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STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

**The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT**

Docket No. 07-AFC-6

CARLSBAD ENERGY CENTER LLC'S

POST-EVIDENTIARY HEARING OPENING BRIEF

August 18, 2010

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. MOTIONS PROPOSED AND/OR OPPOSED	2
III. BRIEFING TOPICS.....	4
A. Project’s Environmental Impacts	4
1. Are there are any unmitigated significant direct, indirect, or cumulative environmental impacts of the Carlsbad Energy Center Project (CECP)? (Question 1a)	4
2. Is the potential shutdown of Encina Units 4 and 5 part of the Project and must the impacts of such a shutdown be evaluated as part of CECP? (Question 1b)	5
3. Has a reasonable range of project alternatives been evaluated? (Question 1c).....	6
B. Project’s LORS Compliance	10
1. Does the Project comply with federal, state, and local laws, ordinance, regulation, or standards (LORS), including the Coastal Act and the City’s General Plan, zoning, redevelopment, and other regulations? (Question 2a)	10
3. Is it a utility or public utility as those terms are used in the City’s regulations? (Question 2c)	18
4. Is a comprehensive update of City Specific Plan 144 required for CECP? (Question 2d).....	20
5. Is a Precise Development Plan in the nature of a Specific Plan or a permit similar to a Conditional Use Permit? (Question 2e).....	21
6. Does the Warren-Alquist Act preempt the City Redevelopment Agency’s permitting authority? (Question 2f)	23
7. Does the Warren-Alquist Act preempt the City’s approval authority over the stormwater pollution prevention plan? (Question 2g)	26
8. Does the Warren-Alquist Act give the California Energy Commission the authority to decide whether and where the Rail Trail can be built on the project site? (Question 2h).....	29
9. Must the Coastal Commission issue a report before the Commission can act on the Project’s application? (Question 2i)	31
10. Does the recently adopted City Urgency Ordinance CS-070, prohibiting the processing of permit applications for power plants, have any effect on the Commission’s processing or consideration of the CECP Application for Certification (AFC)? (Question 2j)	34

TABLE OF CONTENTS

	Page
11. What specific City development standards (height limits, setbacks, fire equipment access, etc.) apply to the project and does it comply with those standards? (Question 2k)	35
12. What deference, if any, should be given to the City’s interpretation and application of its LORS (see, e.g., Cal. Code Regs., tit. 20, § 1744)? (Question 2l)	37
13. What relevance and weight do the Commission’s Notice of Intent proceedings in 1989 and 1990 have in this proceeding? (Question 2m)	38
C. Greenhouse Gases	40
1. Describe the findings and conclusions you believe the Commission should make regarding greenhouse gas emissions of CECP. (Question 3a)	40
2. Should the greenhouse gas emissions of LNG be included in the estimation of CECP’s potential GHG emissions? (Question 3b).....	48
D. Other Issues	49
1. What is the relevance, if any, of the status of electricity purchasing contracts for CECP’s output to the Commission’s evaluation of the AFC? (Question 4a)	49
E. Conditions of Certification.....	51
1. Discuss the changes proposed to the Staff-recommended Conditions of Certification by Staff, the Applicant or any other party. (Question 5a).....	51
F. Overrides	54
1. An override of significant environmental impacts, inconsistency with state or local LORS, or both, may be required in order to approve the Project. (Question 6a).....	54
2. Discuss whether the Commission should adopt overrides and if so, on what grounds, citing specific facts and conclusions justifying an override. (Question 6b)	55
IV. CONCLUSION.....	55

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Pursuant to the Committee's Briefing and Scheduling Order dated July 12, 2010, Carlsbad Energy Center LLC herein provides its Opening Brief in support of the Carlsbad Energy Center Project.

I. INTRODUCTION

Carlsbad Energy Center LLC ("Applicant") filed its Application for Certification ("AFC") for the Carlsbad Energy Center Project ("CECP" or the "Project") on September 11, 2007. In November 2009, the California Energy Commission ("Commission") Staff ("Staff") published its Final Staff Assessment ("FSA"). On January 21, 2010, the Siting Committee for the Project held a pre-hearing conference setting the schedule for the Evidentiary Hearing ("Hearing"). The Hearing was held in Carlsbad, California February 1 through 4, 2010.

At the close of the Hearing, Hearing Officer Kramer proposed a date by which each party should identify topics and issues that it would like to brief. On or about February 12, 2010, the

parties submitted their lists of topics and issues pursuant to Hearing Officer Kramer's request. The parties anticipated that the Committee would issue a briefing schedule by mid-March 2010. On June 15, 2010, Applicant submitted a request for the Committee to issue a briefing schedule so as to advance the proceeding toward issuance of the Presiding Member's Proposed Decision and, soon thereafter, a Final Decision. Due to the Committee's diligent work on renewable energy projects, however, the parties did not receive a Briefing Order and Revised Schedule until July 12, 2010. To that end, Applicant herein addresses the topics presented in the Briefing Order.

II. MOTIONS PROPOSED AND/OR OPPOSED

There are four outstanding motions pending before the Committee. A short summary of each motion is set forth below:

1) Applicant's Motion to Admit Supplemental Documents into the Evidentiary Record (February 18, 2010) ("CECP Motion").

The CECP Motion seeks to admit supplemental documents into the evidentiary record. Specifically, the documents are the final Carlsbad Planning Commission and the City Council approved plans for the Poseidon Desalination Project. The supplemental documents are relevant to CECP's compliance with local fire protection and worker safety laws, ordinances, regulations and standards ("LORS"). These are documents from the City's own files and speak for themselves.

2) City of Carlsbad and Carlsbad Redevelopment Agency's (collectively referred to herein as the "City") Response to Motion to Admit Supplemental Documents into the Evidentiary Record (March 1, 2010) ("City Response").

The City Response does not object to the proposed supplemental evidence by CECP,

claiming that it is important for the Committee to view the description of the Poseidon Desalination project. However, the City, in its Response, provided additional testimony of City Fire Marshal James Weigand explaining the documents that CECP is seeking to submit into the evidentiary record.

3) CECP's Reply in Opposition to City Response (March 16, 2010) ("CECP Reply").

Applicant notes that the City failed to make the requisite motion to add James Weigand's testimony to the evidentiary record, and failed to demonstrate why the new testimony regarding the Project should be added to the evidentiary record. The additional testimony also contains inadmissible hearsay of Fire Chief Bandamo regarding the Kleen Energy Project in Connecticut, is not relevant to the CECP proceeding, was not made under oath, and is not subject to cross-examination by the parties.

4) Terramar's Motion to Admit Supplemental Documents Into the Evidentiary Record (February 25, 2010) ("Terramar Motion").

Terramar seeks to supplement the CECP evidentiary record with four newspaper articles relating to the Kleen Energy Center in Middletown, Connecticut, along with Findings of Fact from the Connecticut Siting Council for construction of that facility. Terramar failed to state the legal reasons why these supplemental documents should be added to the evidentiary record.

Applicant herein objects to and opposes the Terramar Motion for the reasons set forth in the CECP Reply, discussed above. Further, the Terramar Motion seeks to supplement the CECP evidentiary record with information not relevant to the CECP proceeding, was not made under oath, lacks a legal foundation, and is not subject to cross-examination by the parties.

III. BRIEFING TOPICS

A. Project's Environmental Impacts

1. **Are there any unmitigated significant direct, indirect, or cumulative environmental impacts of the Carlsbad Energy Center Project (CECP)? (Question 1a)**

Answer: No, there are not any unmitigated significant direct, indirect, or cumulative environmental impacts associated with CECP. CECP complies with all LORS, and, as proposed, will not have any significant adverse, direct, indirect or cumulative environmental impacts.

Legal Argument: Title 20, California Code of Regulations, Chapter 5, Appendix B requires specific data and supporting analysis for every environmental topic required to be evaluated for each AFC filed with the Commission. For each environmental topic, Staff must evaluate the potential cumulative impacts of a project. (*See, e.g.,* 20 Cal. Code Regs., Chptr. 5, Appendix B(g)(1).) Moreover, Staff is required to prepare a final staff assessment ("FSA"). (20 Cal. Code Regs., § 1747.) The purpose of a FSA is to provide an independent analysis of a proposed project and the FSA serves as Staff's final testimony based on intensive discovery and analysis thereof.

Over a period of time exceeding two years, Staff requested from and evaluated additional information provided by Applicant to supplement information set forth in the AFC, including data that evaluated any potential direct, indirect or cumulative environmental impacts resulting from the construction and operation of CECP. Staff's FSA for CECP describes, in particular, "a comprehensive cumulative analysis of the potential impacts of the project, along with potential impacts from other existing and known planned developments..." and contains a discussion within each of the nineteen technical area assessments of "project specific and cumulative

impacts.” (Ex. 200 at pp. 2-1 and 2-2.)¹ Based upon these analyses, Staff properly concluded that “significant adverse direct, indirect, and cumulative impacts would not occur” as a result of the construction and operation of the Project. (See Ex. 200 at p. 1-6.)

Conclusion: Based on the comprehensive data analyzed by the parties, Staff, and Applicant, CECP will not have any significant adverse, direct, indirect or cumulative environmental impacts.

2. Is the potential shutdown of Encina Units 4 and 5 part of the Project and must the impacts of such a shutdown be evaluated as part of CECP? (Question 1b)

Factual Background: CECP is a proposed 558 MW gross combined-cycle generating facility configured as two trains each comprised of one natural-gas-fired combustion turbine and one steam turbine. As part of the Project, existing steam boiler Units 1, 2, and 3 at Encina Power Station (“EPS”) will be retired. The retirements will occur upon the successful commercial operation of the new Project generating units. The retirements will create substantial environmental benefits, including permanent air emission reductions from the boiler units; elimination of 225 million gallons per day of cooling water (seawater) intake capacity associated with Units 1-3 and a resulting decrease in impingement and entrainment of marine organisms attributed to those units’ cooling water flow; cessation of discharge of wastewaters to the Pacific Ocean from Units 1-3; and elimination of the use of potable water attributed to the existing operation of Units 1-3.

Answer: No, the potential shutdown of Encina Units 4 and 5 is not part of the Project. Therefore, the impacts of such a shutdown need not be evaluated as part of CECP.

¹ For purposes of Applicant’s Opening Brief, citations to Evidentiary Hearing Exhibits and the official Transcript will be referred to as “Ex. ___ at p. ___” and “Trans. (Date of Hearing) at p. ___” respectively.

3. Has a reasonable range of project alternatives been evaluated? (Question 1c)

Short Answer: Yes, a reasonable range of project alternatives has been evaluated. The Project's objectives are sufficiently broad and clearly delineated and the alternatives identified in the FSA are comprehensive. Alternative technologies such as geothermal, solar thermal, solar photovoltaic, wind, biomass, and hydroelectric do not present feasible alternatives to the 558 MW CECP and do not meet these two specific project objectives.

Factual Background: The FSA identifies and evaluates six project objectives that are sufficiently broad to include consideration of alternative sites. CECP's objectives include, amongst others, the following: meeting the California Independent System Operator's need for new, highly efficient, reliable electrical generating resources that are dispatchable and incorporate alternative generating technologies and are located in a load-pocket of the San Diego region; and improving San Diego's electrical system reliability through fast starting generating technology that creates a rapid responding resource for peak demand situations and a dependable resource to backup intermittent renewable resources. In addition, the FSA considers six alternative sites, a comprehensive list that covers a reasonable range of project alternatives.

