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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 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 water quality certification ("DWQCERT") for Eagle Crest Energy Company's ("ECEC") proposed Eagle Mountain Pumped Storage Project to be located at Eagle Mountain, California (the "Project"). 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. If, however, the State Board should decide to grant the proposed 401 certification despite numerous environmental and safety concerns, additional appropriate conditions must be imposed upon the Project.¹

BACKGROUND AND CONTEXT

KEM owns and controls over 10,000 acres at Eagle Mountain which is located northwest of the town of Desert Center, 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 (the "**Landfill**")². ECEC has been pursuing

¹ By suggesting that additional conditions be imposed upon the Project KEM and MRLLC are not in any manner waiving any of their respective rights to challenge administratively or in court the issuance of a 401 certification for the Project's 401, the certification of Project's final EIR, and other matters associated with the Project.

² On October 30, 2011, MRLLC filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for Central District of California, Riverside Division, bankruptcy case number 6:11-bk-43596 (the "**Bankruptcy Court**"). MRLLC continues to operate as a "debtor in possession" under the jurisdiction of the Bankruptcy Court and in accordance with the applicable provisions of the Bankruptcy Code, Rules and orders of the Bankruptcy Court. Even though MRLLC filed for bankruptcy protection, this does not mean that the Landfill is "dead" as there are parties expressing a continuing interest in the pursuit of the Landfill and a resolution of the issues that arose out of the completed federal land exchange litigation. The Landfill will have the capacity to handle



off and on for more than 20 years a possible hydro-electric pumped storage project at Eagle Mountain. ECEC has pending before the Federal Energy Regulatory Commission ("FERC") a license application to construct and operate the Project (FERC Project No. 13123). 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 its reservoirs. According to ECEC, the Eagle Mountain site is a valuable site for its proposed Project.³

ECEC continues to pursue the Project even though it does not own or control the lands at Eagle Mountain necessary for its Project. 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 site. In addition, ECEC continues to pursue the Project despite the fact that the Project is not commercially viable⁴ and the fact that it conflicts with other uses of the property on which the Project would be constructed, including the Landfill and its existing approved waste discharge requirements as well as the resumption of large-scale iron ore mining.

PARTICIPATION IN SWRCB'S PROCESS AND INCORPORATION OF PREVIOUS COMMENTS BY REFERENCE AS COMMENTS ON THE DWQCERT

Both Kaiser and MRLLC have participated in the FERC process and State Board process concerning the Project. With regard to the State Board, the current iteration of the process commenced with ECEC's September 26, 2008, application for a 401 certification. Since that time, ECEC has annually withdrawn and resubmitted its application. A draft environmental impact report for the Project ("DEIR") was released by the SWRCB on July 27, 2010. A final environmental impact report for the Project ("FEIR") which would include the response to the comments on the DEIR has yet to be released.⁵ KEM's and MRLLC's participation in the State Board process has

and dispose of 470 million tons of municipal solid waste in current Phases 1-4 and 238 million tons in Phase 5 for Southern California.

³ ECEC valued the Eagle Mountain reservoir sites alone as being worth at least \$190 million to ECEC based upon the value of not needing to construct the two dams for the Project. (See EXHIBIT "A").

⁴ ECEC has conceded that the Project is not commercially viable in that there is not a sufficient differential between day-time (peak) and night-time (off peak) electrical rates. At a public hearing on the Draft Environmental Impact Statement held on February 3, 2011 Mr. Lowe, President of Eagle Crest was asked by the undersigned: "It's my understanding from looking at your initial economic analysis that the project is not commercially viable just based upon the difference between pumping at day rates versus pumping at night rates. Is that correct?" Mr. Lowe responded: "That is correct." (Transcript of FERC public meeting held on the Eagle Crest project held on February 3, 2011, commencing at 6:52 p.m., p. 57.) (See EXHIBIT "B"). In addition, the market and value of the ancillary services that are touted as the means to make the Project commercially viable have not materialized.

⁵ Pursuant to the requirements of the National Environmental Policy Act of 1969, as amended, FERC released a draft environmental impact statement for the Project in December 2010 ("DEIS") and a final environmental impact statement for the Project was released in January 2012 ("FEIS"). The DEIS and the FEIS address many of the same topics as the DEIR for the Project. Often citations to the DEIS or FEIS are used to identify that a particular study or



included, among other things, the following written communications, which are attached hereto for your convenience and incorporated herein by this reference:

- Letter of KEM and MRLLC to Paul Murphey with the SWRCB dated October 7, 2010 (EXHIBIT "C") regarding detailed comments on the Project's DEIR;
- Letter of KEM and MRLLC to Paul Murphey with the SWRCB dated May 26, 2011, (EXHIBIT "D") 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. dated May 20, 2011, in which the Service states that ECEC has been "unable to provide site-specific studies including those involving water and biological resources, as well as geotechnical siting studies necessary to determine if the proposed site would be suitable for the project and its ancillary facilities"; and
- Letter of KEM and MRLLC to Paul Murphey with SWRCB dated September 23, 2011 (EXHIBIT "E") regarding inadequacy of ECEC's application for a 401 certification.

