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October 11, 2010

The Honorable James D. Boyd
Presiding Member
California Energy Commission
1516 Ninth St.
Sacramento, Ca. 95814

The Honorable Anthony Eggert
Associate Member
California Energy Commission
1516 Ninth St.
Sacramento, Ca. 95814

Hearing Officer Paul Kramer
California Energy Commission
1516 Ninth St.
Sacramento, Ca. 95814

Re: Carlsbad Energy Center Project (CECP) 07-AFC-6

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)
Application for Certification for)
the Carlsbad Energy Center Project)
Carlsbad Energy Center, LLC)

Docket No. 07-AFC-6

Terramar's Reply Brief, POS,
Declaration of Service

Dear Commissioner Boyd, Commissioner Eggert and Hearing Officer Kramer,

Please find enclosed Terramar's Reply Brief, POS List and Declaration of Service for the Carlsbad Energy Center Project.

Thank you for your service and please accept our reply brief submission.

Sincerely,

Kerry Siekmann
Terramar Intervener

**Terramar Reply Brief
Re: Carlsbad Energy Center Project (CECP)
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Introduction

The Staff of the California Energy Commission (CEC) has advised the California Energy Commissioners to approve the certification of the Carlsbad Energy Center Project (CECP). But before a decision can be determined there is a process the State of California has instituted allowing interveners and the public to partake in the proceedings. The public and interveners are invited to challenge, question and suggest; and by doing so are able to assist the process and ensure that a thorough examination of the facts, laws, and most importantly the environmental impacts occurs before the Commissioners make a decision.

This lawful course of action was not available when the Encina Power Station (EPS) was built on the Carlsbad Coastline. There was no Coastal Commission, the Warren Alquist Act was nonexistent and CEQA was not on the horizon. Carlsbad wasn't even an incorporated city. So Encina was built on the coastline out of necessity for water and Carlsbad has lived with it for 50+ years.

Carlsbad has been a good citizen to San Diego County by supporting regional infrastructure consisting of; the Encina Power Station, the McClellan Carlsbad Airport, the Encina Wastewater Facility, and possibly the Carlsbad Seawater Desalination Plant. In fact, the City of Carlsbad even offered alternate sites for the CECP. For all of this, the CEC opening brief (p. 7) labeled Carlsbad as "City-centric".

"It is highly unlikely in the current era that anyone would propose a new power plant on the California coast"; a quote from the CEC brief page 1. Terramar as well as other interveners agree. In our briefs and now our reply briefs, we offer arguments to the California Energy Commissioners that new expansion or replacement of Encina with the CECP violates the Coastal Act, LORS and CEQA and therefore should not be certified.

Contract Relevance

"Frankly, the investment in a plant such as CECP is dependent on their ability to compete for and win a contract with the utility," (Feb. 3, p. 168).

Mr. McClary, witness and consultant for the California Energy Commission during the CECP hearings, offered his expert opinion regarding the importance of a contract with a utility.

Yet during the hearings NRG's counsel, Mr. McKinsey, was unwilling to provide any information publicly or privately to the CEC regarding whether there were any contract negotiations happening with San Diego Gas & Electric (SDG&E) for the CECP (as a result of the SDG&E 2009 RFO (Request for Offer)). (Please see testimony found in Terramar's opening brief page 42.)

It is very curious that NRG won't share this information with the CEC. This is certainly not the case with all applicants. On the CEC website, in the section dedicated to the Pio Pico proposal (in Chula Vista) the introduction states;

"Pio Pico Energy Center LLC is currently negotiating a power purchase agreement (PPA) with San Diego Gas & Electric (SDG&E)."

The Pio Pico Project (Docket 2010- AFC-01), (filed 6-30-10), Alternatives Section 4.0, page 4-2 states that their project meets San Diego's reliability and load-growth needs and thus is under contract negotiations with SDG&E;

"The CPUC recognizes that load growth forecasts for the SDG&E electrical service territory cannot be met without new generation capacity. As such, the CPUC authorized SDG&E to proceed with its 2009 RFO for new peaking generation with the goal of bringing online new generation to meet reliability and load-growth needs. PPEC, as a successful bidder in the RFO, is now under contract negotiations with SDG&E to design, construct, and operate a 300MW peaking facility."

Continuing on page 4-4 in the Alternatives Section, the Pio Pico Project AFC explains why SDG&E decided their project meets the SDG&E region's needs.

