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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

Application for Certification
For the *CHULA VISTA ENERGY UPGRADE PROJECT*

Docket No. 07-AFC-4

ERRATA TO THE PRESIDING MEMBER'S PROPOSED DECISION

After reviewing the comments submitted by the parties on March 16, 2009 and March 30, 2009, and discussing them and hearing public comment at the April 13, 2009 Committee Conference, we incorporate the following changes to the January 23, 2009 Presiding Member's Proposed Decision (PMPD):

AIR QUALITY

1. Page 123, first sentence of third paragraph, make the following correction:

In addition to the emission reduction mitigation measure **AQ-SC6** ~~**AQ-SC7**~~ recommended by Staff and agreed to by the Applicant;…

2. Page 125, paragraph below AIR QUALITY Table 13, add the following:

The total incremental emissions value shown in the table and recommended in **AQ-SC6** is 10.86 tons, which is 2.11 tons greater than the Applicant's estimate of 8.75 tons. Additionally, Staff has recommended the use of the current, or future as applicable, Air Resources Board Carl Moyer Program Guideline cost effectiveness cap level as the mitigation fee basis, which reduces the pollutant mitigation cost per ton and very slightly reduces the total recommended mitigation fee from the Applicant's recommended level of $210,000 to a Staff recommended value of $208,512. **AQ-SC6** has also been designed to allow other public agency administered emission mitigation fee programs or traditional emission reduction credits (ERCs) from the District bank to be used to meet the emission mitigation requirement of the Condition.

3. Page 141, FINDINGS AND CONCLUSIONS, Item 3, add the following:

3. SDAPCD is a nonattainment area for both the federal and state ozone standards and the state PM10 and PM2.5 standards.

4. Page 141, FINDINGS AND CONCLUSIONS, Item 4 add the following:

4. Potential impacts from power plant construction-related activities will be mitigated to insignificant levels with implementation of a Construction Mitigation Plan that specifies fugitive dust control, dust plume control, and off road diesel engine emissions particulate reduction measures.

5. Page 142, FINDINGS AND CONCLUSIONS, Item 6 change as follows:

6. Project operation is limited to 4,400 hours per year but is expected to be less than 1,200 ~~1,000~~ hours per year.

ALTERNATIVES

6. Page 31, first full paragraph, line 4 and line 6, respectively:

Line 4 - after "Plant would," delete ~~probably~~
Line 6 - after "would," delete ~~likely~~

7. Page 32, FINDING AND CONCLUSION 4:

delete the phrase "~~and the proposed location is inconsistent with land use LORS~~."

8. Page 33:

delete **FINDING AND CONCLUSION** Number 18.

GEOLOGY AND PALEONTOLOGY

9. Page 255, 1st paragraph, line 8:

After "include," delete "~~mineral,~~"

10. Page 257, first paragraph under "a. Faulting and Seismicity", line 11:

Replace first word "~~distant~~" with "distance."

11. Page 258, second paragraph, line 1:

Replace "~~Subsidence or settlement may occur~~" with "Local subsidence (settlement) may occur."

12. Page 258, third paragraph, line 1:

Replace "~~Subsidence~~" with "Regional subsidence."

13. Page 258, last paragraph, line 2:

After "water line breaks, etc., causes" insert the word "certain."

LAND USE

14. Page 270, insert as new Footnote 43 at end of first paragraph after heading "LAND USE", the following text:

Applicant, in its comments on the PMPD, has requested that we take official notice of the City's final EIR for the City of Chula Vista General Plan Update and CPUC Decision 08-11-008. This request is probably unnecessary as we may take official notice of any generally accepted matter within the Commission's field of competence and of any fact which may be judicially noticed by the courts of this state. Nonetheless, we grant Applicant's request for purposes of clarity of the record.

15. Page 271, LAND USE TABLE 1, under "Local" Chula Vista General Plan, add the following text:

The Economic Development Element establishes policies to ensure the long-term vitality of the local economy. The Housing Element details the City's five-year strategy for the enhancement and preservation of the community's character, identifies strategies for expanding housing opportunities for the City's various economic segments and provides the official policy guidance for local decision-making related to housing. The Public Facilities and Services Element establishes the City's plan to provide and maintain infrastructure and public services for future growth, without diminishing services to existing development. The Environmental Element establishes the policy framework for improving sustainability through the responsible stewardship of Chula Vista's natural and cultural resources, promotion of environmental health, and protection of persons and property from environmental hazards and noise. The Growth Management Element provides the policy framework for Chula Vista's Growth Management Program.

16. Page 272, LAND USE TABLE 2, under "City of Chula Vista" Limited Industrial, add the following text:

Floor Area Ratio (FAR).

17. Page 274, Footnote 46, change to read as follows:

[46] ~~The Committee notes that~~ General Industrial also lists Electrical Generating Plants as a permitted use. Chula Vista Municipal Code, § 19.46.020 (E).

18. Page 277, first paragraph, change as follows:

~~We note an apparent inconsistency between Staff's and Applicant's zoning tables; Staff's Table 3, Ex. 200 p. 4.5-7, does not include the General Industrial zone within a one-mile radius of the site whereas Applicant's Table 5.6-2, Ex. 1, p. 5.6-11, does include that designation.~~ In its comments on the PMPD, Staff points out that Figure 5.6-3, of the AFC, which is based on data provided by the City of Chula Vista, shows that the General Industrial Precise Plan (I-P) designation does not occur within a one-mile radius of the site. Whether or not the designation exists within a one-mile radius is not relevant to our analysis here. What is relevant is the fact that the City does have areas zoned General Industrial~~. We further note that the description of permitted uses in the General Industrial zone in Applicant's Table 5.6-2 fails to mention~~ and that electrical generating plants is a specifically permitted use in that zone. The fact that the City of Chula Vista . . . with land use LORS.

19. Page, 278, Heading Number 3, change as follows:

"Areas of No Potential Land Use Impact"

20. Pages 278 to 294, delete entire section "4. Consistency with Land Use LORS":

~~4. Consistency with Land Use LORS~~

~~The evidentiary record and post-hearing briefs show that a dispute among the parties exists concerning consistency of the project with the General Plan and Title 19 of the Chula Vista Zoning Ordinance. We analyze this dispute below.~~

~~a. General Plan~~
~~i) Existing Land Use Designations~~

~~The northern portion of the CVEUP site is designated "IL, Limited Industrial" in the City of Chula Vista General Plan Land Use Diagram. (City of Chula Vista General Plan, 2005, p. LUT-47.) The Limited Industrial category encompasses light manufacturing, warehousing, auto repair, auto salvage yards, and flexible-use projects that combine these uses with associated office space. (City of Chula Vista General Plan, 2005, p. LUT-53.) There are two other designations in the Industrial category: Regional Technology Park and General Industrial. The latter category includes all Limited Industrial and Technology Park uses as well as heavier manufacturing, large-scale~~

warehousing, transportation centers, and public utilities. (City of Chula Vista General Plan, 2005, p. LUT 53.)

The southern portion of the CVEUP site is designated "OS, Open Space" in the City of Chula Vista General Plan Land Use Diagram. (City of Chula Vista General Plan, 2005, p. LUT-47.) The Open Space designation is intended for lands to be protected from urban development, including floodplains, canyon, mountain, and agricultural uses. These lands may include unique natural conditions, provide scenic vistas, or be areas to be set aside that have potential exposure to hazards such as earthquakes, landslides, fires, floods, erosion, or even high levels of roadway noise. Passive recreation uses, such as trails, staging areas, scenic overlooks, and picnic areas may occur within these areas. (City of Chula Vista General Plan, 2005, p. LUT-54.)

The proposed construction laydown/worker parking area has a General Plan land use designation of "OSP, Open Space Preserve." The Open Space Preserve designation is intended for areas designated within the Chula Vista Multiple Species Conservation Program (MSCP) Subarea Plan for the permanent conservation of biological resources. The various Preserve categories and locations of these lands are provided in the Chula Vista MSCP Subarea Plan. (City of Chula Vista General Plan, 2005, p. LUT-55.)

ii) Conflicts with General Plan

The General Plan contains numerous policy statements which are set forth in Staff's Table 4, at pages 4.5-13 to 4.5-14 of the FSA. (Ex. 200.) Noteworthy are policies LUT 45.6, ED 1.3, E 6.4, and E 23.3. Although Staff and Applicant were in agreement that the proposed project did not conflict with these General Plan policies, Intervenor EHC contended that there were serious conflicts. We discuss these land use policies below.