In addition, the State Board has been served with a copy of Kaiser's filings with FERC that commented on the Project and its environmental documentation. Many of Kaiser's comments and concerns regarding the Project filed with FERC are equally applicable to the State Board's consideration of ECEC's application for a 401 certification. In particular, Kaiser provided detailed comments and concerns on the Project by its letter to FERC dated February 28, 2011, a copy of which is attached hereto as EXHIBIT "F" and incorporated herein by this reference.

Through these and other means Kaiser has conveyed its comments and concerns regarding the Project, the DEIR, and on the information and studies provided for the Project (or more properly the lack thereof). To date, neither Kaiser nor MRLLC has received responses to their prior comments on the Project and the DEIR. It is important that FEIR be released and comments solicited from the public and governmental agencies prior to any certification of the FEIR and prior to any possible issuance of the 401 certification. However, a review of the DWQCERT reveals that most of the comments and concerns previously expressed have not been adequately addressed and certainly such comments and concerns have not been addressed in a manner that satisfies the necessary requirements for the State Board to appropriately process an application for a 401 certification for the Project and to issue and condition a 401 certification for the Project. Due to the volume of Kaiser's comments and concerns, Kaiser is not repeating in this letter all its previous comments and concerns but such comments and concerns are still appropriate. Accordingly, all of Kaiser's prior comments on the Project, DEIR, DEIS and on the other environmental documentation for the Project are hereby incorporated into this letter by reference as comments on the DWQCERT. However, there are certain critical issues that impact the DWQCERT that Kaiser further addresses in this letter.



THE STATE BOARD NEEDS TO MAKE A POLICY DETERMINATION OF WHETHER THE STATE BOARD CAN OR SHOULD ACCEPT AND APPLICATION ISSUE A 401 CERTIFICATION WHEN AN APPLICANT LIKE ECEC DOES NOT OWN, CONTROL OR HAVE ACCESS TO THE PROPERTY ON WHICH IT DESIRES TO BUILD A PROJECT

It is undisputed that ECEC neither owns nor controls the very heart of its proposed Project-the Eagle Mountain land necessary for the Project's power generation facilities including the two mine pits that would serve as the necessary upper and lower reservoirs for the Project. Additionally, ECEC has not had access to the Eagle Mountain site. These facts are acknowledged throughout the DWQCERT (as well as in many other documents involving the Project). For example the DWQCERT states: (i) "The feasibility of the Project depends, in part, on the Applicant acquiring ownership or control via a lease or easement of the Project site. The Applicant has not been granted access to the Central Project site by the current land owner." (DWQCERT, p. 5); (ii) "Phase 1 Site investigations will be initiated after licensing and acquisition of site access (DWQCERT, p. 6); (iii) "Currently the Applicant has not been granted access to the privately-owned land where the Central Project is proposed." (DWQCERT, p. 7); and (iv) "The Applicant shall begin a Phase 1 Site Investigation within 60 days of receipt of site access to confirm that basic Project feature locations are appropriate and to provide basic design parameters for the final layout of Project features." (DWQCERT, p. 33.)

As Kaiser's comment letter to the State Board dated October 7, 2010, correctly points out that: "Where a project is proposed for a portion of the property owned by an entity other than the project proponent, it appears difficult and bad policy for the State Water Board to issue a 401 certification; unless and until a determination is made that the project proponent has an actual legal right to use the property and a determination can be made that the proposed project is consistent with existing and future uses by the existing landowner. Indeed, consistent with these points, the applications for 401 water quality certification of the California Regional Water Quality Control Boards for the San Diego, Lahontan, and North Coast Regions ask for information from the owner or related to ownership of the project site." Thus, as foundational step the State Board must undertake an appropriate evaluation of whether it can or should even consider an application for a 401 certification (or any other application made to the State Board for that matter) where the applicant does not own, control or have access to the site on which the Project is proposed. Without a clear policy on this issue, which should be undertaken by appropriate rule making by the State Board, any one could file an application with the State Board concerning property that one does not own, or control or to which it even does not have access.

A 401 CERTIFICATION SHOULD NOT BE GRANTED FOR THE PROJECT BECAUSE OF A LACK OF PROPER ENVIRONMENTAL ASSESSMENT

ECEC has not undertaken a number of necessary studies that are required to properly process and support any determination of whether ECEC's application for a 401 certification should be granted and what conditions should be imposed on the Project. In addition, the lack of or incomplete studies makes the Project's EIR inadequate and thus, fails to comply with the requirements of CEQA.



