

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

**APPLICATION FOR
CERTIFICATION FOR THE
CHULA VISTA ENERGY UPGRADE
PROJECT**

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

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I. INTRODUCTION

The opening comments on the Presiding Member's Proposed Decision ("PMPD") make it clear that the PMPD should be amended because the PMPD reaches two erroneous conclusions:

- First, the PMPD incorrectly finds that the Chula Vista Energy Upgrade Project ("Upgrade Project") does not comply with local laws, ordinances, regulations, and standards ("LORS"). In particular, as the City of Chula Vista ("City") explains in its comments, the Upgrade Project is consistent with the City's General Plan and Ordinances.
- Second, the PMPD incorrectly finds that a further analysis of alternatives is required.

Although the PMPD reaches erroneous conclusions with respect to LORS compliance and the adequacy of the alternatives analysis, the PMPD reaches the important and correct conclusion that construction and operation of the Upgrade Project *will not have a significant impact on the environment, including air quality, public health, and environmental justice*. All four of the environmental studies performed in connection with this application (by the applicant, the Chula Vista Elementary School District, the San Diego Air Pollution Control District ("APCD") and the California Energy Commission Staff ("CEC Staff")) have clearly concluded that there is no significant health risk from the Upgrade Project. Nothing in the comments of the City or the CEC Staff suggests that they in any way disagree with the PMPD with regard to these important findings.

In its comments, the Environmental Health Coalition ("EHC") reiterates the erroneous conclusions of the PMPD with respect to LORS compliance and the alternatives analysis. Then EHC once again makes its unsubstantiated and incorrect claims of adverse impacts on the environment, public health, and environmental justice. The scientific evidence introduced in the course of the proceeding clearly rebuts EHC's unsupported claims.

EHC also argues that additional analysis of greenhouse gas (“GHG”) emissions should be done. However, such an analysis has already been done and the PMPD correctly concludes that since the Upgrade Project would replace older, inefficient generating units, the GHG emissions of the Upgrade Project would not have a significant cumulative GHG impact.

II. THE UPGRADE PROJECT COMPLIES WITH LORS.

In their opening comments, MMC Energy, Inc. (“MMC Energy”) and CEC Staff have explained in detail why the PMPD errs in concluding that the Upgrade Project is inconsistent with the City of Chula Vista’s General Plan and zoning ordinance. MMC Energy at 2-19; CEC Staff at 11-15.¹ The City’s opening comments now explain in detail the City’s interpretations of its General Plan policies and zoning ordinances, reinforcing that the Upgrade Project creates no inconsistency with the General Plan and making it clear the project would not violate any zoning ordinance. City at 2-3.

EHC, however, insists the PMPD’s conclusions are correct, and praises the PMPD’s “*independent* analysis of the text of the Chula Vista General Plan and zoning ordinance.” EHC at 3 (emphasis added). MMC Energy respectfully submits, as it did in its opening comments, that the PMPD’s analysis of Chula Vista’s rules is not permitted to be “independent.” The City has explained that it interprets its General Plan and ordinances—which the City itself created—differently than does the PMPD. The City’s interpretations are not arbitrary, capricious, or entirely lacking in evidentiary support, such that no reasonable person could agree with them.

¹ In these reply comments, references to the parties’ opening comments on the PMPD filed on March 16, 2009, will be made by indicating the party’s name and the page numbers on which the comments appear.

Therefore, the PMPD should defer to the City’s interpretations and should be revised to reflect the City’s determinations.²

Because the City’s opening comments expand upon its prior statements regarding the Upgrade Project’s consistency with City LORS, MMC Energy will briefly discuss those comments in the context of the rules of deference MMC Energy has described.

With respect to the General Plan, the City had already concluded any potential inconsistencies with the City’s General Plan were addressed. Ex. 803. The City now expressly states it reads General Plan Policy E 6.4 to apply only to energy generation facilities that are also “major toxic air emitters.” This interpretation was indicated by the City’s earlier comments and actions. *Id.*; Ex. 621. Now the City clearly explains it applies such an interpretation to allow the City to determine on a case-by-case basis, with reference to applicable air standards and regulations, whether a proposed facility is a major toxic air emitter, the siting of which should be avoided within 1,000 feet of sensitive receivers. City at 2.