Legal Analysis: The California Energy Commission's power plant site certification program (Pub. Resources Code §§ 25500 et seq.) is a certified state regulatory program, exempt from California Environmental Quality Act, Pub. Resources Code §§ 21000 et seq., ("CEQA") requirements for preparing an environmental impact report ("EIR"). (14 Cal. Code Regs. § 15252(j); see Pub. Resources Code § 21080.5.) For purposes of CEQA, the Energy Commission is the lead agency for all power plant projects that are certified by the Energy Commission pursuant to the Warren Alquist Act. (Pub. Resources Code § 25519(c).)

According to CEQA, an EIR must describe a reasonable range of alternatives to the Project, including consideration of alternative locations for the Project that could feasibly attain

most of the basic objectives of the Project while avoiding or substantially lessening any of the significant effects of the Project. (14 Cal. Code Regs. § 15126.6(a), (f).) Certain factors may be considered “when addressing the feasibility of alternatives,” including the following:

[s]ite suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent). No one of these factors establishes a fixed limit on the scope of reasonable alternatives.

(*Id.* (citing *Goleta II*, 52 Cal.3d 553; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1753, fn. 1).)

Further, the “range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects” and “[t]he EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency’s determination.” (14 Cal. Code Regs. § 15126.6(c).)

According to the CEQA Guidelines, the “range of alternatives required in an EIR is governed by a ‘rule of reason’ that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice.” (*Id.* at § 15126.6(f).) Such alternatives “shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project” and an “EIR need examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project. The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making.”

(*Id.*) There are certain factors, such as feasibility, that must be considered in addressing alternatives. Another aspect of an alternatives analysis under CEQA is “alternative locations,” which requires the lead agency to analyze the following three items:

(A) Key question. The key question and first step in analysis is whether any of the significant effects of the project would be avoided or substantially lessened by putting the project in another location.

(B) None feasible. If the lead agency concludes that no feasible alternative locations exist, it must disclose the reasons for this conclusion, and should include the reasons in the EIR.

(C) Limited new analysis required. Where a previous document has sufficiently analyzed a range of reasonable alternative locations and environmental impacts for projects with the same basic purpose, the lead agency should review the previous document. The EIR may rely on the previous document to help it assess the feasibility of potential project alternatives to the extent the circumstances remain substantially the same as they relate to the alternative. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 573).

(14 Cal. Code Regs. § 15126.6(f)(A)-(C) (emphasis added).)

The FSA analyzed in great detail the CECP site, as well as three alternative sites: CATO (*sic*), Maerkle, and the Carlsbad Oaks North site. (Ex. 200 at pp. 6-6 – 6-11.) Further, Staff discussed two additional alternative sites that did not meet the basic criteria for evaluation of alternative sites under CEQA. Of the sites evaluated, Staff considered both short-term and temporary construction-related impacts, as well as long-term and operational-related impacts. The Staff’s alternatives analysis in the FSA provides an assessment of a reasonable range of feasible alternatives that could substantially reduce or avoid any potentially significant adverse impacts of the Project while obtaining the basic project objectives pursuant to CEQA. (14 Cal. Code Regs §15126.6; 20 Cal. Code Regs. §§1765; 2300 *et seq.*)

A key finding of the environmental impacts analysis in the CECP FSA is that the environmental impacts associated with CECP are either less than significant or, with the inclusion of the Conditions of Certification in the FSA, any potential impacts will be reduced to below a level of significance. Under the Warren-Alquist Act, akin to CEQA, the purpose of the alternatives evaluation is to determine if an alternative to a proposed project would avoid or substantially lessen environmental impacts of the project which are significant and cannot be mitigated to below a level of significance. Notwithstanding that CEC Staff has found that any potential impact from CECP can in fact be fully mitigated to a less than significant level, the FSA includes a table comparing the impacts of CECP to the impacts that would occur at the three alternative sites evaluated in detail in the FSA. As shown in the FSA's Alternatives Table 2 (Ex. 200 at pp. 6-12 – 6-14), none of the alternative sites evaluated by Staff would avoid or substantially lessen the environmental impacts of CECP. Staff concluded that the proposed CECP is the environmentally superior alternative. (Ex. 200 at p. 6-12.)

As discussed above, CEC Staff considered a reasonable range of alternatives to the CECP project site. Similarly, CEC Staff considered a reasonable range of technology alternatives to the natural gas-fired technology proposed for CECP. Alternative technologies such as geothermal, solar thermal, solar photovoltaic, wind, biomass, and hydroelectric do not present feasible alternatives to the 558 MW CECP and do not meet specific project objectives.

Conclusion: Yes, a reasonable range of project alternatives have been evaluated. The Project objectives are sufficiently broad and clearly delineated and the Project alternatives identified in the FSA are comprehensive.

B. Project's LORS Compliance

- 1. Does the Project comply with federal, state, and local laws, ordinance, regulation, or standards (LORS), including the Coastal Act and the City's General Plan, zoning, redevelopment, and other regulations? (Question 2a)**

Short Answer: Yes. The Project complies with all federal, state, and local LORS, including the Coastal Act, and the City's General Plan, zoning, redevelopment and other regulations. (Trans. (02/01/10) at pp. 160-161, 175; Ex. 147.)

Legal Analysis:

- a. Power Generation is Authorized Under LORS Applicable to CECP.

The EPS property is designated for electric power generation purposes under all applicable local LORS. (*Id.*) CECP is located entirely within the existing footprint of the EPS property. Thus, CECP is proposed to be located in an area that is consistent with applicable land use LORS. The Project is not a new use being introduced into an area, but rather, the modernization and replacement of a portion of the existing EPS electrical generation facilities, which is a clearly permitted use under all applicable LORS.

- b. CECP is Consistent with the California Coastal Act and Associated Agua Hedionda Land Use Plan.

CECP is consistent with the California Coastal Act because the Project is consistent with the Coastal Commission-certified Agua Hedionda Land Use Plan ("AHLUP"). The AHLUP, which covers approximately 1,100 acres, was initially developed by the City and submitted to the Coastal Commission for certification of the City's overall local coastal program covering all portions of the City within the Coastal Zone. (Trans. (02/01/10) at p. 164). The AHLUP was initially adopted and certified in 1982 and has been amended from time to time with the ongoing consent/certification of the Coastal Commission. In each instance, Coastal Commission findings were made that the AHLUP is consistent with Coastal Act policies and standards. The AHLUP

expressly recognizes electrical power generation as an authorized use at the EPS site, and such use was found consistent with the Coastal Act. (*Id.*; *see also*, Ex. 147 at § 6.)

The Project is fully consistent with the expressly allowed uses of the AHLUP and represents a modernization of an existing Coastal Zone power generating facility, which will result in significant environmental benefits. (Trans. (02/01/10) at p. 161.) CECP's commencement of commercial operations concurrently with the de-commissioning of EPS Units 1, 2, and 3 will result in substantial environmental benefits as a result of: reducing significantly the volume and impacts of using ocean water to cool the retired units; reducing the amount of air emissions compared to the rate of emissions of the older units that will be de-commissioned; and facilitating the eventual redevelopment of the westerly portion of the EPS site for non-power generating uses, thereby significantly reducing the amount of Coastal Zone property utilized for power generation purposes.

c. CECP is Consistent with the General Plan.

The City's General Plan designates the EPS property as "U" (Utility). (Trans. (02/01/10) at pp. 162, 175). The "U" classification expressly allows for the generation of electrical energy, treatment of wastewater, and other primary utility functions designed to serve all or a substantial portion of the community. (Trans. (02/01/10) at p. 162). Clearly and unambiguously, CECP fits within the clear purpose and scope of allowed uses for this land use classification under the City's General Plan. (*See also* Ex. 147 at § 2.)

d. CECP is Consistent with the City's Zoning Ordinance as an Authorized Use in the Public Utility Zone.

Under the express provisions of the City's Zoning Ordinance, the applicable zoning designation for the entire EPS property, including the Project area is "P-U" (Public Utility). (Trans. (02/01/10) at p. 163). Chapter 21.36 of the City's Zoning Ordinance, Section 21.36.020,

expressly authorizes various uses and structures, including the “generation and transmission of electrical energy” and associated ancillary support facilities. (*Id.*) As such, the Project is fully consistent with the Zoning Ordinance. In turn, this zoning designation is fully consistent with the General Plan “U” designation. (*See also* Ex. 147 at § 3.)

e. CECP is Consistent with Specific Plan 144 and an Amendment to SP 144 is Not Required for the Project.

CECP is consistent with Specific Plan 144 (“Specific Plan 144” or “SP 144”).² (Trans. (02/01/10) at pp. 163-164, 177-178). SP 144 is a zoning/land use tool applicable to the project area and the larger EPS property, as well as hundreds of adjacent acres that are not zoned or designated for electrical energy generation and transmission uses. (Trans. (02/01/10) at pp. 163-164). However, with respect to the area in question, SP 144 expressly anticipates electrical generation and transmission uses on the EPS property, including the area proposed for the Project. (Trans. (02/01/10) at p. 164). Further, as discussed in more detailed below in Section II.B.4, a comprehensive amendment to SP 144 is not required.

f. CECP is Consistent with South Carlsbad Coastal Redevelopment Plan and Satisfies the City’s “Extraordinary Public Purpose” Requirement.

CECP is within the South Carlsbad Coastal Redevelopment Plan (“SCCRP”) area. (Trans. (02/01/10) at p. 84). As acknowledged by the written testimony of Ms. Fountain (City Housing and Redevelopment Director), one of the underlying goals of the SCCRП was to realize a modernization over time of the existing EPS. (City’s Opening Testimony (D. Fountain) at p. 6.) The SCCRП specifically includes the following goal: “Facilitate the redevelopment of the Encina Power Generating Facility to a physically smaller, more efficient generating plant.”

² The City’s Specific Plan 144 and the related Amendment was not lodged as an exhibit during the Hearing. Nevertheless, the SP 144 was cited to and referenced throughout the CECP AFC proceeding. Further, the Siting Committee specifically identifies SP 144 as the subject of a briefing topic.

(Trans. (02/01/10) at p. 84; Ex. 194 at p. 3). Further, the “smaller, more efficient” plant was to be located on the eastern portion of the existing EPS site between the AT&SF railroad tracks and Interstate 5, precisely the location of the Project. ((Trans. (02/01/10) at pp. 91-92; Ex. 194 at p. 3). While the City now contends otherwise, it is clear that not only is CECP fully consistent with the SCCRP, the Project furthers the goals and policies of the SCCRP, as the Project includes the concurrent decommissioning of the three oldest EPS units and represents modernization and efficiency improvements while utilizing existing electrical transmission infrastructure in place.

The Project also includes “extraordinary public purposes” or benefits and will have the following public benefits and purposes:

- i. result in the concurrent de-commissioning of the three oldest steam boiler units at EPS;
- ii. reduce the current EPS facility’s demand for once-through ocean water cooling through the retirement of Units 1-3 at EPS;
- iii. replace less efficient, higher polluting generation units with modern, more efficient and less polluting units;
- iv. result in additional tax revenues to the City as a result of the construction/valuation of the project and natural gas franchise taxes;
- v. be a step toward potential future redevelopment of the western portion of the EPS site for non- power plant purposes as the project occupies only a small portion of the existing EPS site that is very constrained in terms of potential future uses, located between the railroad tracks, Interstate 5 and City sewer pump station/sewer interceptor facilities; and
- vi. enhance the incorporation and penetration of renewable energy generation supplies into the local grid from locations outside the region.