SUMMARY OF MISSING/INCOMPLETE INFORMATION. In summary, the studies not undertaken and improperly deferred or studies in which estimates were generated due to the lack of site access for the Project include the following⁶:

- upper and lower reservoir site studies and analysis⁷ (DWQCERT, p. 5 and Condition 1., p. 33);
- reservoir and tunnel seepage studies and analysis (DWQCERT, p. 5 and Condition 1., p. 33; DEIR, pp. 2-12 - 2-13). In addition, the current estimates of seepage were developed "based upon a small quantity of samples because the applicant currently does not have access to the site." DWQCERT, p. 14);
- water quality studies and analysis relating to the reservoirs and seepage contacts with the ore-body which would include a determination of whether acid production would occur (DWQCERT, p. 6 and Condition 1., p. 33; DEIR, pp. 6-12 – 6-13);
- geologic mapping (DEIR, p. 2-13);
- subsurface investigation studies and analysis (DEIR, pp. 2-25)
- hydrocompaction studies and analysis (DWQCERT, p. 5 and Condition 1., p. 33; DEIS, p. 40);
- subsidence studies and analysis (DWQCERT, p. 5 and Condition 1., p. 33; DEIS, p. 40);
- hydraulic structures studies and analysis (DWQCERT, p. 5 and Condition 1., p. 33);
- tunnels, shafts and powerhouse studies and analysis (DWQCERT, p. 5 and Condition 1., p. 33);
- landslides studies and analysis (DEIS, p. 40);
- mass movement studies and analysis (DEIS, p. 40);
- liquefaction studies and analysis (DEIS, p. 40);
- reservoir-triggered seismicity and analysis (DWQCERT, p. 5 and Condition 1., p. 33; DEIS, p. 40);
- structural integrity of bat adits adjacent to the Project site (DEIS, p. 47);
- a determination of the degree, and orientation of jointing and fracturing and weathering of mine benches and a determination of the stability of the slopes and benches in the central Project site (DEIR, pp. 2-26);
- biological studies, surveys and analysis (DWQCERT, Condition 1., p. 33; DWQCERT, Condition 2., p. 34; DEIR, pp. 6-43) including: (i) on-the-ground surveys at the central Project site for the threatened

⁶ The references being provided are an example of where support for a particular statement can be found but they are not an exhaustive listing of all locations where support for such statement can be found.

⁷ Many of the studies not undertaken and improperly deferred are to be undertaken as a part of a proposed Phase 1 Site Investigation which is to commence within 60 days of receipt of access to the Eagle Mountain site. These studies and analysis are to be compiled and furnished within a year following the commencement of the site investigation and are to be submitted to the Deputy Director. In addition, ECEC tries to make a number of pre-construction surveys as a mitigation measure rather than a part of the required environmental assessment. All of this occurs a substantial period of time **after** the decision of the State Board to issue a 401 certification for the Project and without public review.



- desert tortoise. The USFW's Project biological opinion dated April 13, 2012,⁸ notes that "...because Eagle Crest does not have site access, tortoise presence/absence in the central project area and the likelihood of translocation cannot be determined" (BIO, p. 9); (ii) the nesting sites for certain birds (DEIR, 6-51; DEIS, p. 105); (iii) badger and kit fox burrows (DEIR, pp. 2-25; DEIS, p. 22); (iv) the existence, location and condition of any bat roosts (DEIR, pp. 6-55 - 6-56; DEIS, p. 37); (v) big horn sheep in order to update available information (DEIS, p. 98); (vi) predator surveys at the central project site including surveys for the golden eagle (DEIR, pp. 6-54); and (vii) vegetation at the central project site (DEIR, pp. 6-44; DEIS, p. 103);
- a determination of actual hydraulic capacity of Eagle Creek (DWQCERT, pp. 23-24);
 - a determination of dam breaches and flooding impacts on the dams; and
 - a determination of artificial impoundments and ephemeral pools at the Eagle Mountain site and any impacts resulting to the Couch's Spadefoot Toad (DWQCERT, Condition 2., p. 34; DEIR, pp. 6-42 - 6-43; DEIS, p. 117).

There is no doubt that the foregoing items involve potentially significant adverse environmental impacts that require appropriate and complete study and analysis **prior to** any action by the State Board on ECEC's application for a 401 certification. This missing and incomplete information is essential for a reasoned review and analysis of the Project, the Project's actual and foreseeable impacts, formulation of mitigation measures and Project alternatives. It is telling that the DWQCERT effectively acknowledges that it is not even known if the basic Project features as proposed are even appropriate for the site. ("Due to limited site access and the necessary use of previous studies to complete the environmental review, this certification recognizes the need to develop more specific and detailed site information...") DWQCERT, p. 7; and "The Applicant shall begin a Phase 1 Site Investigation within 60 days of receipt of site access to confirm that basic Project feature locations are appropriate and to provide basic design parameters for the final layout of Project features." (DWQCERT, Condition 1, p. 33) Even the USF&W notes in its letter dated May 20, 2011, that ECEC has been "unable to provide site-specific studies including those involving water and biological resources, as well as geotechnical siting studies necessary to determine if the proposed site would be suitable for the project and its ancillary facilities. (See USF&W letter included with and a part of **EXHIBIT "D"**). The USF&W more recently confirmed in its BIO, that: "Throughout this process, Eagle Crest has not been granted access to land owned by Kaiser Ventures LLC⁹. As a result and as described in more detail in the biological baseline section, Eagle Crest has been unable to conduct hydrologic, geological and biological surveys of the proposed central project site." (BIO, p. 2.)

