STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

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In the Matter of:

The Application for Certification for the CARLSBAD ENERGY CENTER PROJECT

Docket No. 07-AFC-6

RESPONSE OF CARLSBAD ENERGY CENTER LLC TO THE CITY OF CARLSBAD'S MOTION TO HOLD RECORD OPEN PENDING COASTAL COMMISSION REPORT

January 29, 2010

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STATE OF CALIFORNIA

Energy Resources Conservation
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The Application for Certification for the CARLSBAD ENERGY CENTER PROJECT	Docket No. 07-AFC-6

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Applicant, Carlsbad Energy Center LLC ("Applicant"), herein responds to the City of Carlsbad's ("City") Motion to Hold Record Open Pending Coastal Commission Report ("Motion") in the Carlsbad Energy Center Project ("CECP" or "Project") proceedings.[1] For the reasons set forth herein, the Energy Commission ("CEC" or "Commission") should deny the City's request to hold these proceedings open indefinitely on the basis that it lacks any legal foundation and is patently unfair, untimely, and unduly burdensome on the Commission's ability to conduct evidentiary hearings and issue a final decision in this proceeding.

I. INTRODUCTION

The City has voiced numerous objections to the Coastal Commission's decision not to prepare a report on the consistency of the Project with the Coastal Act pursuant to Public Resources Code section 30413(d) ("30413(d) Report"). Despite the Coastal Commission having informed the CEC that it would not prepare a 30413(d) Report for the CECP, the City maintains its position that the Coastal Commission's participation is required. In furtherance of this position, the City filed its Motion to hold the record in this proceeding open indefinitely, pending submittal of a 30413(d) Report by the Coastal Commission. This Response rebuts the City's

[1] Pursuant to 20 Cal. Code Regs. § 1716.5.

assertions, clarifies the various permitting procedures required by law, and explains the limited nature and extent of the Coastal Commission's role in the CECP Application for Certification ("AFC") proceeding.

II. THE COASTAL COMMISSION IS NOT REQUIRED TO PREPARE A REPORT ON THE CONSISTENCY OF CECP WITH THE COASTAL ACT.

The Motion is not based on a defensible interpretation of the statutes governing the participation of the Coastal Commission in an AFC proceeding before the CEC. The Coastal Commission, in its discretion, has chosen not to participate more fully in the CECP AFC proceedings by declining to prepare a 30413(d) Report. This decision by the Coastal Commission is permissible under both the Coastal Act (Pub. Res. Code §§ 30000 *et seq.*) and the Warren-Alquist Act (Pub. Res. Code §§ 25000 *et seq.*).

A. Statutory Requirements

Contrary to the City's contentions, the Coastal Commission is not required to prepare a report on the consistency of CECP with the Coastal Act. The City fails to accurately present the statutory provisions of the Coastal Act and the Warren-Alquist Act that govern the Coastal Commission's participation in the CECP AFC proceeding. The City also fails to consider the plain meaning of Public Resources Code section 30413(d), which provides, in relevant part:

> Whenever the [CEC] exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25000) of Division 15 with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the [Coastal Commission] shall participate in those proceedings and shall receive from the [CEC] <u>any notice of intention to file an application for certification</u> of a site and related facilities within the coastal zone. The [Coastal Commission] <u>shall analyze each notice of intention and shall</u>, prior to the completion of the preliminary report required by Section 25510, <u>forward to the [CEC] a written report on the suitability of the proposed site and related facilities specified in that notice</u>....

(Pub. Res. Code § 30413(d) (emphasis added). Public Resources Code section 30413(d) clearly

applies only to a Notice of Intent ("NOI") proceeding. To the extent any doubt exists as to the meaning of this language, statutory construction "'begin[s] by examining the statutory language, giving the words their usual and ordinary meaning.' [citation] If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Estate v. Griswold* (2001) 25 Cal.4th 904, 911 (emphasis added).)