As the City has noted, in this case it waited until the San Diego APCD and CEC Staff completed their analyses of the Upgrade Project’s air emissions. The City relied on those analyses, which found the Upgrade Project would cause “no significant air quality impacts” and “project related health risks from construction and operations would be less than significant for all individuals in

² Contrary to EHC’s suggestion of unfettered judicial independence, the case cited by EHC in its opening comments recognized that deference was due to a city administrator’s interpretation of a city ordinance *if* that interpretation was not “clearly erroneous.” *Stolman v. City of Los Angeles* (2003) 114 Cal. App. 4th 916, 928. EHC at 4. *See Anderson First Coalition v. City of Anderson* (2005) 130 Cal. App. 4th 1173, 1193: “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.’” (Cited in MMC Energy opening comments at 17.)

the project area....” City at 2. After receiving such air quality information, and engaging in further discussions with MMC Energy that resulted in an agreement guaranteeing additional air quality improvement funding and other measures, “the City concludes that any potential inconsistencies with the City’s General Plan will have been addressed.” Ex. 803.

The reasonableness of the City’s articulated interpretation of Policy E 6.4, requiring that an energy generation facility also be a “major toxic air emitter” in order to be subject to the 1,000-foot rule, is emphasized by the City’s comment on the effect of the contrary interpretation (the one adopted by the PMPD): A rule that *all* energy generation facilities must be avoided within 1,000 feet of sensitive receivers would severely curtail the siting of solar/photovoltaic energy generation facilities. City at 3. Such facilities, like the Upgrade Project, are “energy generation facilities” and, like the Upgrade Project, are not “major toxic air emitters.” Under the PMPD interpretation, such facilities could not be sited at the location of the Upgrade Project or anywhere else in the City that is within 1,000 feet of a sensitive receiver. The PMPD’s interpretation creates a potential conflict between the General Plan and the City’s policy “to encourage and promote the use of solar energy.” CVMC § 20.08.050. The PMPD should be revised to defer to the City’s reasonable interpretation of Policy E 6.4.³

The City’s comments also clarify its interpretation of other General Plan policies with which the PMPD asserts the Upgrade Project would conflict. For example, Policy E 23.3 calls for

³ MMC Energy’s opening comments also pointed out that the Environmental Impact Report for the General Plan Amendment that added Policy E 6.4 focused on 13 “large air emission sources,” and that these large emitters of toxic air contaminants did not include the existing Chula Vista peaker plant. *See* Request for Official Notice, EIR Excerpts at pp. 395-396 (discussing 13 facilities in the City “that release the largest amount of toxic air contaminants” – including the South Bay Power Plant – and are monitored by the APCD under its Air Toxics Hot Spots Program).

avoidance of placement of industrial uses that may pose a significant hazard to human health and safety in proximity to schools and residences. The City's comments explain that Policy E 23.3 (like Policy E 6.4) necessitates consideration of a proposed facility's environmental and health impacts, and that whether a proposed project may cause a significant hazard is determined through a health risk assessment. As noted by the City, here an appropriate health risk assessment was prepared and, as the PMPD itself observes, showed the Upgrade Project would have no significant adverse health impacts. The City also found significant that Commission Staff exceeded the usual mitigation standards by requiring the applicant to fund mitigation reductions for all non-attainment pollutants at a 1:1 ratio. City at 3.

As to Policy LUT 45.6, which provides for maintaining Main Street primarily as a limited industrial corridor, the City's comments explain the policy applies to an area that extends beyond the Upgrade Project site and includes pre-existing residential uses. Because the policy applies at the corridor level, consistency with the policy must be considered at the corridor level. Just as the corridor's character was not jeopardized by the existing peaker plant, the corridor would remain limited industrial with the cleaner-burning Upgrade Project. City at 3. The PMPD improperly fails to defer to the City's reasonable interpretation of these General Plan policies.

Finally, interpreting all three policies as more clearly articulated by the City in its recent comments allows the provisions of the General Plan to be read together, harmoniously, so as to avoid internal inconsistencies. Portions of a general plan should be reconciled if reasonably possible. *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 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 has done

this balancing here, and after consideration of the air quality analyses done by the relevant expert agencies, and with the additional air quality improvement measures MMC Energy has agreed to implement (regardless of whether they are included as conditions of approval by the Commission as requested by the City and MMC Energy), the City has determined that the Upgrade Project is in conformity with the City's General Plan. Such determination should be respected by the Commission.

The City's comments also confirm the City considers a peaker power plant to be a use that is allowable in the I-L zone with approval of a CUP and the Special Use Permit process used to approve the existing peaker in 2000 is representative of the CUP process that would be applied if the City were the lead agency on the Upgrade Project today. The City's comments point out that the testimony of its Assistant City Manager, "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), supports this interpretation of the Zoning Code. Such testimony does not support the PMPD's finding that because power generating facilities are a permitted use in the City's General Industrial zone they necessarily cannot be considered an "unclassified use" allowable with a CUP in any other zone. Indeed, the City states the PMPD "appears to misunderstand" the Assistant City Manager's testimony. And, as MMC Energy has noted, there are other examples in the Zoning Code of uses that are expressly permitted in certain zones but "unclassified" in others. MMC Energy at 17.

