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October 11, 2010

The Honorable James D. Boyd
The Honorable Anthony Eggert
California Energy Commission
1516 Ninth Street
Sacramento CA 95814

Re: Carlsbad Energy Center Project, Docket No. 07-AFC-06

Dear Presiding Commissioner Boyd and Commissioner Eggert:

In accordance with the Committee's order of September 22, 2010 please accept the City of Carlsbad's and Redevelopment Agency's response to briefs pertaining to the Carlsbad Energy Project, Docket No. 07-AFC-06. We in the City appreciate the opportunity to participate in this process and to express our concerns with the proposed project.

We thank the California Energy Commission for the countless hours it has spent on this application and for carefully weighing the City's position. If there's any way we can be of assistance, please do not hesitate to contact me.

Very truly yours,

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Application for Certification for the Carlsbad Energy Center Project Carlsbad Energy Center, LLC	Docket No. 07-AFC-6

INTERVENOR CITY OF CARLSBAD AND CARLSBAD REDEVELOPMENT AGENCY'S REPLY BRIEF IN OPPOSITION TO CECP AND ON REQUESTED BRIEFING TOPICS

October 11, 2010

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INTRODUCTION

The City of Carlsbad (City) and the Carlsbad Redevelopment Agency (Redevelopment Agency) are not opposed to a new power plant within the city. As it has for the past 60 years, the City is willing to serve the needs of the region by hosting a power plant within its jurisdiction. However, the City and the Redevelopment Agency[1] strongly oppose locating the Carlsbad Energy Center Project (CECP) on the site of the existing Encina Power Station (Encina). The City's and Redevelopment Agency's opposition to continued use of this sensitive coastal location for a power plant is consistent with the California Coastal Act, the California Community Redevelopment Law and the State Water Resources Control Board's policy on once-through cooling (OTC Policy). The City's and Redevelopment Agency's opposition to the proposed site also is based on its non-conformance with the California Fire Code, the Carlsbad General Plan and the South Carlsbad Coastal Redevelopment Plan, as well as the project's unmitigated significant impacts on worker and fire safety, visual resources, water supply and biological resources.

The CEC staff's mischaracterization of the City's and the Redevelopment Agency's[2] opposition as biased reflects an unfortunate insensitivity to the City staff's legal and ethical obligations to interpret, apply and enforce the City's laws, ordinances, standards and regulations (LORS) for the protection of the public health, safety and welfare of its residents. Rather than using local LORS to obstruct the project, the City is opposed to

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[1] The Redevelopment Agency of the City of Carlsbad is a separate legal entity with separate legal powers and duties governed by its Board of Directors. Its directors are members of the City Council.

[2] For the sake of brevity, sometimes the use of "City" also refers to the Redevelopment Agency.

the proposed location of the CECP precisely because it does not conform with applicable state and local LORS.

The City has an obligation to enforce its policies, standards and ordinances and to consider the short and long-term welfare of its citizens. In fulfilling these obligations, the City and the Redevelopment Agency firmly believe the CECP is proposed for the wrong location. The City has shown, with substantial evidentiary and legal support, that the CECP does not conform with state and local LORS and will cause significant and unmitigated water supply, biological, visual and fire safety impacts at the proposed location.

In light of these inconsistencies and deficiencies, the Commission must consider whether to use its override authority to allow the construction and operation of a power plant that would deprive future generations of Californians from the use and enjoyment of an irreplaceable coastal resource. The City believes that the evidence in the record is insufficient to support the necessary overrides and instead shows that the CECP is not needed to satisfy public convenience and necessity and that alternate non-coastal locations are available within the City's jurisdiction to serve the energy needs of the San Diego region.

This brief replies to the arguments advanced by CEC staff and the project applicant in their opening briefs. The law and evidence presented below focuses on five major issues:

1. **The CECP cannot be approved because it does not conform with numerous state and local LORS.** As the City and Redevelopment Agency have demonstrated on the record, the CECP is not in conformance with numerous state and local LORS, including the California Coastal Act, the California Fire Code, the California Community Redevelopment Law, the Carlsbad General Plan and the Zoning law. Rather than recognizing the experience and expertise of the City and Redevelopment Agency, CEC staff ridicules the City's land use policies

and ordinances, discounts the City's position as biased, and implies that some of the City's issues are contrived to prevent licensing the CECP. Had the City and the Redevelopment Agency not intervened and gained a seat at the table, CEC staff's misguided approach would have deprived the Committee of the City's and Redevelopment Agency's experience and expertise in interpreting and applying relevant LORS. The City and Redevelopment Agency trust that the Committee will disregard CEC staff's unsupported and highly inappropriate allegations regarding their motives and will receive their comments and recommendations in the spirit in which they are offered: To assist the Committee in siting necessary generation facilities in the best possible location.

2. **The CECP cannot be approved because it is not a "coastal dependent" facility and does not conform with the Coastal Act.** The City demonstrated at the evidentiary hearings that the CECP does not conform with the fundamental policies of the Coastal Act. Neither CEC staff nor the applicant challenges this point. Instead, CEC staff and the applicant vigorously contend the CECP is a "coastal dependent" facility because it relies on the once-through cooling system of Encina Units 4 and 5 for its water supply and wastewater discharge. This contention not only is incorrect under the Coastal Act, but also it reveals two other serious defects in the proposed project. First, the CECP's dependency on Units 4 and 5's once-through cooling system conflicts with the State Water Resources Control Board's (SWRCB) OTC Policy, which seeks to retire the entire Encina power plant by the end of 2017. Second, the CECP's reliance on Units 4 and 5 for water supply and wastewater discharge confirms their potential shutdown is an integral part of the project which should have been evaluated as part of the application.

3. **The CECP cannot be approved because the project presented to the Committee is incomplete and failed to include the potential shutdown of Units 4 and 5 as part of the project.** Rather than providing a clear, accurate

and stable description of the proposed project as required by CEQA, CEC staff and the applicant variously describe the CECP in their testimony and opening briefs as a "modernization" or an "expansion" or a "replacement" of the existing Encina facility, as well as a "new facility that would be built in an existing power plant complex." CEC staff and the applicant also emphasize that, while the CECP will replace Units 1, 2 and 3, it will rely on the continued operation of the once-through cooling system for Units 4 and 5 for water supply and wastewater discharge. Although the California Supreme Court has unequivocally ruled that a project's water supply is an integral part of the proposed project which must be evaluated under CEQA, CEC staff and the applicant insist the shutdown of Units 4 and 5 is not part of the project and need not be evaluated as part of the CECP. Their position is, in a word, wrong. CEC staff's evaluation of the CECP is incomplete because it failed to include an integral part of the proposed project—the potential loss of the CECP's sole source of water supply and wastewater discharge within a few years after it commences operations. To comply with the requirements of CEQA, the potential closure of Units 4 and 5 pursuant to the SWRCB's OTC Policy must be evaluated as part of the CECP.

4. **The CECP cannot be approved because it will have unmitigated significant impacts on water supply, biological resources, visual resources, and fire safety.** By overstating the benefits of closing Units 1-3, encouraging the use of ocean water for cooling the CECP, ignoring conflicting visual and fire safety mitigation, and failing to accurately account for the widening of Interstate 5 (I-5), CEC staff and the applicant minimize the real environmental and safety consequences of the proposed project. CEC staff pointed out that recent court decisions have made clear that existing physical conditions are the appropriate baseline for determining the significance of the CECP's environmental impacts. Nonetheless, CEC staff and the applicant continue to use the wrong assumptions and thus significantly overestimate the benefits of retiring Units 1-3 and underestimate the CECP's likely impacts on ocean water use. CEC staff also

fails to address the serious conflict between the state policy requiring termination of once-through cooling and the CECP's plan to continue the long-term use of ocean water for industrial purposes, including cooling of the project.

CEC staff recommends measures to mitigate significant impacts to visual resources and fire safety that appear to be mutually exclusive. CEC staff also seeks to diminish or defer concerns regarding cumulative impacts to visual resources and fire safety on the ground that "the I-5 widening project does not yet have an EIR." (Staff Opening Brief, pp. 39, 45.) However, these concerns must be addressed now because, contrary to CEC staff's belief, Caltrans made the Draft EIR/EIS for the I-5 widening available for public review in June, more than a month before the parties' opening briefs were due. The Draft EIR/EIS validates the concerns raised by the City regarding the cumulative fire safety and visual resource impacts of the CECP and the I-5 widening and the inability of the proposed mitigation measures to avoid or substantially lessen these impacts.

5. **The Commission's exercise of "override" authority would be inappropriate because there is not sufficient evidence in the record to support a finding that alternative locations are infeasible or that the CECP is required for the public convenience and necessity.** In order for the project to proceed, the Warren-Alquist Act and CEQA require the Commission to find that there are no feasible alternative locations for the CECP, the public convenience and necessity override the CECP's non-conformance with state and local LORS, and the benefits of the CECP outweigh its unmitigated significant environmental effects. These findings must be supported by substantial evidence in the record. The applicant has not provided any evidence to support these findings, instead contending the CECP will conform with all applicable LORS and will not have any unmitigated significant impacts. CEC staff acknowledges that overrides may be necessary, but claims the CECP meets a "critical reliability need" and will promote important state policies. The evidence in the record does not support

these claims. The testimony of CEC technical staff during the evidentiary hearings established that the CECP is not critical to meeting regional energy needs and its proposed functions could be provided by a power plant at a non-coastal location or even a location outside the region. CEC staff's arguments regarding the CECP's conformance with the Coastal Act, which assert the CECP must use Unit 4 and 5's once-through cooling system "in order to function at all," confirm the CECP will obstruct, not promote, the SWRCB's OTC Policy. Moreover, the absence of a power purchase agreement belies CEC staff's claims regarding the critical need for this facility and its benefits to the electric system. It also allows the reasonable inference that, as clearly established by CEC staff testimony; it is unlikely the CECP will ever be built.

Despite the blizzard of competing contentions, the underlying purpose of the laws and regulations which the City and the Redevelopment Agency are bound to uphold must not be ignored. The California Coastal Act was enacted to protect, to enhance and to restore the unique beauty of the California coastal zone. The Community Redevelopment Law and the South Carlsbad Coastal Redevelopment Plan are intended to eliminate blight and to promote redevelopment of a significant portion of Carlsbad's coastal zone. The Carlsbad General Plan and land use regulations are designed to protect the natural beauty of the City, and especially the coastal area, by ensuring that proposed development is appropriate for the area.

As the CEC staff acknowledges in its opening brief, the CECP proposes to locate "on a beautiful coastline", at the site of what is considered an "industrial eyesore," and will impede the City's desired "opportunities in redeveloping the property in ways that might benefit the local economy", and will "extend the existence of power plant use at the coastal site." Perhaps not understanding the significance of these admissions, CEC staff questions the City's motives in opposing the proposed location of the CECP. The City believes the best response to this

mischaracterization is to repeat the offer it extended to the Committee during the evidentiary hearings: To work with the CEC and a project developer to provide a site for a new regional energy facility at an appropriate non-coastal location within the City. The City respectfully asks the Commission to accept this offer and to take advantage of this rare opportunity to achieve a fundamental goal of the Coastal Act to "enhance and restore the overall quality of the coastal zone environment."

I.

THE CECP DOES NOT CONFORM WITH STATE AND LOCAL LORS INCLUDING THE CALIFORNIA FIRE CODE, THE CALIFORNIA COMMUNITY REDEVELOPMENT LAW AND THE CITY OF CARLSBAD GENERAL PLAN.

The City and the Redevelopment Agency have identified a disturbing number of state and local LORS with which the CECP does not conform, including the California Coastal Act, the California Community Redevelopment Law, the California Fire Code, and the City of Carlsbad General Plan and related specific plans and zoning provisions. Rather than giving deference to the City's and the Redevelopment Agency's interpretation of the applicable LORS, CEC staff has attacked the good faith of the City's and Redevelopment Agency's opposition to the CECP and ridiculed the City's land use plans and ordinances as "nearly impenetrable." CEC staff's attempts to divert attention from the serious issues of LORS non-conformance should be disregarded as inappropriate and disrespectful.

A. THERE ARE SOUND LEGAL AND POLICY REASONS FOR CEC STAFF AND THIS COMMISSION TO ACCORD DEFERENCE TO A LOCAL AGENCY'S INTERPRETATION OF ITS OWN LAWS, ORDINANCES, REGULATIONS AND STANDARDS.

CEC staff is required by law to give due deference to the comments and recommendations of an interested agency on matters with its jurisdiction. (20 Cal. Code Reg. § 1744(e).) This requirement reflects the well established principle that a

reviewing body should defer to the expertise of an administrative agency in the interpretation of its own laws, ordinances and regulations:

> When we review an agency's decision for consistency with its own general plan, we accord great deference to the agency's determination. This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. (Citation omitted.) Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. (Citations omitted.) A reviewing court's role "is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies." (Citation omitted.)

(*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142.)

Both the City and the Redevelopment Agency have been frustrated throughout this proceeding by CEC staff's refusal to give due deference to their comments and recommendations regarding the applicable state and local LORS. Had the City and the Redevelopment Agency not intervened, the Committee would have been denied the benefit of the City's and the Redevelopment Agency's staff's expertise and experience in applying state and local LORS to a controversial project in a highly sensitive and severely constrained coastal site.

Apparently stung by the validity of the City's and the Redevelopment Agency's concerns, the applicant and CEC staff seek to divert attention from the serious issues of LORS non-conformance by attacking the good faith of the City's opposition to the

CECP. The opening brief of the CEC staff illustrates an "agree with me or I will ignore your views" approach:

> Typically, Staff would seek the locality's help with "due deference" to its interpretations of local land use controls (citation omitted). However, here the City is a party to the proceeding strenuously opposing the project, making such impartial consultation impossible.

(Staff Opening Brief, p. 5.) The project applicant echoes the same sentiment: "The City is an intervener and no longer has an unbiased viewpoint of an interested agency." (Applicant Opening Brief, p. 37.)

CEC staff's assertion that the City's opposition to the CECP made impartial consultation on LORS compliance impossible turns reality on its head. In fact, the City and the Redevelopment Agency are opposed to the CECP precisely because it does not comply with important state and local LORS. CEC staff's inappropriate assertion also prompts the question: Shouldn't CEC staff also disregard the project applicant's arguments because it vigorously promotes the CECP for its own reasons?

The assertion that the City's and the Redevelopment Agency's concerns regarding LORS compliance are biased is contrary to the law and the evidence. The law presumes a public agency's interpretation of its laws, ordinances and regulations is in good faith. (Evid. Code § 664; *Bus Riders Union v. Los* An*geles County Metropolitan Transit Agency* (2009) 179 Cal.App.4th 101, 108 ["All presumptions of law are in favor of the good faith of public officials"].) Bias in an administrative proceeding can never be implied. (*Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549.) Where an agency has a duty to act, the fact that it may have an interest in the result does not disqualify it from acting. (*Id.* at p. 550.)

CEC staff's assertion of bias also impugns the good faith of the City's and Redevelopment Agency's elected officials and employees who are responsible for protecting the citizens, their property and the beauty that is Carlsbad. These officials

and employees would violate their charge to do otherwise. The law presumes their opposition is in good faith because public employees have an ethical duty to serve the public interest. The California Supreme Court recently affirmed the requirement that a government attorney cannot interpret a law in such a way as to win a case yet be consistent with his or her higher ethical duties to serve the public interest:

> Recognizing that a city attorney is a public official, we noted that "the rigorous ethical duties imposed on a criminal prosecutor also applied to government lawyers generally."
>
> Accordingly, to ensure that an attorney representing the government acts even handedly and does not abuse the unique power entrusted in him or her in that capacity--and the public confidence in the integrity of the judicial system is not thereby undermined--a heightened standard of neutrality is required for attorneys prosecuting public-nuisance cases on behalf of the government.

(*County of Santa Clara v. Atlantic Richfield Company* (2010) 50 Cal. 4th 35, 49, 57.) In light of this duty, the City, the Redevelopment Agency and their attorneys and staff cannot interpret any of the relevant LORS in a way that undermines the Committee's confidence in the integrity of these proceedings.