In addition, the meaning and applicability of statutory provisions must be considered in the context of each Act, as a whole. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 ("[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.").) Likewise, individual subsections of a provision, or parts thereof, must be considered in the context of the provision as a whole, rather than attempting to discern the meaning of one sentence in isolation. (*Id.* ("[W]e must consider the above quoted sentence in the context of the entire statute (§ 3716.2) and the statutory scheme of which it is a part. ...When used in a statute [words] must be construed in context ... .").)

The City ignores these fundamental rules of statutory construction in a duplicitous attempt to skew section 30413(d) of the Coastal Act in a manner that supports the City's preferred applicability and meaning. The City's contentions are simply not applicable to the CECP proceedings.

The CEC has exclusive jurisdiction to permit certain thermal power plants throughout the state, including those, such as CECP, within the coastal zone. (Pub. Res. Code § 25500.) Public Resources Code section 30413 establishes the interagency relationship between the Coastal Commission and the CEC in the permitting proceedings for facilities located in the coastal zone.

The scope of the Coastal Commission's role in the CEC permitting process is defined by the nature of the particular permitting proceeding. (Pub. Res. Code § 30413(d), (e).)

The Warren-Alquist Act distinguishes between the types of permitting proceedings that may be conducted by the CEC. NOI proceedings generally analyze the suitability of potential locations to site a new facility. (Pub. Res. Code § 25503.) AFC proceedings analyze whether that particular site and related facility are suitable for certification, and may or may not follow NOI proceedings. (Pub. Res. Code § 25519.) For gas-fired power plants, such as CECP, only the AFC procedure is required for certification of the power plant and related facilities ("AFC-Only proceedings"). (Pub. Res. Code § 25540.6.) Public Resources Code section 25540.6, which governs AFC-Only proceedings, specifically provides:

> Notwithstanding any other provision of law, <u>no notice of intention is required</u>, and the [CEC] shall issue its final decision on the application, as specified in Section 25523, within 12 months after the filing of the application for certification of the powerplant and related facility or facilities ... for any of the following:
>
> (1) A thermal powerplant which will employ cogeneration technology, a thermal powerplant that will employ <u>natural gas-fired technology</u>, or a solar thermal powerplant.

(Pub. Res. Code § 25540.6 (emphasis added).) Accordingly, the NOI requirement is specifically eliminated in AFC-Only proceedings. The City's Motion mistakenly suggests that the requirements applicable to NOI proceedings govern the AFC-Only proceedings here. Nothing in the Warren-Alquist Act or Coastal Act supports this interpretation.

The Coastal Act clearly states that a 30413(d) Report must be prepared for NOI proceedings. Public Resources Code section 30143(d) provides that the Coastal Commission

> ... shall analyze each notice of intention and shall, prior to the completion of the preliminary report required by Section 25510, forward to the [CEC] a written report on the suitability of the proposed site and related facilities specified in that notice ... .

(Pub. Res. Code § 30413(d).) Thus, a 30413(d) Report is required only for NOI proceedings. Likewise, the summary and hearing order referenced in Public Resources Code section 30413(d) and set forth in Public Resources Code section 25510[2] is part of the procedure for NOI proceedings.[3]

Public Resources Code section 30413 draws a clear distinction between the Coastal Commission's role in NOI proceedings and other proceedings. Section 30413(e) states:

> The [Coastal Commission] <u>may, at its discretion,</u> participate fully in <u>other proceedings</u> conducted by the [CEC] pursuant to its powerplant siting authority. In the event the [Coastal Commission] participates in any public hearings held by the [CEC] it shall be afforded full opportunity to present evidence and cross-examine witnesses.

(Pub. Res. Code § 30413(e) (emphasis added).) Public Resources Code section 30413(e) removes any doubt about the Coastal Commission's role in permitting for CECP, because it confirms that the Coastal Commission may, but is not obligated to, participate in non-NOI proceedings. The Coastal Commission exercised this statutory discretion by agreeing to prepare an equivalent of a 30413(d) Report in its 2005 Memorandum of Agreement ("MOU") with the CEC. The MOU of course, does not change the statutory requirements. Moreover, the Coastal Commission's decision not to prepare any report in this case, while objectionable to the City, is completely within the Coastal Commission's statutory discretion under 30413(e). Indeed, the Coastal Commission's October 16, 2007 letter to the CEC cites multiple reasons to support its

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[2] Public Resource Code section 25510 provides:

> After the conclusion of such hearings, and no later than 150 days after filing of the notice, the commission shall prepare and make public a summary and hearing order on the notice of intention to file an application. The commission may include within the summary and hearing order any other alternatives proposed by the commission....

