

Power of Vision

DOCKET

07-AFC-6

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4213 Sunnyhill Drive
Carlsbad, CA 92008
760.729.4068

powerofvisioncarlsbad@gmail.com

Friday, August 13, 2010

The Honorable James D. Boyd
Presiding Member
California Energy Commission
1516 Ninth Street
Sacramento CA 95814

The Honorable Anthony Eggert
Associate Member
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Hearing Officer Paul Kramer
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Carlsbad Energy Center Project
07-AFC-6

Dear Commissioners Boyd and Eggert and Hearing Officer Kramer:

Please find enclosed the Opening Brief from Power of Vision in the Carlsbad Energy Center Project application before the California Energy Commission. Thank you for the opportunity to present to the Commission legal briefs for this project. As you heard from the many attending the Evidentiary Hearings in Carlsbad, this project is very important to the community.

Sincerely,

Arnold Roe, PhD
Julie Baker

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Power of Vision
Julie Baker & Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, California 92008
Telephone: 760.729.4068
powerofvision@roadrunner.com

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)	Docket No. 07-AFC-6
Application for Certification for)	
the Carlsbad Energy Center Project)	Power of Vision's
Carlsbad Energy Center, LLC)	Opening Brief
_____)	

Intervener Power of Vision hereby submits its Opening Brief.

EXECUTIVE SUMMARY

Power of Vision (POV) is an ad hoc group of unpaid volunteers organized in response to the far-reaching outcry of North County residents against the proposed Carlsbad Energy Center Project (CECP). This community displeasure has been evidenced by the over 2,300 petition signatures submitted to the Commission, and by the packed audiences at the two Commission hearings open to the public. We contend that the CECP proposes the wrong technology, in the wrong place, at the wrong time, and we urge the Commission to reject the proposal.

We urge the Commission to reject the application of NRG's CECP on several grounds. The applicant has consistently failed to put forth a compelling argument that this power plant is needed or is, indeed, in the proper location. The applicant essentially argues that because there is already a power plant on the property, it is a suitable location for a 550 mega-watt gas-fired plant that will continue the use of seawater for its operation. This argument fails to take into account the property is 95 acres of oceanfront property in the center of a residential neighborhood and adjacent to beaches and a coastal lagoon.

Power of Vision's brief will outline a series of City policies, land use regulations and recent land-use decisions that render this application a violation of LORS. CECP is a violation of the General Plan, Zone Code, Agua Hedionda Land Use Plan, South Carlsbad Redevelopment Plan and California Coastal Commission policies. City land-use regulations were formed to take into account the existing power plant use. Since that time, 1954, Carlsbad has grown into a world-class resort community with resorts, LegoLand, golf courses and beach recreation facilities that are not conducive to industrial uses. Residents live within 1200 feet of the proposed CECP. Visitors from all over the world travel to Carlsbad to enjoy the beaches, lagoons and unique coastal resources found nowhere else. Citing of an additional power plant is not an environmentally superior alternative when the applicant or CEC staff has demonstrated no need.

Through the adoption of the South Carlsbad Coastal Redevelopment plan, city leaders declared their intention to revitalize the Encina property with the need for any project to provide “Extraordinary public benefit” to the community. The applicant failed to demonstrate that CECP would provide extraordinary public benefit. Indeed, the applicant can make no claim of any significant benefit derived from its siting. No public access is being offered; no public view corridors are being protected. Instead, the applicant proposes to subject the residents and visitors of Carlsbad to 50 more years of industrial blight, air pollution, and visual degradation when no compelling reason is offered other than “the sight is already a power plant site.”

City leaders declared their opposition to CECP be passing an urgency ordinance declaring a moratorium on coastal power plants. Carlsbad envisions its future free of industrial uses not suited to the coast. CECP cannot prove it is coastal dependant, and since its benefits do not serve the citizens or Carlsbad or San Diego County but rather the electrical grid, it can be located anywhere outside the coastal zone.

On behalf of the citizens of Carlsbad, San Diego County and visitors Power of Vision asks the California Energy Commission to deny CECP’s Application for Certification on grounds that it violates LORS, is a safety risk, cannot be visually mitigated and violates California Coastal Commission policies. There is no compelling reason to locate a facility that is not needed by the region for energy supplies, on coastal property better suited for recreational uses. This facility as proposed is the wrong plant, in the wrong place at the wrong time.

1. PROJECT LORS COMPLIANCE.

A. CITY LORS.

i. THE CARLSBAD ENERGY CENTER PROJECT (“CECP”) IS NOT A UTILITY IN TERMS OF THE CITY LAND USE REGULATIONS.

The Land Use Policies for the City of Carlsbad (“City”), which incorporate the existing Encina Power Plant, were written when power generation was done exclusively by a “Public” Utility. The City’s land use policies were drafted at a time when the only electrical generation that was possible was regulated by the Public Utility Commission. Land use policies assumed that the burden of an electrical generation would be offset by the benefit of power generation for the local community. The City did not “approve” the power plant in its current location because the plant was constructed prior to City incorporation. The current General Plan and zoning designations were created in 1971 and applied to the existing Encina Power Plant, which was at that time a public utility owned by SDG&E and regulated by the PUC. The land use designations in the General Plan and Zoning merely acknowledged an existing use. The City did not envision in 1971 that in the future, power generation would be done by merchant utilities selling power on an open market to a grid system that spans several states.

ii. THE CITY HAS NO DESIRE TO EXPAND POWER GENERATION ALONG ITS COAST.

