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January 15, 2014

Via U.S. and Electronic Mail

Kristin V. Pollot
City of Pittsburg
Planning Department
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RE: Recirculated Environmental Impact Report for the WesPac Pittsburg Energy Infrastructure Project (SCH # 2011072053)

Dear Ms. Pollot:

Attorney General Kamala D. Harris submits the following comments on the Recirculated Draft Environmental Impact Report (RDEIR) for the WesPac Pittsburg Energy Infrastructure Project (Project).¹ WesPac's proposed \$200 million, 134-acre Project will transform a long-inactive facility into a significant center for the storage, transfer, and transportation of crude oil by rail, pipeline, ship and barge and will bring new sources of crude to the Bay Area for refining. The Project's capacity is massive, with a maximum annual throughput of almost one-fifth of all oil currently processed each year in California.

As set forth below, our review of the RDEIR has revealed some significant legal problems under the California Environmental Quality Act (CEQA). As a threshold matter, the document fails to disclose the sources and analyze the environmental impacts of the new crude. There are a wide range of crudes with different chemical compositions currently available in commerce, and an increasing number of unconventional crudes, such as crudes produced from bitumen sands (so-called "oil sands" or "tar sands"). Different types of crude can have very

¹ The Attorney General submits these comments pursuant to her independent power and duty to protect the environment and natural resources of the State. (See Cal. Const., art. V, § 13; Gov. Code, §§ 12511, 12600-12612; *D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) This letter is not intended, and should not be construed, as an exhaustive discussion of the RDEIR's compliance with the California Environmental Quality Act.

different types of impacts on such things as local air quality, greenhouse gas emissions, and the risks associated with accidental releases.

This fundamental defect affects the adequacy of the entire document. Because of this and other errors, the RDEIR fails to:

- Adequately disclose and analyze local air quality impacts to the already impacted community of Pittsburg;
- Consider the effects to other Bay Area communities of refining the new crudes;
- Propose and analyze feasible mitigation that could reduce local air quality impacts;
- Adequately disclose and address the risk of accidents that could result from transportation and storage of the new crudes;
- Fully disclose and consider mitigation for the Project's climate change-related impacts; and
- Consider a reasonable range of feasible alternatives that could reduce the Project's significant impacts.

We urge the City of Pittsburg to correct these deficiencies before certifying the RDEIR and approving the Project.

Summary of the Project

WesPac proposes to transform an existing oil storage and transfer facility that has been dormant for 15 years into a major facility with the capacity to receive, store, and transfer almost 20 percent of California's crude oil supply. The proposed Project is next to residential neighborhoods in the City of Pittsburg with no buffer zone and is located within a quarter-mile of a number of sensitive receptors including schools, an extended care facility, a head-start program, three parks, and several churches. The Office of Environmental Health Hazard Assessment has ranked central Pittsburg, the Project area, in the top ten percent of California communities that are already burdened by multiple sources of pollution and experiencing adverse public health effects.²

The Project will bring in large volumes of crude oil and partially refined crude oil³ from unidentified "distant sources"⁴ delivered daily by train (100-plus cars long), ocean-going ships, barges, and pipelines. The facility will store the crude in tanks and then transfer it by pipeline to nearby Bay Area facilities (and possibly elsewhere) for refining. Refineries that may receive the

² See <http://oehha.ca.gov/ej/ces11.html> (zip code 94565).

³ The total annual average throughput for the Project will be approximately 88.3 million barrels per year, with a maximum throughput of over 136 million barrels per year. To put these numbers in context, all the refineries in California currently process well over 700 million barrels of oil annually, with Bay Area refineries processing 276 million barrels annually. <http://energyalmanac.ca.gov/petroleum/refineries.html>.

⁴ RDEIR at p. 1.0-9

crude include the Shell Martinez Refinery in Martinez; the Tesoro Golden Eagle Refinery in Martinez; the Conoco Phillips Refinery in Rodeo; and the Valero Benicia Refinery in Benicia.⁵ The Project will operate twenty-four hours per day, seven days per week.