(Pub. Res. Code, § 25510.)

[3] In contrast, AFC-Only proceedings are governed by separate provisions of the Warren-Alquist Act, which do not require a summary and hearing order, or a 30413(d) Report. Although Public Resources Code section 25523 (which governs the written decision on AFCs that follow NOI proceedings) references the 30413(d) Report, and contemplates that written findings on theAFC may incorporate provisions from this Report, there is no such reference to the 30413(d) Report for AFC-Only proceedings. (Pub. Res. Code § 25523(b).)

discretion to not submit a 30413(d) Report, including CECP's employment of technology that would reduce many of the Coastal Commission's previous environmental concerns associated with coastally located power plants.

Likewise, the Warren-Alquist Act differentiates between the Coastal Commission's responsibility with respect to NOI proceedings, in Public Resources Code section 25507, and its role in AFC proceedings, under Public Resources Code section 25519. The City's interpretation of Public Resources Code section 30413(d) also ignores these relevant provisions. Under the Warren-Alquist Act, for any facility in the coastal zone, the CEC must transmit a copy of an AFC to the Coastal Commission for its review and comments:

> If the site and related facility specified in the application [for certification] is proposed to be located in the coastal zone, the [Energy] commission shall transmit a copy of the application to the California Coastal Commission for its review and comments.

(Pub. Res. Code § 25519(d).) There is no provision in the Warren-Alquist Act requiring particular action from the Coastal Commission on an AFC. On the other hand, the Warren-Alquist Act provisions regarding a Notice of Intention ("NOI") provide:

> If any alternative site and related facility proposed in the notice is proposed to be located, in whole or in part, within the coastal zone, the [Energy] commission shall transmit a copy of the notice to the California Coastal Commission. The California Coastal Commission shall analyze the notice and prepare the report and findings prescribed by subdivision (d) of Section 30413 prior to commencement of hearings pursuant to Section 25513.

(Pub. Res. Code § 25507(a).)[4] This provision clearly lays out the Coastal Commission's obligation to an analyze an NOI and prepare a 30413(d) Report before adjudicating hearings on

[4] When a new power plant site is first being chosen among many potential sites, an applicant must first go through the NOI process before filing an AFC. By its nature, consideration of an NOI is very different from that of an AFC. The former considers the potential impacts of placing a power plant on various potential sites, while an AFC focuses more on the actual impacts of the facility itself on one chosen site. Once a site has been selected in the coastal zone as most suitable for a new facility, understandably the Coastal Commission's role in analyzing the impacts of the facility itself would not need to be as involved.

an NOI.

As it stated at the beginning of the CECP proceeding, the Coastal Commission has determined that it will not participate further in a review of the CECP, along with several other repowering projects. (Letter from to B.B. Blevins, CEC, from Peter McDouglas, Coastal Commission, October 16, 2007, p. 1-2.) The Coastal Commission's decision not to participate more fully in the CECP proceeding, after reviewing the information provided to it for the CECP AFC, is consistent with its statutory obligations under section 30413.

The Coastal Commission has no statutory mandate to submit a 30413(d) Report for an AFC proceeding and its decision not to issue such a report does not abrogate any legal responsibility under the Coastal Act. In addition, while the City asserts that the Coastal Commission has abrogated its legal responsibility, it would have its own staff step into the shoes of the Coastal Commission to prepare a 30413(d) Report for the Energy Commission's benefit. (City Opening Testimony of Ralph Faust, p. 14.) This suggestion is made regarding the City's qualifications to analyze and implement coastal policies, even though the City has no jurisdiction, experience, or expertise to issue coastal development permits in the area governed by the City's Local Coastal Program Aqua Hedionda Land Use Plan, including the CECP site.

