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Energy Resources Conservation and  
Development Commission

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In the Matter of: )  
Application for Certification for the )  
Carlsbad Energy Center Project )  
(CECP) )  
\_\_\_\_\_ )

Docket No 07-AFC-6

City of Carlsbad and Carlsbad Redevelopment Agency  
Comments and Assignments of Error re Presiding Member's Proposed Decision

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## TABLE OF CONTENTS

<b>INTRODUCTION.....</b>	<b>1</b>
<b>SUMMARY OF ARGUMENTS.....</b>	<b>5</b>
<b>KEY LEGAL FLAWS IN THE DECISION .....</b>	<b>7</b>
1. Conformance with the California Coastal Act.....	7
2. Conformance with the California Fire Code .....	11
3. PMPD Fails to Conform with the California Redevelopment Act –Extraordinary Public Benefits .....	15
4. Necessity for Override Findings and Lack of a Basis for Override .....	17
5. Conformance with CEQA – Flawed alternatives analysis and lack of a Reasonable Range of Alternatives.....	23
6. Conformance with CEQA – Future Water Supply without Encina Units 4 & 5 .	24
<b>COMMENTS ON PROPOSED DECISION .....</b>	<b>25</b>
1. Fast-Track Decision .....	25
2. Introduction .....	26
3. Project Description.....	26
4. Project Alternatives .....	27
5. Worker Safety/Fire Protection.....	28
6. Soil and Water Resources .....	29
7. Land Use .....	31
8. Socioeconomics.....	34
9. Visual Resources .....	35
<b>ASSIGNMENTS OF ERROR IN PROPOSED DECISION .....</b>	<b>37</b>
<b>I. PROJECT DESCRIPTION.....</b>	<b>37</b>

A.	The PMPD's Description Of The Project Is Incomplete Because It Fails To Include The Retirement Of Units 4 And 5 As A Reasonably Foreseeable Future Phase Of The CECP. ....	38
B.	The PMPD's Failure To Consider The Anticipated Retirement Of Units 4 And 5 Results In Unlawful Piecemeal Environmental Review.....	41
C.	At Minimum, CEQA Requires The SWRCB's OTC Policy To Be Evaluated As A Cumulative Project. ....	44
<b>II.</b>	<b>PROJECT ALTERNATIVES. ....</b>	<b>46</b>
A.	A Reasonable Range Of Alternatives In The CECP's Proposed Service Area Has Not Been Evaluated. ....	46
B.	The PMPD Erroneously Rejected The "No Project" Alternative. ....	49
C.	The PMPD Improperly Emphasized Certain Project Objectives To Exclude Meaningful Consideration Of Reasonable Alternatives.....	50
<b>III.</b>	<b>Worker Safety and Fire Protection.....</b>	<b>59</b>
A.	The CECP Will Have Unmitigated Significant Impacts on Emergency Access and Public Safety. ....	59
B.	The Proposed 28-Foot-Wide Road Within The Bowl Is Too Narrow To Permit Emergency Personnel To Do Their Jobs.....	60
C.	The CECP And The Proposed Widening Of The I-5 Freeway Will Have An Unmitigated Significant Cumulative Impact On Emergency Access By Allowing Insufficient Room For A Continuous Rim Road Around The Plant. ....	66
D.	The Proposed Access Route On Plant Grounds Is Inadequate Because It Will Delay Emergency Response Time.....	68
E.	The Potential Impacts To Emergency Access And Worker And Public Safety Have Been Understated. ....	68
<b>IV.</b>	<b>SOIL AND WATER RESOURCES.....</b>	<b>72</b>