⁸ The USF&W formal section 7opinion for the Project dated April 10, 2012, is attached hereto as **EXHIBIT "G"** and such opinion is hereafter referred to in this letter as the "**BIO**".

⁹ The land at Eagle Mountain is actually owned by Kaiser Eagle Mountain, LLC and not by Kaiser Ventures LLC.



Not having any or not having current and complete information available for review and analysis defeats the very critical purpose of the State Water Board to assess the actual and potential impacts of the Project on water and other resources before making a determination if an appropriately conditioned 401 certification should be issued for the Project.

THE EIR FOR THE PROJECT DOES NOT COMPLY WITH CEQA. ACCORDINGLY, A 401 CERTIFICATION CANNOT BE PROPERLY ISSUED FOR THE PROJECT.

CRITICAL STUDIES AND ANALYSIS HAVE NOT BEEN PERFORMED. As a result of the lack of numerous site specific studies for the Project, among other reasons, any State Board action to approve the 401 certification cannot be made in compliance with CEQA. Additionally, recognizing that critical site specific studies have not been undertaken, the SWQCERT (and no doubt the FEIR) impermissibly defers numerous studies and analysis which results in uncertainty as to the known and foreseeable environmental impacts of the Project and the inability to develop appropriate mitigation measures which will lead to an uninformed decision on the Project. Simply put, a 401 certification for the Project cannot be properly issued when there has not been compliance with CEQA.

There is no exemption or excuse provided in CEQA, its implementing guidance and regulations, or in applicable case law that would allow noncompliance with the requirements of CEQA merely because an applicant does not have access to a project site and therefore cannot conduct critical studies and develop appropriate mitigation measures prior to a governmental agency making a discretionary decision. To allow what is being proposed in this situation would effectively eviscerate the primary purpose of CEQA. If the Project is allowed a "free pass" under CEQA for the reason of not having access to a site then this loop hole will only encourage future applicants not to have access to a site so that they can defer the effort and cost of preparing necessary studies and analysis as well as the attendant necessary public and governmental review and comment process on environmental impacts and mitigation measures until after a project has obtained its approvals from a governmental agency.

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.)

As summarized above, numerous critical studies with current and adequate information will be absent from the FEIR and will not be undertaken until *after* the 401 certification may be issued for the Project.

THERE IS AN IMPROPER DEFERRAL OF STUDIES. Deferring studies, impact analysis and then subsequently developing mitigation measures does not comply with 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. Deferral of mitigation is generally impermissible, unless an agency commits itself to mitigation and either: (1) adopts a performance standard and makes further approvals contingent on finding a way to meet the standard; or (2) lists alternative means of mitigating the impact which must be considered, analyzed, and possibly adopted in the future. (*Endangered Habitats League v. County of Orange* (2005) 131 Cal. App. 4th 777, 793-794; *Gray v. County of Madera* (2008) 167 Cal. App. 4th 1099, 1118;). This is **not** the case here, as it is impossible to adopt any performance standard when the project impacts are still largely unknown. (*See Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1275 [deferral is impermissible where agency "simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in that report"])).

PUBLIC PARTICIPATION HAS BEEN THWARTED DUE TO THE LACK OF ADEQUATE INFORMATION. In addition to CEQA requiring adequate and complete studies and analysis of actual and foreseeable environmental consequences, "[p]ublic participation is an essential part of the CEQA process." (CEQA Guidelines Section 15201). The public's right to participate is mandated by the CEQA statute itself (Cal. Pub. Res. Code Section 21061) and is protected by the California courts. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 197-200). While there certainly have been opportunities for the public to participate in the State Board process, the public participation process has been effectively thwarted and restricted due to the unavailability of studies and analysis for the Project which, if they were available, would have allowed for meaningful public and other governmental agency participation, review and analysis. Failure to comply with CEQA's information disclosure requirements is a prejudicial abuse of discretion when the omission of relevant information has precluded informed decision making and informed public participation, regardless of whether the agency would have reached a different outcome if it had complied with the disclosure requirements. (*City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal. App. 4th 889, 898).

Furthermore, the DWQCERT provides no procedures for a realistic and meaningful means for governmental agencies and the public to comment on all of these deferred Project studies and plans for the Project and the mitigation measures that may be formulated after the 401 certification may be issued. If the State Board should proceed with the issuance of a 401 certification for the Project even though the issuance of the 401 certification will be flawed, at the very least, as a condition of the Project, the



State Board should provide for the circulation of all of these additional studies and plans and provide for a comment period. It may be necessary to circulate a supplemental environmental impact report containing the studies and analysis that are to be undertaken once ECEC gains access to the Eagle Mountain site (assuming it ever gains access to the site).