"Use flexible resources that can provide regulation during the morning and evening ramps and/or units that can be started and shut down as needed: STs¹ do not work well as faststart/ multiple daily start machines. REs¹ cannot easily be economically scaled up for a suitable 300MW project. CTs can be reliably started several times per day and follow grid load swings attentively.

Provide quick start operations: CTs best meet this objective with their 10-minute starts, prompt emission compliance, and quick load-following characteristics.

Several proven CT configurations exist. Principal among these are simple-cycle, combined cycle, and cogeneration. Cogeneration requires a compatible steam host, which does not work within the realm of the RFO because the generation equipment must serve the steam host first and would not be sufficiently dispatchable. Combined-cycle facilities are efficient, but they cannot meet the multiple-fast startups required. SDG&E specifically asked for peaking generation in the RFO, and combined-cycle units would not qualify. Simple-cycle CTs can meet these demands, and do so relatively cleanly and reliably. Simple-cycle machines, however, are not as efficient as combined-cycle machines. Thus, a trade-off is made for quick startups and load following capability.

To partially off set the lower energy efficiency of conventional simple-cycle CTs, in 2005 GE introduced its latest evolution CT, called the LMS100. The LMS100 incorporates an internal cooling device called an "intercooler" that promotes higher energy efficiency than that of conventional CTs, especially in hot ambient conditions when electric demand is highest."

CEC brief states that the CECP meets the commercial qualifications for long-term power contract opportunities on page 41,

"Consistent with CEQA precepts, the range of alternatives was determined by the "basic objectives of the project." (Cal. Code Regs., tit. 14, § 15126.6(c).) Staff stated these objectives in Exhibit 200, pages 6-3 and 6-4, as follows:

...

¹ "Effectively, this class of performance can only be met with combustion turbine (CT) technology, Rankin-cycle steam systems (STs), and reciprocating engines (REs)", quote from page 4-3 Pio Pico AFC

6. "Meets the commercial qualifications for long-term power contract opportunities"

yet during the CECP hearings, Jim McIntosh, a Director at California Independent System Operator, clarified that CAISO is responsible for determining the power needs and that it is the responsibility of the utilities to contract for the power.

MS. SIEKMANN: Do you predict the needs in an area and then have the local utility make the decision on who to offer contracts to?

MR. McINTOSH: We determine the need, that's correct, and the utilities contract for the power. (Feb 3, '10, page 213)

Mr. McClary added critical comments to demonstrate the relevance of contracts to protect the taxpayers of the State of California. If a CEC certification is awarded but no contract is negotiated then the chances of financing the project become nearly impossible.

Frankly, the investment in a plant such as CECP is dependent on their ability to compete for and win a contract with the utility, it is not assured; (McClary, Feb. 3, p. 158)

Ignoring the presence of a contract (or negotiation of a contract occurring) by the CEC, leaves the door open for merchant power producers to use their unused CEC certifications as leverage when negotiating with cities for future permits and licenses for the land. If that would occur, then all California Energy Commission costs incurred during the certification process would financially benefit the power merchant in negotiating the sale or alternate use of the land. This creates a major flaw in the certification process. Considering the serious budget constraints California is facing right now makes this situation even more contentious.

Another issue relating to contracts became relevant during the hearings and needs highlighting; and that is defining where power plants need to be located in the San Diego basin. Even though SDG&E has chosen to negotiate a contract with Pio Pico, does it meet the need in the north San Diego area? This issue was succinctly clarified by Mr. Vidaver, CEC staff, in his testimony.

I'm not sure that -- there is no one power plant that is yet to be built that can be -- claim to be critical. The lights are on. The lights stay on. We have a reliable system. So as long as you're going to keep the existing system at Encina operating, there's no need for a power plant within one mile of it. The ability to incorporate renewables in large quantities into the system can be -- is a function that can be performed by power plants located virtually anywhere in California. The ability to provide dispatchable or dependable capacity in the San Diego local reliability area, and thereby retiring the existing units at Encina can be accomplished, as far as I know, by any replacement capacity located anywhere in the San Diego area. So to say that the Carlsbad energy project is critical is setting -- at the very least it's setting a standard that's not possible to meet." Page 325, feb. 3, Mr. Vidaver

Mr. McIntosh's testimony supported Mr. Vidaver. While being questioned by Mr. Thompson on Feb. 3 hearings, page 203, Mr. McIntosh stated,

Would those same benefits be available if the CECP were not in this exact location but a mile or two or more -- is it absolute site specific is my question?