A.	The CECP Will Have Unmitigated Significant Impacts On Water Supply Resources.....	72
1.	Recycled Water. ....	72
2.	Ocean Water.....	74
B.	Cumulative Significant Impacts On Water Supply Are Unmitigated. ....	76
1.	Recycled Water. ....	77
2.	Ocean Water.....	78
C.	The CECP Will Have Unmitigated Significant Impacts On Long-Term Water Supply. ....	80
D.	The Analysis Of Ocean Water Impacts Is Erroneous Because It Used The Wrong Baseline For Evaluating Potential Significant Impacts.....	82
E.	The Analysis Of Ocean Water Impacts Is Erroneous Because It Failed To Analyze The CECP’s Impacts Over The Life Of The Project. ....	84
<b>V.</b>	<b>CONSISTENCY WITH THE CALIFORNIA COASTAL ACT.....</b>	<b>86</b>
A.	The Coastal Commission Should Have Participated In This Proceeding And Provided A Written Report On The Suitability Of The Proposed Site. ....	87
B.	Public Resources Code Section 30413 Requires The Coastal Commission To Provide A Formal Report In These Proceedings. ....	87
C.	The PMPD’s Conclusion That A Formal Report From The Coastal Commission Is Not Required Is Erroneous. ....	92
D.	The CECP Is Not A Coastal Dependent Facility And Thus Cannot Be Approved At A Location In The Coastal Zone.....	95
E.	The CECP Is Not Consistent With Other Provisions Of The Coastal Act.	99
<b>VI.</b>	<b>CONSISTENCY WITH COMMUNITY REDEVELOPMENT LAW. ....</b>	<b>105</b>

A.	The CECP Is Not Consistent With The Community Redevelopment Law And Will Not Serve An Extraordinary Public Purpose As Required By The Applicable Redevelopment Plan.....	107
B.	The Redevelopment Agency Acts As An Arm Of The State In Redevelopment Matters And Is A Separate Entity From The City. ....	110
C.	The Redevelopment Agency Addresses Matters Of Statewide Concern In Implementing The South Carlsbad Coastal Redevelopment Project. ....	111
D.	The Redevelopment Agency Is Charged With The Responsibility For Implementing Planning, Land Use And Construction Requirements That Will Achieve State Policies On Redevelopment.....	113
<b>VII.</b>	<b>CONSISTENCY WITH LOCAL LAND USE LORS.....</b>	<b>115</b>
A.	The PMPD Does Not Recognize the Inconsistency with Local Laws nor Recommend Overriding Them.....	116
B.	The PMPD Decision Is Contrary To Fundamental Principles Of Land Use LORS.....	117
1.	The CECP Is Inconsistent With The City’s General Plan.....	119
2.	The CECP Does Not Constitute A “Public Utility” Under The City’s General Plan and Zoning Ordinance.....	122
3.	The CECP Is Not Consistent With SP-144. ....	125
4.	The CECP Is Inconsistent With The Requirement For A Precise Plan. ....	126
5.	The CECP Is Inconsistent With Applicable Development Standards. ....	127
6.	The CECP Is Inconsistent With The City’s Moratorium On The Development Of New Power Plants. ....	128
7.	The CECP Is Inconsistent With The Coastal Rail Trail. ....	130
<b>VIII.</b>	<b>VISUAL RESOURCES.....</b>	<b>131</b>
<b>CONCLUSION</b>	<b>.....</b>	<b>138</b>

## INTRODUCTION

The City of Carlsbad (City) is greatly disappointed with and deeply concerned about the Presiding Member's Proposed Decision (PMPD). For over 60 years, the Carlsbad community has lived with the Encina Power Station. As this power plant approaches the end of its useful life, the Committee is poised to impose on the citizens of Carlsbad a new power plant that will last at least another 30 years in a location that is no longer appropriate for these type of industrial uses and is not designed in a manner that respects the character of this coastal city.

The City understands the importance of electricity to our society and is not opposed to a new power plant within its jurisdiction. In that spirit, the Carlsbad Redevelopment Agency (Redevelopment Agency) tried to work with the applicant prior to its filing an AFC to develop a smaller, more efficient power plant. As Redevelopment Agency staff testified, they were led to believe by the applicant that a smaller plant would be constructed on the site within an office building type structure. However, instead of replacing the Encina Power Station with a smaller facility located in an office building type structure, the applicant is asking the Committee to replace the existing 321 megawatts of Units 1-3 with a large, 558-megawatt, 135-foot high, industrial structure.

