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November 19, 2008

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07-AFC-4
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Via U.S. Mail

Docket No. 07-AFC-4
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814-5512

Re: In the Matter of: The Application for Certification for the Chula Vista Energy Upgrade Project

Dear Docket Unit:

Enclosed are an original and one copy of the Reply Brief of Intervenor Environmental Health Coalition. Please file the original with the docket unit and return a conformed copy to this office in the self-addressed stamped envelope also provided.

If you have any questions, then please do not hesitate to contact me at (415) 552-7272 ext. 245. Thank you.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Sarita C. Candy
Legal Assistant to Kevin P. Bundy

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STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification for the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

REPLY BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION

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REPLY BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION

This Application for Certification presents the Commission with a number of stark but critical choices. The Commission must decide whether to approve additional fossil-fueled generation in a predominantly minority community already burdened with poor air quality, respiratory health problems, and a disproportionate concentration of existing and permitted generation facilities. The Commission must decide whether to do so, moreover, despite the availability of other more prudent and feasible alternatives, including not only a workable alternative site identified by Commission Staff, but also other, better ways to address peak electricity demand in a manner more consistent with state energy policy. The Commission also must decide whether to approve a project that will move the state further away from, rather than closer to, its greenhouse gas reduction goals. The Commission must decide, in short, whether it will look backward—to increasingly outmoded generation technologies that exacerbate poor air quality and perpetuate environmental injustice—or forward, in the direction state energy policy must proceed if California is to clear its air, achieve its ambitious greenhouse gas reduction goals, and ensure that all of its citizens bear only their fair share of the environmental burdens of development.

The correct choice is clear. As demonstrated in the Opening Brief of the Environmental Health Coalition ("EHC"), the Chula Vista Energy Upgrade Project ("Project") may not be certified under the Warren-Alquist Act or the California Environmental Quality Act ("CEQA"). The Project is inconsistent with laws, ordinances, regulations, and standards ("LORS") adopted by the City of Chula Vista ("City") to protect public health and safety and to ensure fair treatment of its residents in the allocation of environmental benefits and burdens. Furthermore, the Final Staff Assessment ("FSA") for the Project does not satisfy the requirements of CEQA.

The Project will cause significant environmental impacts that the conditions of certification proposed in the FSA will not adequately mitigate. Feasible alternatives that would avoid or lessen these impacts are available, but have been rejected by the Applicant. The Project's exceedingly modest benefits cannot justify its environmental consequences.

Because EHC's Opening Brief anticipated and refuted most of the contentions presented in the opening briefs of other parties, EHC will not repeat all of those arguments here. Rather, EHC will address contentions that merit further discussion or require a specific response. In short, nothing in the other parties' opening briefs provides a compelling legal or factual basis for approving this Project. On the contrary, denial of this Project would be consistent with new and necessary directions in state energy policy, consistent with the Warren-Alquist Act, consistent with CEQA, and consistent with principles of environmental justice.

ARGUMENT

I. THE PROJECT IS INCONSISTENT WITH LORS.

A. The Project Conflicts with the City's General Plan.

As explained in detail in EHC's Opening Brief, this Project conflicts with the objectives and policies of the City's general plan. Confronted with these inconsistencies, the Applicant and Staff argue that the general plan must not mean what it says, and that even if it does, its language may be ignored. These assertions lack merit.

1. The Commission May Not Disregard Fundamental and Specific Provisions of the City's General Plan.

In arguing that the Commission may simply disregard general plan policies with which this Project conflicts (see MMC Chula Vista's Opening Brief on Requested Briefing Topics ("MMC OB") at pp. 5-6), the Applicant misstates governing law. Whether other cities' general plans "ordinarily" contain specific mandates or prohibitions (*id.* at p. 6) is irrelevant. The City's

general plan here contains a specific, mandatory, and fundamental injunction to "avoid" siting power plants within 1,000 feet of sensitive receptors. As explained in EHC's Opening Brief, a project that conflicts with such a policy cannot be approved, regardless of its consistency with other, non-mandatory policies. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782-83; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-42 ("*FUTURE*").) The City's general plan is therefore unlike the plan discussed in *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817, which explicitly encouraged the balancing of policies. The Applicant's reliance on *Sequoyah Hills Homeowners Association v. City of Oakland* (1993) 23 Cal.App.4th 704, is similarly misplaced. (See MMC OB at p. 6.) Unlike Policy E 6.4, none of the policies at issue in that case was mandatory. (*Sequoyah Hills*, *supra*, 23 Cal.App.4th at p. 719.) Neither the City nor the Commission may lawfully balance away the general plan's specific, mandatory requirements.[1]

Nor does the Applicant provide any authority for its novel assertion that general plan inconsistencies may be disregarded if a project's other impacts are less than significant for purposes of CEQA. (See MMC OB at pp. 7-9.) The general plan consistency requirement arises under state planning and zoning law, not CEQA, and nothing in CEQA provides an exemption from this requirement. Indeed, the Applicant's argument gets the relationship between the statutes exactly backwards: in the "context" of CEQA, general plan conflicts are considered potentially significant impacts that must be disclosed and mitigated. (See CEQA Guidelines, App. G, § IX(b); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930.)

[1] The Applicant suggests that the City sent a letter to the Commission stating that the Project need not conform to the general plan. (MMC OB at pp. 6-7.) The language quoted in the Applicant's brief, however, is not from the City's letter, but rather from the *Applicant's* letter. (Ex. 803 at p. 3.)

This Project's significant impacts thus include—and, as explained in EHC's Opening Brief, are far from limited to—a number of conflicts with local land use policies. CEQA provides no support for the Applicant's attempt to disregard the general plan.

2. The Project Fatally Conflicts with Policy E 6.4.

Staff and the Applicant both argue that Policy E 6.4 is inapplicable here because, in their view, the Project is not a "major toxic emitter." (See MMC OB at pp. 9-10; Energy Commission Staff's Opening Brief ("Staff OB") at p. 4.) As detailed in EHC's Opening Brief, this argument has no merit. The City, which wrote the policy, found that it applies to this Project. (Ex. 622 at pp. 5, 7 [Advanced Planning Section Comments at pp. 1, 3].) Ignoring the City's position, Staff and the Applicant would have the Commission read the words "energy generation facilities" right out of the general plan. However, under the same rules of statutory construction invoked by the Applicant—indeed, under the very case cited in the Applicant's brief—this Commission must give significance "to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 744 [internal quotations omitted].) Moreover, the Commission "may neither insert language which has been omitted nor ignore language which has been inserted." (*People v. National Auto. and Cas. Ins. Co.* (2002) 98 Cal.App.4th 277, 282 [internal quotations omitted].) Had the City intended Policy E 6.4 to apply only to new major sources of air pollution as defined in the Clean Air Act, it would have said so—and it never would have specifically included "energy generation facilities" within the policy's reach. As one court of appeal warned,

> qualifying the unqualified language of a statute with unexpressed exceptions premised on legislatively unmentioned policy judgments creates a trap for the unwary reader, undermines the predictive value of statutory language so necessary for jurisprudential stability, imposes transaction costs consisting of lawyer and judicial hours scouring the case law for counterintuitive

> interpretations, and risks judicial trespass upon the Legislature's province by varying the enacted words of the statute.

(*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 379-80.) The Commission should decline the Applicant's and Staff's invitation to rewrite Policy E 6.4 according to their own policy preferences—preferences that appear nowhere within, and in fact contradict, the plain text of the general plan.