(Trans. (02/01/10) at pp. 86-89; Ex. 147 at § 5.)

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g. The Precise Development Plan is a Permit, Not a LORS.

As discussed in more detail below in Section II.B.5, Precise Development Plan 00-02 (PDP)³ is an implementing permit, rather than an applicable LORS regulating allowable land uses on the Project site. (Trans. (02/01/10) at pp. 165, 175).

Conclusion: Yes. The Project complies with all applicable LORS.

2. Is the Project “coastal dependent”? (Question 2b)

Factual Background: CECP includes an ocean-water purification system to provide the water supply necessary for operation of the proposed units if reclaimed water is unavailable. (Ex. 35 at pp. 2-3.) In addition, CECP will discharge process wastewater through EPS’s existing ocean-water discharge system. (*Id.*) These Project elements were incorporated into the CECP design to address reliability issues that the City raised concerning available water supply and wastewater discharge capacity. The ocean-water purification system will take ocean water that has been utilized as cooling water and for maintaining the cooling water system (i.e., service water) for EPS Units 4 and 5, and through a reverse osmosis and ion exchange process, produce high-purity industrial water for use in the new CECP units. The intake for the ocean-water purification system will be from the existing EPS ocean water discharge channel. It is estimated that for ocean-water purification, CECP will take in 3,000 gallons per minute (i.e., equivalent to one service water pump for the EPS cooling water system), or 604,500 gallons per day to 1.22 million gallons per day, from the EPS discharge stream.

Legal Argument: In rendering its decision on an AFC, the Commission must consider whether the proposed power plant can be constructed and operated in compliance with LORS and land use plans applicable to the site and the facility, and must make findings regarding the

³ The City’s Precise Development Plan 00-02 was not lodged as an exhibit during the Hearing. Nevertheless, the PDP was cited to and referenced throughout the CECP AFC proceeding. Further, the Siting Committee specifically identifies the PDP as the subject of a briefing topic.

project's conformity with applicable local, regional, state, and federal standards, ordinances, and laws. (Pub. Resources Code § 25523(d)(1); 20 Cal. Code Regs. § 1748(b).) For a proposed facility in the coastal zone, like CECP, the Commission must evaluate whether the Project will conform with the Coastal Act and the local coastal plan applicable to the CECP site—the AHLUP. As discussed in Section II.B.1., *supra*, CECP complies with both the Coastal Act and the AHLUP. The City has raised the question of whether CECP is a coastal-dependent use under the Coastal Act, with the implication that any new development within the coastal zone must be a coastal-dependent use in order to comply with the Coastal Act. This is inaccurate. The Coastal Act does not provide that only coastal-dependent uses may be developed within the coastal zone.

The Coastal Act provides numerous findings and declarations to guide development in the coastal zone and ensure the protection of coastal resources. For instance, the Act declares that the coastal zone is a distinct and valuable nature resource of vital and enduring interest to all the people and that it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction. (Pub. Resources Code § 30001(a),(c).) The Act also declares that existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of California. (Pub. Resources Code § 30001(d).) In addition:

[t]he Legislature further finds and declares that, **notwithstanding the fact electrical generating facilities, refineries, and coastal-dependent developments**, including ports and commercial fishing facilities, offshore petroleum and gas development, and liquefied natural gas facilities, **may have significant adverse effects on coastal resources and coastal access, it may be necessary to locate such developments in the coastal zone** in order to ensure that inland as well as coastal resources are preserved and that orderly economic development proceeds within the state.

(Pub. Resources Code § 30001.2 (emphasis added).) Through the Coastal Act, the Legislature promotes the preservation of coastal resources, balanced with the need for coastal development where appropriate. The Coastal Act does not specifically limit development in the coastal zone, of electrical generating facilities or any other kind of development, to coastal-dependent uses. (*Id.* at §§ 30001.2, 30250-30255.)

In the Coastal Act, the Legislature declared that one of the basic goals of the state for the coastal zone is to “[a]ssure priority for coastal-dependent and coastal-related development over other development on the coast.” (Pub. Resources Code § 30001.5.) The statute gives express priority to coastal-dependent developments, over other developments on or near the shoreline. (*Id.* § 30255.) The Legislature has defined “coastal-dependent development or use” as “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.” (*Id.* § 30101.)

The City has stated that it has insufficient quantities of California Code of Regulations Title 22 reclaimed water to meet CECP’s industrial water requirements. Likewise, the City avers that it does not have sufficient capacity for CECP to discharge industrial wastewater into the City’s sanitary/industrial sewer system. Accordingly, the enhanced CECP facility design incorporated ocean-water purification and discharge through the EPS cooling water discharge system as key design features allowing for operation of the new units. Without a source of high-purity water for the CECP heat recovery steam generators (HRSGs) and other plant processes, CECP would be unable to operate. CECP is designed to take in water from the EPS ocean water discharge system. CECP could not function without the EPS ocean-water discharge system to accept process wastewater from the new units. Therefore, under the definition of “coastal-dependent development or use” provided in the Coastal Act, CECP is coastal dependent because

it is a development that requires a site adjacent to the sea to be able to function. If CECP were not located adjacent to the Pacific Ocean, it would not have any water to operate or a means to dispose of its process wastewater.

Whether CECP is a coastal-dependent development is relevant to the Commission's evaluation of the Project, though the Commission is not required to find that the Project is coastal-dependent in order to determine that CECP complies with the Coastal Act. Section 30260 of the Coastal Act provides that coastal-dependent industrial facilities "shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division." (Pub. Resources Code § 30260.) Section 30260 also prescribes conditions for siting new or expanded coastal-dependent industrial facilities when they cannot be feasibly accommodated within an existing site; however, this is not the case for CECP. CECP, as the proposed replacement for EPS Units 1, 2, and 3, will be housed entirely within the existing footprint of EPS and will reuse acreage occupied by unnecessary storage tanks. As a coastal-dependent use, CECP must be allowed to locate within the existing EPS site.

Conclusion: CECP must make use of ocean water discharge from EPS to operate, as there is insufficient Title 22 reclaimed water available from the City to provide water for CECP. CECP must also discharge its process wastewater into the EPS cooling water discharge channel, because the City's sanitary/industrial sewer system cannot accommodate industrial wastewater streams from CECP. This use of ocean water, via the existing EPS ocean water discharge system, is necessary for CECP to function. As CECP is taking water from the EPS ocean-water discharge system, CECP requires a site adjacent to the ocean and to EPS. Therefore, CECP is a coastal-dependent development or use within the meaning of Public Resources Code section 30101.

3. Is it a utility or public utility as those terms are used in the City's regulations? (Question 2c)

The zoning designation applicable to the CECP property is "P-U Public Utility Zone." Chapter 21.36 of the City's Municipal Code enumerates the uses permitted in the Public Utility Zone which expressly include "generation and transmission of electrical energy." (Carlsbad Municipal Code, § 21.36.020, Table A.) The Project proposes a facility that will generate electrical energy and thus is expressly permitted by the applicable zoning. Indeed, the CECP property has been used to generate electrical energy for the past 50 plus years and PDP 00-02 approved in 2006 by the City expressly acknowledged that the current use of the site was permitted in the P-U zone. (Ex. 409 at p. 8.) Until now, the City has never suggested that the Applicant's operation of a power station on the Property is prohibited or otherwise inconsistent with applicable zoning.

Hoping to defeat the Project, the City now argues that the owner of CECP is not a "public utility" and the Project is therefore prohibited by the Zoning Ordinance because the facility will not be regulated by the California Public Utilities Commission or another regulatory body. (City's Opening Testimony, S. Donnell at p. 13.) Nothing in the Zoning Ordinance states that uses permitted in the PU must be subject to regulatory oversight or "publicly owned." More importantly, the law would not tolerate a zoning ordinance that permitted public, but not private energy generating facilities. (*Roman Cath. Etc. Corp. v. City of Piedmont* (1955) 45 Cal.2d 325 (invalidating a zoning ordinance that permitted public, but not private schools).) "When certain uses are permitted, a city cannot arbitrarily exclude others who would employ a similar use." (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013 ("A city does not have carte blanche to exclude a retail merchant that it, or some of its residents, do not like.")). Carlsbad's P-U zoning regulations also make clear that the P-U zone permits uses that do not

require regulatory oversight, such as agriculture, alcohol treatment centers, campsites, golf courses, and hospitals.

It is also important to recognize that the City's current position contradicts its prior interpretation and application of the P-U zone. As recently as 2006, the City did not view the P-U zone as prohibiting utility facilities that are operated by private, unregulated entities. In 2006, the City issued approvals to Poseidon Resources LLC authorizing it "to construct and operate an approximately 50 million gallon per day Carlsbad Seawater Desalination Plant and other appurtenant and ancillary water and support facilities to produce potable water." (Ex. 409 at p. 3-8.) The Carlsbad Seawater Desalination Plant is located on the same site and immediately adjacent to the existing EPS, also within the P-U zone. Like the generation of electrical energy, the "processing, using and storage of . . . domestic and agricultural water supplies" is a permitted use in the P-U zone. (Carlsbad Municipal Code § 21.36.020, Table A (or Ex. 411).) The City cannot approve a privately owned and operated water desalination plant in the P-U zone and then claim that a private entity cannot operate an electrical generating plant in the P-U zone.

As evidenced by the above, the Commission should find that CECP's proposed use—electrical energy generation—is permitted by the City's Zoning Ordinance. Contrary to what the City argues, the Ordinance does not permit only electrical energy generation by an operator regulated by the CPUC. Such an interpretation is not supported by the Ordinance language nor by the City's past practice. Therefore, the CEC should afford no deference to this novel and constrained interpretation offered by the City for the sole purpose of defeating project approval. (*Yamaha Corp. of Am. v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 12 (deference to City's interpretation of zoning ordinance is "fundamentally situational" and must consider a complex of factors including whether the agency offering the interpretation is one that was consistently

maintained and of long standing.)

4. Is a comprehensive update of City Specific Plan 144 required for CECP? (Question 2d)

Short Answer: No. A comprehensive update of Specific Plan 144 is not required for CECP.

Legal Argument: The City insists that a comprehensive update of Specific Plan 144 is required for the Project. No legal authority supports the City's position. To the contrary, the law requires CECP be consistent with the currently adopted Specific Plan 144. (Gov. Code, § 65455 [project must be consistent with the applicable specific plan].) Under certain circumstances, project consistency can be analyzed pursuant to a draft plan, but here the City has not published or even proposed any draft amendments to Specific Plan 144. (*Harroman Co. v. Town of Tiburon* (1991) 235 Cal.App.3d 388, 396.) Instead, the City is asking the CEC to analyze the Project for consistency with the City's arguable conceptual vision for a future update to Specific Plan 144 that would exclude the Project. That vision has not been subjected to the analyses and public procedures required for a specific plan amendment. As such, it is inapplicable to the LORS analysis for this Project.

As discussed above in Section II.B.1.e, CECP is fully consistent with the current adopted Specific Plan 144. A project is consistent with the specific plan if, in all its aspects, it will further the objectives of the plan and not obstruct its attainment. (*Sierra Club v. Napa County (Beringer Wine Estates)* (2004) 121 Cal. App. 4th 1490.) Specific Plan 144 designates the Property for electrical generation uses. The Project proposes development of a facility that will generate electrical energy. Under these circumstances, the City cannot credibly refute that the Project is consistent with the applicable plan.

Conclusion: A comprehensive update of Specific Plan 144 is not required for CECP.