The City worked with other power plant developers and the Energy Commission subcommittee during this proceeding to identify and develop viable alternative locations, one of which was submitted into San Diego Gas and Electric Company's (SDG&E) RFO process. Unfortunately, the CEC staff and Committee limited the evaluation of alternative sites only to those located in the City of Carlsbad and ignored the environmental benefits of locating a power plant outside the coastal zone. The staff and Committee also gave preference to a project whose owner chose to rely on ocean water, rather than work with the City to obtain reclaimed water<sup>1</sup>.

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<sup>1</sup> As City staff testified in its written testimony (City Testimony, J. Garuba, p. 14, Question 25 and 26), at the hearing on February 4, 2010 (Hearing Transcript, p. 467, l. 13 – p. 468, l. 23) and at the PMPD

During this proceeding, the City was accused by the CEC staff of being biased against the project and by the Committee of having a land use process that is “complex” and a “policy and regulatory puzzle.” These accusations ignore the fact that the Energy Commission sub-committee has demonstrated a natural bias toward approving new power plants at existing sites and the fact that the Commission’s permitting process itself is unique in California government and is overly complicated to anyone that is not extremely familiar with it.

In reaching the PMPD, the Committee has either ignored or incorrectly interpreted several important legal requirements. Among these requirements are:

1. The California Coastal Act (Public Resources Code Section 30101) requires that an industrial facility can be located within the coastal zone only if it is “coastal dependent.” The Coastal Act defines a coastal-dependent development or use as “any development or use which requires a site on, or adjacent to, the sea to be able to function at all”. Rather than using this clear legal definition, the Committee attempts to interpret this clear statutory language away as discussed in detail below.
2. California Fire Code Section 503.2.2 states: “The *fire code official* shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations.” [Emphasis added.] Rather than incorporating the Carlsbad Fire Chief’s access requirements into its decision, the Committee in a rather alarming way deferred to the CEC staff, which has had no experience fighting fires and is not directly responsible for the safety of the City’s fire personnel or its citizens. As discussed in detail below, the Fire Chief’s requirements are fully supported by lessons learned from the recent Palomar plant fire and comments from the Escondido Fire Chief. The Commission cannot legally ignore the requirements identified by the Carlsbad Fire Chief.
3. The Redevelopment Agency which adopted the South Carlsbad Coastal Redevelopment Plan, as the arm of the State implementing redevelopment law in

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Hearing (Hearing Transcript, p. 56, l. 18 – p. 64, l. 13), City reclaimed water can be made available to the CECP if it is willing to fund the necessary system upgrades.

Carlsbad, requires development within the plan area to provide an “extraordinary public benefit”. As discussed in detail below, the CECP clearly does not comply with this requirement. The Committee implied during the hearings that removal of the Encina Power Station may be considered such a benefit and urged the City and applicant to propose a condition to this effect. The City explains why this is a legal requirement that cannot be ignored in the CEC’s decision. While the Redevelopment Agency worked with the City and the applicant to develop a condition that provides for the ultimate removal of the existing Encina Power Station, the Redevelopment Agency does not believe that this condition alone will satisfy the finding of “extraordinary public benefit” due to the scale of the proposed CECP and its negative impacts on the community.

4. The California Environmental Quality Act (CEQA) and its implementing guidelines require a lead agency to consider the cumulative impacts of the CECP, including “[a] list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency.” (14 Cal. Code Reg. § 15130(B)(1)(a).) The CEC staff and the Committee never fully evaluated the implications of the closure of Encina Power Station Units 4 and 5 pursuant to the State Water Resources Control Board’s once through cooling policy or the proposed widening of Interstate 5 described in the Caltrans Draft Environmental Impact Report.