LUT 45.6 Land Use and Transportation Policy 45.6 calls for Main Street to be maintained primarily as a limited industrial corridor. The "Limited Industrial" designation is defined in the General Plan as "intended for light manufacturing, warehousing, auto repair, auto salvage yards, and flexible-use projects that combine these uses with associated office space." (City of Chula Vista General Plan, 2005, p. LUT-53.) Applicant's and Staff's position is that the CVEUP constitutes an upgrade of an existing industrial use, thereby furthering the policy of maintaining Main Street as a limited industrial corridor.[52] (Ex. 200, p 4.5-15.) EHC, however, focused on the "limited" designation and argued that the operation of a natural gas-fired power plant such as the

[52] We note that Staff's Table 4 omits the word "limited" from its explanation of why the CVEUP would be consistent with LUT 45.6. Ex. 200, p. 4.5-15.

existing plant or the proposed CVEUP is not a light industrial use. (EHC Opening Brief at 15.)

We find the wording of the General Plan itself to be specific and definitive here. Section 4.9.5 of the General Plan describes the "Industrial" category and breaks it down into Limited Industrial and General Industrial sub-categories. "Heavier manufacturing" and "public utilities" are uses listed as appropriate in the General Industrial land use sub-category. These uses are compatible with the industrial nature of a power plant. The examples given to illustrate the Limited Industrial sub-category—warehousing, auto repair and salvage, and office uses--do not resemble gas-fired power plants. (Chula Vista General Plan, 2005, pp. LUT-53 -54). We can only conclude that this distinction is meant to purposefully categorize these different types of uses. The purpose of these categories is to further the goal of preserving the Main Street Corridor as a limited industrial area. Siting a power plant in the area designated Limited Industrial conflicts with this goal. Siting it in an area designated General Industrial would be in keeping with the wording of the policy. We thus find that the proposed project conflicts with General Plan Policy LUT 45.6.

ED 1.3 Economic Development Policy 1.3 seeks to encourage the preservation and expansion of existing industrial uses in areas designated as industrial. (City of Chula Vista General Plan, 2005, p. EDE-5.) Applicant's and Staff's position is that the CVEUP is an expansion of an existing industrial use and thus is in accord with this policy. EHC contends that the Policy does not give license to expand such uses "ad infinitum." (EHC Reply Brief at 6.)

We find that the CVEUP is consistent with this policy. The General Plan contains many policies designed to balance such competing interests as economic prosperity, reliability of electrical service, separation of industrial and residential uses, and the like. Conformity with the General Plan requires that the project achieve an overall harmony with the General Plan. *Sequoyah Hills Homeowners Association v. City of Oakland* (1993) 23 Cal.App.4th 704, 719 ("state law does not require an exact match between a proposed subdivision and the applicable general plan."). The proposed expansion of the existing use is obviously finite and would not introduce an new non-conforming use. As such, we believe it represents a pragmatic balance as envisioned in Policy ED 1.3.

E 6.4 Environmental policy 6.4 calls for the City to:

> "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." (City of Chula Vista General Plan, 2005, p. E-32.)

Staff and Applicant are of the opinion that the proposed CVEUP project does not conflict with this policy, while EHC argues that siting the facility at the proposed location does not comply with the requirement to avoid siting major toxic air emitters within 1000 feet of a sensitive receptor. The parties all agree that there are sensitive receptors within 1000 feet of the site (Ex. 200, p. 4.5-16), and that Policy E 6.4 was adopted after the existing peaker plant was already in place (Applicant's Opening Brief at 12) but long before this AFC was filed.

Applicant's and Staff's argument is that the "avoid" requirement in Environmental Policy section 6.4 of the City's General Plan applies only to major toxic emitters. In the view of these two parties, power plants that are not major toxic emitters are not included. In other words, the phrase "energy generation facilities and other major toxic emitters" implies that the requirement applies only to power plants which are major toxic emitters, and excludes power plants that are not major toxic emitters. In essence, the argument boils down to the assertion that if the drafters had intended to include all power plants, they would have written "power plants and major toxic emitters."

EHC argues that the policy applies to all new or repowered energy generation facilities. The word "other" indicates that the drafters viewed any "new or repowered energy generation facility" as a major toxic emitter.

The former interpretation requires an initial inquiry as to whether or not a particular power plant is a major toxic emitter, a term undefined in the General Plan. If so, then its siting near a sensitive receptor must be avoided. Applicant suggests that proper interpretation and implementation of policy E 6.4 requires one to become familiar with the projected emissions of a proposed project and then consult the Federal Clean Air Act and rules of the SDAPCD to determine if its toxic emissions are "major" as that word is used in those laws. This strikes us as unrealistic. A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*O'Kane v. Irvine* (1996) 47 Cal.App.4th 207, 211.) "To determine the intent of legislation, we first consult the words themselves, giving them their usual and ordinary meaning." (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) Since even the cleanest natural-gas fired power plant emits large quantities of toxic substances, albeit within legal limits, it is reasonable to assume that the drafters of Policy E 6.4 listed "new or repowered energy generation facilities" as an example of a major toxic emitter. This interpretation gives the words of the policy their usual and ordinary meaning.

The evidence of record supports this view. Exhibit 626 contains various documents pertaining to the drafting and adoption of Policy E 6.4 as part of the General Plan update in 2005. Particularly telling are documents A and C. Document A shows a redlined draft of Policy E 6.4 from July, 2005. It is clear that the original intent was to allow the siting of new or repowered energy generation facilities and other major toxic air emitters within 1,000 feet of a sensitive receptor if a health risk assessment showed that attendant health risks were within acceptable standards. In August 2005, Mayor Padilla, in Document C, made it clear that he wanted stronger protection for the community. "A health risk assessment alone is never sufficient in my opinion to achieve adequate protections for our community and so I believe the Staff language is not strong enough." (emphasis added.) Mayor Padilla then proposed adopting Policy E 6.4 as it exists today. The Mayor's language eliminated the need to determine whether or not a project constituted a health risk.

Applicant's interpretation requires one to make a judgment as to whether or not a new or repowered energy generation facility is a major toxic emitter (according to an undefined standard). This is the equivalent of making a judgment as to whether or not a project constitutes a health risk by conducting a health risk assessment. The legislative history reveals the drafters' purpose to eliminate such subjectivity from policy E 6.4 by imposing a requirement to avoid siting any new or repowered energy generation facility, and any other major toxic emitter, within 1,000 feet of a sensitive receptor, regardless of what the outcome of a health risk assessment might have been.

A document from the archives of the Chula Vista General Plan Update also suggests that the drafters did not view any energy generation facilities as exempt from the "avoid" requirement of Environmental Policy 6.4. The "Digest of General Plan Update Revisions," Digest, page 5 of 7, accessed at http://www.ci.chula-vista.ca.us/city_Services/Development_Services/Planning_Building/Archive/GPUArchive/documents/GPU_PE_09_05_Web_000.pdf, contains a summary of revisions to the first draft of the General Plan made in 2005 in response to community input. In summarizing the revisions to Policy E 6.4, the document reads:

> "Revising certain policies promoting clean air (Policy E 6.4, which deals with environmental effects of *energy generation facilities and major toxic air emitters*,…)." (emphasis added)

The omission of "other" from the italicized portion of this statement supports an inference that the word "other" in Policy E 6.4 does not have the significance assigned to it by the Applicant. It therefore appears to us that the City intended the Policy to apply to all energy generation facilities and to all major toxic air emitters.

Furthermore, Applicant's interpretation comes perilously close to rendering the policy meaningless. "Major" as used in the Federal Clean Air Act and the SDAPCD Rules connotes facilities that emit such large quantities of air pollutants that it is implausible that anyone would seek to site one within 1,000 feet of a sensitive receptor. Policy E 6.4 would have little meaning if it only applied to facilities that would not normally be sited near sensitive receptors even in the absence of the Policy.

We therefore find that the weight of the evidence shows that the purpose of Policy E 6.4 is to avoid siting energy generation facilities and other major toxic emitters within 1,000 feet of a sensitive receptor.

Our conclusion is supported by recent events concerning the City's consideration of this project. In a letter from the Office of the City Manager to the Energy Commission Project Manager, dated June 13, 2008, (Ex. 622) the City expressed concern that the CVEUP is inconsistent with Land Use Policy E 6.4. The basis for this concern was that the General Plan Update of 2005 added policies that did not exist at the time the SUP for the existing plant was approved in 2000. The City stated that:

> "The City's General Plan was updated in 2005 and contains policies regarding locating of a major toxic emitter within 1,000 feet of a sensitive receptor (residents). Adequate justification must be provided to demonstrate that there are no other feasible locations to site the Upgraded Peaker Plant."