Finally, the City has explained that a Precise Plan is not always required for projects within the I-L zone, but rather is required where an applicant seeks to modify the site development standards (*e.g.*, setbacks or heights) of the base zone. City at 3. Because the City is not the lead agency on the project, it has not had cause to consider whether it would actually grant a CUP or

require a Precise Plan for the Upgrade Project. Nonetheless, the City's articulated interpretation of its Zoning Code unambiguously demonstrates a peaker plant can be permitted in the I-L zone with a CUP, and therefore the Upgrade Project is consistent with the City's Zoning Code. The PMPD should be corrected to so find.

As explained in MMC Energy's comments filed on March 16, the City's interpretations of its General Plan policies and Zoning Code are not arbitrary, capricious, or entirely lacking in evidentiary support and the PMPD was required under applicable law to defer to such interpretations. A city's interpretation of its own general plan or ordinance is to be deferred to unless it is "arbitrary, capricious, or entirely lacking in evidentiary support" such that "a reasonable person could not have reached the same conclusion." *No Oil, supra*, 196 Cal. App. 3d at 243-244; *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, 1191; *Save Our Peninsula, supra*, 87 Cal. App. 4th at 141-142. Similarly, "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 Commission applies the same rule of deference to local agencies' interpretations of their own land use regulations as is applied by the California courts. 20 C.C.R. §§ 1714.5(b), 1744(e) (requiring Commission Staff to pay "due deference" to comments submitted by an agency as to a project's conformance with LORS); Los Esteros Critical Energy Facility Final Decision at 346 (July 2002, CEC Docket No. 01-AFC-12, P800-02-005).

The City interprets the provisions of its General Plan in a manner that leads to the conclusion the Upgrade Project is consistent and such interpretation is reasonable and supported by the evidence in the record. The PMPD conclusions that Policy E 6.4 applies to *any* energy generation facility

regardless of whether it is also a major toxic air emitter and that the Upgrade Project is inconsistent with Policy E 23.3 and LUT 45.6 improperly fail to accord the great deference due to the City's reasonable interpretation of its own General Plan policies. The City's interpretations of its Zoning Ordinance to allow an electrical generating facility in the I-L zone as an "unclassified" "quasi-public use" with a CUP and to find a Precise Plan would not be required are also reasonable. Neither the City's interpretation of its General Plan nor its Zoning Code is "clearly erroneous." Thus, the PMPD's failure to accord due deference to the City's construction of its own land use regulations was improper. The PMPD should be revised to give due deference to the City's interpretations and find the Upgrade Project is in conformity with LORS.

III. THERE IS NO NEED FOR FURTHER ANALYSIS OF ALTERNATIVES.

In its opening comments MMC Energy explained that there is no need for further analysis of alternatives. MMC Energy at 19-33. CEC Staff comments concerning the analysis of alternatives strongly support the arguments made by MMC Energy. CEC Staff at 4-10. EHC's comments with respect to alternatives largely repeat the erroneous conclusions reached in the PMPD. MMC Energy's opening comments explained why the conclusions of the PMPD with respect to alternatives are erroneous and should be changed. MMC Energy at 19-33.

A. There Is No Need For Further Analysis of Alternative Sites.

MMC Energy's opening comments with respect the adequacy of the alternative sites analysis are supported by CEC Staff's comments in several ways. For example:

- MMC Energy and CEC Staff agree that because the Upgrade Project is consistent with LORS, an analysis of alternative sites is not required. MMC Energy at 24-25; CEC Staff at 4.

- MMC Energy and CEC Staff agree that because the Upgrade Project has a strong relationship to an existing industrial site, it was not necessary to analyze alternative sites. MMC Energy at 23-24; CEC Staff at 9.
- MMC Energy and CEC Staff agree the alternative sites analysis that was done was more than adequate to meet CEQA requirements. MMC Energy at 26-28; CEC Staff at 8-9.

In its comments, EHC largely reiterates the conclusions of the PMPD. EHC at 2. EHC also contends the analysis of alternative sites is inadequate since the applicant did not consider any alternative site located more than 1,000 feet from residences and thus “any site that could have been consistent with Policy E 6.4 of the City’s General Plan.” EHC at 2. EHC is incorrect for two reasons. First, as MMC Energy and CEC Staff have both pointed out, an analysis of alternative sites is not required due merely to an alleged conflict with laws, ordinances, regulations, or standards since such conflicts do not in and of themselves have environmental impacts. MMC Energy at 24-25; CEC Staff at 4.

