

DOCKET

07-AFC-6

DATE OCT 11 2010

RECD. OCT 11 2010

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 REPLY BRIEF**

October 11, 2010

John A. McKinsey
Melissa A. Foster
Brian J. Nese
Allison D. Cook
Stoel Rives LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
Phone: (916) 447-0700
Facsimile: (916) 447-4781

Attorneys for CARLSBAD ENERGY CENTER LLC

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 REPLY BRIEF

In response to the Committee's Briefing and Scheduling Order, parties to the Carlsbad Energy Center Project ("CECP") Application for Certification ("AFC") proceeding filed Post-Evidentiary Hearing Opening Briefs on or about August 18, 2010. On September 22, 2010, the Committee issued an order formally extending the Reply Brief filing deadline for all parties to October 11, 2010. Accordingly, Carlsbad Energy Center LLC ("Applicant") provides herein its Reply to certain issues raised in various parties' Opening Briefs.

I. INTRODUCTION

The Opening Briefs of both Applicant and Staff demonstrate that the Project will not create any unmitigated, significant environmental impacts, and that the Project complies with all applicable laws, ordinances, regulations, and standards ("LORS"). In contrast, the City of Carlsbad and other Project opponents have demonstrated throughout the AFC process that they vehemently oppose the construction of the Project because the proposed use of the Project site differs with their vision for the Project site. The Opening Briefs of the City and other

Intervenors are tainted with this deep-rooted bias as reflected by the outcome-oriented arguments proffered by these parties in an attempt to kill a project they deem undesirable.

The City's bias and outcome-oriented assault on the Project is revealed through the City's repeated attempts to usurp the California Energy Commission's ("CEC" or "Commission") exclusive jurisdiction over power plant licensing. In several instances, the City claims that it, rather than the Commission, must issue permits before the Commission can approve the Project. The City then attempts to apply ambiguous and subjective standards to interpret land use LORS. Despite the fact that all applicable land use LORS clearly authorize the proposed use of electrical generation at the Project site, the City contends that the Project must comply with a series of local permitting requirements. This is yet another thinly-veiled attempt by the City to hijack the Commission's exclusive jurisdiction over power plant siting. Recognizing the futility of this strategy, the City attempts to reassert control over the Project through a series of excessive Conditions of Certification¹—raised for the first time in these proceedings in the City's Opening Brief—that are designed to entrench the City in a position to unilaterally approve the Project's compliance with the Conditions. While the City would have the Commission abdicate its jurisdiction over siting matters, defer to the City's unreliable interpretation of LORS, and entrust the City to unilaterally determine the Project's compliance with the City's proposed Conditions of Certification, the City cannot be trusted to even-handedly evaluate the Project because the City has demonstrated that it cannot see past its own biased objective to block the Project in its entirety.

¹ Conditions of Certification are also referred to herein as "COCs."

II. THE CITY'S AND OTHER PROJECT OPPONENTS' ARGUMENTS FAIL TO SHOW UNMITIGATED, SIGNIFICANT DIRECT, INDIRECT OR CUMULATIVE ENVIRONMENTAL IMPACTS RELATED TO THE PROJECT

A. Worker Safety Impacts Have Been Analyzed and Mitigated.

The Final Staff Assessment (“FSA”) adequately analyzed worker safety and fire protection impacts of the Project, and with the suggested mitigation measures, any potential impacts have been reduced to insignificant levels. In its Opening Brief, Staff correctly re-characterized the City’s unfounded arguments as speculative cumulative impact concerns that might arise only if the I-5 widening project is approved and built. (Staff’s OB at p. 45.) The alarmist concerns raised by the City at the hearings and in the City’s Opening Brief are yet another example of the City’s efforts to kill the Project through outcome-oriented arguments. The credible evidence presented in this proceeding indicates that the worker safety and fire protection impacts of the Project have been analyzed and mitigated, even if the I-5 widening project is built.

This issue is most clearly demonstrated by the City’s late-filed request that the fire access road be expanded from 28 feet, as called for in the Project design, to 50 feet, despite the fact that the California Fire Code requires only 20 feet. (Cal. Fire Code § 503.2.2; City’s Opening Testimony, Chief Crawford at pp. 3-4.) Staff’s expert, Dr. Alvin Greenberg, testified that prior to the hearings, the Carlsbad Fire Department (“CFD”) expressed support of a fire access road of 24 feet, which was even less than the planned 28 feet. (Trans. (02/04/10) at p. 37:13-17; *see also* March 30, 2009 letter from CFD to Applicant.)² Just before the Hearing,³ however, CFD inexplicably changed its position and demanded the access road be expanded to 50 feet. (City’s

² The City’s correspondence to Applicant dated March 30, 2009 was not entered into evidence during the Evidentiary Hearing (Docket Log # 50740). To that end, Applicant requests the Commission take notice of this correspondence pursuant to Title 20, California Code of Regulations, section 1213.

³ As noted in Applicant’s Opening Brief, the Committee held the CECP Evidentiary Hearing over four days in Carlsbad, California, from February 1 through 4, 2010.

Opening Testimony, Chief Crawford at p. 3-4.) At the Hearing, despite the baseline of 20 feet that has been established by the California Fire Code, CFD Fire Chief Heiser testified that “20 feet isn't even close to what [he] would consider reasonable.” (Trans. (02/04/10) at p. 54:24-25.) After supporting a 24-foot fire access road until the eve of the Hearing, Chief Heiser then reached the unsupported conclusion that “50 feet seems to be a reasonable width to safely conduct fireground and rescue operations.” (*Id.* at 55:2-5.)

Despite the CFD's apparent change of heart from 24 feet to 50 feet, Dr. Greenberg analyzed the worker safety and fire protection impacts from the proposed Project, including consideration of the impacts of the proposed I-5 widening, and concluded that the proposed Project provides for adequate emergency access. (Trans. (02/04/10) at pp. 32:24-37:12.) The Applicant's expert also reached the same conclusion. (*Id.* at pp. 22:15-23:24.)

Aside from the flip-flop regarding the appropriate width of the access road, the City makes additional attempts to create worker safety and fire protection issues where none exist. First, the City complains that the rim road that surrounds the power block must be maintained at a width of 25 feet. (City's OB at p. 16-17). The City, however, ignores the fact that both Applicant's expert and Staff's expert testified that there is no requirement for the rim road. (Trans. (02/04/10) at pp. 23:25-24 and 47:8-48:2.) In fact, Staff's expert confirmed that even under the I-5 widening scenario that would encroach the furthest onto the Project site, the rim road would remain intact. (*Id.* at 47:8-48:2.) Accordingly, the FSA accurately concludes that the project design, including the recommended Conditions of Certification, “would incorporate sufficient measures to ensure adequate levels of industrial safety.” (Ex. 200 at p. 4.14-18.)

Next, the City creates the specter that the proposed access route to the CECP is inadequate because it includes ninety degree turns and would, thus, delay emergency response

times. (City's OB at p. 14). During the Hearing, representatives of CFD testified that, in light of the proposed access route, CFD's emergency response time from the first call to the location of the generation equipment on the Project site would take longer than the six to eight minutes referenced in the FSA. (Trans. (02/04/10) at pp. 61:9-17, 71:2-71-15.) Contrary to the City's assertion, nowhere in the record did the City or its witnesses offer evidence supporting the proposition that these alleged longer response times are inadequate or create an unmitigated, significant impact. Rather, Applicant's fire expert, Frank Collins, testified that the response times proffered by the City are adequate and reasonable. (Trans. (02/04/10) at p. 19: 24-20:3.)