Notwithstanding these concerns, on August 7, 2008, the Office of the City Manager issued another letter (Ex. 804) in which it described certain mitigation measures offered by the Applicant, and concluded that:

> "Subsequent to the Commission adopting the measures contained in the attached letter and/or the completion of a detailed written agreement between the City and MMC on any of the measures not included in the CEC proposed decision, and timely payment by MMC to implement the measures, the City concludes that any potential inconsistencies with the City's General Plan will have been addressed."

The measures described therein, and set forth in a letter from MMC to the City, dated August 4, 2008, (Ex. 804) include payment of $210,000 to City for "air quality related mitigation for the local area," another $210,000 to fund the estimated cost of mitigating the project's air emissions, agreement to pay applicable Utility User Tax to City, payment of $30,000 for a wireless weather station that will help with water conservation, and agreement to remove the existing facility. These mitigation measures, while

commendable, *do not resolve the project's inconsistencies with the General Plan and Zoning Ordinance* set forth in this Decision.

Since the proposed site is within 1,000 feet of a sensitive receptor, we must also determine whether or not the evidence shows that the Applicant has met its obligation to "avoid" siting it there. "Avoid" means to prevent the occurrence of or to refrain from. (Merriam-Webster Online Dictionary, 2008.) Under Policy E 6.4, one seeking to site a major toxic emitter within 1,000 feet of a sensitive receptor would be required to make a reasonable effort to site it farther than 1,000 feet from a sensitive receptor. Many factors would be analyzed in the course of such an examination, including but not limited to economic, environmental, safety, reliability, and visual factors. A reasonable effort logically includes an examination of a reasonable range of alternative sites, which is a part of our certification process, and our detailed discussion is contained within the **Alternatives** section of this Decision.

E. 23.3 Environmental Policy 23.3 calls for the City to "avoid siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools or residential dwellings." (City of Chula Vista General Plan, 2005, p. E-79.) Applicant contends that since the CVEUP does not pose a significant hazard to human health or safety, the power plant may be sited near schools and residences. Staff agrees. EHC argues that the CVEUP will actually produce more emissions than the existing facility, citing the FSA, Ex. 200, at pages 4.1-34 and 4.1-37. (EHC Reply Brief at 7.) The FSA does indicate that an incremental increase in emissions of criteria pollutants is expected, and bases its recommended emissions mitigation on an incremental increase of 10.86 tons/year. (Ex. 200, p. 4.1-41.) EHC further points out that Policy E 23.3 is part of the Environmental Justice subsection of the Environmental Element of the General Plan. According to the General Plan, the City of Chula Vista seeks to avoid the over concentration of industrial uses and promote the equitable distribution of public facilities and services as part of its environmental justice effort. (City of Chula Vista General Plan, 2005, p. E-6.) Diane Takvorian testified that the project area has a disproportionate share of energy generation facilities. (Ex. 608; RT 10/2/08 192:2.) This testimony is uncontroverted.

We need not reach EHC's contentions to conclude that siting the CVEUP at the proposed site must be avoided under Policy E 23.3. It is undisputed that the CVEUP is an industrial facility. Policy E 23.3 plainly asks that siting such facilities in proximity to schools or residential dwellings be avoided. As with Policy E 6.4, we must determine only whether or not the evidence shows that the Applicant has met its obligation to choose an acceptable location. That analysis is contained within the **Alternatives** section of this Decision.

b. Zoning

i) Precise Plan

The entire CVEUP site is zoned "IL-P, Limited Industrial Precise Plan" (Ex. 200, p. 4.4-5.)[53] According to the zoning ordinance:

> …the planning commission or the city council may require that a precise plan be submitted for the development of the property by attaching the P precise plan modifying district to the underlying zone. The precise plan includes, but is not limited to, the location, height, size, and setbacks of buildings or structures, open spaces, signs, and densities. (Chula Vista Municipal Code, section 19.12.120 B.)

According to the City of Chula Vista, the proposed CVEUP site does "…not include a Precise Plan." (Ex. 200, p. 4.5-5, Fn. 3.) Indeed, the Applicant argues in its brief that a Precise Plan is not required. (Applicant's Reply Brief at 14.) EHC, on the other hand, argues that section 19.12.120 B of the Municipal Code does require the approval of a Precise Plan for any proposed development in the zone.

The Code section quoted above gives the commission or the council discretion ("may") as to whether or not to attach the P designation. Attachment of the P designation then triggers a requirement that a precise plan be submitted for the development of the property. Section 19.14.576 of the City's code requires that the City make certain findings before a precise plan can be approved, as follows:

> The planning commission may recommend approval of the plan and the city council may grant approval of the plan if all of the following facts are found:
>
> A. That such plan will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of

[53] The zoning designation for the construction laydown/worker parking area is "A70, Agricultural/County" with permitted uses including: agricultural uses; single-family dwellings; and accessory uses. In addition, according to the Chula Vista Municipal Code (CVMC) § 19.20.020, the agricultural zone allows for agricultural processing plants (per CVMC § 19.58.030), which process agricultural products produced on the premises or within a contiguous agricultural area, so located as to provide convenient trucking access with a minimum of interference to normal traffic and that shall provide parking and loading spaces. No party has placed the siting of this laydown area in dispute, and since in any event its use as a laydown and parking area will be temporary, we find that the record supports our finding that this use does not violate any land use LORS.

persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;

B. That such plan satisfies the principle for the application of the P modifying district as set forth in CVMC 19.56.041;

C. That any exceptions granted which deviate from the underlying zoning requirements shall be warranted only when necessary to meet the purpose and application of the P precise plan modifying district; and

D. That approval of this plan will conform to the general plan and the adopted policies of the city.

There is no evidence in the record showing whether the City would approve or disapprove a Precise Plan were one submitted for the CVEUP. In view of the lack of a Precise Plan, we find a LORS violation which must be corrected before certification can be further considered.

ii) Generation of Electricity as a Permitted Manufacturing Use

Applicant argues that the generation of electricity through the combustion of natural gas is manufacturing, a permitted use in the Limited Industrial zone, and that therefore no Conditional Use Permit is needed here. Applicant cites Exhibit 620, page 19-99, which is a copy of part of Chapter 19.44, in support of this contention. (Applicant's Opening Brief at 25.)

Section 19.44.020 specifies that *permitted* uses in the IL zone are:

A. Manufacturing, printing, assembling, processing, repairing, bottling, or packaging of products from previously prepared materials, not including any prohibited use in this zone;

B. Manufacturing of electrical and electronic instruments, devices and components;

C. Wholesale businesses, storage and warehousing;

D. Laboratories; research, experimental, film, electronic and testing;

E. Truck, trailer, mobile home, boat and farm implement sales establishments;

F. Public and private building material sales yards, service yards, storage yards, and equipment rental;

G. Minor auto repair;

H. Laundries, laundry services, and dyeing and cleaning plants, except large-scale operations;

I. Car washing establishments, subject to the provisions of CVMC 19.58.060;

J. Plumbing and heating shops;

K. Exterminating services;

L. Animal hospitals and veterinarians, subject to the provisions of CVMC 19.58.050;

M. The manufacture of food products, drugs, pharmaceuticals and the like, excluding those in CVMC 19.44.050;

N. Electrical substations and gas regulator stations, subject to the provisions of CVMC 19.58.140;

O. Temporary tract signs, subject to the provisions of CVMC 19.58.320 and 19.60.470;*

P. Any other limited manufactured [sic] use which is determined by the Commission to be of the same general character as the above uses; and

Q. Agricultural uses as provided in CVMC 19.16.030.

The above section does not list electrical generating facilities as a permitted use, however, "manufacturing" is a permitted use, along with printing, assembling, processing, repairing, bottling or packaging of products from previously prepared materials. [§ 19.44.020(A).] Yet "manufacturing" is also a prohibited use when it is a "manufacturing use and process involving the primary production of products from raw materials" [§ 19.44.050 (A).]

