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VIA E-MAIL (OBIONDI@WATERBOARDS.CA.GOV)
& FEDERAL EXPRESS

Mr. Oscar Biondi
Division of Water Rights
STATE WATER RESOURCES CONTROL BOARD
1001 I Street, 14th Floor
Sacramento, CA 95814

**RE: COMMENTS ON THE DRAFT FINAL WATER QUALITY CERTIFICATION
FOR EAGLE CREST ENERGY COMPANY EAGLE MOUNTAIN PUMPED
STORAGE PROJECT (FERC PROJECT NO. 13123)**

Dear Mr. Biondi:

By this letter Kaiser Eagle Mountain, LLC ("KEM") and Mine Reclamation, LLC ("MRLLC") (KEM and MRLLC are sometimes collectively referred to herein as "Kaiser") each submit comments regarding the draft final water quality certification ("DFWQCERT") for Eagle Crest Energy Company's ("ECEC") proposed Eagle Mountain Pumped Storage Project to be located at Eagle Mountain, California (the "Project") that was released for public comment on March 26, 2013. Thank you for the opportunity to comment on the DFWQCERT. As detailed in previous communications with the State Water Resources Control Board (the "State Board") and for the reasons further discussed in this letter, ECEC's application to the State Board for a water quality certification pursuant to Section 401(a)(1) of the Federal Clean Water Act (33 USC § 1341 et seq.) ("**401 certification**") should be denied.

THE EAGLE MOUNTAIN SITE AND THE PROJECT

As the State Board is aware, KEM owns and controls the Eagle Mountain site located in Riverside County, California. MRLLC is the developer of a regional rail-haul municipal solid waste facility for a significant portion of the Eagle Mountain site (the "Landfill"). ECEC has been pursuing for more than 20 years a possible hydro-electric pumped storage project at Eagle Mountain and has pending before the Federal Energy Regulatory Commission ("FERC") a license application to construct and operate the Project (FERC Project No. 13123). As noted in prior communications the Project is located in the desert and would not involve the development or improvement of a water way but instead would rely upon the use of groundwater from the Chuckwalla Basin to fill and replenish two of the existing mining pits at Eagle Mountain. The heart of the Project, the necessary upper and lower reservoirs, related electrical generation and ancillary facilities, would be located on the Eagle Mountain property owned by KEM and portions of which are currently subject to an option agreement and a lease with MRLLC. The required lands for the Project at Eagle Mountain are commonly referred to as the "Central Project Area." Illustrating the proposed facilities at Eagle Mountain is the ECEC prepared map attached hereto as



EXHIBIT "A." (Figure 5 Map - Planned Project Features, March 2013, attached to the DFWQCERT.)

A 401 CERTIFICATION SHOULD NOT BE GRANTED FOR THE PROJECT BECAUSE OF A LACK OF PROPER ENVIRONMENTAL ASSESSMENT AND FAILURE TO COMPLY WITH CEQA

As all are aware, ECEC does not own or control the lands at Eagle Mountain necessary for its Project. Additionally, ECEC has not even had access to the Eagle Mountain site and, as a result, a number of critical studies that are required for compliance with applicable laws, including the California Environmental Quality Act ("CEQA"), have not been undertaken and are being deferred until after ECEC gains access to the Central Project Area.

NO SITE SPECIFIC STUDIES FOR THE PROJECT IN THE CENTRAL PROJECT AREA RESULTING IN FAILURE TO COMPLY WITH CEQA. Prior communications with the State Board (as well as with FERC) on the obvious and fatal flaw of the Project of failing to have conducted necessary environmental studies and deferring studies until after approval of the Project will not be fully reiterated in this correspondence but the prior comments in this regard are still applicable and incorporated herein by this reference.¹ However, for the State Board's convenience attached as **EXHIBIT "B"** is a summary listing of the critical but missing studies that was provided in Kaiser's comment letter of July 25, 2012, on the draft water quality certification ("DWQCERT") for the Project. Nothing has changed in the DFWQCERT with regard to these missing studies. The missing and incomplete information is required for a reasoned review and analysis of the Project, the Project's actual and foreseeable impacts, formulation of mitigation measures and Project alternatives

