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June 3, 2008

VIA EMAIL AND HAND DELIVERY

DOCKET
07-AFC-6
DATE JUN 0 3 2008
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Mr. Michael Monasmith
Siting Project Manager
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

Re: Carlsbad Energy Center Project (07-AFC-6)
Project Consistency with City of Carlsbad Land Use Ordinances

Dear Mr. Monasmith:

This letter identifies the factors by which the Carlsbad Energy Center LLC Project ("Applicant" or "CECP") is consistent with the City of Carlsbad's ("City") land use ordinances. The letter rebuts the interpretations and conclusions provided by City staff in its letter dated May 1, 2008. Applicant provides corrections to the City staff's conclusions and requests that CEC staff look beyond the City staff's position and focus on the land use ordinances in completing the CEC's Warren-Alquist Act siting process.

I. Summary

CECP is urgently needed to meet the San Diego regional electrical needs and goals for new in-basin generating, utilizing the most efficient and environmentally sound generating facilities. Since San Diego Gas & Electric's ("SDG&E") sale of the Encina Power Station in 1999, the City has continuously and repeatedly engaged the new site owner in discussions regarding the repowering and relocation of generation capacity to the easterly portion or the owner's property, so as to free up the westerly portion and adjacent lagoon for an undefined range of public and private uses. The uses include recreation, aqua farming/marine research, hotel/lodging, restaurant, retail and others, all to advantage the City and owner of the beach and lagoon proximity. Only now, when the energy needs and demands of the region have made the first move in that direction achievable, is the City asserting that such a project is inconsistent with the City's land use plans and ordinances. The City incorrectly concludes that the Carlsbad Energy Center Project ("CECP") is fatally inconsistent with the City's existing land use ordinances and

regulations. This conclusion is not supported by the City's zoning of the site or the City's planning documents.

The City also raises, or has recently raised, other objections to CECP. For instance, the City has questioned whether the plant could be properly considered "coastal dependent" given its avoidance of the use of once though sea water cooling. Ultimately, all of these objections or concerns can be shown as being driven by a recent change in view of the City rather than being founded upon consistent policy, facts, or law. The focus of this letter, however, is upon correcting the record on the statements or characterization by City Staff of Carlsbad land use ordinances and regulations in the City's letter dated May 1, 2008.

As the City letter warns: "...be advised that Carlsbad does not support CECP." It appears this articulated firm position has influenced the City's present interpretation of its existing land use regulations and policies. Such interpretation, however, does not change the fact that CECP is consistent with City land use plans and ordinances. Instead, the letter acts as a political signal that the CEC may be obliged to assert its superior jurisdiction over local ordinances and take full responsibility for determining compliance with local land use ordinances and approving all aspects of the project.

The origin and incorporation of the city in 1952 was driven, in part, by a goal of the community of benefiting financially and economically from a new tax base represented by the construction of the Encina Power Station and capturing the economic and financial benefits of a key regional infrastructure, rather than see it included in the City of Oceanside or remain in the unincorporated portion of the County of San Diego.

CECP is the initial stage of an overall "modernization and repowering" program at the Encina Power Station that is integral to the long-standing City goal to eventually retire the existing five steam generating units, large structural enclosure and 400 foot high exhaust stack that makes up the existing Encina Power Station and potential relocation of the SDG&E owned electrical transmission facilities. Dating back multiple decades, the ongoing discussions and land use polices announced by the City have consistently envisioned the modernization and relocation of the existing, older Encina Power Station generating facilities to more compact, modern, efficient and environmentally superior combined cycle generation, and specifically identified the repowering be located on the easterly portion of the existing power station site, between the railroad tracks and Interstate 5 ("I-5"). CECP precisely meets these expectations.

As shown below, CECP is fully consistent with the Encina Specific Plan and the South Carlsbad Coastal Redevelopment Plan. As also shown below, a Precise Development Plan required by the

City is a site design permit device the City uses as an equivalent of a building or site development permit. The City's process is fully supplanted and accomplished by the Warren-Alquist Act siting process and its replacement of local building permits.