The Applicant also suggests that Policy E 6.4's use of the word "avoid" confers broad discretion to do the opposite. (MMC OB at pp. 10-11). As explained in EHC's Opening Brief, the plain meaning of the word "avoid" is "to keep from happening." Nothing in Policy E 6.4 indicates that its use of this word was intended as a mere suggestion. In any event, the Applicant's assertion that it complied with the policy's injunction to "avoid" siting the Project within 1,000 feet of sensitive receptors by examining alternative sites (MMC OB at p. 11) is baseless. Both of the alternative sites examined by the Applicant were located *even closer* to residences than the proposed Project site. (Ex. 1 at p. 6-9; Tr. at pp. 350:24-351:4.) The Applicant even conceded that it defined its objectives for the Project so narrowly as to preclude consideration of any other site. (Ex. 5 at p. 25; Tr. at p. 353:4-8.) The Applicant has done nothing to "avoid" siting this Project within 1,000 feet of sensitive receptors.

Other arguments advanced by the Applicant similarly lack merit. As explained in EHC's Opening Brief, the terms of Policy E 6.4 are clear enough that no separate zoning ordinance implementing the policy was required. The legislative history of the policy also clearly expresses the City's intent that it be applied notwithstanding mitigation measures and health risk assessments. The Applicant's attempt to dismiss this history as "largely consist[ing] of EHC's own correspondence" (MMC OB at p. 13) mischaracterizes the record. (See Ex. 626A, 626C,

626D, 626E, 626F, 626G.) Policy E 6.4 is clear, mandatory, specific, and in fatal conflict with this Project.

Nor would reading Policy E 6.4 as mandatory—as its plain language requires—create a conflict with other general plan provisions, as Staff suggests. (See Staff OB at p. 6.) Policy E 6.4's mandate to avoid siting power plants within 1,000 feet of homes is entirely compatible with Policy PFS 22.4, which encourages "siting and design techniques that minimize community impacts." (See Ex. 200 at p. 4.5-15.) Policy ED 1.3, although intended to "encourage" preservation and expansion of industrial uses (*id.*), does not mandate that every industrial use in the City be allowed to expand *ad infinitum*, no matter what its character or location. Policy E 6.4 affects only a particular subset of uses categorized as "industrial," and does nothing to discourage preservation or expansion of other uses.

Finally, as detailed in EHC's Opening Brief, the City's prior approval of a special use permit ("SUP") for a smaller existing facility, under a different general plan, is entirely irrelevant to the Commission's determination of *this* Project's consistency with *this* general plan. Staff's assertion that "there is nothing in the record" to indicate that the "goals and objectives" of the City have changed since approval of the SUP (Staff OB at p. 5) is plainly false. *The City's entire general plan was rewritten in 2005*. The Montgomery Specific Plan, which governed the Project area at the time the SUP was approved, was repealed in 2005.[2] That same general plan update added Policy E 6.4, which would have precluded the City from approving the existing plant had it been in force four years earlier. Indeed, when the previous owner of the existing facility applied for an expansion in 2001, the City Council passed a resolution stating that it would *not*

[2] Chula Vista General Plan at p. LUT-6.

make the findings necessary to grant an SUP.[3] There is ample evidence that the City's "goals and objectives" have changed since it approved the existing plant. Staff has simply—and indefensibly—chosen to ignore this evidence.

3. Certification of the Project Would Impede the General Plan's Goals and Objectives.

In order to be found consistent with the general plan, a project must not only comply with the plan's fundamental and mandatory policies, but also must advance its goals and objectives as a whole. The Project fails to do so, as demonstrated in EHC's Opening Brief.

In asserting that the Project will comply with Policies E 6.15 and E 23.3, the Applicant claims that the Project "will actually improve air quality in the area by generating fewer emissions" than the existing plant.[4] (MMC OB at pp. 14, 16.) This claim contradicts the FSA, which found the Project's increased emissions of criteria pollutants significant as compared to those of the existing plant. (See Ex. 200 at pp. 4.1-34, 4.1-37.) Indeed, the exhibit cited in the Applicant's brief confirms that this assertion is untrue, even assuming only 500 hours per year of Project operation. (See MMC OB at pp. 14-15 [citing Table DR9-1].) Table DR9-1 compares Project emissions to those of the existing plant *per generating unit*. (Ex. 5 at p. 12.) The Project, of course, has two generating units. When both units are considered, the Project will result in increased emissions of NOx, VOC, SO_2 and PM as compared to the existing facility, even at

[3] Staff Supplemental Assessment, RAMCO Chula Vista II Peaker Generating Station (01-EP-3) (June 12, 2001), Attachment II, pp. 18-19, available at http://www.energy.ca.gov/sitingcases/peakers/chulavista/documents/CHULAVISTA_SUPPLEMENT.PDF.

[4] The Applicant also suggests that the Project is not a new project. (See MMC OB at p. 14 [arguing that general plan's use of verb "site" applies only "to industries not yet in existence," whereas the Project entails the "upgrade" of a pre-existing site].) This contradicts the AFC, which on its very first page describes the Project as a "new 100-MW facility" to be built on a "currently unoccupied" portion of the parcel. (Ex. 1 at p. 1-1.)

only 500 hours per year. (*See id.*) Total emissions at the "CEQA mitigation" level of 1,200 hours per year, or the permitted level of 4,400 hours per year, obviously would be much higher.[5]

The Applicant's assertion that the Project will improve air quality as compared to the existing plant thus has no basis in the record. People do not breathe on a "per generating unit" or "per megawatt-hour" basis. They simply breathe the air, along with whatever amount of pollution it contains. The Project is designed to produce more electricity and to run more often than the existing plant, and accordingly will result in a net increase in criteria pollutant emissions. As a result, the Project will not advance—but rather will impede—achievement of the general plan's public health and environmental justice objectives.

B. The Project Conflicts with the City's Zoning Code.

1. The Project Cannot Be Approved as an "Unclassified Use."

Prompted by the Committee's questions regarding "unclassified uses" at the evidentiary hearing, the Applicant and Staff now offer this category of uses as their primary argument for the Project's consistency with the zoning code. In fact, Staff now relies *solely* on the unclassified use provisions of the City's zoning code (see Staff OB at pp. 7-8), notwithstanding that these provisions were not discussed in the FSA and despite the fact that Staff's witness was concededly unfamiliar with them prior to the evidentiary hearing. As shown in EHC's Opening Brief, the Applicant's and Staff's late-developed reliance on these provisions is unavailing.

Staff, citing a comment made at the evidentiary hearing by Scott Tulloch, the Interim City Manager, suggests that "unclassified uses" comprise a broad, discretionary category of uses that can be approved as the City sees fit. (See Staff OB at p. 8 [citing Tr. at p. 336:3-8].) Like

[5] According to the Applicant's estimates, the hourly rate of PM10 emissions from the Project would be higher than that of the existing plant. (Ex. 5 at p. 13.) However, because the Applicant never conducted source tests for PM emissions at the existing plant, the FSA does not contain enough information for a true comparison. (Ex. 200 at p. 4.1-42 [Table 26, fn. b].)

other extemporaneous comments made at the evidentiary hearing, however, Mr. Tulloch's unsworn statement contradicts the plain text of the ordinance. "Unclassified uses" do not comprise a broad, catch-all discretionary category, but rather a specific list of uses that, due to their unique characteristics, were not included automatically in the classes of uses established in designated zoning districts. (See Chula Vista Municipal Code ("CVMC") §§ 19.54.010(A), 19.54.020.) Power plants *are* included automatically in the general industrial district. (Ex. 620 at p. 19-101 [CVMC § 19.46.020(E)].) By definition, therefore, a power plant is not an "unclassified use." Nor are power plants mentioned in the code's definition of "quasi-public" uses (see CVMC §§ 19.04.190), the list of permitted and conditional uses in the "Public/Quasi-Public" zoning district (see CVMC §§ 19.47.020, 19.47.040), or the list of permitted and conditional uses in the "Limited Industrial" zoning district. (Ex. 620 at pp. 19-98 to 19-99 [CVMC §§ 19.44.020, 19.44.040].) "[I]f a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent the provision is not applicable to the statute from which it was omitted." (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827.) As a matter of law, the Commission must interpret and apply the text of the ordinance, not off-the-cuff remarks made at a hearing by witnesses and parties unfamiliar with the provisions under discussion. Under the plain text of the City's zoning code, power plants belong in the general industrial zone.