Second, as MMC Energy demonstrated in its opening comments, and the City has explained in its comments, EHC’s and the PMPD’s analysis of Policy E 6.4 of the City’s General Plan is incorrect. MMC Energy at 7-12; City at 1-2. The policy requires the City to avoid siting energy generation facilities which are *also* “major toxic air emitters” within 1,000 feet of sensitive receptors. City at 1. The City has explained that the term “major toxic air emitter” is “to be defined by applicable air standards and regulations based on a case-by-case basis dependent upon the proposed facility.” City at 1. As the City noted, in this case the San Diego APCD report “concluded that there would be no significant air quality impacts” and “the CEC Staff Assessments went on to generally state that project related health risk from construction and operations would be less than significant for all individuals in the project area and below those

levels that would warrant further analysis or mitigation.” City at 1-2. Therefore, the Upgrade Project would not be considered a “major toxic air emitter” and Policy E 6.4 does not apply.

B. There Is No Need For Further Analysis Of Alternative Technologies.

In its opening comments MMC Energy explained that the PMPD was incorrect in concluding that there is a need for further analysis of rooftop solar photovoltaic (“PV”) generating systems as an alternative to the Upgrade Project. MMC Energy at 29-30. The CEC Staff in its comments strongly agrees with the position of MMC Energy. CEC Staff at 5. In particular:

- MMC Energy and CEC Staff agree the PMPD has incorrectly identified the project objectives. MMC Energy at 20-21; CEC Staff at 5.
- MMC Energy and CEC Staff agree solar PV cannot meet the project objective of providing fast-start peaking power. *Id.*
- MMC Energy and CEC Staff agree fast-start peaking power plants such as the Upgrade Project are necessary to support efforts to increase the supply of electricity from intermittent renewable resources such as solar PV. MMC Energy at 29; CEC Staff at 9.

EHC’s comments also discuss the solar PV alternative and claim EHC’s testimony regarding solar PV was “uncontroverted.” EHC at 2. EHC’s claim is incorrect. First, as both MMC Energy and CEC Staff have indicated, it was not necessary to rebut EHC’s testimony with regard to solar PV since, regardless of how much testimony on solar PV was presented, solar PV is not a feasible alternative to a fast-start peaking power plant. MMC Energy at 29; CEC Staff at 9. Second, as the CEC Staff points out, the solar PV testimony was in fact analyzed and questioned by CEC Staff at several points in the proceeding. *See* CEC Staff at 5. MMC Energy also challenged this testimony by getting EHC’s witness to acknowledge that the solar peak does not coincide with the load peak and that his analysis did not include many of the costs associated with solar PV systems, including the cost of interconnection with the electric grid. *See generally*

10/2/08 RT at 381:3-384:25; 387:22-389:18. Therefore, EHC's testimony was not "uncontroverted" as EHC claims.

C. The Alternatives Section Of The PMPD Should be Amended To Discuss The Adverse Consequences Of The "No Project" Alternative.

In its opening comments MMC Energy explained that the PMPD does not adequately describe the significant impacts associated with the no project alternative. MMC Energy at 30-31. The comments of the CEC Staff support this position in several important ways. For example:

- MMC Energy and CEC Staff agree the no project alternative would result in greater air pollutant emissions per quantity of electricity produced because the new highly efficient Upgrade Project would replace generation from older and more inefficient power plants. MMC Energy at 30-31; CEC Staff at 7.
- MMC Energy and CEC Staff agree the Upgrade Project would contribute to removal of the reliability-must-run ("RMR") status of the South Bay Power Plant. MMC Energy at 30; CEC Staff at 7-8.
- MMC Energy and CEC Staff agree the lack of a power purchase agreement is irrelevant. MMC Energy at 32; CEC Staff at 6, 9.
- MMC Energy and CEC Staff agree the PMPD should be amended to indicate that additional electric generation is necessary in the area. MMC Energy at 32; CEC Staff at 10.

EHC's discussion of the no project alternative contends: (1) "Statements in the FSA that older, dirtier power plants might be built in the [Upgrade] Project's place were speculative and unsupported by the evidence" and (2) the contribution of the Upgrade Project toward the retirement of the South Bay Power Plant "was negligible and speculative." EHC at 3. EHC's contentions are incorrect because both evidence in the record and conclusions reached in the PMPD support the position that the no project alternative should discuss the adverse impact on air quality of the no project alternative. As the PMPD found, the Upgrade Project would reduce air emissions because it would result in retirement of the older, inefficient existing MMC Energy

power plant. PMPD at 125, 141. Moreover, the contribution the Upgrade Project would make toward the retirement of the South Bay Power Plant has been well-documented in letters from the California Independent System Operator that are part of the evidentiary record in this proceeding. Ex. 20 and 804. Therefore, EHC's comments should be disregarded. The alternatives section of the PMPD should be revised to acknowledge and discuss the adverse air quality impacts associated with the no project alternative.