Since its incorporation in 1952, the City has created zoning and General Plan Designations to reflect a community character consistent with a coastal community determined by the needs and desires of the residents. City Councils through the last 58 years have worked to create a well-planned city reflective of community values. From the Growth Management Plan approved by the citizens in 1986 to the most current city-sponsored Envision Carlsbad, City planning documents strive to create a place, which reflects residents’ wishes for a well-planned community. The Vision Statement in the General Plan speaks to a “City which recognizes the value of its unique ecological position as a coastal city of beaches, fragile lagoons and unspoiled canyons; which has taken steps to conserve the quality and quantity of its air, water, land and biological resources.”

Carlsbad citizens, through the City’s past and recent land use decisions, no longer accept the need for electrical generating facilities on the coast. The City Council has passed the following resolutions concerning the CECP and the EPS:

1. Resolution 2009-323, December 22, 2009 (exhibit 400) *determined that the proposed Carlsbad Energy Center Project is inconsistent with applicable local and related land use laws, ordinances, regulations and standards and poses serious impacts to the health, safety, welfare and quality of life to the community at large...*
2. Resolution No. 482, September 2007 (exhibit 401) Housing and Redevelopment Commission of the City of Carlsbad *opposing the proposed Carlsbad Energy Center project is inconsistent with applicable LORS and determination that said project does not comply with SCCRP...*
3. Ordinance NS-108, January 23, 1990 (Exhibit 432) *Adopting an emergency measure prohibiting the expansion of gas and electrical utility facilities located within the public utility zone pending studies....*

4. Urgency Ordinance CS-067, December 2, 2009 (exhibit 405) prohibiting *the expansion or location of thermal electrical power generation facilities within the coastal zone pending studies*

The South Carlsbad Coastal Redevelopment Plan, Carlsbad Ranch Overlay, Agua Hedionda Land Use Plan, Ponto Vision Plan, Local Coastal Program, Aviara Community, Four Seasons Resort, Cannon Lands Committee et al, have all moved Carlsbad in the direction of a residential and resort, tourist-destination community. The General Plan has directed industrial uses to a select area within the City along the “airport industrial corridor” of Palomar Airport Road.

“[T]he model upon which the Land Use Plan of this General Plan is based, is one of a centralized employment core (the airport/industrial corridor) supporting and supported by several adjoining residential communities, each of which is, and will continue to be, relatively self-contained, developing with its own special identity and character.”

(General plan, page 3)

Even if the City had originally approved the Encina Power Plant, which it did not, the California Supreme Court has held that a city’s prior approval of a particular land use in a particular location cannot be construed as a promise that the same kind of land use may continue to expand and intensify in the future.

Even if the city and county had made an express contract granting to the plaintiff the right to make interments in this ground in perpetuity, such contract would have no force as against a future exercise by the legislative branch of the government of its police power. *Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 475 (Cal. 1907)*

The City has demonstrated through its General Plan and land use policies and planning documents its intent to revitalize coastal lands to uses more conducive to recreation, public uses and visitor-serving facilities in keeping with coastal lands, not to expand power production along the coast. Expansion of the Encina Power Plant, and construction of the CECP, violates numerous City planning documents. The violations to the General Plan and zoning are addressed below.

iii. THE CECP VIOLATES THE GENERAL PLAN REQUIREMENT THAT POWER GENERATION MUST SERVE THE LOCAL COMMUNITY.

The General Plan designation for the proposed CECP property is “U – Public Utility” (Carlsbad General Plan, page 20, Section 6) which allows for “the generation of electrical energy, treatment of waste water, and operating facilities, or other primary utility functions designed to serve all or a substantial portion of the community.” It stands to reason that the “community” contemplated within the General Plan is exclusively the City of Carlsbad, not the County in general, and certainly not the western region of the power grid. The CECP is a merchant plant that will sell power anywhere within the western electric grid, which includes several states outside of California. CECP does not have a contract for electrical output with San Diego Gas & Electric (SDGE) and therefore will not provide electricity to any portion of Carlsbad or the San Diego County region. Thus, it cannot be said that the CECP will serve “the community”. This is an important point, because the FSA indicated that the primary purpose of the CECP was to provide power to the San Diego Region

In general, the applicant’s objectives are to design, build, own, and operate the Carlsbad Energy Center Project (CECP) to meet the need for additional electric generation capacity and ancillary services in the Southern California region.

Specifically, the CECP is designed to provide flexible, quick-start peaking capacity in the northern San Diego County service territory of San Diego Gas and Electric (SDG&E), (FSA, page 3-3)

Even if an SDG&E contract were in place, Carlsbad would not specifically derive any specific benefit from CECP in the event of a blackout or other service disruptions, as the facility's intent is to serve the north county service territory, not specifically Carlsbad. Therefore, the CECP is not consistent with the City's General Plan because it will not serve the Carlsbad community.

Additionally, the Carlsbad General Plan (page 20, Section 6.) specifies that the Public Utility category is for uses that are "for public or quasi-public functions." Carlsbad Energy Center LLC (the Applicant), an indirect wholly owned subsidiary of NRG Energy, Inc. LLP is owned and to be operated by NRG, which is neither a public or publicly controlled agency nor a utility company. It is a shareholder owned merchant power plant. The Energy Commission has previously found that private plants that sell electricity to public utilities are not "public or quasi-public uses."¹ The CECP is not a public or semi-public use. It is a private, for-profit use and is therefore not consistent with the intent of the General Plan U designation.

iv. THE CECP VIOLATES THE ZONING ORDINANCE BECAUSE P-U PUBLIC UTILITY ZONE ALLOWS PUBLIC UTILITIES, NOT MERCHANT UTILITIES.

