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 ENERGY, INC.'S COMMENTS ON THE PRESIDING MEMBER'S PROPOSED DECISION

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I. SUMMARY

MMC Energy, Inc. respectfully submits the following comments on the January 23, 2009 Presiding Member's Proposed Decision (PMPD) for the Chula Vista Energy Upgrade Project (Upgrade Project). MMC Energy's comments explain why MMC Energy believes certain aspects of the PMPD are mistaken.

With respect to Laws, Ordinances, Regulations and Standards (LORS), Section II of the comments explains that as a matter of law, the PMPD errs in failing to defer to the City of Chula Vista's interpretations of the City's General Plan and zoning ordinances. A city's interpretation of its own enactments must be followed unless it is arbitrary, capricious, or entirely lacking in evidentiary support, such that no reasonable person could draw the same conclusion. As discussed below, the City's conclusions with respect to the Upgrade Project are not arbitrary, capricious or entirely lacking in evidentiary support, and the PMPD should not attempt independently to interpret the City's General Plan or ordinances.

Section III of these comments addresses the concerns expressed in the PMPD relating to the adequacy of the alternatives analysis. The PMPD concludes that further analysis of alternative sites for the Upgrade Project is required. However, as discussed below, the alternatives sites analysis was done correctly and, in particular, for an upgrade project it is appropriate to limit the sites considered to those that will reuse project linears. The PMPD also concludes that an additional analysis of a rooftop solar photovoltaic system is required, but the comments explain that this is not a feasible alternative. Finally, these comments show that the PMPD does not adequately analyze the "no project alternative" because it does not adequately address the significant environmental impacts of the no project alternative, or acknowledge the benefits of the Upgrade Project.

In Section IV, these comments point out that the PMPD is required to discuss public benefits and why the section in which those benefits are discussed is inadequate. In particular, the public benefits that should be discussed include: increases in efficiency and associated decreases in air emissions; socioeconomic benefits including an $80 million capital investment which would bring construction jobs and increased tax revenues; and several community benefit projects agreed to with the City of Chula Vista.

Section V addresses a statement in the PMPD regarding the relationship between the upgrade Project and California's greenhouse gas goals, and Section VI notes an omission from the PMPD's cultural resources discussion.

These comments do not address the question of a LORS override. These comments explain why the PMPD is mistaken in stating that the Upgrade Project is inconsistent with LORS. If the Commission disagrees, MMC Energy will consider whether to seek an override.

II. THE COMMISSION MUST DEFER TO THE CITY'S INTERPRETATIONS OF THE CITY'S GENERAL PLAN AND ORDINANCES BECAUSE THOSE INTERPRETATIONS ARE NOT ARBITRARY, CAPRICIOUS, OR ENTIRELY LACKING IN EVIDENTIARY SUPPORT.

A. The "Due Deference" The Commission Pays To The City's Determinations Of Consistency With LORS Means The Commission Should Accept The City's Conclusions Unless "No Reasonable Person Could Have Reached The Same Conclusion."

California courts have consistently held that unless a city's interpretation of the city's own general plan or ordinance is "arbitrary, capricious or entirely lacking in evidentiary support," that interpretation must be accepted. *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 243; *A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal. App. 4th 630, 648; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal. App. 4th 1173, 1192. Only if "no reasonable person could have reached the same conclusion" may the city's interpretation be

overturned. *A Local & Regional Monitor,* 16 Cal. App. 4th at 648. These principles necessarily apply to the Commission's review of a city's conclusion that a project does not conflict with its LORS. The Commission's role is not to decide, independently, what a city's general plan policies and ordinances mean, but to decide whether the city's interpretation of its own policies and ordinances is beyond the realm of reason. Because a reasonable person could reach the same conclusions as the City of Chula Vista has reached here with respect to the Upgrade Project, the Commission should defer to the City's interpretation.

The regulations governing this proceeding require that Commission staff pay "due deference" to comments and recommendations submitted by an agency regarding a project's conformance with the agency's own applicable laws, ordinances and standards. 20 C.C.R. §§ 1714.5(b), 1744(e). An applicant's or responsible agency's assertion of *noncompliance* with LORS must be independently verified. 20 C.C.R. § 1744(d). But nothing in the Warren-Alquist Act or regulations states that staff or the Commission should override a city's conclusion that a project *is* consistent with its own local ordinances and regulations if they disagree with that conclusion. The Commission must consult with the local agency only where an *inconsistency* with LORS has been identified; in that event, the Commission meets with the local agency to attempt to correct or eliminate noncompliance. Cal. Pub. Res. Code § 25523(d)(1).

These rules requiring Commission deference to a city's interpretation of its own LORS flow from the fact the Commission was established not to be a super land use regulator, but rather to bring a statewide perspective to bear on the siting of energy facilities, so that a "not in my backyard" approach does not undermine the integrity of the statewide electric system. Where, as here, a city finds no inconsistency with its general plan and zoning ordinances, the Commission

must necessarily defer unless the city's conclusion is arbitrary, capricious, or entirely lacking in evidentiary support.

In its previous decisions, the Commission has followed these rules, consistently deferring to local agency interpretations of their own general plans and ordinances. In the Final Commission Decision for East Altamont Energy Center, for example, the Commission deferred to Alameda County's determination that the project was consistent with its East County Area Plan, because the County's determination was "plausible." East Altamont Energy Center Final Decision at 368-370 (Aug. 2003, CEC Docket No. 01-AFC-4, P800-03-012). This is the same as the principle laid down by the courts; if an interpretation is "plausible," a reasonable person could agree with it.

In the Final Commission Decision for the Los Esteros Critical Energy Facility Project, the Commission observed that the Commission applies the same rule of deference as do the courts: "We accept Applicant's position that we should defer to San Jose for an interpretation of their LORS in the present situation where the City has determined that substantial compliance with the General Plan requirement furthers the City's interest. [See title 20 California Code Regulations, § 1714.5(b)] We are persuaded that the courts of record in California have adopted this principle as law and we believe that we are bound by the court's interpretation." Los Esteros Critical Energy Facility Final Decision at 346 (July 2002, CEC Docket No. 01-AFC-12, P800-02-005).[1] Thus the Commission has consistently expressed its belief in deference to local agency

[1] Without disturbing the city's interpretation of its LORS, the Commission added a condition of certification to address a factual scenario in which the project would not be visually screened by other development. *Id.*

interpretations and acknowledged that it follows the same principles of deference as do the courts.

The deference that courts pay to cities' interpretations of their own general plans and ordinances is illustrated in *No Oil, Inc. v. City of Los Angeles.* Opponents of an oil drilling project alleged that the City of Los Angeles had violated the Brentwood-Pacific Palisades District Plan, an element of its General Plan, by allowing drilling in an open space district where *industrial uses* were not allowed. 196 Cal. App. 3d at 243. The opponents relied on "plain meaning" to argue that oil drilling and production were obviously industrial uses. They also argued that the City's zoning code, which permitted oil drilling and production as a matter of right only in the Heavy Industrial Zone, showed how the General Plan must be interpreted. *Id.* at 243-245.

Despite this evidence, the court of appeal ruled the city did not violate the general plan by allowing the oil drilling. The court noted that oil drilling could be considered "managed production of resources" and did not necessarily have to be considered an "industrial" use. 196 Cal. App. 3d at 243-244. It also concluded that defining "industrial" uses by reference to the zoning code would mean many other uses such as banks and veterinary hospitals would also be banned in the entire Brentwood-Pacific Palisades District. *Id*. at 245.

The court also concluded that statements by individual city officials on how the policy should be interpreted were irrelevant in the face of the city's ultimate determination. 196 Cal. App. 3d at 245-246. The court further observed that the opponents' references to the "legislative history" of the General Plan were not persuasive because "it is well settled that, in construing legislation, a court does not consider the motives or understanding of individual legislators even when it is the person who actually drafted the legislation." *Id.* at 247 (citation omitted). The court concluded

that it would defer to the final city interpretation of the city's own document, including the "implicit finding" that the project was not prohibited by any element of the general plan. *Id.* at 249.