The Applicant suggests that a passing reference to public and quasi-public uses in the SUP for the existing plant means that this Project is an "unclassified use." (MMC OB at p. 24.) However, as addressed in EHC's Opening Brief—and as the Commission itself has properly recognized—the City's issuance of the SUP did not set any precedent for future decisions. (Commission Decision, *Eastshore Energy Center*, Publication No. CEC-800-2008-004-CMF,

Docket No. 006-AFC-6 (Oct. 2008) ("*Eastshore*"), at pp. 336-37; see also, e.g., *Howard Jarvis Taxpayers Association v. City of Riverside* (1999) 73 Cal.App.4th 679, 689 [City cannot be estopped or otherwise bound by such prior statements of its representatives].) A prior SUP for a different facility cannot make this Project consistent with the zoning code.

Indeed, the City has never clearly stated in *this* proceeding that *this* Project is consistent with all applicable zoning provisions. (See Ex. 621 at p. 7; Ex. 622 at p. 7 [Advanced Planning Section Comments at p. 3].) The Applicant attempts to convert Mr. Tulloch's evidentiary hearing comments into such a statement (see MMC OB at p. 24), but in doing so misreads the record. Mr. Tulloch did not say that the City "concurred that it would issue a CUP," as the Applicant claims. (*Id.*) On the contrary, he said that before making such a decision, the City would want to go through the process of evaluating whether a CUP *could* be issued. (Tr. at pp. 335:21-336:1.) The City, which has no jurisdiction to issue a CUP here (Pub. Res. Code § 25500), has not gone through that process, and thus has never reached the conclusion that this Project could be found consistent with its zoning code. Based on Mr. Tulloch's response to Commissioner Pfannenstiel's question on this point, it appears that the City has chosen to let the Commission decide the issue. (See Tr. at p. 336:14-25.) Nothing in the City's opening brief indicates otherwise. Accordingly, the Commission must apply the plain text of the zoning ordinance, and under that plain text, must find this Project inconsistent with applicable zoning.

2. The Applicant Has Provided No Evidence that Electrical Generation Is a "Manufacturing Use."

The Applicant contends that the Project should be considered a "manufacturing use" for purposes of the limited industrial zoning designation. (MMC OB at p. 25.) The *only* evidence cited for this assertion, however, is that a power plant was once approved in the City of Riverside's "Manufacturing Park" zoning district. (*Id.* [citing Ex. 24].) The bare fact that a

power plant was built in another city's zoning district, which happened to have the word "manufacturing" in its name, is not evidence that the Commission "has regularly identified power plants as manufacturing uses." (MMC OB at p. 25.) In fact, nothing in the Commission's staff report for the Riverside Energy Resource Center identifies the generation of electricity as a "manufacturing" use. (See Ex. 629J at pp. 11-1 [finding that power plant would be allowed with a conditional use permit], 11-5 to 11-6 [describing power plant as "industrial" use].) The Applicant's contentions lack any support.[6]

C. The Applicant Has Failed to Demonstrate that Staff's Alternative C Is Infeasible.

Staff's Alternative C—a vacant parcel adjacent to an existing landfill gas power plant near the Otay Landfill—would take advantage of the landfill's existing buffer from residential areas and would avoid any conflict with the City's LORS. The Applicant protests that this alternative is economically infeasible, arguing (1) that the site does not meet the Applicant's objective of eliminating Project linears, and thus would be more costly; and (2) that building a power plant atop a closed landfill would require additional permits and expensive engineering while raising safety concerns. (See MMC OB at pp. 31-34.) As set forth in EHC's opening brief, the Applicant has failed to provide the analysis necessary to show that this alternative is economically infeasible. Nothing in the Applicant's opening brief remedies this deficiency.

[6] Indeed, the Applicant's argument on this point amply illustrates why the Commission should disregard Exhibit 24 in its entirety. As demonstrated in EHC's Opening Brief, the exhibit contains no useful analysis, offers only conclusory assertions, and is misleading. It is also legally irrelevant, as the Applicant effectively concedes elsewhere in its opening brief. (See MMC OB at pp. 111-12 [arguing that a "comparison to past projects is irrelevant to Staff's present analysis" of whether this Project complies with LORS].)

1. A Mere Conflict with a Project Objective Does Not Render an Alternative Economically Infeasible.

The fact that Alternative C might not completely satisfy all of the Applicant's stated objectives does not render it infeasible.[7] The Applicant effectively conceded that it defined its objectives so narrowly as to preclude any alternative location for the Project. (Ex. 5 at p. 25; Tr. at pp. 351:5-11, 353:4-8.) Of course, if applicants could thwart consideration of all potentially feasible alternatives simply by adopting overly narrow objectives, CEQA would be rendered meaningless. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37 [holding that applicant's prior commitments could not foreclose analysis of alternatives]; see also *Simmons v. U.S. Army Corps of Engineers* (7th Cir. 1997) 120 F.3d 664, 666-67 [holding under NEPA that agency may not "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)"].) Nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with one of the applicant's objectives. The statutory definition of "feasible" does not even mention the applicant's objectives. (Pub. Res. Code § 21061.1.) In fact, the CEQA Guidelines expressly provide that a feasible alternative may *impede* achievement of those objectives to some degree. (See CEQA Guidelines § 15126.6(a), (b).)

The CEQA cases cited by the Applicant do not suggest otherwise. The decision in *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, did not turn on an alternative's mere inconsistency with project objectives. Rather, the court found that

[7] Once again, the Applicant mischaracterizes the FSA in stating that the Project objectives were "approved" by Staff. (See MMC OB at pp. 88, 95.) In reality, Staff "determined" what the Applicant's objectives were by looking at AFC, and then developed screening criteria for alternative sites based on these objectives. (Ex. 200 at p. 6-5.) Staff then found that Alternative C met these screening criteria. (Ex. 200 at pp. 6-7, 6-8 to 6-9.) If anything, this shows that Staff found Alternative C largely consistent with the Project objectives.

a detailed economic analysis, showing that a proposed alternative would eliminate all profit from the project and result in a loss of construction financing, provided substantial evidence of economic infeasibility. (*Id.* at p. 1401.) The Applicant here has provided no such analysis. The decision in *Sequoyah Hills, supra*, mentions that the city council accepted the applicant's assertion that a reduced-density development alternative was economically infeasible. (See 23 Cal.App.4th at p. 715.) What the case actually holds, however, is that the city council's *alternative* conclusion—that a reduced-density alternative was barred by statute, and thus *legally* infeasible—was correct. (*Id.* at pp. 715-16.) The Applicant has raised no issue of legal infeasibility here. Finally, *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, does not aid the Applicant. *Sierra Club* primarily held that the county did not abuse its discretion by considering evidence of economic infeasibility that was not included in the EIR. (See *id.* at pp. 1503-06.) The court then went on to find that there was ample evidence to conclude that a proposed alternative was economically infeasible, even without considering the applicant's letter regarding the alternative's inconsistency with project objectives. (*Id.* at p. 1508.)

None of these cases stands for the proposition that an applicant's mere assertion of a conflict with project objectives renders an alternative economically infeasible. On the contrary, recent decisions have clarified that a finding of economic infeasibility must be based upon quantitative, comparative evidence showing that the alternative would render the project economically impractical. (See, e.g., *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461-62 [holding that applicant's inability to achieve "the same economic objectives" under a proposed alternative does not render the alternative economically infeasible]; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 [requiring evidence that comparative marginal costs would be so great that a reasonably prudent property owner

would not proceed with the project]; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 [holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party].) The courts have set a high bar for a finding of economic infeasibility. The Applicant's conclusory protestations regarding the Project objectives—objectives already defined so narrowly as to undermine consideration of *any* alternative—fail to clear that bar.

2. The Applicant Has Provided No Evidence that Alternative C is Unsafe or Otherwise Infeasible Due to its Location Near the Otay Landfill.

