

City of Morro Bay

City Council Agenda

Mission Statement

The City of Morro Bay is dedicated to the preservation and enhancement of the quality of life. The City shall be committed to this purpose and will provide a level of municipal service and safety consistent with and responsive to the needs of the public.

SPECIAL MEETING

Councilmember Noah Smukler will be communicating by teleconference from the following location: 11-1884 1st Avenue, Keaau, Hawaiian Paradise Park, Hawaii

**WEDNESDAY, DECEMBER 5, 2012; 5:00 P.M.
VETERAN'S HALL - 209 SURF STREET, MORRO BAY, CA**

- I. ESTABLISH QUORUM AND CALL TO ORDER**
- II. MOMENT OF SILENCE**
- III. PLEDGE OF ALLEGIANCE**
- IV. PUBLIC COMMENT**
- V. RESOLUTION 59-12 APPROVING AND AUTHORIZING THE EXECUTION OF AN AMENDMENT TO THE AGREEMENT TO LEASE AND AN AMENDMENT TO THE OUTFALL LEASE BETWEEN THE CITY OF MORRO BAY AND DYNEGY MORRO BAY LLC**
- VI. ADJOURNMENT**

THIS AGENDA IS SUBJECT TO AMENDMENT UP TO 24 HOURS PRIOR TO THE DATE AND TIME SET FOR THE MEETING. PLEASE REFER TO THE AGENDA POSTED AT CITY HALL FOR ANY REVISIONS OR CALL THE CLERK'S OFFICE AT 772-6205 FOR FURTHER INFORMATION.

COPIES OF STAFF REPORTS OR OTHER PUBLIC DOCUMENTATION RELATING TO EACH ITEM OF BUSINESS REFERRED TO ON THIS AGENDA ARE ON FILE IN THE OFFICE OF THE CITY CLERK AND AVAILABLE FOR PUBLIC INSPECTION AND REPRODUCTION AT COST AT CITY HALL, LIBRARY, AND MILLS STATIONERY.

IN COMPLIANCE WITH THE AMERICANS WITH DISABILITIES ACT, IF YOU NEED SPECIAL ASSISTANCE TO PARTICIPATE IN A CITY MEETING, PLEASE CONTACT THE CITY CLERK'S OFFICE AT LEAST 24 HOURS PRIOR TO THE MEETING TO INSURE THAT REASONABLE ARRANGEMENTS CAN BE MADE TO PROVIDE ACCESSIBILITY TO THE MEETING.



AGENDA NO: _____

Meeting Date: December 5, 2012

Staff Report

TO: Honorable Mayor & City Council

DATE: December 3, 2012

FROM: Robert Schultz, City Attorney

SUBJECT: Resolution 59-12 Approving and Authorizing the Execution of an Amendment to the Agreement To Lease and An Amendment to the Outfall Lease Between the City of Morro Bay and Dynegy Morro Bay LLC

RECOMMENDATION

Approve Resolution 59-12 authorizing the execution of an Amendment to the Agreement to Lease and an Amendment to the Outfall Lease between the City and Dynegy.

FISCAL IMPACT

The Amendment to the Agreement to Lease and the Amendment to the Outfall Lease will have a fiscal impact of over \$800,000 per year to the City. These impacts are set forth below.

BACKGROUND

The Morro Bay Power Plant Project and its related facilities fall within California Energy Commission (CEC) licensing jurisdiction. (Pub. Resources Code, §§ 25500 et seq.) Although the City does not have regulatory authority over the Power Plant, it does administer the Outfall Lease. The heated discharge water from the Power Plant is pumped through subterranean pipes that traverse City-administered property, which is subject to the Public Trust for Commerce, Navigation and Fisheries (the "Public Trust"). The heated water is then discharged into Estero Bay through a discharge canal located at the base of Morro Rock. The City also uses the outfall discharge system for brine discharge from its desalination facility.

The City administers the Public Trust lands as the trustee for the State of California, which conveyed the Public Trust lands first to the County of San Luis Obispo and then to the City upon its incorporation. As administrators of public trust lands, the City is required to manage tidelands through statute and implementation of the Public Trust Doctrine (the common law principles that govern use of these lands). Uses on public trust lands must serve statewide, as opposed to purely local, public purposes.