Comparing the permitted types of manufacturing with the prohibited types of manufacturing leads us to find that not only is the generation of electricity through the combustion of natural gas not a permitted use, it may in fact be a prohibited use in the Limited Industrial zone. None of the permitted types of manufacturing involves combustion and the resultant production of air emissions. The permitted types of manufacturing are not what one might categorize as "smokestack industries." The generation of electricity through the combustion of natural gas, on the other hand, more closely resembles the prohibited uses because it involves the production of a product (electricity, as Applicant contends) from a raw material (natural gas). Furthermore, the types of manufacturing listed as prohibited are largely what might be characterized as "smokestack industries," for example the manufacture of charcoal, rubber, chemicals, and petroleum refining. Also prohibited is "any other use which is determined by the commission to be of the general character as the above uses" [§ 19.44.050(C).] We find that Applicant has not provided any evidence in support of its contention that the CVEUP is a manufacturing use of the type permitted in the Limited Industrial zone.

iii) Special Use Permit/Conditional Use Permit

a) Electrical Generating Facilities as a Conditional Use

Applicant, Staff, and Intervenor City all point out that the City of Chula Vista Redevelopment Agency issued a Special Use Permit (SUP) in September 2000 to the existing 44.5-MW peaking power plant (Ex. 8), and argue that this constitutes a de facto determination by City that the siting of the CVEUP would qualify for a Conditional Use Permit (CUP) today. According to information prepared by City staff and presented in the board packet that recommended approval of the Special Use Permit in September, 2000:

> "[t]he zoning on the currently vacant site (Limited Industrial) *allows public and quasi public uses like a peak load power plant through a Special Use Permit*… With the approval of the Special Use Permit (and the conditions listed in the Agency Resolution) the proposed project is determined to be consistent with the Zoning Ordinance, the Montgomery Specific Plan[54], and the General Plan of the City of Chula Vista." (emphasis added)

The evidence shows that the City based its 2000 approval of the SUP for the existing plant on a determination that the plant was a public or quasi public use, permissible in the Limited Industrial zone. While we recognize that we are to give deference to a City's interpretation of its zoning ordinance, we do not necessarily feel bound by such determinations when the evidence shows that the City erred in its determination, or

[54] According to the City of Chula Vista, "[t]he Montgomery Specific Plan was deleted from the 2005 General Plan Update…" (COCV 2008b).

when circumstances have changed since that interpretation was made. Applicant, Staff, and Intervenor City argue that a CUP would be granted today because the CVEUP is a public or quasi-public use. We now discuss whether or not their analysis of that issue is correct.

The relevant language of the zoning ordinance is as follows:

> "The purpose of the I-L zone is to encourage sound limited industrial development by providing and protecting an environment free from nuisances created by some industrial uses and to insure the purity of the total environment of Chula Vista and San Diego County and to protect nearby residential, commercial and industrial uses from any hazards or nuisances." (City of Chula Vista Municipal Code, § 19.44.010.)

After listing the permitted uses, set forth above in our discussion of manufacturing, the Limited Industrial section goes on to specify that *conditional* uses in the IL zone are:

A. Machine shops and sheet metal shops;

B. Service stations, subject to the conditions in CVMC 19.58.280;

C. Steel fabrication;

D. Restaurants, delicatessens and similar uses;

E. Drive-in theaters, subject to the conditions of CVMC 19.58.120;

F. Major auto repair, engine rebuilding and paint shops;

G. Commercial parking lots and garages;

H. Plastics and other synthetics manufacturing;

I. Building heights exceeding three and one-half stories or 45 feet;

J. Unclassified uses, as set forth in Chapter 19.54 CVMC;

K. Trucking yards, terminals and distributing operations;

L. The retail sale of such bulky items as furniture, carpets and other similar items;

M. Retail distribution centers and manufacturers' outlets which require extensive floor areas for the storage and display of merchandise, and the high-volume, warehouse-type sale of goods and retail uses which

are related to and supportive of existing, on-site retail distribution centers of manufacturers' outlets. Conditional use permit applications for the establishment of retail commercial uses, covered by the provisions of this subsection, shall be considered by the city council subsequent to its receipt of recommendations thereon from the planning commission;

N. Roof-mounted satellite dishes, subject to the standards set forth in CVMC 19.30.040;

O. Recycling collection centers, subject to the provisions of CVMC 19.58.345;

P. Hazardous waste facilities, subject to the provisions of CVMC 19.58.178; and

Q. Brewing or distilling of liquors requiring a Type 23 Alcoholic Beverage Control License; Conditional use permit applications for the use in subsection (Q) of this section shall be considered and approved by the zoning administrator.

The conditional use section of the IL zoning description, like the permitted use section, does not list electrical generating facilities. Nor does it list public or quasi public uses—which Applicant, Staff, and Intervenor City contend is the proper category for the proposed CVEUP. These parties argue that the project is an Unclassified use under subpart J, and point out that Unclassified uses includes public and quasi-public uses by its reference to section 19.54.[55]

Applicant, Staff, and Intervenor City contend that a Conditional Use Permit would be granted because the proposed project is an unclassified use, as set forth in section 19.44.040 (J).[56] That section, however, by its terms, requires reference to section 19.54, which describes unclassified uses as follows:

A. All of the following, and all matters directly related thereto, are declared to be *uses possessing characteristics of such unique and special form as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined*, and the authority for the location and operation thereof shall be subject to review and the issuance of a conditional use permit; provided,

[55] It is uncontested that the zoning ordinance is essentially the same today as it was in 2000.

[56] The City's Special Use Permit, granted in 2000 for the existing peaker was based upon a determination that the power plant was an unclassified use.

however, that conditional use permits may not be granted for a use in a zone in which it is specifically excluded by the provisions of this title.

B. The purpose of this review shall be to determine that the characteristics of such use shall not be incompatible with the type of uses permitted in surrounding areas and for the further purpose of stipulating such conditions as may reasonably assure that the basic purposes of this title shall be served. Factors to be considered and the manner in which conditional use applications are to be processed shall be as set forth in CVMC 19.14.060, et seq. (emphasis added)

The section then goes on to list a number of types of uses deemed unclassified, including "public and quasi-public uses." Those unclassified uses, the ordinance provides, may be "considered for location in any zone."

Uses that are specifically assigned elsewhere in the ordinance to a particular zone or zones, such as electrical generating facilities, are not, and cannot be, unclassified uses. They become classified by virtue of being assigned to a particular zone or zones. Not only are electrical generating facilities *not* a use "possessing characteristics of such unique and special form as to make impractical their being included automatically in any classes of use" as set forth in section 19.54.010, the fact is that electrical generating plants *are included* in the General Industrial zone as set forth in section 19.46.020 (E). Thus, it cannot be said that it would be impractical to include electrical generating plants automatically in a particular class of use; the City *did* in fact include them in the General Industrial zone. "Electrical Generating Facilities" is *not* an unclassified use.

The evidence of record leads to no other conclusion. Both Applicant's and Staff's experts testified that the purpose of the "unclassified use" designation was to cover uses the city "didn't think about" when drafting the zoning ordinance (10/2/2008 RT 312:9-10; 327:12-14). The evidence shows that the City *did* "think about" electrical generating plants because the City specifically included that use in the General Industrial zone. The Acting City Manager, Scott Tulloch, agreed with this interpretation of the meaning of an unclassified use in the zoning ordinance: it "gives the City flexibility *where they haven't either prohibited or specifically allowed a use*." (10/2/2008 RT 336: 4-6.) (emphasis added) The City *has* specifically allowed this use in the General Industrial Zone.

These facts lead us to reject the argument that the proposed project is an unclassified use and could therefore be conditionally permitted. Since we find that electrical generating facilities is not an unclassified use, we need not reach the question of whether or not it is a public or quasi public use. The public and quasi public designations depend first upon a determination that the use is unclassified. Since we

find that Electrical generating facilities is not an unclassified use, it cannot be conditionally permitted as a public or quasi-public use in the Limited Industrial zone.

b) Changed Circumstances

In light of our finding that the CVEUP cannot be a conditional use in the Limited Industrial zone, we need not reach the issue of whether or not changed circumstances would affect giving deference to the City's interpretation. Nonetheless, we address it briefly because the General Plan Update is a changed circumstance that could have an impact on the City's analysis of the zoning issue were it considering granting a CUP today.