CECP is not consistent with the P-U Public Utility Zone (CMC 21.36), which allows for a *public* utility. Public Utilities are regulated by the California Public Utilities Commission. The CECP is not so regulated, and is not a "public utility". Since CECP/NRG is not a *public* utility and the zone specifically makes that a requirement, it would not be consistent with the zone requirements.

v. THE CECP VIOLATES THE GENERAL PLAN AND ZONING, BECAUSE IT DOES NOT COMPLY WITH THE RESTRICTIONS PLACED ON THE USE, WHICH REQUIRE A PRECISE DEVELOPMENT PLAN, AND AN AMENDMENT TO THE EXISTING SPECIFIC PLAN.

Although the power generation is listed as a "permitted use" in the City Zoning Ordinance, the use is only permitted "subject to the requirements and development standards specified by this chapter." (Carlsbad Municipal Code Section 21.36.020) If the use does not comply with the requirements and development standards within the Zoning Ordinance, then it is not a "permitted use". The requirements indicate that "any use" in the P-U zone requires a precise development plan, including energy generation. (Section 21.36.030) Because the uses in the P-U zone are unusual and have a great potential for environmental impacts, a precise development plan is required for any new facility. In this case, the CECP is a new power plant, being located on property that is already subject to a Specific Plan, and therefore an update to the Specific Plan 144 is required, as well as a Precise Development Plan.

¹ "MMC sells electricity to utilities but is not itself a utility. The CVEUP is therefore not a 'public or quasi-public; use.'" (CEC ruling June 17, 2009).

CEC Staff has indicated that the requirement for a Specific Plan in the City of Carlsbad Regulations is like the requirement of a use permit, because the Specific Plan must set development standards and requirements for each new proposed use at the time the application for that use is filed with the city. In addition CEC Staff has indicated that the associated PDP, which addresses the details of site utilization and configuration, is also like a use permit, rather than land use regulations. (See, FSA pages 4.5-22 to 4.5-27) However, this argument is flawed because the subjects covered within the specific plan (development standards and requirements for a specific geographic area) are entirely appropriate for a Specific Plan under the Government Code. Pursuant to the Government Code, a Specific Plan serves essentially as an implementation tool of the General Plan.

65450. Preparation of specific plan

After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan.

(Repealed and Added by Stats. 1984, Ch. 1009.)

The adoption and amendment of a specific plan, like a general plan is a legislative act. See *Yost v. Thomas*, 36 Cal.3d 561, 570 (1984); *Sierra Club v. Gilroy City Council*, 222 Cal.App.3d 30 (1990). In general, legislative decisions involve adoption of local laws, policies, or regulations of general applicability. See, e.g., *Karlson v City of Camarillo*, 100 Cal.App.3d 789, 799 (1980). Legislative acts involve more than a mere statement of policy, and also carry an implication of an ability to compel compliance. *Worthington v. City Council of the City of Rohnert Park*, 130 Cal.App.4th 1132 (2005)

A Specific Plans must contain regulations and development standards for the geographic area that it covers, and can address additional subjects necessary to implement the General Plan (Government Code Section 65451 and 65452)

65451. Content of specific plan

(a) A specific plan shall include a text and a diagram or diagrams, which specify all of the following in detail:

(1) The distribution, location, and extent of the uses of land, including open space, within the area covered by the plan.

(2) The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy, and other essential facilities proposed to be located within the area covered by the plan and needed to support the land uses described in the plan.

(3) Standards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable.

(4) A program of implementation measures including regulations, programs, public works projects, and financing measures necessary to carry out paragraphs (1), (2), and (3)

(b) The specific plan shall include a statement of the relationship of the specific plan to the general plan.

(Repealed and Added by Stats. 1984, Ch. 1009; Amended by Stats. 1985, Ch. 1199.)

65452. Optional subjects

The specific plan may address any other subjects, which in the judgment of the planning agency are necessary or desirable for implementation of the general plan.

(Repealed and Added by Stats. 1984, Ch. 1009.)

A Specific Plan, or an Amendment to a Specific Plan, cannot be adopted unless it is found to be consistent with the General Plan.

65454. Consistency with general plan

No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan.

The standards and requirements of SP144 do not convert the Specific Plan to a use permit.

City Council resolution 98-145, states: “the existing Specific Plan for SDG&E properties does not address the regulations and restrictions of the LCP (Agua Hedionda Local Coast Plan) and therefore requires a Precise Development Plan adopted by ordinance. Since CECP does not have an approved update of SP144, as required by City Council resolution 98-145, the City cannot make a determination if CECP complies with the General Plan or the Agua Hedionda Land use Plan. This is clearly reflected in the testimony of City Planner, Scott Donnell:

“The reason the City has stressed the need for a comprehensive update of SP 144 since 1982 and why it views the update with such importance is that it has long anticipated the re-use of the EPS and other adjacent property, particularly those west of I-5, to something other than heavy industry. For more than 50 years, Carlsbad has had a prominent industrial presence in the form of the EPS along its coastline. In the ensuing time, while Carlsbad has grown into a community the EPS has remained a stagnant land use in the City’s center. It is reasonable to expect, therefore, that development proposals within SP 144 especially very significant ones such as the CECP warrant a serious, public, and comprehensive considerations of land use and other matters of community interest. The vetting achieved through Carlsbad’s requirement for a board, complete update of SP144 would achieve this expectation.” (written testimony DONNELL-5)

The rationale for the update of SP 144 requirement which covers 680 acres surrounding EPS and the proposed CECP is to determine the uses of the surrounding lands which would then enable the determination of conditions such as setbacks, landscaping, parking, special height and bulk of building restrictions (CMC 21.36.050).