Prepared By: <u>RWS</u>	Dept Review: _____
City Manager Review: _____	
City Attorney Review: <u>RWS</u>	

The initial Outfall Lease was entered into between the County and PG&E on November 15, 1954 for a term of 50 years. On November 15 2004, the City entered into a new Outfall Lease Agreement and Agreement to Lease. The November 15, 2004 Outfall Lease Agreement and Agreement to Lease was for a term of 50 years, so long as the Power Plant operator reached New Plant Commencement Construction by November 15, 2012. Since the Power Plant Operator did not reach New Plant Commencement Construction by that date, the Outfall Lease Agreement and Agreement to Lease are in hold over status and on a month to month lease.

City Staff has now negotiated an extension of the Outfall Lease Agreement and Agreement to Lease. The following terms and conditions have been incorporated into the attached Amended Agreement to Lease and Amended Outfall Lease:

- Term of Lease. The term of the Lease will be extended until December 31, 2017.
- Outfall Rent. Rent under the amended Lease will be \$260,000 per year, commencing January 1, 2013. Rent will not be adjusted by CPI.
- CDF Payments. Dynegy will make annual payments to the City's Community Development Fund ("CDF") in an amount of \$525,000, commencing January 1, 2014. CDF payments will not be adjusted by CPI.
- Option to Cancel. Dynegy shall have option to cancel the Agreements by written notice to the City by August 1, 2013, and February 28th of each following year to cancel any and all payments for the next calendar year.
- Embarcadero Property. Dynegy agrees to deed the triangle shaped property adjacent to the Power Plant to the City. The City has for a long time sought ownership of this parcel of over two acres for many different possible City purposes.
- Lila Keiser Park and adjacent land on J Street. Dynegy shall provide a continuous 10 year Lease to the City for Lila Keiser Park and the adjacent land on J Street. The City currently has an easement for Lila Keiser Park but it can be revoked for power plant purposes. This continuous Lease will enable the City to apply for grant funding for park improvements.
- Front Street ROW. Dynegy agrees to deed the Front Street right-of-way to the City to allow for the development of the Maritime Museum.
- Bike/Pedestrian Path. After cessation of operation, Dynegy agrees to provide property for the construction of a bicycle and pedestrian path. The City shall assume all obligations and funding to design, construct and maintain the bicycle and pedestrian path.

- Long Term Planning. Dynergy will agree to pay the sum of \$35,000 to develop a planning process involving local neighborhood groups and citizens to shape a vision and a range of planning options for the redeveloped Site.
- Fire Protection. Dynergy agrees to pay \$40,000 annually beginning January 2014 for the City to provide fire protection services, first response services and rescue services.
- Cost Reimbursement. Dynergy will reimburse the City up to \$35,000 to cover the reimbursement of all lease negotiations.

CEQA Guideline Section 15301 exempts from CEQA review the operation, repair, maintenance, permitting, leasing, licensing or minor alteration of existing public or private structures and facilities involving negligible or no expansion of use. In addition, in 2004, the CEC determined and made findings that the thermal impacts from the outfall are not significant on the marine environment and meet the requirements of the Clean Water Act and the California Thermal Plan.

In a nutshell, the City of Morro Bay stands to receive over \$800,000 per year if the Agreements are approved by City Council. These amounts will continue annually until 2017 unless the Power Plant ceases to operate. In addition, the City will immediately gain key real estate appraised in the millions of dollars. With this in mind, the City of Morro Bay should approve and authorize the Amendments to the Agreement to Lease and Outfall Agreement.

CONCLUSION

Staff recommends that Council Approve Resolution 59-12 authorizing the execution of the Amendments to the Agreement to Lease and the Outfall Lease between the City and Dynergy.