5. Is a Precise Development Plan in the nature of a Specific Plan or a permit similar to a Conditional Use Permit? (Question 2e)

Short Answer: Yes. Under the City's regulatory program, the Precise Development Plan permit is a project specific site development permit, like a conditional use permit. (Carlsbad Municipal Code § 21.36.010.)

Legal Argument: The precise development plan permit is not like a specific plan or other legislative plan that must be analyzed for LORS consistency as part of Project approval. Legislative approvals [e.g., General Plan, Specific Plan, Zoning, Aqua Hedionda Land Use Plan] apply generally to all projects falling under its provisions. (*San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 212; see also *J.D. Patterson v. Central Coast Regional Coastal Zone Conserv. Comm'n* (1976) 58 Cal.App.3d 833, 840 (legislative decisions set forth rules that apply to a large group of properties or projects).) An adjudicative approval, on the other hand, considers the application of established standards set forth in legislative approvals to an individual project. (*Arnel Dev. Co. v. City of Costa Mesa* 1980) 28 Cal.3d 511, 519.) A conditional use permit and a precise development plan are both adjudicatory under the City of Carlsbad's Zoning Ordinance and applicable California law.

The precise development plan permit is not a legislative approval because it does not establish permitted uses or regulations generally applicable to a broad class of properties. Rather, it is a project specific site development permit used to implement the P-U zoning in the same way that a conditional use permit implements applicable zoning. This is substantiated by the Carlsbad Municipal Code, which states:

The intent and purpose of the P-U zone is to provide for certain public utility and related uses subject to a precise development plan procedure to:

- (1) insure compatibility of the development with the general plan and the 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.) Similarly, the Carlsbad Municipal Code states the purpose of a conditional use permit is to implement applicable zoning by ensuring a proposed use is compatible with surrounding developments. (*Id.* § 21.42.010.)

Unlike a legislative approval, the Carlsbad Municipal Code also provides that both a conditional use permit and precise development plan permit may be approved subject to conditions of approval. (*Id.* § 21.36.050.) Many of the conditions that may be imposed on precise development plan permits and conditional use permits are identical and concern specific site development project design issues such as:

- yards and open space (Carlsbad Municipal Code, § 21.36.050(1) and 21.42.040(A)(2));
- fences and walls (Carlsbad Municipal Code, § 21.36.050(3) and 21.42.040(A)(3))
- street dedication and improvements (Carlsbad Municipal Code, § 21.36.050(7) and 21.42.040(A)(4));
- regulation of points of ingress and egress (Carlsbad Municipal Code, § 21.36.050(10) and 21.42.040(A)(5)); and
- time schedule for developing the proposed project (Carlsbad Municipal Code, § 21.36.050(9) and 21.42.040(A)(9)).

Approval of specific plans and other legislative documents, on the other hand, are not subject to project specific site design conditions of approval.

Conclusion: As demonstrated by the foregoing, the precise development plan permit functions like a conditional use permit in Carlsbad. Its purpose is to document actual site development of specific projects under the City's P-U zoning designation in terms of compliance with applicable use and other standards and to impose site development conditions, if appropriate, to ensure continued compatibility with the surrounding environment. Adjudicatory permits such as this are not relevant to the CEC's LORS analysis. (Ex. 147 at § 7.)

6. Does the Warren-Alquist Act preempt the City Redevelopment Agency's permitting authority? (Question 2f)

Short Answer: Yes, the Warren Alquist Act preempts the City Redevelopment Agency's permitting authority.

Legal Argument: The Warren-Alquist Act (Public Resources Code §§ 25000 *et seq.*) gives the Commission exclusive jurisdiction over the siting of thermal power plants in California. (Pub. Resources Code § 25500.) Public Resources Code section 25500 provides:

The commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

The licensing authority provided under Public Resources Code section 25500 “supersedes all other local and state permitting authority.” (Pub. Resources Code § 25500; *see also* Bay Area Air Quality Management District, Russell City Energy Center, *Statement of Basis for Draft Amended Federal 'Prevention of Significant Deterioration' Permit*, Dec. 8, 2008, p. 5.) Subject to the Commission's requisite cooperation with other agencies and compliance with all applicable law, the Commission's jurisdiction over power plant siting within California is “all encompassing.” (5 Manaster & Selmi, *Cal. Environmental Law and Land Use Practice* (2004) Power Plant Siting, § 75A.03, p.75A-6.) The Commission's certificate constitutes the only state, local or regional approval necessary to construct and operate a power plant, and all other such

approvals are effectively subsumed within the Commission permit. (*City of Morgan Hill v. Bay Area Air Quality Management District* (2004) 118 Cal.App.4th 861, 879.)

Given the Commission's certification is in lieu of all local and state permits, such as redevelopment permits issued by a city redevelopment agency, the Commission works with local agencies who would have permitting authority over the project, but for the Commission's exclusive jurisdiction pursuant to Public Resources Code section 25500. The Commission must forward an AFC for a proposed power plant to "local government agencies having land use and related jurisdiction in the area of the proposed site and related facility." (Pub. Resources Code § 25519(f).) Then, local agencies responsible for enforcing any regulations, ordinances, or similar legal mandates applicable to the proposed power plant project must assess the adequacy of an applicant's proposed compliance measures to determine whether the proposed facility will comply with legal mandates. (20 Cal. Code Regs. § 1744(b).) Under this provision, the Carlsbad Planning Department or Housing and Neighborhood Services Department, or the Carlsbad Housing and Redevelopment Commission, can evaluate whether CECP complies with the SCCRP.

Proposed compliance measures, and a local responsible agency's assessment of compliance, are presented at the Commission's hearings on a proposed project. (20 Cal. Code Regs. § 1744(c).) The Commission is required to "consider whether the facilities can be constructed and operated in compliance with other standards, ordinances, regulations and laws and land use plans applicable to the proposed site and related facility." (20 Cal. Code Regs. § 1748(b).) While any local permit is replaced by the Commission's certification, the Commission must use as guidance the same criteria that the local government would apply in making a determination of compliance. (*See* CEC Draft Staff Report, *Energy Facility Licensing Process*:

Developers Guide of Practices and Procedures (2000) at p. 12, fn. 1 (“CEC Staff Draft Report”).) Using this criteria, the Commission is required to make findings regarding the conformity of a proposed power plant project with “applicable local, regional, state, and federal standards, ordinances, and laws.” (Pub. Resources Code § 25523(d)(1).) The Commission incorporates appropriate compliance measures into a project’s certification. These compliance measures act as the terms and conditions that a local agency might place on a project through its own permits. (See CEC Draft Staff Report at p. 12.) The City may offer compliance measures that it would incorporate into a redevelopment permit, to ensure that CECP complies with the SCCR and its Five-Year Implementation Plan.

The policy of the Commission has been for local agencies to retain jurisdiction over any land use plan amendment or zoning change necessary for a project. In Staff’s view, local land use determinations such as general or specific plan amendments or zoning ordinance amendments are not “permits, certificates, or similar documents” which are subsumed within a Commission permit. (CEC Draft Staff Report at p. 12.) Other land use decisions that “go to the terms and conditions placed on a project are subsumed in the Commission’s permit. Examples of such decisions include variances, conditional use permits, and specific site development plans that specify terms and conditions for permitting the project.” (*Id.* at fn.1 (emphasis added).) Regardless of Staff’s interpretation of the Warren-Alquist Act, the statutory language is clear, “[t]he issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency” (Pub. Resources Code § 25500.)

As the Five-Year Implementation Plan for the SCCR contemplates the “redevelopment of the Encina Power Generating Facility to a physically smaller, more efficient power generating

plant,” it is not necessary to amend the SCCRP to accommodate this Project’s proposal to replace EPS Units 1-3 with two smaller, more efficient units. (Ex. 194 at p. 5.) To undertake work in the redevelopment zone, normally it may be necessary to obtain an additional permit from the City. However, given that the Commission’s certification for CECP acts in lieu of any permit required by a local or state agency, any required redevelopment permit from the City is subsumed within the Commission’s certification. Any authority which the City would normally have to issue a redevelopment permit, pursuant to local or state laws or ordinances, is preempted by the Commission’s exclusive jurisdiction over CECP permitting.

Conclusion: The Warren-Alquist Act preempts the City Redevelopment Agency’s permitting authority.

7. Does the Warren-Alquist Act preempt the City’s approval authority over the stormwater pollution prevention plan? (Question 2g)

Short Answer: The City has no approval authority over the stormwater pollution prevention plan.

Legal Argument: A complete discussion of the Commission’s exclusive jurisdiction over the siting of thermal power plants in California pursuant to the Warren-Alquist Act is set forth above in Section II.B.6. As discussed above, the Commission’s exclusive jurisdiction is all encompassing.

CECP is subject to federal and state water quality laws and regulations governing the discharge of wastewater implemented on the state and local level. These laws and regulations, however, grant no approval authority to the City. The Clean Water Act (33 U.S.C. §1251 *et seq.*) requires states to set standards to protect water quality. Under provisions of the Clean Water Act, the California State Water Resources Control Board (“SWRCB”) has adopted general National Pollutant Discharge Elimination System (“NPDES”) permits for control of stormwater

runoff during construction and operation of industrial facilities, such as a power plant and associated facilities.

First, under the General Permit for Discharges of Storm Water Associated with Construction Activity, Construction General Permit Order 2009-0009-DWQ, developers are required to prepare and implement a Storm Water Pollution Prevention Plan (“SWPPP”) if activities disturb greater than one acre of soil. The SWPPP identifies best management practices to reduce sediment, oil and other contaminants in stormwater discharges from the site. In addition, the Industrial Storm Water General Permit Order, 97-03-DWQ, also requires developers of industrial facilities, such as power plants, to prepare and implement a SWPPP that identifies best management practices to reduce the discharge of contaminants from facility operation in stormwater discharge. Thus, CECP is required to comply with both General Permits, each of which require a SWPPP.

According to the SWRCB’s own website, the local municipality in which construction will occur only has a limited role in reviewing/enforcing the SWPPP:

The local municipal storm water programs and the [Construction General Permit (“CGP”)] requirements intentionally have some overlap/redundancy. However, the local municipality has no authority to enforce the State's CGP requirements; this is done by the Regional Water Board inspectors. Typically, the local agency is responsible for ensuring compliance with local storm water ordinance which prohibits sediment and other pollutants from entering the municipal separate storm sewer system, and with a local grading ordinance which typically requires an erosion and sediment control plan (typically a sheet in the construction plan set) for projects with a grading permit. In some cases, the local municipality may have a condition in their MS4 storm water permit requiring the agency to check that certain items are included in the SWPPP. This does not constitute approval of the SWPPP and the review is typically conducted prior to issuing a grading permit.

(http://www.waterboards.ca.gov/water_issues/programs/stormwater/gen_const_faq.shtml#27 (emphasis added).) In a similar vein, for coverage under the Industrial Storm Water General Permit, the facility operator must file a Notice of Intent for coverage under the Permit, along with a site map and applicable fee with the SWRCB. Once these three complete documents are received by the SWRCB, the Notice of Intent will be processed and the facility operator “will be issued a receipt letter with a Waste Discharge Identification (WDID) Number.”

(http://www.waterboards.ca.gov/water_issues/programs/stormwater/indusfaq.shtml at Item 6.) Coverage under the Industrial Storm Water General Permit “is in effect until the [facility operator] submits a valid Notice of Termination (NOT) to the appropriate [Regional Water Quality Control Board].” (*Id.* at Item 8.)