In addition CEC Staff has indicated that the associated PDP, which addresses the details of site utilization and configuration, is also like a use permit, rather than land use regulations. (See, FSA pages 4.5-22 to 4.5-27) Again, this argument is flawed because the Zoning Ordinance specifies that approval of a Precise Development Plan is to be processed in the same manner as a zone change.

An application for a precise development plan shall be made and processed in accord with the procedures for a zone change (21.36.040)

The subjects of the PDP (site utilization and configuration) are appropriate subjects under the Government Code to be covered in a zoning ordinance (21.36.040). The Government Code specifies the subjects that may be addressed in a zoning ordinance, or a change of zoning as follows:

65850.Regulation by ordinance

The legislative body of any county or city may, pursuant to this chapter, adopt ordinances that do any of the following:

(a) Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

(b) Regulate signs and billboards.

(c) Regulate all of the following:

(1) The location, height, bulk, number of stories, and size of buildings and structures.

(2) The size and use of lots, yards, courts, and other open spaces.

(3) The percentage of a lot which may be occupied by a building or structure.

(4) The intensity of land use.

(d) Establish requirements for off-street parking and loading.

(e) Establish and maintain building setback lines.

(f) Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

The requirements for a Specific Plan Amendment and a Precise Development Plan are proper legislative acts of the City, and without them, the CECP is inconsistent with the General Plan and Zoning, and is not a permitted use. See, e.g., *San Diego Bldg Contractors Ass'n v. City Council*, 13 Cal.3d 205, 211 (1974). See, *Neighborhood Action Group v. County of Calaveras*, 156 Cal.App.3d 176 1186 (1984). Although NRG did submit a major amendment to the approved precise development plan in the form of PDP 00-02(A), no final legislative action ensued. If the City were processing the proposed application the first step would be to require an update to SP144. When the update was complete, *then* compliance of applicable land use regulations

would be determined. See May 2, 1, 2008 letter from City of Carlsbad to CEC staff. Without the final ruling on the precise development plan, and without a Specific Plan Amendment, there is no evidence to support the FSA conclusion that the CECP complies with the City General Plan and Zoning. Additionally, the 1990 Coastal Commission report on a similar project says an amendment to the Specific plan would be required to include the expansion of the facilities.

vi. AT THE VERY LEAST, THE CEC MUST USE THE FINDINGS REQUIRED FOR A SPECIFIC PLAN AND THE FINDINGS FOR A ZONE CHANGE WHEN CONSIDERING THE CECP.

Even if the requirement for an amendment to SP 144 or for a PDP were deemed to be the equivalent of the requirement of a Use Permit, CEC must still consider the findings that are required by the Local Agency. In the Eastshore Decision, the Energy Commission stated that when a permit is required by a local jurisdiction, a review of the findings is required.

Since the Energy Commission has exclusive jurisdiction, we typically request the local permitting agency to identify the findings that would be necessary to obtain a CUP. (Eastshore Decision, page 325)

In this case, the FSA fails to address the findings necessary for approving a Precise Development Plan, and or an amendment to Specific Plan 144. The City Code specifies that a PDP can only be approved as a change in zoning, and only “whenever public necessity, convenience and general welfare require” such a change (21.52.010). Therefore, the Energy Commission must determine if the change is required for public necessity, convenience or general welfare. Without a determination on this issue, there is no basis for the CEC to conclude consistency with the City General Plan and Zoning.

The CEC must also find that the CECP is consistent with the General Plan, because that is the finding necessary to approve a specific plan amendment. (Government Code 65454) Furthermore, the CEC must find that the CECP meets the purposes of the Public Utility zone is to allow uses:

“Subject to a precise development plan procedure to:

- (1) Insure compatibility of the development with the general plan and surrounding developments;
- (2) Insure that due regard is given to environmental factors;
- (3) Provide for public improvements and other conditions of approval necessitated by the development. “ (Carlsbad Municipal Code 21.36.010)

In summary, both specific plans and zoning are legislative decisions while land use permits are adjudicative decisions. Since the Precise Development Plan, and Specific Plan 144, can only be approved as legislative acts, the CEC cannot consider them to be the equivalent of use permits, and the CECP violates the City General Plan and Zoning.

vii THE CEC CANNOT USE THE DESALINATION PLANT AS PRECEDENT TO IGNORE THE CITY GENERAL PLAN AND ZONING REQUIREMENTS.

