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Oscar Biondi
State Water Resources Control Board
Division of Water Rights
1001 "I" Street
P.O. Box 2000
Sacramento, CA 95812-2000
obiondi@waterboards.ca.gov

Re: Eagle Mountain Pumped Storage Water Project, EIR (SCH #2009011010) and Section 401 Certification (FERC Project No. 13123)

Dear Mr. Biondi,

Thank you for taking the time to speak with me this past Friday about the remaining steps in the State Water Resource Control Board's consideration of the Eagle Mountain Pumped Storage Water Project proposed to be located near Joshua Tree National Park. My office has been retained by Laborers International Union of North America, Local Union 1184 ("LIUNA"), to review the Project's EIR and certification document. Pursuant to Public Resources Code Sections 21092.2, and 21167(f), Government Code Section 65092, 23 Cal. Code of Regulations ("CCR") § 3721(c) and 23 CCR § 647.2, or any other applicable notice provision, please include my office on any notifications relating to the Eagle Mountain Pumped Storage Water Project.

As we began our review, at least two substantial issues were apparent that we wanted to bring to your attention as soon as possible. First, you indicated to me during our telephone conversation that the final approval of the Section 401 certification and the certification of the FEIR would be completed by the State Board's Executive Director and that neither action was going to be agendized and approved by the State Board at a duly noticed Board meeting. Our review of the Water Code does not disclose any authority granted to the State Board to delegate any of its decisionmaking powers to its staff, including its Executive Director. Hence, any issuance of a 401 certification or certification of the FEIR must be done by the State Board, not the Executive Director. Two, the EIR's analysis of the project's greenhouse gas ("GHG") emissions applies an illegal baseline rejected by the Supreme Court in *Communities for a Better Environment v. So Coast Air Qual. Mgmnt. Dist*. (2010) 48 Cal.4th 310. For these reasons, LIUNA requests that the State Board revise the EIR's GHG analysis and air and water quality analyses and recirculate the EIR for public review and comment. LIUNA also requests that the State Board change the anticipated process to present the EIR and Section 401 certification for approval by a quorum of the State Board at a duly noticed public hearing.

1. The State Board Has No Authority to Delegate a Section 401 Certification or A Certification of a FEIR to its Staff.

The State Board has no authority to delegate to the Executive Director or other staff the Board's duties to issue water quality certifications pursuant to Water Code § 13160 or certify EIRs pursuant to 14 CCR § 15090. The Water Code expressly provides that "[t]he board shall have any powers, and may employ any legal counsel and other personnel and assistance, that may be necessary or convenient for the exercise of its duties authorized by law." Under the Water Code, "'Board,' unless otherwise specified, means the State Water Resources Control Board." Water Code § 25. In the context of a water appropriation permit, the Court of Appeal has ruled that, pursuant to Section 186's grant of authority, "[a]lthough the Board may employ personnel to assist it (§ 186), it may not delegate the authority to determine the merits of an application for a permit to appropriate water, except as provided by statute." *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal. App. 4th 245, 261-262. The Court of Appeal noted that, in the water appropriations context, the Water Code specifically provided for only one category of decisions that the State Board was expressly authorized to delegate a specific determination to the Board's staff, in that case the Division of Water Rights. *Id*.

Section 186 is the source of the State Board's authority over water quality as well. There is no logical reason why the same rule does not apply to the State Board's authority to delegate decisions relating to the Board's water quality powers. Indeed, the Water Code is more explicit about the sole role of the State Board in rendering water quality decisions. The State Board, not its Executive Director or other staff, is expressly authorized to approve a Section 401 certification:

> The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act and any other federal act, heretofore or hereafter enacted, and is (a) authorized to give any certificate or statement required by any federal agency pursuant to any such federal act that there is reasonable assurance that an activity of any person subject to the jurisdiction of the state board will not reduce water quality below applicable standards, and (b) authorized to exercise any powers delegated to the state by the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and acts amendatory thereto.