The City's continued disparagement of CECP is not only inconsistent with the law, it is also counter to the very purpose that the City and land use ordinances openly declare: to bring about the retirement of the older, existing generating facility. **CECP represents the first and best opportunity the City will have in the foreseeable future to begin the retirement of the older existing infrastructure west of the railroad tracks**; Applicant knows this and many citizens know this as well. By opposing CECP, the City is actually working counter to the interests and desires of its citizens and prolonging the life of the Encina Power Station that dominates the beach front. Applicant continues to hope the City will accept the reality that relocating the repowering units further inland is not feasible (for both timing reasons and ratepayer burdens of such a costly venture) and reverse its political position to be consistent with its own ordinances and consistent with the City and its citizens' desire to see the expedited retirement of the existing Encina Power Station facility.

II. Factual Summary and History of Applicable Land Use Ordinances, Regulations and Policies

In an effort to facilitate this response with the issues raised in the City letter, the organization of this response uses the same headings as contained in the City letter with page reference.

A. About this Letter (page 2)

Essentially, the City outlines a long history of dealing with the Encina Power Station and its prior owner, SDG&E, who has consistently owned considerable non-power generating property in the vicinity including the adjacent office/maintenance facility known as SDG&E's North Coast Operations Center and approximately 43 acres of high value tourist serving commercial/retail designated properties easterly of I-5, both of which have nothing to do with CECP. Yet, as indicated by the listing of the various letters to SDG&E, the City has had long running and well known disagreements with SDG&E on a number of land use matters and issues. However, as evidenced by the Map/Legend, attached to the City's letter as Attachment 2, once the Encina Power Station was sold, the requirements for its operation as a power plant was further refined to reflect the separate ownership of the power plant itself. This is evidenced by the footprint for the Precise Development Plan ("PDP") boundaries being configured to eliminate SDG&E owned land and facilities, and include only the Encina Power Plant footprint of the westerly and easterly portions, all west of I-5.

B. Carlsbad as Lead Agency (page 2)

It is difficult to determine the point being made by the City in this section, other than the City seems to disagree with the structure of California law and the exclusive jurisdiction of the CEC in evaluating and permitting, where appropriate, certain new thermal generating facilities throughout the state. Further, the environmental analysis and review mandated under the CEC regulatory regime is, by law, the California Environmental Quality Act ("CEQA") equivalent of the Environmental Impact Report process undertaken by other state and local agencies when the subject matter of the application makes such agencies the "lead agency." The state mandated CEC environmental review process will, in fact, inform decision makers as fully as the "standard" CEQA process. It is interesting that the City's letter suggests there are two distinct local agencies involved as though there were separate decision makers for the Redevelopment Agency and the City itself. While it is true, under California Redevelopment Law, the agency is a separate legal entity, it should be recognized that in Carlsbad, the City Council is the governing board, policy maker and both the executive and legislative branch of both the redevelopment agency and the City.

Finally, it is factually interesting to note that the City bid on purchasing the Encina Power Station when it was for sale by SDG&E in 1998. The City was unsuccessful in its bid and immediately processed a new South Carlsbad Coastal Redevelopment Plan Area in an expedited timeframe so that it would become effective shortly before the ensuing fiscal tax year in which the power plant sale would be recognized for ad valorem tax purposes, thereby, securing an advantageous tax allocation for subsequent tax increment.

C. General Plan (page 8)

The City's letter leads off with the Specific Plan (SP 144). However, under California land use and planning law, the General Plan is the "constitution" of local land use regulation, policy and permitting, including the requirement that all specific plans, zoning ordinances and actions be fully consistent with the goals, policies and land use categories set forth in the General Plan. The City cites six separate General Plan (1994 revisions) policies as being relevant. We submit that CECP is fully consistent with each policy and, most particularly, the City recognizes the applicable General Plan Land Use designation for the entire Encina Power Station and CECP site (easterly portion between railroad tracks and I-5) is designated "U" for Public Utilities. The City goes on to acknowledge that this designation includes "...both existing and proposed..." facilities. The General Plan designation further states: "Primary functions include such things as the generation of electrical energy, treatment of waste water...or other primary utility functions designed to serve all or a substantial portion of the community."

