[6] If any LORS inconsistency truly exists here, a highly doubtful proposition, the Commission should exercise its statutory responsibility to override it.

IV. CEQA

A. Baseline for Assessing Impacts

1. The Baseline for Assessing Impacts Should Be the Existing Chula Vista Power Plant

EHC and MMC agree that the baseline for assessing impacts should be the existing setting. The existing setting is the on-site Chula Vista Power Plant.

EHC, however, complains that the FSA "sends conflicting signals to decision-makers and the public concerning the actual impacts of the Project as permitted" because the FSA states that CVEUP will be permitted to operate at 4,400 hours per year but "only proposes mitigation for a maximum of 1,200 hours per year." (EHC's Opening Brief at 38.) EHC also asserts that Staff "has not explicitly identified the baseline assumptions used in the FSA." (EHC's Opening Brief at 37.) MMC largely answers these contentions in its opening brief, but provides further response here. (See MMC's Opening Brief at 54-57.)

MMC responds that both Staff and MMC have analyzed the air quality impacts of CVEUP at the maximum *permitted* emissions from 4,000 hours of operation, 200 hours of warm starts and 200 hours of cold starts ("4,400 Hours").[7] (See Ex. 200 at 4.1-33 and Ex. 1 at 1-2; 10/2/08 RT 48: 18-21.) The modeling of maximum permitted conditions is required by

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[6] EHC claims that demand for peaking generation "will flatten" over the next several years. This statement is patently false. The Commission's own 2007 IEPR clearly calls for increased peaking generation. (See Alternatives discussion below; 2007 IEPR at 76-99, 100-147 and 218; and see MMC's Opening Brief at 97-100.)

[7] The 4,400 hours were selected to be consistent with the level of operation required of projects bidding into requests for offers from San Diego Gas and Electric Company. (10/2/2008 RT 56:12-16.)

Commission Staff, standard Environmental Protection Agency modeling guidance, and SDAPCD rules and regulations and sets the maximum permitted operation of the facility.

Mitigation is based on 1,200 hours of operation because peaking power plants typically do not operate at anywhere near their permit limits. Based upon the real operating data for peaking power plants, MMC proposed project mitigation at 1,000 hours per year (11.4 percent annual capacity factor) and Staff calculated potential project mitigation emissions based upon a conservative (higher than estimated) operating assumption of 1,200 hours per year (13.7 percent annual capacity factor). (Ex. 5 at 12; Ex. 4 at 6; and Ex. 200 pp. 4.1-39 to 4.1-40.) Staff and MMC have agreed to use a conservatively high operating hour assumption for the expected operation case by using 1,200 hours of operation. (Ex. 200 at 4.1-41; Ex. 5 at 12; and Ex. 4 at 6.)

CEQA requires the agency to ensure that the mitigation measure actually relates to and is proportional to the impacts caused by the project. Mitigating an expected operating level is consistent with CEQA's requirements to evaluate a proposed project's "likely" impacts. (Cal. Pub. Resources Code §21061; see also *Environmental Council of Sacramento v. City of Sacramento* [3d Dist. 2006] 142 Cal.App.4th 1018, 1039-1040.)

The CEQA Guidelines declare that there must be an essential nexus between the mitigation measure and a governmental interest and that the mitigation measure must be "roughly proportional" to the impacts of the project. (Cal. Code Regs., tit. 14, § 15126.4(a)(4).) This requirement is consistent with the federal and State constitutions. (See *Nollan v. California Coastal Commission* (U.S. 1987) 483 U.S. 825, 838 and *Dolan v. City of Tigard* (U.S. 1994) 512 U.S. 374, 391.) The air quality mitigation measures are based on the 1,200 hour per year operating assumption because that is the maximum number of hours CVEUP is expected to *operate* per year, which is very different from the maximum *permitted* level. Therefore, the mitigation measures are roughly proportional to the expected project impacts.