IV. THE UPGRADE PROJECT WILL HAVE NO SIGNIFICANT ADVERSE IMPACTS ON AIR QUALITY, PUBLIC HEALTH, OR ENVIRONMENTAL JUSTICE.

As MMC Energy has asserted and the PMPD found, the Upgrade Project will have no significant environmental impacts, including impacts on air quality, public health, and environmental justice. The comments of the CEC Staff and the City reinforce MMC Energy's comments because they fully support the conclusion of the PMPD with respect to air quality, public health, or environmental justice.

Significantly, in its comments EHC does not specifically challenge any of the PMPD's conclusions with respect to emissions of criteria air pollutants, public health, and environmental justice. Instead, EHC refers to the arguments EHC made previously that were rejected in the PMPD. EHC at 5. As the PMPD notes, the air quality and public health concerns expressed by EHC were considered in arriving at the conclusions expressed in the PMPD. *See* PMPD at 172 and 364. Since EHC has provided no new reason why the conclusions of the PMPD were incorrect, the PMPD should not be revised with respect to its findings on air quality, public health, and environmental justice.

The PMPD specifically found that although the generating capacity of the Upgrade Project is greater than that of the existing MMC Energy power plant it will replace, "there will be a

reduction in the emissions of pollutants, including greenhouse gases, emitted per unit of electricity produced.” PMPD at 141. Moreover, emissions of most criteria air pollutants will be lower. PMPD at 125.

The PMPD also correctly concluded that non-criteria pollutants would not have an adverse impact on public health: “[P]roject emissions of non-criteria pollutants do not pose a significant direct, indirect, or cumulative adverse public health risk.” PMPD at 174. The PMPD’s conclusion that these pollutants will not have an adverse impact on public health is consistent with the results of the health risk assessment reviews conducted by CEC Staff, the San Diego APCD, the Chula Vista Elementary School District, and MMC Energy. Ex. 1 at 5.9-12; Ex. 200 at 4.7-1 to 4.7-16; Ex. 202 at 3; Ex. 203; 10/2/2008 RT 102:20-25, 103:1-15.

Finally, the PMPD correctly found no environmental justice concerns. The PMPD explains:

- “Since the project’s cumulative air quality impacts have been mitigated to less than significant, there is no environmental justice issue for air quality.” PMPD at 129.
- “There is no evidence of project-related disproportionate public health impacts on the environmental justice community.” PMPD at 174.

In fact, in light of the benefits of the Upgrade Project, the section of the PMPD devoted to environmental justice ends with these words: “We therefore conclude that the project construction and operation activities *will create some degree of benefit to the local area* and will conform with principles of environmental justice.” PMPD at 365 (emphasis added). The PMPD should maintain its rejection of EHC’s claims to the contrary.

V. THERE IS NO NEED FOR FURTHER ANALYSIS OF GHG EMISSIONS.

EHC is highly critical of the PMPD with respect to its analysis of GHG impacts. EHC claims that the approach taken toward analysis of GHG impacts in the PMPD is “unlawful” and alleges that the PMPD “declines to determine the significance of impacts associated with greenhouse gas emissions.” EHC at 5. EHC is wrong. The approach the PMPD took in reaching this conclusion is lawful. Moreover, although the PMPD does not reach the conclusion EHC wanted, the PMPD certainly does determine the significance of impacts associated with greenhouse gas emissions when it concludes: “Since it will replace an existing gas-fired peaker, the CVEUP project *would not result in a significant cumulative GHG impact.*” PMPD at 134-35 (emphasis added).

EHC contends “the Committee should require further analysis of the significance of the Project’s greenhouse gas emissions” consistent with the requirements of the California Environmental Quality Act (“CEQA”). EHC at 7. As explained below, neither the law nor the facts require further analysis of GHG impacts of the Upgrade Project.

A. The PMPD Appropriately Analyzed The GHG Emissions Of The Upgrade Project.

EHC criticized on legal grounds the approach taken by CEC Staff toward analysis of GHG impacts in the briefs it submitted before the PMPD was issued. EHC’s Opening Br. at 45-49 and EHC’s Reply Brief at 24-27. The PMPD correctly rejects those arguments.