Kaiser recognizes that perfection is not required in an environmental impact report. None the less, it is clear that CEQA has not been appropriately complied with for this Project. In this instance, the emperor (i.e., the Project) has no clothes. The 401 certification for the Project should thus be denied.

UNDERSTANDING HOW A POSSIBLE SETTLEMENT BETWEEN THE STATE BOARD AND ECEC MAY HAVE IMPACTED THE HANDLING OF ECEC'S APPLICATION FOR A 401 CERTIFICATION, THE DWQCERT, ETC.

In response to a public records request regarding the Project, the State Board furnished to Kaiser, among other things, the agenda for each of several meetings of the meetings that took place between State Board staff and ECEC representatives. While the agendas for the meetings document the topics one would typically expect to be discussed between an applicant and the State Board regarding a 401 certification, one agenda item listed for the May 26, 2011, meeting (See EXHIBIT "H" attached) raises some questions. Specifically, one of the topics listed in the agenda is "**5. Process for FEIR and WQ • Settlement Agreement between ECEC and State Water Board?**" 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, threatened litigation, a settlement agreement and the discussions surrounding a possible settlement agreement and possible litigation could have impacted the DWQCERT including the conditions and mitigation measures to be imposed upon the Project. One 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 discussion is warranted.¹⁰

IMPACTS ON GROUNDWATER AND WATER QUALITY

A number of questions and concerns still remain with regard to the Project's impacts on groundwater and water quality. For example, seepage is still a concern. Not all seepage control measures have yet to be identified. (See DWQCERT, pp. 25-27). The cost of seepage mitigation measures has not been adequately discussed and thus, it is not known if the current suggested seepage mitigation measures are economically feasible. In addition, it is unknown if the currently suggested seepage

¹⁰ Kaiser is not asserting or implying that anything improper may have incurred. However, litigation or even the threat of litigation by an applicant, and any settlement discussions and a settlement agreement with an applicant can mold how an application and associated documentation are handled. An understandable and transparent process is critical in dealing with projects, particularly projects that are controversial.



mitigation measures are practical and will be effective. For example the Project's use of fine tailings (which may not be available to ECEC) for a liner does not appear to be practical due to the rapid discharge and refilling of the reservoirs and given the steep slopes of the reservoirs. (See Geosyntec Consultant's report, ATTACHMENT #1 to EXHIBIT "C" of this letter which discusses the use of fine tailings as a liner.)

The DWQCERT does seek to address certain seepage impacts to the Landfill through Condition 7 that provides that "the Project must be operated such that it will not cause pumped groundwater or seepage to encounter the Landfills liner. (DWQCERT, p. 41). This condition is necessary and helpful, but it does not address the other conflicts between the two projects as discussed in more detail below under **"The Project is Not Compatible with the Eagle Mountain Landfill."**

As previously noted, the potential for leaching metal is a concern that has not been adequately addressed. (DWQCERT, p. 8). A complete understanding of the potential environmental impacts of possible metal leaching resulting from the Project needs to be understood for the protection the ground water. This cannot be done at this time and therefore a 401 certification should not be issued for the Project.

The DWQCERT does not adequately address the brine ponds and the disposal of the resulting salts. What if the brine and resulting salt is determined to be a hazardous waste? What permits will be required and how the waste will be properly disposed and at what locations? These matters are essentially left unaddressed.

THE PROJECT IS NOT COMPATIBLE WITH THE EAGLE MOUNTAIN LANDFILL

ECEC has continually, but improperly, asserted that the Project is compatible with the Landfill. The conflicts between the Project and the Landfill 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 the State Board and with FERC by the Los Angeles County Sanitation Districts (the "**District**"). The District recently reiterated its position in its letter to FERC dated May 16, 2012, maintaining that a license for the Project should not be issued "due, among other things, to the adverse effects that the Project would likely have on the District's Eagle Mountain Landfill ('Landfill') project which will operate on lands directly adjacent to, and in places overlapping the proposed Project." (See EXHIBIT "I" attached hereto.)

The DWQCERT should discuss the Project's siting and operational conflicts with the Landfill and the Project's potential environmental and safety impacts to the Landfill. For example, a summary review and analysis of the incompatibility between these two projects was undertaken by Geosyntec Consultants (See ATTACHMENT NO. 1 to EXHIBIT "C" attached hereto). In summary, Geosyntec: (i) states the obvious - that no one purposefully sites a landfill near a large body of water; (ii) discusses a number of issues, concerns and conflicts that have been inadequately studied and analyzed including geotechnical matters, seepage, slope stability, impacts to the landfill's storm water plan, liner, monitoring and collection systems and facilities, etc.; and (iii) the possible loss of approximately 31 million cubic yards (25.6 million tons) of airspace impacts in current Phase 2 of the Landfill, and approximately 9 million cubic yards (7.4 million tons) of airspace impacts in Phase 3 of the Landfill. Additionally,



there will likely be other Landfill air space losses as well as delays in the use of portions of Landfill phases.