B. Air Quality

1. Staff Proposed and MMC Agreed upon Mitigation Measures will Reduce Any Adverse Impacts on Air Quality

In addition to its concern regarding the operating hours baseline, EHC takes issue with MMC's use of the Carl Moyer program to fund mitigation measures. (EHC's Opening Brief at 41-42.) EHC claims that "the Carl Moyer Fund cannot be used to offset the emissions reduction obligations of any entity" and that MMC "intends to use the Carl Moyer program as a pass-

through mechanism for mitigation funding, rather than a source of public funds for emissions reduction." (Id.)

In its opening brief, MMC anticipated EHC would raise a concern about using the Carl Moyer program. (MMC's Opening Brief at 61.) MMC reiterates that the Carl Moyer fund is a well-established and effective mitigation program with proven results. The guidelines for the Carl Moyer program explicitly prohibit using the public funds from the program to finance mitigation for private projects. (Ex. 618 at II-1 and 10/2/2008 RT 58: 9-20.) This prohibition is reasonable and avoids the use of public funds to finance mitigation for private projects. In this instance, MMC is not proposing to use public funds for mitigation for CVEUP. (10/2/2008 RT 58: 15 to 59:1.) Essentially, MMC's contribution to the City through the Carl Moyer program is a vehicle to fund mitigation to be used on a local level and thus will not be using public funds in the traditional sense of the Carl Moyer program. (10/2/2008 RT 67: 10-14.) Therefore, MMC's proposed use of the Carl Moyer program does not violate the program's guidelines.

EHC also insinuates that air quality mitigation must be local in nature. (EHC's Opening Brief at 43-44.) MMC counters that air quality impacts are a regional issue because pollutants are easily dispersed over a wide area that extend far beyond individual cities like Chula Vista. Thus, mitigation measures must accordingly respond on a region-wide basis.

Lastly, in proclaiming that no substantial evidence exists showing that construction-related project impacts will be mitigated to a less than significant level, EHC manipulates the testimony of another party's witness. (EHC's Opening Brief at 44-45, quoting Staff's witness Mr. William Walters.) EHC fails to disclose that Mr. Walters also stated that the mitigation measures will successfully mitigate construction-related emissions to the extent technically feasible. (10/2/2008 RT 85: 14-15 and Ex. 200 at 4.1-33.) And most importantly, by only extracting citations from the evidentiary hearing, EHC has tellingly left out an important statement by Mr. Walters from the FSA: "Based on the relatively short-term nature of the worst-case construction impacts, and staff's recommendation of requiring all feasible construction emission mitigation measures, staff believes that the construction air quality impacts will be less than significant with the implementation of the mitigation measures contained in the recommended conditions of certification." (Ex. 200 at 4.1-33, emphasis added.)

2. CVEUP Can Reduce Overall System Greenhouse Gas Emissions and Support the Addition of Intermittent Renewable Generation

EHC's discussion of greenhouse gas (GhG) impacts fails to acknowledge a fundamental aspect of power generation in that each power plant operates as part of a global system. (EHC's Opening Brief at 45-49.) As discussed in MMC's Opening Brief, the GhG impacts of a power plant cannot be viewed in isolation. Looking at the emissions of a power plant without an analysis of its contribution to increasing or decreasing the overall system GhG impacts would result in simply moving the power plant out-of-state, thereby reducing GhG emissions in a particular California location. However, moving a power plant out-of-state results in a direct increase in system GhG emissions as well as criteria pollutants due to the inherent transmission losses associated with bringing power in from a distant location (i.e., for the same power to be delivered at a point of use, additional power would have to be produced at the point of generation to account for the transmission line losses).