Finally, the City alleges that the "proceedings have generally ignored the greatest potential hazard presented by the [Project] – a major fire or explosion sparked by natural gas lines fueling the plant's combustion..." and inappropriately compares the proposed Project to the Kleen Energy power plant. (City's OB at p. 12-13.) The comparisons to the Kleen Energy power plant—which was enclosed in a building—are entirely misplaced and outside the scope of the CECP evidentiary record. Further, the City ignores the fact, as Applicant's expert testified, that the natural gas that would fuel CECP would not be stored on site and would be transported through lines with multiple shutoff valves. (Trans. (02/04/10) at p. 14:1-19.) In reality, there is an insignificant risk of a major fire or explosion sparked by natural gas at CECP. As Staff's expert testified, and as Staff pointed out in its Opening Brief, in more than 30 years there have been no major fires at CEC-licensed gas fired power plants. (Trans. (02/04/10) at p. 133-134; Staff's OB at p. 49.)

B. Visual Resources Impacts Have Been Analyzed and Mitigated

The FSA adequately analyzed visual impacts of the Project and, with the suggested mitigation measures, any potential impacts have been reduced to insignificant levels.

Regardless, the City makes the unsupported statements that CECP will create visual blight and

screening is not feasible because trees cannot be planted over sewer lines. (City's OB at p. 19.) The City, however, ignores the substantial evidence in the record that supports the conclusion that CECP will not result in significant impacts to visual resources. The FSA included a thorough analysis of key observation points and, based on that analysis, Staff properly concluded that the Project, including the recommended Conditions of Certification, would reduce any potential impacts to less than significant levels. Applicant's and Staff's experts testified that screening was both feasible and adequate - even in light of the possible future I-5 widening project. (Trans. (02/02/10) at p. 246:24-248:20, 252:18-257:16.) Despite the City's statements regarding planting trees over sewer lines, the City fails to demonstrate the relevance of that statement or how the proposed screening is inadequate.

Finally, for the very first time in the CECP AFC process, the City contends in its Opening Brief that the Project must comply with Carlsbad Municipal Code, Chapter 21.40, or the Carlsbad Scenic Preservation Overlay Zone, which requires a special use permit from the Carlsbad Planning Commission. Once again, the City ignores the all-encompassing jurisdiction of the Energy Commission, which supplants all local permits, including special use permits. The licensing authority provided under Public Resources Code section 25500 "supersedes all other local and state permitting authority." (Pub. Resources Code § 25500.) 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—including special use permits—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.)

C. Greenhouse Gas Impacts Have Been Properly Analyzed

Intervenors attack CECP on the grounds that the Project's impact on climate change has not been adequately analyzed, in particular because the life cycle emissions of liquefied natural

gas (“LNG”) as a potential CECP fuel source have not been included in the Project analysis. Applicant demonstrates below that the project’s greenhouse gas (“GHG”) emissions have been properly analyzed in compliance with the California Environmental Quality Act (“CEQA”) and with the Commission’s regulations and decision in the Avenal Energy Center proceeding.⁴

1. The use of LNG at the plant is speculative.

Intervenor Center for Biological Diversity (“CBD”) devotes a great deal of attention to the potential use of LNG at CECP, and argues that such use is reasonably foreseeable. (CBD OB at pp. 6-11.) However, nowhere does CBD demonstrate that the import of LNG into the San Diego area, if it were to occur, is a reasonably foreseeable impact of the Project. Incredibly, CBD cites in its Opening Brief an outdated report and highlights the following statement to support its position:

All of this consumption will convert to natural gas derived from imported LNG when flow is permanently reversed on the SDG&E pipeline system in 2009.

(CBD’s OB at p. 11, quoting Ex. 632.)

First, there is no question that “all of this consumption” of natural gas within the San Diego region has not been derived from LNG since 2009. As the CEC Staff points out in its Opening Brief, there have been no commercial deliveries of LNG to California. (Staff’s OB at pp. 29-30.)

Second, even if the prediction quoted by CBD had been correct, it would support the fact that the introduction of LNG into the San Diego area is not a reasonably foreseeable consequence of CECP, as it would have preceded (by several years) the operation of CECP. The CEC Staff, in its Opening Brief, clearly demonstrates that the use of LNG at CECP is, in fact, speculative within the meaning of CEQA. (Staff’s OB at p. 29.) Applicant concurs with

⁴ See the Commission’s *Final Decision* for the Avenal Energy Center (08-AFC-1) at pp. 21-22.

Staff's analysis.

2. CBD's characterization of LNG is self-serving and incorrect.

CBD also attempts to characterize the use of LNG at CECP as resulting in a 25% increase in GHG emissions from the Project, citing the testimony of CBD Witness Cox. (CBD's OB at p. 11.) CBD, however, mischaracterizes the testimony of its own witness. In fact, Mr. Cox testified that the 25% increase was related to "the process of getting natural gas from one continent to another," including a "higher carbon content" of the natural gas, the "liquefaction process," "transporting the LNG overseas," and "regasification." (Trans. (02/03/2010) at p. 131.) Nowhere in his testimony does Mr. Cox testify that this alleged 25% increase relates to the overall GHG emissions from the Project, which is largely derived from the combustion of natural gas (from whatever source). The only testimony directly on point regarding this issue was that of Applicant's expert, Mr. Rubenstein, who indicated that if a complete life-cycle analysis of LNG use at CECP were to be performed, only 1.3% of the carbon emissions associated with LNG use would be attributable to unique aspects of LNG (such as liquefaction, overseas transport, and regasification). (Trans. (02/03/2010) at p. 365:25.)

3. The assessment of the Project's GHG impacts in the context of reasonably foreseeable impacts to the electric generating system is reasonable and appropriate.

CBD further argues that Staff's analysis of CECP's GHG emissions is inadequate under CEQA because the analysis fails to find that direct GHG emissions from the Project are significant. (CBD OB at p. 12.) This is yet another example of CBD's self-serving conclusions – having already "determined" that GHG emissions from the Project must be significant, CBD concludes that any analysis that fails to reach CBD's preconceived conclusions must, of necessity, be deficient. Staff, in contrast, analyzes the Project's impacts, based on guidance and precedents established by the Commission, and then reaches a conclusion regarding the

significance of the Project's impacts. CBD turns the CEQA process on its head – first determining that an impact is significant, and then defining the criteria to support that conclusion.

The logical inconsistencies presented in CBD's Opening Brief are apparent from the following two quotes:

Staff improperly discounts its own quantitative analysis of the Project's projected emissions and argues that the relative efficiency of the Project in relation to the Western Electric Grid should be the baseline from which to analyze the increase in greenhouse gas emissions from the Project.

(CBD OB at p. 16.) Further, CBD contends, “[a]s the Commission is well aware, CECP is part of a much larger system in which many other fossil fuel plants have already been built and licensed.” (CBD OB at p. 25.)