RESOLUTION NO. 59-12

**RESOLUTION OF THE CITY COUNCIL
OF THE CITY OF MORRO BAY, CALIFORNIA
APPROVING AND AUTHORIZING THE EXECUTION OF AN
AMENDMENT TO THE AGREEMENT TO LEASE AND
ADMENDMENT TO THE OUTFALL LEASE BETWEEN
THE CITY OF MORRO BAY AND DYNEGY MORRO BAY LLC**

**THE CITY COUNCIL
City of Morro Bay, California**

WHEREAS, the City of Morro Bay leases to Dynegy Morro Bay LLC property on which is located an off-site outfall structure used for the discharge of the heated water from the Morro Bay Power Plant; and

WHEREAS, the initial Outfall Lease was for 50 years and expired on November 15, 2004, and Staff negotiated a new Agreement to Lease and Outfall Lease Agreement that was approved by the City Council; and

WHEREAS, the current Agreement to Lease and Outfall Lease Agreement that was approved by the City Council was for a term of 50 years so long as the Power Plant Operator reached New Plant Commencement Construction by November 15, 2012; and

WHEREAS, the Power Plant Operator did not reach New Plant Commencement Construction by November 15, 2012, so the Outfall Lease Agreement and Agreement to Lease are in a month to month holdover lease; and

WHEREAS, the City of Morro Bay and the California Energy Commission have determined that the thermal discharges from the Morro Bay Power Plant Outfall do not result in any significant detrimental biological impacts; and

WHEREAS, the City of Morro Bay and the California Energy Commission have determined that thermal impacts from the Morro Bay Power Plant Outfall are not significant pursuant to the Clean Water Act and will also comply with the California Thermal Plan; and

WHEREAS, the City of Morro Bay and the California Energy Commission have determined that the Morro Bay Power Plant provides local economic benefits and electricity reliability to the San Luis Obispo County area; and

WHEREAS, the City of Morro Bay finds that the requirements of CEQA have been satisfied by the CEC's process and associated documents, and adopts the findings set forth in the California Energy Commission's decision on the Morro Bay Power Plant; and

WHEREAS, the City Council of the City of Morro Bay finds that the approval of the Agreement to Lease and Outfall Lease is exempt from review under CEQA because it involves the lease and minor alteration of existing facilities as described in State CEQA Guidelines Section 15301 and is exempt under Class 1, Existing Facilities; Title 2, California Code of Regulations, section 2905 (a)(2).

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Morro Bay authorizes and directs the Mayor to execute the Amendment to Agreement to Lease and the Amendment to the Outfall Lease in the form attached hereto and to accept, on behalf of the City of Morro Bay, deeds to the parcels of real property to be acquired by the City under the Agreement to Lease, and to execute, on behalf of the City, such additional documents, as may be needed to complete the transactions set forth in the Agreement to Lease and the Outfall Lease.

PASSED AND ADOPTED by the City Council of the City of Morro Bay at a special meeting thereof held on the 5th day of December 2012, by the following vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

WILLIAM YATES, Mayor

ATTEST:

JAMIE BOUCHER, City Clerk

**AMENDMENTS TO AGREEMENT TO LEASE AND AGREEMENT
REGARDING POWER PLAN MODERNIZATION BETWEEN CITY OF
MORRO BAY AND DYNEGY MORRO BAY LLC**

**AMENDMENTS TO THE NOVEMBER 15, 2004 AGREEMENT TO LEASE AND AGREEMENT
REGARDING POWER PLANT MODERNIZATION**

These Amendments to the November 15, 2004 Agreement to Lease and Agreement Regarding Power Plant Modernization ("Amendments") are entered into by and between the City of Morro Bay and Dynegy Morro Bay LLC effective as of January 1, 2013 (the "amendment effective date"). The City of Morro Bay and Dynegy Morro Bay LLC are referred to individually as the "Party" or collectively the "Parties".

The following amendments are made:

Recital (B) is amended to replace "DUKE ENERGY MORRO BAY LLC ("DUKE")" with "DYNEGY MORRO BAY LLC ("DYNEGY")".

Paragraph 1.8 is amended to replace "DUKE ENERGY MORRO BAY LLC" with "DYNEGY MORRO BAY LLC" in both the title and substance.

Paragraph 2.1 is amended to add the following at the end:

"The Outfall Lease has been amended concurrently with this Agreement. The Amendment shall be appended hereto as Exhibit A."

Paragraph 4.2.1 is amended to add the following at the end:

"Commencing on January 1, 2014 Dynegy agrees to make an annual CDF payment to the City, due on or before January 21 of each year, for the then current year, in the fixed amount of FIVE HUNDRED TWENTY FIVE THOUSAND DOLLARS (\$525,000). This payment shall not be subject to adjustment under Section 1.5 or otherwise through the 2017 payment. Pursuant to Section 2.1(4) of the Outfall Lease, Exhibit A hereto, DYNEGY shall have the option to cancel the Agreement to Lease and Outfall Lease by written notice to the CITY by August 1 for the calendar year 2014 and February 28th of each following year to cancel any and all payments for the next calendar year.