EHC criticizes Staff's analysis for not discussing any adopted plan that describes or evaluates GhG emissions. (EHC's Opening Brief at 49.) The Committee need look no further than its own *Final Opinion and Recommendations on Greenhouse Gas Regulatory Strategies* ("Final Opinion") adopted jointly with the CPUC and the California Air Resources Board's *Proposed Scoping Plan, a framework for change* ("Proposed Scoping Plan") for a comprehensive evaluation of statewide GhG emissions including emissions from power imported to serve California demand. (D. 08-10-037.) These documents also provide a detailed plan to reduce the GhG emissions of the electric industry.

EHC makes an additional incorrect assumption in its discussion of the Emission Performance Standard. (EHC's Opening Brief at 48.) The Committee is well aware since this Commission, in conjunction with the CPUC, adopted the Emission Performance Standard in response to Senate Bill 1368, 1,100 pounds/MWh applies only to facilities that operate as baseload power plants. This project is requesting a permit for less than half the total hours in a year and is clearly designed as a peaking facility. Therefore, the Emissions Performance Standard does not apply to this project. As discussed extensively in MMC's Opening Brief, the Commission has recognized a need for peaking generation to enable the addition of intermittent renewable generation to support the 33% renewable goal recognized in both the Final Opinion and the Proposed Scoping Plan. (See MMC's Opening Brief at 64-65.)

Finally, in this case CVEUP is directly replacing an existing, less efficient power plant and the increased generation capacity is going to support replacing the generation from another less efficient power plant, the South Bay Power Plant.

C. Public Health

1. CVEUP Will Not Cause Any Significant Adverse Public Health Impacts

A majority of what EHC discusses in the public health section of its opening brief is addressed in MMC's Opening Brief. (See MMC's Opening Brief at 67-72.) The evidentiary record clearly demonstrates that CVEUP will not cause any significant adverse public health impacts. By declaring that the FSA "did not adequately assess the significance of the Project's public health impacts," EHC is essentially asking the Commission to reevaluate its public health significance standards. (EHC's Opening Brief at 50.) The Commission need not take such an extreme measure because its significance standards are already very conservative.

As provided in MMC's Opening Brief, Staff's public health analysis was more than sufficient to demonstrate that impacts to public health from CVEUP will be far less than significant. (MMC's Opening Brief at 68.) Staff reached this conclusion despite an analysis "intentionally biased toward protection of public health. In other words, the analysis is designed to overestimate the public health impacts from exposure to emissions." (Ex. 200 at 4.7-3.)

D. Noise and Vibration

In its opening brief, EHC tries to convince the Committee that a 9 dBA increase over background noise is a significant impact. (EHC's Opening Brief at 52-53.) This claim is completely unsupported. EHC presents no evidence, either in the form of its own witness or additional testimony, that a 9 dBA increase is significant. Instead, EHC once again relies on the testimony provided by other parties' witnesses. EHC's efforts consequently fall flat. The evidence on the record clearly shows that CVEUP will not cause any significant adverse noise or vibration that will not be mitigated to a less than significant level. (See MMC's Opening Brief at 81-84.)

E. Alternatives

In addition to the above discussion regarding the infeasibility of Staff Alternative C (the Otay Landfill), as well as the extensive alternatives discussion contained in MMC's Opening

Brief, MMC adds that the alternative generation and conservation alternatives suggested by EHC's witness Mr. Bill Powers are also infeasible. (EHC's Opening Brief at 33-35, 58.)

1. There is No Feasible Alternative Generation Technology

EHC's Opening Brief suggests that Mr. Powers has brought to the Commission's attention previously unacknowledged alternative generation technology and conservation measures that prove that feasible alternatives to CVEUP exist. (EHC's Opening Brief at 33-35, 58.) EHC also uses these alternatives to suggest that more prudent and feasible means of achieving public convenience and necessity exist with regard to a potential Commission override. (EHC's Opening Brief at 33-35.)