The City and the Redevelopment Agency (hereinafter sometimes referred to as “City”) strongly urge the full Commission to deny the proposed project. The City recognizes, however, that the Commission has the authority to override the Coastal Act and the Fire Code requirements provided it makes the required findings of public convenience and necessity. As pointed out in these comments, the City does not, however, believe there is substantial evidence in the record to make these findings even if the Commission “cherry-picks” from the CEC staff’s testimony. Oral comments from the California Independent System Operator during the PMPD hearing supported development of the project because of broad regional and system benefits, but did not address the issue of other means of providing those benefits.

In contrast, on the same day as the PMPD hearing, SDG&E submitted a filing and sworn testimony to the California Public Utilities Commission seeking approval of three

power purchase agreements with a combined total of 450 megawatts located in the San Diego load area.<sup>2</sup> As SDG&E testified in that filing:

“...with the resources additions that are proposed in this Application, the SDG&E load pocket will have sufficient resources to meet total local RA (resource adequacy) needs for all customers. It also shows that sufficient resources would exist to allow for the full retirement of the Encina Power Plant prior to the end of 2017, the date at which it would need to meet the State’s new OTC policy.” (Prepared Direct Testimony Of San Diego Gas & Electric Company In Support Of Application For Authority To Enter Into Purchase Power Agreements With Escondido Energy Center, Pio Pico Energy Center And Quail Brush Power, Public Version, p. 12, l. 21 – p. 13, l. 3.)

On the last day of the PMPD hearing, Commissioner Boyd asked the applicant this critical question: “But is SDG&E likely to want energy from your new units, rather than from units four and five as it relates to why they have tolling agreements even for four or five? Can you say the new units would be more efficient and -- and provide less expensive or no more expensive energy to SDG&E should they want this backup?” (Hearing Transcript, May 20, 2011, p. 9, l. 18.) The answer to this question is provided by SDG&E in its PUC filing. SDG&E does not want either the energy from the new CECP units or Encina Units 4 and 5. SDG&E instead wants energy from power plants using a different technology at sites located outside the coastal zone.

To assist the Commission is evaluating the errors in the PMPD, the City has organized its comments into two sections. The first section provides the City’s comments on

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<sup>2</sup> See Application Of San Diego Gas & Electric Company (U 902 E) For Authority To Enter Into Purchase Power Tolling Agreements With Escondido Energy Center, Pio Pico Energy Center And Quail Brush Power, and Prepared Direct Testimony Of San Diego Gas & Electric Company In Support Of Application For Authority To Enter Into Purchase Power Agreements With Escondido Energy Center, Pio Pico Energy Center And Quail Brush Power Project, filed May 19, 2011. In its application to the PUC, SDG&E did not propose a power purchase agreement for any portion of the CECP.

certain portions of the PMPD; and the second section identifies the legal and factual errors in the PMPD.

## **SUMMARY OF ARGUMENTS**

A summary of the major arguments against the PMPD and why it should not become the Commission's decision:

### Lack of Coastal Commission Participation

The Coastal Commission did not participate in this decision, did not prepare a report and, indeed, did not decline to participate or act at all. Instead, its Executive Director sent a few letters begging off. This all could have been avoided if the staff or PMPD had listened to the concerns of the City and the Redevelopment Agency.

### The CECP Is Inconsistent with the Coastal Act

Even though the Coastal Commission did not prepare a report as required in this proceeding it found that another power plant at this location was inconsistent with the Coastal Act when this question was asked of it. This is the best evidence of the Coastal Commission's determinations and a few comments by Commission staff cannot change that.

### If the Coastal Commission's Report Is Not the Best Evidence Then Carlsbad's Report Is

The City of Carlsbad has a certified local coastal program and it is in the best position to determine whether or not the CECP is consistent with the Coastal Act. Its thorough report finds that it is inconsistent.

The Commission Can Only Substitute Its Determination of Coastal Consistency  
After It Has Considered the Coastal Commission's Report

The only proper remedy for the Commission at this point is to remand this issue to staff to seek to obtain a report from the Coastal Commission.

