STATE OF CALIFORNIA—THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION

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October 27, 2005

Mr. Joe Desmond, Chair
Ms. Jackalyne Pfannenstiel, Commissioner
Dr. Arthur Rosenfeld, Commissioner
Mr. James Boyd, Commissioner
Mr. John Geesman, Commissioner
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

RE: Comments on Petition to Amend Condition of Certification for 00-AFC-014

Dear Chair Desmond and Commissioners:

Thank you for the opportunity to comment on the above-referenced petition. The petition, delivered to you on September 30, 2005, is a request by El Segundo II, L.L.C. (ESGS, or the project owner) to change Certification Condition BIO-1 so as to delay payments needed to perform studies associated with the restoration of Santa Monica Bay. On October 17, 2005, your staff submitted their evaluation of the petition and recommendations to you regarding the request. You have scheduled a hearing on the requested change for November 3, 2005.

This letter provides our comments and recommendations regarding the project owner's request and your staff's response. In summary, our comments, which are described in more detail in Attachment 1 of this letter, are:

1. The petition does not conform to Energy Commission regulations that establish how AFC conditions may be changed.
2. The proposed change ignores key language of the condition and key findings of the AFC proceedings that establish the need to do the Santa Monica Bay study sooner rather than later. Further, the proposed change would alter the AFC findings related to Coastal Act conformity.
3. The recommendation by your staff does not properly recognize that the ongoing non-payment of the required funds means the project owner is out of compliance with Condition BIO-1.

We are also providing you with comments on a related issue – in preparing our response to the project owner's request, we have discovered a number of statements in their AFC application and testimony that are inconsistent with information ESGS provided earlier this year to the Regional Board. These inconsistencies relate to issues that were key to the AFC proceedings, and suggest that: 1) the design of the power plant's cooling water system is substantially different than was portrayed and evaluated during the AFC proceedings; 2) the reasons given for the amount of water being used are not supported by operating data; and, 3) the amount of seawater being used at ESGS is significantly higher than was stated during the AFC proceedings.

Based on ESGS's recent submittals to the Regional Board, it now appears the two cooling systems are connected rather than separate and that Intake #1, which was the focus of the AFC proceedings, can and is being used for purposes not described in those proceedings. These inconsistencies and their consequences are described in more detail in Attachment 2 of this letter.

It is clear that these inconsistencies relate directly to your upcoming deliberations on the project owner's petition. It appears that the adverse effects being caused by the cooling system are larger and more immediate than those identified during the AFC process and evaluated as part of the AFC findings, including the findings that resulted in Condition BIO-1. It is also clear that the analyses of cooling water flows done throughout the AFC proceedings were based on the project owner's erroneous description that the power plant's cooling water systems were separate, rather than interconnected. The project owner's representations regarding the cooling system design and water flow were key in establishing your AFC findings, and in fact, issues related to these characteristics of the project represented the single biggest area of controversy during the proceedings.

This combination of the project owner's inaccurate statements during the AFC process and the ongoing non-compliance with Condition BIO-1 trigger two of the four provisions of Warren-Alquist Act Section 25534(a) for revoking a certification. Section 25534(a)(1) states that the certification may be revoked based on a "material false statement set forth in the application, presented in the proceedings of the commission, or included in supplemental documentation provided by the applicant", and Section 25534(a)(2) allows revocation for a "significant failure to comply with the terms or conditions" of the Commission's approval. Additionally, we note that Section 25534(b) allows the Commission to impose a civil penalty for violation of these provisions.

In sum, we recommend not only that you deny the petition but also that you consider imposing a penalty and revoking or re-opening the AFC certification in consideration of these recently disclosed inconsistencies. Again, thank you for this opportunity to comment. We plan to attend your hearing on November 3 and will be available for any questions you might have.