CBD appears to be unable to decide whether the GHG emissions from the Project should be analyzed in a vacuum, or analyzed in the context of the “much larger system” of which it is a part. Fortunately, the Commission has established clear precedent and guidance as to how GHG emissions from electric power generating projects should be analyzed. Staff's Opening Brief addresses these issues, concluding that (i) CEQA's thresholds of significance “are irrelevant to projects that actually reduce impacts,” (ii) mitigation is inapplicable for projects that do not result in significant adverse impacts; and (iii) CECP is consistent with Assembly Bill 32 goals to dramatically reduce GHG emissions. (*See* Staff's OB at pp. 30-35.) Applicant concurs with these conclusions.

4. The significance of the Project's GHG impacts has been properly assessed.

In conclusion, the Project's GHG emissions have been adequately addressed within the context of CEQA. The use of LNG by the Project is entirely speculative and, even should it occur, there is no demonstration that the use of LNG is a reasonably foreseeable consequence of

the Project (as opposed to a facet of the environment in which the Project would be located). To the extent that LNG is used at CECP, it would be reducing and displacing LNG used at other power generating facilities, thus resulting in a net environmental benefit (to the extent that CBD's assertions regarding increased GHG emissions from LNG use are correct). Finally, the Commission's criteria set forth in its own guidance, and elucidated in the Avenal Energy Center *Final Decision*, establish a reasonable and proper framework for assessing the significance of GHG impacts from electric generating facilities proposed for construction in California. (See fn. 3, *supra*.) Applying these criteria to CECP leads to the undeniable conclusion that the Project does not result in significant impacts related to GHG emissions

D. The Shutdown of Units 4 and 5 Has Been Properly Considered

As noted in Applicant's Opening Brief, existing steam boiler Units 1, 2, and 3 at Encina Power Station ("EPS") will be retired as part of the Project. The retirement of Units 1-3 will occur upon the successful commercial operation of the new CECP generating units. CECP will eliminate 225 million gallons per day of seawater intake flow due to the retirement of Encina Units 1-3. CECP will not require the use of any additional seawater beyond what is already being used by EPS Units 4 and 5. As noted in the Memorandum to Hearing Officer Paul Kramer from Richard Ratliff, CEC Staff Counsel IV (May 27, 2010) ("May 27, 2010 Memorandum"), the CECP "has been proposed to replace Encina Units 1-3; Encina Units 4 and 5 would continue to operate." (May 27, 2010 Memorandum at p. 1.)⁵ 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. For the foreseeable future, Units 4 and 5 at the EPS will continue to operate. In fact, EPS Units 4 and 5 will continue operations after CECP has been constructed and

⁵ The May 27, 2010 Memorandum can be found on the Commission's CECP website at http://www.energy.ca.gov/sitingcases/carlsbad/documents/2010-05-28_Memo_for_post-evidentiary_hearing_developmnts.pdf.

operations have commenced. The source water for CECP's ocean water purification system will be only a small portion of discharge channel water from the EPS once-through cooling system discharge channel. In the CEQA context, given the existing once-through cooling ("OTC") background condition at EPS, the additional re-use of a small portion is indeed insignificant, as described in more detail below.

When Unit 4 and/or Unit 5 are operating and generating power, ocean water is moved to the discharge channel by the Unit 4 and 5 circulating pumps. In addition, based on the design and service requirements for Units 4 and 5, when Units 4 and/or 5 are not generating power, ocean water is still circulated by one or more of the existing Units 1 - 5 service water pumps in order to maintain the reliable operation of the intake cooling water system. Any one of these service water pumps has sufficient capacity to support the operation of the CECP ocean water purification system. In general, based on the design and operations procedures for EPS, at least one of the EPS service water pumps will be operating when EPS Units 4 and 5 are not generating power and thus, their circulating pumps (i.e., large capacity cooling pumps) are not in operation. The smallest service water pumps are rated at 3,000 gallons per minute (or 4.32 million gallons per day) and either one is sufficient to provide the purified ocean water for the Project.

While various parties to the CECP AFC proceeding errantly rely on the State Water Resources Control Board's *Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling* (May 4, 2010) ("OTC Policy")⁶ as the basis for the mandated shutdown of Units 4 and 5, shutdown of OTC units like Units 4 and 5 is not mandated by the OTC Policy; it is simply

⁶ The OTC Policy took effect on October 1, 2010, after approval by the Office of Administrative Law and filing of the requisite paperwork with the California Natural Resources Agency. On September 30, 2010, the State Water Resources Control Board published a "Notice of Adoption Hearing, Notice of Filing, Notice of Opportunity for Public Comment – Proposed Amendment to the Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling," setting forth additional proposed changes to the OTC Policy and scheduling a public hearing regarding the proposed amendments to the OTC Policy for December 14, 2010, with a comment deadline of November 19, 2010.

another option for compliance with the OTC Policy. (*Id.* at p. 2.) Under the OTC Policy, there are two separate “tracks” for compliance. Track 1 requires a reduction in intake flow rate, and Track 2 requires the facility to reduce impingement mortality and entrainment of marine life on a unit-by-unit basis. (May 27, 2010 Memorandum at p. 1.) Applicant and Staff concur:

Even if EPS Units 4-5 were refitted with a closed loop cooling system reducing their OTC intake by more than 90 percent to meet the new Water Board policy, these units would still (like the air-cooled CECP) require water to function [and] [s]ince the City has stated that no water is otherwise available, cooling water would presumably still come from the ocean (as is the case with CECP).

(Staff’s OB at p.14, fn.2.) Yet various parties continuously argue that the “shutdown” or “retirement” of Units 4 and 5 should be evaluated as part of CECP. For example, the City argues that the FSA’s “failure to consider the impending retirement of Units 4 and 5 pursuant to the OTC Policy as part of the CECP violates CEQA’s threshold requirement to include all phases of a project, including reasonably foreseeable future activities, in the project description.” (City’s OB at p. 3.) The City then claims that CECP will “continue to draw significant water resources from the Agua Hedionda Lagoon after the existing EPS plant is shut down under State OTC Policy.” (City’s OB at p. 72.) The City also argues that the anticipated shutdown of Units 4 and 5 will likely change the scope or nature of the CECP’s environmental effects and the City claims that CEC Staff failed to evaluate the shutdown of Units 4 and 5 as part of the CEQA analysis for “reasonably foreseeable future activities.” (City’s OB at pp. 30-31, 33.) Finally, the City contends that Staff failed to consider the impacts of shutdown of Units 4 and 5 pursuant to the OTC Policy (as such relates to the availability of ocean water after shutdown). (City’s OB at pp. 24-25, 28.)

Similarly, Terramar repeatedly raises the “shutdown” of Units 4 and 5 in the Terramar Opening Brief yet takes it one step further than the City, arguing that the baseline for the CEQA

analysis should have been a no EPS baseline. Specifically, Terramar claims: (1) that the shutdown of Units 1-5 (4 and 5), produces a “significantly different basis for evaluation” as it is a “foreseeable event” (pursuant to CEQA) (Terramar’s OB at p. 6); (2) the shutdown of Units 4 and 5 will end coastal dependent industrial use, therefore eliminating impacts to marine resources (Terramar’s OB at p. 6); (3) that Staff failed to consider the predicted future shutdown of Units 4 and 5 (Terramar’s OB at pp. 14-15); (4) that Staff failed to evaluate visual impacts from a “no Encina” plant baseline (Terramar’s OB at p. 15); and (5) the shutdown of Units 4 and 5 should have been “considered the baseline condition in order to evaluate [CECP’s] impacts.” (Terramar’s OB at p. 24.)