Cases applying the same rule include *Anderson First Coalition v. City of Anderson* (2005) 130 Cal. App. 4th 1173, 1192 (deferring to city determination that a large commercial development on the city's outskirts was consistent with a general plan policy that the city's Central Business District should be the community's center of activity); and *Save Our Peninsula Comm. v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 141-142 (deferring to County's determination that a general plan policy that the County "shall limit further development" until a new freeway was under construction did not prohibit further development until that time).

The same rule of deference that applies to a city's determinations of consistency with its general plan apply to its determinations of compliance with city ordinances. "Similar to an agency's interpretation of its own general plan, 'an agency's view of the meaning and scope of its own [zoning] ordinance is entitled to great weight unless it is clearly erroneous or unauthorized." *Anderson First,* 130 Cal. App. 4th at 1193.

B. The PMPD Does Not Afford The Required Deference To The City Of Chula Vista's Determination That The Upgrade Project Would Not Be Inconsistent With The City's General Plan And Ordinances.

After expressing concern regarding potential air quality effects of the Upgrade Project, the City ultimately concluded, following the Commission's air quality analysis and health risk assessment, and agreement by MMC Energy to fund air quality improvements, that the Upgrade Project would be consistent with the City's General Plan. Ex. 803. The City has also explained

that the Upgrade Project would not violate any City ordinances. 10/2/2008 RT at 335:19-336:11. As discussed below, the PMPD does not pay the required deference to the City's interpretations and instead supplies its own independent views of General Plan policies and Zoning Code provisions. This is erroneous and should be corrected. Because a reasonable person could agree with the City's interpretations, the City's conclusion that the Upgrade Project creates no inconsistency is not arbitrary, capricious, or entirely lacking in evidentiary support, and must be respected.

1. The City's Interpretation Of Its General Plan Is Not Arbitrary, Capricious Or Entirely Lacking In Evidentiary Support Such That No Reasonable Person Could Agree.

a. Policy E 6.4

The PMPD, giving no deference to the City's interpretation, states that the Upgrade Project is inconsistent with General Plan Policy E 6.4 because the Upgrade Project is an energy generation facility within 1,000 feet of a sensitive receiver. PMPD at 281-284. General Plan Policy E 6.4 reads:

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

The General Plan does not define "energy generation facilities" or "major toxic air emitters." Despite the City's conclusion that the Upgrade Project is consistent with the General Plan, the PMPD states that under Policy E 6.4 *all* "energy generation facilities," not just those that are also major toxic air emitters, are banned within 1,000 feet of sensitive receivers. PMPD at 282. Not only is the City's interpretation, focusing on the toxicity, or lack thereof, of an energy generation

facility, reasonable and consistent with standard rules of statutory construction; the PMPD's blanket rule to the contrary is unreasonable.

The overbreadth of the PMPD's reading of Policy E 6.4 is highlighted if solar power systems are considered. The plain dictionary meaning of "energy generation facilities" is facilities that generate energy. Solar power systems are facilities that generate energy. Nothing in the General Plan exempts solar power systems from the term "energy generation facilities." If the PMPD's reading of Policy E 6.4 were correct, clean solar power systems – including the rooftop solar systems emphasized by the PMPD – would be banned in every area of the City that is within 1,000 feet of a sensitive receiver, because solar systems are "energy generation facilities," and it is irrelevant that they are not also "major toxic air emitters." The City has never taken this position and, in fact, encourages development of clean solar energy systems. (*See* Chula Vista Municipal Code Ch. 20.08, Municipal Solar Utility.)

As noted above, in *No Oil,* the court relied in part on just this type of anomaly to conclude that a city's interpretation of its general plan was not arbitrary, capricious, or entirely lacking in evidentiary support. The court in *No Oil* observed that the project opponents' contrary interpretation would mean that uses including banks and veterinary hospitals were banned from the entire Brentwood–Pacific Palisades District of Los Angeles, a result the court observed "surely" could not be argued. 196 Cal. App. 3d at 245. A reasonable person could agree with the City's conclusion that some "energy generation facilities" – ones that are not "major toxic air emitters – are permissible within 1,000 feet of a sensitive receiver.

The PMPD also errs in concluding, without citation to evidence, that a thermal power plant is *per se* a "major toxic air emitter." As noted above, the General Plan does not define this term,

although it does define "Toxic Air Contaminant" as "[a]n air pollutant that may increase a person's risk of developing cancer and/or other serious health effects." (City of Chula Vista General Plan, Glossary.)

Another source of interpretation is the Environmental Impact Report the City Council certified for the General Plan Update which resulted in addition of Policy E 6.4. *See* Request for Official Notice, EIR Excerpts. The EIR both discusses and provides context for Policy E 6.4. To answer the question whether development under the General Plan will expose sensitive receptors to substantial pollutant concentrations, the EIR discusses thirteen facilities in the City "that release the largest amount of toxic air contaminants" and, therefore, are monitored by the San Diego Air Pollution Control District under its Air Toxics Hot Spots Program. EIR pp. 395-396. The South Bay Power Plant is on this list. EIR, p. 403. The existing Chula Vista Generating Station is not. (*Id.; see also* EIR Figure 5.8-1, Electrical Generation and Transmission in Chula Vista (which includes the Chula Vista Generating Station) and Figure 5.11-2, Pollution Sources, Schools, and Hospitals (which does not include the Chula Vista Generating Station).)

The General Plan EIR identifies Policy E 6.4 (labeled EE 6.4 in the EIR) as self-mitigation for any potential that future development under the General Plan could expose sensitive receptors to substantial pollutant concentrations. EIR, p. 406. The fact that the EIR discussion in which Policy E 6.4 arises is focused on large facilities suggests that the term "major toxic air emitters" refers to facilities on the scale of the thirteen "large toxic air contaminant" sources listed, not to much smaller facilities such as the Chula Vista Generating Station or its replacement, the Upgrade Project.

The City did not simply assume, however, that the Upgrade Project could not be a "major toxic air emitter." From the beginning of the AFC process, the City consistently stated that its concern with respect to the Upgrade Project was the potential for air pollution impacts on neighbors. *See, e.g.,* Ex. 621 [Jan. 31, 2008 letter from Tulloch/Meacham to CEC at p. 3.]. It was not until the Commission's air quality and health risk assessments were completed, and the City obtained additional air quality improvement measures from MMC Energy, that the City concluded that the Upgrade Project would be consistent with its General Plan (Ex. 803) and, therefore, necessarily was not a "major toxic air emitter." A reasonable person could not only agree with the City's conclusion regarding Policy E 6.4, but praise the care the City took to ensure that the Upgrade Project would not harm its residential neighbors.

The City early on explained that "City Staff is participating in the Assessment process in part, to obtain the benefit of the CEC's analysis and will be better prepared to respond as to the intent and spirit of the General Plan policy when the CEC's analysis explains what the net impact of the proposed project will be on the community. The CEC air modeling work is one important example of the CEC's invaluable analysis that the City is counting on for its review." Ex. 621. The PMPD's statement that the project's "mitigation measures, while commendable, do not resolve the project's inconsistencies with the General Plan" improperly ignores the City's view that the Upgrade Project's impact on the community, including the results of the "air modeling work" and the agreement on additional mitigation measures, is important to the City's interpretation of the project's consistency with Policy E 6.4.

Finally, the PMPD places great weight on evidence submitted by Intervenor Environmental Health Coalition ("EHC") indicating that during the General Plan update process a draft version of what finally became Policy E 6.4 contained language that would have allowed siting of new or

re-powered energy generation facilities and other major toxic air emitters within 1,000 feet of a sensitive receiver if a health risk assessment showed that health risks were within acceptable standards. The PMPD posits that the removal of this language shows the City intended Policy E 6.4 to apply to all new or re-powered energy generation facilities regardless of whether they were also "major toxic air emitters," because determining whether a facility is a "major toxic air emitter" is the equivalent of making a judgment whether a project would constitute a health risk per a health risk assessment. PMPD at 284.

This reasoning suffers from three errors. First, as explained above, if accepted, this interpretation would mean the City would be prohibited from allowing even the cleanest solar "energy generation facility" within 1,000 feet of any sensitive receiver.