Sincerely,

Tom Luster

Tom Luster
Energy and Ocean Resources Unit

Attachment 1: Comments Regarding the Project Owner's Requested Change to Condition BIO-1
Attachment 2: Comments Regarding Inconsistencies Between the Project Owner's AFC Application and Testimony and Recent Disclosures to the Regional Board

cc: El Segundo II, L.L.C. – John McKinsey
Los Angeles Regional Water Quality Control Board – David Hung, Tony Rizk
Energy Commission Service List for 00-AFC-014

ATTACHMENT 1

COMMENTS REGARDING THE PROJECT OWNER'S REQUESTED CHANGE TO CONDITION BIO-1 (00-AFC-014)

1. THE PETITION DOES NOT CONFORM TO ENERGY COMMISSION REGULATIONS THAT ESTABLISH HOW AFC CONDITIONS MAY BE CHANGED.

We concur with your staff's October 17, 2005 analysis showing that the petition does not conform to the Energy Commission regulation that establishes when petitions may be considered. A modification such as the one requested in the petition may be approved only when "there has been a substantial change in circumstances since the Commission certification justifying the change or that the change is based on information which was not available to the parties prior to Commission certification" (Cal. Code Regs., tit. 20 § 1769(a)(3)(D)). As noted in your staff's analysis, the petition identifies no change in circumstances related to the requested modification. The petition is essentially a restatement of the request made by the applicant at your December 23, 2004 Special Business Meeting during your deliberations on the proposed project. We therefore concur with the recommendation by your staff that the petition is invalid and should be denied.

2. THE PROPOSED CHANGE TO CONDITION BIO-1 IGNORES KEY LANGUAGE IN THE CONDITION AND KEY FINDINGS OF YOUR AFC PROCEEDINGS THAT ESTABLISHES THE NEED FOR THE SANTA MONICA BAY STUDY TO BE DONE SOONER, RATHER THAN LATER, DURING THE POWER PLANT'S PRE-CONSTRUCTION AND CONSTRUCTION TIMELINE.

The existing condition requires that within thirty days of a final decision on the AFC, the project owner start paying into a fund that is to be used for studies of Santa Monica Bay.[1] Additional payments are to be made every ninety days for a year and subsequent payments are to be based on a schedule approved by the Compliance Project Manager. The condition also states that any money left unspent at the beginning of the project's commercial operation may be returned to the project owner.

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[1] **Condition BIO-1:** "The project owner shall place $5,000,000 in trust for the Santa Monica Bay Restoration Commission (SMBRC) to assess the ecological condition of the Santa Monica Bay and to develop and implement actions to improve the ecological health of the Bay. At least $250,000 shall be provided within 30 days after this Decision becomes final, and an additional sum of at least $250,000 shall be provided every 90 days thereafter until $1 million has been provided. At that time, the SMBRC in consultation with the project owner, shall propose a schedule for the payment of the remaining funds; within 30 days after submittal of the proposed schedule to the CPM, the CPM shall approve a schedule, which may be the SMBRC's schedule or a modification thereof. The project owner shall comply with the approved schedule. The funds shall be spent as directed by the SMBRC, after consultation with the CPM and the Los Angeles Regional Water Quality Control Board, for the purposes of assessing the ecological condition of the Santa Monica Bay and developing and implementing actions to improve the ecological health of the Bay. To the maximum extent feasible in keeping with those purposes, the studies conducted shall be designed to assist the LARWQCB in carrying out its responsibilities under section 316(b) of the Clean Water Act, for this project and other activities affecting Santa Monica Bay. If any funds remain unspent upon beginning of commercial operation, the project owner may petition the Energy Commission for return of those unspent funds to the project owner." [emphasis added]

The project owner's petition requests that the condition be changed so that the initial payment would not be due until ninety days before the start of construction. Obviously, such a change would be inconsistent with the part of the condition that would allow unspent money to be returned to the project owner at the beginning of commercial operation. If the project owner's request were to be approved, it could result in a single payment of $250,000 rather than the anticipated $5 million. It is clear from the language of the condition and from the record of the proceedings that a significant amount of the funds required through Condition BIO-1 are meant to be used before the power plant starts commercial operations.[2] The change requested by the project owner would not only delay the first payment due date, but would likely delay the beginning of the study, and could also result in far less than the anticipated $5 million to complete the study.