The Applicant contends that Alternative C would be more costly, and even potentially unsafe, due to its location near the Otay Landfill. This contention is unsupported by the record.

In response to a data request from EHC regarding an evaluation of possible alternative sites "in the closed section of the landfill," the Applicant provided a very general discussion of the potential engineering and permitting constraints associated with siting a power plant on top of a closed landfill. (See Ex. 5 at pp. 25-26.) In its opening brief, the Applicant cites these constraints in support of its argument that Alternative C is infeasible. (See MMC OB at pp. 32-33, 95-96.) *Yet nothing in the Applicant's data response discusses Alternative C, and nothing in the FSA states that Alternative C is located on top of a closed section of the landfill.* (See *id.*; see also Ex. 200 at pp. 6-8 to 6-9.) On the contrary, the FSA states that the Alternative C site consists of several acres of land adjacent to an existing landfill gas power plant. (Ex. 200 at pp. 6-8 to 6-9.) The Applicant thus has not shown that the engineering, permitting, and safety constraints cited in the data response apply to the Alternative C site at all; indeed, the fact that there is already a power plant on the site strongly suggests that these constraints have been

overcome, if they ever existed.[8] In any event, even if Alternative C were located on a closed section of the landfill, the Applicant would have failed to meet its burden here. The general discussion of engineering and permitting constraints in the Applicant's data response is utterly conclusory as to cost, and thus does not provide the level of analysis necessary to support a finding of economic infeasibility.

Staff's Alternative C meets the basic purpose of the Project: to provide a nominal 100 MW of peaking power to the Otay Substation. If existing transmission potential along the Otay-Otay Lake Tap line had been taken into account, as discussed in EHC's Opening Brief, Alternative C might even be consistent with the Applicant's goal of minimizing project linears. The Applicant has presented no evidence or analysis sufficient to support a finding that Staff's Alternative C is economically infeasible.

D. The Commission Cannot Make the Findings Necessary to "Override" the Project's Non-Compliance with LORS.

In urging a LORS override, the Applicant not only applies an erroneous standard for a finding of public convenience and necessity, but also vastly overstates the benefits of the Project. The Applicant also fails to address the second finding necessary for a LORS override, namely whether there are more prudent and feasible means of achieving public convenience and necessity. As shown in EHC's Opening Brief, and as explained in further detail below, the Commission cannot make either of the two required findings on the record here.

[8] Despite the Applicant's claims to the contrary, it is not clear that additional permits would be required in order to site a plant atop a closed landfill, for the simple reason that Commission's siting authority expressly supersedes the permitting authority of other state agencies. (Pub. Res. Code § 25500.)

1. The Applicant Applies an Erroneous Standard for a Finding of Public Convenience and Necessity.

The Applicant, citing three prior decisions of this Commission, concludes that "the core analysis" as to whether a project is "required" for public convenience and necessity "pivots on the question of whether the project can supply a need that is recognized under state energy policy." (MMC OB at p. 40; see also *id.* at pp. 35-40, citing Final Commission Decision, *Los Esteros Critical Energy Facility II Phase 2*, Publication No. CEC-800-2005-004-CMF, Docket No. 03-AFC-2 (Oct. 2006) ("*Los Esteros*"); Commission Decision, *El Segundo Power Redevelopment Project*, Publication No. CEC-800-2005-001-CMF, Docket No. 00-AFC-14 (Feb. 2005) ("*El Segundo*"); Commission Decision, *The Metcalf Energy Center*, Publication No. P800-01-023, Docket No. 99-AFC-3 (Sept. 2001) ("*Metcalf*").) Although the Applicant seems to recognize that each decision requires a careful balancing of a particular project's benefits and burdens, its ultimate conclusion comes perilously close to suggesting that any project capable of generating electricity must be "required" for public convenience and necessity within the meaning of Public Resources Code section 25525.

This reading of past decisions as establishing "precedential and non-regulatory standards" is incorrect, as the Commission recently clarified. (Final Commission Decision, *Eastshore Energy Center*, Publication No. CEC-800-2008-004-CMF, Docket No. 06-AFC-6 (Oct. 2008) ("*Eastshore*"), at pp. 446 [describing applicant's position]; 454-56 [clarifying that each project's benefits must be balanced against the salutary purposes of the LORS with which it conflicts].) As shown in EHC's Opening Brief, the Project's meager benefits do not outweigh the salutary purposes of the general plan and zoning provisions with which it fatally conflicts.

2. The Benefits of the Project Do Not Outweigh Its Conflicts with LORS.

In order to find that a facility is "required for public convenience and necessity," the Commission must balance the facility's public benefits against the purposes of the LORS with which it conflicts. (*Eastshore* at p. 455.) Here, the Project benefits touted by the Applicant—local property and sales tax revenues, temporary construction jobs, a marginal increase in generation efficiency, and a small, incremental potential contribution to the eventual removal of the South Bay Power Plant (see MMC OB at pp. 42-45)—are meager by comparison to those of other power plant projects. These insubstantial benefits do not outweigh the protective purposes of the general plan and zoning provisions with which the Project conflicts.

The Project's contributions to local property and sales tax revenues would be considerably smaller than those of the Eastshore peaker plant—a project that the Commission found was not required by public convenience and necessity. (Compare MMC OB at pp. 42-44 [estimating annual property tax revenues of $800,000, utility tax revenues of $63,000, City sales taxes of $22,500 during construction and demolition, and local construction-phase purchases of $1.8 million] with *Eastshore* at p. 454 [estimating property tax revenues of $1.4 million, sales tax revenues of $116,480, and $1.9 million in local purchases annually].) The project similarly would provide only $8.9 million in construction and demolition payroll (MMC OB at p. 43), in comparison to the $20.3 million expected under the Eastshore project. (*Eastshore* at p. 454.) After construction, the Project would have only two contract employees (Ex. 2 at p. DA-33; Ex. 200 at p. 4.9-6), while the Eastshore project would have employed 13 full-time workers. (*Eastshore* at p. 454.) As in *Eastshore*, moreover, all of these Project benefits could be achieved by a similar project in another, more appropriate location. (See *id.*) Although the Commission has been careful to state that its prior decisions do not establish precedential standards, its

Eastshore decision nonetheless provides an instructive point of comparison regarding this Project's exceedingly modest local benefits.

The Project's ability to displace other less-efficient generation also pales in comparison to that of other projects. CalISO's evidentiary hearing testimony made very clear that certification of this Project would provide only an incremental contribution at best toward removal of the RMR designation from the South Bay Power Plant—an incremental contribution that could be achieved by a peaking generation project located anywhere in the San Diego area. (See Tr. at pp. 244:20-245:8.) The Project thus has no unique or compelling ability to displace generation from South Bay, in contrast to other projects that the Commission has found to be required by public convenience and necessity. (See, e.g., *Metcalf* at p. 467 [finding that facility would directly displace 945 MW of RMR generation]; *El Segundo* at p. 297 [finding that facility would directly replace a 50-year-old facility with a less-visually-intrusive project].) At best, the Project here is more like the one considered in *Eastshore*, which potentially could have reduced somewhat the need to run older, less efficient facilities. (*Eastshore* at p. 453.)

The reliability and energy policy benefits of the Project are similarly doubtful. Once again, the Applicant claims that the Project will emit less air pollution that the existing facility. (MMC OB at p. 46.) As previously discussed, the claim is specious. Even if it runs for only 500 hours per year, the Project will emit more criteria air pollutants and greenhouse gases[9] than the existing plant. Furthermore, as explained in EHC's Opening Brief and in the testimony of Bill Powers, Staff's and the Applicant's assumptions about the need for the Project failed to consider

[9] The Project, emitting .541 metric tons of CO_2 per MWh, would produce a total 24,886 metric tons of CO_2 per year at 500 hours (46,000 MWh/year, assuming 92 MW output). (See Ex. 200 at p. 4.1-53.) The existing facility, operating at the five-year average "baseline" level, would emit 4,914 metric tons of CO_2 per year. (See Ex. 200 at p. 4.1-54.) During 2007, operating at levels more consistent with current environmental conditions, the existing facility emitted only 1,452 metric tons of CO2 per year. (*Id.*)

the effect of a recent California Public Utilities Commission energy efficiency decision that will essentially flatten the peak demand curve over the next several years. (See Ex. 616 at pp. 3-4.)