Water Code § 13160. Only the State Board "succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in [various precursor agencies under the Water Code], or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised." Water Code § 179. The State Board consists solely of five members appointed by the Governor. The Board does not include any de facto additional members selected by the Board itself, even long-standing members of the Board's staff. Water Code § 175(a) ("There is in the California Environmental Protection Agency the State Water Resources Control Board consisting of five members appointed by the Governor"). The State Board may only act with a quorum of at least three of the appointed Board members. Water Code § 181. And "[a]ny hearing or investigation by the board may be conducted by ***any member upon authorization of the board***, and he shall have the powers granted to the board by this section, but any final action of the board shall be taken by a majority of all the members of the board, at a meeting duly called and held." Water Code § 183 (emphasis added). Given these explicit directions in the Water Code, there can

be no implied authority by the State Board to delegate water quality decisions with which it has been entrusted.

As was the case in *Central Delta Water Agency*, the Water Code expressly identifies those few occasions where decisions may be delegated to the Executive Director. Thus, the Water Code expressly provides that the Board's Executive Director may issue a complaint to initiate a proceeding to assess an administrative civil penalty. Water Code § 1055; § 13323(c). But only the State Board may assess such a penalty. Water Code § 1055(c); § 13323(c). The only other provisions allow the Board or "representatives authorized by the Board" to "call, conduct or attend conferences or hearings, official or unofficial, within or without this state…" and to attend meetings with the United States or its agencies. Water Code §§ 179.6, 179.7. Likewise, Section 13223 expressly provides for delegation of authority by the regional water quality control boards and their unsalaried board members to each of their executive officers with a number of broad exceptions but no similar authority is provided for the State Board and its salaried members. Water Code § 13223. By specifying only certain activities that the Board's Executive Director may conduct, and expressly identifying only the State Board as the entity authorized to render water quality decisions in the State above the Regional Board levels, the Water Code excludes any implication that the State Board's staff may be elevated to positions on the State Board by assigning them decisions earmarked for the State Board.

The delegation of authority to a deputy or authorized person provided at Section 7 of the Water Code does not apply to the State Board. Section 7 states that "[w]henever a power is granted to, or a duty is imposed upon, ***a public officer***, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, ***pursuant to law***, by the officer, unless this code expressly provides otherwise." Water Code § 7 (emphasis). This provision applies "[u]nless the provision or the context otherwise requires…." Water Code § 5. The Board and its five members cannot reasonably be construed as a "public officer." If anything, each Board member is a public officer. However, no Board member can act unilaterally, a quorum of three Board members being necessary to conduct business. Water Code § 181. Nor can Section 7 be itself deemed the authority to delegate that meets Section 7's condition that any delegation be "pursuant to law." Such a circular reading of the section would in effect delete the condition that any delegation be pursuant to law. Nor is there a deputy to the State Board provided by the Water Code. Thus, any duties delegated to the Board by the Legislature are not duties of "a public officer" but of a board. Moreover, as explained above, pursuant to the Water Code, there is no authorization for the Board to delegate its decision-making functions and the context, as clarified by the Court of Appeal precludes reading any implicit authority for the State Board to delegate decisions to its staff. *Central Delta Water Agency*, 124 Cal. App. 4th at 261-262.

To the extent State Board Resolution No. 2012-0061 purports to delegate Section 401 certification or CEQA approvals to the Executive Director, given the absence of authority for such a delegation, that resolution as applied to the Eagle Mountain Project is void. *See Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050, 1062. Likewise, to the extent 23 CCR § 3859 suggests that the Executive Director may serve as the State Board's designee for Section 401 certifications, that regulation also is void as applied to the Eagle Mountain Project. 23 CCR § 3859.

CEQA itself emphasizes that an elected or appointed Board cannot delegate its CEQA responsibilities to its staff. Similar to Water Code § 186, the staff functions identified by CEQA are limited to assisting the Board in ***administering*** CEQA:

> (a) A public agency may assign specific functions to its staff to assist in administering CEQA. Functions which may be delegated include but are not limited to:
> (1) Determining whether a project is exempt.
> (2) Conducting an initial study and deciding whether to prepare a draft EIR or negative declaration.
> (3) Preparing a negative declaration or EIR.
> (4) Determining that a negative declaration has been completed within a period of 180 days.
> (5) Preparing responses to comments on environmental documents.
> (6) Filing of notices.
> (b) ***The decisionmaking body of a public agency shall not delegate the following functions***:
> (1) ***Reviewing and considering a final EIR or approving a negative declaration prior to approving a project.***
> (2) The making of findings as required by Sections 15091 and 15093.

