



April 25, 2013

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STATE WATER RESOURCES  
CONTROL BOARD

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DIV OF WATER RIGHTS  
SACRAMENTO

Mr. Oscar Biondi  
State Water Resources Control Board  
Division of Water Rights  
P.O. Box 2000  
Sacramento, CA 98512-2000

Re: Draft Final Water Quality Certification for Eagle Mountain Pumped Storage Project

Dear Mr. Biondi:

This letter is submitted on behalf of Eagle Crest Energy Company, applicant for the Eagle Mountain Pumped Storage project water quality certification.

The applicant is in receipt of various comment letters submitted on the proposed revised water quality certification and posted online at the Board's website. To the extent these letters purport to address the sufficiency of the EIR, these letters are (1) untimely as they are submitted outside the designated comment period, and (2) factually and legally inaccurate.

1. **Comments with respect to the sufficiency of the EIR are untimely.** CEQA is quite clear. Comments on the EIR submitted outside of the formal comment period need not be responded to by the lead agency. Thus the State Board is not obligated to provide responses to comments submitted after October 7, 2010. CEQA Guidelines section 15207 ("Although the lead agency need not respond to late comments, the lead agency may choose to respond to them.") As is discussed below and as discussed more fully in the corresponding letters offered by the applicant, the State Board need not rest on the untimeliness of these letters alone, as the letters are also inaccurate as to both the facts and law as it applies to this requested certification.
2. **Factual Inaccuracies or Misstatements.** The comment letters contain numerous misstatement or inaccurate recitation of the evidence in the administrative record. The more serious inaccuracies and misstatements are addressed in the concurrent letters submitted by the Eagle Crest Energy Company.
3. **Misstatement or Misapplication of the Law as Applied to this Application.**
  - a. **Access.** A common theme of a number of the comment letters is the criticism of the EIR based on the fact that the applicant did not have access to the site. This

position effectively translates into the proposition that no EIR can be prepared if the lead agency or applicant lack site access as necessary to conduct current site studies.<sup>1</sup> This position is flawed for two reasons. First, CEQA does not compel current detailed studies in every instance. Case law recognizes that there may be circumstances in which detailed studies (and related mitigation measures) are not available at the time of EIR certification (*Sacramento Old City Association v. City of Sacramento* 229 Cal.App.3d 1011, 1028). Second, this state water quality certification is part of the overall FERC licensing of the proposed pumped storage facility. Federal law expressly permits an applicant for a FERC license to file on property not under the applicant's control. A rigid requirement for site access under state CEQA procedures would conflict with the Federal regulatory scheme for licensing major power facilities.

- b. There is no need for a Supplemental EIR. The Lozeau Drury letter, on behalf of the Local Union 184 and various individuals, at page 5 argues for a Supplemental EIR. However, the various provisions applicable to supplemental EIRs only applies once the EIR has been certified which of course has not occurred. (See *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112 (*Laurel Heights II*)). This argument has no bearing on this EIR or the pending application.
- c. The Lozeau Drury letter (starting page 6) suggests that the EIR relied upon the wrong baseline for evaluating impacts. This is an evidentiary issue. As reflected in the response by Eagle Crest Energy Company, this comment misstates the baseline analysis contained in the EIR and supporting studies. This EIR conservatively evaluated GHG generation by the project along with the offset reductions resulting from avoidance of the use of likely energy sources, which is well documented to be single-cycle peaker plants. Substantial evidence supports the methodology employed in the EIR. That is all that is required.
- d. The Lozeau Drury criticism of the information regarding the design ponds is legally misplaced. As their letter illustrates, any opponent can conjure up a list of unanswered questions regarding project design features. For obvious reasons, engineering design of this facility today would be premature. As the courts have acknowledged, only a general discussion of the project's characteristics is required. CEQA Guidelines 15124; *MSBEC v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 204. The EIR satisfies this test. As further noted in the Eagle Crest letter, this design information is required to be kept confidential in accordance with federal law.

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<sup>1</sup> As reflected in the EIR, there are significant site specific studies that were made available as part of an earlier proposed pump storage project at this location, along with the CEQA analysis conducted as part of the landfill project. The EIR was based upon all readily available information.

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As a final comment, the administrative record contains extensive studies in support of the various conclusions set forth in the EIR. As the Board staff is well aware, the legal standard relevant to judicial review of the factual points raised in these late comment letters is the deferential *substantial evidence* standard. The fact that commenters disagree with conclusions, provide alternative conclusions or suggest different study methodology, does not mean that the EIR is deficient. Rather, any judicial inquiry focuses on the evidence which supports the agency's decisions. Ample, competent evidence supports the EIR conclusions.

Thank you for considering this letter.

Sincerely,

A handwritten signature in blue ink, appearing to read "William W. Abbott", with a long horizontal flourish extending to the right.

William W. Abbott

WWA/sb

cc: Eagle Crest Energy Company