In addition, CEC staff's notion that it can disregard the City's and Redevelopment Agency's recommendations because they intervened in these proceedings is absurd. The City and the Redevelopment Agency intervened only after the CEC Staff ignored their recommendations and concerns for an extended period. Consider the following:

September 14, 2007	Application for Certification filed with CEC
September 17, 2007	CEC staff requests agency participation
October 24, 2007	City submits 9-page letter describing concerns

November 2, 2007	CEC staff requests agency participation on supplement
February 20, 2008	City submits letter regarding available water supply
March 26, 2008	City travels to Sacramento to meet with CEC staff regarding land use LORS
May 1, 2008	City submits 17-page letter regarding land use LORS
August 11, 2008	CEC staff requests agency participation on supplement
August 22, 2008	City submits letter on project inconsistency with land use LORS
January 12, 2009	Intervention status granted by the Committee

During this time, the City also was forced to file three sets of data requests to obtain needed project information. The City and the Redevelopment Agency finally sought intervenor status to ensure their full participation in these proceedings. CEC staff's use of the City's and Redevelopment Agency's status as intervenors, as a reason to ignore their reasonable interpretations of applicable LORS, is highly inappropriate.

CEC staff's assertion regarding bias is particularly disturbing because it clearly appears in CEC staff's brief on the fire safety issue. After describing the concerns of the Carlsbad Fire Department, CEC staff concludes that "[t]he City's contentions on this matter are serious, and more difficult to fully assess given the City's overarching goal of preventing the licensing of CECP." (Staff Opening Brief, p. 45.) CEC staff also asserts that the rim road requirements first came up in January 2010 and that the Fire Department could have issued data requests. (*Id.* at pp. 44, 47.) The implication is that the Fire Department steered its analysis to further the goals of other City departments and the Redevelopment Agency.

CEC staff's assumptions are not only false, but also they are potentially dangerous. Questioning the good faith of Fire Department personnel wrongfully diminishes the import of their testimony, which had only one purpose: To promote and protect public safety. As discussed more fully below, the Fire Department's recommendations regarding compliance with applicable provisions of the California Fire Code, and the CECP's non-conformance with these requirements, are supported by substantial evidence in the record which cannot be devalued by unsupported assertions regarding bias. Unless there is evidence of actual bias, the law presumes the City and the Redevelopment Agency performed their tasks and interpreted their regulations properly. (Evid. Code §664; *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768; *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731.)

The City and the Redevelopment Agency realize that the due deference requirement applies to CEC staff not the Committee. However, if the recommendations of the City, the Redevelopment Agency and Fire Department had been afforded appropriate deference, the result of CEC staff's analysis and the record before the Committee would have been very different. The City and the Redevelopment Agency trust the Commission will address this concern here as it has in previous cases:

> By deferring to local government's interpretation of its own LORS, we obviously accept that the City and the County have applied their LORS appropriately. To conclude otherwise would require us to completely disregard substantial evidence provided by local officials concerning matters within their unique purview.

(Eastshore Energy Power Plant, 06-AFC-06, Final Commission Decision, p. 451.)

B. THE CECP DOES NOT CONFORM WITH THE REQUIREMENTS OF THE CALIFORNIA FIRE CODE BECAUSE IT DOES NOT PROVIDE ADEQUATE ACCESS FOR EMERGENCY AND FIRE SAFETY OPERATIONS OR CONNECT TO A RELIABLE WATER SUPPLY.

As discussed in detail in the City's opening brief, the CECP does not conform with the requirements of the California Fire Code. (24 Cal. Code Reg. §§ 503.2.1, 503.2.2.) The testimony of Carlsbad Fire Department officials established that the proposed 28-foot wide access roads within the project site are inadequate and that a 50-foot road at the bottom of the pit and a 25-foot upper rim road are required to provide adequate access and escape routes for fire and rescue operations. Accordingly, an override pursuant to Public Resources Code section 25525 would be necessary to approve the CECP with interior roads that provide insufficient access for emergency operations.

Apparently because the evidence presented by Fire Department personnel could not be refuted, CEC staff instead attacks the Fire Department's motives: "Staff believes that there is no logical explanation to justify the requested (road) width other than the City's opposition to the project." (Staff Opening Brief, p. 47.) This tactic is not only a wholly unjustified slur on the good faith, ethics and professionalism of public safety officials, but also it is an irresponsible attempt to diminish legitimate concern regarding the worker and public safety deficiencies of the CECP's proposed design. Fire Chief Kevin Crawford succinctly disposed of CEC staff's charge as follows: "We are not in the business here of land use. That's not the concern of the Fire Department. Our job is to give our best professional recommendations as to the safety of the project as it's applied right now." (RT, 2/04/10, p. 86, ll. 10-17 [K. Crawford].)

CEC staff also seeks to minimize the consequences of the CECP's non-conformance with the California Fire Code by complaining that the City "could have made data requests for reasonable information, but did not." (Staff Opening Brief, p. 46.) In fact, the City made its requests in a timely manner and is simply attempting to achieve with

the CECP no more than it has done with other projects that present unique safety hazards. City fire officials are exercising their authority under Fire Code section 503.2.2 to make the required safety determinations for the CECP. The project site is an unusually constrained location that requires access beyond the bare minimum allowed by code. It is the applicant, not the City, who was recalcitrant in failing to meet and confer with the City to address critical public safety issues.

The record is replete with instances where the City made requests for information from the applicant, many of which were ignored:

- Data Request Set 1, Nos. 11 and 12 (October 24, 2007): hazardous materials: request for reconsideration of hazardous materials routes and handling.

- Data Request Set 2, No. 61 (December 20, 2007): hazardous materials: requests for information on types of fuels other than natural gas.

- Data Request Set 3 (September 11, 2008):

    - No. 62: requested a comprehensive site plan showing all facilities in the vicinity of the CECP.

    - No. 96: requested additional detail regarding hazardous materials handling.

On March 23, 2009, the City repeated its request (DR No. 142) for a comprehensive site plan showing the location of all facilities in the constrained space that contained the CECP, a switchyard, the Coastal Rail Trail, a sewer interceptor, and the proposed I-5 widening and LOSSAN double-tracking projects. On April 9, 2009, the applicant objected to this request, saying it was submitted too late for a response, despite the fact the City had made the same request six months earlier.

The record shows the Fire Department made many requests for information to which the applicant did not respond. For example, on March 10, 2009, Chief Crawford wrote a letter to the CEC expressing concern that the applicant had not responded to previous requests for information and asking for a 3-D model to enable the Fire Department to evaluate whether it could "adequately provide fire protection and emergency response and rescue to the proposed project." (Docket Log No. 50459, Request for Information from Carlsbad Fire Department, posted 3/11/09.)

CEC staff responded by stating that Dr. Alvin Greenberg was preparing a fire safety analysis. Chief Crawford replied and emphasized that, "[u]ntil NRG provides the Carlsbad Fire Department with the necessary 3-D depictions of the facility that has been requested, it is impossible for us to evaluate the actual required width of the roadways." (Docket Log No. 50740, City of Carlsbad Fire Chief's Response to NRG's Letter, posted 4/01/09.)

After waiting in vain for another month for a response from the applicant, Chief Crawford again wrote to the CEC on April 28, 2009, citing the applicant's lack of cooperation and refusal to supply requested information. Chief Crawford specifically said that unless the applicant responded, the Fire Department would have to list a broad range of project conditions for the CEC to consider. (Docket Log No. 51317, Fire Department's Request for Information, posted 4/28/09.)

During the same time the Fire Department was seeking information from the applicant, the applicant issued Fire Risk and Emergency Response Assessments on November 7, 2008, and April 29, 2009. Both reports cited a single telephone conversation the applicant had with Fire Marshal James Weigand in May 2008, and make no mention of the Fire Department's continuing efforts to obtain information needed to perform its own fire and emergency response assessment. The timing of the applicant's assessments gives rise to a reasonable inference that while the City was attempting to gather information to make its required safety determination, the applicant was avoiding

contact and claiming the City's requests were unreasonable. (RT, 2/04/10, pp. 85-86 [K. Crawford].)

CEC staff also characterized the request for a 3-D model as "extraordinary," saying that no city fire department had ever made such a request. (Exhibit 203, p. 22.) Staff's characterization of the request as "extraordinary" confirms the Fire Department's concern that the proposed location of the CECP itself was extraordinary, perched above an underground sewer interceptor that serves more than 100,000 people, adjacent to a Coastal Rail Trail, and wedged between railroad tracks, a biologically sensitive lagoon, and an interstate freeway about to undergo a massive expansion. In view of the severely constrained nature of the proposed site, the term "extraordinary" would more appropriately have been applied to the applicant's outright refusal to respond to the Fire Department's requests for information needed to assure the safety of residents, workers, and travelers in the vicinity of the proposed site.

Lacking the applicant's cooperation and the requested information, the City constructed at its own expense a 3-D graphic to enable fire officials to determine the nature and extent of necessary fire and emergency access. (Exhibit 424.) This graphic was based on information provided by the California Department of Transportation (Caltrans) to assure its integrity and objectivity. (Direct Testimony, Juan Martinez, pp. 1-2; RT, 2/02/10, pp. 231, 235 [J. Martinez].) The creation of this graphic demonstrates that the Fire Department was serious in its concerns for worker and fire safety and was not, as CEC staff has argued, pressuring the applicant unreasonably because of City opposition to the CECP. (Direct Testimony, Kevin Crawford, p.2; Chris Heiser, pp. 1-2; James Weigand, p. 5.)

After creating the 3-D graphic, the Fire Department realized the true extent of the proposed site's constraints and recommended road widths greater than 24 feet. The Fire Department determined the access road would need to be 50 feet wide to allow adequate space for a variety of emergency operations and still provide enough room to move people and equipment around the site as needed. (RT, 2/04/10, pp. 52-55 [C.

Heiser].) The Fire Department also reiterated its requirement that a 25-foot access road be maintained around the upper "rim" of the project site. (RT, 2/04/10, p. 88 [K. Crawford.)

In light of the critical nature of their public safety responsibilities, Fire Department personnel went to extraordinary lengths to obtain an accurate visualization of the CECP site to ensure an accurate and complete emergency and fire safety determination. CEC staff's suggestion that the Fire Department steered its recommendations to support the City's opposition impugns the integrity of dedicated safety officials and disregards the Fire Department's legal responsibilities and professional expertise. Of all those who provided comments and recommendations to the Committee on worker and fire safety, the senior officials of the Carlsbad Fire Department are the only ones with years of on-the-ground experience and the legal responsibility for responding to emergency events at the CECP.

The applicant also attempted to portray the City's requests as unreasonable by questioning why the City did not require fire access roads in excess of 42 feet from Poseidon Resources, the developer of a desalination plant to be built on the grounds of the Encina Power Station. (RT, 2/4/2010, pp. 96-100.) What the applicant ignored, however, is that Poseidon representatives met frequently with Fire Department officials to develop an adequate fire safety plan. In contrast, the applicant met only once with Fire Department officials and thereafter refused to respond to repeated requests for necessary information.

The City has a history of actively working with developers to implement safety measures that, where necessary, exceed the statutory minimum dimensions. Fire Marshal Weigand described three instances in which Fire Department personnel met and conferred with developers to devise suitable fire safety plans that exceeded minimum requirements. (Docket Log No. 55760, Response of the City of Carlsbad & Carlsbad Redevelopment Agency to Admit Supplemental Documents into the Evidentiary Record, posted 3/01/10; Direct Testimony, James Weigand, pp. 2-3.) In addition to the

Poseidon project, the Life Technologies facility agreed to wider fire road access roadways ranging from 30 feet to 57 feet where access was impeded due to grade differentiation. Dos Colinas, an affordable-housing project, also agreed to 28-foot road access, when only 20 feet were required, to afford emergency personnel enough space to perform their duties. (*Ibid.*)

The point that apparently is lost on the applicant is that responsible developers work closely with the City to devise adequate fire-safety plans which address the nature of their projects and the specific characteristics of their project sites. In Fire Marshal Weigand's words: "Applicant's inability to distinguish Poseidon as just an example of CFD (Carlsbad Fire Department) exercising its authority under the California Fire Code results in an erroneous conclusion that the CECP's proposed access widths are adequate. Furthermore, Applicant's rush to discredit CFD's request for additional access as it relates to the CECP fails to account for the specific attention CFD has paid to the CECP." (*Ibid*.)

The applicant's focus on the required width of the Poseidon project's roads ignores critical differences between the projects. The Poseidon plant will not exceed 35 feet in height and is an at-grade facility with ample room surrounding the plant to stage emergency response operations. In addition to the severe constraints discussed above, the CECP will be located in a 25-foot depression with limited space for emergency operations, active natural gas lines, multiple structures and smokestacks 140-feet tall. (*Ibid*.) All other commercial/industrial structures in the City besides the Encina facility are less than 45-feet tall and generally have the profile of an office building. The evidence is undisputable, therefore, that the Fire Department's requirement for wider fire and emergency assess than proposed by the applicant is authorized by the California Fire Code and justified by the unique characteristics of the CECP and its proposed location.

C. THE CECP DOES NOT CONFORM WITH THE REQUIREMENTS OF CALIFORNIA REDEVELOPMENT LAW AND DOES NOT PROVIDE EXTRAORDINARY PUBLIC BENEFITS AS REQUIRED BY THE SOUTH CARLSBAD COASTAL REDEVELOPMENT PLAN.

The fundamental purposes of the California Community Redevelopment Law (CRL), Health and Safety Code section 33000, *et seq*., are to eliminate blight, to provide meaningful employment opportunities to all economic segments, and to provide affordable housing for lower income residents. (Health & Saf. Code § 33071; *Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 169.) The City established through its written and oral testimony that the CECP would not accomplish any of these objectives and instead would obstruct their achievement by adding to and continuing an existing blighted condition in the South Carlsbad Coastal Redevelopment Plan area for another 50 years. Neither CEC staff nor the applicant disputed this serious issue of non-conformance with state LORS in their opening briefs. Instead, they addressed only the CECP's non-conformance with the "extraordinary public benefit" requirement of the South Carlsbad Redevelopment Plan (SCCRP).

In its opening brief, CEC staff claims the Redevelopment Agency's determination that the CECP will not provide any extraordinary public benefits is "City-centric" and fails to consider the local, regional and state benefits of the CECP. (Staff Opening Brief, p. 7.) This claim ignores the facts that the CECP does not conform with the requirements of the redevelopment plan for the area in which it proposes to locate and the applicant failed to carry its burden of proving the CECP would provide extraordinary public benefits as required by the plan.

As with CEC staff's other attacks on the good faith of the City's opposition, characterizing the Redevelopment Agency's recommendation as "City-centric" is of little benefit to the Committee and does not excuse the CECP's non-conformance with applicable state LORS. There is nothing untoward about the Redevelopment Agency's

concern for the City's goals and policies. After all, the redevelopment area in question is located in the City. The Redevelopment Agency is required by law to give priority to the concerns of the community in which it is located and to use its authority and expertise to benefit that community. The Legislature enacted the CRL to advance state policy and to deploy state powers to benefit local jurisdictions. CEC staff's use of "city-centric" clearly highlights their limited understanding of the purpose of redevelopment agencies and their failure to grasp that, as matter of state law, the Legislature intended redevelopment agencies to assist local jurisdictions in the redevelopment of blighted areas.

Furthermore, CEC's staff mischaracterization of the City's opposition and the Redevelopment Agency's recommendation cannot obscure the fact that the recommendation relates only to the CECP's proposed location on a sensitive coastal site. The City has demonstrated its concern for and commitment to the regional welfare by affirmatively offering to continue to host a regional power plant at an appropriate location within its jurisdiction. The City has expressed both in its written testimony and at the evidentiary hearings its willingness to host a new power plant in another location, outside the Coastal Zone and the Redevelopment Area and in an appropriate industrial area of Carlsbad. The City's offer is not mere talk. It already has acted on its offer by searching for, identifying and working with a private developer to locate a power plant on either of two potential sites – actions not undertaken by any local government in the history of the CEC.

The term "extraordinary public benefits" is a term of art under the SCCRP. Its meaning is most aptly determined from other instances in which the Redevelopment Agency found a project would provide such benefits. For example, with the Poseidon desalination plant, the Redevelopment Agency found that the provision of a safe and reliable water supply to the citizens of Carlsbad, future rate stabilization, the provision of coastal use and access, the dedication of land and monies beyond that which would be associated with a normal development project, and a carbon neutral footprint

constituted extraordinary public benefits. (Direct Testimony, Debbie Fountain, pp. 10-11.)

At the evidentiary hearings, the applicant's witness, Ronald Rouse, argued that the CECP would satisfy the "extraordinary public benefit" requirement because it would allow the decommissioning of Encina Units 1-3, would reduce the demand for ocean water for once-through cooling, and would replace Units 1-3 with smaller, more efficient operations that would have fewer environmental impacts. (RT, 2/01/10, pp. 87-88 [R. Rouse].) Although Mr. Rouse is an experienced attorney in general land use matters, the applicant did not establish that he was an expert in redevelopment law.