However, as discussed above, “shutdown” and “decommissioning” of OTC units like Units 4 and 5 is not required by the OTC Policy. Specifically:

the shutdown of Units 4 and 5 is not a consequence of this project. Units 4-5 must continue to operate until at least the end of May 2017 unless they are replaced or made unnecessary by additional resources, which presumably would be additional generation resources within the San Diego “load pocket.” Units 4-5 may continue to operate well beyond 2017 if they are refitted to greatly reduce their use of once-through cooling water (or, alternatively, employ structural barriers to reduce entrainment and impingement of marine life by a similar amount) or if no new generation is built to supply adequate reliability in the “load pocket.”

(Staff’s OB at p. 4 (citing OTC Policy).) Further, as Staff correctly points out in Staff’s Opening Brief:

[the CECP] would be part of the overall infrastructure necessary for the closure of the EPS facilities that rely on OTC . . . [and CECP] would therefore facilitate the State Water Board’s newly adopted policy for such power plants, which can only be closed when modern replacement generation is ready.

(Staff’s OB at p. 8 (emphasis added).)

Thus, there is no legal basis for consideration of the shutdown or retirement of Units 4

and 5 as part of CECP as the shutdown or retirement of these Units is not required by the OTC Policy, nor is there a requirement that if the Units are shut down, that they also be decommissioned and demolished, thus changing the landscape at the EPS property and therefore the CEQA baseline.

Moreover, the OTC Policy was in draft form in the summer of 2009 before publication of the FSA, and remained in draft form throughout the CECP AFC evidentiary hearings. In fact, the OTC Policy was only recently adopted (on May 4, 2010) and contained seventeen changes from those items set forth in the version of the draft Policy circulated for public notice and comment. In fact, the OTC did not go into effect until October 1, 2010. (*See* footnote 5, *supra*).

Based on the foregoing, Units 4 and 5 have been properly considered in the context of CECP.

E. Water Resources Have Been Thoroughly Analyzed

Applicant originally proposed to use reclaimed water for CECP, and it was not until the City vehemently opposed the CECP's use of reclaimed water that Applicant filed the Project Enhancements and Refinements document ("PEAR") with the CEC, which provided an environmental analysis of a different water source for CECP—an ocean water purification system. (Ex. 35.) The City maintains, however, that CECP will have "unmitigated significant impacts on water resources" for three reasons: the source of recycled water is unknown; the future source of ocean water is uncertain; and the recommended conditions of certification would not reduce the CECP's direct impacts below significance. (City's OB at p. 22.) Applicant disagrees. Since the future source of ocean water is known and has already been addressed (*see*

Part II.D., *supra*),⁷ Applicant will address the City’s other two claims regarding the unknown source of recycled water and the proposed Condition of Certification SOIL&WATER-8 below.

Staff and Applicant have recommended permitting of the CECP with the ocean water purification system as the source of industrial water supply solely because the City has refused to provide the Project with recycled water. Even so, the FSA analyzes the necessary reclaimed water line (3700 feet) and the amount of recycled water needed for CECP (517 acre-feet per year). (Ex. 200 (FSA) at p. 4.9-5.) In fact,

[r]egardless of the recycled water producer, its delivery would be through the City’s recycled water infrastructure and would require agreements with the City for the delivery and discharge of recycled water. Based on the “yet to be determined” recycled water producer and the need for a delivery agreement with the City, staff has recommended Condition of Certification SOIL&WATER-8 . . . [which] would require the project owner to enter into a long-term (30 to 35 years) recycled water supply agreement with the producer and the City for the delivery of recycled water to CECP. With this agreement, the recycled water producer would commit to a long-term recycled water supply that would be delivered by the City.

(Ex. 200 at p. 4.9-14.) Staff also notes that it is their belief “that with the projected increase in northern San Diego County population a reliable supply of recycled water will be available prior to the operation of the CECP. With the growth in population and new recycled water infrastructure, the impact on recycled water supply would be cumulatively insignificant.” (Ex. 200 at p. 4.9-18.)

Here, CECP is not contingent on “finding a source of water” as the City contends. (City’s OB at p. 22.) The amount of recycled water needed for CECP is known and would be delivered by the City, and such quantity was thoroughly analyzed in the FSA. Further, recycled

⁷ To further clarify, the proposed CECP includes industrial re-use of a small portion of the existing Encina discharge stream via an ocean water purification system. In the CEQA context, given the existing OTC background condition, the additional re-use of a small portion of the existing discharge channel stream is indeed insignificant.

water is an alternative industrial water supply for CECP; the Project as proposed and permitted is using the proposed ocean water purification system that would rely on water from the EPS discharge channel. SOIL&WATER-8 is, therefore, better understood as a requirement “triggered,” if at all, in the event in the future when reclaimed water sources in adequate quantities are available. As such, any CEQA analysis of the environmental effects of providing the future recycled supply would necessarily have been evaluated as part of the recycled water producer expansion plan, and not as part of the CECP. To that extent, any future recycled water source is not part of the proposed CECP. Thus, no impact analysis of the proposed CECP “impacts” is being deferred. Lastly, in line with the foregoing, Condition of Certification SOIL&WATER-8 is a “contingent” condition, which will be triggered if and when sufficient reclaimed water sources and delivery programs become available. Therefore, Applicant has requested SOIL&WATER-8 be revised to clarify that it is for an alternative, conditional source of industrial water for CECP (instead of reading as though a recycled water agreement is necessary for the Project to move forward). (*See* Exhibit A-7 of Applicant’s Opening Testimony (Hearing Exhibit 118); Applicant’s OB at p. 53 (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. 4:1; Ex. 118 at pp. 2).)

Based on the foregoing, water resources for CECP have been thoroughly analyzed.

F. Staff’s Alternatives Analysis is Sound

Pursuant 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).) 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).) There are certain factors, such as feasibility, that must be considered in addressing alternatives.

In Staff’s Opening Brief, Staff notes that the FSA concluded “CECP would not have any significant environmental effects with Staff’s recommended mitigation” (Staff’s OB at p. 40), but even so, Staff still “considered a range of reasonable alternatives that would ‘foster informed decision-making and public participation.’” (Staff’s OB at p. 40.) Such analysis in the FSA also included a number of project site alternatives proposed by the City. (Staff’s OB at p. 40.) Most importantly, the CEQA baseline or “current condition” as noted in Staff’s Opening Brief is that “a power plant use already exists in the coastal zone, with all the infrastructure that goes with it, and CECP is merely a replacement or expansion of that existing use.” (Staff’s OB at p. 40.) There is already a power plant at the proposed CECP site and no significant impacts would result from the construction and operation of CECP at the proposed site. Thus, any alternative sites proposed by the City would not avoid significant impacts or LORS inconsistencies, because none are expected at the proposed site. (*Id.*)

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. Regarding site alternatives, the “No Project Alternative” was not preferable as it would further delay the closure of OTC facilities at EPS and would allow for higher GHG emissions to an unknown date in the future. In addition, alternative sites proposed by the City were also determined to be no better, and often worse, than the proposed CECP site,

because of the extensive amounts of project linear facilities required for the project, including new transmission lines. (Staff's OB at p. 43.) Lastly, the three principle alternative sites analyzed by Staff would result in a new industrial use within 2,500 feet of residential dwellings, not to mention require zoning amendments, increased noise, biological, and visual impacts, just to name a few, which defeats the CEQA requirement that the alternative "avoid or substantially lessen environmental impacts when compared to CECP." (*Id.*) Moreover, Applicant and Staff considered a reasonable range of generation alternatives, noting that only 10 MW of renewable energy contracts are currently in place for resources within the San Diego reliability area and, thus, CECP and other projects like it are required to support and integrate intermittent renewable electricity generation located remotely from the load center. (Staff's OB at pp. 41-42.)