Comments on RDEIR

The RDEIR fails to disclose and analyze the local air quality impacts to the already impacted community of Pittsburg.

CEQA mandates that an EIR identify and analyze all potentially significant adverse effects of a project, including, both direct and indirect impacts, short-term and long-term impacts, and growth-inducing impacts. (Pub. Resources Code, § 21100; Cal. Code Regs., tit. 14, §§ 15126, 15126.2.) The RDEIR's discussion of local air quality impacts is deficient in several respects, as set forth below.

The RDEIR understates local air quality impacts.

The Project's many ships, barges, tugboats, locomotives, process equipment and storage tanks will significantly increase the pollution in the surrounding community. According to the RDEIR, even after implementing the proposed mitigation measures, WesPac will exceed the Bay Area Air Quality Management District's (Air District's) recommended significance thresholds for nitrogen oxide (NOx) and organic compounds that contribute to smog and can exacerbate respiratory problems. The Project will also emit particulate matter, a pollutant that already accounts for more than 90 percent of premature mortality related to air pollution in the Bay Area.⁶ Because the Project's estimated particulate emissions are under the Air District's recommended thresholds, the RDEIR concludes that the impacts are less than significant and proposes no mitigation. Further, the RDEIR concludes that Project's incremental cancer risk from localized pollution is 9.5 – meaning that the Project is expected to cause 9.5 excess cases of cancer per one million people exposed in a lifetime due to the operation of the Project. This is just under the Air District's recommended threshold of ten excess cancers. No mitigation is proposed.

The RDEIR's disclosure and analysis of localized air impacts is deficient in at least two important respects. First, there is no discussion of the types of crude that will be transported to and distributed from the facility.⁷ Information on crude type, however, is critical to a full and fair analysis of potential impacts to local air quality. The amount and toxicity of air emissions and

⁵ RDEIR at p. 2.0-43, Table 2-6. It is not clear whether Chevron's Richmond refinery will receive oil from the Project.

⁶ <http://www.baaqmd.gov/Divisions/Planning-and-Research/Particulate-Matter.aspx>.

⁷ The rail and marine component of the Project will allow delivery of crude from almost anywhere in the world, including the oil sands of Alberta, Canada. See, e.g., BNSF, Crude-by-Rail presentation (Sept. 2013) at p. 10, available at <http://www.fra.dot.gov/Elib/Document/3436>.

potential releases associated with transporting and storing crude⁸ will vary based on the crude's chemical composition, including the contaminants it contains, its sulfur content, and whether it is blended with other chemicals such as diluent (used to make thick crudes like oil sands less viscous and easier to transport).⁹ The failure to base local air impacts analysis on the Project's projected crude types causes the RDEIR to "fail[] as an informational document[.]" (See *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89 [holding EIR deficient where the "project description is inconsistent and obscure as to whether the Project enables the Refinery to process heavier crude."])

Second, the RDEIR's emissions estimates for localized air pollutants do not appear to include all aspects of the Project. The RDEIR fails to include all "fugitive" emissions (for example, from leaks in pressurized equipment, pipelines, seals, and valves) and all aspects of transportation that affect local air quality.¹⁰ Third, the RDEIR's pollution projections are based on hypothetical ship, barge, and rail fleets made up of new and efficient models, rather than real-world fleets made up in part of older, less efficient and higher polluting vehicles and vessels.¹¹ The RDEIR's reliance on hypothetical, cleaner fleets causes it to underestimate the Project's actual emissions.

Underestimating the Project's localized pollution emissions in this case is prejudicial, working against CEQA's informed decision making and public disclosure purposes. For example, even with the identified deficiencies, the RDEIR's estimated cancer risk is very close to the threshold of significance.¹² A relatively small increase in the estimated emissions may well place the Project over the threshold for cancer risk, requiring the City to consider mitigation for this impact, which it has not done in the RDEIR. Before approving the Project, the City must ensure that the environmental document accounts for crude types and includes all sources in estimating the Project's potential impacts to local air quality.

The RDEIR fails to analyze the significance of local air quality impacts on the already overburdened residents of Pittsburg.