Second, "it is well settled that, in construing legislation, a court *does not consider* the motives or understanding of individual legislators even when it is the person who actually drafted the legislation." *No Oil, supra,* 196 Cal. App. 3d at 248 (emphasis added). *See also People v. Farell* (2002) 28 Cal.4th 381, 393 (the "expressions of individual legislators generally are an improper basis upon which to discern the intent of the entire" decision-making body); *Water Quality Assn. v. City of Escondido* (1997) 53 Cal. App. 4th 755, 764 (declaration by individual legislator regarding language that was proposed to be included in bill but never enacted was unpersuasive, because "[a]n individual legislator's opinion is not a strong indicator of the overall intent of the Legislature, and the same holds true for an individual participant in the proceedings leading up to enactment of a law").

Third, the PMPD's conclusion as to what the City intended when it adopted Policy E 6.4 conflicts with what the City has said during the review process for this project. As explained

above, the City has clearly indicated that (1) it believes that it has the ability and need to understand the toxic air impacts of a proposed energy generation facility in order to assess consistency with this General Plan policy, and (2) with the additional agreed upon mitigation measures, the Upgrade Project is consistent with the General Plan. These conclusions of the City are directly at odds with the PMPD's legislative history analysis, which is based solely on the opinion of one member of the Council. The evidence of how the City views its policy in the context of the Upgrade Project is the best evidence of the meaning of that policy and the project's consistency with it.

The evidence before the Commission indicates the City considered the results of the air quality analyses done for the project, which showed the Upgrade Project was not a major source of toxic air emissions and would have no significant adverse air quality impacts, to be relevant to the City's determination whether the project was consistent with Policy E 6.4. Only after the City obtained the results of the air quality analyses and the additional mitigation measures agreed upon by MMC Energy did the City reach the conclusion that the project would be consistent with its General Plan. The PMPD statement that Policy E 6.4 applies to *any* new or re-powered energy generation facility regardless of whether it is also a major toxic air emitter improperly fails to accord the great deference due to the City's reasonable interpretation of its own General Plan policy.

b. Policy LUT 45.6

The PMPD, giving no deference to the City's determination, states that the Upgrade Project is inconsistent with General Plan Policy LUT 45.6 because thermal power plants are "industrial," not "limited industrial" uses. Policy LUT 45.6 provides: "Maintain Main Street primarily as a

limited industrial corridor." The City's conclusion that the Upgrade Project is consistent with this policy is not arbitrary, capricious, or entirely lacking in evidentiary support. When the City approved the existing Chula Vista Generating Station, it decided that the thermal power plant was a "limited industrial" use. Ex. 207. The City's conclusion that replacing the existing "Limited Industrial" Chula Vista Generating Station with the cleaner-burning Upgrade Project would not jeopardize Main Street's limited industrial character is not arbitrary, capricious, or entirely lacking in evidentiary support and the Commission should defer to that conclusion.

c. Policy E 23.3

The PMPD, giving no deference to the City's determination, states that the Upgrade Project is inconsistent with General Plan Policy E 23.3. That policy provides: "Avoid siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools or residential dwellings." Leaving aside the question whether "siting" includes replacement of an existing facility, the City has concluded that Policy E 23.3 does not apply to the Upgrade Project because the air quality analyses done for the project and Public Health and Hazardous Materials sections of the FSA show that the project does not "pose a significant hazard to human health and safety." Ex. 1 at 5.9-12; Ex. 200 at 4.1-42 to 4.1-43, 4.4-22, 4.7-1, 4.7-16; 10/2/2008 RT 102:20-25, 103:1-15; Ex. 203. Similar to its discussion of Policy E 6.4, the PMPD interprets Policy E 23.3 to ban all industrial uses in proximity to schools or residential dwellings, regardless of whether the particular "industrial" use poses any significant hazard to human health and safety. PMPD at 285. The City's contrary view is not, however, arbitrary, capricious, or entirely lacking in evidentiary support. In addition, under the PMPD's proposed rule, General Plan Policy 23.3 would conflict with General Plan Policy LUT 45.6, which calls for *maintaining* Limited Industrial uses in the Main Street Corridor. In the Main Street Corridor,

limited industrial uses are in proximity to residential uses. *See* Ex. 619 [General Plan Figure 5-24, p. LUT-157]. Portions of a general plan should be reconciled if reasonably possible. *No Oil, supra,* 196 Cal. App. 3d at 244. It is for the city that has adopted a general plan to conduct this reconciliation and to perform any necessary weighing and balancing of various general plan policies. *Save Our Peninsula Committee, et al., v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 142. The City's determination that the Upgrade Project is in conformity with the City's General Plan, including Policy E 23.3, cannot be disturbed.

2. The City's Interpretation Of Its Zoning Ordinance Is Not Arbitrary, Capricious Or Entirely Lacking In Evidentiary Support Such That A Reasonable Person Could Not Agree With The City's Conclusion.

The evidence before the Commission shows that the City interprets its zoning ordinance to allow peaker power plants in the Limited Industrial ("I-L") zone with approval of a conditional use permit ("CUP"). That evidence includes, significantly, approval in September 2000 of a special use permit ("SUP") for the existing peaker plant. Ex. 207. That approval identified the peaker plant as a "quasi-public" use. "Quasi-public" uses are a category of "unclassified uses" allowed with a CUP pursuant to Chula Vista Municipal Code ("CVMC") sections 19.44.030(J) and 19.54.020(M). These Zoning Code provisions were not amended after the 2005 update of the General Plan, and the City has stated that it does not interpret these provisions any differently now than it did in 2000.[2] 10/2/2008 RT at 335:19-336:11. By asserting that the Upgrade Project

[2] On the question of changed circumstances, the PMPD places substantial weight on the statements of two power plant opponents that Policy E 6.4 was added to the General Plan in specific response to the approval of the existing peaker plant. PMPD at 293-294. The PMPD's reliance on these statements is misplaced for several reasons. As a matter of law, opinions of individuals associated in some manner with a legislative proposal are simply not relevant to determining the intent of the decision-making body in enacting a law. *No Oil, supra,* 196 Cal. App. 3d at 247-248 (rejecting both

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is inconsistent with the Chula Vista Zoning Code, the PMPD takes the position that the City misinterpreted its own Zoning Code in 2000, when it approved the Chula Vista Generating Station, and would do so again were the City the permitting authority for the Upgrade Project. MMC Energy respectfully submits that this is not the Commission's judgment to make, and that there is nothing arbitrary or capricious in the City's reading of its Zoning Code.

There is significant evidence in the record from the City that it interprets these Zoning Code provisions the same today as it did in 2000, and that were the Upgrade Project being processed by the City, it would conclude that the project could be approved in the I-L zone with a CUP. The City's Reply Briefing Statement (November 19, 2008 at 3) says "[t]he process used to establish the existing SUP is representative of the process the City would use if it were the lead agency on the CVEUP." Interim City Manager Scott Tulloch also testified that "the unclassified use category gives the City flexibility" to approve projects with a CUP where a use has not been "either prohibited or specifically allowed." 10/2/2008 RT at 336:3-6.

Rather than give due weight to this evidence provided by the City as to how it interprets its own Zoning Ordinance, the PMPD states that because power generating facilities are a permitted use in the City's General Industrial zone they necessarily could not be considered an "unclassified use" allowable with a CUP in any other zone. The PMPD states that Mr. Tulloch's testimony

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councilmember's and citizens advisory committee member's assertions regarding intent of general plan provision); *Water Quality Assn.*, *supra,* 53 Cal. App. 4th at 764. As discussed in subsection a above, the cited statements contradict the City's own interpretation of the General Plan. In addition, the opponents' statements are not supported by the discussion surrounding Policy E 6.4 in the City Council-certified General Plan EIR, which did not even mention the existing Chula Vista peaker plant (but did discuss 13 "large air emission sources"). Finally, the statements cited were public comments, not sworn testimony, and were characterized as "selective memory" by another witness. 10/2/2008 RT 514:25.

supports this conclusion. However, the PMPD takes Mr. Tulloch's testimony out of context. The statement quoted above came toward the end of a lengthy discussion of land use consistency issues and whether public and quasi-public uses could include power plants. Hearing Officer Renaud stated: ". . . we'd like to hear from the city about its interpretation of the zoning ordinance. And particularly whether the city would issue a conditional use permit for this project were it within the city's jurisdiction to do so."