Nor will replacement of the existing Chula Vista Power Plant contribute significantly to efficient generation. Unlike the kinds of projects discussed in the Commission's Integrated Energy Policy Report ("IEPR") and cited in the Applicant's brief (see MMC OB at pp. 49-50, citing IEPR at pp. 249-50), this Project would not replace a dirtier, less efficient, decades-old baseload plant that is currently being run as a peaker. Rather, it would replace another peaker plant that is only eight years old. According to Staff, there is only a "relatively insignificant" difference in efficiency between a LM6000 turbine, like those proposed for the Project, and a Pratt & Whitney FT8 TwinPac, like the one used at the existing plant. (Ex. 200 at p. 5.3-5; see also Ex. 4 at p. 5.) In fact, the Project's projected efficiency is only 39.2% LHV. (Ex. 200 at p. 5.3-2.) As pointed out in EHC's Opening Brief, moreover, the Project has a greenhouse gas emissions rate that is higher than the California system average, and does not qualify as "clean" generation. Finally, neither Staff nor the Applicant has shown that the Project will result in any transmission system loss savings, a potential benefit considered in other Commission decisions. (See *Eastshore* at pp. 453-54; *Los Esteros* at p. 370; *Metcalf* at p. 467.) The Project does not substantially advance the state's policy interest in moving toward more efficient generation. If anything, the Project conflicts with this goal.

In sum, the benefits of the Project are not only meager, but also could be achieved in a more appropriate location, such as Staff's Alternative C. (See Ex. 200 at p. 6-6.) Like the Eastshore project, there is nothing unique or highly compelling about this Project being built at this site. (*Eastshore* at p. 454.) These insubstantial, generic benefits cannot outweigh the salutary purposes of the general plan policies and zoning provisions with which the Project

fatally conflicts. These policies and provisions carry out some of the most important and fundamental functions of local government: to protect the public health, safety, and welfare, to provide for rational urban development, and to ensure that all residents are treated fairly in the allocation of environmental benefits and burdens stemming from land use decisions. Indeed, these policies reflect the City's groundbreaking decision to incorporate environmental justice principles, goals, and policies into its general plan. The Commission should send a clear message that it recognizes the important principles behind these policies by squarely rejecting the Applicant's contention that the City's LORS are somehow insignificant. (See MMC OB at pp. 40-42.) Given its paltry benefits, and considering the importance of the LORS that it would violate, this Project is not required for public convenience and necessity.

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

Neither the Applicant nor Staff explicitly addresses the second finding required for a LORS override in any detail. As shown in EHC's Opening Brief, even if this Project were required for public convenience and necessity, there are more prudent and feasible means of obtaining whatever benefits the Project would provide. The Commission thus cannot make the findings required for a LORS override here.

E. Proposed LORS Findings and Conclusions.

In light of the foregoing discussion, and the analysis presented in EHC's Opening Brief, EHC requests that the Commission adopt the following findings and conclusions:

1. The Project site is designated "Limited Industrial" under the Chula Vista General Plan. Under the general plan, utility uses such as the Project are classified as "General Industrial" uses. The Project is inconsistent with the intent and purpose of the general plan's land use designations.

2. The Project is inconsistent with Policy LUT 1.1 of the general plan, which is intended to ensure that land uses develop in accordance with the general plan's Land Use Diagram and zoning code.

3. The Project conflicts with general plan Policy E 6.4. Policy E 6.4 is fundamental, mandatory, and clear. Policy E 6.4 requires that the Commission "avoid" siting an "energy generation facility" within 1,000 feet of "sensitive receivers" such as homes and schools. The Project is an "energy generation facility" within the meaning of Policy E 6.4. The proposed Project site is within 1,000 feet of homes. The only alternative sites identified by the Applicant are also within 1,000 feet of homes. Staff's Alternative C, which would not conflict with Policy E 6.4, has been rejected by the Applicant despite a lack of evidence of infeasibility. Accordingly, the Applicant has made no effort to "avoid" locating this Project within 1,000 feet of sensitive receivers as required by Policy E 6.4.

4. The Project impedes achievement of the public health and environmental justice objectives articulated in general plan policies E 6.15 and E 23.3. Because it proposes a heavy industrial use, the Project also conflicts with the general plan's vision for limited industrial development along Main Street. Accordingly, the Project does not advance the goals and objectives of the general plan as required by state law.

5. The Applicant's August, 2008 side agreement with the City does not resolve the Project's inconsistencies with the general plan.

6. The special use permit ("SUP") for the existing Chula Vista peaker plant was issued prior to the City's 2005 general plan update. Accordingly, the SUP is of no probative value in determining whether this Project is consistent with the general plan. The SUP also cannot and does not establish any precedent concerning whether this Project is consistent with the City's zoning code.

7. The Project site is zoned IL-P, or "Limited Industrial-Precise Plan," under the City's zoning code. The proposed construction/laydown area is zoned "Agricultural."

8. The Project is inconsistent with the site's IL-P zoning. Energy generating facilities are not specifically allowed as either permitted or conditional uses in the IL zone. The zoning code expressly provides that such facilities are permitted in the I, or "General Industrial," zone. Read in conjunction with the intent and purposes of the general plan's land use designations, this indicates that such facilities are not appropriate in the IL zone.

9. Under the City's zoning code, "unclassified uses" mean only those uses not automatically included in a defined zoning district. Because energy generating facilities are automatically included as permitted uses in the I ("General Industrial") zone, such a facility is not an "unclassified use." Nor is power generation included among the "public" or "quasi-public" uses defined in the zoning code. The Project cannot be conditionally approved in the IL zone as an "unclassified use."

10. In the City's P or "Precise Plan" modifying district, a precise plan is required before any zoning permit may issue. A precise plan has not been prepared for the Project site. Accordingly, under the City's zoning code, a zoning permit for the Project could not be issued. Approval of the Project without a precise plan would violate this requirement.

11. The uses proposed for the construction/laydown area are not allowed as either permitted or conditional uses in the Agriculture zoning district. Nor are those uses accessory to any use permitted in the Agriculture zoning district. Approval of the Project would violate these provisions of the zoning code.

12. The Project does not comply with the laws, ordinances, regulations, and standards ("LORS") of the City of Chula Vista.

13. In order to "override" the Project's non-compliance with LORS, the Commission must find (1) that the Project is required for public convenience and necessity, and (2) that there are no more prudent and feasible means of achieving public convenience and necessity. (Pub. Res. Code § 25525.)

14. The Project is not required for public convenience and necessity. The Project will not generate a significant amount of electricity, will not appreciably improve overall generating efficiency as compared to the existing plant on the site, and will increase emissions of both criteria air pollutants and greenhouse gases. The Project thus does not substantially advance state energy policy. The Project's energy generation and local economic benefits are modest, and are not unique or compelling, in that they are capable of being achieved at another, more appropriate location. These benefits do not outweigh the salutary purposes of the City's LORS, including the protection of public health, safety, and welfare and the fair allocation of environmental benefits and burdens.

15. Even if the Project were required for public convenience and necessity, the Commission would find on this record that there are more prudent and feasible means of achieving public convenience and necessity. The Applicant has failed to demonstrate that an alternative location, Staff's Alternative C, is infeasible. The Commission also finds that alternative means of reducing peak demand through conservation and energy efficiency, as well as alternative and renewable generation technologies, are more prudent, are more consistent with state energy policy as expressed in the energy loading order, and are currently feasible.

16. Because the Project is inconsistent with LORS, and because the findings required to override that inconsistency cannot be made, the Commission finds that the Application for Certification must be denied.