The CECP Does Not Conform to Numerous LORS but Especially  
the California Fire Code and There are No Overriding Findings

The Legislature has given the Commission paramount jurisdiction over local laws and it can exercise it in appropriate cases. What it cannot do is substitute its judgment for a local law. The PMPD is replete with instances where it overrides local laws sub silencio but does not exercise its paramount jurisdiction. These are grievous errors throughout the PMPD and represent an abuse of discretion and a failure to follow the law and to exercise its jurisdiction appropriately.

There Are No Extraordinary Public Benefits

The local law requires extraordinary public benefits to the citizens of Carlsbad. There are no extraordinary public benefits to the citizens of Carlsbad in this case as determined by the Carlsbad Housing and Redevelopment Agency. If there are no extraordinary local benefits, then the Commission can override that local law by making the appropriate findings but what it cannot do is to ignore the local law. The PMPD in essence ignores the local law and substitutes its judgment for the local legislative body. The appropriate remedy in this case is to remand the PMPD to the presiding member for further proceedings to recognize the local law or amend the recommendation to override it.

## The Alternatives Analysis Is Flawed and Did Not Consider New Information Available

The City's and the Redevelopment Agency's proffered evidence by way of official notice is highly relevant to the PMPD's alternatives analysis and, indeed, calls it into question at the most basic levels. When all is said and done, the Commission should not ignore this new evidence since its job is to license power plants that are necessary and appropriate when they are licensed. In this case, the new evidence demonstrates that power from this plant at this location at this time is not necessary.

### **KEY LEGAL FLAWS IN THE DECISION**

The City and the Redevelopment Agency believe there are numerous flaws in the legal underpinnings of the Committee's decision. These are discussed in the following sections.

#### **1. Conformance with the California Coastal Act**

The PMPD did not properly consider the applicable laws of the State of California, specifically the Coastal Act, with respect to the approvability of the proposed CECP in the coastal zone. The CEC is charged with "making findings on the conformity of a site and the applicable ...state...standards. (Public Resources Code (PRC) section 25523 (d) (1)). The PMPD misapplied the Coastal Act by ignoring the standard for approval of coastal dependent industrial facilities as well as the undisputed testimony regarding that standard. Instead, as will be demonstrated below, the PMPD assumed the conclusion of coastal dependency rather than applying the clear and specific statutory standard of PRC section 30101.

Under the Coastal Act, development proposed to be located within the coastal zone must be found to be "in conformity with (the policies of) Chapter 3 (commencing with Section 30200)" of the Coastal Act. (PRC section 30604 (a)). Under narrowly defined

circumstances, development that is not in conformity with Chapter 3 may still be approved. One such circumstance is provided in PRC section 30260, which provides that:

“...where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.”

That is the Coastal Act provision upon which the PMPD relies in finding the proposed CECP to be consistent with the Coastal Act. There is no question in the record that the proposed CECP is inconsistent with the policies of Chapter 3 of the Coastal Act. The PMPD does not assert otherwise. Instead it purports to find that the project is a coastal dependent industrial facility, and thus to find that the proposed project is consistent with PRC section 30260. However, nowhere in the PMPD is there any attempt to find that the proposed CECP is consistent with PRC section 30101, which clearly defines coastal dependent development. That section provides that a “coastal-dependent development or use’ means any development or use which requires a site on, or adjacent to, the sea to be able to function at all”. As the record and Proposed Decision makes clear, (CEC Staff, Final Staff Assessment, page Project Description 3-2; Presiding Member’s Proposed Decision, page Project Description 3), the proposed CECP does not require a site on or adjacent to the sea to be able to function at all. While the original units of the Encina Power Station relied on a once-through cooling technology that required a location adjacent to the sea, the CECP is designed to use either ocean water or reclaimed water<sup>3</sup>. The technology can, in fact, use water from virtually any source.

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<sup>3</sup> As City staff testified at the PMPD Hearing (Hearing Transcript, page 58 line 10 to page 64 line 13) as well as in its written testimony (City Testimony, page Garuba-14, Question 25 and 26) and at the hearing on February 3, 2010 (Hearing Transcript, page 467 line 13 to page 468 line 23), City reclaimed water has been and is available to the applicant for use in this power plant if they are willing to fund the necessary system upgrades.