Here, Staff proposed Conditions of Certification SOIL&WATER-1 and SOIL&WATER-3 to specify that the City should receive, review, and “approve” the construction and industrial SWPPPs for CECP. Applicant vehemently opposes this language, as it contradicts the law and is not allowed under the implementing agency’s own interpretation of its authority under the Clean Water Act (here, the SWRCB and San Diego Regional Water Quality Control Board). Further, such an obligation for the City to “approve” the SWPPPs could allow the City to disapprove the SWPPPs for any reason it so chooses, thus stalling construction and/or operation of CECP indefinitely.

Lastly, allowing the City of Carlsbad “approval authority” contravenes the Warren-Alquist Act, which gives the CEC the exclusive permitting authority over thermal power plants of 50 MW or more.

Conclusion: Based on the foregoing, the City has no approval authority over SWPPPs.

8. Does the Warren-Alquist Act give the California Energy Commission the authority to decide whether and where the Rail Trail can be built on the project site? (Question 2h)

Short Answer: Yes. The Warren-Alquist Act gives the Commission the authority to impose conditions of certification on those facilities within its jurisdiction and includes siting authority over issues relating to the Rail Trail.

Legal Argument: The Commission clearly has the exclusive authority to determine whether the Rail Trail can be located within the project site of CECP. As discussed above, the Warren-Alquist Act gives the Commission exclusive jurisdiction over the siting of thermal power plants in California. (Pub. Resources Code § 25500.) This exclusive jurisdiction “supersedes all other local and state permitting authority” (Bay Area Air Quality Management District, Russell City Energy Center, *Statement of Basis for Draft Amended Federal ‘Prevention of Significant Deterioration’ Permit*, Dec. 8, 2008, p. 5) and is “all encompassing.” (5 Manaster & Selmi, *Cal. Environmental Law and Land Use Practice* (2004) Power Plant Siting, § 75A.03, p.75A-6.) Under the power plant siting regulations (20 Cal. Code Regs. §§ 1701 *et seq.*), the Commission is required to make findings regarding the conformity of a proposed power plant project with “applicable local regional, state, and federal standards, ordinances, and laws.” (Pub. Resources Code § 25523(d)(1).)

The City continually mischaracterizes the “Rail Trail location” issue in an effort to block the Project. The Rail Trail, however, is not a Project site requirement under any applicable LORS or land use plans. Accordingly, pursuant to the Commission’s exclusive authority over project site conditions, the Commission has the authority over portions of the Rail Trail that may be located on the Project site.

The Rail Trail is more properly characterized as a City imposed exaction. Cabrillo Power I LLC, owner of the entirety of the EPS site, previously acquiesced in a City imposed exaction

that the Rail Trail would be accommodated “in a mutually acceptable location” on the overall EPS site pursuant to PDP 00-02 approved in 2006 for the Poseidon Desalination Facility. The language of the City exaction (Condition 16.d.) reads:

Coastal Rail Trail - Prior to occupancy [of the Poseidon Desalination facility], dedicate an easement for the Coastal Rail Trail in a location within the boundaries of the Precise Development Plan [entire Encina Power Station Site] that is mutually acceptable to the City and Owner [Cabrillo Power] or its successor in interest. [Clarifications added]

Not only is the Rail Trail not included in the LORS applicable to CECP, there is no credible argument that the Rail Trail must be located on the CECP site east of the railroad tracks as the City suggests. The phrase “mutually acceptable” was included in recognition of the necessary locational flexibility associated with the long-contemplated modernization of the EPS, foreshadowing the pending CECP application, and recognizing that direct public access east of the tracks may be logistically incompatible with the CECP requirements. Cabrillo Power and its representatives have previously met several times with the City to discuss a feasible alignment for the Rail Trail west of the railroad tracks in order to avoid the safety risks associated with an easterly alignment through the CECP site. The westerly alignment has the additional benefit of connecting directly to the City’s existing Rail Trail alignment southerly of Cannon Road, which then continues on the west side of the railroad tracks all the way to the City’s southern City limits. (*See generally*, Ex. 147 at § 4). The westerly alignment is both workable and feasible, bringing the Rail Trail closer to the ocean and other public access opportunities. More importantly, CECP does not interfere with the feasible westerly alignment. In any event, the Commission has the exclusive authority to determine all siting issues on the project site, including all issues related to the Rail Trail.

9. Must the Coastal Commission issue a report before the Commission can act on the Project's application? (Question 2i)

Short Answer: No, the Coastal Commission need not issue a report before the Commission can act on the Project's application.

Legal Argument: The Warren-Alquist Act and the Coastal Act both expressly allow for Coastal Commission participation in Commission proceedings involving the siting of power plants in the coastal zone. (Pub. Resources Code §§ 25507, 25508, 25519(d), 25523(b), 30314.) Within the context of a notice of intention ("NOI") process for new power plant sites and related facilities,⁴ Coastal Commission participation is mandated. (Pub. Resources Code §§ 25507, 25508, 30413(d).) For an AFC proceeding, for power plants on sites already certified through the NOI process or for power plants exempt from the NOI process, such as natural-gas fired facilities, Coastal Commission involvement is permissible, but not mandated. (Pub. Resources Code §§ 25519(d), 25523(b), 30413(e).)

For a natural gas-fired power plant like the proposed CECP, an Applicant is not required to file a NOI prior to filing an AFC. (Pub. Resources Code § 25540.6(a)(1).) In AFC proceedings, the Commission must transmit a copy of the AFC to the Coastal Commission for its review and comment where a facility is proposed in the coastal zone. (Pub. Resources Code § 25519(d).) NOI proceedings involving sites in the coastal zone, however, require the Commission to transmit a copy of the NOI to the Coastal Commission, and, in addition, the Coastal Commission "shall analyze the notice and prepare the report and findings prescribed by subdivision (d) of Section 30413" (Pub. Resources Code § 25507(a).)

⁴ The NOI process is "an attempt primarily to determine the suitability of the proposed sites to accommodate the facilities and to determine the general conformity of the proposed sites and related facilities with standards of the commission and assessments of need" (Pub. Resources Code § 25502.)

Pursuant to section 30413(d) the Coastal Act, cited in the above provision of the Warren-Alquist Act, the Coastal Commission must analyze each NOI before Staff has completed its Preliminary Staff Assessment (“PSA”) and then provide a written report to the Commission on the suitability of the proposed site and related facilities specified in the NOI. This report must contain a consideration of, and findings regarding, all of the following:

- (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.
- (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.
- (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.
- (4) The potential adverse environmental effects on fish and wildlife and their habitats.
- (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.
- (6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.
- (7) Such other matters as the commission deems appropriate and necessary to carry out this division.

(Pub. Resources Code § 30413(d).)

In contrast, **for non-NOI proceedings**, the Coastal Act simply directs that the Coastal Commission:

may, **at its discretion**, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority. **In the event the commission participates** in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.

(Pub. Resources Code § 30413(e) (emphasis added).) Thus, for non-NOI proceedings, such as the CECP AFC proceeding, the Coastal Commission is given discretion to participate fully in the proceeding, but is not required to participate at all. The Warren-Alquist Act echoes this. For AFC proceedings, the Warren-Alquist Act provides that:

The commission shall prepare a written decision after the public hearing on an application which includes all of the following:

(b) In the case of a site to be located in the coastal zone, **specific provisions to meet the objectives of Division 20** (commencing with Section 30000)⁵ **as may be specified** in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the [CEC] specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible.

(Pub. Resources Code § 25523(b) (emphasis added).) Hence, in an AFC proceeding, the Coastal Commission *may* prepare and provide to the Commission a report or other assessment of a proposed facility's conformity with the Coastal Act, pursuant to Public Resources Code section 30413(e). However, there is no requirement for the Coastal Commission to prepare a report, as is required for an NOI proceeding under section 25507(a).

Thus, neither the Warren-Alquist Act nor the Coastal Act obligate the Coastal Commission to participate in AFC proceedings, or prepare an official report pursuant to Public Resources Code section 30413(d) for such proceedings. Rather, Public Resources Code section 30413(e) provides the Coastal Commission with *discretion* to participate in Commission proceedings outside of the NOI process.

The Coastal Act and the Warren-Alquist Act allow for but do not mandate Coastal Commission participation in an AFC proceeding like CECP. For this Project, the Coastal

⁵ Division 20, commencing with section 30000 of the Public Resources Code is the California Coastal Act.

Commission has decided not to participate further in the AFC review process. In its October 16, 2007 letter to the Commission, the Coastal Commission provided its reasoning for not participating in the CECP AFC process. (Ex. 195.) As there is no statutory requirement for the Coastal Commission's participation, it is appropriate and lawful for the Coastal Commission to take this position.

Conclusion: The Coastal Act does not require that the Coastal Commission submit a report pursuant to Public Resources Code section 30413(d) for an AFC proceeding like the instant one. In accordance with Public Resources Code section 30413(e), the Coastal Commission has lawfully decided not to participate in the CECP AFC proceeding.

10. Does the recently adopted City Urgency Ordinance CS-070, prohibiting the processing of permit applications for power plants, have any effect on the Commission's processing or consideration of the CECP Application for Certification (AFC)? (Question 2j)

The City's late adopted "Urgency Ordinance CS-070" has no relevance or operative effect on the pending AFC for CECP. Adopted December 1, 2009, Ordinance CS-070 is another of the City's multiple efforts to "block" the AFC for CECP through unilateral local action in excess of its authority. Self serving Ordinance CS-070 essentially has two operative sections: (1) Section 2 locally ordains that CECP "... represents a current and immediate threat to the public health, safety and welfare to the Citizens of Carlsbad" and (2) Section 3 declares that "No development application shall be accepted, processed or approved which would increase the size, location, generating capacity or use of the existing Encina Power Station..." (See Ex. 432.)

The City's actions are clearly preempted by the exclusive jurisdiction of the Commission regarding siting, design and permitting of electric generating facilities. (Pub. Resources Code § 25500; 5 Manaster & Selmi, Cal. Environmental Law and Land Use Practice (2004) Power Plant Siting, § 75A.03, p.75A-6); 58 Ops.Atty.Gen. 729, 731 (1975); *City of Morgan Hill v. Bay Area*

Air Quality Management District (2004) 118 Cal.App.4th 861, 879.) Were it otherwise, any local jurisdiction could frustrate and block entirely one of the essential duties and powers of the Commission by simply adopting local ordinances, after the fact, categorically prohibiting the processing and approval of new power generating facilities.

Further, Ordinance CS-070 on its face is contrary to state law in other respects as well. In *Building Industry Legal Defense Foundation v. Superior Court* (1999) 72 Cal.App.4th 1410, the Court held it impermissible to use the California urgency ordinance provisions of Government Code section 65858 to prohibit the submittal or processing of development applications. Clearly, the City's efforts attempt to retroactively "outlaw" the processing and consideration of CECP.

Additionally, given that the AFC for CECP has been pending since September 2007, the City can hardly identify the "emergency" justifying the extraordinary nature of an urgency ordinance adopted in December 2009 – more than two years after the AFC was originally filed with the Commission. Notwithstanding the "form" of the Ordinance, it can have no impact on the current CECP AFC proceeding pending before the Commission.