In addition, the RDEIR fails to consider whether the Project's contribution to local air pollution is significant given central Pittsburg's existing pollution burdens. The significance of the Project's localized air emissions must be evaluated in context. (Cal. Code Regs., tit. 14, § 15064, subd. (b).) The context of an action or a specific impact may include the sensitivity of

⁸ E.g., releases and spills, fugitive emissions (discussed below), evaporative emissions, and emissions from storage tanks and thermal oxidizers. See Air District comment letter at p. 2.

⁹ See, e.g., Crude Oil Material Data Safety Sheets, Keystone XL Pipeline, available at <http://keystonepipeline-xl.state.gov/documents/organization/205570.pdf>. See also comment letter from Natural Resources Defense Council, September 13, 2013, at pp. 8-21.

¹⁰ The Air District noted that it was "unable to verify the potential health risks" from the Project because of defects in quantifying and modeling the Project's emissions. Air District comment letter at pp. 2-3.

¹¹ See Air District Letter at p. 3.

¹² RDEIR, 4.0-57, Table 4-21.

the environment or of the persons affected; some affected persons may be more vulnerable than the general population (such as children, the elderly, or persons whose health already is compromised). In addition, some of those affected may already be subject to higher pollution burdens and thus more sensitive to even seemingly small incremental increases in that burden. (See *Kings County Farm Bur. v. City of Hanford* (1990) 221 Cal.App.3d 692, 718.) Given that the residents of Pittsburg are already facing some of the highest pollution burdens in California, and, for example, are in the 98th percentile for emergency room visits for asthma,¹³ the environmental document for this Project must analyze whether adding additional pollution that can contribute to the community's existing public health problems is significant.

The RDEIR fails to consider the effects to other Bay Area communities of refining the new crudes.

One of the stated, central purposes of the Project is to replace California and Alaska crude stocks, whose volumes are declining, with new sources of crude oil. (RDEIR at pp. 1.0-2, 1.0-6, 1.0-9.) The RDEIR fails, however, to consider any impacts that may be experienced in the communities receiving and refining the new, high-volume deliveries of unidentified crude.

To comply with CEQA, the environmental document for this Project must evaluate whether there is the potential for new or increased impacts to the communities where the crude oil will be refined due to changes in delivered volume or in the composition of the crude. If, for example, the incoming crude oil requires more energy to refine it, or contains different or higher levels of contaminants than the current mix, there may be higher levels of emissions around the receiving refineries. Such impacts would constitute a "reasonably foreseeable indirect physical change in the environment which may be caused by the project. (See Cal. Code Regs., tit. 14, § 15064; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 387.) The fact that these indirect impacts will be experienced some distance from the Project's footprint is irrelevant. Indeed, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369.)

The RDEIR fails to analyze feasible mitigation that could reduce local air quality impacts.

Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." (Pub. Resources Code, § 21002; *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 134.) By the RDEIR's own estimates,¹⁴ localized air emissions from both construction and direct operations will exceed the Air District's significance thresholds for nitrogen oxides and organic compounds that result in smog. But the RDEIR's proposed mitigation measures fall far short.

¹³ See CalEnviroScreen, <http://oehha.ca.gov/ej/ces11.html>.

¹⁴ As noted above, the RDEIR may substantially underestimate local air emissions.

The RDEIR proposes to “offset” certain aspects of the Project’s local air pollution by buying or using credits previously earned for reducing emissions elsewhere (emissions reduction credits) rather than implementing on-site mitigation measures. While offsets might reduce air pollution in California or the general region (depending on where actual reductions take place), they will not reduce the localized air pollution impacts in the community where the Project is located. Stated simply, the mitigation does not match the impact. To address the specific local impacts identified, CEQA requires that the RDEIR analyze – and the Project should be required to achieve – all feasible emission reductions of localized air pollutant on-site first.