B. Agency Interpretation of Coastal Act and Warren-Alquist Act Requirements.

The City's reliance on Staff comments from the El Segundo Power Redevelopment ("ESPR") proceeding is misplaced; Staff's opinion does not defeat the express statutory language of section 30413(d), examined above. Nor does Coastal Commission correspondence to the CEC, or the 2005 Memorandum of Agreement between the Coastal Commission and the CEC regarding Coastal Commission participation in AFC proceedings negate the language of the agencies' implementing statutes. The entire lawmaking authority of the State of California is

vested in the legislature. (*County of Sonoma v. Comm'n on State Mandates* (2000) 84 Cal.App.4th 1264, 1280.) As administrative agencies, the limits of the Coastal Commission's and the Energy Commission's powers and authority are defined in their enabling statutes, and as administrative agencies, they cannot "expand or enlarge [their] power in the absence of either express or implied legislative authority." (*Am. Fed'n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1041-1042; *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139 ("An administrative agency or official may exercise only those powers conferred by statute.").)

Nor can administrative agencies "engage in rulemaking, including interpreting and implementing a statute, through informal procedures such as oral announcements, internal memoranda, or written and oral correspondence with affected parties." (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 951.) Where a statute does not appear to have the meaning informally assigned to it by the decision making body of an administrative agency and the agency's director, and the statute has not been interpreted and implemented through an appropriate administrative rulemaking process, the agency may not give the statute a meaning that is not apparent from its terms and statutory setting by engaging in informal, ad hoc decisionmaking. (*Id.* at 952.)

Even assuming that the Coastal Commission or the Energy Commission's informal or case-specific interpretations of their implementing statutes should be given some consideration, agency interpretations must be rejected where contrary to statutory intent (*Pacific Legal Found. v. Unemployment Ins. App. Bd.* (1981) 29 Cal.3d 101, 111) or when the proposed interpretation ignores the plain meaning of the statute (*Indian Springs v. Palm Desert Rent Review Bd.* (1987) 193 Cal.App.3d 127, 134, 135).) In sum, the City attaches too much meaning and importance to

various agency documents that can be construed to support its interpretation of the Coastal Commission's obligation to participate in the CECP proceeding, while ignoring the plain language of the Coastal Act and the Warren-Alquist Act.

In addition, Staff's comments on the ESPR project should not be taken out of context. Staff's comments in the ESPR proceedings were in relation to the appropriate deference the CEC must give Coastal Commission recommendations in a 30413(d) Report. A more relevant consideration in the current proceeding is the opinion of Staff that the CECP is consistent with the goals, policies, and express terms of the Coastal Act. CEC Staff has not taken issue with the Coastal Commission's decision not to prepare a 30413(d) Report in the present case.

For ESPR, the topic of appropriate mitigation for the continued use of once-though ocean water cooling at the repowered El Segundo Power Station facility was highly controversial and the Coastal Commission was an active participant in that AFC proceeding, submitting a thorough 30413(d) Report. The Coastal Commission does not have the same concerns in the CECP proceeding:

> We note that all the projects listed above are proposing to end the environmentally destructive use of seawater for once-through cooling and instead employ dry cooling technology, which the Coastal Commission has strongly supported during past power plant reviews. This move away from once-through cooling removes what has been the single most contentious and environmentally damaging aspect of past project proposals. It also reduces the Coastal Commission's concerns about the type and scale of impacts associated with these proposed projects and about the ability of these projects to conform to Coastal Act provisions.

(Letter from to B.B. Blevins, CEC, from Peter McDouglas, Coastal Commission, October 16, 2007, p. 1.) Therefore, it is unsurprising that the Coastal Commission has found it appropriate, under its duty to protect coastal resources, to decline to prepare a 30413(d) Report for the Project.

III. THE COMMISSION AND ITS STAFF ARE QUALIFIED – AND OBLIGATED – TO DETERMINE THE CECP'S POTENTIAL IMPACTS ON COASTAL RESOURCES.