MR. McINTOSH: No. My testimony is that you can get those attributes at other locations; I'm just talking about those are the types of machines we need.

There is no evidence that the CECP is in negotiation or has been offered a contract from SDG&E, the local utility. Therefore it is important for the CEC to evaluate the deficit of a contract and deny certification of the proposed CECP.

Biological Impacts-

Eliminating “once through cooling” (OTC) is a key topic in the CEC brief. The actual concerns with OTC are the consequential negative impacts of impingement and entrainment. The proposed CECP will continue impacts of impingement and entrainment whenever the CECP’s desalination system requires water;

- over and above daily use required by Encina Units 4 & 5 (FSA 3.2)
- after the shutdown of Encina Units 4 & 5 slated for 2017 (FSA 4.2-16)

It is surprising that the CEC brief denies the CECP’s impingement and entrainment impacts and declares that it will end OTC on page 8,

It will not use OTC, thus avoiding its attendant biological damage.

How can the CEC brief deny OTC (and thus avoiding its attendant biological damage) by the CECP? Please return to arguments in Terramar Brief, page 7 through page 15, regarding Biological Impacts.

Units 4 & 5 are part of the project.

The shutdown of Encina Units 4 & 5 is a crucial part of the project and the evaluation of cumulative impacts created by this shutdown are required by CEQA.

“Cumulative impacts are defined as “two or more individual effects which, when considered together, are considerable or . . . compound or increase other environmental impacts” (CEQA Guidelines § 15355). “A cumulative impact consists of an impact that is created as a result of a combination of the project evaluated in the EIR together with other projects causing related impacts” (CEQA Guidelines § 15130[a][1]). Such impacts may be relatively minor and incremental, yet still be significant because of the existing environmental background, particularly when one considers other closely related past, present, and reasonably foreseeable future projects.” (FSA 4.1-44)

The Applicant made it very clear in their AFC project objectives that the shutdown of Encina Units 1-3 will “set in motion actions that are likely to facilitate the eventual retirement of Units 4 & 5”.

Facilitating the retirement of existing Units 1 – 3 at the Encina Power Station consistent

with the following City of Carlsbad's land use programs and to set in motion actions that are likely to facilitate the eventual retirement of Units 4 and 5 at the Encina Power Station:" (AFC, p 1-4, Executive Summary, 1.2.1 Project Objectives)

In the FSA, CEC staff insists the continuation of Encina Units 4 & 5 "unlikely".

While those OTC facilities owned and operated by utilities and recently-built combined cycles may well install dry or wet cooling towers, it is unlikely that the aging, merchant OTC plants will do so. Most of these units operate at low capacity factors, suggesting a limited ability to compete in the current electricity market. (FSA page 4.1-119)

In the CEC brief, Encina is characterized as a "legacy" OTC facility. It states both Encina and South Bay "are tentatively scheduled to be shut down over the next decade" as they are replaced.

Currently, system reliability backup is provided by aging boiler facilities built more than 50 years ago. They are inefficient, rely on OTC, lack fast-start capability, and must be kept running at low levels to respond to emergencies. These "legacy" OTC facilities, which include the EPS and South Bay facilities in the San Diego area, are tentatively scheduled to be shut down over the next decade, as soon as new generating infrastructure can replace them. (CEC brief, page 33)

Yet CEC brief insists units 4 & 5 are not part of the project. The brief insists those units may be refitted and continue to operate well beyond their proposed shutdown date of 2017.

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." (State Water Board, *Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling*, May 4, 2010.) CEC brief, page 4)

Therefore, CEC staff arguments vary from;

- Encina will be refitted to run well into the future;
- to
- Encina's old and inefficient units will be shut down as soon as new infrastructure can replace them.
 - It is unlikely that the aging, merchant OTC plants will run into the future. Most of these units operate at low capacity factors, suggesting a limited ability to compete in the current electricity market.

Is it standard for CEC staff to vary their position? Is the scheduled shut down of Encina painted in different lights to fulfill different needs? That is not how cumulative environmental impacts work. The scheduled shutdown of units 4 & 5 will significantly

impact the coastline in the near future. The cumulative impacts of this foreseeable shutdown must be evaluated per CEQA Law.