The City issued a SUP for the existing peaker in 2000 under the same zoning that exists today. The City updated its General Plan in 2005, adding a policy, discussed above, requiring that placement of electrical generating facilities and other major toxic emitters within 1000 feet of a sensitive receptor be avoided. While no party presented evidence on the reason power plants were specifically mentioned in that policy, that question was addressed by two commenters at the Evidentiary Hearing. First, Theresa Acerro stated that she was on a committee that worked on the General Plan Update[57] and that the inclusion of Policy E 6.4 was a response to the existing peaker. (RT 10/2/08 437:12-17.) Second, Councilman Rudy Ramirez stated that he, too, participated in the General Plan Update. He stated that he represented southwest Chula Vista in connection with the update, and that based upon some 6,000 surveys completed by residents it was his belief that "…this peaker plant expansion in this neighborhood is exactly what we did not want." (10/2/2008 RT 467:16-18.) These comments corroborate what we find to be a reasonable inference based upon the relevant policy stated in the General Plan: that power plants were mentioned in Policy E 6.4 because of the relatively recent approval and construction of the existing peaker.[58] This inference is further corroborated by the City's Advanced Planning Section's recently-submitted comments on the PSA in which concern was expressed over the apparent conflict of the proposed peaker with this Policy. (Ex. 622) As discussed previously, it appears to us that Policy E 6.4 was adopted to ensure that any future attempt to site a power plant within 1,000 feet of a

[57] Reference to the agendas and minutes of the Environment, Open Space, and Sustainable Development Subcommittee for the General Plan Update confirms that Ms. Acerro was a member of that subcommittee representing the Sierra Club. These documents are available at: http://www.chulavistaca.gov/City_Services/Development_Services/Planning_Building/General_Plan/PDFs/environmental/minutes/2004-06-01.pdf

[58] Another commenter, Kevin O'Neill, stated he worked with Ms. Acerro and Mr. Ramirez on the Update, and implied that his recollection of the intent of policy E 6.4 was different than what they described. However, he did not elaborate and we cannot presume to guess at what he meant. (10/2/2008 RT 514:22 – 515:1.)

~~sensitive receptor would be subject to greater scrutiny than was the existing peaker. There is no evidence in the record which would support any contrary inference, nor can we fathom any other reason why power plants would have been singled out for specific mention in Policy E 6.4.~~[59]

21. Page 278, "4. Consistency with Land Use LORS" is changed to read as follows:

4. Consistency with Land Use LORS

The evidentiary record and post-hearing briefs show that a dispute among the parties exists concerning consistency of the project with the General Plan and Title 19 of the Chula Vista Zoning Ordinance. We analyze this dispute below.

a. General Plan
   i) Existing Land Use Designations

The northern portion of the CVEUP site is designated "IL, Limited Industrial" in the City of Chula Vista General Plan Land Use Diagram. (City of Chula Vista General Plan, 2005, p. LUT-47.) The Limited Industrial category encompasses light manufacturing, warehousing, auto repair, auto salvage yards, and flexible-use projects that combine these uses with associated office space. (City of Chula Vista General Plan, 2005, p. LUT-53.) There are two other designations in the Industrial category: Regional Technology Park and General Industrial. The latter category includes all Limited Industrial and Technology Park uses as well as heavier manufacturing, large-scale warehousing, transportation centers, and public utilities. (City of Chula Vista General Plan, 2005, p. LUT 53.)

The southern portion of the CVEUP site is designated "OS, Open Space" in the City of Chula Vista General Plan Land Use Diagram. (City of Chula Vista General Plan, 2005, p. LUT-47.) The Open Space designation is intended for lands to be protected from urban development, including floodplains, canyon, mountain, and agricultural uses. These lands may include unique natural conditions, provide scenic vistas, or be areas to be set aside that have potential exposure to hazards such as earthquakes, landslides, fires, floods, erosion, or even high levels of roadway noise. Passive recreation uses, such as trails, staging areas, scenic overlooks, and picnic areas may occur within these areas. (City of Chula Vista General Plan, 2005, p. LUT-54.)

[59] This finding is further corroborated by the Digest of General Plan Update Revisions discussed at page 15, supra. That document states that Policy E 6.4 deals with "…energy generation facilities and major toxic air emitters."

The proposed construction laydown/worker parking area has a General Plan land use designation of "OSP, Open Space Preserve." The Open Space Preserve designation is intended for areas designated within the Chula Vista Multiple Species Conservation Program (MSCP) Subarea Plan for the permanent conservation of biological resources. The various Preserve categories and locations of these lands are provided in the Chula Vista MSCP Subarea Plan. (City of Chula Vista General Plan, 2005, p. LUT-55.)

ii) Conflicts with General Plan

The General Plan contains numerous policy statements which are set forth in Staff's Table 4, at pages 4.5-13 to 4.5-14 of the FSA. (Ex. 200.) Noteworthy are policies LUT 45.6, ED 1.3, E 6.4, and E 23.3. Although Staff and Applicant were in agreement that the proposed project did not conflict with these General Plan policies, Intervenor Environmental Health Coalition (EHC) contended that there were serious conflicts. We discuss these land use policies below.

LUT 45.6 Land Use and Transportation Policy 45.6 calls for Main Street to be maintained primarily as a limited industrial corridor. The "Limited Industrial" designation is defined in the General Plan as "intended for light manufacturing, warehousing, auto repair, auto salvage yards, and flexible-use projects that combine these uses with associated office space." (City of Chula Vista General Plan, 2005, p. LUT-53.) Applicant's and Staff's position is that the CVEUP constitutes an upgrade of an existing industrial use, thereby furthering the policy of maintaining Main Street as a limited industrial corridor.[60] (Ex. 200, p. 4.5-15.) EHC, however, focused on the "limited" designation and argued that the operation of a natural gas-fired power plant such as the existing plant or the proposed CVEUP is not a light industrial use. (EHC Opening Brief at 15.)

We find the wording of the General Plan itself to be specific and definitive here. Section 4.9.5 of the General Plan describes the "Industrial" category and breaks it down into Limited Industrial and General Industrial sub-categories. "Heavier manufacturing" and "public utilities" are uses listed as appropriate in the General Industrial land use sub-category. These uses are consistent with the industrial nature of a power plant. The examples given to illustrate the Limited Industrial sub-category—warehousing, auto repair and salvage, and office uses--do not resemble gas-fired power plants. (Chula Vista General Plan, 2005, pp. LUT-53 -54). We can only conclude that this distinction is meant to purposefully categorize these different types of uses. The purpose of these categories is to further the goal of preserving the Main Street Corridor as a limited

[60] We note that Staff's Table 4 omits the word "limited" from its explanation of why the CVEUP would be consistent with LUT 45.6. Ex. 200, p. 4.5-15.

industrial area. Siting a power plant in the area designated Limited Industrial conflicts with this goal. Siting it in an area designated General Industrial would be in keeping with the wording of the policy. We thus find that the siting of the proposed project conflicts with General Plan Policy LUT 45.6.

ED 1.3 Economic Development Policy 1.3 seeks to encourage the preservation and expansion of existing industrial uses in areas designated as industrial. (City of Chula Vista General Plan, 2005, p. EDE-5.) Applicant's and Staff's position is that the CVEUP is an expansion of an existing industrial use and thus is in accord with this policy. EHC contends that the Policy does not give license to expand such uses "ad infinitum." (EHC Reply Brief at 6.)

We find that the CVEUP is consistent with this policy. The General Plan contains many policies designed to balance such competing interests as economic prosperity, reliability of electrical service, and separation of industrial and residential uses. (City of Chula Vista General Plan, 2005, p. INTRO-1.) The proposed expansion of the existing use is finite in size and would not introduce a new non-conforming use, although it does double its size. As such, we believe it does preserve and expand the existing use as set forth in Policy ED 1.3.

E 6.4 Environmental policy 6.4 calls for the City to:

> "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." (City of Chula Vista General Plan, 2005, p. E-32.)

Staff and Applicant believe that the proposed CVEUP does not conflict with this policy; EHC disagrees. The parties all agree that there are sensitive receptors within 1000 feet of the site (Ex. 200, p. 4.5-16), and that Policy E 6.4 was adopted after the existing peaker plant was already in place (Applicant's Opening Brief at 12) but long before this AFC was filed.

Applicant, Staff and City contend that the "avoid" requirement in Environmental Policy section 6.4 of the City's General Plan applies only to major toxic emitters. In the view of these parties, power plants that are not major toxic emitters are not included. In other words, the phrase "energy generation facilities *and other* major toxic emitters" implies that the requirement applies only to power plants that are major toxic emitters, excludes power plants that are not major toxic emitters, and that the status of any particular power plant as such must be determined on a case-by-case basis. In essence, the

argument boils down to the assertion that if the drafters had intended to include all power plants, they would have written “power plants and major toxic emitters.”

EHC argues that the policy applies to *all* new or repowered energy generation facilities. In EHC’s view, the word “other” indicates that the drafters viewed *any* “new or repowered energy generation facility” to be a major toxic emitter.