This exchange followed in response:

> MR. TULLOCH: Well, we would want to go through that process, ourselves. But this is my understanding, it's pretty consistent with what you've heard. *And that is that the unclassified use category gives the city the flexibility where they haven't either prohibited or specifically allowed a use*. It gives them the flexibility to go through that process to determine on a specific basis for a specific project.
>
> HEARING OFFICER RENAUD: All right.
>
> MR. TULLOCH: So what I've heard so far, *if it's in that vein*, is consistent with that.

10/2/2008 RT at 335:19-336:11 (emphases added).

Contrary to the meaning ascribed to this exchange in the PMPD, the City did not agree that unclassified uses were intended to cover *only* uses the City didn't think about when drafting the Zoning Ordinance. Rather, Mr. Tulloch clearly stated that the purpose for the unclassified use was to give the City flexibility where a particular use was not either prohibited or specifically allowed. All parties acknowledge that energy generating facilities are not a specifically allowed use in the I-L zone. Review of the prohibited uses in the I-L zone shows that energy generating facilities are also not specifically listed as prohibited. CVMC § 19.44.050. The evidence is

undisputed that in 2000, the City approved the existing peaker plant in the I-L zone as an unclassified quasi-public use with a SUP.

The PMPD finding that listing of electrical energy plants as a permitted use in the General Industrial zone necessarily means the use cannot also be considered "unclassified" is also demonstrably incorrect based upon an examination of the Zoning Ordinance as a whole. There are other uses listed as specifically allowed or conditionally allowed uses in certain zones that are also considered "unclassified." For example, "schools" are conditionally permitted in the P-Q (public/quasi-public) zone and "business and technical schools" are allowed in the C-B (central business) zone, but "colleges, universities, private schools, and elementary and secondary public schools" are also listed as "unclassified" uses permitted in any zone with a CUP. CVMC §§ 19.32.020(C); 19.47.040(B); 19.54.020(D). Thus, similar to "public and quasi-public uses," schools are both permitted or conditionally permitted uses in certain zones, while also being considered "unclassified" uses allowable in any zone with a CUP. Accordingly, the mere fact that electrical generating plants are a permitted use in the General Industrial zone does not preclude such use from also being considered an unclassified, public or quasi-public use allowable with a CUP in the Limited Industrial zone under the City's zoning scheme.

"Similar to an agency's interpretation of its own general plan, 'an agency's view of the meaning and scope of its own [zoning] ordinance is entitled to great weight unless it is clearly erroneous or unauthorized.'" *Anderson First*, 130 Cal. App. 4th at 1193. The City's interpretation of its Zoning Ordinance to allow electrical generating plants in the Limited Industrial zone as an unclassified quasi-public use with a CUP is not clearly erroneous. The PMPD's failure to accord due deference to the City's construction of its own Zoning Ordinance was improper.

Even if it were the Commission's role to interpret the City's Zoning Code *de novo*, the PMPD's finding that a power plant is actually a prohibited use in the I-L zone because it involves "the primary production of products from raw materials" like other "smokestack" type uses would be unreasonable. Power plants are not specifically listed as prohibited uses in the I-L zone. CVMC § 19.44.050. The City could have included power plants as a prohibited use in the I-L zone if it wanted to prohibit the use in that zone. It also could have amended the Zoning Ordinance after the 2005 amendment of the General Plan if it was the City's intent (as found by the PMPD) to prohibit any expansion of the existing peaker plant. The City did neither, further supporting that the City does not consider peaker power plants to be the same type of use as other prohibited uses that are listed in Section 19.44.050, and that it does not interpret its Ordinance in the same manner as the PMPD. This fact, in conjunction with the City's testimony regarding how it applies the "unclassified" category, demonstrates that the PMPD's independent interpretation of prohibited uses in the I-L zone is incorrect.

It is also noteworthy that the list of uses prohibited in the I-L zone includes "manufacturing . . . involving the primary production of products from raw materials," including coal and coke. CVMC § 19.44.050(A)(3). While such fuels are often used by power plants, the Upgrade Project is a natural gas-fired power plant and is therefore *unlike* the manufacturing uses listed as prohibited in the I-L zone. In addition, the prohibited uses in the General Industrial zone where power plants are specifically permitted are quite similar to the prohibited uses in the I-L zone, including a prohibition on manufacturing uses involving primary production of products from raw materials including coal and coke. CVMC § 19.46.041(A)(3). Thus, it would be an incorrect interpretation of the prohibited uses in the I-L zone to conclude that gas-fired peaker power plants are prohibited, since such use is clearly allowed in the General Industrial zone even

though the list of prohibited uses with respect to manufacturing involving primary production from raw materials is nearly identical to the same type of prohibited uses in the Limited Industrial zone.

Finally, the PMPD finding of a LORS violation due to lack of a precise plan is equally mistaken. The Upgrade Project would only be required to have a precise plan if the City were the lead agency considering approval of the project and if MMC Energy sought to modify the structural or physical standards (such as setbacks, height and parking requirements) of the underlying I-L zone. If the City were the lead agency, the project would also be required to obtain a new CUP. No such approvals are required from the City if the Commission approves the Project, so the lack of such approvals says nothing about the project's consistency with LORS. This determination should therefore be revised.

The PMPD determination that the project is not compatible with the existing and planned uses of the area follows solely from the incorrect determination that the City's General Plan and Zoning Ordinance would not permit the Upgrade Project in the I-L zone. Once that determination is corrected, consistent with the City's interpretation of its own General Plan and Zoning Ordinance, the Staff assessment that the project is compatible should be accepted. Ex. 200, p. 4.5-23, 4.5-25.

III. A FURTHER ANALYSIS OF ALTERNATIVES SHOULD NOT BE REQUIRED

The PMPD concludes that the analysis of alternatives for the Upgrade Project is inadequate and that a further analysis of alternatives should be required. According to the PMPD, too few alternative sites were considered, and the solar photovoltaic alternative should have been examined in greater detail. PMPD at 28, 30. But, as explained below, a further analysis of

alternative sites and solar PV should not be required. In addition, in its discussion of the "no project" alternative, the PMPD states there would be no construction or operational impacts and no LORS violations with the no project alternative. The PMPD's discussion of the no project alternative does not, however, discuss the important adverse environmental consequences of that alternative, and should be revised to do so.

A. The PMPD Does Not Correctly Identify the Project Objectives

The foundation for an alternatives analysis under CEQA is identification of the purpose of the proposed project. The PMPD's conclusions about the adequacy of the analysis of alternatives are seriously flawed because they rest on an incorrect description of the purpose of the Upgrade Project. Reduced to the essentials, the fundamental purpose of the Upgrade Project is to upgrade the power plant by retiring the old and inefficient power generating equipment currently at MMC Energy's existing power plant and installing two highly efficient and fast-starting General Electric LM6000PC Sprint gas turbine peaking units, and to reuse project linears, including gas and water supply lines, discharge lines, and transmission interconnections. Ex. 1 at 6-1 to 6-2.

The PMPD does not acknowledge these project objectives. Instead, the PMPD identifies "key factors for power plant siting" listed in the AFC as the basis for its discussion of alternative sites, and erroneously identifies them as the "project objectives."[3] *Compare* Ex. 1 at 6-1 to 6-2 *with*

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[3] The factors identified in the AFC as relevant to power plant siting which the PMPD erroneously identifies as the project objectives are: Site control readily available; adjacent to or near an existing substation where additional peaking capacity would serve growing markets near load centers and provide system stability as well as peaking energy; adjacent to or near high pressure natural gas transmission lines; adjacent to or near water supply for process and sanitary purposes to maximize efficiency; industrial land use designation with consistent zoning; and potential environmental impacts can be mitigated and minimized. Ex. 1, p. 6-2, and PMPD at 17-18. This list reflects factors that may be taken

(Footnote Continued on Next Page.)

PMPD at 17. This error diverts the PMPD's discussion of alternatives onto the wrong track. The PMPD discusses the factors on this list and concludes that they define the project objectives too narrowly. PMPD at 25. But because they are not project objectives, but are instead factors to consider in identifying alternative sites, the PMPD's conclusion that the project objectives are too narrow is misplaced.