Further, and importantly, the findings in the Commission Decision document describe this AFC condition as intended in part to provide conformity to requirements of the Coastal Act.[3] If you decide to accept the petition and modify the condition, we request that you also re-open the proceedings to determine how this change would affect conformity to the Coastal Act. A delay in the payments and the subsequent study would represent a temporal loss of the study's intended benefits and would therefore result in something less than what was anticipated in the AFC decision as full conformity to the Coastal Act.

3. THE RECOMMENDATION BY YOUR STAFF DOES NOT PROPERLY RECOGNIZE THAT THE PROJECT OWNER IS CURRENTLY OUT OF COMPLIANCE WITH CONDITION BIO-1.

Your staff has recommended that you not accept the petition and that you require the project owner to provide the first payment within thirty days of your decision regarding the petition. While we concur with your staff's recommendation to reject the petition, we do not concur with the recommendation that the required payment be further delayed. We note that the project owner is currently out of compliance with the permit condition and has been since the payment due date of September 30. We note as well that the project owner had an opportunity to appeal the condition when it was first issued earlier this year, but did not take advantage of that opportunity.

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[2] See, for example, at page 57 of the February 2005 AFC Decision document: "...while we hope that the studies can be done as soon as possible, we do not want to risk the quality of the comprehensive studies for the sake of immediacy. We trust that the SMBRC will proceed with appropriate speed. To assist in this regard, we direct that the Applicant provide $1 million within 6 months after certification of the project. During that 6-month period the SMBRC should develop a study plan and schedule, including a payment schedule."

[3] See, for example, at page 43 of the February 2005 Commission's Decision Document: " Further, the project meets the objectives of the California Coastal Act to maintain, enhance, and where feasible restore the marine environment. The project will maintain the existing environmental setting, and will help to restore and enhance the Santa Monica Bay by payment to the Santa Monica Bay Restoration Commission of up to $5 million for studies assessing the ecological condition of the Santa Monica Bay and recommending actions needed to improve the ecological health of the Bay." [emphasis added.] This is further described on pages 55-59 of the document.

ATTACHMENT 2

COMMENTS REGARDING INCONSISTENCIES BETWEEN THE PROJECT OWNER'S AFC APPLICATION AND TESTIMONY AND RECENT DISCLOSURES TO THE REGIONAL BOARD (00-AFC-014)

During the past year, the project owner submitted various documents to the Regional Board as part of the NPDES permitting process (these are available at a web site established by the Regional Board at http://www.waterboards.ca.gov/losangeles/html/permits/316b_Issues.html). For several key aspects of the proposed project, the project owner's descriptions in those submittals differ significantly from those provided during the AFC proceedings. The three main inconsistencies, which are described in more detail below, include:

1. The design of the power plant's cooling systems is different than described in the AFC proceedings. It appears that the two systems are interconnected rather than separate.
2. The reasons given for the amount of water being used at Intake #1 for two non-functioning generators do not appear to be based on actual requirements or on available data.
3. The amount of water being used at Intake #1 (and therefore the associated effects on marine biology) is substantially higher than was described during the AFC process.

Each discussion below includes a brief description of how the project was portrayed in the AFC proceedings, how the power plant is portrayed differently in the Regional Board submittals, and some consequences of those differences.

Each of these issues – intake design, water use, and water volumes – created considerable controversy during the AFC proceedings. The overarching consequence of these inconsistencies is that the design, operation, and adverse impacts of both the existing and the proposed project are likely substantially different from those evaluated during the AFC process. As a result, the AFC findings likely do not accurately describe how ESGS affects the coastal environment and the AFC conditions may be inadequate to provide the necessary environmental protections. We do not know to what degree the Commission's decisions and findings would be different had these aspects of the project been more accurately represented, but it is clearly worth the Commission's reconsideration of its decision to find out.