Paragraph 10.3 is amended to add the following at the end:

"The CITY and DYNEGY acknowledge the incredible opportunity and responsibility in planning for re-use of the Site upon the Permanent Cessation of Electrical Power Generation from the Existing Plant. The Parties agree to cooperate and work together to develop a planning process involving local neighborhood groups and citizens to shape a vision and a range of planning options for the redeveloped Site. Beginning in 2015, Dynegy agrees to pay up to the sum of \$35,000 to develop a series of development scenarios for reuse of the Site."

Add Paragraph 13.2.11 as follows:

"Prior to June 1, 2013, DYNEGY shall provide to the CITY with a Lease Agreement for Lila Kaiser Park and the adjacent land on J Street, for a term of 10 years. Each anniversary date of the Lease Agreement shall automatically become the new effective date of the Lease Agreement. The Lease Agreement shall allow for either party, on the anniversary date, to elect to not continue the automatic renewal provision of the Lease whereupon the term of the Lease Agreement shall revert to 10 years from the anniversary date of said exercise not to renew the automatic extension. It is understood by the Parties that this Lease Agreement is being entered into in order to allow the City to obtain grant funding for improvements to Lila Kaiser Park and is inclusive and does not superseded the revocable easement that has been entered into by the Parties."

Add Paragraph 13.2.12 as follows:

"The CITY currently desires to pursue locating a Maritime Museum within a portion of the Front Street Right Of Way and the Front Street parking lot. In order for the project to be developed in the existing public ROW, the CITY must vacate and abandon the public ROW. The vacation of a public easement for a street or highway will allow that property under the easement to revert back to the property owner. DYNEGY agrees to quitclaim all of its rights, title and interest in the Front Street right-of-way to the CITY to allow for the development of the Maritime Museum."

Add Paragraph 13.2.13 as follows:

"The CITY currently desires to pursue a Bikeway/Pedestrian Path through the Existing Plant Property. Upon the Permanent Cessation of Electrical Power Generation, DYNEGY agrees to cooperate with the CITY to achieve that goal. The CITY shall assume all obligations and funding to design, construct and maintain the Bikeway/Pedestrian Path through the Existing Plant Property. In the event the City moves forward with a Bikeway/Pedestrian Path through the Existing Plant Property, the location and reasonable terms and conditions of such easement shall be agreed upon by the parties prior to final design and construction. The location and terms and conditions shall include that the City

shall repair and maintain the paths, and that construction of the paths, location and use of said easements may not interfere with operation and maintenance of the Existing Plant Property. Any dispute over the location, use and terms and conditions shall be submitted to arbitration under Article 21."

Add Paragraph 13.2.14 as follows:

"Dynergy shall dedicate to the CITY by May 1, 2013, the triangle-shaped property adjacent to the Embarcadero ("Southern Triangle"); the property is delineated on the Map attached hereto and is currently subject to a License Agreement between the parties. If remediation is necessary for the Southern Triangle property, the CITY may elect either to delay receipt of the property until completion of remediation or to accept the property "as is." In addition, DUKE shall not be required to make this dedication until appropriate security fencing is installed as necessitated by power plant operations. The CITY agrees that in accepting any dedication under this Section, the CITY will not use the property in a way that is not compatible with development or operation of the Existing Plant. In addition, after dedication, DYNEGY shall be able use said property for necessary power plant operates based upon agreeable terms and conditions. Said dedication shall be subject to and consistent with any applicable restrictions in the PG&E Purchase and Sale Agreements.

Add Paragraph 13.2.15 as follows:

"The payments, property dedications, licenses and easements to be made under Sections 10.3, 13.2.11 and 13.2.12, 13.2.13 and 13.2.14 are not contingent on DYNEGY's operation of the Existing Plant or whether DYNEGY cancels the Agreement pursuant to Section 2.1. The Parties intend and acknowledge that the payments, property dedications, licenses and easements are to be made on the terms and conditions provided in this Amendment regardless of whether DYNEGY continues to operate the Existing Plant, ceases to operate the Existing Plant, constructs or cancels this Agreement or the Outfall lease Agreement attached as Exhibit A."