City Council Resolution 2008-208 allowed the desalination plant to proceed with a PDP amendment to be processed along with other necessary permits rather than a complete update of SP 144. The reasons for this decision are the plant’s extraordinary public purpose benefits:

water reliability, price guarantees, significant public lands donation, carbon neutral footprint and restoration of local wetlands. In addition, the desalination plant is coastal-dependent and is designed to fit inside a three-story office building complying with height, massing, and landscaping and design requirements. CECP has no extraordinary public benefit or purpose that would warrant the same consideration, which was given to the desalination plant. Further, it does not comply with City height, massing and landscaping design requirements.

viii. THE PROJECT VIOLATES COASTAL ACT AND CITY COASTAL POLICIES

The Agua Hedionda Lagoon is a unique resource to the City of Carlsbad, the region and the state. It supports recreational activities as well as natural habitat and commercial enterprises such as the existing EPS and aquaculture. The Agua Hedionda Land Use (AHLUP) plan is a segment of the City of Carlsbad's Local Coastal Program that applies to the property where CECP is proposed. When the City applied to the Coastal Commission for approval of the LCP, the AHLUP portion was removed at the request of the SDG&E, the property owner at the time. While the Coastal Commission retains jurisdiction to approve permits in that area, the City still reviews projects for consistency with the AHLUP. Accordingly, the CEC must determine that the CECP is consistent with the Coastal Act Policies, as well as consistent with the City's AHLUP.

ix. THE PROJECT VIOLATES THE HEIGHT LIMITS OF THE AHLUP

The AHLUP covers such areas as land use, agriculture, environmental, public works, recreation/visitor facilities, shoreline access and visual resources. The intensification of the site by CECP would degrade the quality of life for residents, visitors and recreational users. The applicant, CECP, has the burden of proof to demonstrate that the CECP would comply with the AHLUP, which it cannot do. CECP violates the height requirement in the AHLUP, which is 35 feet. CECP will, in combination with EPS, dominate the skyline. In addition, the cumulative impacts of CECP along with EPS create an unacceptable level of visual blight and restriction of public enjoyment. The EPS is already a blight on the city as identified in the SCCRA and in photo exhibits submitted by Power of Vision. The construction of CECP will exacerbate an already deplorable site for the community.

B. COASTAL ACTS LORS.

THE PROJECT VIOLATES THE COASTAL ACT REQUIREMENT THAT INDUSTRIAL USES AT THE COAST MUST BE COASTAL DEPENDENT.

The 1990 California Coastal Commission report to the California Energy Commission states in its Executive Summary that the proposed new power plant(s) at SDGE's Encina site would cause significant adverse impacts to coastal resources. Although the project proposed in 1990 is somewhat different than that proposed by the applicant, there are several similarities that apply to the current proposed project. Among those are public access & recreation, visual, consistency with LCP and air quality impacts.

As defined in PRC section 30101 a coastal dependent use is *any development or use, which requires a site on, or adjacent to, the sea to be able to function at all*. Modern power plants no longer require ocean water for cooling so therefore are NOT coastal dependent uses since they can be located in other areas. Written testimony of Ralph Faust (FAUST-9) states that

when power plant technology allowed large plants to be constructed inland without the need for large amounts of ocean water, power plants, in my view, ceased to be coastal-dependent.

CEC failed to take into consideration the cumulative impacts of CECP along with the existing EPS and the proposed widening of I-5 when preparing the visual section of the FSA. As demonstrated by photos submitted by Power of Vision (Exhibit 727) the Encina Power Station is a dominant feature of the Carlsbad view shed. The addition of CECP will considerably exacerbate existing unsightly industrial views as seen from public beaches, trails and roadways. A clear violation of PRC section 30251.

C. ENVIRONMENTAL IMPACTS.

THE CONFLICTS WITH LORS RESULT IN SIGNIFICANT LAND USE IMPACTS UNDER CEQA.

Using the Thresholds Identified in the FSA, the CEC Must Conclude That the Project's Land Use Impacts is Significant.

The FSA identifies the following as a "Thresholds for Determining Significance":

"Conflict with any applicable land use plan, policy or regulation of an agency with jurisdiction, or that normally have jurisdiction, over the project. This includes, but is not limited to, a General Plan, redevelopment plan, or zoning ordinance." (FSA. page 4.5-8)

The FSA failed to utilize this threshold in reviewing the project for consistency. As stated above, the CECP cannot be considered consistent with the General Plan or zoning designations. In addition, the CECP conflicts with several General Plan policies that address the character and image of the City, and the desired design of future development within the City as discussed below:

The CECP does not meet General Plan standards regarding the character and image of the City:

"A City which preserves and enhances the environment, character and image of itself as a desirable residential, beach and open space oriented community." (Carlsbad General Plan Land Use Element (pg 27, A.1)

"A City which provides for an orderly balance of both public and private land uses within convenient and compatible locations throughout the community and ensures that all such uses type, amount, design and arrangement serve to protect and enhance the environment, character and image of the city." (Carlsbad General Plan, page 27, A.2)

The CECP cannot meet the General Plan standards for residential, beach and open space that is pleasing to the eye and enhances the City's image. The project is industrial in nature, and is not consistent with the City's image of residential, beach and open space.