In an attempt to reargue the legal issues, EHC now claims that “[r]ecent policy developments – including some instigated by the Commission itself – indicate that the approach taken in the PMPD is out of step with the developing law in the area.” EHC at 6. EHC discusses new draft guidelines published by the Governor’s Office of Planning and Research regarding how GHG emissions should be addressed in documents required by CEQA (hereinafter referred to as “Draft

Guidelines”).⁴ EHC at 6. EHC also discusses a new report issued by the Commission’s Siting Committee entitled “Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications, CEC-700-2009-004 (March 2009). EHC at 6-7 (hereinafter “Committee Guidance”). What EHC fails to appreciate is that these recent policy developments fully support the approach in the PMPD analysis of GHG impacts.

The analysis of GHG impacts under CEQA differs from the analysis of other air emission impacts. Since the effects of GHG emissions are felt globally, not locally, they are analyzed only to determine whether they will have a cumulatively considerable effect. Generally, a cumulative impact analysis need not be as detailed as the analysis of impacts attributable to the project alone, but “shall reflect the severity of the impacts and their likelihood of occurrence” and “should be guided by the standards of practicality and reasonableness.” 14 C.C.R. § 15130(b).

The Draft Guidelines describe the circumstances under which the discussion of cumulative impacts in an environmental impact report (“EIR”) should include a discussion of GHG emissions as follows:

An EIR should evaluate greenhouse gas emissions associated with a proposed project when those emissions, when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects, may result in a cumulatively considerable impact to the environment that cannot be mitigated to a level of less than significant.

⁴ See Office of Planning and Research, Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions § 15064.4, available at http://opr.ca.gov/download.php?dl=Workshop_Announcement.pdf.

Draft Guidelines § 15130(f). The Draft Guidelines go on to provide guidance for determining the significance of impacts from GHG emissions. In particular, the Draft Guidelines indicate:

- “A lead agency should make a good-faith effort, based on available information, to describe, calculate, or estimate the amount of greenhouse gas emissions associated with a project, including emissions associated with energy consumption.” Draft Guidelines § 15064.4(b).
- “A lead agency should consider the following, where applicable, in assessing the significance of impacts from the greenhouse gas emissions, if any, on the environment: . . . (3) The extent to which the project *may result in increased energy efficiency of and a reduction in overall greenhouse gas emissions from an existing facility.*” Draft Guidelines § 15064.4(a) (emphasis added).
- The lead agency has discretion to quantify GHG emissions or rely on qualitative standards to estimate the significance of GHG emissions. Draft Guidelines § 15064.4(b).
- Project-level CEQA documents need not provide additional project-level greenhouse gas emissions analysis or mitigation measures if they are consistent with a regional or local plan that adequately addresses greenhouse gas emissions. Draft Guidelines § 15152(i).

The Committee Guidance also recognizes the need to address GHG impacts in the cumulative impacts analysis and goes into detail with respect to how that should be done for new power plant applications. As the Draft Guidelines suggest, the Committee Guidance takes into account “*increased energy efficiency of and a reduction in overall greenhouse gas emissions from an existing facility.*” Draft Guidelines at § 15064.4(a) (emphasis added). Thus, the Committee Guidance favors an electric systems approach over a single facility approach to analysis of GHG impacts. Committee Guidance at 19-25.⁵ In taking an electric systems approach, it is important

⁵ In the proceedings which led up to issuance of the Committee Guidance, the Commission’s Siting Committee solicited comments regarding whether the Commission should use an electric systems approach or a single facility approach to analysis of GHG impacts. EHC submitted comments critical of the electric systems approach. Committee Guidance at 11. But the Committee did not agree with EHC.

to look at the displacement of old, inefficient power plants. Committee Guidance at 20-21. The Committee Guidance also suggests that eventually the GHG impacts of new power plants should be addressed programmatically, but concludes “At least for the immediate future, the Committee believes that the prudent course is to address the significance of GHG as a cumulative impact on a case by case basis, and any mitigation likewise.” Committee Guidance at 28.

The PMPD’s analysis of GHG impacts meets the requirements of CEQA and is fully consistent with the Draft Guidelines and Committee Guidance. As the Draft Guidelines suggest, the PMPD evaluated the GHG emissions associated with the Upgrade Project as a part of its discussion of cumulative air quality impacts. PMPD at 129-135. *See also* Ex. 200 at 4.1-50 - 4.1-57. The PMPD provides both background information regarding the impact of GHG emissions generally and the GHG emissions of the Upgrade Project, including expected GHG emissions data. PMPD at 129-135.

As the Draft Guidelines and the Committee Guidance also suggest, the PMPD correctly looked at both “increased energy efficiency” and the impact on an “existing facility.” Thus, the PMPD correctly noted that:

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. Therefore, the PMPD appropriately concludes that “Since it *will replace an existing peaker*, the CVEUP project *would not result in a significant cumulative GHG impact.*”

PMPD at 134 (emphasis added).