In an attempt to tap dance around the lack of required environmental studies prior to issuance to 401 certification, characterization of the site conditions and environmental matters for the Project is drawn from previous reports and observations during the 1992 to 1994 FERC licensing process, information prepared for the landfill, geologic reports and technical information prepared by others. The State Board acknowledges that: "The previous investigations were not intended to obtain data that would support design of a large hydroelectric development with dams, tunnels and

¹ Even though not fully set forth in this letter, Kaiser reaffirms its previous comments on the Project. Accordingly, the following documents are incorporated herein by reference: (i) letter of KEM and MRLLC to Paul Murphey with the State Board dated October 7, 2010, providing detailed comments on the Project's DEIR; (ii) letter of KEM and MRLLC to Paul Murphey with the State Board dated May 26, 2011, regarding continuing concerns about the adequacy of the EIR for the Project which includes a letter from the U.S. Fish and Wildlife Service (the "USF&W") dated May 20, 2011, in which the USFW states its concerns about the lack of site specific studies and reliance on old information and that there is a lack of site-specific studies to able to determine "if the proposed site would be suitable for the project and its ancillary facilities"; (iii) letter of KEM and MRLLC to Paul Murphey with the State Board dated September 23, 2011 regarding inadequacy of ECEC's application for a 401 certification; (iv) letter of KEM and MRLLC to FERC dated February 28, 2011, regarding the inadequacy of the environmental impact statement for the Project; and (v) letter of KEM and MRLLC to Oscar Biondi with the State Board dated July 25, 2012, regarding comments on the draft water quality certification.



related structures.” (DFWQCERT, p. 5.) Despite the concession that even the data relied upon was not for purposes of the Project, the DFWQCERT states: “However, data are available to understand the site characteristics in sufficient detail to document the feasibility of constructing the Project, comply with analyses required by the California Environmental Act (CEQA), and issue a water quality certification.: (DFWQCERT, p. 5.) These conclusions are in error. The proper conclusions would be that there is insufficient data to document the feasibility of constructing and operating the Project, to comply with CEQA, to determine water quality impacts, and to properly issue a 401 certification.

The fact that these conclusions are in error is further evidenced by the need for detailed Phase 1 and Phase 2 Site Investigations. The DFWQCERT provides: "Due to site access constraints, the Applicant will undertake detailed site investigations to support the final configuration and design of the Project after the FERC License has been issued, access to the Central Project Area is obtained, and regulatory agencies have granted approval for ground disturbing activities. These detailed investigations will be conducted in two phases, in part to validate the results obtained using previous studies..." (DFWQCERT, p. 5.) The State Board has the proverbial cart before the horse. The purpose of the Phase 1 and 2 investigations is to seemingly verify the forgone conclusion that the Project is environmentally acceptable. This approach is not acceptable and is not in accordance with the requirements of CEQA. Environmental studies and analyses are required before Project approval and not after. As noted in Kaiser's comment letter dated July 25, 2012: "To allow what is being proposed in this situation would effectively eviscerate the primary purpose of CEQA." Kaiser further noted in such comment letter the following which remains applicable:

The primary purpose of CEQA is to assure that governmental decision makers are informed about the actual and potential adverse environmental impacts to the environment of their decision *prior* to their decision to approve a project. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal. 3d 376, 394; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1196). Consistent with this overarching purpose, a fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken. (*Laurel Heights, supra* at 394). This purpose is achieved by the preparation of an adequate environmental impact report that identifies studies and analyzes all of the actual and reasonably foreseeable direct and indirect environmental consequences that would arise from a project. (Cal. Pub. Res. Code §§ 21002.1; 21100; CEQA Guidelines § 15126.2. "[W]hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal. App. 3d 818, 831.)



The final environmental impact report for the Project ("FEIR") simply does not satisfy the requirements of CEQA. To the contrary, the requirements and purposes of CEQA are gutted without the necessary site specific environmental studies and analyses prior to Project approval. The 401 certification should be denied for failure to comply with CEQA.

If the State Board should approve the 401 certification for the Project, the State Board is effectively saying to any applicant that the applicant: (i) need not own, control, or have access to the property on which the applicant' project would be located²; (ii) does not need to conduct site specific environmental studies and analyses that would otherwise be required for project approval because the applicant does not have access to the site; (iii) data developed for other uses for the same land may be used even though such data may not be applicable to the particular project then before the State Board; and (iv) the lack of site specific studies can be cured after the project is approved. Why would any person want to access the property on which its project ultimately may be built if compliance with CEQA can be effectively circumvented until after project approval is obtained?