The District's letter of February 29, 2012, to FERC commenting on the FEIS for the Project also details the conflicts between the two projects; Such letter is attached hereto and incorporated herein by this reference (EXHIBIT "J").

In addition to addressing the environmental and safety impacts to the Landfill, the DWQCERT (as well as the FEIR) should discuss how the waste discharge requirements for the Landfill may be impacted by the Project's construction and operation and how conflicts between the Project and the Landfill will be addressed and resolved. At a minimum, additional conditions with regard to this matter need to be imposed on the Project in the 401 certification. Suggested additional conditions are set forth later in this letter.

ALTERNATIVES ANALYSIS

There is no meaningful discussion and evaluation of alternatives to the Project and in particular there is no discussion of alternative locations for the Project's reservoirs and ancillary facilities other than the transmission line. CEQA Guidelines (Section 15126.6) mandate that an environmental impact report describe and evaluate the comparative merits of alternatives to the Project that could achieve most of the Project's objectives but that would avoid or substantially lessen substantial environmental effects. This has not been adequately undertaken and the Project's stated objectives are improperly self-fulfilling. While the FEIS¹¹ provides a very minimal explanation as to why the use of one of the far west mining pits at Eagle Mountain as the upper reservoir and the central pits as the lower reservoir for the Project is not a feasible alternative, there is no meaningful discussion in such document. It fails to adequately analyze the possible reduced environmental and safety risks of an alternative location for the reservoirs and other affiliated structures. A thorough analysis by the State Board of this alternative much like that undertaken by State Board with regard to the transmission line which resulted in the recommendation of an alternative transmission route that was environmentally superior must be undertaken prior to issuance of a 401 certification.

MINERAL RESOURCES

As previously commented on by Kaiser, the DEIR did not adequately discuss and analyze the Project's impacts on the mineral resources at Eagle Mountain, including the possible loss of valuable mineral resources, the possible loss of jobs and the possible loss of funding for the California State Teachers Retirement System. In fact, the DEIR incorrectly responds "No" to the question: *"Would the project result in the loss of available mineral resources that would be of value to the region and the residents of the state?"* Similarly, while the DWQCERT does discuss in summary fashion the geology of the Eagle Mountain region, it does not address the impacts of the Project on the mineral resources and the consequences of such impacts.

¹¹ Again, because the FEIR has not been released one does not know of the content, if any, of any new alternatives analysis but such topic is not adequately addressed in the DWQCERT.



The final EIS issued by FERC for the Project released on January 27, 2012, better describes the mineral resources at Eagle Mountain and their value although such description and the analysis are incorrect or incomplete in several material respects.

With regard to the analysis on the mineral resources, the FEIS states, in part as follows:

Reclamation of existing rock and ore materials from both recoverable and bedrock sources within the proposed central project area would not be possible once the project is constructed and is in operation. The iron ore present beneath the project facilities, and specifically the reservoirs, would only become accessible for mining and operations if in the future the project is decommissioned.

We estimate the potential economic value of recoverable iron ore at Eagle Mountain mine that would be inaccessible in the east and central pits once the project is operational would be between \$8 billion and \$13 billion. ...

However, given that the mining equipment once use to extract and process iron ore at the mine has since been removed, the extraction and shipment of any recoverable mineral resources from the mine is not currently feasible without significant investment to replace the mining equipment. Additional permitting in accordance with the County of Riverside would be required because, as stated in the proposed landfill's draft EIS/EIR (CH2M HILL, 1996), the county has held that vested mining rights cease to exist at the Eagle Mountain mine in 1983 when mining activities stopped. (FEIS, pp. 63-64.)

As noted, the FEIS is incorrect in several material respects, and these same errors presumably underlie the State Board's analysis with regard to the Project's impacts to mineral resources.

First, and most importantly, the Eagle Mountain mine does have a vested mining right, meaning that no use permit is required to continue mining iron ore and other mineral resources at the mine, or to conduct other surface mining operations. The proposed Landfill draft EIS/EIR contains a limited discussion of vested rights at the mine, including a statement based upon one individual's erroneous analysis of vested mining rights under zoning principles rather than the law specifically applicable to vested mining rights. The existence and validity of mining rights at the mine have since been confirmed first by the California Natural Resources Agency in the 2006 Salton Sea Ecosystem Restoration Draft PEIR, which proposed to obtain aggregate from the mine as part of the subject project, and then by Riverside County. The PEIR states that the mine is entitled to supply aggregate material, and "no further permit under [the California Surface Mining and Reclamation Act] is anticipated . . ." (Salton Sea Ecosystem Restoration Draft PEIR, H5-26.) Riverside County has subsequently confirmed that the Eagle Mountain mine has vested mining rights. See, e.g. letter of



Riverside County to Kaiser Eagle Mountain, LLC dated May 25, 2010, a copy of which is attached hereto as EXHIBIT "K."