While the City letter acknowledges consistency with the use designation, it suggests it would not be able to make a "finding of consistency" because of a subordinate planning document, SP 144, and the "25 year policy" of the City requiring a comprehensive amendment to SP 144, which encompasses hundreds of acres outside the Encina Power Station boundaries and involves many other landowners, notably SDG&E. The City's logic is circular and misplaced. Clearly, CECP is fully consistent with the General Plan land use designation and policies. As will be demonstrated in the next section, it is also fully consistent with SP 144 and by express action taken by the City on August 5, 2003, it rescinded its prior policy requiring a comprehensive update of SP 144 a the ownership and land use landscape had changed dramatically by then, including the City's desire to approve the Poseidon Resource 50 million gallon per day desalination facility on the westerly portion of the Encina Power Station site.

D. Encina Specific Plan (SP 144) (page 3)

The City does not suggest that CECP is in any way inconsistent with the range of permitted uses, regulations or provisions of SP 144 itself. Indeed, as with General Plan consistency, the permitted land use designation for the Encina Power Station is stated as follows:

> "The Specific Plan 144(H) incorporates the Carlsbad General Plan land use designations for the area covered by the Specific Plan 144 (H)...The Encina Power Station is designated U..."

(See SP 144(H) at p. 14.)

SP 144(H) goes on to reiterate CECP consistency as follows:

> "The Specific Plan provides regulations for the development of the Encina Power Station which provides "generation of electrical energy," and incorporates PDP 00-02. The PDP serves as a **permit** for the Carlsbad Seawater Desalination Project, which would provide "primary utility functions designed to serve all or a substantial portion of the community," by augmenting potable drinking water supplies for the City of Carlsbad. **Thus, the power station and desalination plant are uses consistent with the provisions of the General Plan. Other than the desalination plant, Specific Plan 144(H) authorizes no additional development.**

(SP 144(H) at p. 14; emphasis added.)

Two things are important to note here. First, SP 144(H) recognizes the role of PDP as a permit, not as a zoning or other land use designation. Second, because SP 144(H) encompasses so much additional property outside the Encina Power Station, the City wanted to make clear that, while adopting the PDP for the Encina Power Station authorizing power generation and desalination uses, it was not extending those uses or in any way changing the range of permitted uses for any other properties within SP 144(H) (namely, any of the SDG&E owned properties west or east of I-5).

E. <u>City Council Policy</u> (page 6)

The City letter asserts a "25 year policy" that no further development could occur in SP 144(H) area without concurrently adopting a comprehensive amendment of SP 144(H) for all affected properties. Clearly, an accurate reading of the history of this "comprehensive update policy" demonstrates, that whatever its intent had been when the Encina Power Station was owned by SDG&E, as part of the process for consideration and adoption of the PDP 00-02 for the Encina Power Station site itself and authorizing the desalination project within the PDP, the "policy" was rescinded as it relates to the Encina Power Station site. On August 3, 2003, Resolution 2003-208 was adopted unanimously by the City Council in order to specifically authorize and permit the Encina Power Station PDP 00-02 to be processed for the "Carlsbad Desalination Facility and Encina Power Plant." The resolution states, in part as follows, why the council was canceling its prior stated policy for power plant and desalination purposes on the Encina Power Station portion only, noting its rationale:

> "...discussions with property owners within Specific Plan 144 area relating to land use, public access and other similar matters have progressed to the point where the City Council believes it is not necessary to update the entire Specific Plan at this time."

Resolution 2003-208 then specifically resolves as follows:

> "...an amendment of Specific Plan 144 shall be processed for the processing of the Carlsbad Desalination Facility **<u>and Encina Power Plant rather than a comprehensive update of the entire Specific Plan</u>**." (Emphasis added.)