Thus, for the reasons set forth in the FSA, Staff's Opening Brief, and Applicant's Opening Brief, the CECP site is the environmentally superior alternative.

III. ARGUMENTS RAISED BY THE CITY AND OTHER PROJECT OPPONENTS FAIL TO SHOW A LORS COMPLIANCE PROBLEM

A. Staff Has Accorded Sufficient Deference to the City's Biased, Outcome-Oriented Interpretation of its LORS

Staff has fully complied with its obligations under California Code of Regulations, Title 20, section 1744, which provides, in pertinent part, that "comments and recommendations by a [*sic*] interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff." As a preliminary matter, in its Opening Brief, the City mischaracterizes the nature of "due deference" required by Section 1744. The City erroneously relies on *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142, which has no bearing on Section 1744 and instead discusses the due deference standard of judicial review a court applies in a mandate proceeding to review an agency's decision for

compliance with CEQA. Section 1744, however, involves CEC procedures for considering applications for certification. Hence, the judicial standard of review cited by the City is inapplicable here.

Section 1744 includes the competing goals of requiring Staff to accord due deference to the City's interpretation of its own LORS and to independently verify any non-compliance identified by an agency. (*See* 20 Cal. Code Regs. § 1744 (d), (e).) Here, Staff correctly noted that the City is a biased intervenor that is adamantly opposed to the Project. (Staff's OB at p. 5.) Early in this proceeding the City unambiguously stated its opposition to and bias against the Project. (*See* May 1, 2008 Letter from City to M. Monasmith at p. 1.)⁸ Throughout the proceeding, the City has consistently relied on outcome-oriented arguments in an attempt to block the Project. For example and as discussed in further detail herein, CFD inexplicably changed its stance on the acceptable fire access road widths on the eve of the Hearing, and the City continually asserted that the Applicant needed to comply with permit-like land use requirements that are clearly subsumed by the Commission's exclusive jurisdiction over CECP pursuant to the Warren-Alquist Act. Neither of these positions advocated by the City was plausible or unbiased; rather, they were outcome-oriented interpretations designed to achieve the result the City desired—blocking the Project.

Furthermore, as the City acknowledges in its Opening Brief, the Commission has stated that when an agency demonstrates bias or outcome-oriented positions, neither the Commission nor the Staff must defer to the City. (*See* City's OB at pp. 93-94, 97.) The Staff's Comments on the Chula Vista Presiding Member's Proposed Decision ("PMPD") and the Final Decision in

⁸ The City docketed correspondence addressed to Commission Siting Project Manager M. Monasmith on May 1, 2008 (Docket Log # 46114). This correspondence was not entered into evidence during the Hearing. Applicant therefore requests the Committee take notice of this letter pursuant to Title 20, California Code of Regulations, section 1213.

Eastshore Power Project, both cited by the City, are inapplicable here because those proceedings involved both land use LORS that had no permit-like characteristics and cities that applied reasonable interpretations of land use LORS supported by substantial evidence. (*See* Staff's Comments on the Chula Vista PMPD at p. 4; Commission Final Decision for Eastshore Power Project at p. 451.) Here, in contrast, the City implores the Commission to adopt its unreasonable interpretation of land use LORS that are dominated by permit-like characteristics. In the face of such biased opposition, Staff properly weighed the City's contentions against Staff's familiarity with power plant construction, operation, siting and safety.

B. The Project Complies With Worker Safety and Fire LORS

The CEC need not adopt CFD's arbitrary demands regarding road widths in order to comply with LORS. The FSA properly concluded that CECP complies with all applicable worker safety and fire protection LORS. (Ex. 200 at pp. 4.14-18.) In a poorly veiled attempt to kill the Project, the City attempts to create a LORS issue where none exists by asserting that CECP does not comply with California Fire Code Section 503.2.2, which authorizes a fire official to require an increase in access widths. Both Applicant's and Staff's experts testified that the proposed road widths are adequate and compliant with the California Fire Code, which requires 20 foot wide fire access roads. (Trans. (02/04/10) at pp. 22:1-24:19 and 32:9-19, 35:21-38:15.) Further, the proposed fire access is consistent with other CEC-approved power plants. (*Id.* at pp. 37:24-38:15, 40:4-42:20.)⁹ Despite those facts and after supporting this aspect of the project design up until the eve of the hearings, the City and the CFD now contend that wider access is required. This unjustified attempt to "require" wider fire access is an arbitrary and capricious exercise of the authority granted to the City under Fire Code Section 503.2.2. Further, the CFD's authority is preempted by the exclusive jurisdiction granted to the Commission under

⁹ *See also* Part II.A., *supra*.

the Warren-Alquist Act. The City yet again attempts to usurp the Commission's jurisdiction, this time by invoking the Fire Code. Given the City's demonstrated bias and outcome-oriented arguments, the Commission should not defer to the City's arbitrary attempt to exercise its statutory discretion.

C. The Project Complies With All Land Use LORS, Including the City's General Plan, South Carlsbad Coastal Redevelopment Plan, Specific Plan 144, Precise Development Plan, and the Agua Hedionda Land Use Plan

The Project is fully consistent with all applicable LORS, as explained in detail in Staff's and Applicant's Opening Briefs. (Staff's OB at pp. 4-24; Applicant's OB at pp. 10-39.) All of the City's relevant legislative and adjudicatory planning documents designate the Project site for power plant uses, as set forth below.

1. The Project complies with the City's General Plan and Zoning Ordinance.

The City's General Plan designates the Project site as "U" (Utility). 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. (Ex. 147 at p. 3; Trans. (02/01/10) at p. 162.)

The Zoning Ordinance designation for the Project site is "P-U" (Public Utility). Chapter 21.36 of the Zoning Ordinance, Section 21.36.020, expressly authorizes various uses and structures within the P-U Zone, including "the generation and transmission of electrical energy" and associated ancillary support facilities.¹⁰ (Ex. 147 at p. 1; Trans. (02/01/10) at p. 163.)

¹⁰ The City argues that the Commission should look to the P-M, Planned Industrial zoning regulations, to deduce that only publicly regulated entities may operate electrical generating facilities in the P-U Zone. Here again, in an effort to defeat the Project, the City offers up a contrived interpretation that is inconsistent with the plain meaning of the Zoning Ordinance and its past implementation of the Zoning Ordinance. (See Applicant's OB at pp. 18-19.) If the P-U Zone intended to permit only publicly regulated electrical generating facilities, such intention would be set out in the P-U Zone. It is not, and as explained in the Staff's Opening Brief, a discriminatory regulation of that sort would not pass legal scrutiny. Moreover, the P-M zoning concerns public and quasi public *buildings* and *accessory* utility structures, not electrical generating facilities, which are exclusively covered in the P-U Zone.