It should be noted that surface mining operations at the mine, including the recovery, processing, and sale of stockpiled materials, remains ongoing. The Landfill draft EIS/EIR recognized these ongoing operations. (See Landfill Draft EIS/EIR, pp. 1-2.) The federal Interior Board of Land Appeals ("IBLA") also determined, in a formal decision issued after litigation, that the mine had been operated continuously after large-scale iron ore mining was phased down in 1983. (See 150 IBLA 314 (September 30, 1999), at 343, fn. 30.) These surface mining operations remain ongoing to the present, and have been actively reported to Riverside County and the state Department of Conservation, which regulates mining operations in California. Furthermore, increases in global market prices for iron ore have both increased the value of extracted and *in situ* reserves at the mine, and made large scale iron ore mining again economically feasible. Large-scale iron ore mining would be accompanied by significant local investment and hundreds of jobs. The DWQCERT does not reflect the fact that the Project would prevent these economic benefits.

Second, the FERC FEIS analysis also states that because a sizeable investment will be necessary to resume large-scale iron ore mining it implies the conclusion that such mining would not resume. There would indeed need to be a sizable investment in mining equipment, etc. However, even based upon the estimates made in the FEIS, the value of the resources directly impacted by the Project would range from \$8 to \$13 billion dollars. This estimated range of value does not even take into account all the iron ore that may be recoverable at the Eagle Mountain site and that would be impacted by the Project. By contrast, ECEC's Project may involve a total cost approaching \$1.5 billion dollars, and ECEC does not have a power purchase contract or an economically viable project. The investment required to access mineral reserves at the Eagle Mountain mine is not a reasonable basis on which to conclude that the Project's impacts would be insignificant.

Third, the State Board's mineral analysis also incorrectly concludes that the Project would only impact the mineral resources on which ECEC's reservoirs and other facilities would overlay. This is not the case. The site has been designed and utilized as a cohesive mining unit, and disruption of a significant portion of the site could make mining the remainder infeasible. Moreover, the investment required to continue large scale iron ore operations demands scale that would be prevented by the Project. The Project would consequently effectively eliminate the resumption of extractive iron ore mining on the entire Eagle Mountain site. Mining companies will not want "half-a-loaf." Thus, the Project impacts on the mineral resources and their loss must be described and analyzed accurately and more expansively.

Fourth, and finally, DWQCERT does not address the possible impacts of the Project on the California State Teachers Retirement System. This discussion is also lacking in the DEIR and the FEIS. The FEIS states that: "About 23.5 million tons of recoverable iron ore situated in the east pit is currently held by the California State Lands Commission and not owned or leased by Kaiser." (See FEIS, p. 63-64.) What is not said and what is not addressed is that this iron ore is held for the benefit of the California State Teachers Retirement System. Under California law, revenues



generated from these "School Lands" accrue to the benefit of the State Teachers Retirement System. In other words, Kaiser must pay royalties to the California State Teachers Retirement System based upon the value of iron ore extracted from the subject property. In an April 10, 2012 article, the *Los Angeles Times* reported that the unfunded liability for the California teacher's retirement pension fund is an estimated \$64.5 billion. (See EXHIBIT "L") The FEIS further discusses assumed per ton values for iron ore based upon a set of cost assumptions made in the FEIS which resulted in value of iron ore from \$90 to \$146.72 per metric ton. Using these estimates, the gross value of this resource on the lands held for the benefit of the California State Teachers Retirement fund would range from approximately \$1.7 billion to \$2.76 billion dollars. Yet, analysis of these impacts is non-existent.

Again, appropriate studies and analysis of the mineral resources is required to be undertaken and the State Board will need to make appropriate findings. At a minimum a statement of overriding considerations concerning the Project's impact to mineral resources and to the underfunded State Teachers Retirement System pension fund is required.

Finally, with respect to mineral resources, neither the DWQCERT or the DEIR address jobs and revenues that would be lost if the Eagle Mountain mine cannot resume large-scale iron ore mining as a result of the Project.

BIOLOGICAL IMPACTS

NO INFORMATION ON MANY OF THE ACTUAL AND POTENTIAL IMPACTS TO BIOLOGICAL RESOURCES HAS BEEN PROVIDED. As previously discussed in this letter and in previous comment letters by KEM, MRLLC and others, there simply is inadequate information on the actual and potential biological impacts of the Project. This error is compounded by the fact that appropriate biological baseline studies have not having been undertaken. Deferring appropriate baseline studies does not satisfy the requirements of CEQA. Additionally, all biological measures described in the BIO, as it may be amended, should be added as a condition of the 401 certification.