Paragraph 16. 1 is amended to add the following at the end:

"Prior to January 1, 2013, DYNEGY and the CITY shall enter into a Fire Protection Agreement. The purpose of this Agreement is to set forth the terms upon which the City shall provide DYNEGY fire protection services, first response services and rescue services. The Fire Protection Services Agreement shall require DYNEGY to pay the CITY \$40,000 annually beginning on January 1, 2014 through the end of the Agreement. The form of the Fire Protection Agreement is set forth in Exhibit C attached hereto."

Article 19 notice is amended as to Notice to DYNEGY as follows:

Dynegy Inc.
601 Travis Street
Houston, TX 77002
ATTN: General Counsel

Paragraph 22.11 is amended to add the following at the beginning:

Upon the execution of the Amendments to the Amendment to Lease Agreement, DYNEGY agrees to pay to the CITY a sum not to exceed \$35,000.00 for consideration for the costs of negotiating and executing the Amendments to the Amendment to Lease. The City agrees to provide DYNEGY with a detailed description of the costs incurred by the CITY and DYNEGY agrees to reimburse the CITY the costs incurred up to \$35,000. It is the Parties' intent that this payment will cover any and all costs of the CITY through execution of the Amendments to the Amendment to Lease Agreement. Upon receipt of the aforesaid payment(s), the CITY waives any and all additional claims for said cost reimbursements.

Executed on this 29th day of November, 2012 to be effective January 1, 2013.

CITY OF MORRO BAY

DYNEGY MORRO BAY, LLC

By: _____
MAYOR

By: Martha W. Daley
Name: Martha W. Daley
Title: Vice President, Dynegy Power LLC

2012 AMENDMENTS TO NOVEMBER 15, 2004

OUTFALL LEASE

These amendments to the Lease made and entered into by and between the City of Morro Bay, a municipal corporation of the State of California ("CITY"), and Duke Energy Morro Bay LLC, a Delaware limited liability company ("TENANT"), effective as of November 15, 2004 ("LEASE") are made effective January 1, 2013. All other terms and conditions of the LEASE remain in full force and effect.

The TENANT on the LEASE is amended from "DUKE ENERGY MORRO BAY LLC, a Delaware limited liability company" to "DYNEGY MORRO BAY LLC"

Section 1.2(1) is amended on the third line by deleting the date "November 15, 2012" and replacing it with "December 31, 2017"

Section 1.2(3) is amended on the third line by deleting the date "November 15, 2012" and replacing it with "December 31, 2017" and by adding the phrase "subject to TENANT exercising the early termination option described in Section 1.2(4) below" at the end of the section.

Section 1.2(4) is added as follows: "(4) TENANT shall have the option, effective upon notification to the CITY on or before August 1, 2013 for the 2014 calendar year and February 28th of each following year to cancel any and all future payments.

Section 2.1(1) — add the following language at the end: "Commencing January 1, 2013, annual rent during the remaining term shall be Two Hundred and Sixty Thousand Dollars (\$260,000) and shall be due and payable in advance on January 1 (or the first business day of the new year thereafter) of each year of the remaining term."

Section 2.1(2) — Strike entire section and replace with the " Annual rent will not be subject to any cost of living adjustment . Section 13.2 is amended as to whom notices or demands to TENANT may be given at:

Dynegy Inc.
601 Travis Street
Houston, TX 77002
ATTN: General Counsel

IN WITNESS WHEREFORE, this Amendment to Lease is entered into by CITY and TENANT to be effective as of January 1, 2013.