11. What specific City development standards (height limits, setbacks, fire equipment access, etc.) apply to the project and does it comply with those standards? (Question 2k)

A. Height Limits. The City's development standards, such as architectural treatment, setbacks, or landscaping are applicable to the Project if those standards are set forth in a legislatively approved document of broad application. In other words, overall design standards relevant for the Project's LORS analysis are those set forth in the P-U Zoning Ordinance, the City's General Plan, Specific Plan 144, the Aqua Hedionda Land Use Plan and the South Carlsbad Coastal Redevelopment Plan Area. As such, the Project is required to have permanent landscaping in all yards and satisfy parking requirements described in the P-U Zoning Ordinance

(Carlsbad Municipal Code, § 21.36.090.) The Specific Plan also contains a couple of design standards that would apply to the Project (as opposed to other standards that apply only to existing improvements), such as the requirement to orient exterior lighting so that adjacent properties will be screened from glare or a direct light source (Specific Plan 144, Section III.10.) The Specific Plan's 35-foot height limitation, however, does not apply to the Project's power generating buildings and structures. The Specific Plan specifically provides:

The heights of future power generating buildings and transmission line tower structures **shall be heights and of a configuration similar to existing facilities**. . . . No other structure or building shall exceed thirty five (35') feet in height unless a specific plan is approved at a public hearing.

(Specific Plan 144, III.5 (emphasis added).)

Existing power plant facilities include a 400-foot stack and a boiler/turbine building that is approximately 190-feet in height. The highest structures the Project proposes are two approximately 140-foot tall stacks; all other significant structures will be less than 100-feet high. These proposed heights are similar to existing facilities and therefore fully consistent with the Specific Plan.

B. Fire Equipment Access. The City's Municipal Code ("Municipal Code") Title 17-Fire Protection addresses the applicable city requirements for fire access. Municipal Code section 17.04.010 states that the City adopts by reference the 2007 Edition of the California Fire Code ("Fire Code"). Amendments to the 2007 Fire Code are also specified in the Municipal Code.

Fire Code Section 503.1.2 states that the Fire Code Official is authorized to require more than one fire apparatus access road under certain conditions. The CECP design includes more than one access both to the site in general and down to the grade level of the facility itself.

Fire Code section 503.2.1 states that the minimum unobstructed width of the fire

apparatus road shall be not less than 20 feet. An unobstructed vertical clearance of not less than 13 feet 6 inches is also required. The CECP design meets or exceeds that minimum unobstructed width for the access. The design also complies with the vertical clearance requirements.

Fire Code section 503.2.4 states that the turning radius for the fire apparatus access road shall be determined by the Fire Code Official. Municipal Code section 17.04.110 specifies an inside turning radius of 28 feet or greater and outside turning radius of a minimum of 46-feet utilizing Caltrans' 407-E turning template. The turning radii within CECP comply with these requirements.

12. What deference, if any, should be given to the City's interpretation and application of its LORS (see, e.g., Cal. Code Regs., tit. 20, § 1744)? (Question 21)

In this particular case, none. The Commission is not required to give deference to any interested agency, much less an intervenor like the City. Title 20, California Code of Regulations, section 1744(e) provides that "comments and recommendations by a (*sic*) interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." (20 Cal. Code Regs. § 1744(e)(emphasis added).) Section 1744(e), however, says nothing about the Commission itself. Further, subdivision (e) only applies to "interested agencies." The City is an intervenor and no longer has the unbiased viewpoint of an interested agency. Given the City's strenuous opposition to the Project, the City's interpretation of its own LORS must be looked at with a critical eye. (May 1, 2008 Letter from City to M. Monasmith at p. 1 stating, "be advised that Carlsbad does not support the CECP."⁶).

In any event, Staff has met its obligations under Title 20, California Code of Regulations, section 1744. The Commission Staff must not blindly defer to an interested agency's

⁶ This correspondence was not presented as an exhibit by any party during the Hearing but is identified as Docket No. 46114 on the CECP proceeding's docket log available at http://www.energy.ca.gov/dockets/docket_redesign.php?docketNo=07-AFC-06.html.

interpretation. Rather, Staff must give only “due” deference and must also “independently verify” any alleged non-compliance. (20 Cal. Code Regs. § 1744(d).) Here, Staff has done so, finding “ambiguity exists regarding the City's interpretation of its complex and layered land use ordinances.” (Ex. 200 at p. 1-9.)

13. What relevance and weight do the Commission’s Notice of Intent proceedings in 1989 and 1990 have in this proceeding? (Question 2m)

Factual Background: In 1989, San Diego Gas & Electric (“SDG&E”) submitted a Notice of Intent (“NOI”) (“89-NOI-1”) to site a new power plant at one of five proposed sites, including on the EPS property. This NOI was suspended in 1990 at the request of SDG&E, and withdrawn in 1991 for a variety of reasons, including a potential merger of SDG&E with Southern California Edison in 1990 and 1991, a new competitive bidding alternative put forth by the Public Utilities Commission, and the failure of an AFC submitted for one of the other sites to satisfy the Commission’s data adequacy requirements.

Legal Argument: The Commission is required to prepare a written decision, after a public hearing, on each AFC before it. (Pub. Resources Code § 25523.) The Commission’s decision includes findings on a proposed facility’s compliance with applicable local, regional, state, and federal LORS. (*Id.* at § 25523(d)(1).) In evaluating a newly proposed facility, neither the Warren-Alquist Act, nor the Commission’s power plant siting regulations suggest, much less require, that the Commission consider its previous findings or decisions on supposedly similar projects. Each project proposed for certification is required to submit a comprehensive set of data and an evaluation of the project’s potential impacts. (*Id.* at §§ 25519, 25520.) This information allows the Commission and Staff to evaluate each project on an individual basis. Information on a different type of gas-fired power plant proposed more than 20 years ago for the EPS site has no relevance to the current Project, which utilizes a different technology, has a

different footprint, and has radically different air quality, biological, and visual impacts, just to name a few. Any discussion of the impacts of the 1989 project and its compliance with LORS, compared with the potential impacts of CECP and its LORS compliance, is a comparison of apples and oranges considering the significant differences in the two projects.

In its testimony, the City cited the Coastal Commission report and Staff's Issues and Alternatives Report on 89-NOI-1. If one looks at the entirety of these reports, rather than only specific sections quoted by the City, one will find that the plant proposed by SDG&E in 1989 was extremely different from CECP. For example, that plant would have utilized once-through cooling technology with the associated impingement and entrainment and thermal plume effects on biological resources. That project also proposed an expansion of the cooling water discharge channel, further limiting public beach access, and included two 150-foot emission stacks, as well as a 75,000 square-foot building. It is no wonder that the Coastal Commission expressed concerns with the project's potential impacts on visual and biological resources, considering that project's design. Such concerns cannot be transferred to CECP, however, which does not have any of the above characteristics of the 1989 project.

One relevant item that has remained constant between 1989 and the present, the AHLUP, was not a concern for the Coastal Commission in evaluating the 1989 project's consistency with the Coastal Act. With regards to local coastal plan consistency for the 1989 project, the Coastal Commission concluded that "[a]t Encina, both the Agua Hedionda Land Use Plan (LUP) and the Encina Specific Plan designate the site as appropriate for power generating facilities. Therefore, the project is consistent with the certified Land Use Plan." (Ex. 418 at p.4.)

Conclusion: The Warren-Alquist Act does not contemplate utilizing the Commission's decisions or analysis on individual NOIs or AFCs as precedent for future decisions on new

projects. While this is proposed here with the City's presentation of information on 89-NOI-1, a comparison of the 1989 plant proposed at the EPS site with the currently proposed CECP shows how untenable such an approach would be. A cursory perusal of the 1989 project demonstrates the fundamental differences between the 1989 project and CECP. Accordingly, any Staff or Coastal Commission evaluation of 89-NOI-1 that took place 20 years ago has no relevance in the CECP AFC proceeding.

C. Greenhouse Gases

1. Describe the findings and conclusions you believe the Commission should make regarding greenhouse gas emissions of CECP. (Question 3a)

It is common knowledge that any fossil-fueled power plant generates greenhouse gas ("GHG") emissions as a result of producing electricity. However, this does not mean all fossil-fueled generation is counterproductive to achieving California's goals for reducing GHG emissions. Indeed, some new fossil-fueled generation is necessary to reduce GHG emissions in the interim period and provide a bridge to the next era of power supply options for California. (Ex. 212 at 6-8.) The Project would be a highly efficient (Trans. (02/03/2010) at pp. 113-114) and state-of-the-art resource to supplant existing older, higher GHG emitters (Trans. (02/03/2010) at pp. 115, 118 and 168-169; Ex. 200 at pp. 4.1-101 and 123), supporting the state's electricity demand that cannot yet be filled by renewable resources, while providing the necessary ancillary services to support the growing demand for renewable energy sources. (Trans. (02/03/2010) at pp. 115, 118 and 168-169; Ex. 200 at pp. 4.1-101 and 123.)

The Commission has extensively studied the role of natural gas-fired generation in achieving California's objectives of reducing GHG emissions and increasing the amount of electrical energy produced from renewable energy sources. The results of this research informed the testimony of the Staff in this proceeding, and these results confirm that the Project would

help further California's goals of reducing GHG emissions and for facilitating the integration of additional renewable energy resources. (Trans. (02/03/2010) at p. 118; Ex. 200 at pp. 4.1-122 and 123). For the reasons set forth below, the Commission should find that the analysis of the Project's GHG emissions satisfies the requirements of CEQA and all applicable LORS, and that the Project will not cause any significant adverse environmental impacts related to GHG emissions.

In recent years, the Commission has dedicated an extensive amount of time and resources to studying the proper scope of an assessment of GHG emissions from power generating facilities. To understand the issue, it is critical to recognize that any assessment of GHGs must first look at the scope of the impacts – GHG impacts are global in nature and, as recognized by the Siting Committee, potentially a cumulative concern. (*See* Siting Committee Guidance on Fulfilling California Environmental Quality Act Responsibilities for Greenhouse Gas Impacts in Power Plant Siting Applications [March 2009] [the “Committee CEQA Guidance”] at 28.) While any individual gas-fired power plant's contribution to global GHG emissions would be de minimis, the need to address the potential cumulative impact remains.

The Commission's Siting Committee released a comprehensive report on this issue. (*Id.*) The Siting Committee recommended that these issues be addressed both in individual siting cases and in the 2009 Integrated Energy Policy Report, and ultimately concluded that the GHG impacts from new electric generation projects are different from other sources for which GHG emissions are analyzed on a facility-specific basis. (*Id.* at pp. 2, 20.)

To further address the somewhat unique nature of GHG emissions from power plants, the Committee tasked Staff with developing a report demonstrating natural gas plant impacts on GHG emissions from the overall electric system. (*Id.* at pp. 29-30.) Staff commissioned an

independent consultant, MRW & Associates, to complete this report, which is titled “Framework for Evaluating Greenhouse Gas Implications of Natural Gas-Fired Power Plants in California” (May 2009) (the “MRW Report” or Ex. 212). The MRW Report demonstrates that new, efficient natural gas generation designed to meet specified system needs, such as the Project, will cause a system-wide net reduction in GHG emissions. (*Id* at pp. 6-8; Trans. (02/03/2010) at p. 153; Ex. 200 at p. 4.1-105.) The MRW Report further shows that new natural gas-fired generation is required in the near term to facilitate the integration of renewable generation facilities. (Ex. 212 at pp. 6-8.)