2. The Project complies with the South Carlsbad Coastal Redevelopment Plan.

The South Carlsbad Coastal Redevelopment Plan (“SCCRP”) states that one of its goals and objectives is “facilitating the redevelopment of the Encina Power Generation facility to a smaller, more efficient power generating plant.” Further, it contemplates a “smaller, more efficient” power plant 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 proposed Project. (Ex. 147 at pp. 2-3; Trans. (02/01/10) at p. 84.)

3. The Project complies with the City’s Specific Plan.

Specific Plan 144 expressly anticipates that the Project site will be used for electrical generation and transmission uses and even contemplates future development of new power generating facilities, noting that “the heights of *future* power generating buildings and power transmission line tower structures shall be of heights and of a similar configuration similar to existing facilities.” (Ex. 147 at p. 2; Trans. (02-01-10) at p. 164 (emphasis added).) Indeed, one stated purpose of Specific Plan 144 is to “provide design and development guidelines for *expansion* of the power plant.” (Specific Plan 144, at p. 2 (emphasis added).)

4. The Project complies with the City’s Precise Development Plan.

The Precise Development Plan (the “PDP”) is a permit, not a plan or ordinance relevant to the Project’s LORS analysis. (Staff’s OB at pp. 18-19, Applicant’s OB at pp. 21-22.) Nevertheless, the Project is consistent with existing PDP 00-02, which recognizes that electrical generating facilities are an authorized use on the EPS property. (Ex. 147 at p. 4.)

5. The Project complies with the Agua Hedionda Land Use Plan.

The Agua Hedionda Land Use Plan (“AHLUP”), approved by the City and certified by the California Coastal Commission as consistent with the Coastal Act, expressly recognizes electrical power generation at the Project site as an authorized use. (Ex. 147 at p. 3.)

6. The City’s “Vision” for the CECP site is not a LORS.

The City and other Project opponents cannot credibly deny that the Project is consistent with applicable LORS. So instead, they attack the Project as being inconsistent with the City’s “vision” for future redevelopment of the property with tourist-serving and recreational uses. (City’s Direct Testimony (L. Hildabrand) at pp. 3-6; Trans. (02/01/10) at pp. 208-213.) This newly announced City “vision” is not reflected in the applicable General Plan, Specific Plan, AHLUP or SCRPP, and, therefore cannot be considered as part of the CEC’s LORS analysis.

In an effort to conform the LORS to the City’s wishes, the City insists that the Project requires a “comprehensive update” to Specific Plan 144. The City cites no authority (aside from its own desire) for this requirement. Moreover, the fact that the Poseidon Desalination Plant was recently approved without a comprehensive update to Specific Plan 144 demonstrates that is just one more attempt by the City to usurp the CEC’s exclusive jurisdiction over siting and design of the Project. No doubt, the City would deny any request for a Specific Plan update that contemplated the Project. As Staff’s Opening Brief explained, such a specific plan amendment that concerns only the Project is an adjudicatory permit over which the CEC has exclusive jurisdiction. (Staff’s OB at pp. 19-23.) The same is true with respect to the City’s claim that the Project requires a PDP, which also is a permit rather than a LORS. (Staff’s OB at pp. 18-19, Applicant’s OB at pp. 21-22.)

As demonstrated above and in Staff’s Opening Brief and Applicant’s Opening Brief, the Project is consistent with all applicable LORS. The City’s arguments to the contrary are disingenuous, contrived, and inconsistent with its past interpretation of LORS and should be disregarded as pure advocacy aimed solely at defeating the Project.

D. The Project Complies with the California Coastal Act

Intervenors’ arguments that CECP does not comply with the Coastal Act rest almost

exclusively on their assertion that CECP is not a coastal-dependent facility. This argument ignores the fact that no provision of the Coastal Act requires development in the coastal zone to be coastal dependent in order to comply with the Act. Public Resources Code section 30255 and the legislative policies included in the Coastal Act, such as section 30001.5, give priority to coastal-dependent and coastal-related development, but do not prohibit non-coastal dependent or coastal-related uses. In fact, section 30001.2 provides 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 or coastal access, it may be necessary to locate such developments in the coastal zone....

(Pub. Resources Code § 30001.2.)

More importantly, Intervenor ignores section 30260, which provides that “[c]oastal-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.) Intervenor simply points to the second part of section 30260, arguing that CECP cannot feasibly be accommodated consistent with other policies of the Coastal Act. Section 30260 provides that even if a facility cannot feasibly be accommodated consistent with Coastal Act policies that it shall nevertheless be permitted unless alternative locations are infeasible and more environmentally damaging. Applicant’s discussion of alternative locations demonstrates that, in fact, other locations proposed for CECP are not less environmentally damaging and, because of a lack of infrastructure for an electrical generating facility, are infeasible. (See Applicant’s OB at p. 6.)

Furthermore, Intervenor fails to explain how CECP cannot be accommodated consistent with other policies of the Coastal Act. Coastal Act policies, such as Section 30001.2, expressly

declare the Legislature's findings that electrical generating facilities may need to be located in the coastal zone, despite the fact that they may have significant adverse effects on coastal resources. (Pub. Resources Code § 30001.2.) Applicant has demonstrated that in fact CECP will not have significant adverse effects on coastal resources, which is a concern under Section 30001.2. CECP is in line with several policies of the Coastal Act, including Section 30001(d) ("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 this state") and Section 30001.5(b) (basic goals for the coastal zone include assuring balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.) Intervenors have errantly concluded that CECP has significant adverse impacts and those other locations for CECP would be less environmentally damaging. However, the data and analyses provided by Staff and supported by Applicant's submissions demonstrate that CECP has no significant adverse environmental impacts and that there are no alternative sites that are both feasible and with less environmental impacts than the CECP site. Therefore, CECP is consistent with Section 30260.

Applicant explained in its Opening Brief that the CECP is coastal-dependent under the definition of "coastal-dependent development or use" provided in the Coastal Act because CECP requires a site adjacent to the ocean to function. (Pub. Resources Code § 30101.) The technology and design of the Project are such that it would not be able to operate without ocean water obtained through the existing EPS ocean water discharge channel. However, even if in the future CECP were able to obtain reclaimed water from the City in order to operate, under section 30260 of the Coastal Act, CECP is a permissible expansion of EPS, a coastal-dependent industrial facility, within an existing site. (Pub. Resources Code § 30260.) CECP includes the

shutdown of EPS Units 1-3, replacing those outdated, inefficient units with less-polluting, more efficient technology. Section 30260 ensures that expansion will be permitted for “reasonable long-term growth” where consistent with the Coastal Act. The replacement of the oldest EPS units with units that have no significant adverse impacts on the environment is a prime example of reasonable long-term growth that is permitted under the Coastal Act.