The CECP also does not meet design standards within the General Plan:

General Plan: "Evaluate each application for development of property with regards tosite design quality which may be indicated by the harmony of the proposed buildings in terms of size, height and location, landscaping and screening" (page 28 C.7)

General Plan: “Screen all storage, assembly and equipment areas completely from view mechanical equipment, vents, stacks,and other appurtenant items should be incorporated into the total design of structures in a visually attractive manner or should be entirely enclosed and screen from view.” (page 38,C.14)

The height of the 139’ smokestacks and 88’ HRSGs are over the height limit allowed by the City of Carlsbad zone code. The two 139 foot smoke stacks are well above the height limit of 45 feet for commercial/industrial uses. (CMC 21.32.050) Add the 88 feet height of the accessory buildings and the project is most definitely not in compliance. In combination with the existing EPS and the anticipated I-5 expansion, CECP fails this test by intensifying industrial uses along the coast and lagoon. In addition, there is no evidence to support the conclusions regarding adequate setback requirements and landscaping because these issues have not been adequately detailed in the FSA. The FSA, Vis-2, states that tall fast growing evergreen trees will be required of sufficient density and height to screen the power plant structures to the greatest extent feasible. There is no evidence that such trees even exist. There are no trees or landscaping that will grow tall enough to adequately screen CECP 139’ smokestacks or HRSGs from the beach, Carlsbad Blvd, I-5 or the surrounding residences. While the FSA says screening to the best extent feasible, Carlsbad requires equipment areas be completely screened from view. (Carlsbad General Plan page 38,C.14). CECP has not proposed screening of equipment.

The CECP also does not meet the General Plan requirement regarding compatibility with adjacent uses:

“Ensure that the review of future projects places a high priority on the compatibility of adjacent land uses...” (Carlsbad General Plan, page 28, C.3)

The FSA does not adequately acknowledge that residential uses are approximately 1200 feet north, directly across the lagoon from the proposed CECP. In addition, residences are less than 1 mile to the east, on hillsides, with direct views of the project and residences are located across the street-west and south of the existing EPS.

According to the FSA, “The proposed CECP is physically compatible with the existing surrounding predominately industrial land uses of the EPS.” This assertion is factually incorrect. The only industrial land uses surrounding the proposed CECP is the existing Encina Power Station to the south. Immediately to the north of CECP, is an open space lagoon. Condominiums are located less than 1 mile to the north. To the east are agricultural lands, and to the west is the Pacific Ocean. The FSA does not properly acknowledge the open space, residential and recreational uses that are in close proximity to the CECP site. Also in close proximity to the site is the West Inn (adjacent to the site) Sheraton, Legoland California (2.13 miles) and the beach (1/4 miles). These visitor-serving uses were not acknowledged in the FSA. An industrial use such as the CECP is not compatible with residential, beach, visitor-serving or recreational and open space uses that immediately surround the project site, and the FSA conclusions to the contrary are not supported by evidence.

The CECP is not consistent with the City vision of “pollution-free” industrial uses:

A City which develops an industrial base of light, pollution-free industrial of such magnitude as will provide a reasonable tax base and a balance of opportunities for employment of local residents.” (Carlsbad General Plan, Land Use Element, p37)

The CECP represents a 10-fold increase in air pollution because it will produce 850,000 metric tons of carbon. The CECP also creates environmental damage by promulgating the use of seawater (impingement and entrainment) for industrial purposes. Accordingly, it is not a use that is consistent with the General Plan's vision of Industrial uses. Cumulative effects of air pollution and noise are disruptive to residents and recreational users. Since EPS currently runs about 7%, CECP represents a 10-fold increase in air pollution and increases in visual blight from two 139' foot smoke stacks for surrounding uses.

In addition, the CECP does not provide opportunities for employment of the local residents. According to the FSA (page 4.8-7), CECP will provide temporary construction jobs for 357 workers at its peak. It is expected these workers will commute from their homes to the site on a daily basis. (FSA 4.8-5) Upon completion, only 14 workers will operate CECP...workers that will be transferred from EPS. (FSA 4.8-6) The long-term employment contribution of CECP is zero so the plant does not facilitate the goal of providing employment for local residents.

General Plan: "Control nuisance factors (noise, smoke, dust, odor and glare) and do not permit them to exceed city, state and federal standards." (page 38 C.12)

There is an outstanding question on whether CECP should be required to get a PSD (Prevention of Significant Deterioration) permit from the EPA prior to permitting. The EPA uses a different set of rules than the SDAPCD (San Diego Air Pollution Control District) for determining background emissions. The EPA rules require the five years *prior to start of* construction. The APCD's allows for the averaging of five years. Due to the inefficiency and cost of running the EPS, in recent years ISO has not relied upon the EPS very often for the generation of power. ISO is required to select cheaper, more efficient power whenever possible. Thus, if the last five years were to be used as a basis, then the current pollution levels are relatively low, because the current production is relatively low. However, because the APCD has selected an average of five years in which production was higher, the current pollution levels are indicated as being higher. Using the APCD approach makes the relative difference between current levels of pollution and future levels of pollution appear smaller, thus artificially diminishing the impact of the CECP.²

In addition, noise studies done in the FSA were inadequate. They were not done at night. Nor was any study done on the effects of the noise and screening walls that may be built with the expansion of I-5 and screening of the CECP site.

D. APPLICANT FAILURE

CECP'S REBUTTAL TESTIMONY FAILS TO PROVIDE EVIDENCE OF CONSISTENCY.

Nothing in the Rebuttal Testimony in support of Land Use, Exhibit 147 by the applicant refutes the contention that CECP violates the City of Carlsbad's zoning and General Plan

² Letters and request have been sent to the EPA requesting a PSD review, which would provide a more accurate picture of the project impacts because it would be a comparison to existing levels, not previously higher levels of operation. A decision is pending.

requirements. The applicant's testimony that SP 144 is merely a permit, rather than an entitlement is not accurate, and even if it were, as indicated above, does not demonstrate consistency with the City's General Plan and Zoning.