B. No Further Analysis of Alternative Sites Was Required

1. CEQA Does Not Require An Analysis Of Alternatives That Are Inconsistent With The Fundamental Purpose Of The Project

The purpose of an EIR's discussion of alternatives is to consider whether the basic goals of the project can be achieved at a reduced environmental cost. Accordingly, the alternatives reviewed must "feasibly attain most of the basic project objectives." Guideline § 15126(a). Alternatives that will reduce or avoid significant impacts may, however, be considered even though they might "impede to some degree the attainment of project objectives." Guideline § 15126.6(b).

Interpreting these Guidelines, the California Supreme Court has made it clear that the touchstone in defining the range of alternatives to be considered is the project's "fundamental purpose." As the court explained in *In re Bay-Delta Programmatic Envt'l Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1165, an EIR need not study an alternative that "cannot achieve the project's underlying fundamental purpose." Thus, "although a lead agency may not give a project's purpose an artificially narrow definition, a lead agency may structure its EIR alternative analysis around a reasonable definition of underlying purpose and need not study

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(Footnote Continued from Previous Page.)

into account in addressing the feasibility of off-site alternatives to a proposed project. *See* Guideline §15126.6 (f).

alternatives that cannot achieve that basic goal."[4] *Id.* Applying this standard, the court held that the Bay-Delta EIR was not deficient even though it did not consider alternatives that could achieve some project objectives, but could not attain the fundamental project purposes.[5]

For the same reason, the Commission has recognized that for upgrade projects, the objective of reusing the site, including existing linear facilities, is fundamental, and cannot be ignored in framing the analysis of alternatives:

> Applicant has included in its Project description its objective to make extensive use of existing infrastructure as well as other relationships of the Project to the MBPP site. Many of these relationships are physical connections, fundamental to this Project. To ignore them is to ignore many essential parts of the Project. While CEQA Guidelines allow an examination of alternatives which impede the attainment of project objectives by *some* degree, it appears that in this case the Staff alternatives would impede *fundamental* objectives of this project. [See CEQA Guideline § 15126.6(b).] Therefore, we find that Staff has presented a range of alternative sites which are reasonable only in light of Staff's identification of Project objectives. However, we find that Staff erred in ignoring the Applicant's fundamental Project objectives which connect this particular project to the existing MBPP site.

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[4] The examples the court gave illustrate the point: "if the purpose of the project is to build an oceanfront resort hotel (*Goleta, supra,* 52 Cal.3d at p. 561, 276 Cal.Rptr. 410, 801 P.2d 1161) or a waterfront aquarium (*Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com.* (1992) 10 Cal. App. 4th 908, 924-925, 13 Cal.Rptr.2d 117), a lead agency need not consider inland locations." *In Re Bay Delta*, 43 Cal.3th at 1166. (citations in original) Thus, in these two examples, location was fundamental to the purposes of the projects and accordingly alternatives that could not achieve those fundamental purposes were not necessary to the alternatives analysis.

[5] The underlying purpose of the program was to develop and implement a plan to "improve water management for beneficial uses of the Bay-Delta System." *In Re Bay Delta*, 43 Cal.4th at 1164. The court held that a suggested alternative calling for reduced exports of water would not attain the overall goal of improving water supply reliability and need not be examined in the EIR. *Id.* at 1166.

Third Revised Presiding Members' Proposed Decision, In re: Morro Bay Power Plant Project, at 576 (June 2004, CEC Docket No. 00-AFC-12, P800-04-013), adopted as the decision of the Commission on August 2, 2004.[6]

The PMPD here makes the same error. It identifies alternatives which are reasonable only in light of its identification of project objectives. At the same time, it ignores the *fundamental* project objectives which "connect" the Upgrade Project to the existing power plant site: to modernize the existing power plant with new more efficient generating equipment and to use the existing linears. Thus, the PMPD erred in concluding that a further analysis of off-site alternatives was required under CEQA because those alternatives "would impede *fundamental* objectives of this project."[7]

Furthermore, contrary to what may be implied by the PMPD (at 16 & n. 3), Public Resources Code section 25540.6(b) supports the determination in the Morro Bay proceeding that an evaluation of off-site alternatives is not mandatory for a project designed to improve an existing power plant. Under section 25540.6(b), the Commission may accept an AFC "at an existing industrial site without requiring a discussion of site alternatives if the commission finds that the

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[6] This approach is also consistent with state laws intended to encourage the reuse of power plant sites. *See, e.g.*, AB 1576, Ch. 374 (2005) Sec. 1(f) ("Investment in replacement or repowered electric generating facilities replaces our aging facilities with more efficient and cost-effective facilities that enhance environmental quality and provide economic benefit to the communities in which they are located.").

[7] The PMPD relies on *City of Santee v. County of San Diego*, 214 Cal. App. 3d 1438, 1455 (1989). The holding of that case has no application here. The deficiency identified in *Santee* was that the EIR failed to identify improvement and long term use of one jail as an alternative, to building another jail at a different site. In any case, the governing standard is established by the California Supreme Court's recent decision in the *Bay-Delta* case, making it clear that while the scope of alternatives to be examined in an EIR is not necessarily limited by discrete project objectives, it is defined by the "project's underlying fundamental purpose." That fundamental purpose here is to upgrade an existing power plant, not to build a new power generating facility of any sort someplace else.

project has a strong relationship to the existing industrial site and that it is therefore *reasonable not to analyze alternative sites for the project*." (Emphasis added). Thus, a proposal like the Upgrade Project, which is designed to upgrade an existing operating power plant, necessarily has a "strong relationship to the existing industrial site" and it is accordingly "reasonable not to analyze alternative sites for the project."

The provisions of section 1765 of the Commission's regulations do not change this conclusion. Section 1765 provides for the parties to present evidence on "the feasibility of available site and facility alternatives to the applicant's proposal which substantially lessen the significant adverse impacts on the environment." The purpose is to gather information that will help to define the alternatives evaluated in the FSA in order to comply with CEQA. Section 1765 should therefore be interpreted in light of CEQA's standards for a legally adequate discussion of alternatives. Under that standard, "An EIR shall describe a range of reasonable alternatives to the project, *or* to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project . . ." Guideline § 15125.6(a) (emphasis added). This provision of the CEQA Guidelines makes it clear that an evaluation of alternative sites is not required in all cases. When locating a project on an alternative site would be inconsistent with a project's fundamental purposes, an evaluation of alternative sites is not necessary for an adequate alternatives analysis.

2. An Analysis Of Alternative Sites Was Not Required Due To Any Conflict With LORS

The PMPD concludes that "LORS conflicts constitute adverse environmental impacts whose importance outweighs the largely economic advantages of reusing the existing site infrastructure." PMPD at 26. A LORS conflict in and of itself does not, however, constitute an

adverse environmental impact. As the court stated in *Lighthouse Field Research Rescue v. City of Santa Cruz* (2005) 131 Cal. App. 4th 1170, an inconsistency between a project and land use controls, standing alone, does not mandate a finding of a significant environmental impact. "It is merely a factor to be considered in determining whether a particular project may cause a significant environmental effect." *Id.* at 1207. This is because a finding that a project is inconsistent with a local ordinance or regulation is a legal conclusion, not an environmental impact.

The CEQA Guidelines provide for a discussion that focuses on alternatives that can reduce or avoid significant impacts on "the environment." Guideline §§ 15126.6(a), (b). They do not require a discussion of alternatives for eliminating or avoiding the legal conflict that arises when a project is inconsistent with a local ordinance or regulation. Here, even if the project were inconsistent with provisions of the City's general plan or zoning ordinance due to its location, that would not trigger a requirement that off-site alternatives be evaluated. An evaluation of off-site alternatives locations would be required only if the location of the proposed project would cause a significant adverse physical effect on the neighbors. But the evidence here shows no such adverse effect. Because no significant *environmental* effects would result from the asserted legal conflict, the asserted conflict does not necessitate an analysis of off-site alternatives.