On the other hand, the City's witness, Murray Kane, is a nationally known expert in the CRL and redevelopment agency activities. Mr. Kane established that the benefits identified by Mr. Rouse did not constitute "extraordinary public benefits" under the SCCRP because they would not result in removal of existing blight (i.e., Units 1-3), clean-up and remediation of existing contamination, or redevelopment of the Encina site. (RT, 2/01/10, pp. 94-96 [M. Kane], 108-109 [D. Fountain].) Instead, the CECP would continue existing blight by leaving in place a large power plant building and stack that most likely will not be in use after 2017, and would intensify this existing blight by introducing another long-term, industrial use in the redevelopment area. (*Ibid.*)

There is no doubt that a smaller, more efficient power plant would provide some environmental benefits over the existing Encina facility. However, the applicant's refusal to include demolition of the existing Encina facility and remediation of its site as components of the project precludes the CECP from beginning to provide the type of extraordinary public benefits the Redevelopment Agency is intended to achieve. Although the applicant refuses to consider demolition and redevelopment of the Encina site, it clearly could do so if it wanted—after all, it readily agreed to locate the Coastal Rail Trail on the Encina property.

In addition, the applicant's claim that the CECP will provide a smaller, more efficient power plant appears increasingly unreliable in the absence of evidence of a power purchase agreement with SDG&E, specific conclusions in the CEC's most recent Integrated Energy Policy Report or a site-specific system analysis. Without such evidence, there is no basis for concluding that a new power plant, however efficient it may be, is needed or that its proposed output would ever enter the SDG&E grid, make the grid more efficient or replace any existing generating units.

In light of the SWRCB's OTC Policy, the City and the Redevelopment Agency anticipate that the entire Encina facility will cease to operate by the end of 2017. The applicant has, to date, refused to enter into discussions regarding the redevelopment of the Encina site to a higher and better use. Following closure of Units 1-5, however, there will be considerable pressure under both the CRL and the Coastal Act to redevelop the site to allow greater public access and to improve the scenic and visual resources associated with the site.

The evidence in the record of this proceeding supports the conclusion that the CECP is inconsistent with the SCCRP. Accordingly, the City and the Redevelopment Agency submit that the Committee should find that the CECP does not conform with state LORS regarding redevelopment because the CECP does not provide for removal of existing blight, redevelopment of the Encina site or extraordinary benefits.

D. THE CECP DOES NOT CONFORM WITH LOCAL LAND USE LORS BECAUSE IT IS INCONSISTENT WITH THE CARLSBAD GENERAL PLAN, SPECIFIC PLAN AND ZONING REGULATIONS.

1. The CECP Is Inconsistent With Local Land Use LORS.

The CECP does not conform with specific provisions of the Carlsbad General Plan, Specific Plan 144, and related zoning requirements. This conclusion is supported by the written testimony, the additional information provided during the evidentiary hearings, and the law and evidence discussed in the City's opening brief. The evidence submitted by the City reflects the knowledge, expertise and experience of its staff and elected officials in interpreting and applying the City's land use regulations in a wide variety of contexts, their consideration of the City's near-term and long-term vision for future development, and their understanding of the local and regional needs.

Unfortunately, CEC staff addresses the CECP's non-conformance with local land use LORS in the same way it addressed other issues, by employing demeaning descriptions in lieu of substantive analysis. CEC staff's mischaracterization of the City's land use regulations as being "nearly impenetrable" and of "labyrinthine complexity" (Staff Opening Brief, p. 5) suggests either an unfamiliarity with or an unwillingness to acknowledge two basic principles of land use law in California: first, the extent of a site's regulation is directly proportionate to its environmental value; and second, the local general plan sits atop a hierarchy of land use laws and all other planning and zoning decisions must be consistent with it.

CEC staff's lack of appreciation for the first principle is difficult to understand. It should come as no surprise that the proposed location of the CECP is subject to layers of state and local land use regulation—it occupies a prominent oceanfront location adjacent to a sensitive coastal lagoon. The environmental and scenic values of the site far outweigh its continued use for industrial purposes. To protect and promote these values, the site is subject to the California Coastal Act, the SWRCB's OTC Policy, the RWQCB's

enforcement of federal and state water quality regulations, and the City's land use regulations. The latter regulations are consistent with regulations applicable to sensitive coastal sites throughout California and reflect the commitment of local residents to preserving and enhancing such irreplaceable resources.

CEC staff's lack of appreciation for the second principle may be more explicable. With its statewide responsibilities and the continuing trend to site power plants away from the coast, CEC staff is understandably not as familiar with the local land use regulations governing sensitive coastal sites as the staff of the local jurisdictions in which such sites are located. It is precisely for this reason that both the CEC administrative regulations (and the courts) require CEC staff to show deference to the expertise and experience of local agencies in the interpretation of their own LORS. (20 Cal. Code Reg. § 1744(e); *Save Our Peninsula Committee, supra,* 87 Cal.App.4th at p. 142.) Had the CEC staff bothered to review the previous application by SDG&E to repower the Encina units on the very same site, they would have become aware of the City's view of lack of conformity with these regulations. Also, the City and the Redevelopment Agency consistently expressed these concerns before the AFC was submitted, during early discussions with CEC staff, and after they felt compelled to become interveners. These concerns have been expressed not only by the staff of the City and Redevelopment Agency, but also they have been adopted several times by the elected and appointed officials of both agencies in public meetings.

2. The CECP Is Inconsistent With The Carlsbad General Plan.

CEC staff's mischaracterization of the complexity of the City=s land use LORS presumably reflects staff=s inexperience with the state and local land use LORS which apply to a site located in a redevelopment area and the coastal zone. In light of the fundamental principles which govern their relationship, the land use LORS applicable to the proposed site are not difficult to understand and apply.

A. Fundamental Principles of Land Use LORS.

Three fundamental principles govern the application of local land use LORS. First, the General Plan sits at the top of the hierarchy of land use laws in California and serves as the "constitution" for future development in a city. (Gov. Code § 65300, *et seq*.; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815.)

Second, all land use regulations and decisions must be consistent with the General Plan and each of its mandatory elements. (Gov. Code ' 65359; *Friends of Lagoon Valley, supra,* 154 Cal.App.4th at p. 815.) The "consistency doctrine" is the linchpin of California land use law. (*Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985,994.) It provides a chain of authority which runs from state planning law to the local general plan to zoning ordinances and site-specific permits. (*Gonzalez v. County of Tulare* (1990) 65 Cal.App.4th 777, 785.) Pursuant to this doctrine, any land use plan, permit or other approval that is inconsistent with the General Plan is invalid. (*Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1333.)

Third, the City is a charter city and is entitled to adopt laws within its jurisdiction under its constitutional provisions (Cal. Constitution, Article 11, §5.) The voters adopted the City's charter at a special election on June 3, 2008, and declared in the preamble to the charter that "We the people of Carlsbad are sincerely committed to the belief that local government has the closest affinity to the people governed and firmly convinced that the economic and fiscal independence of our local government will better serve and promote the health, safety and welfare of the citizens of Carlsbad. Based on these principles, we do hereby exercise the express right granted by the Constitution of the State of California and do ordain and establish this charter for the City of Carlsbad."

Under this charter, the City has the full power and authority to adopt and enforce all legislation with respect to municipal affairs subject only to the limitations and restrictions as may be provided in the California and U.S. Constitutions. The City did not anticipate that CEC staff would call these laws "redundant" or "superfluous" and advise the

Committee that they basically can be ignored. It is probably one of the few times in the history of the State of California where the staff to a respected commission has advised it to ignore laws which it is professionally responsible to interpret and apply. In this case, those laws are the City's LORS which are entitled to great dignity and respect within the City. Although local LORS may be overridden by the Commission, they are not capable of being ignored. Accordingly, an explanation is provided below to assist the Committee in understanding proper application of the City's land use LORS and their importance in this proceeding and to avoid an erroneous conclusion that they can somehow be ignored.

B. Application of Fundamental Principles of Land Use LORS.

Beginning with the General Plan and proceeding down the hierarchy of land use laws, the LORS applicable to a particular site generally state the requirements for allowable development with increasing specificity:

- The General Plan sets forth the city=s fundamental goals and policy decisions regarding development. (*Friends of Lagoon Valley, supra,* 154 Cal.App.4th at p. 815.) Every General Plan must include the following elements: Land Use, Housing, Circulation, Conservation, Open Space, Noise and Safety. (Gov. Code § 65302.)

- A Specific Plan provides for the systematic implementation of the General Plan in all or part of the area covered by the General Plan. (Gov. Code § 65450.)

- A Zoning Ordinance prescribes limitations on the use, location, height, bulk and size of buildings and lots, the percentage of a lot which may be occupied by a structure, the intensity of land use, parking requirements, setbacks and other limitations applicable to a specific site. (Gov. Code § 65850.)

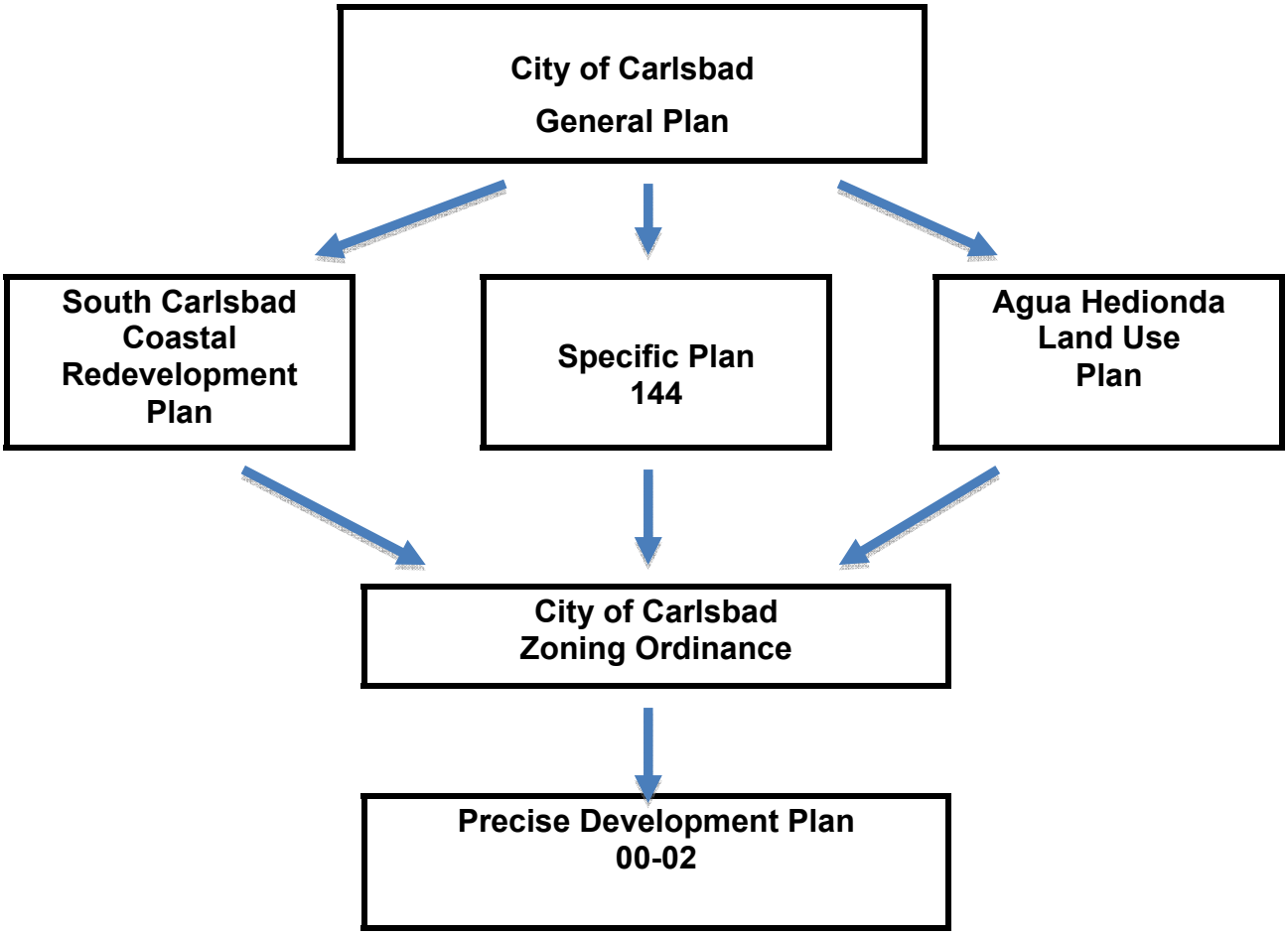
- A precise development plan, conditional use or other permit must be consistent with the applicable zoning ordinance, specific plan and general plan. (*Gonzalez v. County of Tulare* (1990) 65 Cal.App.4th 777, 785.)

The same general principles apply to a proposed site in a redevelopment area. Under state law, a redevelopment plan must be consistent with a city's General Plan. (Health & Saf. Code § 33331.)

C. Land Use LORS Applicable to the Proposed CECP Site.

The following chart illustrates the straightforward relationship among the state and local land use LORS applicable to the CECP's proposed site:

Figure 1



City of Carlsbad General Plan. CEC staff and the applicant correctly point out that the proposed site is designated for "utility (U)" use in the Land Use Element of the Carlsbad General Plan and for "public utility (PU)" use in the Carlsbad Zoning Code. However, CEC staff and the applicant go astray in their contention that the CECP conforms with applicable land use LORS because it fits within these use designations. Their failure to show that the CECP is consistent with the other applicable elements of the General Plan renders their contention incomplete and incorrect.

CEC staff's and the applicant's myopic focus on the proposed site's use designation in the General Plan Land Use Element and Zoning Code is contrary to California law. A finding that a project is consistent with one element of a General Plan is insufficient. The courts have made clear that the consistency doctrine requires a project to be consistent with all of the mandatory elements of the General Plan. (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.) CEC staff and the applicant fail to address the evidence which shows the CECP is not consistent with at least 14 objectives and policies of the Carlsbad General Plan, which are intended to ensure that new industrial uses are appropriate, properly designed and located in non-coastal areas in order to preserve and enhance the scenic and environmental values of coastal areas within the City's jurisdiction. (Direct Testimony, Scott Donnell, pp. 9-12; RT, 2/02/10, pp. 1-4 [S. Donnell].)

Specific Plan 144. In its opening brief, CEC staff spends over four pages describing the requirements of the City's Specific Plan 144 (SP-144) as "superfluous" and "redundant". (Staff Opening Brief, pp. 19-23.) This mischaracterization ignores the law and the facts. A specific plan like SP-144 is a planning tool authorized by the Legislature to implement the goals and policies of the General Plan in a specific area covered by the General Plan. (Gov. Code § 65450.) SP-144 has served as the chief planning tool for the area in which the CECP proposes to locate and most recently achieved its intended goals in the evaluation of the Poseidon desalination project. (Direct Testimony, Scott Donnell, pp. 5-7; RT, 2/02/10, pp. 4-6 [S. Donnell].)

Contrary to CEC staff's belief, the City does not require an update of SP-144 for every project. The CECP's obligation to provide a comprehensive update reflects that fact that the City has been seeking an update from the occupants of the Encina site for the past 25 years to ensure that, among other things, use of the Encina facility is consistent with the goals and policies of the Carlsbad General Plan. The specific reasons for a comprehensive update were first set forth in Resolution 98-145 and described in detail in the City's correspondence with CEC staff in this proceeding. (Docket Log No. 46114, Letter from City of Carlsbad re Land Use Information, posted 5/01/08, pp. 6-8.) Rather than "redundant," SP-144 gives effect to state law which requires all land use decisions to be consistent with the General Plan. The applicant's failure to comply with SP-144 confirms the CECP does not conform with local LORS.