INTRODUCTION OF NEW WATER SOURCES - EUTROPHICATION. Kaiser and MRLLC previously commented on the need for appropriate studies, analysis and mitigation measures with regard to eutrophication, i.e., the addition of nutrients to the desert ecosystem. While surveys and predator mitigation programs are outlined in the DWQCERT, such discussion and conditions inadequately address the possible environmental impacts of eutrophication. The introduction of two large bodies of water, resulting seepage, and the brine ponds result will substantially undoubtedly impact wildlife behavior and allow for the growth of various native and non-dative plants. The DWQCERT is inadequate in its consideration of the proliferation of nutrients and the possible impacts to biodiversity in the sensitive desert environment.

DAM BREAK AND FLOOD ANALYSES

Due to the catastrophic consequences to the town of Eagle Mountain, the CRA, the Landfill and other infra-structure if a dam breach occurs, a dam breach study and analyses is required prior to a decision by the State Board on the 401 certification.



Similarly, an adequate flooding analysis must be provided including a better analysis of Eagle Creek and its capacity to handle at a minimum a 100-year flood. The report and analysis of safety and environmental impacts cannot merely be estimated based upon maps and photos. If the 401 certification should be granted for the Project, it must be conditioned to provide adequate downstream flood and dam release control facilities. In addition, the 401 certification must be conditioned to require the applicant to provide suitable insurance coverage for possible damages and losses that may arise from the Project.

ADDITIONAL CORRECTIONS

In addition to those matters already addressed in this letter, there are a couple of additional factual matters that merit correction.

First, the amount of federal land and private land that will be impacted by the footprint of the Project is incorrectly reported in the DWQCERT as being 1,133 acres of federal land and 1,231 acres of privately owned land. The FEIS more correctly, but not completely correctly, reports the land ownership as follows: "Under current land ownership, the proposed project would occupy 675.63 acres of federal lands managed the U.S. Department of Interior, Bureau of Land Management ("BLM"), 467 acres of land administered by the California State Lands Commission, and about 1,545.63 acres on private lands owned by Kaiser Eagle Mountain, LLC." (FEIS, p. xix). However, even this description of the current land ownership is in error. The California State Lands Commission only owns 467 acres (technically 466.66 acres) of **mineral rights** in the East Pit, the proposed lower reservoir for the Project. Kaiser Eagle Mountain, LLC owns the surface rights to the 467 acres.

Second, there apparently is a misunderstanding as to the scope of the environmental approvals for the Landfill. All five phases of the Landfill were covered in the Landfill EIR/EIS and received the necessary approvals from Riverside County. The confusion perhaps arises from the fact that the approval of waste discharge requirements for Phase 5 was delayed.

ADDITIONAL CONDITIONS FOR THE PROJECT

If the State Board should ultimately determine to issue a 401 water quality certification for the Project, the Project should contain conditions in addition to those set forth in the DWQCERT. As discussed in this letter, additional conditions that should be imposed on the Project include the following:

1. The applicant must obtain a signed agreement from the permittee and landowner of the proposed Eagle Mountain Landfill project that acknowledges that construction and operation of the Project will not interfere with the design, construction or operation of the Eagle Mountain Landfill.

2. The Project shall be constructed and operated consistent with the terms and conditions included in permits issued for or other conditions or requirements imposed on the Eagle Mountain Landfill or on any other authorized use of the Eagle Mountain site that is in effect prior to construction of the Project, including, but not



limited to, the Eagle Mountain Landfill water discharge requirements, as they may be modified from time to time.

3. All reports and plans to be prepared and provided as a part of or in conjunction with the Phase I Site Investigations and the Phase II Site Investigations shall be compiled and released for public and governmental agency comment. The comment period shall be no less than 45 days and the Deputy Director shall be authorized to extend the comment period for up to an additional 30 days. The State Water Board shall review and answer all comments received on the Phase I reports and plans prior to the finalization of any Phase II Site Investigation Plan and prior to the commencement of any Phase II Site Investigation. All reports and plans prepared and provided as a part of or in conjunction with the Phase II Site Investigation Plan shall be compiled and released for public and governmental agency comments at least 6 months prior to the commencement of any construction for the Project. The comment period shall be no less than 45 days and the Deputy Director shall be authorized to extend the comment period for up to an additional 30 days.

4. All survey, monitoring and mitigation measures contained in the USF&W biological opinion for the Project, as it may be amended from time to time, are hereby incorporated as conditions of this water quality certification.

5. The applicant will design, construct and maintain downstream drainage and water control structures and facilities that will not erode and that will be of sufficient capacity and nature to safely divert at a minimum any 100-year flood or a sudden release of all water from a reservoir away from the Eagle Mountain Landfill, the town of Eagle Mountain and other material infrastructure in the area.

6. 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.

7. 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.



MR. BIONDI
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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

TLC:jpk

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