Because it does not require a site on or adjacent to the sea to be able to function at all, the CECP does not meet the definition of coastal dependent development. (See uncontested written direct testimony of Ralph Faust, p. Faust-9)

Perhaps aware that the proposed project is not consistent with PRC section 30101, the PMPD attempts a convoluted side-step by attempting to rely upon the language of PRC section 30260. The PMPD begins by quoting PRC section 30255, which provides that coastal dependent developments have priority over other developments on or near the shore line. It then finds that the CECP is “located at the existing EPS, which is a ‘coastal dependent use’...inasmuch as it uses once-through cooling technology”. It then notes that PRC section 30260 encourages coastal dependent uses to expand “within existing sites”, and on this basis asserts that the CECP is consistent with the Coastal Act policy that prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the Coastal Zone.

The flaw in this argument is that the PMPD assumes the conclusion of coastal dependency without ever comparing the proposed plant’s technology with the specific definition of “coastal dependent development” in PRC section 30101. The basic fact that the PMPD ignores is that the CECP is perfectly capable of functioning at a site that is not on or adjacent to the sea. Since that is the case, the CECP is not a coastal dependent development. While PRC section 30260 encourages coastal dependent uses to locate or expand within existing sites, the CECP is not a coastal dependent use, and thus does not meet the terms of that section. The fact that the existing EPS is coastal dependent because of its dated technology is irrelevant to the issue of whether the proposed CECP is coastal dependent. Nor is it accurate or relevant in the context of the present proposal to suggest, as is stated in the PMPD, that the Coastal Act “prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the coastal zone”. The choice is not where in the coastal zone to locate the CECP; the choice is whether to locate it in the coastal zone at all. The only power plants that are permitted to locate in the coastal zone despite being inconsistent with the policies of Chapter 3 of the Coastal Act are those that meet the definition of

coastal dependent development. This brings the analysis right back to PRC section 30101, the definition of “coastal dependent development” that the PMPD completely ignores. Because the proposed CECP does not meet the Legislative definition of coastal dependency, it cannot be found to be consistent with the Coastal Act, and thus cannot be approved as consistent with LORS.

As a secondary justification, the PMPD asserts that “because the City of Carlsbad is unable to supply reclaimed water...to the project for cooling and other industrial purposes, it is necessary that CECP use its proposed ocean-water purification system”. This attempt to buttress the already announced conclusion is specious. The CECP may need a source of water for cooling and other industrial purposes but there is no necessity that the operation of the CECP depend upon ocean water. The amount of water that the plant needs can come from non-ocean sources. The need for water is an issue that can and should be analyzed as part of an overall evaluation of possible alternative sites outside of the coastal zone. Location of this facility within the coastal zone cannot be approved consistent with the Coastal Act since the facility does not need to be located “on or adjacent to the sea to be able to function at all”. (PRC section 30101).

After its only reference to PRC section 30101, the PMPD makes a number of assertions regarding the convenience of locating the CECP at the EPS site. These include: that co-location “facilitates its proposed ocean-water purification system for supplying water to its air-cooled cooling system”; that it “allows the CECP to utilize the (EPS) plant’s infrastructure...thereby avoiding offsite construction of new linear facilities; and that it “would avoid the need to develop in areas of Carlsbad unaccustomed or unsuited to this type of industrial development”. But none of these arguments of convenience are even slightly relevant to the question of whether the proposed CECP is coastal dependent. (See written direct testimony of Ralph Faust at p.10).