EHC apparently does not accept the PMPD's conclusions since EHC claims that the Upgrade Project will cause a "dramatic *net* increase in greenhouse gas emissions." EHC at 5 (emphasis added). But EHC's statement is incorrect. The PMPD is fully supported by the Final Staff Assessment which found:

[T]he project *should not result in a net increase in global GHG emissions* because it would operate to replace energy from the existing Twinpac™ unit and other less efficient peaking power sources in San Diego County. So, the new project's emissions are expected to be less than those of the existing power plant and other peaking power plants that the project will replace.

Ex. 200 at 4.1-55 (emphasis added).

EHC also alleges that the FSA "failed to substantiate its conclusion that the Project would necessarily displace the greenhouse gas emissions of older, less efficient power plants." EHC at 5. This statement is clearly incorrect since an objective of the Upgrade Project is to replace an existing older, less efficient MMC Energy power plant which has higher GHG emissions. PMPD at 141. Moreover, it is apparent from a number of Commission reports that new power plants necessarily displace generation from older, less efficient power plants which have higher GHG emissions. For example, the Committee Guidance explains that new more efficient power plants will displace generation from older less efficient power plants because of the order in which they will be dispatched:

As the 2007 IEPR acknowledged, new gas-fired power plants are more efficient than older power plants, and they displace these older facilities in the dispatch order. This displacement will occur even if the older plants are not retired. Natural gas prices and "heat rates" (efficiency of fuel use) are the predominant cost-determinants for gas-fired facilities, and such facilities are normally dispatched in the order of facility cost. This explains why, despite California population and electricity demand increases, most aging units built for baseload operation have gradually moved down the dispatch order to the point where some units have capacity factors less than five percent. (2005 IEPR, Appendix A.) Moreover, even with the considerable expansion of electric

generating capacity since 1990, GHG emissions from the state's electricity generation have hardly increased, if at all, since 1990 (with annual variability according to such factors as hydro availability). (Energy Commission and CPUC, Final Decision and Recommendations on Greenhouse Gas Regulatory Strategies ["Joint Decision"], (Oct. 2008, p. 112).

Committee Guidance at 20-21 (footnote omitted).

It may be that what EHC really seeks is quantification of the displacement effect of the Upgrade Project, but there is nothing in the Draft Guidelines that requires such a quantification of GHG impacts. The Draft Guidelines require only that "a lead agency should make a *good-faith effort, based on available information*, to describe, calculate or estimate the amount of greenhouse gases associated with a project." Draft Guidelines § 15064.4(b) (emphasis added). Moreover, the Draft Guidelines provide that the lead agency has discretion to rely on qualitative standards for estimating the significance of GHG emissions. Draft Guidelines § 15064.4(b) (2). *See also Al Larson Boat Shop, Inc. v. Board of Harbor Comm'rs* (1993) 18 Cal. App. 4th 729, 749 (general discussion describing significant increases in cumulative traffic and air quality impacts was adequate, reasoning that an EIR need not contain all information available on subject.) Thus, it is clear that quantification of the displacement effects of the Upgrade Project and the resulting reduction in GHG emissions from the electricity sector is not required by CEQA.

B. The PMPD's Conclusion Is Consistent With The Systems Approach Called For In The Committee Guidance.

In its comments EHC alleges, as it has throughout this proceeding, that the approach taken toward analysis of GHG should be a project-by-project approach. EHC at 5; EHC Opening Brief at 45-49; EHC Reply Brief at 24-27. But neither the PMPD nor the Committee Guidance adopts this approach. The Upgrade Project is a good example of why the approach EHC favors is not

appropriate. Rather, as the Committee Guidance finds, an electrical systems approach is the correct approach for analyzing the GHG emission impacts of new power plants.

EHC's position ignores these three fundamental aspects of the electric industry: 1) that the grid must be balanced and power generation must equal demand at all times, 2) that the proposed Upgrade Project would be part of an interconnected grid, and 3) that generation is dispatched based upon reliability concerns and costs, which for a gas-fired power plant is driven by the amount of natural gas burned to generate a megawatt hour of energy, *i.e.*, the heat rate or measure of efficiency of the facility.

When evaluating impacts related to GHG emissions from the Upgrade Project, the PMPD correctly considers the potential impacts in relation to how the Upgrade Project fits within the interconnected transmission system. EHC's flawed analysis looks only at the operating hours of the existing facility in claiming that the Upgrade Project would result in a significant GHG impact. EHC at 5. EHC's approach fails to recognize the existing conditions in San Diego. The Upgrade Project provides a significant improvement in efficiency over the existing facility. Commission Staff has demonstrated that increased efficiency results in a *net reduction* in GHG emission of .17 metric tonnes CO₂ for each megawatt hour the Upgrade Project produces in comparison to the existing facility. Ex 200 at 4.1-53 to 4.1-54, Table AQ 21 and AQ 22 footnote

b.⁶ MMC calculated the difference on a megawatt basis showing a reduction of 1,720 metric tonnes of CO₂e. Ex. 7 at 3.