Clearly, since neither the desalination facility nor the power plant involved any change of land uses to properties outside the Encina Power Station site and SDG&E was no longer an owner of the Encina Power Station, there was no practical reason to continue to condition the power plant or desalination uses on Encina Power Station site with a requirement for a comprehensive land use update. Further, the City achieved is goals of exacting various property and public use/access provisions in the PDP process requiring future conveyance of power station bluff top property west of Carlsbad Blvd., expanded fishing access to the lagoon, additional beach parking and dedication of another portion for aquaculture and/or marine research.

The City's statement in the letter that Resolution 2003-208 "...applied only to the desalination plant and not any other proposal" is contradicted by the precise language of the resolution quoted above, and by the scope of the facts and circumstances in which the City acknowledged that the discussions with the Encina Power Station owner were progressing satisfactorily with respect to "land use, public access and other related matters." Given the long standing and combative relationship between SDG&E and the City over SDG&E's land uses for its property, there is little doubt that the City did not intend to allow non-Encina Power Station land use approvals without comprehensively updating the SP 144. However, there was compelling justification for the Encina Power Station under new ownership and control to be carved out of the "comprehensive update policy." The new ownership, at the request of the City, identified a location for the Carlsbad Desalinization Facility on its property. Further, as a practical matter, it would have been logistically impossible for the Applicant to process a comprehensive SP 144(H) update as a condition of pursuing continuing power plant uses on its property, as it had no way of compelling SDG&E or any other owner to cooperate in the comprehensive update.

As will be demonstrated under the discussion of the detailed conditions of PDP 00-02 below, the City exacted a wide range of concessions, commitments, future uses and restrictions on the Encina Power Station site so the "comprehensive update policy" was no longer needed. As a practical matter, it locked in the sole use of the Encina Power Station site as power generation, desalination and accessory uses. Clearly, if any other uses were to be proposed in the future, an amendment to both the General Plan and SP 144(H) range of authorized uses would be required, but no legislative amendments are required for continuing power generating uses such as CECP.

F. <u>Zoning Ordinance</u> (page 10)

Applicant fully concurs with the City's recognition that under the existing Public Utilities ("P-U") Zoning classification, "...both the existing and proposed power plants and their appurtenant facilities are permitted uses in the P-U Zone" originally adopted in 1971 for this site. As recognized by the City as well, the specifics of conditions and exactions, design, setbacks,

parking and similar site design features are deferred to the PDP. As such, the PDP is a "site specific permit" addressing the details of site utilization and configuration only. The PDP cannot and does not authorize a different range of land uses in and of itself.

G. Precise Development Plan (page 11)

Importantly, the City letter acknowledges the PDP is a site design permit device, which the city uses to bridge the detail gap between the General Plan, Specific Plan and any unique Zoning Code requirements. In essence, the PDP is like a building or site development permit; that is, it cannot authorize uses inconsistent with the "senior" controlling land use documents. Applicant has filed for a PDP amendment, and as of this date, Applicant is unaware that the City has processed it. Given the City's announced unwavering opposition to CECP, Applicant is not hopeful the City will take any steps to process the local PDP amendment. The City has raised every conceivable obstacle in the way of CECP to date and seems unwilling and uncooperative in exploring solutions to any of the identified obstacles, short of capitulation on CECP at the Encina Power Site. It seems rather apparent that the City's commitment to addressing some of the "obstacles" only if Applicant abandons the existing CECP is a blatant statement that it does not intend to engage in a constructive process to achieve mitigations and/or solutions to the needed CECP with all its obvious benefits of continued utilization of the regional electrical grid infrastructure.

The issue of "reclaimed water use" is a perfect example of the City's obstructive behavior. The City declares itself the sole provider in its territory; claims its supplies are over committed in the peak summer months; and refuses to address any other solution such as continuing purchase of reclaimed water from the Vallecitos Water District and/or expansion of the Encina Wastewater Treatment Facility water reclamation capabilities and distribution systems. The City's behavior is all the more problematic since the Encina Wastewater Treatment Facility is a multi-city, joint powers agency facility and its potential expansion or upgrade to increase available reclaimed water to take pressure off of potable water supplies may be in everyone's collective best interests.