Page 1 of the CEC brief states; “It is highly unlikely in the current era that anyone would propose a new power plant on the California coast.” With Encina’s shutdown as a result of the May 4, ’10 State Water Board’s “Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling”, the Carlsbad coastline would be free, for the first time in 60 years, of a working power plant.

The cumulative impacts resulting from the shutdown of Encina Units 4 & 5 create a CEQA requirement for CEC staff to evaluate. This evaluation is missing in the FSA; therefore the FSA is incomplete and the CECP cannot be properly certified without this evaluation.

Public Utility

The NRG opening brief quotes from the Carlsbad Municipal Code Chapter 21.36 regarding the zoning designation applicable to the CECP property. It states,

Municipal code enumerates the uses permitted in the Public Utilities Zone which expressly include, “generation and transmission of electrical energy.” (Carlsbad Municipal Code § 1.36.020, Table A). (NRG brief p. 18)

Nowhere in the entire AFC, the PSA, the FSA, and the NRG Opening Brief does it state that the CECP is going to be transmitting electrical energy. In fact, the AFC clearly states in the AFC, Project Ownership page 1-6,

“The transmission lines will be owned by the SDG&E.”

SDG&E transmits electrical energy, not NRG!

The Municipal Code definition includes ‘generation and transmission of electrical energy’. It doesn’t say ‘generation or transmission’. It clearly states ‘generation and transmission’. When Encina was owned by SDG&E the plant did both operations and did fit the definition of “P_U Public Utility Zone”. This is no longer the case, per the definition that NRG so clearly stated in their opening brief.

NRG’s brief leads us down a path of misdirection. They are a private, for-profit, power merchant that generates electricity. There is nothing “Public” about them except that they are listed on the stock exchange. In fact, they are not even required to expose the fact that they don’t have a contract for power with SDG&E, a utility.

Per the CEC website, SDG&E is a utility.

SDG&E - The acronym for San Diego Gas & Electric an electric and natural gas utility serving the San Diego, California, region

Per the CEC website, the definition of a utility is:

UTILITY -- A regulated entity which exhibits the characteristics of a natural monopoly. For the purposes of electric industry restructuring, "utility" refers to the regulated, vertically-integrated electric company. "Transmission utility" refers to the regulated owner/operator of the transmission system only. "Distribution utility" refers to the regulated owner/operator of the distribution system which serves retail customers

Per Wikipedia a public utility is:

A **public utility** (usually just **utility**) is an organization that maintains the [infrastructure](#) for a [public service](#) (often also providing a service using that infrastructure). Public utilities are subject to forms of public control and regulation ranging from local community-based groups to state-wide government monopolies. Common arguments in favor of regulation include the desire to control market power, facilitate competition, promote investment or system expansion, or stabilize markets. In general, though, regulation occurs when the government believes that the operator, left to his own devices, would behave in a way that is contrary to the government's objectives. In some countries an early solution to this perceived problem was government provision of the utility service. However, this approach raised its own problems. Some governments used the state-provided utility services to pursue political agendas, as a source of cash flow for funding other government activities, or as a means of obtaining "[hard cash](#)". These and other consequences of state provision of utility services often resulted in inefficiency and poor service quality. As a result, governments began to seek other solutions, namely regulation and providing services on a commercial basis, often through private participation.^[1]

Concerning the definition of a utility per the CEC and an independent encyclopedia, neither NRG nor the CECP fit the definition. NRG's CECP is neither a utility nor a public utility and does not transmit electricity. Concerning the terms used in the City's code, transmission of electricity is part of the code requirements. Therefore, it does not fit the definition of a utility or public utility as those terms are used in the City's LORS.

Visual Impacts

Of the foreseeable projects under consideration in the area surrounding the CECP, the I-5 widening will generate vast negative cumulative impacts. The CEC brief spends a great deal of time defending mitigation for visual impacts created by the CECP; especially cumulative impacts created in concert with the I-5 widening.

At the time the CEC brief was written, it noted that the I-5 Environmental Impact Report (EIR) had not been published. This is not the case. The I-5 EIR was published as of July 9, 2010 confirming the significance of that foreseeable project.

The CEC brief (page 39) states that even with the I-5 widening, mitigating the worst-case scenario is possible using tree and shrub plantings. Upon stating mitigation of trees and shrubs was possible, CEC brief failed to supply the calculations they used for the upper rim road and the road in the pit when they supported the tree and shrub mitigation. Therefore, it is not clear if CEC staff incorporated the concerns of the Carlsbad Fire Department regarding the need for a 50' wide road in the pit, and a 25'

wide upper road in their mitigation solutions. No explanation was given by staff of what they used as the widths for these all important safety roads when indicating that there was room for tree and shrub plantings.