II. CERTIFICATION OF THE PROJECT WOULD VIOLATE CEQA.

As set forth in EHC's Opening Brief, the FSA fails to satisfy CEQA's requirements. The FSA failed to disclose and properly analyze the significance of the Project's environmental

impacts, particularly in the areas of air quality, public health, and noise. Mitigation measures proposed in the FSA are insufficient to reduce those impacts to a less-than-significant level. The Commission cannot make the findings necessary to override these remaining significant impacts, not only because there are feasible alternatives that would avoid or lessen these impacts, but also because the Project's benefits do not outweigh its environmental consequences. Although nothing in the other parties' opening briefs undermines EHC's conclusions, certain contentions merit a brief response here.

A. The FSA Failed to Document or Justify its Choice of a "Baseline."

Both the Applicant and Staff contend that the "baseline" for analysis of the Project's impacts is the existing Chula Vista Power Plant. (MMC OB at pp. 54-55; Staff OB at pp. 9-11.) As discussed in EHC's Opening Brief, however, the FSA failed to disclose exactly what this means in quantitative terms, and failed to explain why the document apparently formulated the baseline differently when discussing different impacts. CEQA requires a clear and conspicuous identification of baseline assumptions. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659.) The FSA failed to provide that discussion here.

Indeed, a reader of the FSA must "sift through obscure minutiae" in order to "ferret out" the fundamental baseline assumptions used in the document. (See *id.*) By following footnotes in the FSA back to data responses prepared by the Applicant, a reader might deduce that Staff calculated the baseline by averaging five of the existing plant's past seven years of operations, excluding the two years during which the plant did not run at all. (Ex. 200 at p. 4.1-26 [Table 18], citing Ex. 4 at pp. 5-6 [describing total emissions at 213 annual hours of operation based on average of years during which plant was running, but variously describing averaging period as

either two years or five years].) Because the FSA never clearly explains what baseline it uses, however, the reader cannot determine whether this average fairly represents existing conditions.

Indeed, the record shows that this baseline may be too high, and thus may understate the Project's impacts. Although the Applicant claims that operations have "increased" during the years MMC has owned the facility (MMC OB at p. 55, citing Tr. at p. 415:18-24), the record actually shows that current operations are well below the 213-hour average used as the baseline. As of October 2, the existing plant had been dispatched 50 times in 2008, with each dispatch lasting roughly an hour, for a total of approximately 50 hours. (MMC OB at p. 55; Tr. at p. 415:18-21.) At this rate—with only three months remaining in the year, and the hot summer peak over—it seems unlikely that yearly operations will be anywhere near the baseline average of 213 hours. Indeed, during 2007, the plant operated for only 58 hours through the month of November. (Ex. 4 at p. 5.) The 213-hour baseline thus appears to be too high, and accordingly may understate the Project's impacts as compared to current conditions at the existing plant. Staff's failure to provide the detailed justification that CEQA requires thus renders the FSA inadequate as an informational document, and calls into question its conclusions regarding the Project's impacts and the effectiveness of proposed mitigation.

B. The Project Will Cause Significant Environmental Impacts That Have Not Been Adequately Mitigated.

1. The FSA Failed to Determine the Significance of the Project's Greenhouse Gas Emissions.

The Applicant, echoing the FSA, contends that it would be "speculative" to conclude that the Project's greenhouse gas emissions might be significant because electricity is generated as part of a "system." (MMC OB at pp. 64-65.) This contention contradicts both the law and the record. The Applicant seems to believe that it is impossible to determine whether the Project

would result in a net increase of greenhouse gas emissions because it might displace other, less efficient generation somewhere else in the "system." As discussed in EHC's Opening Brief, the FSA's conclusion that the Project's impacts are less than significant because such displacement *might* occur is itself nothing more than speculation.[10] CEQA requires more.

The Applicant's argument, like the FSA, also ignores what all parties concede is the relevant CEQA "baseline" here: emissions from the existing Chula Vista Power Plant. As discussed in EHC's Opening Brief, the Project's emissions can be compared to the existing plant's baseline emissions without any need for extensive analysis, much less speculation. In comparison to the same baseline used for assessment of the Project's other impacts, in other words, the Project's greenhouse gas emissions are significant by any measure.

The Applicant, citing a recent draft proposal by California Air Resources Board ("CARB") staff, claims that an increase in greenhouse gas emissions need not be found significant because "some definable level of *emissions increase* in the near term and at mid-century will still be consistent with climate stabilization." (MMC OB at p. 63 [emphasis added].) The Applicant's position contradicts AB 32, the sole purpose of which is to require dramatic emissions *reductions*, both in the near term and by 2020. It also mischaracterizes CARB's draft proposal, which actually says that "some level of *emissions* in the near term and at mid-century is still consistent with climate stabilization."[11] The CARB proposal also says that "any non-zero threshold must be sufficiently stringent to make substantial contributions to

[10] Ironically, in discussing the Project's purported benefits, the Applicant freely claims that the Project will displace dirtier, less-efficient generation from other, unspecified sources within the same overall generation "system." (See, e.g., MMC OB at pp. 48-50.) By the Applicant's own logic, however, any such benefit would be entirely speculative.

[11] California Air Resources Board, Preliminary Draft Staff Proposal, *Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases Under the California Environmental Quality Act* (Oct. 24, 2008) at p. 4 (emphasis added), available at http://www.arb.ca.gov/cc/localgov/ceqa/meetings/102708/prelimdraftproposal102408.pdf.

reducing the State's GHG emissions peak, to causing that peak to occur sooner, and to putting California on track to meet its interim (2020) and long-term (2050) emissions reduction targets." (*Id.*) Finally, the CARB proposal recommends a presumptive threshold of significance of 7,000 metric tons per year for industrial sources. (*Id.* at pp. 7, 9-10.) As shown in EHC's Opening Brief, the Project's greenhouse gas emissions will exceed the baseline by about 50,000 metric tons per year. There is absolutely no basis, in either the record or the law, to conclude that these impacts are anything other than significant.

2. The FSA Failed to Identify and Propose Mitigation for the Project's Significant Greenhouse Gas Impacts.

According to the Applicant, there is no need for this Commission to propose mitigation for the Project's greenhouse gas emissions because climate change impacts will be addressed programmatically under CARB's recently released AB 32 scoping plan and a recent decision by the California Public Utilities Commission. (See MMC OB at pp. 61-66.) Once again, the Applicant is incorrect.

The Applicant's argument overlooks the fundamental purposes of CEQA. A lead agency must disclose and analyze significant environmental impacts, and propose feasible mitigation measures and alternatives to avoid those impacts, *before* approving a project. (Pub. Res. Code §§ 21002, 21002.1(b); *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 394.) The argument also misconstrues the purpose of CARB's scoping plan, which contains only broad *recommendations* for achieving AB 32's greenhouse gas reduction goals. (CARB, Climate Change Proposed Scoping Plan (Oct. 2008) ("Scoping Plan") at pp. ES-3, ES-8; see also Health & Saf. Code § 38561(b).) Regulations to implement these recommendations must be developed through the normal rulemaking process. (Scoping Plan at pp. ES-14, 9-10.) At the earliest, these regulations will not be adopted until sometime in

2011, and will not take effect until 2012. (*Id.* at pp. 1, 30; see also Health & Saf. Code § 38562(a).) The CPUC decision cited by the Applicant similarly adopts only "recommendations" for addressing climate change impacts from electrical generation. (See CPUC, Final Opinion on Greenhouse Gas Regulatory Strategies, Decision 08-10-037, Docket No. R.06-04-009 (Oct. 16, 2008), at pp. 296-301.) The decision does not, by itself, impose mandatory requirements.