Carlsbad Zoning Ordinance. Unfortunately, CEC staff's and the applicant's desire to confine the LORS conformance analysis to the proposed site's use designation is contrary to state law and Chapter 21.36 of the Carlsbad Zoning Code, which require projects in the "PU" zone to be consistent with all elements of the General Plan. (Carlsbad Zoning Code, § 21,36,010.) It ignores important state policies and the advances in power plant technology which CEC staff and the applicant argue is a project benefit. The importance of the CECP's consistency with the "U" and "PU" designation is questionable in light of the fact that these designations were adopted by the City at a time when the most economic cooling technology for a thermal power plant required a site on or adjacent to the coast or other large body of water. (Direct Testimony, Ralph Faust, p. 10.) Today, the SWRCB's OTC Policy requires the retirement of facilities which use ocean water for cooling because of their significant adverse environmental impacts and because other preferred cooling technologies are readily available. As emphasized in the Final Staff Assessment: "The new CECP facility would use evaporative air cooling, eliminating the daily need for large quantities of seawater for purposes of once-through cooling." (FSA, p. 3-2.)

Finally, CEC staff and the applicant miss the point in contesting the City's position that a "merchant plant" like the CECP, which does not have a contract to sell power to a public utility, cannot be considered a "public utility" under Chapter 21.36 of the Carlsbad Zoning Code. CEC staff and the applicant erroneously focus on ownership of a facility, arguing that the City cannot discriminate against privately owned generation facilities. (Staff Opening Brief, p. 18; Applicant Opening Brief, pp. 18-19.) Their arguments avoid the fundamental point the City makes, which is that the use of the facility must serve a public purpose in order to qualify as a "public utility" under Chapter 21.36. (*Glenbrook Development Co. v. City of Brea* (1967) 253 Cal.App.2d 267, 272 ["a 'public utility' is a business or service which is engaged in regularly supplying the public with some commodity or service of public consequence, such as electricity."].) Since the CECP does not have an agreement to sell power to the public or any entity acting on the public's behalf, the City's determination that the project should be considered an industrial use, not a public utility, is reasonable and consistent with applicable law. [3]

Precise Development Plan 00-02. As its name implies, PDP 00-02 is a permit which is intended to provide the standards for development in the area in which the CECP proposes to locate. CEC staff argues that where the local interested agency would, in the absence of the CEC, issue a permit or has permit-like authority, the Commission can ignore the interested agency's opinions. (Staff Opening Brief, p. 7.)

However, local agency determinations regarding development standards, whether permit-like or not, need to be given deference. For example, setbacks serve important purposes in ensuring visual compatibility with surrounding uses, as well as providing necessary safety buffers where a proposed use and the constraints of a particular site require them. The need for adequate setbacks at the CECP's proposed site, which is surrounded by railroad tracks, a congested freeway and sensitive biological resources,

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[3] For example, the privately-owned Carlsbad Seawater Desalination Plant is an appropriate use in the "PU" zone because, unlike the CECP, it has executed purchase agreements with nine public utilities.

is indisputable. CEC staff's disregard of such a key local land use regulation as "superfluous" is patently inappropriate.

Once the Committee understands the basic flow chart and application of the City's land use LORS, it will clearly emerge, contrary to CEC staff's position, that there is nothing in the law which would allow local LORS to be ignored because they are "redundant" or "superfluous". Neither CEC staff nor the applicant submitted any evidence or made any argument in their opening briefs to refute the evidence which shows the CECP is inconsistent with important policies and goals of the Land Use, Open Space and Circulation Elements of the City's General Plan. Their reliance on conformance with the proposed site's "U" and "PU" designation is both myopic and misplaced. If, after reviewing the City's LORS and giving them the dignity and respect to which they are entitled, the Commission concludes that the CECP need not comply with them, an override pursuant to Public Resource Code sections 25525 and 25523(d)(1) will be required.

3. The Powers And Duties Of The Energy Commission And The Carlsbad City Council Are Different Regarding The Coastal Rail Trail.

Rather than answering the Committee's question as to whether the Warren-Alquist Act gave the Commission authority to decide whether and where the rail trail can be built on the project site, CEC staff argues the Committee asked the wrong question. (Staff Opening Brief, pp. 23-24.) However, the answer to the Committee's question is two-fold.

First, the Commission has jurisdiction over the applicant and can require it to dedicate an easement for the Coastal Rail Trail (CRT) wherever the Commission determines is the best location. Second, however, the Commission cannot order the City Council to accept the location of the easement nor curtail the City Council's constitutional powers of eminent domain to decide where the public interest ultimately requires the CRT to be located.

Although the Commission's primary mission is to license power plants, the City Council has a broader responsibility to consider the overall health, safety and welfare of the community and the best location for the CRT which will cause the least private injury. That is to say, the Commission can order the applicant to offer a trail location for dedication, but it cannot order the City Council to accept a particular location or to forgo the use its constitutional power to find an alternate location.

Therefore, the City respectfully submits that the following new condition should be substituted in place of Condition of Compliance Land-1:

> The project owner shall redesign the CECP to accommodate the alignment of the proposed Coastal Rail Trail as identified by the City of Carlsbad within the boundaries of the overall Encina Power Station Precise Development Plan. The CPM shall require proof of acceptance of the dedication or a final order of condemnation prior to commencement of construction.

4. The City's Moratorium Should Be Treated Like Any Other LORS.

CEC staff argues that the City's moratorium on the development of new power plants in the Coastal Zone is not a law because it is self-directed. (Staff Opening Brief, p. 23.) The applicant, on the other hand, argues that the moratorium has no relevance to the pending application since it is self-serving. (Applicant Opening Brief, p. 34.) Neither argument addresses the dispositive question whether the City had the statutory and constitutional authority to adopt such a measure.

Whether or not a law is "self-serving" is irrelevant to its application. Just as in any other jurisdiction, the local laws in Carlsbad are self-serving in the sense that they are intended to promote the health, safety and welfare of the citizens of Carlsbad. The City's moratorium is an urgency ordinance, properly adopted under the authority of the California Constitution for charter cities and under the California Planning and Zoning

Law, which applies to power plants that propose to locate in the Coastal Zone within the City. (Gov. Code § 65858.) The CECP is plainly inconsistent with this ordinance. If the applicant believes that the Urgency Ordinance is "in excess of [the City's] authority" (Applicant Opening Brief, p. 34), then its remedy is to challenge the ordinance in the Superior Court, not to argue to this Committee that it is invalid or should be ignored.

The Commission is empowered to override non-conformance with local laws, not to ignore them. Accordingly, if it were to decide to approve the project, the Commission would be required to adopt an override pursuant Public Resources Code section 25525 and 25523(d)(1) to address the CECP's non-conformance with yet another local LORS.

II.

THE CECP IS NOT A COASTAL DEPENDENT FACILITY, DOES NOT COMPLY WITH THE COASTAL ACT, AND SHOULD NOT BE APPROVED IN THE COASTAL ZONE.

A. THE CECP IS NOT COASTAL DEPENDENT.

Both the applicant and CEC staff assert that the CECP is permissible under the Coastal Act because it is a "coastal dependent" industrial facility. In making this assertion, CEC staff views the CECP as an "expansion" (Staff Opening Brief, p. 9) and the applicant views the project as a "replacement" (Applicant Opening Brief, p. 10) of the existing Encina facilities which require the use of ocean water for once-through cooling. The applicant's and CEC staff's positions are inconsistent with the California Coastal Act and the SWRCB's OTC Policy. They also confirm the potential shutdown of Units 4 and 5 is part of the CECP and should have been evaluated as part of the project.

CEC staff contradicts itself in an effort to show the CECP would be consistent with the Coastal Act. Initially, staff concedes that "no proposal to site a new power plant in the Coastal Zone, outside of an established industrial area, would likely conform to the Coastal Act." (Staff Opening Brief, p.10.) CEC staff acknowledges that the Coastal Commission's primary concerns about the CECP are whether it would use OTC and the effect such systems have on the marine environment. (*Ibid.*) CEC staff then states the reason the Coastal Commission did not participate in this proceeding is that "CECP does not use OTC." (*Ibid.; see also* Exhibit 195 [Docket Log No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07]) Thus, CEC staff admits that a power plant which uses OTC would be inconsistent with the Coastal Act and the Coastal Commission's primary concerns.

Directly contradicting these admissions, CEC staff then argues that the CECP is a "coastal dependent" use because it will use the OTC system of existing Encina Units 4 and 5 for its water supply: "The EPS power plants are a 'coastal-dependent' use, inasmuch as these units all rely on OTC for their operation. As stated above, CECP is a 'reasonable expansion' and 'long-term growth' of the existing facility . . . . Like units 4 and 5, CECP will also be 'coastal dependent' [because it will] rely on an ocean water purification system to provide water to meet process uses." (Staff Opening Brief, p. 11.)

The applicant's and CEC staff's argument assumes that Units 4 and 5 will operate indefinitely into the future. Without this assumption, the CECP would independently withdraw water from and discharge wastewater to the ocean, with all of its associated significant adverse biological impacts, long after Units 4 and 5 cease operation. CEC Staff and the applicant seek to avoid dealing with these long-term impacts by assuming that Units 4 and 5 will operate for as long as does the CECP. However, their assumption that Units 4 and 5 will continue to operate indefinitely and the CECP will use Units 4 and 5's OTC system is contrary to State policy and the Coastal Act.

The October 16, 2007 letter from Peter N. Douglas, Executive Director of the California Coastal Commission, to the Energy Commission confirms that the CECP's proposed reliance on Units 4 and 5's OTC system is contrary to the Coastal Act. When Mr. Douglas sent the letter in October 2007, Coastal Commission staff was unaware the CECP would require the continued use of ocean water in order to be able to function. In justifying its decision not to participate in several AFC proceedings before the Energy Commission, including this proceeding, the Coastal Commission staff stated:

> We note that all the projects listed above are proposing to end the environmentally destructive use of seawater for once-through cooling and <u>instead employ dry cooling technology</u>, 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. [Emphasis added.]

(Exhibit 195, p. 1 [Docket No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07].)

CEC staff's and the applicant's contention that the CECP is "coastal dependent" because it will use Units 4 and 5's OTC system for its water supply and wastewater discharge confirms the project is inconsistent with the Coastal Act and the Coastal Commission's primary concerns. Their contention also establishes the CECP is inconsistent with the SWRCB's OTC Policy, which provides for retirement of the existing Encina facility by the end of 2017. In addition, as discussed in Section III below, their contention is inconsistent with their assertion that the anticipated retirement of Units 4 and 5 is not part of the project. The applicant's and CEC staff's contention that the CECP is "coastal dependent" because its sole source of water and wastewater discharge is Units 4 and 5's OTC system confirms that the potential shutdown of Units 4 and 5 is an integral part of the project and must be evaluated as part of the CECP.

The argument that the CECP is coastal-dependent because it relies upon ocean water purification to meet its needs is an obviously invalid syllogism. The applicant's and CEC staff's argument seems to be:

1. The CECP needs water to operate.

2. The water purveyor asked the CECP to pay for the upgrades necessary to provide reclaimed water.

3. The CECP refused to pay for the upgrades necessary to obtain reclaimed water.

4. The only other source of water is the Pacific Ocean.

5. Therefore, the CECP is coastal dependant.

This argument is based on a disingenuous jab at the City for its inability to provide an adequate supply of reclaimed water to the CECP without the applicant's paying for the needed upgrades to the reclaimed water infrastructure. The applicant's desire to avoid paying the cost of infrastructure upgrades required by its project does not convert the CECP, which Cal ISO staff testified could be located anywhere, into a "coastal dependent" use. (RT, 2/03/10, pp. 203, 212-213 [McIntosh].)

There is nothing about the CECP that requires it to be located adjacent to the Pacific Ocean. Contrary to the applicant's and CEC staff's argument, the CECP does not need water from the Pacific Ocean in order to function. It only needs some source of water, which can be a source located anywhere outside the coastal zone. Their argument that the CECP's only possible source of water and wastewater discharge is the existing Encina OTC system assumes their conclusion that the CECP is "coastal dependent." In reality, the CECP is not "coastal dependent" because it does not have to be located next to the Pacific Ocean in order to function.

The CEC staff's position on coastal dependency also seems to be based upon the first sentence of section 30260 of the Coastal Act, which states: "Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division." (Pub. Res. Code § 30260.) The problem with staff's analysis is that it again assumes the conclusion.

Under the plain language of the first sentence of section 30260, an industrial facility must first be "coastal dependent" before it can locate or expand in the coastal zone. CEC staff assumes that because the CECP is being located within an "existing" site, it is coastal dependent. This assumption fails because it would allow any industrial facility

that locates on an existing coastal site to be considered "coastal dependent" and thus approvable under section 30260.

If the Legislature had intended that <u>any</u> industrial facility could be allowed in a site such as this, it need not have specified in section 30260 that the industrial facility be "coastal dependent." But the Legislature did so specify. This sentence clearly means that the facility must be "coastal dependent" as defined in section 30101 in order to be permitted pursuant to section 30260. As indicated in the testimony of Ralph Faust, the former General Counsel of the Coastal Commission, a new or expanded industrial facility must either be fully consistent with the Coastal Act or be permissible under section 30260 because it is coastal dependent. (Direct Testimony, Ralph Faust, pp. 10-11.) To be considered "coastal dependent," a facility must meet the definition of section 30101, which means "any development or use which requires a site on, or adjacent to, the sea to be able to function at all."

CEC staff concedes that "it has always been possible to build power plants outside the coastal zone." (Staff Opening Brief, p. 14.) This concession makes it impossible for the CECP to come within the definition of "coastal dependent" in section 30101, since it clearly does not require a site on or adjacent to the sea "to be able to function at all." The clear and unambiguous language of the Coastal Act requires a finding that the CECP is not "coastal dependent" and cannot be sited in the coastal zone pursuant to section 30260. As a result, the CECP is not in conformance with the Coastal Act and would require the Commission to adopt an override pursuant to Public Resources Code section 25525 and 25523(d)(1) in order to approve the project.

B. THE CECP DOES NOT COMPLY WITH OTHER PROVISIONS OF THE COASTAL ACT.

As pointed out in the City's California Coastal Act Conformance Report (Exhibit 420), the Legislature declared five guiding policies in the Coastal Act:

> (a) Protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.
>
> (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.
>
> (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.
>
> (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.
>
> (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

(Pub. Res. Code § 30001.5.)

The City's Coastal Act Conformance Report and the expert testimony of Mr. Faust established that the CECP does not conform with any of these policies. In particular, the Coastal Act Conformance Report concluded that:

> The CECP continues the presence of an industrial facility in an otherwise scenic coastal area. It will also extend that industrial long after the current coastal dependent power plant units have exceeded their useful and economic lives. As a non-coastal dependent facility, the CECP takes away opportunities for other less intrusive and more coastal zone compatible uses to be developed.

(Exhibit 420, p. 21.)

Neither CEC staff nor the applicant presented any evidence contradicting the fact that the CECP does not conform with the overarching goals and policies of the Coastal Act. Instead, in its opening brief, CEC staff attacks the ability of Mr. Faust, the City's coastal expert, to make conformity conclusions because of his alleged lack of technical expertise. This attack has no merit. A judgment of consistency with the Coastal Act requires knowledge of the facts pertinent any particular potential impact as well as knowledge of how the law is applied to a particular set of facts. Mr. Faust relied upon the facts presented in the project proposal as well as the information provided in the CEC staff analysis and the City staff analysis. He then applied his knowledge of how the Coastal Act's policies have been applied during his twenty years of experience at the Coastal Commission to the facts of this case. Mr. Faust did not attempt to make any technical conclusions in substantive areas.

As acknowledged by CEC staff during the hearings, Mr. Faust's knowledge of what the Coastal Act's policies require is unquestioned. In addition, the CEC staff's experience and expertise in analyzing a project's conformance with Coastal Act policies is certainly less than that of the City staff, which has extensive actual experience in implementing the Coastal Act in the area in which the CECP proposes to locate. For these reasons, the City's evidence that the CECP does not conform with the guiding principles of the Coastal Act should be conclusive.

C. THE COASTAL COMMISSION SHOULD HAVE PARTICIPATED IN THIS PROCEEDING AND PREPARED A REPORT.

Obviously the perspectives of the Coastal Commission are important to the resolution of the Coastal Act conformance issues in this proceeding. CEC staff's unease with the City's land use regulations for coastal locations confirms the need for and the importance of the Coastal Commission's participation in this proceeding. It is precisely the careful scrutiny which the Coastal Commission gives development in sensitive coastal areas that leads to the layered local land use LORS of which CEC staff complains.

In its opening brief, the City set out the law and the evidence which warrant the following conclusions: first, the Coastal Commission is required by state law to participate in these proceedings; second, the Coastal Commission also is required by state law to provide a report regarding the CECP's consistency with the Coastal Act; and third, if the Coastal Commission does not provide the required report, the Committee should obtain it from the local agency which is experienced in and otherwise responsible for applying the Coastal Act in the area in which the project proposes to locate.