It is undisputed that the addition of electricity from a new, efficient, combined-cycle power plant to the existing grid will displace generation from other less-efficient resources. (Trans. (02/03/2010) at pp. 115, 122, 168, 172, 173; Ex. 200 at pp. 4.1-113 to 4.1-114.) The Siting Committee recognized the electric system is an interconnected grid. Power plants connected to this grid do not operate in isolation, and power plants only operate at times when demand actually exists for the energy. (Committee CEQA Guidance at pp. 20-21.) The demand for electricity must be balanced with the supply at all times. If a more efficient power plant is asked to produce power, a less efficient facility must therefore be asked to turn down its electric output, as it is not yet feasible to store excess electricity. (Ex. 212 at pp. 47.) Therefore, it is factually inaccurate to look at the GHG emissions of a power plant without looking at the resulting, reasonably-foreseeable decreases in GHG emissions from other parts of the system. (Committee CEQA Guidance at pp. 20-21.) Therefore, the only appropriate method under which a proposed new power plant should be analyzed is as part of a larger, integrated system. If a project is more efficient than existing older power plants, it would displace these older, less efficient facilities in the dispatch order. (*Id.* at p. 20; 2007 Integrated Energy Policy Report

["2007 IEPR"] at p. 184; Ex. 212 at p. 98.)

Even from a purely economic perspective, new natural gas-fired generation will displace generation from older, less efficient facilities that produce more GHG emissions per megawatt-hour. (Trans. (02/03/2010) at p. 172; Ex. 200 at pp. 4.1-101 and 4.1-109.) This, in itself, will produce some amount of GHG emission reductions. (Committee CEQA Guidance at p. 20; Trans. (02/02/2010) at p. 104; Trans. (02/03/2010) at pp. 152-153.) This is because natural gas facilities are normally dispatched in the order of their variable cost (Ex. 200 at p. 4.1-109), which is predominantly determined by natural gas prices and heat rates. (Committee CEQA Guidance at p. 20; 2007 IEPR at p. 48.) The record demonstrates that the construction and operation of the Project will result in a statewide net decrease of GHG emissions. (Trans. (02/02/2010) at p. 104; Trans. (02/03/2010) at pp. 148, 250.)

a. The Project Meets Several Identified Needs for Natural Gas-Fired Electric Generating Resources.

As discussed above, the Commission has identified several essential needs to be filled by gas-fired power plants. (Ex. 212 at p. 6-8.) In particular, the MRW Report identifies five roles that gas-fired power plants are most likely to fulfill in the future: (1) intermittent generation support, (2) local capacity requirements, (3) grid operations support, (4) extreme load/system emergencies support, and (5) general energy support. (Ex. 212 at p. 93.) There will be a greater need in the future for natural gas-fired power plants to provide certain ancillary services because the preferred resources - energy efficiency and renewable generating resources - generally are not dispatchable, and because energy storage technologies are not yet sufficiently developed to provide these services. (Ex. 212 at pp. 47 and 93.) CECP fills several of those needs.

First, the Project would provide generation support for intermittent renewable resources, such as wind and solar, using its fast-start and rapid-ramping capability. (Trans. (02/03/2010) at

pp. 118, 151, 163, and 217; Ex. 200 at pp. 4.1-115 through 117, and 123). Second, the Project provides some local capacity support as indicated in Staff's FSA. (Ex. 200 at pp. 4.1-101, 4.1-111-114; Trans. (02/03/2010) at pp. 152, 174.) CECP will also provide grid operation support through its fast-start and rapid-ramping capability, voltage regulation, spinning and non-spinning reserve. (Trans. (02/03/2010) at pp. 118-119, 151.) The plant will provide support for extreme load conditions, such as summer peaks and emergencies, again, through its rapid-start capability without the need to run overnight, as is the case with legacy boilers and some conventional combined-cycle plants (i.e., traditional combined-cycle and legacy steam plants need to remain online at low loads overnight to remain available for the following day's peaks, and hence, generate unnecessary GHG emissions). (Trans. (02/03/2010) at pp. 118-119.) And finally, the project will provide general energy support. While not as efficient as optimized combined-cycle units, it is far more efficient than simple-cycle plants and legacy steam plants, and it is these plants that CECP is likely to displace during dispatch. (Trans. (02/03/2010) at pp. 118-119; Ex. 200 at pp. 4.1-101, 4.1-114-115.)

In addition, the Project would help to retire older, less efficient natural gas power plants, and replace or repower them with new, more efficient power plants. (Ex. 200 at pp. 4.1-101.) New, efficient, natural gas-fired generation promotes the state's efforts to improve GHG electrical generation efficiencies, and, therefore, to reduce the amount of natural gas consumed by electricity generation and the GHG emissions caused thereby.

- b. The Project Satisfies the Criteria the Commission Set Forth in their Decision on the Avenal Energy Project for the Assessment of GHG Emissions from Natural Gas-Fired Generation.

In its decision on the Avenal Energy Project, the Commission established the following criteria for approving new fossil-fired generation and concluding that such generation would not

result in a significant adverse environmental impact:

[T]o the extent that new gas-fired plants are proposed, we must ensure that they support the goals and policies of AB 32 and the related parts of California's GHG framework. To do so, we intend to require that any new natural-gas-fired plant certified by the Energy Commission will likely:

- (1) not increase the overall system heat rate for natural gas plants;
- (2) not interfere with generation from existing renewable facilities nor with the integration of new renewable generation; and
- (3) take into account the factors listed in (1) and (2), reduce system-wide GHG emissions and support the goals and policies of AB 32.

(Avenal Energy Decision, 08-AFC-01, at pp. 110-111 (December 2009).)

First, CECP will not increase the overall system heat rate for natural gas-fired power plants. CECP's efficient design is combined with the efficiency benefits comparable to a conventional combined-cycle power plant and combines that efficiency with the fast-start performance of simple-cycle plants resulting in the ability to provide daily cycling if necessary without the need to run overnight. (Trans. (02/03/2010) at p. at 119.)

Second, CECP will not interfere with renewable generation nor with the integration of new renewable generation into the grid. (Trans. (02/03/2010) at p. 172; Ex. 200 at pp. 4.1-114 to -115.) In fact, CECP will facilitate the addition of new renewable generating resources into the grid by providing efficient backup capability. (Trans. (02/03/10 at 120; Ex. 200 at 4.1-114 to -115.)

Finally, CECP will reduce system-wide greenhouse gas emissions and will support the goals and policies of AB 32, and it will do so through its efficient design and fast-start capability. (Ex. 200 at pp. 4.1-100 to -101.)

c. The Project Will Not Create Any Significant GHG Impacts.

The Commission has extensively studied how GHG emissions should be addressed under

CEQA. On October 8, 2008, the Commission adopted an order initiating an informational proceeding to solicit comments on how to satisfy its responsibilities under CEQA for analyzing GHG impacts of proposed new power plants. (Committee CEQA Guidance at p. 1; Trans. (02/03/2010) at p. 148.) In March 2009, the Siting Committee released the CEQA Guidance document discussed above. The Committee has taken official notice of the Siting Committee CEQA Guidance in this proceeding, and this document has informed the GHG emissions impact analysis for the Project. In addition, as discussed above, the Staff-sponsored MRW Report (Ex. 212) has provided strong guidance to the Commission regarding the role of natural gas-fired generation as California develops its renewable portfolio and moves toward its GHG emission reduction goals.

Both the Committee CEQA Guidance and the Staff-sponsored MRW Report recognize the continuing role of natural gas-fired generation in California's electrical system. The Committee CEQA Guidance was prepared before the MRW Report and therefore without the benefit of the extensive analysis in that report. However, even at that earlier time the Committee cautioned against the assumption that California does not need additional gas-fired power plants. (Committee CEQA Guidance at p. 24.)

Efficient, clean gas-fired generation has been repeatedly recognized as the technology needed to (1) fill the gap that cannot now be bridged by renewable generation, (2) provide system stability to integrate new renewable generation, and (3) replace existing coal contracts (Trans. (02/03/2010) at p. 168, 172; Ex. 200 at pp. 4.1-101 and -118) and aging plants employing once-through cooling technology. (Trans. (02/03/2010) at p. 176; Ex. 200 at p. 4.1-119; also see 2007 IEPR at pp. 70-71, 186; Committee CEQA Guidance at pp. 16, 21 (discussing need to retire older plants using once-through cooling).) The Staff concluded the Project furthers the state's

strategy to promote generation system efficiency and reduce fuel use and GHG emissions. (Ex. 200 at pp. 4.1-101 and -102.)

d. The Project Would Not Cause Any Net GHG Emissions Increases Even In a Worst-Case Scenario Where the Project Does Not Run.

The Project would emit no GHG if it does not run, which could occur when electric demand rises and the preferred sources described above are dispatched first. (Trans. (02/03/2010) at p. 122.) If the Project is dispatched, its GHG emissions would still be less than any units not selected to run in its place (for example, less efficient natural gas-fired plants). (Trans. (02/03/2010) at pp. 122-123.) Therefore, the more the Project is dispatched, the greater the net decreases in GHG emissions. Yet even under a worst-case scenario, if the Project is not dispatched at all, it will not cause a net increase in GHG emissions. (Trans. (02/03/2010) at p. 122.)

e. The Project May Reduce GHGs By Displacing Out-Of-State Coal-Fired Generation.

Although most of the energy displaced by the Project will be from less efficient natural gas-fired generation, the Project may also reduce GHG emissions by displacing electricity produced from coal. (Ex. 200 at p. 4.1-101; Trans. (02/03/2010) at pp. 168, 172.) While Senate Bill 1368 (“SB 1368”) prohibits new long-term contracts for importing electricity produced from coal, California utilities are currently able to import electricity from out-of-state coal plants under existing long-term contracts and short-term transactions. At present, out-of-state coal plants, while less efficient than a natural gas-fired combined-cycle plant, have a lower fuel cost, and an overall lower cost per kilowatt hour produced. (Committee CEQA Guidance at p. 24; 2007 IEPR at p. 51.) These plants are therefore often dispatched before a natural gas-fired plant. (See Committee CEQA Guidance at p. 24.)

In conclusion, CECP:

- fits well within the framework established by the Commission for the licensing of new fossil-fired generation;
- will not increase the system-wide heat rate for natural gas power plants;
- will not interfere with generation by existing renewable energy resources, nor with the integration of new renewable energy resources;
- would not result in any net increase in GHG emissions even in the worst case event that CECP does not operate (and hence does not displace any other generation);
- may reduce GHGs by displacing out-of-state coal-fired generation; supports the goals and policies of AB 32; and
- will not result in a significant adverse environmental impact related to GHG emissions.

2. Should the greenhouse gas emissions of LNG be included in the estimation of CECP's potential GHG emissions? (Question 3b)

Answer: It is too speculative at this time to assume that significant quantities of LNG will be imported into the California natural gas pipeline system, nor less be burned in significant enough quantities at CECP to affect its potential GHG emissions. (Trans. (02/03/2010) at pp. 169-170, 330-331.) Furthermore, the inclusion of GHG emissions associated with LNG production and transport in an assessment of CECP would be an incomplete and biased assessment. (Trans. (02/03/2010) at pp. 290-291, 364-366.) A complete assessment would require the evaluation of life-cycle GHG emissions for all elements of CECP, including the production, treatment, transportation, and combustion of all fuels (whether liquefied or not), and a comparison of these emissions with an appropriate no-project alternative (which would likely include exactly the same fuel-related emissions, but with the fuel burned in a less-efficient existing gas-fired power plant). (Trans. (02/03/2010) at pp. 364-366.) Since most of the GHG

emissions associated with the production, transport and use of natural gas as a fuel are associated with end-use combustion, and only 1.3% of the carbon associated with LNG is uniquely attributable to that fuel (as distinguished from other sources of natural gas), such an analysis for CECP would likely show no significant difference between the project and no-project alternatives on this point, or potentially a slight decrease. (Trans. (02/03/2010) at pp. 331, 365-366.) In any event, the Commission has already concluded that life-cycle analyses for power plants in its jurisdiction are neither required nor appropriate. (Siting Committee CEQA Guidance at p. 19.)