As we just noted, the former interpretation requires an inquiry as to whether a particular power plant is a “major toxic emitter,” a term undefined in the General Plan. If so, then its siting near a sensitive receptor must be avoided. Applicant suggests that proper interpretation and implementation of policy E 6.4 requires one to become familiar with the projected emissions of a proposed project and then consult the Federal Clean Air Act and rules of the SDAPCD to determine if its toxic emissions are “major” as that word is used in those laws. This strikes us as unrealistic. A fundamental rule of statutory construction is that a court should ascertain the intent of the enacting body so as to effectuate the purpose of the law. (*O’Kane v. Irvine* (1996) 47 Cal.App.4th 207, 211.) Since even the cleanest natural-gas fired power plant emits large quantities of toxic air pollutants, albeit within legal limits, it is reasonable to assume that the drafters of Policy E 6.4 listed “new or repowered energy generation facilities” as an *example* of a major toxic emitter. This interpretation gives the words of the policy their usual and ordinary meaning.

The evidence supports this view. Exhibit 626 contains various documents pertaining to the drafting and adoption of Policy E 6.4 as part of the General Plan update in 2005. Particularly telling are documents A and C. Document A shows a redlined draft (which was not adopted) of Policy E 6.4 from July, 2005. It would have allowed the siting of new or repowered energy generation facilities and other major toxic air emitters within 1,000 feet of a sensitive receptor if a health risk assessment showed that attendant health risks were within acceptable standards. However, the final, adopted language in Document C simply provides that all siting of energy generation facilities and other major toxic air emitters within 1,000 feet of a sensitive receptor is to be avoided, without the need for a health risk assessment. The legislative history, then, supports EHC’s interpretation of E 6.4.

Additional legislative history further corroborates this view. In August 2005, when the draft of E 6.4 embodied in Document A was being debated, Mayor Padilla made it clear that he wanted stronger protection for the community. “A health risk assessment alone is never sufficient in my opinion to achieve adequate protections for our community and so I believe the Staff language [in Document A] is *not strong enough*.” (Ex. 626) (emphasis added.) Mayor Padilla then proposed adopting Policy E 6.4 as it appeared in

Document C and as it exists today. (*Id*.) [61] The policy applies to all energy generation facilities that emit toxic air pollutants, even those that a health risk assessment might show were somehow not "major toxic emitters."

A document from the archives of the Chula Vista General Plan Update also suggests that the drafters did not view *any* energy generation facilities as exempt from the "avoid" requirement of Environmental Policy 6.4. The "Digest of General Plan Update Revisions," Digest, page 5 of 7, accessed at http://www.ci.chula-vista.ca.us/city_Services/Development_Services/Planning_Building/Archive/GPUArchive/documents/GPU_PE_09_05_Web_000.pdf, contains a summary of revisions to the first draft of the General Plan made in 2005 in response to community input. In summarizing the revisions to Policy E 6.4, the document reads:

> Revising certain policies promoting clean air (Policy E 6.4, which deals with environmental effects of *energy generation facilities and major toxic air emitters*,…)." (emphasis added)

The omission of "other" from the italicized portion of this statement indicates that the word "other" in Policy E 6.4 does not have the significance assigned to it by the Applicant. The term "other" could be viewed as surplusage. It therefore appears to us that the City intended the Policy to apply to all energy generation facilities which emit toxic air pollutants and to all major toxic air emitters.

Furthermore, Applicant's interpretation comes perilously close to rendering the policy meaningless. "Major" as used in the Federal Clean Air Act and the SDAPCD Rules connotes facilities that emit such large quantities of air pollutants that it is implausible that anyone would seek to site one within 1,000 feet of a sensitive receptor. (Ex. 5, p. 3.) Policy E 6.4 would have little meaning if it only applied to facilities that would not normally be sited near sensitive receptors even in the absence of the Policy.

The new argument put forth by Applicant, Staff and City in their comments on the PMPD—that our interpretation would preclude the siting of even solar photovoltaic energy generation facilities, which have no emissions, within 1,000 feet of a sensitive

[61] Former Mayor Padilla did not testify in this matter but provided comment at the Committee Conference on April 13, 2009 in which he confirmed that policy E 6.4 was worded in this way in order to ensure that power plants not be built within 1000 feet of sensitive receptors, leaving no room for discretion or interpretation. Only if such placement could not be avoided would it be allowed. (4/13/09 RT 99–102.) These comments, like those of Rudy Ramirez (10/2/2008 RT 467:16-18) and Teresa Acerro (10/2/08 RT 437:12-17) are not evidence but corroborate what we find to be a reasonable inference based upon the relevant policy stated in the General Plan: that power plants were mentioned in Policy E 6.4 because of the relatively recent approval and construction of the existing peaker.

receptor—takes the policy language out of context. Policy E 6.4 is intended to further Objective E 6 of the General Plan: "Improve local air quality by minimizing the production and emission of air pollutants and toxic air contaminants and limit the exposure of people to such pollutants." Objective E 6 obviously is not directed at activities that have no toxic air emissions.

We find unpersuasive the recent opinion, expressed by the Office of the City Manager, that payment of mitigation will resolve the project's inconsistencies with the General Plan:

> "Subsequent to the [Energy] Commission adopting the measures contained in the attached letter and/or the completion of a detailed written agreement between the City and MMC on any of the measures not included in the CEC proposed decision, and timely payment by MMC to implement the measures, the City concludes that any potential inconsistencies with the City's General Plan will have been addressed."

The "attached letter," (Ex. 804) describes payment of $210,000 to the City for "air quality related mitigation for the local area," another $210,000 to fund the estimated cost of mitigating the project's air emissions, agreement to pay the applicable Utility User Tax to the City, payment of $30,000 for a wireless weather station that will help with water conservation, and agreement to remove the existing facility. These mitigation measures, while commendable, *do not resolve the project's inconsistencies with the General Plan and Zoning Ordinance* set forth in this Decision. They are solely mitigations of air quality and water use impacts and they do not address the LORS violations. A LORS violation cannot be "mitigated;" either the violation exists or it does not.

Since the proposed project falls within the ambit of Policy E 6.4 and is within 1,000 feet of a sensitive receptor, we must also determine whether or not the evidence shows that the Applicant has met the obligation to "avoid" siting it there. "Avoid" means to prevent the occurrence of or to refrain from. (Merriam-Webster Online Dictionary, 2008.) Obviously, the CVEUP fails to "avoid" being sited within 1,000 feet of a sensitive receptor and the project therefore violates E 6.4. We examine whether there are reasonable siting alternatives farther than 1000 feet from a sensitive receptor in the **Alternatives** section of this Decision.

E. 23.3 Environmental Policy 23.3 calls for the City to "avoid siting industrial facilities and uses that pose a significant hazard to human health and safety in proximity to schools or residential dwellings." (City of Chula Vista General Plan, 2005, p. E-79.) Applicant contends that since the CVEUP does not pose a significant hazard to human

health or safety, the power plant may be sited near schools and residences. Staff agrees. EHC argues that the CVEUP will actually produce more emissions per hour than the existing facility, citing the FSA, Ex. 200, at pages 4.1-34 and 4.1-37. (EHC Reply Brief at 7.) The FSA does indicate that an incremental increase in emissions of criteria pollutants is expected, and bases its recommended emissions mitigation on an incremental increase of 10.86 tons/year. (Ex. 200, p. 4.1-41.) EHC further points out that Policy E 23.3 is part of the Environmental Justice subsection of the Environmental Element of the General Plan. According to the General Plan, the City of Chula Vista seeks to avoid the over-concentration of industrial uses and promote the equitable distribution of public facilities and services as part of its environmental justice effort. (City of Chula Vista General Plan, 2005, p. E-6.) Diane Takvorian testified that the project area has a disproportionate share of energy generation facilities. (Ex. 608; RT 10/2/08 192:2.)

In light of our finding that the CVEUP violates Policy E 6.4, because it is an energy generation facility sited within 1000 feet of sensitive receptors, analysis of whether or not it also violates this policy is unnecessary. Policy E 6.4 applies specifically to energy generation facilities such as the CVEUP. Policy E 23.3 applies to industrial facilities and uses that pose a significant hazard to human health and safety—a category that may or may not encompass the CVEUP.

b. Zoning

i) Precise Plan

The entire CVEUP site is zoned "IL-P, Limited Industrial Precise Plan" (Ex. 200, p. 4.4-5.)[62] According to the zoning ordinance:

> …the planning commission or the city council may *require* that a precise plan be submitted for the development of the property *by attaching the P precise plan modifying district to the underlying zone.* The precise plan includes, but is not limited to, the location, height, size, and setbacks of

[62] The zoning designation for the construction lay down/worker parking area is "A70, Agricultural/County" with permitted uses including: agricultural uses; single-family dwellings; and accessory uses. In addition, according to the Chula Vista Municipal Code (CVMC) § 19.20.020, the agricultural zone allows for agricultural processing plants (per CVMC § 19.58.030), which process agricultural products produced on the premises or within a contiguous agricultural area, so located as to provide convenient trucking access with a minimum of interference to normal traffic and that shall provide parking and loading spaces. No party has placed the siting of this lay down area in dispute, and since in any event its use as a lay down and parking area will be temporary, we find that the record supports our finding that this use does not violate any land use LORS.