Ordinary rules of statutory interpretation support the City's long-standing position that the Coastal Commission is required to participate in this proceeding. Although Public Resources Code section 25540.6 exempts thermal power plants using natural gas-fired technology from the obligation to submit a Notice of Intention, it does not exempt the Coastal Commission from participation when the proposed plant is located in the Coastal Zone. There is nothing in that section which addresses thermal power plants in the Coastal Zone. Since that section does not address power plants in the Coastal Zone, it cannot impliedly overrule the other provisions of the Warren-Alquist Act (Act) that require the Coastal Commission's participation. (*N.T. Hill v. City of Fresno* (1999) 72 Cal.App.4th 977, 990 [implied repeal of statutory provision highly disfavored].)

Since section 25540.6 did not impliedly repeal other pertinent sections of the Act, other relevant statutory provisions must be examined. Public Resources Code section 304413(d) expressly requires participation by the Coastal Commission:

> Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with section 25500) of the division 15 with respect to any thermal power plant or transmission line to be located, in whole or in part, within the Coastal Zone the (Coastal) Commission <u>shall participate in those proceedings</u> and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the Coastal Zone. [Emphasis added.]

Therefore, although Public Resources Code section 25540.6 exempts certain types of proposed thermal power plants from submitting a Notice of Intention, it does not exempt participation by the Coastal Commission. That is why in section 25519(d) the Legislature required the application for certification for a plant proposed in the Coastal Zone to be forwarded to the Coastal Commission for its review and comments.

It is uncontroverted that the Coastal Commission did not participate in this proceeding. Although applicant characterizes a letter from the Executive Director regarding insufficient staff resources as an action of the Coastal Commission, <u>the Coastal Commission itself has never made any findings, prepared any report, or participated in any other way in this proceeding.</u> (*See* Exhibit 195 [Docket No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07].) Moreover, as discussed above, when the Coastal Commission staff sent the letter in October 2007, it was unaware that the CECP would require the continued use of ocean water in order to be able to function.

CEC staff and the applicant contend that whether or not the Coastal Commission is required to provide a report is a closer question. (*See* Docket Log Nos. 46945, 47485,

47616, and 47771.) However, this question must be answered in the affirmative in light of the letter from the Executive Director of the Coastal Commission, which acknowledges the Coastal Commission's duty to review power plant proposals pursuant to the Memorandum of Agreement (MOA) and its duty to provide the report required by Coastal Act section 30214(d). (Exhibit 195 [Docket No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07].) The MOA between the Energy Commission and the Coastal Commission, dated April 14, 2005, sets forth the Coastal Commission's role in AFC proceedings such as this one. Under the MOA, the Coastal Commission must submit a section 30413(d) report in time for the Energy Commission's proposed decision. (Direct Testimony, R. Faust, Attachment 2, p. 2].) The MOA has not been rescinded and remains in effect. It does not contain any provision authorizing one commission or the other to disregard its requirements. Accordingly, it provides the most reliable interpretation of the joint responsibilities of the Coastal Commission and the Energy Commission and is applicable to this proceeding.

In light of the letter from the Executive Director of the Coastal Commission, the 1990 Coastal Commission Report (1990 Report) is the only report from the Coastal Commission which relates to the proposed site. (Exhibit 418.) The 1990 Report concluded that a second power plant at this location would be inconsistent with the Coastal Act. CEC staff and the applicant seek to discount the 1990 Report and seem to assume that if the CECP can be characterized "not as bad" as the previous SDG&E project, it must be consistent with the Coastal Act, without any analysis of where the bar of consistency is set. Notwithstanding this attempt to downplay its importance, the 1990 Report should be considered by the Committee as an clear indication of the disfavor with which the Coastal Commission would view any proposal to extend, for another 50 years, a heavy industrial use in this extremely valuable and sensitive coastal location.

The City understands that the Committee cannot compel the Coastal Commission to perform its statutory duties to participate in this proceeding. Where the Coastal Commission declines to provide the report required by section 30413(d), however, the

Committee should obtain a determination regarding a project's consistency with the Coastal Act from those with the most experience in applying the Coastal Act to the site in question.

The City's planning staff has been interpreting the Coastal Act since its inception and issuing coastal development permits since the Agua Hedionda Land Use Plan was certified by the Coastal Commission. During this time, the City has reviewed over 700 applications for coastal development permits in the coastal zone. (Direct Testimony, Gary Barberio, p. 1.) As a result of the City planning staff's extensive, day-to-day, on-the-ground experience, no other party to this proceeding is better equipped to determine whether the CECP would be consistent with the Coastal Act.

It would not adversely reflect on the good faith or hard work of the CEC staff for the Committee to find that City staff is in a better position than CEC staff to determine whether a site within the City's coastal zone is consistent with the Coastal Act. Just as CEC staff has extensive experience and expertise in evaluating, for example, the technical merit of a power plant proposal, so too the City staff is far more qualified than anyone else in these proceedings to evaluate whether a project within the City's coastal zone conforms with the Coastal Act. Accordingly, the City strongly recommends that the Committee rely on the City's Coastal Act Conformance Report instead of CEC staff's evaluation. (Exhibit 420.)

For the foregoing reasons, the City respectfully requests that the Committee order a stay of these proceedings, or deny the CECP without prejudice, until the Coastal Commission provides the required report. In the alternative, the City requests that the Committee receive the City's California Coastal Act Conformance report in lieu of the report required from the Coastal Commission.

III.

THE CECP CANNOT BE APPROVED BECAUSE CEC STAFF FAILED TO EVALUATE THE POTENTIAL SHUTDOWN OF UNITS 4 AND 5 AS PART OF THE PROJECT.

In their opening briefs, the applicant and CEC staff take the position that, even though the CECP must use ocean water discharge from Units 4 and 5, the potential shutdown of Units 4 and 5 is not part of the proposed project. This position is inconsistent and indefensible. CEQA is abundantly clear that the potential shutdown of Units 4 and 5 is an integral part of the project which must be evaluated as part of the CECP.

CEQA defines a "project" as "the whole of an action," which has a potential for resulting in either a direct or a reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code § 21065; 14 Cal. Code Reg. § 15378(a).) An indirect physical change in the environment is one which may be later in time but is still reasonably foreseeable. (14 Cal. Code Reg. § 15358(a)(1).) The courts interpret the term "project" broadly in order to maximize protection of the environment. (*Tuolumne Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222-1223.)

The scope of environmental review of a project must include the entire project, including "[a]ll phases of project planning, implementation, and operation." (14 Cal. Code Reg. § 15063(a)(1).) Where the operation of a project eventually will require compliance with federal or state environmental regulations, the agency cannot put off consideration of how the project will comply with the applicable regulations by treating it as a separate activity. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1146-1147.)

Under CEQA, separate activities are part of a single project and must be reviewed together where both activities are integral parts of the same project: "when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project." (*Tuolumne Citizens for Responsible Growth, Inc., supra,* 155 Cal.App.4th at p. 1229.) Thus, for example, where a road alignment must be completed before business operations of a retail center may begin, the road alignment and the retail center constitute a single project under CEQA. (*Id.* at p. 1227.)

The applicant and CEC staff characterize the CECP as a modernization and expansion of the existing Encina facility. (Applicant Opening Brief, pp. 10, 11; Staff Opening Brief, pp. 1, 9, 10, 11, 40.) The existing Encina facility consists of Units 1 through 5 and the CECP would add new Units 6 and 7. (FSA, p. 3-1.) According to the applicant and CEC staff, the CECP would replace existing Units 1, 2 and 3 with new Units 6 and 7. (Applicant Opening Brief, pp. 10, 17; Staff Opening Brief, pp. 1, 5, 40.) The CECP also would require the continued operation of Units 4 and 5 because ocean water discharge from their once-through cooling system will be the only source of water and wastewater discharge for new Units 6 and 7. (Applicant Opening Brief, pp. 16, 17; Staff Opening Brief, pp. 11, 14, n. 2; *see also* FSA, p. 6-22.)

The applicant and CEC staff admit that Units 4 and 5 are subject to the SWRCB's once-through cooling policy (OTC Policy) and must comply with the OTC Policy by 2017. (Staff Opening Brief, p. 4; Docket Log No. 56916, Memorandum and Attachment re Post-Evidentiary Hearing Developments, posted 5/28/10; RT, 2/03/10, p. 414, ll. 2-6 [D. Vidaver].) CEC staff's testimony at the evidentiary hearings established that the only feasible way for Units 4 and 5 to comply with the OTC Policy is to shutdown. (RT, 2/03/10, p. 405. ll. 14-21 [D. Vidaver]; *see also* FSA, pp. 4.1-118.)

The applicant and CEC staff also admit that, upon the shutdown of Units 4 and 5, new Units 6 and 7 would have no source of water. (Applicant Opening Brief, pp. 16-17; Staff Opening Brief, p. 14, n. 2 ["No party in this proceeding has presented any evidence of another feasible water source."].) In the applicant's words, the CECP "would be unable

to operate" and "could not function" if new Units 6 and 7 were unable to use Units 4 and 5's ocean water discharge system for water supply and wastewater discharge. (Applicant Opening Brief, p. 16.)

The evidence in the record and the applicant's and CEC staff's admissions confirm that (1) Units 4 and 5's ocean water discharge system is an integral part of the CECP, (2) Units 4 and 5 must comply with the SWRCB's OTC Policy by 2017, (3) Units 4 and 5 are expected to comply with the OTC Policy by shutting down, and (4) when Units 4 and 5 shutdown, new Units 6 and 7 will have no other means of water supply or wastewater discharge.

Despite their admissions, the applicant and CEC staff claim the potential shutdown of Units 4 and 5 is not part of the CECP and is not required to be evaluated as part of the project. The applicant offers no law or evidence in support of its position, emphasizing the benefits that may result from the retirement of Units 1-3 while ignoring the problems that will occur when new Units 6 and 7 lose their only source of water and wastewater discharge upon the retirement of Units 4 and 5. (Applicant Opening Brief, p. 5.)

CEC staff also fails to identify any law or evidence in support of its position. Instead, staff asserts Units 4 and 5 will continue to operate until at least May 2017 unless they are replaced or made unnecessary by additional resources. (Staff Opening Brief, p. 4.) This assertion ignores the fact that SDG&E already has entered into a contract with the Pio Pico Energy Center to add resources in the San Diego region that will make continued operation of Units 4 and 5 unnecessary. (*See* Pio Pico Energy Center, 2010-AFC-01, pp. 2-2 - 2-3.)

CEC staff also asserts Units 4 and 5 may continue to operate beyond 2017 if they are refitted to greatly reduce their use of once-through cooling water. (Staff Opening Brief, p. 4.) Not only does staff fail to identify any evidence in support of this assertion, but also it is directly contrary to the testimony of David Vidaver, who stated that retirement

of the entire Encina facility is “the only feasible response to the state water board’s policy on once-through cooling.” (RT, 2/03/10, p. 405, ll. 20-21 [D. Vidaver].)

As the only source of water supply and wastewater discharge for proposed Units 6 and 7, ocean water discharge from Units 4 and 5 is an integral part of the CECP. The potential shutdown of Units 4 and 5 pursuant to the OTC Policy, within a few years after the CECP hopes to begin operations, is a reasonably foreseeable activity which could cause the CECP to be unable to operate. The decisions in *Tuolumne County Citizens* and *McQueen, supra,* make abundantly clear that activities which are integral parts of the same project constitute a single “project” under CEQA and that all phases of the project, including future compliance with applicable environmental regulations, must be evaluated together. For these reasons, the potential shutdown of Units 4 and 5 must be evaluated as part of the CECP before it can be approved.

IV.

THE CECP WILL HAVE UNMITIGATED SIGNIFICANT IMPACTS ON WATER SUPPLY, VISUAL RESOURCES, AND FIRE SAFETY.

The applicant and CEC staff contend the CECP will not have any unmitigated significant impacts on the environment. (Applicant Opening Brief, p. 5; Staff Opening Brief, pp. 50-51.) However, the applicant's continuing reliance on an improper baseline for measuring the significance of project impacts, the project's reliance on the continued operation of Units 4 and 5 for water supply and wastewater discharge, and CEC staff's ignorance of information available in the Draft EIR/EIS for the I-5 widening project confirm the CECP will have unmitigated significant impacts on water supply, visual resources and fire safety.

A. THE FSA'S ANALYSIS OF OCEAN WATER IMPACTS IS ERRONEOUS AND MISLEADING BECAUSE IT USED THE WRONG BASELINE FOR EVALUATING THE CECP'S IMPACTS.

The applicant and CEC staff deny the CECP will have any unmitigated significant impacts and instead assert it will benefit the environment by eliminating the use of 225 million gallons per day (mgd) of ocean water for cooling Units 1, 2 and 3, which would be retired upon the CECP's commencement of operations. (Applicant Opening Brief, p. 5; FSA, p. 4.9-27.) This assertion is erroneous and misleading because it addresses the maximum permitted capacity of Units 1-3's once-through cooling system, rather than the amount of ocean water actually used by Units 1-3 under existing conditions.

The California Supreme Court recently confirmed the FSA's analysis of ocean water impacts is erroneous in *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, where an air district considered an

application for expansion of an existing oil refinery. The air district and the project proponent argued that the "baseline" for determining whether increased air emissions from the proposed project were significant should be the maximum emission levels allowed under the facility's existing permits. (*Id.* at p. 320.) The Supreme Court rejected this argument and ruled that use of the maximum capacity levels set in prior permits as a baseline for analyzing emissions from the proposed project was inconsistent with CEQA. (*Id.* at pp. 326-327.) According to the Court, the air district was required to compare the actual physical conditions at the existing facility with the conditions expected to be produced by the proposed project: "Without such a comparison, the EIR will not inform the decision makers and the public of the project's significant environmental impacts, as CEQA mandates." (*Id.* at p. 328.)

The evidence produced at the public hearings established that the permitted level of ocean water use for Units 1-3 was more than ten times the amount of water actually used in their existing operations. (*Compare* FSA, pp. 4.9-27 *with* RT, 2/04/10, p. 220, ll. 1-18 [A. Roe].) The CEC staff attorney submitted a memorandum to the Committee regarding the Supreme Court's decision in *Communities for a Better Environment, supra*. (*See* Docket Log No. 59616, Memorandum and Attachment re Post-Evidentiary Hearing Developments, posted 5/28/10, pp. 2-3.) The memorandum acknowledged that the proper baseline for evaluating the CECP's impacts is the existing physical conditions at Units 1-3, not their permitted capacity. The memorandum also admitted the CECP's beneficial impacts on ocean water were overstated and promised to address the issue in the post-hearing briefs. (*Id.* at p. 3.)

However, CEC staff's opening brief does not address the FSA's error. This omission is compounded by the applicant's opening brief, which restates the erroneous information. Furthermore, the information provided in the CEC staff attorney's memorandum cannot cure the FSA's use of an improper baseline in its analysis of the CECP's impacts on ocean water. Under CEQA, information which is required to be contained in an EIR must be in the EIR. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of*

Rancho Cordova (2007) 40 Cal.4th 412, 442 ["To the extent the County, in certifying the FEIR as complete, relied on information not actually incorporated or described or referenced in the FEIR, it failed to proceed in the manner provided in CEQA."].) Furthermore, the information provided in the CEC staff attorney's memorandum is not admissible evidence since it neither identifies the source of the information nor otherwise establishes that it was prepared by a person qualified to assess ocean water impacts. (*See Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 579-580 [attorney's letter regarding potential impacts constitutes argument and unsubstantiated opinion, not substantial evidence].)

B. THE FSA'S ANALYSIS OF OCEAN WATER IMPACTS IS INADEQUATE AND INCOMPLETE BECAUSE IT FAILED TO ANALYZE THE CECP'S IMPACTS OVER THE LIFE OF THE PROPOSED PROJECT.

In its opening brief, CEC staff touts the benefits of the CECP in furthering the State's policy goal of "shutting down electric generation facilities that use ocean water for cooling." (Staff Opening Brief, p. 2.) Both the FSA and the applicant emphasize the amount of ocean water that no longer will be used when Units 1-3 are retired. (FSA, pp. 3-2, 4.9-27; Applicant Opening Brief, p. 5.) Staff's enthusiasm for the CECP is misplaced, and the FSA's analysis of ocean water impacts is inadequate, for two reasons.