E. The Siting of the Coastal Rail Trail is Not a LORS Issue

Although the CEC has authority to determine whether the Rail Trail can be located on the Project site, there is no LORS requirement dictating that the Project must accommodate the Rail Trail. Neither the General Plan, SCCRP, AHLUP, Zoning Ordinance, nor any other legislative land use plan requires the Project to provide an easement for the Rail Trail. Rather, as a condition of approval for the PDP for the Poseidon Desalination Facility, Cabrillo Power I LLC, owner of the entire EPS site, agreed to accommodate the Rail Trail “*in a mutually acceptable location*” before occupancy of the Poseidon Desalination Facility. (PDP 00-02, condition 16.d [emphasis added].) The City now argues that the “mutually acceptable location” must be east of the railroad tracks and even threatens to condemn an easement in such a location by eminent domain if the Project is not so conditioned. (City’s OB at p. 82.) This is another example of the City trying to control design and siting of the power plant. Neither PDP 00-02 nor any other document entitles the City to locate the Rail Trail east of the railroad tracks. As noted in the CEC Staff Opening Brief, locating the Rail Trail east of the railroad tracks creates public safety and security problems. (Staff’s OB p. 24.) Accordingly, if the CEC makes accommodation of the Rail Trail a Condition of Certification, it should require that the Rail Trail be in a safe and “mutually acceptable location” west of the railroad tracks.¹¹

¹¹ Applicant notes that the California Department of Transportation (“CALTRANS”) and the Federal Highway Administration have recently prepared and released a Draft Environmental Impact Report/Environmental Impact

F. The Recently Adopted City Urgency Ordinance CS-070 is Not a LORS

The CEC has exclusive jurisdiction regarding the siting, design, and permitting of electric generating facilities. The Carlsbad City Council adopted Urgency Ordinance CS-070 in another of its multiple attempts to defeat the Project (ordaining that the Project “represents a current and immediate threat to the public health, safety and welfare...”) and to prohibit the City from processing any application seeking to expand the EPS. (Ex. 432.) The City, of course, lacks jurisdiction to approve applications relating to expansion of the EPS. As such, the City’s Urgency Ordinance is not a LORS. (See also Staff’s OB at p. 23; Applicant’s OB at pp. 34-35.)

G. The Project Complies with All Applicable Development Standards

Applicant’s Opening Brief describes the Project’s compliance with applicable development standards. (Applicant’s OB at p. 35-36.) The City fails to identify any inadequacies with respect to development standards, except to state that the AHLUP calls for a height limit of thirty-five feet. (City’s OB at p. 90.) The City is once again misrepresenting the content of its land use plans. In fact, the AHLUP states “*building* height shall be limited to a maximum of 35 feet.” (Ex. 412, at p. 17 (emphasis added).) Electrical generation facilities and towers are not “buildings” subject to this thirty-five foot height restriction. This is demonstrated by the fact that Specific Plan 144 provides that “future power generating buildings and transmission line tower structures shall be heights and of a configuration similar to existing facilities,” and existing facilities are approximately 400-feet high. (Specific Plan 144, III.5; Applicant’s Opening Brief at p. 36.) The various City land use plans are required to be harmonious and consistent with one another. Thus, the 35-foot height restriction of the AHLUP

Statement (“I-5 Draft EIR”) for the Interstate 5 North Coast Corridor Project, informally referred to as the I-5 widening project. While the I-5 Draft EIR includes statements about the Coastal Rail Trail Project, these statements do not constitute LORS and do not affect the Commission’s jurisdiction over all siting issues affecting the CECP. Further, CALTRANS does not have authority to preempt the Commission’s jurisdiction.

should be applied only to “buildings” as the Plan itself states, and not to expressly authorized future power generation facilities.

H. While the Notice of Intention is Generally not Applicable to the Project, Staff Correctly Points Out That the Notice of Intention Confirms that Electric Generation is an Authorized Use for the Project Area

Applicant explained in its Opening Brief all of the reasons that San Diego Gas & Electric’s (“SDG&E”) 1989 Notice of Intention (“NOI”) for a new power plant on the EPS property or on one of four other sites in the county is irrelevant to the AFC proceedings here, despite intervenors’ insistence that the findings on the 1989 NOI on the EPS site are analogous here and should be taken into account by the Commission. (Applicant’s OB at p. 38-39.) CECP’s different design, technology, environmental controls, and placement on the EPS site make its potential environmental impacts radically different from those of the project proposed in the 1989 NOI. (Applicant’s OB at pp. 38-39; Staff’s OB at pp. 14-16.) Nevertheless, Applicant does not wish for the Commission to discount Staff’s valid point that the NOI is relevant in one respect: the Coastal Commission’s 1990 report on the NOI concluded that the proposed facility for the EPS site was consistent with the AHLUP because the land proposed for the plant is “designated ‘U’ or ‘utility’ on the land use maps of the certified LUP.” (Staff’s OB at p. 17.) In fact, the 1990 Coastal Commission report states that the AHLUP was created to provide for public utility uses and the expansion of EPS proposed in the NOI appeared to be consistent with the LUP and the Specific Plan for the site. (*Id.*) Thus, on a fundamental level, the NOI and the Coastal Commission’s report on the NOI demonstrate compliance with land use LORS, in using the EPS property for a power plant use like CECP.

I. The Project Complies With All Applicable Air Quality Requirements

1. The Project is not subject to federal PSD permit requirements, and even if the Project is determined by EPA to be subject to federal PSD requirements, that is no basis for Commission denial of the Project.

Intervenors Simpson and Power of Vision (“POV”) appear to argue that the Project should not be licensed by the Commission because the Project does not have a Prevention of Significant Deterioration (“PSD”) permit from the United States Environmental Protection Agency (“EPA”). (Simpson’s OB at p. 6; POV’s OB at pp. 13-14.) Compliance with federal PSD program requirements is not before the Commission. In fact, the Commission routinely certifies projects that have not completed PSD review. The Applicant has a request pending before EPA seeking a determination that construction and operation of CECP is not subject to PSD review. EPA is still considering that request. Regardless of EPA’s decision regarding the request, CECP will abide by EPA’s determination.

2. The Project’s emission offsets satisfy LORS.

In a shotgun barrage, Intervenor Simpson argues that the emission offsets submitted to mitigate the Project’s impacts are not “adequately identified,” do not include “the year that they were established,” do not include “the distance from the site,” and do not provide an “adequate basis for interpollutant trading.” In fact, the Final Determination of Compliance (“FDOC”) includes a list of emission reduction credits proposed for use with the project, indicating the certificate number, the date the certificate was issued, the location of the emission reductions, and the nature of the actions that resulted in the emission reductions. (*See* Ex. 100, Appendix D.) With respect to interpollutant offsets, the San Diego Air Pollution Control District’s (“District”) Rule 20.3(d)(5)(vi) establishes the ability of an applicant to use VOC offsets to mitigate NO_x emission increases, and establishes, by regulation, a ratio of 2.0:1 for such mitigation. (Ex. 100 at p. 45.) Intervenors have made no demonstration that the District’s requirements have not been

met, nor have they demonstrated that the District's FDOC is in error.

3. The Project's emission offsets fully mitigate all air quality impacts under CEQA.

Intervenor Simpson appears to suggest that the mitigation provided for the Project is not adequate due to issues related to the determination of the baseline emissions from Units 1, 2 and 3 that will be shutdown as a part of the Project. (Simpson's OB at p. 7.) However, Intervenor Simpson demonstrates no evidence of any inadequacy; the mere quotation of provisions of CEQA regulations is not such a demonstration. In contrast, the testimony of both Staff's and Applicant's witnesses clearly demonstrates that there are no significant unmitigated air quality impacts related to the Project. (Trans. (02/02/2010) at p. 67:12-16 and p. 79:22-25.)