THE DEFERRAL OF STUDIES VIOLATES CEQA. As noted above (and in prior comments), the State Board (as well as other governmental decisions makers) are improperly relying on deferred studies, impact analysis and then subsequently developing mitigation measures in making a current determination on the Project. This is not acceptable under CEQA. "A study conducted after approval of a project will inevitably have a diminished influence on decision making. Even if the study is subject to administrative approval, it is analogous to the sort of post-hoc rationalization that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 307. The DFWQCERT concedes that the additional studies which are deferred until after the 401 certification is issued will be required: "Due to limited site access and the necessary use of previous studies to complete the environmental review, this water quality certification recognizes the need to develop more specific and detailed site information,..." (DFWQCERT, p. 7.) The proposed Phase 1 Site Investigation and, to a large extent, the proposed Phase 2 Site Investigations, are nothing more than deferred studies that will be undertaken after the 401 certification is approved by the State Board and once access to the Central Project Area can be obtained. These verification studies (which it is unclear exactly what is being verified other than the assumptions that were used in seeking the 401 certification) are necessary because there is a lack of site specific studies. The very thing prohibited by CEQA, a post hoc rationalization for the previously granted 401 certification for the Project is inevitable.

² Kaiser renews its objection that it would be bad policy and precedent for the State Board to approve a 401 certification in these circumstances and that appropriate clarifying rule making is required prior to any approval of the 401 certification. The State Board in responding to previous Kaiser comments states that the Project will never be built if ECEC does not acquire the necessary property. This is correct but it misses the point-the State Board must make a determination after compliance with CEQA that the 401 certification, appropriately conditioned, can be issued for this Project and this cannot possibly be done with a project of this size and environmental impact given the lack of current site specific studies and analyses for the Project.



IMPACTS ON GROUNDWATER AND WATER QUALITY

As a result of not having conducted site specific studies at the Central Project Area a number of questions and concerns still remain with regard to the Project's impacts on groundwater and water quality. Again, this letter will not reiterate all of Kaiser's previous comments in this regard but such comments remain applicable. The State Board lacks vital information to be able to make an informed decision on the Project's potential environmental impacts on ground water and water quality and therefore cannot develop appropriate mitigation measures and protections prior to issuance of the 401 certification.

To illustrate, the DFWQCERT properly identifies that: "Seepage from the reservoirs has the potential to affect groundwater quality, the CRA and the liner of the proposed Landfill." (DFWQCERT, p. 14). However, there needs to be an understanding of the consequences of these possible impacts and not just the identification of the possible impacts. Informed assumptions cannot be substituted for the necessary site specific studies that are required to really understand the potential environmental and third party impacts.

To further illustrate, the DFWQCERT notes that: "A groundwater model was not developed to assess seepage from the Upper Reservoir because there is insufficient data available to develop a valid model." (DFWQCERT, p. 16.) How then can the State Board legitimately determine the impacts to ground water, to water quality and to third parties, including the Landfill, without this information? It cannot.

THE PROJECT IS NOT COMPATIBLE WITH THE EAGLE MOUNTAIN LANDFILL

From the beginning the FERC and State Water Board process ECEC has continually stated that the Project is compatible with the Landfill. The draft and the FEIR for the Project incorrectly conclude that the two projects are compatible. The conflicts between the Project and the Landfill both in terms of facilities and operations are discussed in detail in Kaiser previous comments and concerns incorporated into this letter as well as expressed in the comments filed with the State Board and with FERC by the Los Angeles County Sanitation Districts (the "**District**"). As issues with compatibility between the Landfill and the Project have been pointed out it is interesting to note that the Project has evolved in that the location of certain facilities have been moved in an effort to be more compatible with the Landfill. Similarly certain monitoring and mitigation measures are being proposed in an effort to reduce the compatibility impacts of the Project on the Landfill. Kaiser acknowledges that there are fewer compatibility issues with the facilities than from when the Project was first proposed. However, the very fact the Project has continually changed the location of certain Project facilities demonstrates that the two projects are indeed incompatible. The fact remains that there continues to be compatibility issues and the compatibility issues are not just limited to physical facilities but also to operational matters. A good example are the unresolved issues particularly with regard to the Upper Reservoir and impacts of the seepage on groundwater and on the landfill and its liner and monitoring systems.