First, with or without the CECP, facilities that use ocean water for cooling will be retired in the near future pursuant to the SWRCB's OTC Policy. (*See* Docket Log No. 59616, Memorandum and Attachment re Post-Evidentiary Hearing Developments, posted 5/28/10, Attachment 1.) As CEC staff testified at the evidentiary hearings, retirement of the entire Encina facility is "the only feasible response to the state water board's policy on once-through cooling." (RT, 2/03/10, p. 405, ll. 14-21 [D. Vidaver].) With or without the CECP, Encina Units 1-5 are expected to shut down pursuant to the OTC Policy by the end of 2017. As a result, the CECP can claim credit for eliminating the amount of ocean water used by Units 1-3 only for the brief period between the date the CECP may begin operations and 2017, when Units 1-3 will be required to shut down pursuant to the OTC Policy.

Second, the FSA failed to disclose and discuss the increased amount of ocean water that will be used over the anticipated operating life of the CECP. The FSA erroneously determined that a significant project benefit would be the reduction in Units 1-3's use of ocean water for cooling, without considering the short-term nature of any such reduction. Because it failed to consider the effect of the OTC Policy on Units 1-5, the FSA erroneously assumed Units 1-3 would be retired only if the CECP begins

operations. (FSA, pp. 4.9-27.) Thus, the FSA mistakenly concluded the impacts to ocean water would be less than significant because the CECP would use far less ocean water than Units 1-3 were permitted to use. (*Ibid.*) The FSA's conclusion is wrong because it failed to consider the amount of ocean water that will be needed over the life of the CECP after the existing Encina units are retired in 2017 pursuant to the OTC Policy.

CEQA requires a lead agency to evaluate a project's long-term impacts on water resources. (*Vineyard Area Citizens for Responsible Growth, Inc., supra,* 40 Cal.4th at pp. 430-431.) This evaluation is especially important where the project proposes the continuation or expansion of an existing use. For such projects, the lead agency must consider the impacts that will occur during the lifespan of the proposed expansion which extends beyond the date the existing use would end if the proposed expansion did not occur. (*South Fork Band Council, etc. v. U.S. Dept. of Interior* (9th Cir. 2009) 588 F.3d 718, 726 ["the mine expansion will create ten additional years of such transportation, that is, ten years of environmental impacts that would not be present in the no action scenario"].)

The FSA properly considered the CECP's near-term impacts on ocean water and found the impacts would be beneficial because the CECP would use less ocean water than Units 1-3, which would shut down when the CECP begins operations. However, the FSA failed to analyze the CECP's long-term impacts on ocean water after 2017, when Units 4 and 5 are likely to shut down pursuant to the OTC Policy. Although the applicant insists the CECP "could not function" without ocean water (Applicant Opening Brief, p. 16), the FSA failed to evaluate the increased amount of ocean water the CECP will use between 2017, when the existing Encina units are expected to shut down pursuant to the OTC Policy, and the end of the CECP's 50-year lifespan.

The opening brief of intervenor Terramar reveals the extent of the FSA's understatement of the CECP's impacts on ocean water by comparing the amount of ocean water that would be consumed by CECP over its projected 50-year lifespan with

the amount consumed by Units 1-3 during their remaining two-year lifespan. Although Units 1-3 would use approximately 17.2 billion gallons of ocean water in two more years of operations, the CECP would consume approximately 63 billion gallons of ocean water over its projected lifespan. Even if more conservative assumptions were used, the result would be the same: the long-term impacts of the CECP on ocean water (and the related impingement and entrainment of marine organisms) would be significant. As a result, the FSA's failure to disclose and discuss the CECP's long-term impacts on ocean water clearly violates CEQA. (*Vineyard Area Citizens for Responsible Growth, Inc., supra,* 40 Cal.4th at p. 441 ["An EIR that fails to explain the likely sources of water and analyze their impacts, but leaves long-term water supply considerations to later stages of the project, does not serve the purpose of sounding an 'environmental alarm bell' before the project has taken on overwhelming 'bureaucratic and financial momentum.'"].)

C. THE CECP WILL HAVE UNMITIGATED SIGNIFICANT IMPACTS ON LONG-TERM WATER SUPPLY.

In its opening brief, the City established the CECP would have unmitigated significant impacts on long-term water supply because the sources of water identified in the FSA were unavailable (recycled water) or uncertain (ocean water). (*See* City's Opening Brief, pp. 22-29.) In its opening brief, the applicant states that, because the City has insufficient supplies of recycled water to serve the CECP, the CECP design has been enhanced to incorporate "ocean-water purification and discharge through the EPS cooling water discharge system as key design features allowing for operation of the new units." (Applicant Opening Brief, p. 16.) As a result, the CECP "will be unable to operate" and "could not function" unless it can obtain water from Encina's ocean water discharge. (*Id.* at p. 16.)

The FSA is inadequate because it did not consider the Encina ocean water discharge system as the sole source of water for the CECP, did not evaluate the likelihood of water from Encina's ocean water discharge system actually being available after 2017 when the OTC Policy is expected to result in the shutdown of Units 4 and 5, and did not identify possible replacement sources of water and the potential environmental impacts associated with those contingencies. (*Vineyard Area Citizens for Responsible Growth, Inc., supra,* 40 Cal.4th at p. 431.) As the Supreme Court has succinctly stated, "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project." (*Id.* at pp. 431-432.)

While the FSA ignored the problem, the applicant simply assumed a solution. In correspondence between the applicant and the RWQCB regarding the source of the CECP's water after Units 1-5 are shut down, the applicant stated:

> If, at some point in the future, EPS Units 4 and 5 are to be retired, CECP will initiate discussions with the RWQCB (Regional Water Quality Control

> Board) regarding the appropriate requirements for CECP to amend the anticipated NPDES permit the RWQCB will issue to CECP. . . ."

(Exhibit 142, p. 2, Docket Log No. 54481, Correspondence from NRG to Michelle Mata, San Diego Regional Water Quality Control Board, dated 12/17/09.) Consistent with CEQA's requirements, the RWQCB rejected the applicant's invitation to defer the necessary analysis: "Well, we are trying to determine now whether at some time in the future those units will be taken offline. We need to consider that now, and not at a later date." (RT, 2/04/10, pp. 201-202 [M. Mata].)

The enhanced design of the CECP suggests additional uncertainty about the long-term availability of ocean water as the project's sole water supply. Documents describing the CECP's enhanced design refer to the use of ocean water for, among other things, "evaporative cooling water." (*See* Exhibit 39, Docket Log No. 47586, dated 8/15/08, NPDES Permit Application for the Carlsbad Energy Center Project, SWRCB Form 200, Attachment 1, p. 2.) Similarly, the applicant's Project Enhancement and Refinement Document, submitted to the CEC in July 2008, shows the project will consume 220 gpm of ocean water for evaporative cooling and will have an entrainment impact of 22.7 million fish larvae per year. (Exhibit 35, Docket Log No. 47257, dated 7/25/08, Project Enhancement And Refinement Document, Figures 2.2-6A and 2.2-6B.) The CECP's ability to obtain an NPDES permit to use ocean water for cooling purposes seems particularly uncertain in view of the SWRCB's recent adoption of the OTC Policy. For these reasons, the CECP will have unmitigated significant long-term impacts on water supply.

D. AN ADEQUATE FIRE ACCESS ROAD AND WATER SUPPLY ARE NEEDED IN THE EVENT OF A FIRE SAFETY EMERGENCY AND TO PROTECT PROJECT WORKERS.

CEC staff and the applicant take the position that the CECP provides roads of sufficient width to satisfy legitimate fire department concerns. They argue that the upper rim road will still be available, although on only three sides and narrower than required, and that the Carlsbad Fire Department failed to make the case for a 50-foot wide lower rim road. Their position ignores California Fire Code provisions which specifically authorize the Fire Department to increase the minimum width where necessary to ensure public safety and the testimony of Fire Department personnel that additional width is necessary because of the severely constrained nature of the proposed site. For the reasons set forth in detail in the City's opening brief, the Fire Department requires an upper rim road of at least 25 feet and a lower rim road of at least 50 feet for the safety of workers and emergency personnel.

CEC staff claims that the Fire Department failed to provide a "logical explanation" for a 50-foot wide lower rim road. (Staff Opening Brief, p. 47.) This claim ignores the fact that the lower rim road is not a "fire apparatus access road" under the California Fire Code and cars and trucks can park on the road. (RT, 2/04/10, p. 115, ll. 14-19 [Holden].) When the 20-foot footprint necessary for fire truck operations is taken into account, it is clear there is no room for vehicles to pass emergency apparatus and for fire personnel escape. (RT, 2/04/10, p. 53, ll. 6-25 [C. Heiser].)

CEC staff and the applicant also do not address the Fire Department's requirement for a looped water supply system connected to the Carlsbad Municipal Water District. (Direct Testimony, James Weigand, p. 5.) The Fire Department strongly recommended that this system be required to ensure a reliable supply of water for fire emergencies. (RT, 2/04/10, pp. 57-59 [J. Weigand].)

State law confers on local fire officials the authority and responsibility to evaluate and determine whether the minimum statutory width is sufficient or whether the particular characteristics of a proposed development site require additional width to ensure that fire and emergency access is adequate. (Cal. Fire Code §§ 503.2.1, 503.2.2.) The Legislature delegated this authority and responsibility to local fire officials in recognition of their unique expertise and knowledge of local conditions. No other entity can conduct this evaluation and make the determination required by the state Fire Code.

The City respectfully requests the Committee respect the extensive Fire Code and operating experience of City fire officials and carefully consider the implications of overriding the Fire Department's requirements for a 50-foot lower rim road, a 25-foot wide upper rim road, and a looped water supply system connected to the Carlsbad Municipal Water District.

E. CEC STAFF AND THE APPLICANT HAVE PRESENTED THIS COMMITTEE AND THE COMMISSION WITH AN UNSAVORY CHOICE – OVERRIDE CALIFORNIA FIRE CODE SECTION 503.2.2 OR OVERRIDE THE SIGNIFICANT VISUAL IMPACTS THAT WOULD RESULT FROM THE INABILITY TO SCREEN THE CECP.

Mr. Kanemoto testified that he believes the CECP can be successfully screened with 30 feet of screening and a 75-90 foot buffer area. (RT, 2/03/10, pp. 13-14 [Kanemoto].) Although a line of trees 30-feet high presents its own significant adverse impact at this coastal location, it does not appear that sufficient space is available even if the CECP's non-conformance with the state Fire Code were overriden.

If the CECP were required to comply with the California Fire Code, the amount of land available for visual mitigation would be reduced to 25 to 30 feet using Mr. Kanemoto's numbers. However, Dr. Greenberg did field measurements and concluded that with Caltrans' preferred "10+4 with barrier" configuration, there would be 45 feet available for visual-blocking vegetation "if a retaining wall is used." (RT, 2/04/10, pp. 36-37 [Greenberg]; FSA, p. 4.14-15.) Since no retaining wall has been proposed or evaluated by the parties, this conclusion cannot stand. One look at the photographs submitted by CEC staff, showing the edge of the Caltrans right-of-way (ROW), illustrates that there is little, if any, land available for visual mitigation, even with an override of the California Fire Code. (FSA, p. 4.14-27, Figures 1-4.)

Although not stated, it may be that CEC staff and the applicant intend to rely upon Caltrans to provide land for mitigation or to plant the vegetation on their ROW. However, CEC staff apparently is unaware that Caltrans made its Draft EIR/EIS available for public review approximately one month before CEC staff submitted its opening brief. (*See* Interstate 5 North Coast Corridor Project Draft Environmental Impact Report/Environmental Impact Statement, June 2010 [I-5 Draft EIR/EIS].) The Draft EIR/EIS identifies the CECP as a nearby project that will have visual impacts,

stating that "the Carlsbad Energy Center would also contribute to the degradation of visual along the corridor with removal of screening vegetation." (I-5 Draft EIR/EIR, p. 3.25-1.) The Draft EIR/EIS appears to confirm the City's position that the CECP and I-5 widening projects together will cause cumulative significant impacts on visual resources and public safety that cannot be mitigated. Although some visual mitigation could be gained with plantings on the Caltrans right-of-way, it is not clear that sufficient land exists for the anticipated screening. At any rate, the I-5 DEIR/EIS makes it clear that there will be insufficient room for the required fire roads.

In its opening brief, CEC staff stated that it met with Caltrans to discuss the future widening of I-5 and the potential impact on CECP, that the impact is "potentially severe" and the widening of I-5 would have an impact with or without the CECP. (Staff Opening Brief, pp. 37-38.) CEC staff said the alternatives provided by Caltrans would "require complete removal of the earthen berm and associated tall tree landscaping" at the eastern boundary of the project site. (Staff Opening Brief, p. 38, *citing* Exhibit 200, p. 4.12-26.) CEC staff reiterated a proposed condition, VIS-5, "that anticipates the I-5 widening and requires a new landscaped berm with vegetation to maximize growing time for trees that will replace those currently screening the project site. (Exh. 200, p. 4.12-29.)" (Staff Opening Brief, p. 39.)

It is now questionable whether the proposed condition could ever be met. CEC staff emphasized that "Staff has analyzed the project *as proposed by the Applicant*." [Emphasis of staff.] (Staff Opening Brief, p. 4.) In an effort to demonstrate that both the fire safety and visual mitigation concerns could be met, Dr. Greenberg wrote in his fire safety section of the FSA that:

> If the I-5 10+4 with Barrier configuration is chosen by Caltrans, the CECP at the closest point would have 45 feet available for visual-blocking vegetation and a protective barrier + security fence <u>if a retaining wall is used.</u> [Emphasis added.]

(FSA, page 4.14-15.) However, the CECP, as proposed by the applicant, never incorporated a retaining wall into the design of the project. Neither the CEC engineering staff nor any other party in this proceeding has reviewed any plans for such a retaining wall. Careful review is critical as the failure of a very high vertical wall could severely impact the CECP's operations, the safety of its workers and the adequacy of emergency access to the site.

Caltrans' Draft EIR/EIS describes a project that would widen the existing freeway next to the CECP from 8 lanes to a "10-plus-four" configuration, with 10 regular traffic lanes plus four HOV lanes. The widening project also will include additional features that will further increase the width of the freeway footprint, including either a barrier or a buffer between the regular lanes and the HOV lanes and a "Direct Access Ramp" (DAR) on the east side of the freeway north of Cannon Road and opposite CECP. The DAR structure would give vehicles access to the HOV lanes via ramps soaring over the regular lanes in the freeway's center, increasing the width of the freeway footprint even more. (I-5 Draft EIR/EIS, pp. 2-3.)

In addition, Caltrans intends to construct an auxiliary lane and a shoulder alongside the freeway's southbound lanes, and a bicycle/pedestrian path west of and separated from the auxiliary lane, immediately adjacent to the CECP. (I-5 DEIR/EIS, pp. 2-3, 2-10.) This path is described as "crossing from east to west following the southern shore of the lagoon. Switchbacks would ascend to meet the grades of a new trail <u>between the freeway and the power plant</u>. Walls and protective fencing would be required to enhance the safety of pedestrians or cyclists utilizing the trails in areas in close proximity with the rail lines and freeway." [Emphasis added.] (I-5 Draft EIR/EIS, p. 2-10.) This feature would further reduce the space between I-5 and the CECP, eliminating the east side of the upper rim road and potentially eliminating the space needed for an

adequate fire road in the CECP bowl. (*See* I-5 Draft EIR/EIS, pp. 2-58, 2-59, Appendix A, pp. A-36, A-37, copies of which are attached hereto.) [4]

Notwithstanding CEC staff's previous contacts with Caltrans regarding the I-5 widening project, it is difficult to conceive how the cumulative impacts of these two combined projects can be mitigated. The aerial photographs and other graphics provided in the I-5 Draft EIR/EIS show the freeway expansion extending across the existing tree-covered berm and apparently eliminating any possibility for a visual screen. CEC staff photographs that previously depicted the I-5 widening's demarcation are now obsolete. The photographs in section 4 of the FSA show red stakes marking the supposed limit of the freeway widening. (FSA, p. 4-14-27, Figures 2, 4.) However, those stakes were intended to reflect the "8 plus 4 plus barrier" alternative (FSA, p. 4.14-14) and do not appear to consider Caltrans' preferred "10 plus 4 plus barrier" alternative or the additional space that will be required for the auxiliary lane, shoulder and walled-off bicycle/pedestrian path described by Caltrans in the Draft EIR/EIS. (*See* I-5 Draft EIR/EIS, pp. 2-58, 2-59, Appendix A, pp. A-36, A-37.)