14 CCR § 15025 ("Delegation of Responsibilities") (emphasis added). *See also* 14 CCR 15090(a)(2) (decisionmaking body must review and consider the information contained in the final EIR prior to approving the project). Because only the State Board is the decisionmaking body pursuant to the Water Code, the Board may not delegate certification of the Eagle Mountain Project EIR to the Executive Director. Final certification of the EIR and the Section 401 Certification should be scheduled for consideration by the State Board at a duly noticed public meeting.

2. The EIR's Baseline for GHGs Is Unlawful.

The EIR applies an incorrect baseline to its GHG analysis. In order to generate 1300 MW of power, the Project will need to use 1600 MW of power to pump water from the lower to the upper reservoir during off-peak hours and on weekends. EIR, NPS-1. According to the DEIR and the response to comments, the vast majority of the power purchased at night from the grid to operate the Project's pumps will be generated by natural gas-fired combined-cycle power plants. FEIR, p. 3.15-14. The energy stored in the project would then be used, in large part, as a very large peaker plant that "displaces" power currently produced in large part by simple cycle natural gas generating plants (also known as "peaker plants"). FEIR, p. 3.15-10. During peak hours, the Eagle Mountain Facility would not emit directly or indirectly any GHGs, whereas simple cycle natural gas peaker plants of an equivalent size would emit about 1,115,000 metric tons/year of CO_2e during those peak hours. FEIR, p. 3.15-10-3.15-11. The Project would still generate as much as 1,066,156 tons of CO_2 per year by using combined-cycle gas-fired plant to pump water to the upper reservoir during off-peak hours. However, because simple cycle natural gas peaker plants emit more GHGs and more CO_2 then the combined-cycle gas-fired plants that the Project would rely upon at off-peak hours to pump water pack up to the upper reservoir, the project claims an overall net reduction of about 50,000 metric tons of CO_2 assuming all of the pump-back power is from combined cycle gas plants. FEIR, p. 3.15-15. As a result, the FEIR concludes that the

Project's emission of 1,066,156 tons per year of CO_2 during evenings and other off-peak hours has no GHG implications because of the peak hour "displacement" that will occur.

LIUNA is concerned with this analysis because it does not clearly disclose whether the simple cycle peaker plants that it anticipates will be "displaced" by the project currently exist. It would appear from various statements found in the DEIR that the displaced peaker plants do not yet exist and, if the Project comes on line, will not exist in the future. Thus, the DEIR states that "the proposed Project would eliminate the need for the regional transmission operator (California ISO) to dispatch up to 1,300 MW of fossil-fueled peaking plants … during peak periods…." FEIR, p. 3.13-14. Citing the Project's compatibility with the goals of AB 2514, the DEIR states that "[t]he proposed Project would provide the energy storage benefits described in AB 2514, Including: … ***avoiding or deferring the need*** for ***new*** fossil fuel-powered peaking power plants and expansion of the transmission grid…." DEIR, p. 2-3 (emphasis added). The FEIS prepared by the Federal Energy Regulatory Commission for the Project clearly suggests that the peaker plants that will be displaced have yet to come on line:

> However, the variable output of wind and solar facilities can create an imbalance in the stability of the electric grid if sufficient facilities are not available to balance the system. The two primary alternatives ***being considered*** in the region to address these imbalances are pumped storage facilities and gas-fired combustion turbines.

FEIS, p. 4 (emphasis added). Likewise, the FEIS describes one of the benefits of the Project as offsetting peak-period pollution generated by future peaker plants:

> In addition to pumped storage facilities, California is seeing an increase in the number of applications to construct "peakers," which are typically natural gas-fired units that are not installed to act as base load units but to function solely as standby units until circumstances arise when their capacity and output is immediately needed to provide power during peak periods or to provide ancillary services. Obviously, natural gas-fired units have their own environmental effects and produce greater greenhouse gas emissions than those associated with a pumped storage facility, such as the Eagle Mountain Project.