1. REGARDING THE DIFFERENT DESCRIPTIONS OF THE FACILITY DESIGN:

- **Project owner's testimony and submittals during AFC proceedings:** The AFC application described ESGS as having two separate cooling water systems, and stated that water for the proposed project would be taken from Intake #1, which served Units 1 and 2 (Intake #2 was described as serving Units 3 and 4). Throughout the AFC process, the analyses and recommendations by the Energy Commission staff, the intervenors, and the involved agencies were based on ESGS having two separate cooling systems, and this also served as the basis for the AFC findings. We are not aware of anywhere in the AFC record describing an interconnection between the two systems that allowed water from Intake #1 to be used to cool Units 3 and 4. In fact, the project owner's NPDES permit application, which was posted to the AFC website in October 2004, describes the two systems as separate.

- **Project owner's submittals to Regional Board:** In letters of November 2004 and February 2005, the Regional Board requested information from ESGS about its ongoing cooling water use. A May 2005 letter from the project owner to the Regional Board describes a "cross over" between the two cooling systems at the power plant, in which water from Intake #1 can be used to "backup and supplement" the other cooling system.[4] It further states that this "crossover" is a critical component of the power plant. This "crossover" was not disclosed during the AFC proceedings, and appears to not have been disclosed in previous NPDES permit-related applications and submittals.

- **Consequences:** Analyses done for the AFC review were based on ESGS having two separate and independent cooling systems. This characteristic of the power plant served as the basis for many of the AFC evaluations – for example, it was key in determining the appropriate amounts of cooling water flow to use as a baseline, how much flow to assign to one or the other of the two intakes, whether monthly or seasonal caps were needed, etc. To find out now that the cooling system design is entirely different from how it was portrayed during the AFC proceedings brings into question many of the AFC analyses and findings.

2. **REGARDING THE REASONS GIVEN BY THE PROJECT OWNER FOR NEEDING A MINIMUM 50 MGD (MILLION GALLONS PER DAY) FLOW THROUGH INTAKE #1:**

- **Project owner's testimony during AFC proceedings:** In January 2003, the air permits lapsed for the two ESGS generating units dependent on cooling water from Intake #1. Although Intake #1 was to then serve two non-operating generating units, the project owner stated in February 2003 that a flow of 50 mgd was needed to prevent fouling and to maintain the NPDES permit (as cited on page 49-50 of the AFC Decision document).

- **Project owner's submittals to the Regional Board:** As shown below, the flow data provided by the project owner to the Regional Board shows relatively long periods of time with average daily flows each month through Intake #1 of far less than 50 mgd.

Flows through Intake #1 (in millions of gallons per day)

	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec
1996	51.8	51.8	51.8	51.8	***26.7***	77.7	75.2	101.9	51.8	51.8	51.8	51.8
1997	51.8	51.8	51.8	62.1	83.8	89.7	124.5	118.1	127.6	53.5	53.3	60.2
1998	***47.0***	***13.8***	***0.0***	***0.0***	***10.0***	102.2	147.4	116.9	148.1	98.9	***46.4***	***2.4***
1999	***2.1***	***3.2***	***12.7***	79.6	***41.5***	207.4	201.5	152.0	136.4	165.4	*28.5*	***1.2***
2000	51.8	51.8	51.8	52.2	207.4	***37.4***	207.4	207.4	207.4	133.9	207.4	207.4
2001	203.4	190.2	202.9	195.1	75.3	61.0	***43.4***	***35.9***	71.1	85.4	60.8	54.9
2002	***37.9***	***5.7***	***34.7***	***6.0***	***48.6***	54.7	104.5	64.3	79.5	***20.9***	***28.2***	***26.6***

[4] The project owner's May 12, 2005 letter to the Regional Board (at page 2) states that "...the bearing cooling water heat exchangers on Units 3 & 4 draw additional cooling water from the Units 1 & 2 cooling water system during peak operational periods when the heat transfer is poor across the Units 3 & 4 bearing cooling water heat exchangers that may be caused by marine fouling. The cooling water utilized during these peak periods is drawn through the cross over between Units 1 & 2 and Units 3 & 4. This cross over is considered a backup and supplement to the Units 3 & 4 cooling water system and therefore a critical component to the operation of Units 3 & 4."