The State Board recognizes the incompatibility issues in several of the conditions it imposes on the Project if the 401 certification for the Project is issued. For example, a Condition 1. SITE INVESTIGATIONS requires that the Phase II Site Investigation shall "ensure compatibility of the Project with existing and proposed land uses within the Project Area." (DFWQCERT, p. 32). This is an excellent first step but this condition does not go far enough. What is unclear, and should be spelled out, is that ECEC must work with those in control of the existing and proposed land uses to reach a mutual agreement on compatibility issues and failing mutual agreement, there should be some mechanism and process beyond the Deputy Director to which these matters can be appealed. Finally, what happens if there is a matter of incompatibility that cannot be resolve despite the best efforts of all involved? Which land use will prevail? These are items that need to be more fully addressed in the conditions to the possible 401 certification.

COMMENTS ON THE PROPOSED CONDITIONS

Kaiser has the following comments on the proposed conditions in addition to Kaiser's comment on Condition 1 discussed above under "The Landfill Project is Not Compatible with the Eagle Mountain Landfill".

PUBLIC PARTICIPATION AND THE NEED FOR A CLEAR PATH OF APPEAL. Proposed Condition 1 provides that there shall be public participation during the development of the Phase I and Phase II Site Investigations Reports and that there shall be at least one public workshop following the completion of each phase to inform the public of the results of each investigation and to solicit comments. Again, as previously discussed, public participation at this stage for these deferred site specific studies is too late for use in determining whether the 401 certification should be issued for the Project. While public participation at this stage will undoubtedly be of some use, the danger is that such participation will be only "feel good" participation in that the public has no recourse if their valid and proper comments need not be seriously considered. While ECEC would be required to summarize the public comments and explain to the Deputy Director why the comments were addressed or not addressed, it is not clear if the Deputy Director could require Project modifications to address public comments that ECEC has determined not to address. Further, it is also not clear what recourse or appeal rights the public may have at this stage to seek review of the Deputy Director's decisions in this regard. We suggest that a general condition be imposed that makes clear that the Deputy Director shall have the authority to mandate that the Project address issues and concerns regarding compatibility, as well as such matters and issues that are raised by the public with regard to the Project. An additional 1 condition should specify what recourse and procedures can be followed to appeal any decision of the Deputy Director for these subsequent studies, etc. For example, Kaiser suggests specifying the same appeal procedures that are currently available, i.e., the right to appeal to the full State Board and the subsequent right to seek judicial review of the decision of the State Board.

Finally, it also be clarified that governmental agencies may also be afforded the opportunity to provide comments in these public forums.



FINANCIAL ASSURANCES. Due to the potential environmental and third-party impacts of the Project, ECEC should be required to provide appropriate financial assurances and recourse. Accordingly, the following financial assurance conditions should be imposed on the Project.

➤ Prior to the commencement of construction of the Project, applicant shall post with the State Board financial assurances in the form approved by the State Board in amount of not less than \$100 million to secure the performance of applicant's obligations under this this water quality certification as it may be amended from time to time.

➤ Prior to the commencement of construction of the Project and during the life of the Project, applicant shall obtain insurance with a company with an "A.M. Best Rating" of not less than A-VII which is qualified to do business in California covering any damages (including environmental and natural resources damages), expenses and/or loss (including that may be incurred by a third-party that may result from the construction and operation of the Project or that may arise from any flood or release of water from the reservoirs and other Project facilities. The insurance coverage shall be in an amount of not less than \$100 million with the owners or holders of any interest in land or improvements at the Eagle Mountain site being named as an additional insured for such policy or policies. Applicant shall furnish appropriate certificates of insurance and policy endorsements evidencing not less than the above described coverage. The insurance requirements specified as a condition of this water quality certification shall not in any manner limit or be construed to limit the liability or responsibilities of applicant.

CONDITION 7. It should be clarified that the required quality assurance firm has qualifications suitable to observe and supervise the proper installation of the required lining for the reservoirs. In addition, such quality assurance firm should be approved by the Deputy Director prior to its engagement. The quality assurance firm should be directed to promptly contact the Deputy Director in the event it observes or discovers problems in the installation or effectiveness of the lining of the reservoirs and promptly provide a report on the issues observed and/or discovered and any recommended actions.