> buildings or structures, open spaces, signs, and densities. (Chula Vista Municipal Code, section 19.12.120 B.) (emphasis added)

By attaching the P precise plan designation to the Limited Industrial zoning of the proposed site, the City established a requirement that a precise plan be submitted. Yet according to the City of Chula Vista, the proposed CVEUP site does "…not include a Precise Plan." (Ex. 200, p. 4.5-5, Fn. 3.) Indeed, the Applicant argues in its brief that a Precise Plan is not required. (Applicant's Reply Brief at 14.) EHC, on the other hand, argues that section 19.12.120 B of the Municipal Code does require the approval of a Precise Plan for any proposed development in the zone.

The Code section quoted above gives the commission or the council discretion ("may") as to whether or not to attach the P designation. Attachment of the P designation then triggers a *requirement* that a precise plan be submitted for the development of the property, and that the precise plan be approved. Section 19.14.576 of the City's code requires that the City make certain findings before a precise plan can be approved:

> A. That such plan will not, under the circumstances of the particular case, be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity;
>
> B. That such plan satisfies the principle for the application of the P modifying district as set forth in CVMC 19.56.041;
>
> C. That any exceptions granted which deviate from the underlying zoning requirements shall be warranted only when necessary to meet the purpose and application of the P precise plan modifying district; and
>
> D. That approval of this plan will conform to the general plan and the adopted policies of the city.

There is no evidence in the record showing whether the City would approve or disapprove a Precise Plan were one submitted for the CVEUP, but we need not reach that question here, because the CVEUP does not have a Precise Plan. Therefore, the project does not comply with Sections 19.12.120 B or 19.14.576 of the Chula Vista Municipal Code.

ii) Generation of Electricity as a Permitted Manufacturing Use

As we noted above, the CVEUP is proposed to be built in an area zoned Limited Industrial Precise Plan.

Section 19.44.020 of the City's Zoning Ordinance states that *permitted* uses in the IL zone are:

A. Manufacturing, printing, assembling, processing, repairing, bottling, or packaging of products from previously prepared materials, not including any prohibited use in this zone;

B. Manufacturing of electrical and electronic instruments, devices and components;

C. Wholesale businesses, storage and warehousing;

D. Laboratories; research, experimental, film, electronic and testing;

E. Truck, trailer, mobile home, boat and farm implement sales establishments;

F. Public and private building material sales yards, service yards, storage yards, and equipment rental;

G. Minor auto repair;

H. Laundries, laundry services, and dyeing and cleaning plants, except large-scale operations;

I. Car washing establishments, subject to the provisions of CVMC 19.58.060;

J. Plumbing and heating shops;

K. Exterminating services;

L. Animal hospitals and veterinarians, subject to the provisions of CVMC 19.58.050;

M. The manufacture of food products, drugs, pharmaceuticals and the like, excluding those in CVMC 19.44.050;

N. Electrical substations and gas regulator stations, subject to the provisions of CVMC 19.58.140;

O. Temporary tract signs, subject to the provisions of CVMC 19.58.320 and 19.60.470;*

P. Any other limited manufactured [sic] use which is determined by the Commission to be of the same general character as the above uses; and

Q. Agricultural uses as provided in CVMC 19.16.030.

Thus electrical generating facilities *per se* are not listed as a permitted use. "Manufacturing" is a permitted use, along with printing, assembling, processing, repairing, bottling or packaging of products from previously prepared materials. [§ 19.44.020(A).] "Manufacturing" is also a *prohibited* use when it is a "manufacturing use and process involving the primary production of products from raw materials" [§ 19.44.050 (A).]

Comparing the "permitted" types of manufacturing with the "prohibited" types of manufacturing leads us to find not only that the generation of electricity through the combustion of natural gas not a permitted use, but also that it may be a prohibited use. None of the permitted types of manufacturing is what one might categorize as a "smokestack industry:" none involves combustion and the resultant production of air emissions as does the CVEUP. The generation of electricity through the combustion of natural gas more closely resembles the prohibited uses because it involves the production of a product (electricity, as Applicant contends) from a raw material (natural gas). Furthermore, the prohibited types of manufacturing are "smokestack industries," for example the manufacture of charcoal, rubber, and chemicals, and petroleum refining.

Also prohibited is "any other use which is determined by the [city planning] commission to be of the general character as the above uses" [§ 19.44.050(C).] The City Planning Commission has not made any determination that we are aware of regarding whether or not the combustion of natural gas to produce electricity is of the same general character as the manufacture of charcoal, rubber, and chemicals, and petroleum refining. We find that the proposed use is far more similar in character to the prohibited types of manufacturing than to the permitted ones. However, because we find that the CVEUP is not a permitted use in the Limited Industrial zone, and would not qualify for a CUP, we need not make a finding as to whether or not the CVEUP would actually violate the prohibition on manufacturing uses involving the primary production of products from raw materials in the Limited Industrial zone.

iii) Special Use Permit/Conditional Use Permit

Applicant, Staff, and Intervenor City all point out that the City of Chula Vista Redevelopment Agency issued a Special Use Permit (SUP) in September 2000 for the existing 44.5-MW peaking power plant (Ex. 8), argue that this constitutes a determination by City that the siting of the CVEUP would qualify for a Conditional Use Permit (CUP) today, and contend that the CEC must, therefore, afford "due deference" to that so-called determination. We disagree. The September 2000 SUP, without more, is irrelevant to whether a different project complies with LORS in 2009. Moreover, even if it were relevant, we would not be required to defer to it.

We deal first with deference. While we recognize that under some circumstances we should, and perhaps in some situations we must, give deference to a City's interpretation of its General Plan, zoning ordinance, and other municipal laws, we do not necessarily owe such deference when circumstances have changed since that interpretation was made or the determination was made for a different project than the one before us—and in this case circumstances have changed and the City has made no determination about the CVEUP. Applicant argues strenuously that the Commission owes deference to a City's determinations, referring to our decisions in *East Altamont Energy Center* (01-AFC-4) and *Los Esteros Critical Energy Facility*, (01-AFC-12), but points to no such determination by the City of Chula Vista in this case. In *East Altamont*, the county Board of Supervisors adopted a resolution making specific findings about the proposal. In *Los Esteros* the City Council did the same.

There is no evidence that the City has ever made a determination about the CVEUP to which we could give deference. In comment at the Committee Conference on April 13, 2009, MMC's Harry Scarborough stated that the City had approved the Project by issuing the August 7, 2008 letter (Exs. 204, 803), but he acknowledged that the letter is a "side agreement" that was entered into in "closed session." (4/13/09 RT 21:11—22:6.) There is no evidence that a duly constituted City body came out of closed session and ratified the letter in open session or otherwise took any official action. In fact, once the August 7, 2008 letter became public, council member Castaneda issued a memorandum to the City Manager requesting that the Chula Vista City Council Energy Subcommittee hold a public meeting regarding the mitigation measures contained in the August 7, 2008 letter. (CEC Docket No. 47713, memo from council member Castaneda to City Manager and Assistant Manager dated August 13, 2008.) The City never conducted such a meeting. We must therefore regard the August 7th letter as nothing more (or less) than the opinion of a City employee (albeit a relatively high-ranking one).

When determining whether to defer to a governmental body's interpretation of the laws that it implements, the courts consider several factors. Here, the lack of action by the entire City Council, the informality of the August 7 letter, and the lack of a public process

supporting the interpretation all caution against giving undue deference to the letter. (See (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 - 8, 12 - 13.) Indeed, the opinions of a single staff member (or even a single legislator or council member) are usually entitled to no weight at all. (See *Zapara v. County of Orange* (1994) 26 Cal.App.4th 464, fn.4.; *Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 975.)

Furthermore Chula Vista's Acting City Manager, Scott Tulloch, has repeatedly stated that the City does not intend to make a determination regarding whether or not the CVEUP qualifies for a CUP and that it is the job of the Energy Commission to make that determination. In light of all these circumstances, whatever deference might be owed to the August 7 letter cannot overcome our own independent determination that the CVEUP does not comply with the Chula Vista LORS described above.