D. Other Issues

- 1. What is the relevance, if any, of the status of electricity purchasing contracts for CECP's output to the Commission's evaluation of the AFC? (Question 4a)**

Short Answer: The status of an electricity purchasing contract is not relevant to the evaluation of the CECP AFC or any other AFC proceeding.

Factual Background: During the CECP Prehearing Conference, and again at the Hearing, Intervenors requested the Committee to obtain certain information from SDG&E as related to CECP; specifically, whether CECP was shortlisted or had entered into a power purchase agreement pursuant to SDG&E's 2009 Request for Offer ("SDG&E 2009 RFO") process. (City's Prehearing Conference Statement (01/14/10) at p. 1; CECP Prehearing Conference Trans. (01/21/10) at pp. 162-163.) At the Hearing, Applicant presented Exhibit 196, which consisted of an email from SDG&E's Senior Environmental Counsel, Taylor O. Miller. Therein, Mr. Miller explained it was not necessary for SDG&E to provide information related to the 2009 RFO process in order for the Commission to make a decision on the CECP AFC. Applicant has maintained the same position. That is, the Commission need not obtain such information from SDG&E in order to make a decision on CECP's AFC.

Legal Argument: Title 20, California Code of Regulations, section 1716(h) provides that the Committee may require information from any electric utility that is specific to an AFC and if such information is reasonably necessary to make a decision on the AFC. In this instance, Intervenors have requested SDG&E to provide information on the status of its 2009 RFO and, in particular, if “there are any Carlsbad bids on the shortlist.” (City’s Prehearing Conference Statement dated January 14, 2010 at p. 1 (not entered into evidence; and the CEC Prehearing Conference Trans. (01/21/10) at pp. 162-163.) As stated in Exhibit 196, the data requested by Intervenors constitutes market sensitive, electric procurement-related information. Such information is protected pursuant to Public Utilities Code, section 454.6(g), which states:

The commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the Office of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.

Moreover, the California Public Utilities Commission (“CPUC”) explicitly recognized that RFO bid information must remain confidential, and therefore is protected, pursuant to the CPUC’s *Interim Decision Relating to Confidentiality of Electric Procurement Data Submitted to the CPUC*, D.06-06-066, as amended by D.07-05-032. (See Ex. 196, Appendix 1, Section VIII (A) – (B).)

The market sensitive electric procurement-related information sought by Intervenors is also protected by Evidence Code section 1060 and Government Code section 6254(k) (“the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it” and any records will remain confidential whereby “the disclosure of [such] is

exempted or prohibited pursuant to federal or state law...”). Here, Applicant has not disclosed any information related to any bid. Any bid information related to SDG&E’s 2009 RFO should remain confidential, regardless of what entities participated in the bidding process.

Finally, Applicant finds no authority in the Public Resources Code nor the governing regulations for the CEC siting process that requires disclosure in an AFC proceeding of an applicant’s status in any RFO proceeding, nor whether such applicant has entered into a power purchase agreement. To that end, information regarding SDG&E’s 2009 RFO should remain confidential – in this siting proceeding and any other AFC proceeding before the Commission.

Conclusion: Based on the foregoing, the status of a power purchase agreement is not relevant to the evaluation of CECP’s AFC.

E. Conditions of Certification

1. Discuss the changes proposed to the Staff-recommended Conditions of Certification by Staff, the Applicant or any other party. (Question 5a)

It its Opening Testimony and Supporting Declarations (Exs. 111-142), Applicant identified a number of proposed revisions to Staff’s recommended Conditions of Certification (“COC”). These revisions were provided as exhibits to Applicant’s Opening Testimony. (*See* Exs. 111 through 118.)

To summarize, Applicant reviewed each section of the FSA and agrees that CECP will comply with all applicable LORS and will not result in significant adverse impacts to the environment. However, there are several COCs that Applicant believes require minimal edits. For example, in order to ensure that the Final Decision comports with the Final Determination of Compliance issued by the San Diego Air Pollution Control District, edits are required for conditions AQ-18, 19, 20, 29, 35, 43, 44, 55, 57, 64, 65, 69, 75, 76, 82, 83, 87, 89, and 90. Many

of these edits are needed to correct typographical errors or simple inconsistencies. (*See*, comprehensively, Ex. 112.)

In addition, Applicant believes edits are necessary for COCs in the Land Use, Visual Resources, Hazardous Materials, Noise and Vibration, Traffic and Transportation, Worker Safety and Fire Protection, Cultural Resources, and Soil and Water Resources sections. A short summary of the edits Applicant proposes is set forth below.

LAND-1: Applicant believes the proposed edit to LAND-1 will better specify and ensure that the Coastal Rail Trail is encouraged by CECP. Specifically, Applicant desires to clarify the appraisal focus and process, should the Project owner and the City not be able to reach agreement on the location of an easement through the generating station property. (Ex. 111 at p. 2:B and Ex. 113.)

VIS-5: Applicant seeks minor changes to VIS-5 to better align the schedule components of the condition with potential development schedules of possible I-5 widening alternatives. Applicant also notes that endorsement of VIS-5 does not constitute a waiver of any right to defend its property against any attempted, adverse taking by any branch of government. (Ex. 111 at p. 2:C and Ex. 114.)

HAZ-9: A potential conflict between Noise and Vibration in Staff's Response to Comment 4.6-5 appears to assume that the Coastal Rail Trail is installed to the east of the railroad tracks. This conflicts with HAZ-9, which prohibits the Project owner from granting an easement for the Coastal Rail Trail east of the Rail Corridor on the CECP site. Applicant believes that the assumption in this section is neither critical nor necessary and the integrity of CEC Staff's findings remain even if this assumption is removed. (Ex. 111 at p. 2:D.)

TRANS-5: Applicant requests a clarifying but minor change to TRANS-5 to specify that road repairs be made for actual damage to the roads caused by CECP. (Ex. 111 at p. 3:F and Ex. 115.)

WORKER-SAFETY-8: Applicant requests adjustments to WORKER SAFETY-8 to clarify the staffing of the site at startup. (Ex. 111 at p. 3:G, Ex. 116, and Trans. (02/04/10) at p. 29:9-30:2.)

CUL-6: Applicant seeks an edit to CUL-6, which would tailor the condition to the circumstances involved at the CECP site. These changes would avoid the continuous presence of a Native American Monitor during any soil disturbance evolutions, since no areas of heritage or religious significance exist within the Project site, and regulate archaeological monitoring as done in other Commission projects. (Ex. 111 at p. 4:H and Ex. 117.)

SOIL&WATER-1 and SOIL&WATER-3: Applicant requests a minor modification to SOIL&WATER-1 and SOIL&WATER-3 that will specify the City of Carlsbad should review and comment only on the Storm Water Pollution Prevention Plan ("SWPPP") and not approve the SWPPP as the conditions currently require. (Ex. 111 at p. 4:I and Ex. 118 at pp 1-2.)

SOIL&WATER-2: Applicant has suggested a minor edit to SOIL&WATER-2 to ensure the Project is not expected to use truck delivery for large volumes of reclaimed water for construction purposes. (Ex. 111 at p. 4:I and Ex. 118 at pp. 3-4.)

SOIL&WATER-8: Applicant requests changes to SOIL&WATER-8 to require a water purchase agreement only if CECP is constructed to rely upon recycled water as its water supply. (Ex. 111 at p. 4:I and Ex. 118 at pp. 2.)

F. Overrides

1. **An override of significant environmental impacts, inconsistency with state or local LORS, or both, may be required in order to approve the Project. (Question 6a)**

Short Answer: An override is not necessary because the Project does not have any significant environmental impacts and is consistent with state and local LORS.

Legal Argument: There are two types of overrides in power plant siting cases: environmental overrides and nonconformance overrides. Where a project will result in significant environmental impacts that cannot be mitigated, an agency cannot approve that project unless it finds that "the benefits of the project outweighs the unavoidable significant adverse environmental effects." (20 Cal. Code of Regs. § 1755 (d)(2).) Further, the Commission cannot license a project that conflicts with one or more LORS unless it finds "that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity." (Pub. Resources Code § 25525.) This determination must be made based on the totality of the evidence of record and considering environmental impacts, consumer benefits, and electric system reliability.

Here, Staff determined that all potentially significant impacts are mitigated and no environmental override is necessary. Further, Staff determined that CECP conforms to the Carlsbad General Plan, Municipal Code and Zoning Code, Specific Plan 144, Precise Development Plan 06-02, the Aqua Hedionda Land Use Plan, and the South Carlsbad Coastal Redevelopment Plan; and is consistent with the development pattern for the area established by the General Plan, Municipal Code and Zoning Code and the various plans noted above. Moreover, the City's December 1, 2009 Urgency Ordinance (CS-070) does not change the City's General Plan, Zoning, Specific Plan 144, Redevelopment Plan or Agua Hedionda Land Use Plan. In short, the Urgency Ordinance is a processing moratorium while the City proposes to study the

possibility of changing the various LORS applicable to the Public Utility zoned areas within the City's coastal zone. Given the City's existing opposition to CECP, the Urgency Ordinance adoption is recognition itself that existing City LORS allow electrical power generating facilities. Otherwise, there would be no need to declare a moratorium on further processing in order to study changing the existing LORS to prohibit generating plants in the future.

Conclusion: Based on the foregoing, an override is not necessary, as CECP does not have any significant environmental impacts and is consistent with state and local LORS.

2. **Discuss whether the Commission should adopt overrides and if so, on what grounds, citing specific facts and conclusions justifying an override. (Question 6b)**

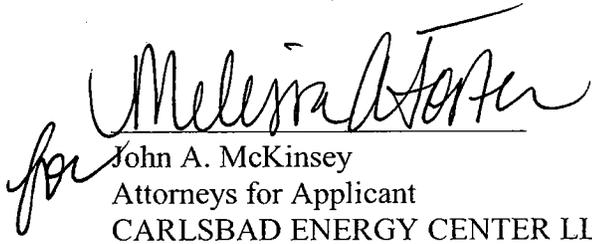
Answer: As noted above, an override is not necessary, as the Project does not have any significant environmental impacts and is consistent with state and local LORS.

IV. CONCLUSION

In conclusion, as demonstrated in this Opening Brief, there is no legal or logical reason why the Committee should not prepare the Presiding Members Proposed Decision advancing this valuable Project toward final approval by the full Commission.

Date: August 18, 2010

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

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

Carlsbad Energy Center LLC's
Post-Evidentiary Hearing Opening Brief

CALIFORNIA ENERGY COMMISSION

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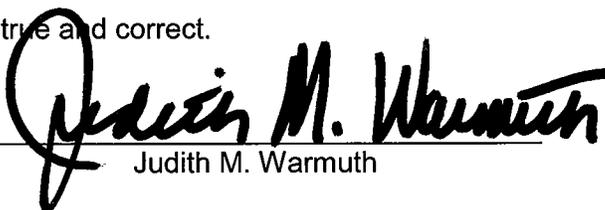
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on August 18, 2010, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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


Judith M. Warmuth