For instance, on-site mitigation could include requiring dock electrification (which can reduce emissions from marine vessels running their auxiliary engines), minimizing the idling time of diesel-powered construction equipment, prohibiting diesel generators where access to the electrical grid is available, and requiring all equipment meet at least the Tier II engine standard or be fitted with diesel particulate filters if Tier II engines are not available. Additional components of the Project, including the rail elements, could be electrified, and there may be additional process efficiencies that should be considered. The City should also consider whether creating a buffer around the Project, planting vegetation or creating other physical screens, or subsidizing the installation of air filters in the community could reduce air impacts. Further, the City should develop its suite of feasible mitigation measures in a process that is accessible to the public and the affected community. “Fundamentally, the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather, an open process that also involves other interested agencies and the public.” (*Communities for a Better Environment, supra*, 184 Cal.App.4th at p. 93.)

The RDEIR fails to adequately disclose and address the risk of accidents that could result from transportation, storage, and refining of the new crudes.

The RDEIR states that the Project’s potential to “[c]reate a hazard to the public or environment through reasonably foreseeable upset or accident conditions involving the release of a hazardous material to the environment” is “[s]ignificant and unavoidable.”¹⁵ This conclusion requires that the City discuss the risk in order to fashion appropriate mitigation measures to reduce the likelihood of accident in all phases of the operation, and increase the probability of an effective response should an accident occur. The RDEIR fails on both counts.

Because the RDEIR fails to identify the types of crude oil that will be handled at the facility, it necessarily also fails to identify the varied risks associated with transporting, storing, and refining these crudes. For instance, higher acid and/or sulfur content in a crude may increase the risk of corrosion to refinery equipment and pipes, which in turn can lead to leaks, explosion or fire.¹⁶ Further, crudes and crude mixtures with a lower flash point present a greater risk of

¹⁵ RDEIR 10.0-31.

¹⁶ Pipe corrosion contributed to the August 6, 2012 explosion and fire at Chevron’s Richmond refinery. See <http://www.dir.ca.gov/DIRNews/2013/IR2013-06.html>. Further, the Federal Railroad Administration has expressed concern about an increasing number of severe corrosion incidents and has noted that “[a] possible cause is contamination of the crude oil by materials

explosion and fire¹⁷ And certain types of crudes can be more challenging to contain and clean up in the event of an accidental release.¹⁸ The National Oceanographic and Atmospheric Administration notes that “knowledge about the chemical properties and behavior of tar sands products during a marine spill is limited” and that “[t]hese gaps in information make effective spill planning and response more difficult”¹⁹

To ensure that the Project’s risks are adequately disclosed and that there is sufficient information to design tailored mitigation and accident response plans, the EIR for this Project must provide additional, detailed information about the new sources of crude, their chemical compositions, and the risks associated with their transportation, storage, and refining.

In addition, as of the date of the RDEIR, it appears that the City had failed to engage key agencies that will have essential roles in the event of an accident or threat of release. For example, the RDEIR states that the facility will not require any extra fire services and that the Contra Costa County Fire Protection District (“Fire District”) is fully capable of providing any required emergency services.²⁰ The Fire District, however, submitted a comment letter stating that it does not have an adequate number of personnel to properly respond to a fire incident at this facility or the necessary equipment/material such as industrial foam firefighting apparatus to handle a large-scale fire.²¹ Moreover, there is nothing in the RDEIR demonstrating that the Project applicant or the City has actively engaged the California Department of Fish and Wildlife’s Office of Spill Prevention and Response (OSPR), the State’s lead agency for marine and off-highway oil spill prevention, response, and natural resource restoration, to ensure that OSPR has all the information it requires and is prepared and able to respond in case of a spill related to the Project.

Before this Project is approved, to ensure a full disclosure of the Project’s risks and an adequate analysis of specific, enforceable mitigation, the City and WesPac must work with all

(...continued)

used in the fracturing process that are corrosive to the [rail] tank car tank and service equipment.” See <http://www.fra.dot.gov/eLib/details/L04717>.

¹⁷ See <http://www.tsb.gc.ca/eng/medias-media/communiques/rail/2013/r13d0054-20130911.asp> (Canadian Transportation Board analysis of July 6, 2013 derailment and explosion in Lac-Mégantic, Quebec).