Applicant, Staff, and Intervenor City also argue, independent of the August 7 letter, that the City would grant a Conditional Use Permit to the project. We disagree, for two reasons: the CVEUP is not a conditional use, and even if it were, it is not a public/quasi public use.

iv) Electrical Generating Facilities as a Conditional Use

We discussed above the uses that are "permitted" and "prohibited" in the Limited Industrial (LI) Zone in which the CVEUP is located. There is a third category of uses, "conditional uses," that *may* be sited in an LI zone under a Conditional Use Permit. Section 19.44.010 lists those uses as:

A. Machine shops and sheet metal shops;

B. Service stations, subject to the conditions in CVMC 19.58.280;

C. Steel fabrication;

D. Restaurants, delicatessens and similar uses;

E. Drive-in theaters, subject to the conditions of CVMC 19.58.120;

F. Major auto repair, engine rebuilding and paint shops;

G. Commercial parking lots and garages;

H. Plastics and other synthetics manufacturing;

I. Building heights exceeding three and one-half stories or 45 feet;

J. Unclassified uses, as set forth in Chapter 19.54 CVMC;

K. Trucking yards, terminals and distributing operations;

L. The retail sale of such bulky items as furniture, carpets and other similar items;

M. Retail distribution centers and manufacturers' outlets which require extensive floor areas for the storage and display of merchandise, and the high-volume, warehouse-type sale of goods and retail uses which are related to and supportive of existing, on-site retail distribution centers of manufacturers' outlets. Conditional use permit applications for the establishment of retail commercial uses, covered by the provisions of this subsection, shall be considered by the city council subsequent to its receipt of recommendations thereon from the planning commission;

N. Roof-mounted satellite dishes, subject to the standards set forth in CVMC 19.30.040;

O. Recycling collection centers, subject to the provisions of CVMC 19.58.345;

P. Hazardous waste facilities, subject to the provisions of CVMC 19.58.178; and

Q. Brewing or distilling of liquors requiring a Type 23 Alcoholic Beverage Control License; Conditional use permit applications for the use in subsection (Q) of this section shall be considered and approved by the zoning administrator.

The conditional use section of the IL zoning description does not list electrical generating facilities. Applicant, Staff, and Intervenor City contend that the project is an Unclassified use under Section 19.44.040(J). That section, however, expressly requires reference to Section 19.54 which describes Unclassified uses as follows:

M. ….uses possessing characteristics of such unique and special form as to make impractical their being included automatically in any classes of use as set forth in the various zones herein defined ... .

Thus, uses that are specifically assigned elsewhere in the ordinance to a particular zone or zones, (in the words of the ordinance, uses that are "included in any classes of use

as set forth in the various zones herein defined") are not, and cannot be, "unclassified" uses. They have become classified by virtue of being assigned to a particular zone or zones. Electrical generating plants *are included* in the General Industrial zone as set forth in section 19.46.020 (E). Thus, it cannot be said that it would be impractical to include electrical generating plants automatically in a particular class of use; the City *did* in fact include them in the General Industrial zone. Therefore, "Electrical Generating Facilities" is *not* an unclassified use.

We see nothing in the zoning ordinance that would compel any other conclusion about the definition of "unclassified." Furthermore, the testimony of expert and lay witnesses at the Evidentiary Hearing is consistent with our conclusion that "unclassified" is a zoning category that covers uses the zoning ordinance does not mention or assign to any zone. (*See* 10/2/2008 RT 312:9-10; 327:12-14, 336:4-6--witness testimony that "unclassified" covers uses the City "didn't think about" when it drafted the zoning ordinance, and that "unclassified" gives the City flexibility regarding uses that are neither specifically permitted nor prohibited.)

These facts lead us to reject the argument that the proposed project is an unclassified use and could therefore be conditionally permitted. Since we find that electrical generating facilities is not an unclassified use, we need not reach the question of whether or not it is a public or quasi public use. The public and quasi public designations depend first upon a determination that the use is unclassified. Since we find that Electrical generating facilities is not an unclassified use, it cannot be conditionally permitted as a public or quasi-public use in the Limited Industrial zone. Nonetheless, we address this argument briefly.

v) The CVEUP as a Public/Quasi-Public Use

CVEUP would not qualify as a "public and quasi-public" use even if it were an unclassified use. "Public and quasi-public" is described in section 19.47.010 as "uses in appropriate locations which are maintained by public or publicly controlled agencies such as municipal and/or county agencies, school districts, or utility companies (e.g. water, gas, electricity, etc.)… ." The evidence shows that the entity to which the City granted a license for the existing peaker was PG&E, an investor-owned public utility. The CVEUP, however, is to be owned and operated by MMC Energy, Inc., which is neither a public or publicly controlled agency nor a utility company. MMC sells electricity to utilities but is not itself a utility. The CVEUP is therefore not a "public or quasi-public" use.

22. Pg 294, last paragraph, second sentence, change to read:

Staff's testimony provides a comprehensive listing of the existing uses in the vicinity, mentioning residential, retail, school, agricultural, auto salvage, storage, warehousing and commercial/light industrial uses as well as the Otay substation. None of these uses is similar in character to a natural gas-fired power plant.

23 Page 294, last paragraph, add the following at the end:

As indicated previously, we make no findings nor reach any conclusions regarding the consistency of the existing peaker with the zoning and General Plan, either currently or at the time the City issued a SUP in 2000. The existing peaker is not within our jurisdiction as its capacity is less than 50MW.

24. Page 295, last sentence of first paragraph, change to read:

Immediately across from the ~~peaker~~ proposed site is ~~an attractively landscaped~~ a new business park that appears intended for office, retail, and wholesale use.

25. Page 295, FINDINGS OF FACT, Item 3, change to read as follows:

3. The ~~L~~local ordinances and policies applicable to the CVEUP i~~nclude~~ are the City of Chula Vista General Plan 2005 Update and the Chula Vista Municipal Code.

26. Page 295, FINDINGS OF FACT, Item 5:

Delete "either the existing plant or".

27. Page 296, FINDINGS OF FACT, Item 9, change as follows:

The City of Chula Vista included the Unclassified category in section 19.10.010 (R) of the zoning ordinance to cover those uses ~~not~~ neither specifically permitted ~~or~~ nor prohibited in ~~any zone~~ the zoning ordinance.

28. Page 296, add the following FINDINGS OF FACT after Finding 10 and renumber:

11. In June, 2001, the Chula Vista City Council passed a resolution directing City staff to communicate to the California Energy Commission the City's position in opposition to the proposed expansion of the existing peaker by RAMCO, its owner at the time.

12. On June 13, 2008, a letter on City of Chula Vista stationery was issued, signed by acting City Manager Scott Tulloch, expressing to the California Energy Commission the City's concerns over the CVEUP and specifically whether or not it would be consistent with policy E 6.4 of the General Plan.

13. On August 7, 2008, a letter on City of Chula Vista stationery was issued, signed by acting City Manager Scott Tulloch, describing certain air quality mitigation measures and stating that City concludes that compliance with those measures would address any potential inconsistencies with the General Plan.

14. The August, 7 2008, a letter described in Finding No.13, above, was not approved, ratified or voted upon through any public process or noticed action of the Chula Vista City Council.

15. The City of Chula Vista City Council has not taken or made any official determination with respect to whether or not the CVEUP would qualify for a Conditional Use Permit or is consistent with the City's General Plan or Zoning Ordinance.

29. Page 296, add the following FINDINGS OF FACT after Finding 18. and renumber:

24. The Applicant, MMC Energy, Inc. is not a public or publicly-controlled agency.

30. Page 297, add as a CONCLUSION OF LAW after Number 24 and renumber:

25. The Applicant, MMC Energy, Inc. is not a public or publicly-controlled agency. and the CVEUP therefore is not a public/quasi public use.

31. Page 297, add as a CONCLUSION OF LAW after Number 26. and renumber:

34. The production of electricity through the combustion of natural gas is similar to the types of manufacturing prohibited in the Limited Industrial zone.

POWER PLANT EFFICIENCY

32. PMPD, page 79, third full paragraph, line 2:
replace "~~40.3~~" with "40.5"

Dated: May 4, 2009 in Sacramento, California.

Original Signed By:
JAMES D. BOYD
Vice Chair and Presiding Committee Member
Chula Vista AFC Committee

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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Application for Certification
For the *CHULA VISTA ENERGY UPGRADE PROJECT*

Docket No. 07-AFC-4

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(Revised: 2/10/09)

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on May 4, 2009, I served and filed copies of the attached Errata To The Presiding Member's Proposed Decision, dated May 4, 2009. 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 emailed respectively, to the address below (***preferred method***);

OR

_____depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

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

Original Signed By:
RoseMary Avalos