However, Staff has already concluded that "current demand side programs are not sufficient to satisfy future electricity needs, nor is it likely that even much more aggressive demand side programs could accomplish this as the economic and population growth rates of the last ten years." (Ex. 200 at 6-12.) As a result, new generation facilities are needed in the immediate future to meet current demand. (Id.) This need for new peak generation in the region is also evidenced by CAISO and SDG&E's recent RFO to provide peak capacity in the vicinity. (Ex. 200 at 6-13.) Moreover, because no new generation in the San Diego region is expected to come online in 2008 or 2009, CVEUP becomes a more critical component to meeting demand. (10/2/2008 RT 413: 6-10.) Thus, although demand side programs are likely to receive more attention in the future, these types of measures are an infeasible alternative to CVEUP to meet the immediate need for peak generation.

Importantly, the Commission has already considered all of the alternative generation technology and conservation measures proposed by Mr. Powers. The Commission's own 2007 IEPR explicitly analyzes renewable generation and conservation but still finds that a need for peaking generation is desperately needed in California. (See 2007 IEPR at 76-99 and 100-147.) The 2007 IEPR provides: "Natural gas power plants are also the best complement to renewable resources since they have the ability to come on line quickly when wind or solar resources lose output due to lack of wind or sunshine. Natural gas power plants have proven to be reliable providers of electricity for California." (2007 IEPR at 218.)

Finally, because CVEUP will replace the existing Chula Vista Power Plant, the "No Project" alternative is environmentally inferior to the project and would preclude the City from realizing CVEUP's numerous benefits. As discussed in MMC's Opening Brief regarding the

Commission's override authority, under the "No Project" alternative, the older less efficient Chula Vista Power Plant and South Bay Power plant would continue to operate, producing higher levels of air emissions. (Ex. 200 at 6-14.)

F. Override Under Section 21081(b) of CEQA and Section 1755(d) of the Commission's Regulations

MMC responds to the claims set forth in EHC's Opening Brief (at 54) in MMC's Opening Brief at 100-102. Given CVEUP's numerous economic, social, technological, and environmental benefits, in the highly unlikely event that a significant unmitigated adverse environmental impact exists, substantial evidence exists in the record to support the Commission's authority to override such impact.

V. ENVIRONMENTAL JUSTICE

Both the Commission and MMC regard the consideration of environmental justice issues as an important part of the power plant site certification process. CVEUP is consistent with federal, state, and local environmental justice principles.

A. The Methodology Followed by MMC and Commission Staff Complies With All Applicable Environmental Justice Guidance

The methodology used by Commission Staff and MMC satisfies all applicable policy and guidance. Staff's approach consists of (1) public outreach, (2) demographic screening, and (3) impact assessment. (California Energy Commission, Environmental Justice: Frequently Asked Questions.[8]) MMC used an approach identical to that of Staff. (Ex. 1 at 5.10A-1 and 2.) These approaches mirror the three primary factors outlined by the Resources Agency (public outreach, demographics, impact assessment) and include both factors identified by the federal government (demographics and impact assessment). (See MMC's Opening Brief at 105-106.)

In its opening brief, EHC particularly focuses on the impact assessment step of this analysis. As described in MMC's Opening Brief, in conducting its impact assessment, Staff typically focuses on "whether the project creates an unavoidable significant adverse impact on the affected population and, if so, [Staff considers] whether the impact is disproportionate." (California Energy Commission Staff Approach to Environmental Justice.[9]) The applicable

[8] Available at http://www.energy.ca.gov/public_adviser/environmental_justice_faq.html (last visited Nov. 9, 2008).
[9] Available at http://www.energy.ca.gov/public_adviser/staff_env_justice_approach.html (last visited Nov. 9, 2008).

environmental justice guidelines and policies do not provide any specific guidance with regard to identifying whether an impact is "significant." In performing this step of the analysis, Staff has traditionally used the same standards of significance as those used during the environmental review process required by the Commission, which is based on the requirements for an EIR under CEQA. (See MMC's Opening Brief at 107-108.)