The problem with relying on these recommendations is that the Applicant is seeking Project approval *now*, not several years from now. Right now, CEQA governs approval of this Project.[12] The Commission therefore must comply with CEQA by analyzing the Project's climate change impacts, determining their significance, and providing feasible mitigation. Nothing in the FSA or proposed conditions of certification obligates the Applicant to follow the recommendations outlined in the Scoping Plan and the CPUC's decision. On the contrary, proposed condition AQ-SC9 requires only that the Applicant monitor and report the Project's greenhouse gas emissions. (Ex. 200 at pp. 4.1-82 to 4.1-83.) It does not require that the Applicant take any steps to reduce or avoid those emissions. It does not even require that the Project reduce or avoid emissions if and when the AB 32 regulations are adopted. (*Id.* at p. 4.1-57.) The Commission may not simply assume that AB 32 will take care of everything in a few years, and just tally the greenhouse gases emitted by the Project in the meantime. Rather, CEQA requires the Commission to ensure that this Project's significant impacts are disclosed and mitigated or avoided to the extent feasible.

[12] Counsel for the Applicant, while advocating in a separate proceeding that the Commission address the greenhouse gas impacts of power plants using the regulations to be adopted under AB 32, nonetheless acknowledged that there will be an "interim period" before those regulations take effect, posing both difficulties and opportunities for mitigation. (See Reporter's Transcript, CEC Docket No. 08-GHG OII-1 (Oct. 28, 2008) at pp. 64:4-68:12.)

3. The FSA's Discussion of Public Health Impacts Is Inadequate.

The Applicant's arguments in defense of the FSA's public health analysis lack merit. For example, in discussing Joy Williams' testimony regarding the potential impact of diesel particulate matter ("DPM") on children, the Applicant apparently confuses the 70-year timeline for assessment of cancer risks with the much shorter timeline for assessing chronic *non*-cancer risks. (See MMC OB at p. 69.) According to guidelines published by the Office of Environmental Health Hazard Assessment ("OEHHA"), the "chronic" exposure period for non-cancer risks (including risks associated with exposure to DPM) is 12% of a lifetime, or about eight years for an adult.[13] Twelve percent of a child's lifetime, of course, would be a much shorter period.

The Applicant also incorrectly cites the health risk assessment performed by the Chula Vista Elementary School District as confirmation that the FSA "properly addressed sensitive receptors." (MMC OB at p. 70.) In reality, this study noted that the FSA failed to evaluate the cancer risk posed to children over a nine-year exposure period, as recommended in the OEHHA Guidelines (see Ex. 203 at p. 4; see also OEHHA Guidelines at pp. 2-4, 5-15, 8-3 to 8-5), despite the Project's proximity to residences, schools, and day care centers. (See Ex. 632 [map showing locations of schools, day care centers, and recreational facilities near Project site].) The study also noted that the FSA did not follow new non-cancer risk assessment methodology calling for analysis of eight-hour, rather than just one-hour, exposures. (Ex. 203 at p. 5.) Upon later review, the school district's consultant again confirmed that these studies had not been done, but concluded that the health risk assessment for the Project was nonetheless consistent with

[13] OEHHA, *Air Toxics Hot Spots Program Risk Assessment Guidelines: The Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments* (Aug. 2003) at p. 6-5 ("OEHHA Guidelines"), available at http://www.oehha.ca.gov/air/hot_spots/pdf/HRAguidefinal.pdf.

OEHHA Guidelines because adopted significance thresholds exist only for the 70-year cancer risk and one-hour non-cancer hazard indices. (*Id.* at p. 4.)

Far from confirming that the FSA's analysis was adequate under CEQA, the school district's study actually confirms the opposite. Given the Project's proximity to schools and other facilities where children congregate, the FSA's failure to use OEHHA's updated risk assessment methodology is an abuse of discretion. (See *Berkeley Keep Jets Over the Bay Committee v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1366-67.) The mere lack of an adopted threshold of significance for an impact, moreover, does not automatically render that impact less than significant. (See *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) Nor does it excuse the Commission from its duty to determine whether the risk is significant, based on available scientific and factual data. (See CEQA Guidelines § 15064(b).) The FSA's failure to assess the Project's risk to children, using available methodology developed for that very purpose, falls short of what CEQA requires.

C. The Applicant Has Not Demonstrated that Proposed Alternatives Are Infeasible.

EHC addressed the Applicant's failure to demonstrate the infeasibility of proposed alternatives, including demand reduction, renewable resources, and distributed generation alternatives, in its Opening Brief. The Applicant's specific assertions regarding Staff's Alternative C, as well as its general assertions regarding project objectives, also are addressed above in Part I.C. of this Reply Brief.

One comment in the Applicant's opening brief demands additional attention. In discussing the feasibility of solar generation, the Applicant proclaims that "until SDG&E endorses a specific biomass, wind, solar, or CHP project with equivalent capacity to CVEUP, such a project's viability is entirely speculative." (MMC OB at p. 100.) SDG&E has not only

"endorsed" such a project, but has actually *proposed* such a project, namely a partnership between the utility and private landowners to generate 77 MW of solar PV using rooftops and parking lots.[14] SDG&E's application for this project is currently under review by the CPUC. By the Applicant's own measure, therefore, the viability of a distributed solar generation project with equivalent capacity to this Project is no longer "entirely speculative."

D. The Commission Cannot Make the Findings Necessary to Approve the Project Despite its Remaining Significant Impacts.

Once again, as shown in EHC's Opening Brief, and as further discussed in this Reply Brief, the Applicant has failed to demonstrate that there are no feasible alternatives available that would lessen or avoid this Project's remaining significant impacts. Even if alternatives and mitigation measures were found to be infeasible, the Project's meager benefits would not outweigh its significant impact on this already overburdened community, as discussed in detail in EHC's Opening Brief and the LORS "override" section of this Reply Brief. As a result, the Commission cannot make the findings required to "override" these impacts pursuant to CEQA. (Pub. Res. Code § 21081(a)(3), (b).)

E. Proposed CEQA Findings and Conclusions.

In light of the foregoing discussion and the analysis presented in EHC's Opening Brief, EHC requests that the Commission adopt the following findings and conclusions:

1. Construction and operation of the Project would cause and/or exacerbate violations of ambient air quality standards for particulate matter and would exacerbate existing violations of air quality standards for ozone. These are significant, cumulative impacts attributable to the Project.

[14] See Application of San Diego Gas & Electric Company (U902-M) for Approval of the SDG&E Solar Energy Project, CPUC Docket No. A08-07-017 (July 11, 2008) at pp. 3-4, available at http://docs.cpuc.ca.gov/efile/A/85265.pdf. In somewhat ironic contrast, given that the Applicant does not have a contract with SDG&E, it could be argued that SDG&E has *not* "endorsed" the Applicant's Project.

2. The population living in the Project area has unique characteristics that are relevant to analysis of the Project's public health impacts. Emergency room discharge rates for asthma and chronic obstructive pulmonary disease are among the highest in the county, as are hospitalization rates for children and youth with asthma, in the zip code where the Project would be built. The Project would exacerbate existing poor air quality conditions in this area by emitting additional particulate matter and ozone precursors. These pollutants are associated with respiratory disease. Accordingly, the Project will have a significant, cumulative impact on public health.

3. The effectiveness of the air quality mitigation measures proposed for the construction phase of the Project has not been quantified. Accordingly, the Commission cannot find that these measures have mitigated the Project's construction-related air quality impacts to a less than significant level.

4. The air quality mitigation measures proposed for the operational phase of the Project do not specifically identify any feasible, quantifiable means of ensuring that the Project will not contribute to existing violations of air quality standards for particulate matter and ozone. In addition, although the Project would be permitted to run for as many as 4,400 hours per year, no mitigation has been proposed for operations in excess of 1,200 hours per year. Accordingly, the Commission cannot find that these measures have mitigated the Project's operational air quality impacts to a less than significant level.

5. The Project's air quality impacts and public health impacts are closely related. Because the Commission cannot find that the Project's air quality impacts have been mitigated to a less than significant level, it cannot find that the Project's public health impacts have been mitigated to a less than significant level.