If, as the City states, the PDP approval was solely for the benefit of the desalination project and did not authorize the continued use of the Encina Power Station for power generating purposes, then the City misled the Applicant and there was no reason for the Applicant to cooperate such that "...the City was able to condition a number of public improvements and public land use dedications both in and adjacent to the EPS." In fact, the City demanded the owner pursue a PDP in the various negotiations for a Memorandum of Understanding previously mentioned by the City. Then the City came to the owner and said that the PDP process, initiated strictly for

power plant purposes in 2000, should be used by the Carlsbad Desalination Facility to obtain its desalination approvals; in an effort to cooperate, the power plant owner agreed. Certainly, it could not imagine that the City would later disclaim any relevance whatsoever to the long standing dialogue between the City and the owner regarding the phased repowering to a more efficient and environmentally preferred combined cycle facility in the area designated between the tracks and I-5 and a corresponding phased elimination of the older, steam generating units, large structure and 400 foot stack the City wishes to see retired.

H. Local Coastal Program/Agua Hedionda Land Use Plan (page 12)

Once again the City fails to identify any inconsistency between CECP and the Agua Hedionda Land Use Plan (AHLUP). The City correctly notes that it is not a certified Local Coastal Program, therefore the California Coastal Commission ("CCC") retains original jurisdiction, if any, on projects within the AHLUP boundaries for Coastal Development Permit issuance purposes. Here, the CCC has determined not to participate in CECP process as is it is allowed to do so, given the expansive exclusive jurisdiction and preemptive process authorized for the CEC in siting new power plants. One thing for certain is the AHLUP, since its inception in 1982, has consistently provided for the utilization of the Encina Power Station for "Utilities" purposes, a use designation fully consistent with existing uses and . (See AHLUP pp. 12-17, including the Land Use Map.)

Further, it is interesting to note that in the AHLUP the City's "comprehensive amendment policy" requiring Specific Plan amendment of SP 144 before further development is restricted to the 45-acre SDG&E property east of I-5 and requires a future specific plan before it could be utilized for Travel Services. This mention is another example of the intention to require the "comprehensive amendment policy" apply to non-power generation properties and purposes in order to compel SDG&E to address build-out of its properties east of I-5. (See AHLUP at p. 17.)

I. South Carlsbad Coastal Redevelopment Project Area (page 14)

The historic context of the City adopting the South Carlsbad Coastal Redevelopment Plan ("SCCRPA") is discussed above in Section B. above. Further, the City and the Encina Power Station Owner discussed how the existence of the Redevelopment Area could financially participate or facilitate the construction of new, efficient combined cycle generation facilities into that portion of the Encina Power Station between the railroad tracks and I-5. This occurred during the time of the on again/off again discussion regarding the phased retirement of the existing older facilities, the large structure, and the 400 foot stack. While no agreements were reached, it was clear the City was encouraging the owner to relocate and phase out the older units

at the earliest opportunity. To that end, the SCCRPA work plan adopted February 19, 2002 by the Housing and Redevelopment Commission in Resolution No. 352, specifically includes the following goal:

> "The City's and Redevelopment Agency's objective is to work towards the complete demolition of the existing Power Plant at its current location on the existing site and provide for the construction of a new, physically smaller Plant towards the rear of the existing site. **The City and Agency's top preference is to have the new Power Plant constructed within the area between the railroad tracks and Interstate 5, which is east of the existing Plant site**. With demolition of the existing Power Plant and construction of a new Plant to the rear of the existing site, excess development property will be created which is located in a prime coastal location. It is staff's position that this excess property could be used for both private and public land uses."

(Emphasis added.)

As to the suggested further requirement of extraordinary benefit, we believe the City has misread its provisions. The extraordinary benefit requirement applies to the list of uses to the extent they are to be located elsewhere than where currently located. For example, at page 14 of the City letter, it points out the SCCRPA incorporates all "existing permitted uses." Clearly, the Encina Power Station area is authorized for electrical power generating purposes pursuant to the General Plan, Specific Plan 144(H), the AHLUP and PDP 00-02. The reference to new uses requiring finding of extraordinary benefit must apply to those uses which are not otherwise permitted by the then existing underlying land use regulations, or are being introduced in SCCRPA areas where they had not previously been allowed. Under the interpretation advocated by the City, the sentence would make no sense and the "exception" would swallow the rule.