1. A Project With No Significant Environmental Impacts Does Not Violate Environmental Justice Principles

EHC takes issue with the method used in the impact assessment phase of the analysis used by Staff and MMC. EHC claims that "Staff's approach to environmental justice, which examines only whether a significant impact remains after mitigation, does not adequately take account" of environmental justice issues. (EHC's Opening Brief at 62.) However, the only authority EHC has been able to cite for this contention is testimony by its own witness, Ms. Takvorian, who was unable to cite any policy or guidance supporting her opinion. (10/2/2008 RT 205:5.) Indeed, despite EHC's contentions, no legal authority or even policy or guidance suggests any inadequacy in Staff's and MMC's practice of using CEQA-based thresholds of significance when conducting their environmental justice impact assessment. (MMC's Opening Brief at 114-115.) Applicants for the AFC process and Staff routinely use this methodology in power plant certification cases. (See MMC's Opening Brief at 114-115.) The only guidance that mentions a level of significance in environmental justice assessments refers specifically to the preexisting standard of significance under NEPA: "[Executive Order 12898] does not change the prevailing legal thresholds and statutory interpretations under NEPA and existing case law." (Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, April 1998.) There is simply nothing in the law or in the Commission's past practices suggesting that Staff's existing method of environmental justice assessment is inadequate.

B. MMC and Commission Staff Followed Their Methodology In Correctly Concluding that CVEUP Will Not Result In a Disproportionate Impact on an Environmental Justice Population

In conducting their environmental justice analysis, MMC and Staff followed their prescribed methodology. As part of the Commission's environmental justice methodology Staff conducted extensive public outreach for this project, evaluated and found an environmental justice population, and performed an impact assessment by conducting an extensive evaluation

of significant adverse impacts in accordance with federal and state law and guidelines. (See MMC's Opening Brief at 108-121.)

1. CVEUP Will Produce No Unmitigated Significant Impacts to an Environmental Justice Population

EHC takes issue with Staff's determination, claiming that "the Project will have significant, inadequately mitigated impacts on a predominantly minority community." (EHC's Opening Brief at 52.) However, Staff and MMC examined the impact of CVEUP on potential environmental justice populations in eleven technical areas. (Ex. 1 at 5.10A-4; Ex. 200 at 1-4.) Because neither Staff nor MMC found significant impacts in any area, Staff concluded that CVEUP would not have a significant disproportionate impact on the environmental justice population. (*Id.*) The analysis used by Staff and MMC complied with the Commission's methodology and with applicable state and federal guidance. EHC's contentions therefore are not supported by any of the actual technical studies conducted in connection with CVEUP.

2. Impacts Below the Level of Significance Do Not Create Environmental Justice Problems

As discussed above, the impact portion of the Commission's environmental justice analysis focuses on whether a project will create significant disproportionate impacts to an environmental justice population. (See California Energy Commission Staff Approach to Environmental Justice, *supra.*) EHC incorrectly claims that simply because most of CVEUP's impacts will fall on the residents of a predominately Latino community, this means that CVEUP will have a *per se* disproportionate impact on a minority population. (EHC's Opening Brief at 61.) This argument misconstrues the applicable environmental justice methodology. The mere fact that the primary environmental effects of a project take place in a predominantly minority community does not mean that the project has a disproportionate significant effect on the community. Staff and MMC both concluded that CVEUP will not have any significant adverse environmental impacts. (Staff's Opening Brief at 18.) Because the applicable environmental justice analysis is concerned with whether a *significant*, or "high and adverse," impact will befall an environmental justice population, the fact that no such impacts exist means that CVEUP will create no environmental justice impacts. (*Id.* at 17.)