The CEC brief along with the FSA completely omitted a discussion of the change in visual impacts that will be created by the 2017 shutdown of the Encina plant, a foreseeable event. This foreseeable shutdown (based on the State Water Board, *Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling*, May 4, 2010) should have been part of the cumulative impacts analysis per CEQA. This is a significant investigation missing from both publications.

The FSA evaluated all key observation points (KOP's) of the CECP combined with the current visual impacts of Encina. But nowhere did CEC staff consider the "visual change", ("meaning the degree of change that the CECP would impose on the existing visual environment" (CEC brief, p. 36)) without the Encina plant.

The cumulative "visual change" impacts resulting from the shutdown Encina (scheduled for 2017) create a CEQA requirement for CEC staff to evaluate. This evaluation is missing in the FSA; therefore the FSA is incomplete and the CECP has not been properly certified without this evaluation.

Not Coastal Dependent

The following chain of events create a clear pathway disproving CECP as "coastal dependent" facility.

1. 9/14/07-The AFC docketed, and declares the project will use recycled water from the City.
 - i. AFC page 1-4 declares the use of recycled water as a project benefit, "Utilizing CCR Title 22 reclaimed water raw water source for the CECP. The use of reclaimed water by CECP represents a significant project benefit as use of potable water will be limited to sanitary uses and fire protection."
 - ii. AFC Project Overview page 1-1, "Another critical component of the CECP generating units is that the project will be air cooled, thereby avoiding the need to connect to the existing Encina Power Station's sea water once-through-cooling system. For the project's raw water needs, CECP will use CCR Title 22 reclaimed water, thereby, minimizing its use of potable water."
 - iii. AFC Project Overview, page 1-2, "CECP will use California Code of Regulation (CCR) Title 22 reclaimed water supplied by City of Carlsbad and delivered to the CECP via a new 12-inch pipeline from the interconnection point at Cannon Road and Avenida Encinas (approximately 3,700 feet long)."
 - iv. AFC Project Overview, page 1-3, "The CCR Title 22 reclaimed water will be delivered to CECP by the City of Carlsbad through a recycled water pipeline from a connection point in the existing pipe system at Cannon Road and Avenida Encinas."

2. 9/17/07-Request for Agency Participation sent to the Coastal Commission docketed.
 - i. Page 1 states, “The operation of the Carlsbad EC would use both Title 22 reclaimed water and potable water supplied by the city of Carlsbad.”
3. 10/16/07-Letter docketed from Coastal Commission to CEC regarding non-participation in the project docketed with the following quote;
 - i. “We note that all the projects listed above are proposing to end the environmentally destructive use of seawater for oncthrough 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.”

When the Coastal Commission communicated by letter 10/16/07, that they would not be able to participate in the CECP process, they supported the project’s intention of moving away from the environmentally negative effects of OTC. Per the timeline, the Coastal Commission thought the CECP was going to use recycled water, not the Encina OTC system. The decision by NRG to use Encina’s OTC system for ocean water came long after the Coastal Commission made their decision not to participate.

4. 10/24/07-City informs CEC recycled water is not available in docketed letter;
 - i. Oct. 24, '07 letter from City of Carlsbad Planning Department listing issues of Concern.
 - ii. Issue #47 of the Oct. 24, '07 letter informs Energy Commission recycled water not available.
5. 8/11/08 Request for Agency Participation Supplemental Information docketed
 - i. Coastal Commission informed ten months after declaring non-participation that the CECP needed a desalination unit due to unavailable recycled water.
6. Date Unknown-City states that they were neither approached by NRG regarding water needs for the AFC nor approached by NRG when the City was expanding the water treatment plant in docketed testimony.
 - i. Feb. 3, page 468 testimony of Joe Garuba,
 1. “We were all committed, we were sold out, and the Applicant never came and talked to the city while we were expanding our plant to say, hey, we're going to build a new power plant, you know, factor us in. It wasn't in any of our plans.”
7. Date Unknown -The City offers to expand the water facility if NRG will cover the costs and NRG refuses per docketed written testimony;
 - i. Jan. 7, '10, Page 14-Garuba, City’s Written Testimony
 1. **“Q26. Did the City offer recycled water to the CECP?”** A26. Yes. From the initial filing of the CECP with the CEC, the Applicant made

representations that its project would be served with recycled water. City staff made clear their concerns that this was not accurate and that the Applicant had not engaged the City as to the availability of the recycled supply. The City offered to discuss the potential expansion of its recycled water system to accommodate the CECP, but this offer was rejected by the Applicant.”