¹⁸ A 2010 pipeline leak near Marshall, Michigan released an estimated at 843,000 gallons of tar sands oil. Substantial amounts of the oil remain on the river bottom to this day, and cleanup continues. See <http://www.epa.gov/enbridgespill/>.

¹⁹ <http://response.restoration.noaa.gov/about/media/what-are-increased-risks-transporting-tar-sands-oil.html>.

²⁰ RDEIR at pp. 10.0-62-63.

²¹ Troublingly, it appears that the RDEIR does not examine the adequacy of response to certain large-scale incidents that, while they may have a low probability, could have catastrophic consequences. For example, it does not consider the possibility of a major release with fire, a complete tank failure, or a rail spill that involves more than one rail car. RDEIR at pp. 10.0-41-42; 10.0-55-56; 10.0-61. Without explanation, it also fails to consider the possibility of derailment outside of Contra Costa County. RDEIR at p. 10.0-56.

relevant response agencies, including those listed above, to develop a detailed, enforceable, and fully funded response plan for its facility and other areas where crude could be released.

The RDEIR fails to fully disclose and consider mitigation for the Project's climate change-related impacts.

The RDEIR calculates the Project's greenhouse gas emissions at over 35,000 metric tons per year, concludes that the Project's climate change impacts are significant, and summarily asserts that *no* mitigation measures are available to reduce the GHG emissions from the Project. The RDEIR does not explain why no mitigation measures are available or even what mitigation measures were considered and rejected. There are a number of problems with the RDEIR's analysis.

The Project may substantially underestimate greenhouse gas emissions by not, for example, basing calculations on the expected crude mix²² and on the current and projected fleets for barges, ships, ground equipment and rail. In addition, it is unclear why the RDEIR considers greenhouse gas emissions for rail operations only within Contra Costa County, and considers only those emissions from marine tankers that occur within 54 nautical miles of the Project.²³ Unlike localized air emissions, greenhouse gases are global pollutants that have effects worldwide and in California regardless of where the emissions occur. If the Project is causing new rail and vessel traffic resulting in additional greenhouse gas emissions, this would appear to be a growth-inducing aspect of the Project that should at the very least be disclosed in the document.

The RDEIR also errs in jumping to the conclusion that the Project's impacts related to climate change are significant and unavoidable, without conducting the analysis of *why* this is the case. (*Keep Berkeley Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1371 [holding that "simply labeling the impact 'significant' without accompanying analysis" violates "the environmental assessment requirements of CEQA."]) For this particular long-term infrastructure investment Project, the question of the Project's significance may turn less on the precise volume of greenhouse gases that will be emitted, and more on how the Project is or is not consistent with the State's energy and climate objectives.

The RDEIR states that the Project is needed to ensure reliable sources of transportation fuels for California, citing the California Energy Commission's 2009 Integrated Energy Policy Report, and asserts that demands for crude oil in California are increasing as a result of increasing vehicle miles traveled. (RDEIR at pp. 1.0-3, 1.0-6.) But the 2009 report, based on 2008 data, is significantly outdated. The California Energy Commission published a superseding 2011 Energy Policy Report and a 2012 update, and recently issued its final 2013 Integrated Energy Policy Report. These more recent documents show that conditions relating to traditional vehicle fuels have changed substantially in recent years, due in part to policies and laws designed

²² See Congressional Reporting Service, Canadian Oil Sands: Life-Cycle Assessments of Greenhouse Gas Emissions, Richard K. Lattanzio (March 15, 2013), Summary, available at www.fas.org/sgp/crs/misc/R42537.pdf.