The PMPD reads section 30260 of the Coastal Act as if it said: “non-coastal dependent industrial facilities that are related in purpose to existing coastal dependent industrial

facilities shall be encouraged to locate or expand within existing sites...” This interpretation would allow non-coastal dependent industrial facilities to continue to be placed on or adjacent to the sea indefinitely, regardless of technological improvements that make such location decisions inconsistent with the clear and specific Legislative policy to keep such facilities that are not otherwise consistent with the Coastal Act out of the coastal zone. The policy reasons for avoiding this outcome were eloquently stated by Carlsbad City Manager Lisa Hildabrand in her testimony at the evidentiary hearing on February 1, 2010. (See transcript of testimony, February 1, 2010, at pgs. 209-213). But it makes no technical legal sense either. There is not a shred of evidence in the legislative history to support the interpretation of the PMPD. Nor, most important, is it consistent with the plain language of sections 30101 and 30260 of the Act. For all of these reasons the proposed CECP cannot be found to be consistent with the Coastal Act, is not a coastal dependent industrial facility, and thus the Commission cannot certify it.

## **2. Conformance with the California Fire Code**

The PMPD did not appropriately consider the laws of the state of California or the City of Carlsbad regarding fire safety. The issue involves the section of the California Fire Code dealing with access road widths at the extremely constrained CECP site, but ultimately disregards protection of fire personnel and citizens.

The CEC is charged with “making findings on the conformity of a site and the applicable local, regional, state and federal standards, ordinances or laws.” (PRC 25523 (d) (1)). The PMPD fails to adhere to this charge by ignoring applicable state and local laws. This violates the rights of the citizens of the state and the city of Carlsbad to have public safety laws enforced by the California Energy Commission.

The California Fire Code defines the basic laws of the state related to fire protection, including fire access. The California Fire Code, Title 24, Part 9, Section 502.1 defines a “fire lane” as:

“A road or other passageway developed to allow the passage of fire apparatus. A fire lane is not necessarily intended for vehicular traffic other than fire apparatus.”

Section 503.2.1 states:

“Fire apparatus access roads shall have an unobstructed width of not less than 20 feet (6090 mm), exclusive of shoulders.”

Section 503.2.2 allows for the local fire chief to make exceptions to this access width:

“The fire code official shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations.”

The California Fire Code must be adopted by local and regional fire fighting agencies. However, these local and regional agencies may supplement the California code to reflect local conditions and needs – the state and local codes must be read together. The City of Carlsbad has conformed to this requirement. The code sections here under scrutiny are as follows:

City of Carlsbad City Ordinance CS-126, Exhibit 1, (April 5, 2011) Section 503.2.1

“Fire apparatus access roads shall have an unobstructed width of not less than 24 feet (7.315 meters) exclusive of shoulders. . .”

State of California Fire Code (24 CCR Part 9, Section 503.2.2

“The fire code official shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations.”

It is clear that these two code sections must be read together. This is confirmed by the legislative history where section 503.2.1 required minimum widths have decreased in

the state code to 20 feet, but the city adopted a wider 24 feet and provided for a greater width when local conditions require it. [TR. May 19, 2011, Page 140]

The PMPD fails miserably to protect fire fighting personnel and the general public, as evidenced in the PMPD:

Discussion of section 503.2.1: page 4, two references

Discussion of section 503.2.2: None

Staff witness Greenberg testified that, with regard to the section 503.2.2 powers given local fire officials, that there needs to be a stated reason, not just opinion [Tr. May 19, 2011, Page 165]. The design of the California Fire Code anticipates that both science and opinion would be the basis for a 503.2.2 determination. The Carlsbad fire officials relied on their judgment but also evaluated: the potential threat, the ability to maneuver the apparatus, distance from walls, narrow corridors [Tr. May 19, 2011, Pages 177-179]. Following the Palomar fire, the Fire Chief felt more strongly than ever that a 50-foot lower perimeter road and a 25-foot upper rim road are required. [Tr. May 19, 2011, Page 127]

The PMPD ignored section 503.2.2. This is clearly wrong. The CEC has the power to either enforce the code or override the code – it cannot ignore the code.

PMPD Worker Safety-6 reads, in part.

“The access roads, below-grade perimeter road, and ramps shall be no less than 28 feet wide.”

The City fire code official requires that this condition be changed to replace the above with the following:

“The below-grade perimeter road shall be no less than 50 feet wide, and the above-grade perimeter road shall be continuous around the plant site and shall be no less than 25 feet wide. Ramps shall be no less than XXX feet wide.”