In addition, the South Bay Power Plant is located in the same load pocket and is likewise significantly less efficient than the Upgrade Project. On a cost-based dispatch order, even under a reliability scenario, operation of the Upgrade Project would replace the existing facility and displace the South Bay Power Plant. Either replacement results in direct local reductions, as well as world wide reductions, in the amount of GHG emissions generated by electricity production. Even though the Upgrade Project cannot replace the entire output of the South Bay Power Plant, each megawatt hour it does replace will reduce the net amount of GHG emissions caused by energy generation needed to serve California's energy requirements.

A system analysis for a peaker that is dispatched with a ten minute start and a low minimum load requirement at approximately 50% load equivalent, less than 25 megawatts, is actually the most straightforward system displacement argument. Peakers dispatch in 10 minutes and can be turned on and off as needed. Therefore, they do not have the same requirements of baseload projects for ramp rates and cold starts that can take as long as four hours for a modern combined cycle power plant and can take even longer for a boiler. Because of the ability to turn peakers on and off as needed, they are only dispatched when they are needed for reliability or when they are the next most efficient generator within the dispatch order. Peakers do not need to be left running at low levels to be available at a later time.

⁶ This number is based upon a conservative calculation using the lowest emission rate from the existing turbines of 0.71 mt CO₂/MWh from 2002/2003 from table AQ-22 and the permit level emission rate for the Upgrade Project of 0.541 mt CO₂/MWh from Table AQ-21. $0.71 - 0.541 = 0.17$ mt CO₂/MWh.

Since the Upgrade Project would replace an existing much less efficient facility, every hour it runs instead of the existing facility results in a net GHG emission reduction. In addition and from a reliability dispatch standpoint, every hour the Upgrade Project would be dispatched ahead of the South Bay Power Plant would also result in a net GHG emission reduction because the Upgrade Project is far more efficient than the South Bay Power Plant. These are the facts. The Upgrade Project and the South Bay Power Plant are located in the same constrained load pocket identified by the CAISO. The CAISO reliability dispatch would look first to the most efficient generation in the load pocket to satisfy local reliability and move up the dispatch order to reach the amount of energy needed to satisfy local reliability needs. Beyond the reliability dispatch, the Upgrade Project would only be dispatched when its heat rate is better than the next facility. Therefore, by definition, it would only displace higher emitting resources in the system, again resulting in a net decrease in GHG emissions for each hour the Upgrade Project operates.

In addition to the dispatch order and direct replacement of the existing less efficient facility, MMC Energy has committed to fund air quality improvement programs. MMC will contribute to two separate mitigation programs that will both result in direct reductions of GHG emissions. The first is the mitigation required for criteria pollutants in Condition of Certification AQ-SC6. The proposal to fund emissions reductions in a Carl Moyer equivalent program means the funds will be used to reduce emissions from combustion sources. Improving the efficiency of combustion sources will also reduce the GHG emissions from these same sources resulting in direct GHG reductions. Furthermore, the contribution to the air quality program conducted by the City to improve the efficiency of home appliances will also result in direct GHG emission reductions by reducing the amount of energy needed to power local homes and businesses. Both

of these programs will have direct GHG reduction benefits and will only occur if the Upgrade Project is approved and built.

Based upon the Upgrade Project's direct replacement of an existing facility, the Upgrade Project's location within the San Diego constrained load pocket which also includes the South Bay Power Plant, and the mitigation agreed upon by MMC Energy, EHC's claim that the Upgrade Project will increase net GHG emissions is simply wrong. The Upgrade Project will cause no adverse impacts with respect to GHG emissions, as found by the PMPD, and will actually reduce net GHG emissions.

VI. CONCLUSION

The PMPD should be amended to correct errors and omissions since, as the comments of MMC Energy, the City, and CEC Staff show, the Upgrade Project is in full compliance with LORS and there is no need for further analysis of alternatives. The Upgrade Project will cause no significant environmental impacts and, in particular, will cause no significant impacts on air quality, public health, environmental justice, or global climate change. The next draft of the PMPD should recommend that the Commission approve the Upgrade Project.

Respectfully submitted,

/s/

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**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 2/10/09)**

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Declaration of Service

I, Lois Navarrot, declare that on March 30, 2009, I served and filed copies of the attached **MMC ENERGY, INC.'S REPLY COMMENTS ON THE PRESIDING MEMBER'S 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:

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

/s/
Lois Navarrot

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