²³ RDEIR at pp. 5.0-10; 4.0-36.

to improve vehicle efficiency, increase the development and use of alternative fuels, reduce air pollutants and GHG emissions from the transportation sector, and reduce vehicle miles traveled.²⁴

The RDEIR also fails to note and address the numerous state laws and policies specifically designed to reduce the need for conventional, high-carbon transportation fuels. These include California's Low Carbon Fuel Standard Program, its Zero Emission Vehicle Program, and the Sustainable Communities Strategies Act (SB 375), whose purpose is to reduce vehicle miles traveled. It is the State's goal to "transform[] personal transportation so that virtually all vehicles in the state are zero-emission by 2050, and ultimately reducing transportation sector greenhouse gas emissions by 80 percent below 1990 levels."²⁵ The revised EIR should include evidence and analysis addressing whether and how this Project meets any interim need as the State transitions to low- and zero-carbon transportation fuels and to renewable energy sources – changes that are essential to meeting of the State's objective to reduce California's greenhouse gas emissions to 80% below their 1990 levels by 2050 in order to reduce the risk of dangerous climate change.²⁶

In addition, it is simply not plausible that there are *no* feasible mitigation measures that could reduce the Project's greenhouse gas emissions. The CEQA Guidelines set out examples of potential measures, including off-site mitigation²⁷ and energy conservation. (Cal. Code Regs., tit. 14, § 15126.4, subd. (c); see also Appendix F to the CEQA Guidelines, addressing energy conservation.) In addition, the document should discuss the possibility of requiring minimum standards for the marine vessels and rail engines servicing the Project, dock electrification, and potential electrification of other aspects of the Project that could reduce the use of fuels with higher carbon intensities. The Final EIR must consider these and any other feasible mitigation measures that could apply to this Project.

The RDEIR fails to consider a reasonable range of feasible alternatives that could reduce the Project's significant impacts.

One of the "core" requirements of an EIR is an adequate consideration of alternatives. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Under CEQA, an EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Cal. Code Regs., tit. 14, § 15126.6, subd. (a).)

²⁴ 2013 Integrated Energy Policy Report - Final Lead Commissioner Report, available at http://www.energy.ca.gov/2013_energypolicy/. See, e.g., *id.* at pp. 192 and 229.

²⁵ California Energy Commission, Integrated Energy Policy Report, 2012 Update, at p. 61, available at http://www.energy.ca.gov/2012_energypolicy/index.html.

²⁶ This deficiency is also present in the RDEIR's statement of "Purpose and Need" beginning at p. 1.0-6.

²⁷ Off-site mitigation for greenhouse gas emissions may be appropriate where reductions outside the facility can reduce climate change impacts as effectively as on-site mitigation.

The RDEIR is fundamentally defective because it considered only *one* action alternative: a version of the Project that reduces storage capacity by 18%. (The reduced capacity alternative would create a slight buffer zone between single family residences adjacent to some of the storage tanks but is otherwise very similar to the proposed Project.) There are other feasible alternatives that the City could have considered. For example, the City summarily rejected an alternative that would utilize docks and storage tanks at existing refineries. It cited the 2009 California Energy Commission report, which the City believes supports its view that existing “facilities are currently at or near capacity, resulting in a need for additional marine terminal and storage capacity infrastructure.”²⁸ Based on current trends, however, it is possible that there is sufficient infrastructure to meet the State’s need for imported oil; if this is the case, then smaller, dispersed upgrades to existing facilities in the Bay Area and elsewhere could in fact be sufficient. Another alternative might be to remove the Project’s rail terminal component (which was only recently added) and rely on an electrified marine terminal and pipelines. In a revised document, the City must consider a full range of alternatives that could meet most of the Project’s objectives.

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²⁸ RDEIR at 2.0-138.

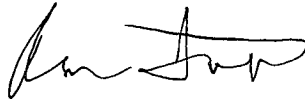
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Conclusion

We urge the City of Pittsburg to substantially revise the environmental document for this Project so that it will fully inform the public and the City Council of the impacts of this Project to the residents of Pittsburg, to the other Bay Area communities that will refine the incoming crude, and to the State as we transition to a low-carbon economy and make long-term infrastructure investments.

We appreciate your consideration and would be happy to answer any question you might have about our comments.

Sincerely,



JANILL L. RICHARDS
Supervising Deputy Attorney General
ROSE B. FUA
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

cc: Ken Alex, Director, Governor's Office of Planning and Research
Thomas Gibson, General Counsel, Department of Fish and Wildlife
Michael Levy, Chief Council, California Energy Commission