The City contends that "[e]ven though CEC staff lacks meaningful Coastal Act experience, they were placed in the awkward position of having to perform a consistency analysis." (Motion at 4.) According to the principles of CEQA, the CEC has the obligation to evaluate the Project's impacts on coastal resources and may not delegate this responsibility to its sister agency, even if the Coastal Commission has particular expertise in this area.[5] (*See* 14 Cal. Code Regs. §§ 15025(b), 15050; *Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 443, fn.8 ("*Each* public agency is required to comply with CEQA and meet its responsibilities … .").) "When issuing a license, the Energy Commission is the lead agency under CEQA." (FSA, p. 1-1.) The Court of Appeal has rejected the notion that a lead agency under a certified regulatory program can delegate its responsibility to prepare findings on the potential effects and appropriate mitigation measures of a project to another state agency with no decisionmaking authority over the project, but with particular expertise regarding certain potential impacts. (*Lexington Hills Association v. State of California* (1988) 200 Cal.App.3d 415, 4334.)

CEC staff has the obligation to analyze the CECP's impact on all resources, including coastal resources, and determine the Project's consistency with applicable laws, including the Coastal Act . (20 Cal. Code Regs. §§ 1742.5, 1744.) The City's assertion that it is qualified to determine the CECP's compliance with Coastal Act provisions (City Opening Testimony of Faust, *supra*, p. 14), and CEC Staff is not, is a spurious assumption, considering the CEC's

[5] As an agency with a certified state regulatory program under CEQA, the CEC is exempt from certain CEQA requirements, such as preparation of environmental impact reports and negative declarations. (Pub. Res. Code § 21080.5; 14 Cal. Code Regs. §§ 15250, 15252(j).) However, an exemption under section 21080.5 does not "stand as a blanket exemption from CEQA's thorough statutory scheme and its salutary substantive goals." (*Envtl. Prot. Info. Ctr., Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 618.)

exclusive jurisdiction to site thermal power plants in California, including in the coastal zone. (Pub. Res. Code § 25500.)

IV. HOLDING THE RECORD FOR CECP OPEN INDEFINITELY IS AGAINST WARREN-ALQUIST ACT POLICY.

The Coastal Commission has not altered the position it first iterated in October 2007 that it will not prepare a 30413(d) Report for CECP, despite the City's repeated requests for the Coastal Commission to do so. Given the Coastal Commission's stance that a 30413(d) Report is not forthcoming, it would be inappropriate, unfair, and inconsistent with the policy of the Warren-Alquist Act for the CEC to hold the record for the CECP proceedings open indefinitely. The Commission must solicit comments from interested agencies in evaluating the impacts of the CECP, then must make findings and issue a decision on the AFC. (Pub. Res. Code §§ 25519, 25523; 20 Cal. Code Regs. §§ 1714, 1742(c), 1742.5(d), 1752, 1755.) The failure of any local or state agency to provide its input or expertise to the CEC does not alter the CEC's obligation to issue a decision on the CECP AFC in a timely manner in accordance with section 25540.6(a)(1) of the Warren-Alquist Act. Section 25540.6(a)(1) provides for an expedited AFC process and exemption from NOI procedures for a natural-gas fired power plant, underscoring the Warren-Alquist Act policy of processing AFCs for projects like the CECP in an efficient and timely manner. The Commission should follow the policy of section 25540.6(a)(1) by expeditiously processing the CECP AFC.

V. CONCLUSION

For the above reasons, Applicant respectfully requests that the Commission deny the City's Motion and provide a decision on the CECP AFC following evidentiary hearings and subsequent briefing on outstanding legal issues.

Date: January 29, 2010

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APPLICATION FOR CERTIFICATION FOR THE CARLSBAD ENERGY CENTER PROJECT	Docket No. 07-AFC-6 PROOF OF SERVICE (Revised 1/27/2010)

Carlsbad Energy Center LLC's
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DECLARATION OF SERVICE

I, Judith Warmuth, declare that on January 29, 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.

Warmuth

Judith Warmuth