Not only do these data show that average daily flows were less than 50 mgd for 24 of the 84 months of record (shown in the table with ***bold italics***), they also show significant periods during which average flows were far lower – for example, the data show a three-month period in 1998 where average flows were zero, and another three-month period in late 1998 and early 1999 where average daily flows were less than 2.6 mgd.

The Regional Board has also posted data at the website cited above showing flows for each day during much of this reporting period. These data show, for example, periods of over two months in 1998 where each day's flows were zero, and another period in November and December of 1999 where flows for 49 of 50 straight days were only 0.7 mgd. The project owner's purported need for 50 mgd stated in the AFC proceedings is about seventy times the 0.7 mgd commonly used during the period shortly before submittal of the AFC application.

- **Consequences:** The 50 mgd figure stated by the project owner in AFC testimony as necessary to prevent fouling and to maintain the NPDES permit is not supported by the available data. This amount is far higher than the amounts apparently deemed necessary during long periods of time in previous years. Although some of these low flow periods were during operation of the facility by the previous owner, neither the cooling system nor the NPDES permit requirements have changed in a way that would require an increase of this magnitude for maintaining either. These data appear to contradict the project owner's AFC testimony regarding the ongoing need and use of 50 mgd for non-functioning generators.

3. **REGARDING THE FLOW AMOUNTS THROUGH INTAKE #1:**

- **Project owner's testimony during AFC proceedings:** As noted above, the air permits for the two ESGS generating units using Intake #1 lapsed in January 2003. As stated on page 49 of the AFC Decision document, the project owner testified in February 2003 that despite this lapse in the air permits, ESGS "continues to operate the cooling system at Intake #1 at approximately 50 million gallons per day".

- **Project owner's submittals to the Regional Board:** Between January/February 2003 (when the air permits lapsed and the project owner provided the above testimony) and December 2004 (near the end of the AFC proceedings), the project owner's report to the Regional Board shows the following flows through Intake #1:

Flows Through Intake #1 (in millions of gallons per day)

	Jan	**Feb**	**Mar**	**Apr**	**May**	**June**	**July**	**Aug**	**Sept**	**Oct**	**Nov**	**Dec**	***Avg.***
2003	28.7	26.9	51.8	51.8	51.8	54.7	52.5	***90.7***	***85.9***	51.8	***87.2***	***103.7***	**61.5**
2004	***103.7***	***103.7***	***103.7***	***103.7***	***93.4***	52.6	***84.0***	***79.9***	***68.6***	49.6	57.0	47.9	***79.0***
Avg.	**66.2**	**65.3**	**77.75**	**77.75**	**72.6**	53.65	**68.25**	**85.3**	**77.25**	50.7	**72.1**	**75.8**	**70.25**

During those 24 months, the flows through Intake #1 were often higher than 50 mgd, and during some months, much higher. Average daily flows were substantially higher (by at least 20%) during 12 of those 24 months (as shown in ***bold italics***), and were more than 100% higher during five of those months. The average daily flows for both years were more than

20% above the stated 50 mgd. Coincidentally, the highest flows during that time were during months that the Energy Commission had imposed a flow cap on future operations to protect marine organisms (February, March, April).

- **Consequences:** Not only does the project owner's testimony not match the actual operating characteristics of the intake, the adverse effects caused by the ongoing cooling water flows are both substantially higher and more immediate than were considered during the AFC proceedings. We note, too, that the project owner's October 2004 submittal of NPDES permit information to the AFC proceedings did not include these flow data, and we are not aware of these data being available elsewhere in the records of the AFC proceedings.

SUMMARY

The three sets of discrepancies described above – in the cooling system design, the reasons given for use of the seawater, and the volume of water used – bring into question key aspects of the AFC proceedings. In essence, it appears that the power plant does not operate as stated, that it is using more seawater than necessary, and that it is causing unnecessary adverse effects at a level higher than was considered during the AFC review.

At the very least, the Commission should investigate these discrepancies to determine how they affected the final AFC findings and conditions, and to consider whether the proceedings should be re-opened in light of this new information.