In any event, as is shown in Section II above, the project is consistent with LORS, which disposes of the PMPD's finding that an inconsistency with LORS necessitates a further analysis of alternative sites.

3. If An Analysis Of Alternative Sites Was Required, The Analysis In The FSA Is Legally Sufficient

The PMPD rejects the two offsite alternatives MMC Energy identified in its AFC (see Ex. 1 at 6-10 to 6-11), reasoning that MMC Energy defined the project objectives too narrowly, and this improperly limited the reach of the analysis to sites in proximity to the existing power plant site. PMPD at 25-26. As discussed above, however, since reuse of existing linears is a basic objective of the project – a project that proposes to upgrade an existing plant – assuming a discussion of alternative sites is required, it is entirely appropriate that the two nearby sites be considered. Both are close to the existing site and only a proximate site would meet one of the project's basic objectives – reuse of existing linear lines – and both would avoid the environmental impacts that would result from installing new linear lines at a more distant site.

The FSA also evaluated the Otay Landfill site, Staff Alternative Site C. The PMPD finds the staff assessment defective because it does not "contain a meaningful level of detail showing why an alternative is infeasible." PMPD at 27, citing *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 399-407. This requirement only applies, however, when an EIR provides no discussion of alternatives, and excludes them from its analysis, without explaining why they are infeasible. Thus, in *Laurel Heights*, the EIR did not discuss alternative sites for the project, and simply stated that none were evaluated because no suitable alternative sites were available. *Id.* at 403. As the court explained, the EIR "contains no analysis of any alternative locations." *Id.* at 404. The court held that if a discussion of alternative sites was excluded from the EIR because the agency found them infeasible, the

reasons they were not examined in the EIR must be discussed in the EIR. *Id.* at 405.[8] Here, unlike in *Laurel Heights*, off-site alternatives, including the Otay Landfill site, are discussed in the FSA; they were not excluded from discussion in the FSA as infeasible.

The PMPD also finds that the staff erred in concluding that the Otay Landfill site is not superior to the proposed project site. PMPD at 26. This finding appears to be based on the conclusion that the proposed project's asserted conflict with LORS and the relative distances to sensitive receptors. But the PMPD does not explain what *significant* impacts to the *environment* would result from the project, and how those *significant environmental effects* would be avoided by the Otay Landfill alternative. In any case, the PMPD's disagreement with staff's opinion about the relative merits of the Otay Landfill site in comparison with the proposed Upgrade Project does not amount to a defect in the process. The Commission's ultimate decision on what option is the superior one should be based on all of the evidence in the record, not just the staff's opinion on the question. In other words, an FSA does not "reject" alternatives (see PMPD at 27); it expresses staff's view on the relative merits of the proposed project and the alternatives to it.

The PMPD also finds that "not enough was done to select and analyze potential sites in eastern Chula Vista." PMPD at 27. There is no requirement, however, that every conceivable alternative be evaluated, and only a reasonable range need be considered. Guideline § 15126.6(a) An EIR is not deficient because it fails to consider variations on the alternatives it

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[8] The CEQA Guidelines were subsequently amended to reflect this holding. The subsection on selection of a reasonable range of alternatives for consideration in an EIR provides that an EIR should "identify alternatives that were considered by the Lead Agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the Lead Agency's determination." Guideline § 15126.6(c).

discusses, particularly where the relative merits of other potential alternatives can be inferred from those that are discussed. *See, e.g., Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App. 3d 1022, 1028-29 (EIR that analyzed four alternatives to 20,000 unit development – no development, and 7,500, 10,000 and 25,000 unit alternatives – did not have to evaluate variations on these themes.); *Save San Francisco Bay v. BCDC* (1992) 10 Cal. App. 4th 908, 922-23 (EIR need only discuss a reasonable range of alternatives and can limit its discussion to prototypical alternatives). *See also Sierra Club v. County of Napa* (2004) 121 Cal. App. 4th 1490, 1503-1504 (EIR that discussed a no-project alternative and two other alternatives was adequate because it discussed a reasonable range of alternatives). The Otay Landfill alternative illustrates whatever advantages there may be from locating a power plant in a General Industrial zone, further from sensitive receptors, and the effects of having to install new linears;[9] the no project alternative illustrates the effects of disapproving the proposed project. There is no evidence in the record that a discussion of alternative sites in eastern Chula Vista would add anything meaningful to this analysis, and no evidence that the FSA's analysis is unreasonable without such a discussion. This is particularly true in light of the fact that (unlike other lead agencies) the Commission determines whether to approve or disapprove the proposed project, not whether to approve the project or one of the alternatives to it.

[9] The Staff's analysis of the Otay Landfill site correctly found that because of the need to construct linear facilities for the Otay Landfill site, construction of the project at the Otay Landfill would cause greater environmental impacts than the proposed site with respect to biological resources, cultural resources, and traffic and transportation. Ex. 200 at 6-11.

C. There Is No Need For Additional Analysis Of Solar PV As An Alternative To The Project

There was no need for a discussion of solar PV as an alternative to the proposed project for four reasons. First, solar PV would not implement the fundamental purposes of the project – to upgrade the existing power plant – and so a discussion of it is not necessary to have a reasonable range of alternatives.

Second, solar PV would not meet the important objective of providing quick-start (10-minute) peaking capacity for the San Diego region. *See* Ex. 1 at 6-1. As the PMPD acknowledges, "PV is not a quick-start technology which can be dispatched on 10 minutes' notice any time of the day or night." PMPD at 30. The PMPD fails to consider and appropriately weight the importance of bringing fast-start peaking power supplies to Chula Vista. As the FSA and Integrated Energy Policy Report make clear, such fast-start peaking power is necessary to enable the addition of additional intermittent renewable resources such as wind and solar power. Ex. 200 at 6-13. Indeed, projects like the Upgrade Project are a necessary prerequisite to, not an alternative to, increased use of renewable resources. Fast-start peaking power plants must be put on-line before significant wind or solar power is added because fast-start peaking power must available when the wind subsides or cloud coverage renders solar PV ineffective.

Third, the evidence does not show that a solar PV project on rooftops is a feasible alternative to the Upgrade Project. The FSA explains that generating 100 MW using PV panels would require 400 acres, or 4 acres per MW, Ex 200 at 6-13; Mr. Powers suggested that rooftop PV would require 6 acres of rooftop space per MW, or 600 acres. Ex. 616 at 11. Both figures assume ideal conditions, and do not account for the fact that rooftops are not necessarily configured with optimal orientation and shade conditions for PV panels. Further, there is no evidence to suggest

that MMC Energy could gain access to the massive number of rooftops needed to develop 100 MW of power, a critical element of feasibility. *See* Guideline § 15126.6(f)(1).

Finally, the pros and cons of solar PV are discussed in both the FSA and the Powers testimony. The fact that the staff stated in the FSA that it "believes" that solar PV is not a feasible alternative (Ex. 200 at 6-14) is not material to the adequacy of the ESA since the record contains evidence on both sides of the issue.

D. The PMPD's Analysis Of The No Project Alternative Is Flawed.

The CEQA Guidelines provide that "the purpose of describing and analyzing a no project alternative is to allow decision-makers to compare the impacts of approving a project with the impacts of not approving the project." Guideline § 15126.6(i). But, the PMPD's analysis of the no project alternative does not accomplish this objective.

The PMPD fails to acknowledge the significant environmental impacts of the no project alternative. For instance, as the FSA indicates, if the Upgrade Project is not built, "in the near term the likely result is that existing plants, such as [MMC Energy's] existing Chula Vista Power Plant and the South Bay Power Plant many of which produce higher levels of pollutants could operate more." Ex. 200 at 6-15.

With respect to the existing MMC Energy Chula Vista Power Plant, another portion of the PMPD makes it clear that there would be greater efficiency and lower emissions resulting from the proposed upgrade than from continued operation of the existing Chula Vista Power Plant, despite the increased electrical capacity of the new units. As the PMPD states:

> The proposed project would improve the overall thermal efficiency of the power plant due to the higher efficiency of the two new

> LM6000PC Sprint gas turbines compared to the existing FT8 Twinpac™ unit. This along with an improved emission control system for the new LM6000PC Sprint gas turbines leads to a reduction in emissions of pollutants, including greenhouse gases, emitted per unit of electricity produced. It also leads to a reduction in amount of natural gas fuel consumed to generate the same amount of power.