CEC staff's previous suggestion to wait until the I-5 widening project takes place before addressing the mitigation required to reduce the significant cumulative impacts of the combined the CECP and the I-5 widening project--to kick the can down the road, so to speak--is no longer feasible. It is also illegal (*Sundstrom v. County of Mendicino* (1988) 202 Cal.App.3d 296.*)* Deferring the identification of necessary mitigation measures is unlawful. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-93.) The can has come to rest on the west side of I-5, at the edge of

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[4] The proposed trail is described as a "community enhancement" feature which Caltrans would voluntarily provide as a benefit of the freeway expansion. Among other things, the trail improvements would include "a planting buffer to provide screening along the power plant perimeter." (I-5 Draft EIR/EIS, p. 2-10.) The planting buffer is part of the trail improvements and is not proposed as mitigation for visual impacts related to the CECP.]

the CECP's proposed site. As it is a certainty that the I-5 widening project will occur, it is imperative that the Commission look at the ultimate impacts from both projects.

Several images in the I-5 Draft EIR/EIS depict the magnitude of the expansion, which is projected to begin construction in 2021 and last until 2035. In Chapter 2 of the Draft EIR/EIS, Figure 2-2.14ae shows the footprint of the widened I-5 will eliminate the berm and any possibility of an upper rim road between the CECP and the freeway. (I-5 Draft EIR/EIS, p. 2-58.) This depiction also raises doubt that enough space exists for an emergency access road in the sunken bowl and accentuates City's concerns for the safety of emergency personnel who may be called upon to perform rescues at that location.

Other aerial photographs confirm these concerns. Figures 15 and 16 of Appendix A of the Draft EIR/EIS show the footprint of the freeway after its expansion south of Agua Hedionda Lagoon. (I-5 Draft EIR/EIS, pp. A-36, A-37.) These images also appear to show that the future freeway width will be greater than anticipated and will encroach directly on the existing upper rim road.[5]

City fire officials require a 50-foot-wide emergency access road in the CECP's bowl and a 25-foot-wide road on the bowl's upper rim. The I-5 Draft EIR/EIS confirms that the proposed placement of the CECP, between the Los Angeles-San Diego railroad and a freeway that will be dramatically widened beyond its current configuration, will leave no space for the upper rim road. The space remaining between the CECP and the expanded freeway will be so constrained that emergency personnel responding to incidents on the plant's eastern edge will have little or not room to work, no room to

[5] The remedy here is for the Committee to remand this issue to the applicant for more information and clarification. This is especially appropriate since Cal. Trans DEIR is now available. Adding a condition to require a retaining wall at this late juncture in the proceedings would be inappropriate since one has not been proposed and its impacts not yet studied.

pass other vehicles, and no egress east or west from that space should they become trapped.

CEC staff and the applicant present the Committee with a dilemma: should the Committee and the Commission override the CECP's non-conformance with California Fire Code Section 503.2.2 or override the significant visual impacts that will result from the inability to screen the CECP. While fire safety requirements and the I-5 widening will limit or preclude the visual mitigation screening required by Condition of Certification VIS-2 on the eastern side of the CECP, visual screening required on the western side will be limited or precluded by the sewer interceptor and lift station project because no structures or permanent vegetation can be located on top of a sewer line. (RT, 2/01/10, p. 206, ll. 1-6 [S. Donnell].)

The City provides the Committee with a solution that addresses these concerns, as well as the other issues of LORS non-conformance and unmitigated significant impacts discussed in the City's briefs: Deny the application at the proposed location without prejudice to the applicant's seeking a license at an appropriate non-coastal location in the City or elsewhere.

V.

THE CECP CANNOT BE APPROVED BECAUSE THERE IS NOT SUFFICIENT EVIDENCE TO SUPPORT A FINDING OF PUBLIC CONVENIENCE AND NECESSITY AND TO REJECT ALTERNATE LOCATIONS.

In its opening brief, CEC staff recommends that the Commission consider making "override" findings regarding the CECP's non-conformance with applicable LORS and its unmitigated significant impacts because of the overall benefits of the project. (Staff Opening Brief, p. 2; FSA, p. 1-9.) Other than a general description of alleged benefits, however, CEC staff fails to identify sufficient evidence in the record to support such findings.

The Warren-Alquist Act (Act) prohibits the approval of a project which does not conform with <u>any</u> state or local LORS unless the Commission determines that the project 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. Res. Code § 25525; 20 Cal. Code Reg. § 1752(k).) In making this determination, the Commission must 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." (*Ibid.*)

In a similar vein, CEQA prohibits the approval of a project which will have unmitigated significant impacts on the environment unless the Commission determines that there are no feasible alternatives and the benefits of the proposed project outweigh its adverse environmental impacts. (Pub. Res. Code § 21002; 14 Cal. Code Reg. § 15093.) As under the Act, a statement of overriding considerations under CEQA must

be supported by substantial evidence in the record. (*Woodward Park Homeowner's Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 717.)

An important corollary of the requirement that "overrides" must be supported by substantial evidence is that the alleged benefits of a project must be identified with specificity and accuracy. An agency's unsupported claim that a project will confer general benefits is not sufficient and a claim that misrepresents the alleged benefits will be emphatically rejected. (*Id.* at pp. 717-720; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1224.)

CEC staff's claims regarding the benefits of the CECP are neither specific nor accurate and are not supported by substantial evidence in the record. In its opening brief, CEC staff alleges the CECP "will further two of the state's policy goals for old power plants: shutting down electric generation facilities that use ocean water for cooling and replacing aging gas-fired generation with more efficient and flexible gas generation that will help integrate electric energy from increased reliance on renewable sources." (Staff Opening Brief, p. 2.) These allegations misrepresent the CECP's alleged benefits in two ways. First, although it would replace Encina Units 1-3, CEC staff admits the CECP will rely on once-through cooling for its operation. (*Id.* at p. 11.) Thus, the CECP will require the continued operation of Units 4 and 5 for water supply and wastewater discharge. Second, CEC staff fails to disclose that the alleged benefits could be provided by a new power plant located anywhere (RT, 2/03/10, p. 325, ll. 6-25 [D. Vidaver]) and that a non-coastal location would avoid virtually all of the LORS non-conformance and unmitigated significant impacts of the project.

CEC staff also alleges that the CECP will assist the State of California in meeting its extremely important energy policy goals. According to CEC staff, the CECP will meet the expanding need for new, highly efficient, reliable electrical generating resources in the San Diego "load pocket" and will integrate renewable power from wind and solar sources much more effectively than the older units it replaces. (Staff Opening Brief, pp. 1, 8, 41.) However, these general benefits can be provided by a new power plant in any

location. (RT, 2/03/10, p. 325 [D. Vidaver].) They also are not supported by substantial evidence and cannot be used as basis for the necessary overrides.

During the evidentiary hearings, CEC technical staff largely discredited the alleged project benefits and "critical reliability need" now touted in staff's opening brief. For example, CEC staff testified that:

- Q. "Then I'm trying to understand how you show that this specific plant is critical to renewable integration if you didn't do the specific analysis." A. "I don't think we ever said it's critical." (RT, 2/03/10, p. 303 [Walters].)

- Q. "Did you show that this plant is critical to renewable integration?" A. "I believe the FSA analysis does not say that." (RT, 2/03/10, p. 311 [Layton].)

- "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." (RT, 2/03/10, p. 325 [D. Vidaver].)

- "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." (RT, 2/03/10, p. 325 [D. Vidaver].)

- Upon retirement of Encina Units 1-5 pursuant to the SWRCB's OTC Policy, "replacement infrastructure can take the form of transmission, which allows for additional imports into local reliability areas . . . . Or they can take the form of no longer being necessary due to reduction in load in local reliability areas. Additional capacity either located in or outside a local reliability area, renewable generation. So there are a variety of resources that can be brought

to bear on -- that obviates the need for these facilities." (RT, 2/03/10, pp. 275-276 [D. Vidaver].)

As a result, the benefits which CEC staff now urges as grounds for Commission overrides are not supported by and conflict with the evidence in the record.

The alleged project benefits which CEC staff used to justify the rejection of alternate locations also is contrary to important state policies. According to the FSA, the primary advantage of the CECP's proposed coastal location over non-coastal locations is the existing transmission lines and related infrastructure at the Encina site. (FSA, pp. 6-1, 6-7, 6-9, 6-11.) However, the perpetuation of a "brownfield" use in a sensitive coastal location, which will require the indefinite continuation of once-through cooling, is directly contrary to the important state policies which require the retirement of once-through cooling systems under the SWRCB's OTC Policy and encourage the redevelopment of "brownfield" sites under the Community Redevelopment Law. (*See, e.g.,* Polanco Redevelopment Act, Health & Saf. Code § 33459, *et seq*., and California Land Reuse and Revitalization Act of 2004, Health & Saf. Code § 25395.10, *et seq*.)

CEC staff's reasons for rejecting alternate locations also conflict with the evidence in the record. For example, CEC staff asserts that the Maerkle, Carlsbad Oaks North, and CATO alternatives proposed by the City "would involve a panoply of environmental (and LORS) objections and obstacles. All three would result in a new industrial use within 2500 feet of residential dwellings, would require zoning and general plan amendments to be compatible with LORS, have greater noise, biological, and visual impacts, and would require considerably greater new infrastructure for water and transmission connections." (Staff Opening Brief, p. 43.) These assertions conflict with the evidence in several material ways.

First, CEC staff fails to acknowledge that it previously found the proposed CECP site would be within 0.44 mile, or 2,323 feet, of residences on the northeast, and would be within approximately 0.5 mile, or 2,600 feet, from many other residences the northwest

and southwest. (FSA, p. 4.1-20.) CEC staff's assertion regarding the CECP's proximity to nearby residences conflicts with the applicant's calculation, which states the CECP lies within 0.33 miles — 1,742 feet — of nearby homes. (Exhibit 26, Offsite Alternatives Analysis, 4/17/2008, Table 1, p. 5.) Contrary to CEC staff's assertion, therefore, the evidence shows the alternate sites are further away from nearby residences than the CECP.

Second, CEC staff's assertion that the alternate sites would require zoning and general plan amendments to be compatible with LORS ignores the many ways in which the CECP does not conform with state and federal LORS. It also disregards the City's willingness to work with the CEC and a project applicant to resolve any LORS inconsistencies that may exist at the alternate sites. (*See* RT, 2/03/10, pp. 434-455 [J. Garuba].)

Third, CEC staff's assertion that the alternate sites would have greater visual impacts than the CECP is contrary to the evidence discussed more fully in Section IV.E above. In addition, it ignores evidence which shows that approximately 190,000 motorists will pass the proposed CECP site daily, with their views of the coast interrupted by either the CECP and its stacks or by a tree-covered berm (I-5 Draft EIR/EIS, p. 1.3, Table 1.3.1), while only approximately 4,000 motorists daily travel Faraday Avenue, the arterial road nearest the Oaks North industrial park and the Fleet Maintenance Facility. (RT, 2/03/2010, p. 450, l. 10 [J. Garuba].)

Fourth, contrary to CEC staff's assertion, the CECP's biological impacts will clearly be greater than any of the alternate locations because the CECP would continue to draw 4.32 million gallons per day from the lagoon after the existing Encina facility is retired at the end of 2017, resulting in an estimated annual entrainment of 22.7 million fish larvae. (Exhibit 35, Project Enhancement and Refinement Document, p. 5-10.) Locating the project at any of the proposed alternate sites would result in no equivalent impact, as all are on disturbed sites and none is on the coast. For example, Carlsbad Oaks North, where the City proposed a plant with partner Pattern Energy, is a planned industrial

park that is already graded. (Exhibit 26, Offsite Alternatives Analysis, 4/17/2008, p. 5, Table 1.)

Fifth, CEC staff's assertion that alternate sites would require considerably greater new infrastructure for water and transmission is mistaken, given that the CECP would require an ocean-water desalination plant and the alternate sites would require only the installation of pipes connected to Encina Wastewater Authority's water reclamation plant. Oaks North is adjacent to that pipe, so the impact would be nonexistent. (Direct Testimony, Joe Garuba, p. 10.) In addition, the City and Pattern Energy proposed undergrounding transmission lines to minimize any impact, an action not proposed by the CECP. (RT, 2/03/2010, p. 441, ll. 12-21 [J. Garuba].) As a result, CEC staff's assertions regarding alternate sites generally reflect the positions it took early in the process, discounting or ignoring evidence in the record which shows the alternate sites are feasible and more appropriate.

The benefits which CEC staff now urges as grounds for Commission overrides are not supported by and conflict with the evidence in the record. As discussed in the City's opening brief, none of the purported benefits or justifications rises to the level used to support overrides for the four power plants approved by the Commission since the restructuring of California's energy market.

The applicant does not address the lack of evidence in support of overrides because it continues to insist, quite incorrectly, that the CECP will not have any unmitigated significant impacts under CEQA or LORS conformance issues. As the moving party in this proceeding, the applicant had the burden of proof and the burden of producing evidence in support of the need for the CECP, the likelihood that adverse environmental impacts can be avoided or mitigated, the likelihood the project will comply with applicable LORS, and the suitability of the site. (20 Cal. Code Reg. § 1723(a).)

The applicant's failure to meet the burden of proof is extremely important to the disposition of this proceeding. To date, the applicant has not provided any evidence in

support of the purported benefits of the CECP. Equally importantly, the applicant has failed to demonstrate, with substantial evidence, the need for the proposed project. A power purchase agreement with the local utility is one way to demonstrate that the project is needed to meet the reliability and operational needs of the service territory.

The City acknowledges that such an agreement is not a prerequisite to approval by the Commission. However, the provision of a power purchase agreement is one way for a project applicant to demonstrate that the local utility and the California Public Utilities Commission agree the project is necessary to meet the reliability and operational needs of the service territory. As CEC staff testified in the evidentiary hearings: "[I]f they are needed, they will get a power purchase agreement and they will operate. If they are not needed, they may not get a power purchase agreement and they will not operate." (RT, 2/03/10, p. 258, ll. 21-24 [Layton].)

SDG&E's decision to enter into a power purchase agreement with the Pio Pico Energy Center, and not the applicant, is powerful evidence that the CECP is not needed. (Pio Pico Energy Center, 2010-AFC-01, p. 2-3.) As CEC staff clearly stated during the evidentiary hearings: "If San Diego Gas & Electric has said that it does not intend on entering into a power purchase agreement with a generator in the northern part of the county because it doesn't feel it's necessary, I would assume—I would conclude that San Diego doesn't feel it's necessary." (RT, 2/03/10, p. 341, ll. 5-11 [D. Vidaver].)

The general nature of the CECP's alleged benefits, their inconsistency with the project's reliance on the continued operation of Encina's once-through cooling system, and their lack of evidentiary support in the record combine to make the court's admonition in the *Woodward Park Homeowners Assn.* case, *supra*, particularly apt here:

> We believe a statement of overriding considerations, like an EIR, must make a good-faith effort to inform the public. In *Sierra Club v. Contra Costa County, supra,* 10 Cal.App.4th at page 1223, the court acknowledged that a statement of overriding considerations represents an

> agency's policy decision, but concluded that it still must have a foundation in the record. Likewise, the statement's status as a policy judgment does not insulate it from CEQA's central demand that environmental decisions be made after the public and decision makers have been informed of their consequences and the reasons for and against them. The statement's purposes are undermined if its conclusions are based on misrepresentations of the contents of the EIR or it misleads the reader about the relative magnitude of the impacts and benefits the agency has considered.

(*Woodward Park Homeowner's Assn., supra,* 150 Cal.App.4th at p. 718.) For these reasons, the City respectfully submits that there is insufficient evidence in the record to support overrides of the CECP's non-conformance with state and local LORS and its unmitigated significant impacts on the environment.

CONCLUSION

The absence of evidence of a strong, specific and urgent statewide or regional need for the CECP means that the Committee's decision basically boils down to a land use determination. Through their comments and recommendations in this proceeding, the City and the Redevelopment Agency have attempted to educate CEC staff and to assist the Committee in understanding the unique land use issues associated with the proposed coastal location of the CECP. Because the most important issues in this proceeding relate to land use rather than energy, the City and the Redevelopment Agency urge the Committee to accord their recommendations the respect which they deserve in interpreting and applying their own land use regulations.