Further, even if one were to assume, for argument purposes, that an extraordinary public benefit finding is required, here, that standard is clearly met for the following reasons: CECP (1) includes the decommissioning of older Units 1, 2 and 3; (2) replacement of those units with state of the art combined cycle facilities; (3) is an initial step to the eventual decommissioning of Units 4 and 5 and further; (4) meets current regional power generation needs; (5) results in lower requirements for once through ocean water cooling at the Encina Power Station realizing a tangible benefit to the marine environment consistent with statewide policies; (6) avoids the enormous cost of re-establishing the electrical distribution system elsewhere, a cost that rate

payers would ultimately shoulder; (7) improves the reliability of power generation capacity to meet the fluctuating demand needs in the region; (8) provides a reliable back up/supplemental source to augment the use of less reliable renewable resource generation sources; (9) is a step toward the elimination of the offshore oil delivery and onshore heavy oil storage facilities required for the old steam generating units to burn in the event natural gas supplies are curtailed; and, (10) results in progress toward the common goal of demolishing the final two steam generating units along with the large structure and 400 foot stack to make room for future private and/or public economic uses and benefits.

Certainly, these amount to "extraordinary public purpose" under any objective application of the standard. Further, CECP is precisely the first step the City has consistently and repeatedly encouraged the owners of the Encina Power Station to pursue with vigor.

III. Conclusion

CECP fully meets each and every legitimate existing City land use regulation, ordinance or policy. Applicant believes the City has taken a position of opposition, without regard for the underlying merits of CECP and has taken a position that is political in nature, not legal. In taking such an unrelenting position, the City is avoiding any meaningful, joint effort to resolve identified issues and/or mitigate potential adverse consequences and is also working counter to the interests of the City's citizens to see the existing structure and facility eliminated. Having adopted such an adverse position, it appears to Applicant the City has embarked on an effort to block CECP and frustrate California's long-term energy planning and procurement process.

The Applicant remains hopeful that the City will change its method of involvement and participate in a more constructive manner, to engage with the CEC Staff, Applicant and others involved in the process to reach the correct decision in the best interests of all the citizenry, to identify real issues and jointly fashion real solutions and enhancements to achieve the best possible outcome consistent with the California law and necessary energy policies. Certainly, Applicant does not presume the City must "like" CECP or endorse it (though Applicant believes CECP is fully consistent with long held goals of the City communicated to Applicant over the years in no uncertain terms). Instead, by engaging in constructive, problem solving endeavors, CECP can be improved, even if the City in its independent judgment still elects to oppose its approval. Applicant respectfully urges the CEC and staff to attempt to facilitate City cooperation even while moving CECP forward without it.

Should you have any questions, please do not hesitate to contact me directly at (916) 447-0700.

Respectfully submitted,

Stoel Rives LLP

John A. McKinsey
Attorneys for Applicant Carlsbad Energy Center LLC

JAM:kjh
cc: See Proof of Service List Attached

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Application for Certification for the ***CARLSBAD ENERGY CENTER PROJECT***	**Docket No. 07-AFC-6** **PROOF OF SERVICE** **(As of 03/19/2008)**

DECLARATION OF SERVICE

I, Elizabeth Hecox, declare that on June 3, 2008, I deposited in the United States mail at Sacramento, California with first-class postage thereon fully paid and addressed to those identified below ***OR*** transmitted via electronic mail consistent with the requirements of the California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210 the following documents:

CARLSBAD ENERGY CENTER PROJECT (07-AFC-6) PROJECT CONSISTENCY WITH CITY OF CARLSBAD LAND USE ORDINANCES

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I declare under penalty of perjury that the foregoing is true and correct.

Elizabeth Hecox