PMPD at 141. In its discussion of the no project alternative the PMPD fails to acknowledge that these benefits would not occur if the Upgrade Project is not built.

The Staff also correctly found in the FSA that a key benefit of the Upgrade Project is that it would likely reduce the number of hours that the South Bay Power Plant must run. As the FSA explains:

> The existing South Bay Power Plant is an older base-load facility that is now being run as a peaker. The technology and design of the proposed CVEUP is considerably more efficient as a peaking power facility than the South Bay Power Plant, which was designed to operate continuously as a base-load facility. The highest levels of air pollution occur during start-ups, further outlining the inefficiency of using South Bay, with its older air pollution control technology, as a peaker when the proposed project is designed as a cleaner, quick-start peaker facility.

Ex. 200 at 6-15. *See also* the *Integrated Energy Policy Report* for 2007 at 184 (describing adverse environmental impacts associated with aging power plants like the South Bay Power Plant). But, despite the clear advantages of having the Upgrade Project displace some of the electricity generated by the South Bay Project, the PMPD is silent with respect to this significant environmental benefit of the Upgrade Project and the significant impacts of the no project alternative.

The PMPD does mention the South Bay Power Plant, but only in the context of dismissing the significance of the contribution that the Upgrade Project could make toward removal of the

reliability-must-run status of the South Bay Power Plant. *See* PMPD at 31. The FSA is correct that "additional peaking power the Upgrade Project would provide would be an integral step in removing the Reliability Must Run ("RMR") status from the South Bay Power Plant and allowing the removal of this older, inefficient facility." Ex. 200 at 6-15; Ex. 20. Certainly this project alone will not be enough to permit removal of the RMR status of the South Bay Power Plant, but any step in that direction, such as the construction of the Upgrade Project, is a step forward in reducing the hours the South Bay Power Plant must run and ensuring that there is sufficient peaking power to remove the RMR status of the South Bay Power Plant which will, at last, permit it to be decommissioned. Ex. 20 (explaining need to remove South Bay RMR status in order to decommission power plant).

The discussion of the no project alternative also fails to acknowledge the contribution that this peaking power plant would make to meeting electrical system needs of the San Diego region. The PMPD notes that MMC Energy does not currently have a power purchase agreement and apparently infers from this that there is no need for new sources of power in San Diego. PMPD at 31. But, having a power purchase agreement has never been a criterion for certification by the Commission and has never been a requirement for showing need for power supplies. In fact, San Diego will need much more power than the Upgrade Project can provide. The California Public Utilities Commission recently gave San Diego Gas & Electric authorization to procure an additional 400 MW for local area resources through 2015. *See* CPUC Decision 08-11-008, issued November 10, 2008, at 25-26. This decision demonstrates that there is a currently unmet local need for electric generating capacity, which the Upgrade Project can help fulfill.

Finally, in its discussion of the no project alternative the PMPD makes no mention of the many economic and other benefits to the community that the Upgrade Project would bring and that

would be lost if the Upgrade Project is not approved. These benefits are explained in detail in the next section.

IV. THE PMPD FAILS TO ADEQUATELY DESCRIBE THE BENEFITS OF THE UPGRADE PROJECT

As explained above, the PMPD is deficient because the discussion of the no project alternative fails to describe the environmental benefits of the project as required by CEQA. The PMPD is also deficient because it fails to describe the public benefits of the project as required by the Warren-Alquist Act, which provides that:

> The Commission shall prepare a written decision after the public hearings on an application, which includes all of the following:
>
> . . .
>
> (h) A discussion of any public benefits from the project including, but not limited to, economic benefits, environmental benefits, and electric reliability benefits.

Cal. Pub. Res. Code § 25523.

The discussion of project benefits included in the PMPD does not provide an accurate or complete description of the benefits that could result from the construction and operation of the Upgrade Project. The PMPD supposedly summarizes these benefits in the introduction to its decision in a section entitled "Noteworthy Public Benefits," but all this section contains is a brief comment on the addition of 55 megawatts of high reliability, quick start peaking capability and a cross-reference to the socioeconomics section of the PMPD. *See* PMPD at 14. As explained below, the description of the Project's noteworthy public benefits should be expanded to describe all of the noteworthy public benefits of the project so the reader gets a complete picture of the project. Many of these benefits are discussed in other portions of the PMPD, but the reader should not be forced to search through several sections of the document to find those benefits.

The PMPD should also be amended to describe the many public benefits that are completely missing from the PMPD.

A. The Discussion Of Noteworthy Public Benefits Should Be Expanded To Refer To Benefits Discussed Elsewhere In The PMPD.

The summary of noteworthy public benefits should refer to several benefits discussed elsewhere in the PMPD. Chief among these benefits are the energy efficiency and environmental benefits of the project. For instance, the PMPD states:

- "The proposed project would improve the overall thermal efficiency of the power plant due to the higher efficiency of the two new LM 6000 Sprint gas turbines compared to the existing FT8 Twinpac™ unit. This along with an improved emission control system for the new LM 6000 PC Sprint gas turbines leads to a reduction in emissions of pollutants, including greenhouse gases, emitted per unit of electricity produced. It also leads to a reduction in amount of natural gas fuel consumed to generate the same amount of power." PMPD at 141.

- "[T]he actual normal hourly emissions from the two new LM6000 gas turbines combined are expected to be lower than the normal hourly emissions from the existing Twinpac™ gas turbines. The exceptions are SO_2 emissions, which are strictly a function of total fuel flow, and potentially PM10/PM2.5 emissions, as the actual Twinpac™ normal operating emission rate is not known." PMPD at 125.

- "The Applicant has proposed to provide emission reductions through the Carl Moyer Fund . . . Using this basis, the total emission reduction funding proposed by the Applicant is $210,000." PMPD at 122-123.

- "In addition to the emission reduction mitigation measure **AQ-SC7** recommended by Staff and agreed to by the Applicant; the Applicant has agreed to provide the City of Chula Vista with an additional $210,000 in mitigation funds. These mitigation funds would be used for energy efficiency and related improvements to

local homes and business, and are intended to directly benefit the residents potentially most affected by the proposed project." PMPD at 123.[10]

- "The Applicant has agreed to fund the installation of a weather station at the City's Explorer Park to provide microclimate and evapo-transpiration data that would improve municipal water efficiency at several City parks. This project would save approximately 4,000,000 gallons in most years." PMPD at 232.

The Upgrade Project also has significant socioeconomic benefits which are not adequately explained by merely cross-referencing the Socioeconomics section. Given the current economic situation, it is certainly a noteworthy public benefit that construction of the Upgrade Project would have a stimulus effect. Construction of the project would cause $80 million of private capital to be invested in the infrastructure of the state. *See* PMPD at 3. This would bring construction jobs. As the PMPD indicates, there would be an average workforce of approximately 100 personnel and a peak workforce of 160 personnel." *Id*. This would mean an eight-month construction payroll of $8.9 million. PMPD at 313. In addition, approximately $14.5million would be spent on construction materials and supplies and $1.25 million for operation and maintenance supplies. *Id*.

In light of the severe fiscal crisis that the State and local agencies currently face, it is also a noteworthy public benefit that the project would bring in significant public sector revenue of almost a million dollars annually. As the PMPD states, the public sector revenue impacts of the upgrade project include:

- Property tax revenue for San Diego County of $800,000, distributed as follows:

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[10] MMC Energy notes energy efficiency is the first consideration in the loading order adopted by the Commission in the Energy Action Plan. *See* Energy Action Plan II at 2 [Sept. 21, 2005]; commitment and benefits of energy efficiency reaffirmed in 2008 Update, Energy Action Plan at 1 & 6-8 [Feb. 2008].

- Housing set-aside - $160,000
- Chula Vista Elementary School District - $88,000
- Sweetwater Union High School District - $57,000
- Southwestern College - $15,000
- County of San Diego - $68,000
- County Office of Education - $8,000
- County Administration - $6,000
- Chula Vista Redevelopment Agency - $398,000

- Construction total (state and local) sales tax of $139,500;
- Operation total (state and local) sales tax of $23,250; and
- School impact fee of $344.