4. The District's review of the 1-hour NO₂ air quality impact analysis is consistent with District regulations.

As pointed out by Intervenor Simpson, a new federal ambient air quality standard became effective on April 12, 2010, after the close of the evidentiary record in this proceeding. At the request of the District, Applicant prepared a supplemental analysis of its compliance with that standard. The supplemental analysis, which was docketed with the Commission on April 15, 2010, demonstrated that the Project would be in compliance with the new standard. Intervenor Simpson has identified no flaws with this analysis but rather only notes that this is a "precedent setting act and an issue of national public interest and concern." (Simpson's OB at p. 8.) While Applicant is flattered that Intervenor Simpson believes that the Project is of national interest, in fact, there is no issue here. A new ambient air quality standard became effective following the close of the Commission's hearings, and the local air quality agency requested and received a supplemental analysis demonstrating that the Project would not cause or contribute to violations of this new standard.

J. Despite Faulty Arguments Raised by the City and Other Project Opponents, the Commission Can Approve the Project Without an Override

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 outweigh 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.

For overrides pursuant to CEQA, a “Statement of Overriding Considerations” allows the lead agency to approve a project notwithstanding significant, unmitigated environmental impacts. Yet under CEQA, a Statement of Overriding Considerations is not necessary unless the EIR concludes there are significant, unmitigated adverse impacts after incorporation of all feasible mitigation measures and there are no “environmentally superior” feasible alternatives. As the FSA, Staff’s Opening Brief, and Applicant’s Opening Brief have noted, there are no significant, unmitigated impacts. Thus, a CEQA override is not necessary.

Here, Staff determined that CECP does not have any significant environmental impacts and is consistent with state and local LORS. Since all potentially significant impacts are mitigated and there are no LORS conflicts, no environmental override is necessary. (Staff’s OB at p. 2.) However, Staff’s Opening Brief notes that if the Commission disagrees, then the Commission should approve the Project with “override findings” based on the overall benefits of CECP because the CECP “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; Staff’s OB at p. 2.) Applicant agrees with Staff’s conclusion that an override is unnecessary, as CECP complies with all LORS. However, if the Committee decides to issue an override as a cautionary measure or to avoid any doubt about compliance, the Commission can do so pursuant to its override authority under Public Resources Code section 25525, based on the Project’s numerous benefits.

Specifically, Public Resources Code section 25525 provides, in part:

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

Thus, the findings in support of an override must demonstrate that CECP is required for public convenience and necessity, and there are not more prudent and feasible means of achieving public convenience and necessity. To that end, CECP’s numerous benefits that would justify an override include:

- Retirement & decommissioning of existing units 1-3, 320 MW of older, less efficient generation;
- Installation of two low profile, high-efficient, new Units totaling 558 MW (gross combined);
- Operation as soon as 2012;
- Achievement of goals of the South Carlsbad Coastal Redevelopment Plan;
- Provision of new revenues to the City of Carlsbad of about \$5MM per year;
- Provision of new energy supplies that are critically needed in San Diego by 2012;
- Consistency with State policy places the highest priority in new power projects that: (i) retire aging seawater cooled power plants; (ii) are “peaking” plants that

provide backup power to intermittent renewable resources; (iii) are brownfield projects that reuse existing infrastructure; and (iv) improve GHG emission performance for the electric sector;

- Use of highly efficient natural-gas fueled generating units burn 30% less fuel, resulting in 30% better GHG performance;
- Replacement of 225 million gallons per day of ocean water for cooling with air cooling to protect marine life;
- Consistency with the City's goal to phase-out existing power plant for community and commercial redevelopment;
- Consistency with the Carlsbad Housing and Redevelopment Commission's adopted redevelopment work plan, which states: "The City and Agency's Top preference is to have the new Power Plant constructed within the area between the railroad tracks and Interstate 5, which is east of the existing Plant site."

Furthermore, CECP is the most cost-effective, feasible way to bring Carlsbad's visions for the Encina property to fruition and without adversely affecting electrical system reliability and cost. The Project will result in the following economic and development benefits:

- Construction workforce of 357 peak jobs and 237 jobs on average over a two-year construction period;
- Construction payroll exceeding \$55 million;
- Locally purchased materials estimated at \$30 million;
- Sales tax to California of approximately \$22 million;
- Induced and indirect employment estimated to be over 500 jobs and additional indirect local income of \$21 million;
- Use of existing infrastructure;
- Use of existing coastal property on which a power plant already exists;
- Reduction of impingement and entrainment of marine organisms; and
- Reduction in reliance on the Aqua Hedionda Lagoon.

Based on the foregoing, it is clear that CECP has significant benefits, which mandate the issuance of override findings if the Commission first determines that CECP requires an override for Project approval.

IV. CLARIFICATION OF CHANGES TO CONDITIONS OF CERTIFICATION

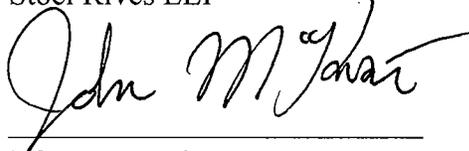
During review of Applicant's Opening Brief, Applicant discovered a typographical error related to "changes proposed to Staff-recommended Conditions of Certification by Staff, the Applicant or any other party." (Applicant's OB at p. 51.) Specifically, Applicant indicated edits "are necessary for COCs in the Land Use, Visual Resources, Hazardous Materials, Noise and Vibration, Traffic and Transportation. . ." sections. (Applicant's OB at p. 52 (emphasis added).) Applicant inadvertently identified Noise and Vibration COCs as a section requiring edits, but previously has not suggested edits to Conditions of Certification related to Noise and Vibration. Thus, to clarify, Applicant has no proposed revisions to any Noise and Vibration COCs.

V. CONCLUSION

In conclusion, as demonstrated in this Reply Brief and throughout the CECP AFC proceeding, there is no legal or logical reason why the Committee cannot prepare the PMPD advancing this valuable Project toward final approval by the full Commission.

Date: October 11, 2010

Stoel Rives LLP



John A. McKinsey
Attorneys for Applicant
CARLSBAD ENERGY CENTER LLC

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

APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

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

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

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

David Lloyd
George Piantka, P.E.
NRG Energy, West
5790 Fleet Street, Suite 200
Carlsbad, CA 92008
David.Lloyd@nrgenergy.com
george.piantka@nrgenergy.com

APPLICANT'S CONSULTANTS

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

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

COUNSEL FOR APPLICANT

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

INTERESTED AGENCIES

(e-mail preferred) e-recipient@caiso.com

INTERVENORS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

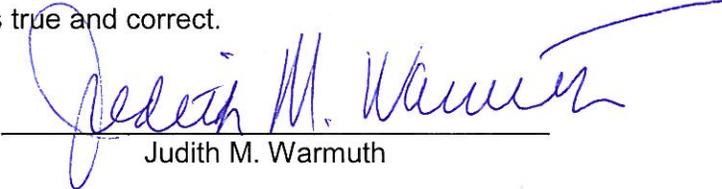
DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on October 11, 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