FEIS, p. A-18. The Project applicant also indicates that the "displaced" peaker plants would otherwise be built in the future. *See* http://www.eaglemountainenergy.net/index2.html ("Eagle Mountain Pumped Storage will reduce the need for less efficient, fossil-fueled alternatives"); *id.* ("Statewide peak demand is expected to grow by 890 MW per year for the next 10 years and beyond, according to the California Energy Commission"). If the "displaced" peaker plants do not currently exist, then the Project is not displacing any emissions from the current GHG baseline. It is only adding 1,066,156 tons per year of CO2 – a level of GHG emissions well above the State Board's preferred threshold of significance of 25,000 tons per year or any of the lower signficance thresholds proposed by several air districts around the State.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Communities for a Better Environment v. So Coast Air Qual. Mgmnt. Dist.* (2010) 48 Cal.4th 310, 321. Section 15125(a) of the CEQA Guidelines (14 C.C.R., § 15125(a)) states in pertinent part that a lead agency's environmental review under CEQA:

> must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant."

See Save Our Peninsula Committee v. County of Monterey (2001) 87 Cal.App.4th 99, 124-125 ("*Save Our Peninsula*.") As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. *Save Our Peninsula*,87 Cal.App.4th 99, 121-123. As the court has explained, using such a skewed baseline "mislead(s) the public" and "draws a red herring across the path of public input." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711. As the Supreme Court has ruled:

> An approach using hypothetical allowable conditions as the baseline results in "illusory" comparisons that "can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts," a result at direct odds with CEQA's intent.

CBE v. SCAQMD, 48 Cal.4th at 322. Thus, because the peaker plants that the FEIR states will be displaced by the Project do not yet exist, those plants cannot be part of the environmental baseline for the EIR's GHG or air quality analysis. The analysis of the Project's 1,066,156 tons per year of CO_2 and GHG emissions cannot be based on a recalculated net emissions subtracting out future peaker plants' emissions. Indeed, if the Project is constructed and operated, those displaced peaker plants will presumably never be built.

On the other hand, if the EIR has failed to adequately describe this aspect of the Project and the "displaced" peaker plants already exist, then the EIR's inadequate description and analysis must be cured so the public fully understands the significant impacts of the Project. For example, if that is the case, then the EIR would have to describe how many such plants would be decommissioned and contain some level of discussion of the environmental impacts that would ensue from "displacing," *i.e.* decommissioning many no longer needed peaker plants. No information about where such plants currently are located or their likely fate if rendered obsolete by the Project is provided by the EIR.

Further compounding the confusion, the EIR assumes that 100% of the energy "displaced" during the daytime would be from peaker plants. EIR, p. 3.15-14. Given this extreme assumption, the EIR concludes that the Project would have a slight net positive GHG impact, despite the fact that the Eagle Mountain project will use 605 GWh/year more electricity than directly producing the same amount of energy. In fact, these assumptions are likely erroneous. It is likely that during the daytime, much of the "displaced" energy would otherwise be produced by a mixture of combined cycle plants, peaker plants, and renewable facilities (solar, wind, hydro) that produce no GHGs. Altering this mix from the worst-case scenario assumed in the EIR to a realistic scenario would likely result in a net negative GHG impact from the Eagle Mountain project. A revised EIR is required to accurately assess the Project's GHG impacts.

The confusion found in this critical component of the DEIR, at a minimum, has obscured a critical part of the State Board's impact analysis and stunted the public's ability to understand the potential impacts of the Project. Because of this fundamental shortcoming in the FEIR, the State Board must clarify this critical component in order to assure that the EIR's GHG and air quality baselines and resulting analyses are accurate and to assure that the public has an opportunity to understand and comment upon the true GHG and air quality impacts of the Project.

In conclusion, LIUNA hereby incorporates by reference the comments already submitted to the State Board by the National Parks Conservation Association, Kaiser Ventures, LLC, The County Sanitation Districts of Los Angeles County, the National Park Service, and The Sierra Club. Consistent with the above comments, LIUNA requests that, rather than a non-public approval by the Executive Director, the State Board consider the final certification of the EIR and the approval of the Section 401 certification at a duly noticed public hearing. LIUNA also requests that the State Board substantially revise the EIR's GHG and air quality analyses to identify a legally sufficient baseline for its analyses of those potential impacts and recirculate a revised EIR for public review and comment.

We apologize for not being able to provide these comments earlier during the initial comment period, but LIUNA was only recently apprised of the Project and the status of the Board's environmental review. LIUNA anticipates filing additional comments on the Project by the recently announced comment deadline on the draft final Section 401 certification. Please do not hesitate to call to discuss any of the above comments.

Sincerely,

Michael R. Lozeau
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