PMPD at 312.

B. Additional Noteworthy Public Benefits Of The Project That The PMPD Fails To Include

There are many project benefits that are simply ignored and not mentioned anywhere in the document. These omissions should be corrected.

1. The PMPD Should Discuss The Beneficial Role The Project Will Play In Retirement Of The South Bay Power Plant

As was noted in the discussion of the no project alternative, MMC Energy believes that PMPD should discuss the beneficial role that the Upgrade Project would have in hastening the retirement of the South Bay Power Plant. The PMPD dismisses this impact by finding that the Upgrade Project would not be "a significant step toward removing the reliability-must-run (RMR) status of the South Bay Power Plant." PMPD at 31. MMC Energy agrees with the position of the Staff that the additional peaking power the proposed project would provide would be an integral step in removing the Reliability Must Run status from the South Bay Power Plant and allowing the removal of this older, inefficient facility. Ex. 200 at 6-15. *See also* Ex. 20

(letter from ISO regarding contribution of the Upgrade Project to removing the RMR status of the South Bay Power Plant).

The PMPD's failure to acknowledge the contribution that the Upgrade Project would make to the retirement of the South Bay Power Plant is puzzling because the Upgrade Project is exactly the type of new power plant the Commission has sought to encourage in its Energy Policy Reports. In the 2007 *Integrated Energy Policy Report* the Commission emphasized the importance of retiring the aging power plants like the South Bay Power Plant. The Commission explained why this is critical from an energy efficiency and environmental perspective:

> New natural gas-fueled electricity generation technologies offer efficiency, environmental, and other benefits to California, specifically by reducing the amount of natural gas used — and with less natural gas burned, fewer greenhouse gas emissions. Older combustion and steam turbines use outdated technology that makes them less fuel- and cost-efficient than newer, cleaner plants. They waste two-thirds of the natural gas they use to make electricity — they are only 33 percent efficient. The state has about 16,000 megawatts of aging natural gas-fired electricity generating capacity; many of these units are between 26 and 62 years old and reaching the end of their assumed operational lifetimes. Because these facilities take too long to ramp up to provide electricity when needed, they are idled during the low demand hours, burning natural gas and emitting greenhouse gas emissions, but producing no electricity. Yet, as electricity demand grows, California remains dependent on these older plants for summertime peak power. California must take serious steps to retire these aging facilities that are being misused as peakers and replace them with newer technology that can more effectively provide electricity when needed without added emissions.

2007 IEPR at 184. The Commission concluded that it should encourage replacement of older less efficient turbines with more efficient technologies. 2007 IEPR at 73. One of the IEPR recommendations was:

> [T]he CPUC should require that investor-owned utilities procure enough capacity from long term contracts to allow for the orderly retirement or repowering of aging power plants by 2012.

2007 IEPR at 74. In light of the IEPR report, it appears that the Commission has a strong interest in adding new more efficient power plants, like the Upgrade Project, to retire aging inefficient plants, like the South Bay Power Plant, and doing so quickly – by 2012. The Upgrade Project is the kind of project the IEPR sought to encourage – an efficient peaking power plant that would not only replace the less efficient Chula Vista Power Plant but also facilitate the retirement of the aging inefficient South Bay Power Plant. Thus, the PMPD should acknowledge that construction of the Upgrade Project is fully consistent with state energy policy, as expressed in the IEPR, and an integral step forward in retiring the South Bay Power Plant.

2. The PMPD Should Note All Of The Benefits For The City In The Negotiated Side Agreement

The PMPD briefly mentions the agreement between MMC Energy and the City. PMPD at 284. But, the PMPD fails to a acknowledge all of the benefits it will provide for the City. In particular:

- The PMPD notes that "there is an agreement with respect to undergrounding of any future reconductoring of the section of transmission line on Albany." PMPD at 58. The PMPD should also note what the agreement is: MMC Energy has agreed to pay for half of the cost to place existing transmission infrastructure (TL 649A and TL644) underground should MMC Energy decide in the future to request an upgrade of existing transmission lines. Exs. 21 & 803.

- The PMPD notes that the City imposes a Utility Users Tax, but finds that neither the gas or electricity used by MMC Energy would be subject to the tax. PMPD at 312-13. The PMPD should note that MMC Energy has agreed to pay these taxes regardless of their applicability to the Upgrade Project. *See* Exs. 21 & 803.

V. AIR QUALITY: THE PMPD INCORRECTLY CHARACTERIZES THE CONTRIBUTION REQUIRED BY THE ELECTRIC SECTOR TOWARD ACHIEVING CALIFORNIA'S GREENHOUSE GAS GOALS

In the discussion of greenhouse gases on page 134 the PMPD states,

> Though it has not yet been determined, the electric sector may have to provide less or more GHG reductions than it would have otherwise been responsible for on a pro-rata basis.

This statement is inconsistent with both the proposed and adopted Climate Change Scoping Plan, a Framework for Change (the "Scoping Plan") issued and adopted by the California Air Resources Board (CARB). (The Scoping Plan was released for public review on October 15, 2008; CARB adopted the Scoping Plan with revisions unrelated to the issue discussed here on December 12, 2008.) The Scoping Plan attributes 23% of California's greenhouse gas (GhG) emissions to the electric sector from both instate power generation emissions and emissions attributed to imported electricity. Scoping Plan at 11, Figure 1. To obtain the necessary reductions to meet the goals set in Assembly Bill 32 of returning California to its 1990 emission profile (including the emissions from electricity imports), the Scoping Plan identifies 29% of the statewide reductions as coming from the electric sector. Scoping Plan at 17, Table 2. In addition to the direct contribution requirements the electric sector must also participate in the cap-and-trade program that is expected to obtain an additional 34.4 million metric tonnes COe. *Id*. The level of reductions required directly from the electric sector and through the cap-and-trade program easily exceed the level of contribution of the electric sector to California's GhG emissions. Therefore, there is no question but that the electric sector is being asked to provide emissions reductions that greatly exceed its contribution to GhG emissions in California.

VI. CULTURAL RESOURCES: THE ANALYSIS IN THE PMPD NEEDS TO ADDRESS THE EVALUATION OF HISTORIC RESOURCES

The cultural resources analysis in the PMPD does not mention the analysis conducted to evaluate historic resources. PMPD at 242-245. Although both Commission Staff and MMC Energy reached the same conclusion that the Upgrade Project would not impact historic structures, the analysis that reached this conclusion needs to be included in the PMPD. MMC Energy's surveys and records searches did not find any listed or recommended eligible historic structures on or near the project site. Ex. 1 at 5.3-8. Both MMC Energy and Commission Staff evaluated two structures listed by the City of Chula Vista as historic sites, the Otay Baptist Church and the Lorenzo Andersen House. Ex. 22 at 1; Ex. 200 at 4.3-12. Both MMC Energy's consultants and Commission Staff concluded these resources would not be impacted due to the existing modern development located between these sites and the Upgrade Project site.

VII. CONCLUSION

The PMPD should be amended to correct the errors and omissions addressed in the foregoing comments. The Upgrade Project is in full compliance with LORS and will cause no significant environmental impacts. Construction of the project will benefit the State and the people of the City of Chula Visa. The next draft of the PMPD should conclude that the Commission will approve the Upgrade Project.

/////

Respectfully submitted,

_____/s/_____

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Dated: March 16, 2009

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 2/9/09)**

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Declaration of Service

I, Lois Navarrot, declare that on March 16, 2009, I served and filed copies of the attached **MMC Energy Inc.'s Comments on the Presiding Members' Proposed Decision**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/chulavista. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service List) and to the Commission's Docket Unit, in the following manner:

(check all that apply)

For Service to All Other Parties

__X__ sent electronically to all email addresses on the Proof of Service list;

__X__ by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service List above to those addresses **NOT** marked "email preferred."

AND

For Filing with the Energy Commission

__X__ sending an original paper copy and one electronic copy, mailed and e-mailed respectively, to the address below (preferred method);

OR

_____ depositing in the mail an original and 12 paper copies as follow:

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

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

_____/s/_____
Lois Navarrot

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