The City's and the Redevelopment Agency's request to honor their recommendations is warranted for an additional reason. As it has stated throughout this proceeding, the City is not opposed to another power plant within its jurisdiction and is willing to host a new regional power plant at an appropriate non-coastal location. The City and Redevelopment Agency believe the evidence clearly shows the CECP is simply the wrong plant in the wrong place. On the eve of the Encina facility's impending closure pursuant to the State's OTC Policy, it would be a terrible injustice if the CECP were approved at the Encina site, excluding future generations of Californians from the use and enjoyment of a magnificent coastal resource for another 50 years.

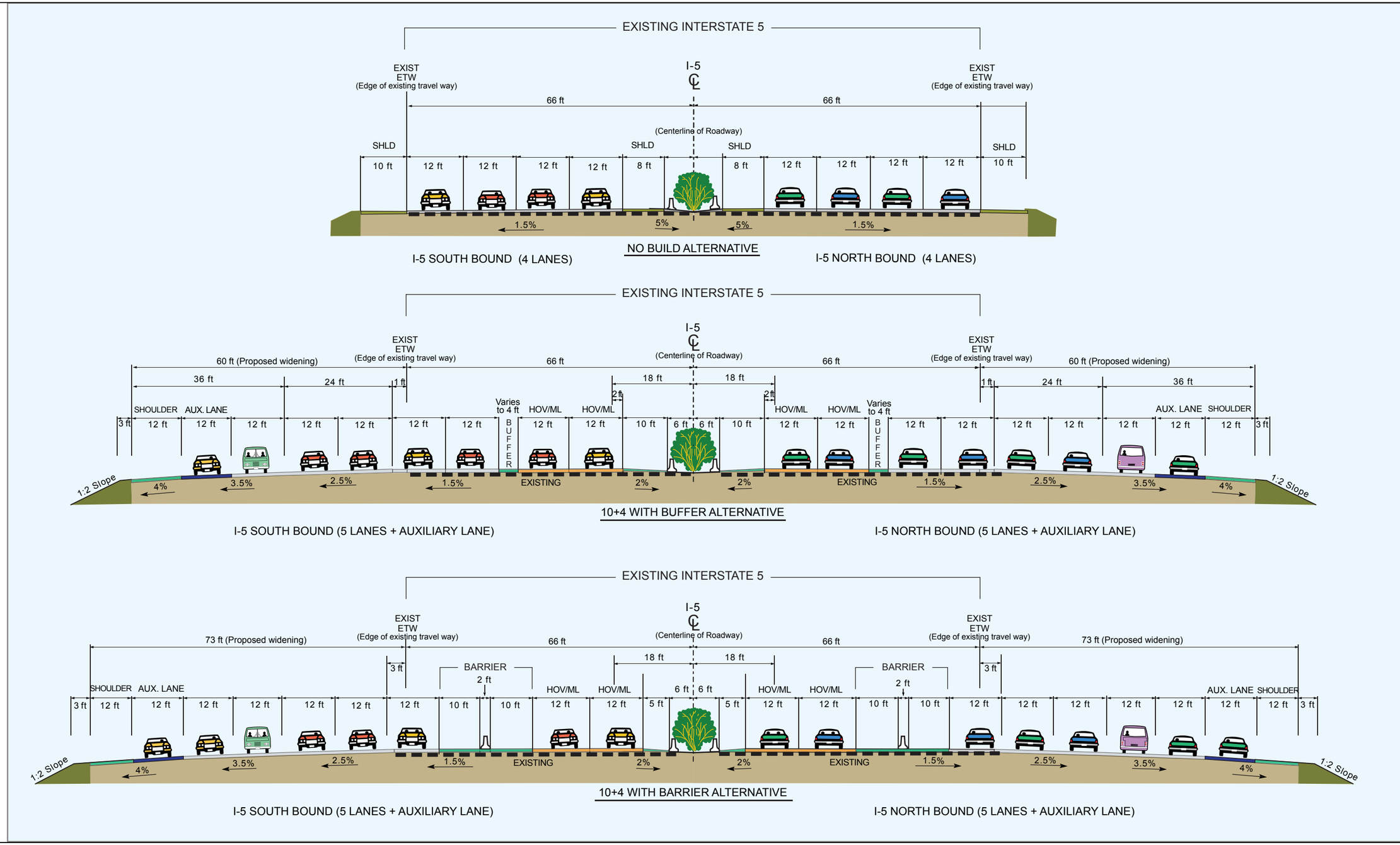

Figure 2-2.10: Typical Cross-section for 10+4 Barrier and Buffer Alternatives

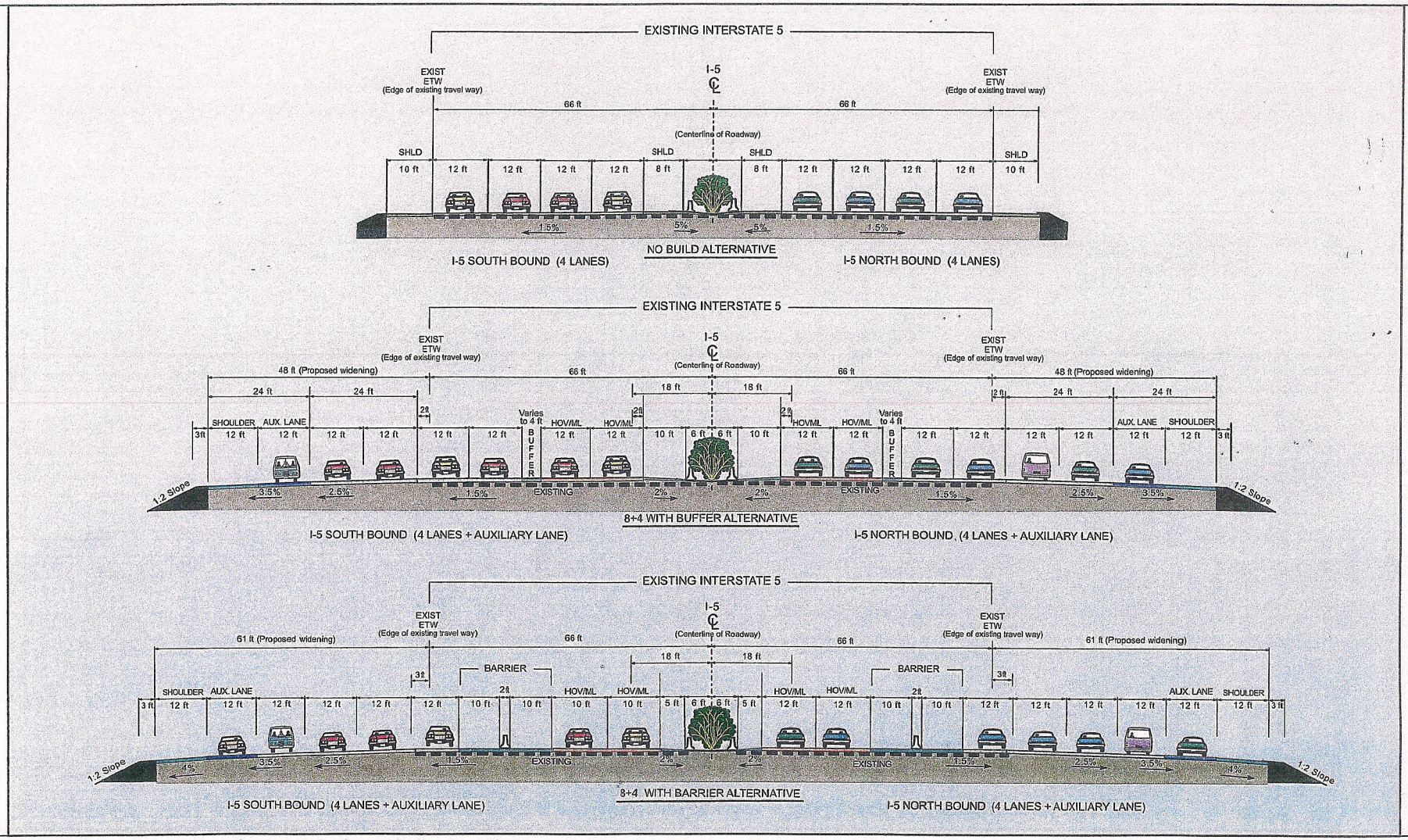

Figure 2-2.11: Typical Cross section for 8+4 Barrier and Buffer Alternatives

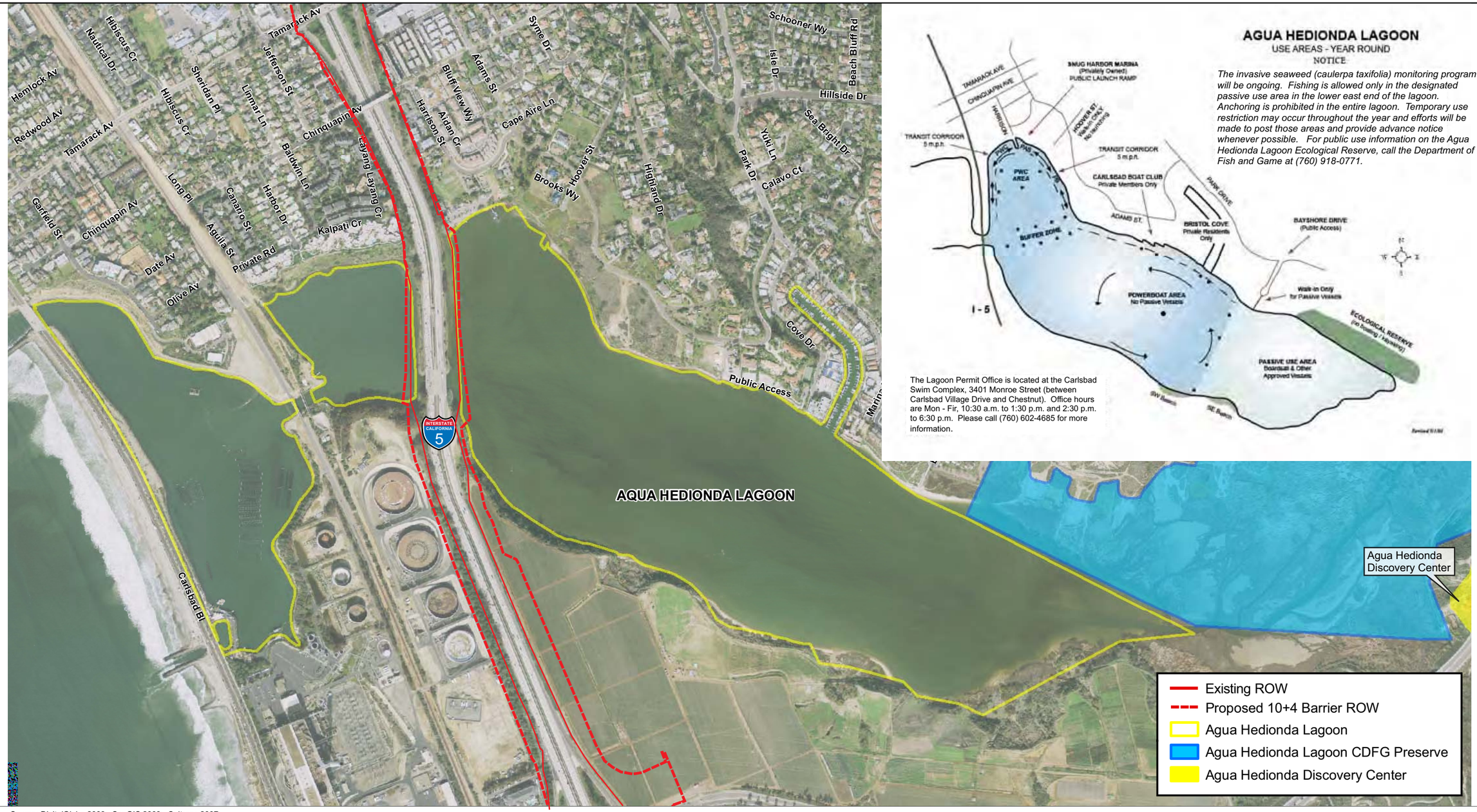

Figure 15
Agua Hedionda Lagoon

Source: DigitalGlobe 2008; SanGIS 2009; Caltrans 2007

200 100 0 200 Feet

Scale: 1:2,400; 1 inch = 200 feet

Figure 16
Impacts to Agua Hedionda Lagoon

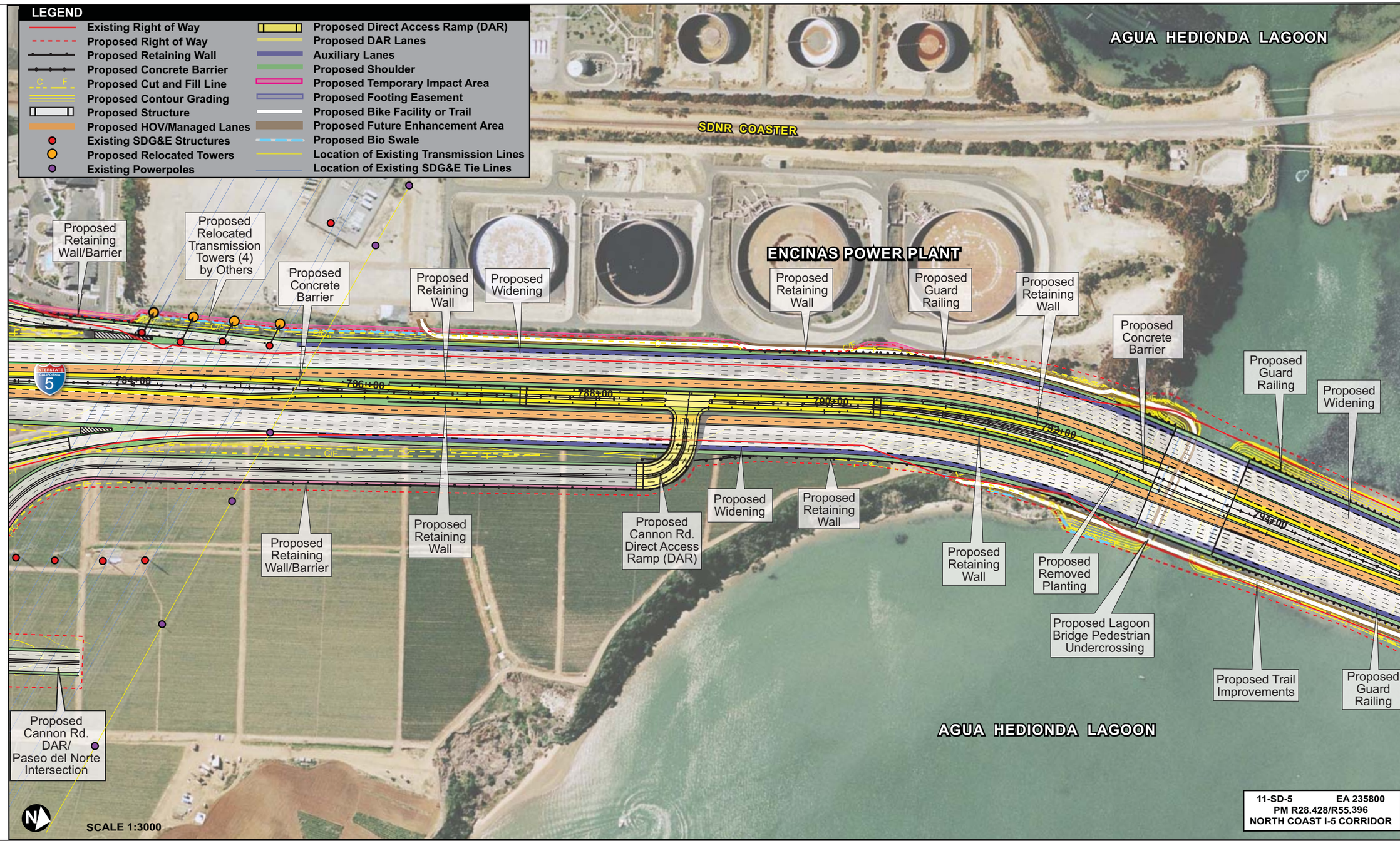

Figure 2-2.14ae Project Features Map: 10+4 Buffer Alternative

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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APPLICATION FOR CERTIFICATION FOR THE *CARLSBAD ENERGY CENTER PROJECT*

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

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DECLARATION OF SERVICE

I, Flora Waite declare that on October 11, 2010, I served and filed copies of the attached Reply Brief, dated Oct. 11, 2010. 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:

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

_____ by personal delivery;

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For filing with the Energy Commission:

_X_ 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.

*indicates change