CONDITION 12. Condition 12 should be expanded so that it is clear that no construction shall commence until after completion of and approval by the Deputy Director of all studies, investigations, plans and other similar items required by this certification.

ADDITIONAL MATTERS AND CORRECTIONS

In addition to those matters already addressed in this letter and incorporated herein by reference, there are a number of other matters that need to be briefly addressed.

EXPLANATION OF SETTLEMENT AGREEMENT BETWEEN ECEC AND THE STATE BOARD. Kaiser still requests an explanation and understanding of how a possible settlement between the State Board and ECEC may have impacted the 401 certification



process. As discussed in Kaiser's letter to the State Board dated July 25, 2012, commenting on the DWQCERT, an agenda item for a May 26, 2011, meeting is listed as: "**5. Process for FEIR and WQ • Settlement Agreement between ECEC and State Water Board?**" Again, if there was threatened litigation or litigation by ECEC against the State Board and a resulting settlement agreement or even a discussion of a settlement agreement, such matters could have impacted the manner in which ECEC's application for a 401 certification was handled, how the lack of site access would be handled and how the resulting lack of various required studies would be treated in an attempt to comply with CEQA. Additionally, any threatened litigation, a settlement agreement and the discussions surrounding a possible settlement agreement and possible litigation could have impacted the 401 certification process. A goal of CEQA is a good-faith effort at full disclosure. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal. App. 4th 957, 979). Thus, a full explanation of the circumstances surrounding this topic and the results of such agenda discussion is warranted.

THE EAGLE MOUNTAIN MINE AND MINING. The DFWQCERT repeatedly misidentifies the Eagle Mountain Mine as being in active or having ceased operations by 1983. For example, at the bottom of p. 7 of the DFWQCERT, it states: "The Central Project occupies a portion of the inactive Eagle Mountain Mine..." (See also DFWQCERT footnote 2 that states that the Eagle Mountain Mine operated from 1948 to 1983.) This is in error. The Eagle Mine has never been inactive. Even though large-scale iron ore mining was curtailed as of 1983, the Eagle Mountain mine has remained active. The Eagle Mountain Mine has shipped rock, rock products and stock pile iron ore products over the years. For example, in 2012 the Eagle Mountain Mine shipped more than 153,000 tons of rock and rock products and 500 tons in Fe bearing tailings. (See attached EXHIBIT "C.")

Similarly, the major infrastructure for large scale iron ore mining was removed in compliance with the approved reclamation plan for the mine-not abandoned as asserted in the DFWQCERT. (DFWQCERT, p. 8.)

In addition, there apparently has been some misunderstanding regarding the Eagle Mountain Mine's vested mining rights as a result of some earlier correspondence issued by the California Department of Conservation-Office of Mine Reclamation. Attached as EXHIBIT "D" is a letter dated February 2, 2102, clarifying that the Office of Mine Reclamation's prior correspondence was not intended to dispute the Eagle Mountain Mine's vested mining rights. Riverside County has recently again confirmed that the Eagle Mountain Mine has a vested mining right. The Eagle Mountain Mine's vested mining right encompasses the removal and transport of mined materials.

Like any commodity, the price of iron ore fluctuates. At the time of the writing the response to Kaiser's comments on the DEIR (August 2012), it was noted that the price of iron ore had fallen to three years lows. Over the last several years the price of iron ore dramatically increased on the world market. In 2010 the spot price for iron ore (at 62.5% Fe content) reached over \$185.00 per metric ton and then dropped to below \$90.00 per ton in early September 2012. The price of iron ore rebounded from its September 2012 low to over \$150 per metric ton in January 2013 with a current price in early April of approximately \$137 per ton making it more economically feasible for there to be a resumption of large-scale iron ore mining and as a result bring the mining



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and needed related jobs to Riverside County that would result from such large-scale mining.

INCORPORATION BY REFERENCE

As previously noted Kaiser is incorporating by reference its previous comments and reserves all rights of review and appeal in these matters. (See footnote 1.)

If you should have any questions about these comments, please do not hesitate to contact the undersigned.

Very truly yours,

MINE RECLAMATION, LLC

Richard E. Stoddard
President

KAISER EAGLE MOUNTAIN, LLC

Terry L. Cook
Vice President

Enclosures

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