2. A. THE EXTRAORDINARY PUBLIC BENEFITS LISTED BY THE APPLICANT ARE ILLUSORY AND CANNOT BE USED AS A JUSTIFICATION TO ADOPT OVERRIDES AND APPROVE THE PROJECT.

The applicant (written testimony) contends CECP provides six extraordinary public benefits:

- A. The de-commissioning of units 1-3
- B. Reduce EPS demands for once-through ocean water for cooling from the retirement of units 1-3
- C. Replace less efficient, higher polluting units with more modern efficient units
- D. Result in addition tax revenue for City
- E. Be a step toward potential future redevelopment of EPS
- F. Enhance the incorporation and penetration of renewable energy generation supplies into the local grid from locations outside the region.

The project is not necessary for the decommissioning of units 1-3, which are financially so expensive to run that they would be decommissioned in any event. In addition, the requirement to end once-through cooling at EPS by 2017 will result in the decommissioning of Units 1-3. Therefore, 2A and 2B are not extraordinary public benefits of the CECP.

Regarding 2C, although the CECP would replace older power generation with modern units, the City of Carlsbad and its residents do not want to replace one form of power generation for another, especially next to the coastline. The energy may not, in fact, be used within the region. Therefore, that is not an extraordinary public benefit. Replacement of the Encina Plant is not consistent with local land use plans, which envision the phasing out of the Plant and energy production along the coastline.

Regarding 2D, the tax revenue from converting the EPS to tourist and visitor serving uses would provide equal, if not greater, tax revenue for the City, so number 4 is not an extraordinary public benefit.

Regarding 2E, the development of the CECP would not be a step towards redevelopment of the EPS, but would instead make it more likely that the EPS site will be replaced with additional power generation units, therefore number 5 is not an extraordinary public benefit.

Regarding 2F, while the ability to have power units that can ramp up quickly will help facilitate the use of renewable energy supplies, there is nothing specific to this project that is extraordinary in that regard. Any new energy facility could contribute to the incorporation of renewable energy into the grid system, so again this is not an extraordinary public benefit. Furthermore, the local grid spans several states, so to the extent that this is a benefit, it may not be a benefit to the State of California.

Even when viewed most generously, the Project's incremental benefits do not even compare to, much less outweigh, the substantial harm that would result because the Project

would violate several policies designed to protect and enhance the community. Under the approach described in *Eastshore*, therefore, public convenience and necessity do not require this Project. Nor would denial of the Project deprive the people of the community, to their detriment, of benefits that others enjoy. (See *Luxor Cab*, supra, 21 Cal.App.3d at pp. 557-58.) Quite to the contrary, approval of the Project would saddle the community with additional burdens that others similarly situated will not have to bear.

As further evidence of the harm continued electrical generation inflicts on Carlsbad; if the EPS site were to be redeveloped to the vision of the South Carlsbad Coastal Redevelopment area, Carlsbad would realize a much higher revenue potential on alternative land uses. Written testimony by Debbie Fountain, Carlsbad Redevelopment Director, (FOUNTAIN – 13) “In our own Agency assessment of the development alternatives, conservative estimates indicate that the revenue generated for local government would be substantially higher for commercial development with visitor-serving uses (such as a hotel and/or restaurants) vs. the development of one or more power plants on the site. The revenue generating potential is significantly different, with commercial development exceeding power plant development by nearly 5 times as much revenue on an annual basis.”

The various industrial/manufacturing zones of Carlsbad allow for light industrial uses such as soap, shoe, textile, furniture, food, garment manufacturing, or sheet metal works which are identified in Chapter 21.30 M Industrial zone. Power plants are not specifically mentioned as an allowable use in these categories. Since the code is silent on specifically mentioning power plants as allowed uses, they would require a conditional use permit to locate in the industrial zone.

3. FSA IS INADEQUATE

A. WORKER SAFETY IMPACTS.

The applicant failed to properly inform the Commission of the reasons for cramming the two proposed units side by side into the narrow space between the (widened) I-5 freeway and the railroad tracks, when there is adequate space on the property to locate the units in line. This side-by-side orientation will restrict fire fighting and safety access to the units, a condition that the Commission must weigh carefully in light of the recent disastrous event at a power plant under construction in Connecticut.

The applicant failed to reveal that they did not choose the safer in line orientation because they wanted to reserve the required land for additional power units to be installed at a later date.

B. AIR QUALITY IMPACTS AND ENERGY EFFICIENCY.

During the testimony (2/2/2010, pg. 194, line 10) CEC staff member, Mr. Walters, indicated that there was no communications or consultations with the CEC staff members working on energy efficiency regarding the impact that approving the lower efficiency Siemens turbines would have on emissions.

Staff also failed to indicate the higher heat rate (and lower efficiency) of the plant that would result from the addition of the desalination system.

C. THE FSA DID NOT ADEQUATELY STUDY ALTERNATIVES.

By ignoring the facts and projections of the 2009 CEC IEPR report and that of the California ISO 2011, 2013 local capacity requirement report, both of which indicate no immediate need for additional power in the San Diego Region, Staff incorrectly dismissed the No Project alternative.

Mr. Hunt's testimony (2/3/2010, pg. 186 highlights the fact that neither the Staff nor CAISO has conducted any quantitative study to indicate that the CECP is necessary in the specific site selected. This fact was further confirmed by the testimony of Mr. McIntosh (2/3/2010, pgs. 203 & 212).