EHC incorrectly argues that existing air pollution levels indicate that CVEUP will cause an environmental justice problem. EHC claims that "air pollution in the area close to the Project

site already violates applicable standards." (EHC's Opening Brief at 63.) While the San Diego Air Basin is designated as a nonattainment area under state law with regard to PM10 and PM2.5 (Ex. 200 at 4.1-7, Air Quality Table 3), this fact has nothing to do with environmental justice concerns. These figures take into account the entire San Diego Air Basin, not the "area close to the Project site" as claimed by EHC. Therefore, this nonattainment status is not merely applicable to the environmental justice population, but rather to the county as a whole. As such, these figures do not demonstrate any sort of disproportionate burden on the residents in the area near CVEUP.

Next, EHC argues that existing asthma rates in the area near the CVEUP site are "some of the County's highest." (EHC's Opening Brief at 63.) However, this assertion is misleading. EHC appears to base this contention on emergency department discharge rates. (EHC's Opening Brief at 63.) EHC's witness, Joy Williams, admitted that "asthma is not a reportable disease." (Ex. 602.) This means that discharge rates are not an accurate measurement of the prevalence of asthma in a community. Furthermore, as Staff noted in the FSA, "[t]here is no single cause of asthma in all cases. Theories of causation include those about lifestyle factors, genetics, and specific environmental agents. Studies to identify predisposing environmental agents or symptom triggers have not yielded a unifying theory to explain the present epidemic." (Ex. 200 at 4.7-15.) Therefore, the best indication available about the prevalence of asthma in a community comes from the scientific air quality studies done by Staff and MMC. When conducting their analyses for both cancer risk and non-cancer health effects, both Staff and MMC used methodology assuming worst-case scenarios. (See MMC's Opening Brief at 120-121.) Therefore, the impacts presented by the assessments, which are below the level of significance, are actually likely to be significantly higher than the actual, real-world impacts created by CVEUP. (See Ex. 200 at 4.1-66.)

EHC's arguments ignore the key inquiry in this portion of the environmental justice analysis – that is, whether CVEUP will cause any significant disproportionate impacts to an environmental justice population. MMC and Staff conducted this inquiry in performing their environmental justice analyses. (See California Energy Commission Staff Approach to Environmental Justice, *supra.*) As described above, CVEUP will have no significant unmitigated environmental impacts in any of the technical areas analyzed. (Ex. 200 at 1-4; Ex. 1 at 5.10.2.4.9 and 5.10A-4.)

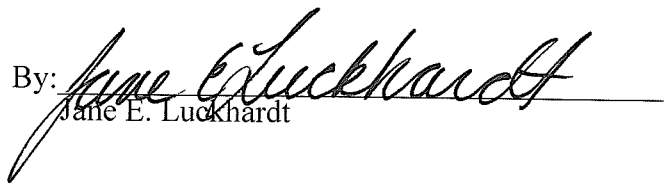
Staff correctly concludes CVEUP will not have any disproportionate significant impacts on an environmental justice population. (Staff's Opening Brief at 17.) The Commission should reject EHC's arguments and adopt Staff's conclusion.

VI. CONCLUSION

The above sections respond to the issues raised by the other parties, particularly EHC. This Reply Brief, in combination with MMC's Opening Brief, Staff's Opening Brief and the City's Opening Brief, demonstrates that CVEUP will be consistent with all applicable state, local, and regional standards, ordinances, and laws and with the specified mitigation, will not cause a significant environmental impact. Therefore, MMC respectfully requests that the Commission certify CVEUP.

DATED: November 19, 2008

DOWNEY BRAND LLP

By: 
Jane E. Luckhardt

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

APPLICATION FOR CERTIFICATION FOR THE CHULA VISTA ENERGY UPGRADE PROJECT	DOCKET NO. 07-AFC-4 **PROOF OF SERVICE (Revised 10/27/08)**

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:

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DECLARATION OF SERVICE

I, Lois Navarrot, declare that on November 19, I deposited copies of the attached **MMC CHULA VISTA'S REPLY BRIEF ON REQUESTED BRIEFING TOPICS** 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