CITY OF MORRO BAY

DYNEGY MORRO BAY, LLC, a Delaware LLC

By: _____
Mayor

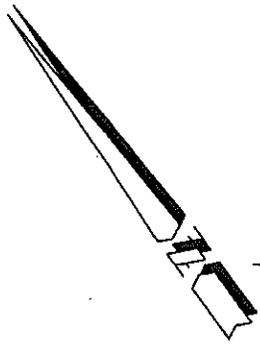
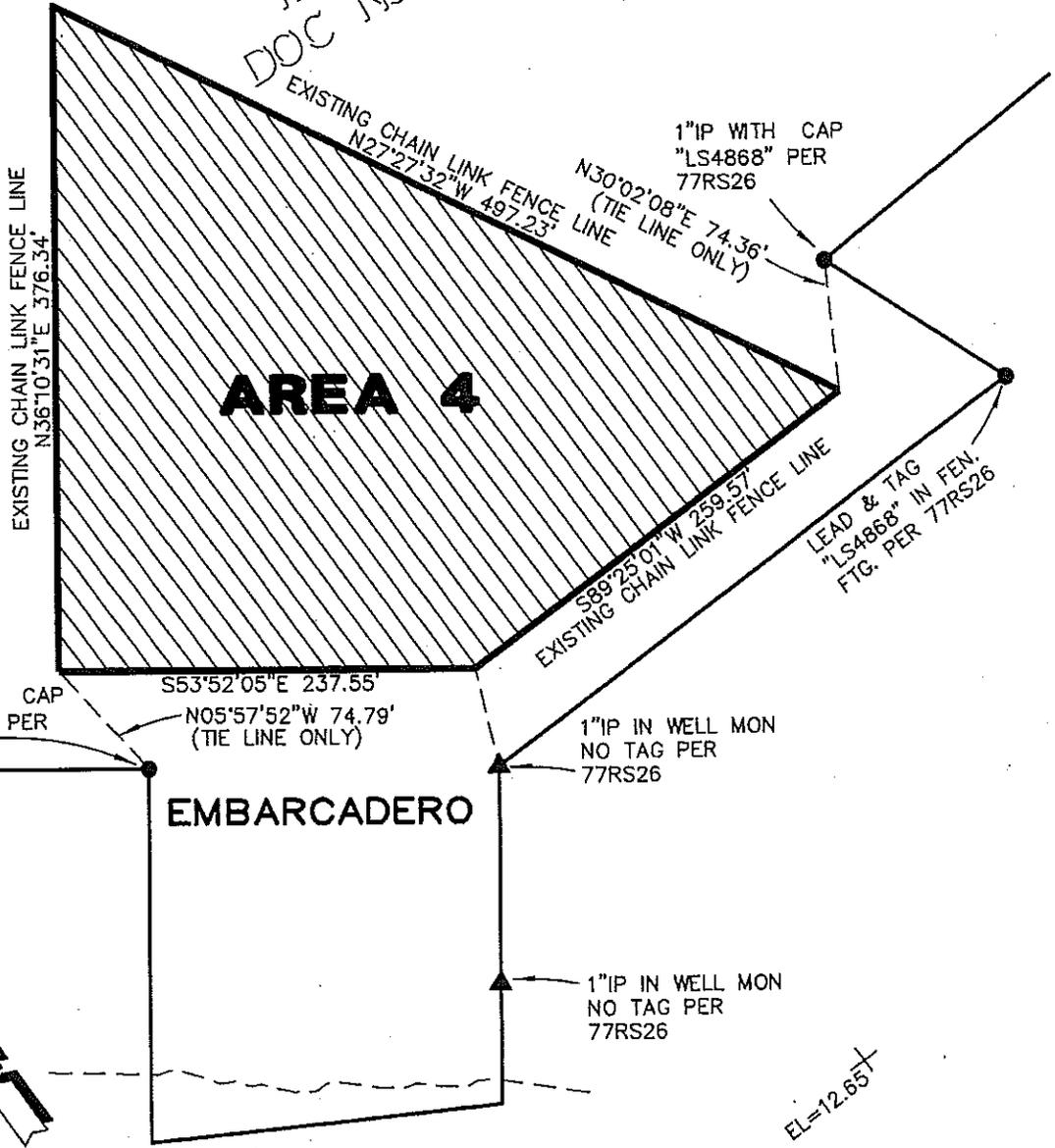
By: Matthew W. Daley
Name: Matthew W. Daley
Title: Vice President, Dynegy Power LLC

Attest:

By: _____
City Clerk

MORRO BAY
POWER PLANT

LOT 1 - LLA 01-97
MBAL 97-239
DOC No. 1993-010270



SCALE 1"=100'

PACIFIC OCEAN



MICHAEL B. STANTON, PLS 5702
3563 SUELDO ST. UNIT Q
SAN LUIS OBISPO, CA 93401
805-594-1960

DYNEGY POWER PLANT
MORRO BAY