- ii. Feb. 3, page 468 testimony of Joe Garuba,
 - 1. “We actually talked to the Applicant about expansion. They didn't like what we had to say, they didn't want to -- they wanted us to do something different with our system than what we have designed.”

8. The City is accused of withholding water from the project in CEC brief.

- i. CEC opening brief page 11,
 - 1. “Like units 4 and 5, CECP will also be “coastal dependent,” inasmuch as the City has stated that it either cannot or **will not** supply recycled water to the CECP, **forcing** the project to rely on an ocean water purification system to provide water to meet process uses. (*Id.*, at p. 4.5-12.)”

So how can NRG’s inadequate initial planning, followed by their refusal to expand the water treatment plant and then decision to use the environmentally destructive OTC system create “coastal dependence” for the “air cooled” CECP?

The CEC brief (p. 10) reminds us that the Legislature required the Coastal Commission to;

“designate the specific locations within the coastal zone where the location of a [transmission line or power plant jurisdictional to the Energy Commission] would prevent the achievement of the objectives of [the Coastal Act]; provided, however, *that specific locations that are presently used for such facilities and reasonable expansion thereof shall not be so designated.*” (Pub. Resources Code, § 30413(b) [emphasis added].) Accordingly, the site of the existing EPS energy infrastructure (including any “reasonable expansion” of the use) has not been designated as an area inconsistent with power plant development. CECP, which would be located on a portion of the 95-acre EPS parcel, is certainly a “reasonable expansion” of the use at the EPS site.

Of course the EPS site was not designated as an area inconsistent with the Coastal Act, as the legislature specifically told the Coastal Commission not to choose sites with existing power facilities and Encina was already an existing power facility. This is no reason to declare an “air cooled” plant (that can function anywhere) as coastal dependent.

CEC brief presents the CECP as if the facility is a foregone conclusion and that it has a right to be there. The Applicant's statement, "As a coastal-dependent use, CECP must be allowed to locate within the existing EPS site" (Applicant brief, p. 17) sounds like they also think they have a vested right to be there. The fact that the facility needs some water source does not make it coastal dependent, and does not confer a special right. The Commission has full discretion to approve or deny.

The CEC brief (page 39) goes on to condemn the relevance of the 1990 Coastal Commission report saying, “It thus has little relevance to the analysis of CECP impacts.” But in Mr. Faust’s testimony (Feb. 1, pp.186-186), he makes very clear what the Coastal Commission evaluates and considers when implementing state policy. Rather than comparing the two projects as equals, Mr. Faust discussed how and what the Coastal Commission uses to evaluate a project, a very appropriate evaluation stated by a highly qualified expert.

In his written and oral testimony Mr. Faust, former Chief Counsel to the Coastal Commission for over 20 years, gave his expert opinion that the CECP was not coastal dependent;

Faust-2 of Carlsbad Written Testimony

Q4. Will you summarize the primary conclusions of your testimony?

A4. Yes, my primary conclusions are that:

1. The CEC must make specific findings on the conformity of any power plant proposed within the coastal zone with specific provisions of the Coastal Act.
2. Based on its status as a local government with a certified LCP and its experience implementing that certified LCP and the Coastal Act, the City of Carlsbad is in an excellent position to evaluate the conformity of a project located within the coastal zone for consistency with the coastal resource policies of the Coastal Act.
3. The Carlsbad Energy Center Project (“CECP”) does not meet the specific definition in the Public Resources Code as a coastal dependent facility.
4. The Coastal Commission determined in 1990 that a new power plant located adjacent to the existing Encina power plant would not be consistent with provisions of the Coastal Act and would probably make that same determination today.

Q18. In your opinion, would the CECP be considered a “coastal-dependent use”?

A18. No. Because the CECP does not require a site on or adjacent to the sea to be able to function at all, it cannot be a coastal dependent industrial use.