Staff also failed to adequately explore how CECP would integrate with the foreseeable increase in renewable power. The cross examinations of Mr. McIntosh and Mr. Hunt (2/3/2010, pg. 199-200), indicated that such studies are needed and are being initiated by CAISO, but could take a year or more to complete. However, as pointed out in the cross-examination of Mr. Hunt (2/3/2010, pg. 224), reduced power demand in the San Diego Basin indicates that the need to make a decision on the CECP could be delayed as much as four years.

4. OVERRIDES

THE CEC CANNOT MAKE THE FINDINGS/OVERRIDES NECESSARY TO APPROVE THE CECP, AS CURRENTLY DESIGNED.

A. THE PROJECT IS NOT EFFICIENT.

The proposed CECP has an overall maximum plant efficiency of less than 47 %, which is a good 8% less efficient than achievable by alternative systems. This violates all of the CEC guidelines concerning energy efficiency for new power plants. It places an unwarranted burden on the ecosystem due to unnecessary increased emissions and unnecessary increased natural gas consumption. If the CECP is approved and is placed in operation, its unnecessarily higher fuel operating costs could be passed on to electric ratepayers.

It is noteworthy that the Siemens system proposed for the CECP has not been adopted by any other electrical generating company in the world, nor has the applicant's parent company, NRG, proposed installing a similar system in any of the locations in the USA where they are adding capacity. One can speculate that the reason SDG&E has not awarded a contract for the purchase of power from the proposed CECP is because SDG&E would not like to bear the increased cost of fuel for the less efficient Siemens units.

B. DEMONSTRATED REGIONAL/COMMUNITY NEED

Nowhere in the FSA, written testimony, Evidentiary Hearings or other docketed information has the applicant proved the output of CECP will serve the region or the community of Carlsbad. The absence of a contract with San Diego Gas and Electric suggests the output of the proposed plant will not be for the "for public convenience and necessity" PRC 25525. A statement by SDG&E President Michael Niggli in a *San Diego Union Tribune* article dated May 23, 2010, "About half of the power San Diego County uses is made locally, Niggli said, with the rest coming in over power lines from the north and east. Still, his company doesn't anticipate the need for another major plant. He said the need will be in the form of "peakers" — much-smaller plants that can help when power is most needed." As proposed, CECP does not fit the requirements as envisioned by SDG&E.

This makes it difficult for the Energy Commission to meet the standard for a LORS override...
“an extraordinary measure which . . . must be done in as limited a manner as possible.”
(Eastshore Final Decision, page 453, citing Metcalf page 469).

Dated: August 13, 2010

Respectfully submitted,

POWER OF VISION

By Julie Baker & Arnold Roe
Co-Chairs Power of Vision

DECLARATION OF SERVICE

I, Julie Baker, declare that on August 13, 2010, I served and filed copies of the attached Power of Vision Opening Brief. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [<http://www.energy.ca.gov/sitingcases/carlsbad/index.html>]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

sent electronically to all email addresses on the Proof of Service list;

by personal delivery;

by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-6 1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Julie Baker



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

**APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT**

**Docket No. 07-AFC-6
PROOF OF SERVICE**
(Revised 6/14/2010)

APPLICANT

David Lloyd
George Piantka, PE.
Carlsbad Energy Center, LLC
1817 Aston Avenue, Suite 104
Carlsbad, CA 92008
david.lloyd@nrgenergy.com
george.piantka@nrgenergy.com

APPLICANT'S CONSULTANTS

Robert Mason, Project Manager
CH2M Hill, Inc.
6 Hutton Centre Drive, Ste. 700
Santa Ana, CA 92707
Robert.Mason@ch2m.com

Megan Sebra
CH2M Hill, Inc.
2485 Natomas Park Drive, Ste. 600
Sacramento, CA 95833
Megan.Sebra@ch2m.com

COUNSEL FOR APPLICANT

John A. McKinsey
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES

California ISO
E-mail Preferred
e-recipient@caiso.com

INTERVENORS

Terramar Association
Kerry Siekmann & Catherine Miller
5239 El Arbol
Carlsbad, CA 92008
siekmann1@att.net

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Allan J. Thompson
21 "C" Orinda Way #314
Orinda, CA 94563
allanori@comcast.net

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Joseph Garuba,
Municipals Project Manager
Ronald R. Ball, Esq., City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008
E-mail preferred
Joe.Garuba@carlsbadca.gov
ron.ball@carlsbadca.gov

California Unions for Reliable Energy
("CURE")
Gloria D. Smith & Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
gsmith@adamsbroadwell.com
mdjoseph@adamsbroadwell.com

Center for Biological Diversity
c/o William B. Rostov
EARTHJUSTICE
426 17th St., 5th Floor
Oakland, CA 94612
wrostov@earthjustice.org

Power of Vision
Julie Baker & Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, California 92013
powerofvision@roadrunner.com

Rob Simpson
Environmental Consultant
27126 Grandview Avenue
Hayward, CA 94542
rob@redwoodrob.com

ENERGY COMMISSION

JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

ANTHONY EGGERT
Commissioner and Associate Member
aeggert@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

Mike Monasmi
Siting Project Manager
mmonasmi@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

*Lorraine White
Adviser to Commissioner Eggert
lwhite@energy.state.ca.us

Jennifer Jennings
Public Adviser's Office
publicadviser@energy.state.ca.us