6. At the operational level used for CEQA mitigation purposes in the FSA (1,200 hours per year), greenhouse gas emissions from the Project will exceed those of the existing plant by more than 50,000 metric tons per year. This increase is significant. Neither the Applicant nor Staff has proposed any mitigation for this significant impact.

7. The Project's nighttime noise impacts, which represent a 9dBA increase above existing ambient levels at the nearest residential receptor, are significant. Although a condition prohibiting nighttime operations could feasibly mitigate this impact, no such condition has been proposed. Accordingly, the Commission cannot find that the Project's noise impacts have been mitigated to a less than significant level.

8. The Applicant has failed to demonstrate the infeasibility of proposed alternatives considered in the FSA, including both Staff's Alternative C location and the demand reduction, conservation, and renewable and/or distributed generation alternatives identified by other parties to this proceeding. These alternatives could avoid or lessen the Project's remaining significant impacts.

9. Feasible mitigation measures and alternatives that could avoid or lessen the Project's remaining significant impacts are available, but have not been incorporated into the

conditions of approval for the Project. The Commission thus cannot make the findings required under CEQA to approve the Project despite its remaining significant impacts.

10. The Commission also cannot make the findings required under CEQA to approve the Project despite its remaining significant impacts because there are no overriding economic, legal, social, technological, or other benefits of the Project that outweigh its significant effects on the environment.

III. CERTIFICATION OF THE PROJECT WOULD VIOLATE ENVIRONMENTAL JUSTICE PRINCIPLES.

The Applicant and Staff each devote several pages of their briefs to dismissing environmental justice issues raised by this Project, but their arguments in essence boil down to a single assertion: that environmental justice requires nothing more than the disclosure and mitigation of significant environmental impacts already required under CEQA.[15] As shown in EHC's Opening Brief, this argument deprives environmental justice of much of its meaning.

In fact, according to Staff's own protocols, the analysis of environmental justice issues must go beyond what CEQA otherwise requires:

> Generally, technical staff:
> 1. Describe the existing setting.
> 2. Analyze "unique circumstances," if any, of the affected population.
> 3. Analyze the project's direct, indirect and cumulative impacts.
> 4. Assess and recommend appropriate mitigation.
> 5. Determine whether the project creates an unavoidable significant adverse impact on the affected population and, if so, consider whether the impact is disproportionate.[16]

The first, third, and fourth items in this list are analogous to steps in the CEQA process. Item two, however, requires additional analysis of the "unique circumstances" of the affected population. Item five confirms that the determination of an impact's significance is not made in

[15] Neither the Applicant nor Staff cites any specific legal authority for this proposition. The Applicant, despite much talk about its "review" of applicable "regulations" and "case law" (see MMC OB at p. 114), ultimately cites only two applications for certification, which it mischaracterizes as representing the conclusions of "Staff." (*Id.* at p. 108.)

[16] *California Energy Commission Staff Approach to Environmental Justice*, available at http://www.energy.ca.gov/public_adviser/staff_env_justice_approach.html.

a vacuum, but with reference to this "affected population." It also requires consideration of whether the impact is "disproportionate"—that is, unfair.

Here, as detailed in EHC's Opening Brief and confirmed by evidence in the record, the "unique circumstances" of the affected population include background levels of air pollution that exceed state standards, county health data showing that people in the vicinity of the Project site may be suffering more severe respiratory ailments than people elsewhere in the County, and data showing that Latinos generally have more limited access to health insurance. (See Ex. 602, 603B, 603C, 603L, 608, 609B.) These "unique circumstances" are the very disparities that were not adequately addressed in Staff's analysis of whether exposing this population to yet another polluting facility constitutes a significant adverse impact. The evidence also shows that this impact is disproportionate, given the high concentration of fossil-fueled generating facilities already located or permitted in southern San Diego County and in other predominantly minority neighborhoods. (See Ex. 604, 605, 606, 608, 609D.) As Staff's own "approach" reveals, an adequate environmental justice analysis requires more than a discussion of whether a project's environmental effects are significant for purposes of CEQA.

Guidance developed by the United States Environmental Protection Agency ("USEPA") for analysis of environmental justice issues under the National Environmental Policy Act ("NEPA"), cited in the opening briefs of the Applicant and Staff, also clearly shows that the significance of environmental impacts must be weighed differently in the environmental justice context.[17] For example, an adequate cumulative effects analysis must consider not only "the full range of consequences of a proposed action," but also "other environmental stresses which may

[17] USEPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (April 1998) ("USEPA Guidance"), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

be affecting the community." (USEPA Guidance § 2.2.2.) Relevant variables include the potential for aggravated susceptibility due to existing air pollution, the presence of multiple exposure pathways for the same pollutants, and "[h]ealth data reflective of the community." (*Id.*) Recognizing that analysts may find it difficult to determine acceptable risks in this context, the USEPA Guidance states that "exhausting all applicable analyses will provide the greatest likelihood of accurately depicting the possibility of disproportionately high and adverse effects on low-income and/or minority communities." (*Id.*) Indeed, the USEPA Guidance explicitly states that focusing environmental analysis on these "relevant contexts . . . may show that potential impacts, which are not significant in the NEPA context, are particularly disproportionate or particularly severe on minority and/or low-income communities." (*Id.* at § 3.2.2.) The USEPA Guidance thus confirms that standard indicators of an impact's significance may not be adequate in analyzing a project that affects an environmental justice community.

In sum, as detailed in EHC's Opening Brief, neither Staff nor the Applicant has fully acknowledged the gravity of the environmental justice issues presented by this Project. Neither party has fully considered the detailed evidence showing that this community is already suffering from high, adverse, and disproportionate environmental impacts—impacts that render any additional environmental burden not only significant, but also unjust.

Accordingly, in light of the foregoing discussion and the analysis presented in EHC's Opening Brief, EHC requests that the Commission adopt the following findings and conclusions:

1. The populations living within one mile and six miles of the proposed Project site are predominantly minority populations.

2. Concentrations of particulate matter and ozone in the vicinity of the Project site currently exceed state air quality standards. County health statistics show that residents of the area near the Project site have some of the highest emergency room discharge rates in the County for respiratory illnesses, and some of the highest hospitalization rates in the

County for youth asthma. Exposure to particulate matter and ozone has been linked to both causation and exacerbation of respiratory illnesses.

3. The Project would exacerbate existing violations of ambient air quality standards for particulate matter and ozone. In light of the unique circumstances of the affected population, the Project's impacts remain significant, even considering the mitigation measures contained in the proposed conditions of certification.

4. There is already a high concentration of existing and permitted fossil-fired electrical generation in the southern portion of San Diego County, which also happens to be a predominantly minority area of the County.

5. The Project will have a high, adverse, and disproportionate impact on a predominantly minority community. There are feasible alternatives available that would avoid or lessen impacts on this community. Accordingly, the Project cannot be approved consistent with environmental justice principles.

CONCLUSION

For the foregoing reasons, and for the reasons stated in EHC's Opening Brief, EHC respectfully requests that the Commission deny the Application for Certification of this Project.

Dated: November 19, 2008

Respectfully Submitted,

SHUTE, MIHALY & WEINBERGER LLP

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Attorney for the
ENVIRONMENTAL HEALTH COALITION

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: The Application for Certification for the CHULA VISTA ENERGY UPGRADE PROJECT	Docket No. 07-AFC-4

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I, Kevin P. Bundy, declare that on November 19, 2008, I deposited copies of the attached **REPLY BRIEF OF INTERVENOR ENVIRONMENTAL HEALTH COALITION** in the United States mail at San Francisco, California, with first class postage thereon fully prepaid and addressed to those on the Proof of Service list above.

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I declare under penalty of perjury that the foregoing is true and correct.

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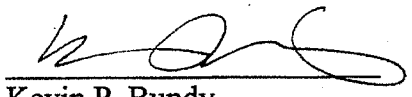

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