Faust-9, of Carlsbad Written Testimony

Again, unlike staff, from a Coastal Commission perspective, we look at those impacts in terms of a comparison to what will be, not just what is at this moment. And certainly, what will be includes the fact that the existing facility, at least according to what I understand to be state policy, is going to disappear sometime plus or minus 2017. And from that point on all the impacts of this project are going to be unique to this project. Those include the visual impacts; they appear to include marine impacts, and so on. (Feb.1,p 190)

Here Mr. Faust gives his expert opinion from a legal perspective; not a technical perspective as suggested in the CEC brief, p. 13. Mr. Faust’s opinion is that CECP is not coastal dependent. Terramar would agree with the expert opinion of Mr. Faust and that the CECP be denied as it is not coastal dependent.

CEC Staff Independence

“The Energy Commission's staff, which includes the project manager, a case attorney and a full range of environmental and engineering experts, is an independent, objective party in a power plant siting procedure”, as quoted from the Energy Commission website.

By calling the City of Carlsbad, “Citycentric”, the CEC brief loses objectivity. It is important to recall what the “**California Code of Regulations Title 20. Public Utilities and Energy, Division 2. State Energy Resources Conservation and Development Commission**” states,

“§ 1712.5. Staff as an Independent Party.

In carrying out its duties pursuant to this chapter, the staff of the commission shall be an independent party to all notice, application, and exemption proceedings”

If this was the only indication of lost objectivity in the CEC brief, it would be appropriate to “let it go”. But there are many statements where CEC staff objectivity appears to have gone by the wayside.

The City’s contentions on this matter are serious, and are more difficult to fully assess given the City’s overarching goal of preventing the licensing of CECP. (CEC brief, p. 45)

Although the labyrinthine complexity of the City’s land use ordinances is nearly impenetrable, Staff believes that the project is consistent with such provisions to the extent that they are applicable. (CEC brief, p. 5)

CECP will also be “coastal dependent,” inasmuch as the City has stated that it either cannot or will not supply recycled water to the CECP. (CEC brief, p. 11)

An examination of this application draft plan is instructive, as it illustrates that the specific plan is no more than an empty device asking, “Mother may I?” (CEC brief, p. 22)

Again, these quotes and more give the impression of negative judgments regarding the City of Carlsbad rather than the required independent evaluation. Why did CEC staff choose to leave this negative impression? It certainly deserves an evaluation.

Conclusion

Due to the complexity of the CECP’s proposed location, the LORS it would violate, and the significant negative impacts that it would create, the time period involved in this certification process has been extensive. The AFC was filed in Sept. ’07 and it appears that the Commission may have a preliminary decision in late ’10 or early ’11. Terramar appreciates the dedication Commissioners and staff have given to this and many, many other projects. Terramar, Power of Vision, City of Carlsbad, and others

have also given great dedication to this project and this project alone. The proposed CECP could severely impact our safety, our future economy, and our environment for many years.

We understand the importance of power to our homes, our City, and our County and we have cohabitated with a major power plant for many years. We realize that Encina was built before there was an incorporated City of Carlsbad, a Warren Alquist Act, a CEQA, a Coastal Act and many of the LORS that are in force today. The CEC brief clearly states, “It is highly unlikely in the current era that anyone would propose a new power plant on the California coast.” CEC brief also states that staff analyzed the project “as proposed by the Applicant” but as noted above, that was three years ago. Along with the ongoing issues docketed by interveners during these three years, enormous changes have occurred in California:

- Major Recession causing energy needs to drop
- Decision by the State Water Board to end OTC
- Encina slated for shut-down by 2017
- EIR for I-5 widening published
- SDG&E ‘09 RFO (Pio Pico in contract negotiations w/ SDG&E per AFC)

Therefore, the FSA is deficit in many impacts analyses and therefore deficit in mitigation especially in the areas of fire & worker safety, biological, visual, and public safety. The project will not create significant extraordinary public benefit as required by Carlsbad Redevelopment. The project violates LORS and CEQA. Therefore, Terramar requests that the California Energy Commissioners not certify the Carlsbad Energy Center Project.

DECLARATION OF SERVICE

I, Kerry Siekmann declare that on 10/11/10, I served and filed copies of the attached Terramar Reply Brief & Cover Letter dated 10/11/10. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[<http://www.energy.ca.gov/sitingcases/carlsbad/index.html>]**. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

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

AND

For filing with the Energy Commission:

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

OR

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

CALIFORNIA ENERGY COMMISSION

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

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

Kerry Siekmann (signature on paper copy mailed to the California Energy Commission)



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)

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