The Committee of a single commissioner requested the parties to address “lessons learned” from two power plant fires – the Kleen Energy fire in Connecticut and the Palomar fire in Escondido. Based upon discussions with the Escondido Fire Chief, the after-action reports of the incident, the experience of Chief Heiser of the Carlsbad Fire Department, and a letter to the Committee signed by Fire Chief Lowry of the Escondido Fire Department, Chief Crawford re-affirmed the necessity for a 50 foot wide lower perimeter road and a 25 foot upper rime road.

The Staff and, by extension, the PMPD appears to treat section 503.2.2 as a guideline or suggestion. This requirement is one of state and local LORS that either needs to be conformed with in the Commission’s decision or overridden with the proper support. The City and Redevelopment Agency urge the Committee to incorporate this requirement in a revised Proposed Decision.

The Committee has two legal choices: enforce the law or override the law. If the Commission decides to enforce the law, the City recommends the Commission adopt the following condition of certification:

**WORKER SAFETY-XX:** Prior to the start of construction, the project owner shall include in the initial engineering designs required in GEN-2 and subsequent site plans at least a fifty (50) foot Emergency Access Lane around the base of the CECP (lower rim road) and at least a 25 foot wide Emergency Access Lane at the top of the CECP (upper rim road) or other emergency access requirements mutually agreed to by the project owner and the Carlsbad Fire Department.

**Verification:** The project owner shall include the required emergency access lanes or other emergency access requirements mutually agreed to by the project owner and Carlsbad Fire Department in all drawings and plans submitted to the CBO.

If the Committee decides to override the law, the record should be clear that there is a responsibility that goes with the Commission substituting its judgment for that of the Carlsbad City Fire Department.

### **3. PMPD Fails to Conform with the California Redevelopment Act – Extraordinary Public Benefits**

As Mr. Kane testified at the evidentiary hearing on May, 19, 2011, state law requires every redevelopment plan to include "...land use policies, construction policies, use limitations, adequate safeguards, appropriate measures." (Hearing transcript, page 208, line 20) The requirements of the South Carlsbad Coastal Redevelopment Plan were adopted under the provisions of state law and require every industrial development (as listed within the Plan) within the redevelopment area to demonstrate an "extraordinary public benefit." Mr. Kane also testified that typical benefits such as retiring Encina Power Station Units 1 -3 without removing the existing structures, generating power, generating tax revenues, and creating jobs do not meet the requirements of an "extraordinary public benefit." (Hearing Transcript, page 212, line 21 to page 216, line 10) Ms. Fountain testified that the South Carlsbad Coastal Redevelopment Plan "...specifically focused on eliminating blight and blighting influences in the south Carlsbad coastal redevelopment area." (Hearing Transcript, page 217, line 8) To approve this project the Commission must either demonstrate that the project provides an "extraordinary public benefit" consistent with the intention of the South Carlsbad Coastal Redevelopment Plan or make override findings.

During the final PMPD hearing, the Committee expressed interest in having the parties meet and discuss an agreement on the demolition and removal of the Encina Power Station to both provide an "extraordinary public purpose" and benefit the community. In response to the Committee's request, the City and applicant met to negotiate two new conditions: LAND-2 and LAND-3. These conditions acknowledge the shutdown of EPS units 1-3 in 2013 and EPS units 4 and 5 at a later date. LAND-2 sets forth a program so that an approved demolition and remediation plan is approved well in advance and demolition to occur when the units are no longer needed. It also ensures that funds will

be available for this demolition and that the redevelopment process starts at the earliest possible date since this will be a time-consuming process. LAND-3 sets out the process to determining when the Encina units can be permanently retired. When they are no longer needed for system reliability, we allow six months to start demolition keeping in mind that a demolition plan and all permits should be obtained at this time. Finally, we confirm that all demolition and remediation costs are to be borne by the project owner. We believe these conditions and verifications, agreed to by the City, Redevelopment Agency, and applicant, address the Commissioner's direction (see letter of June 8, 2011 filed concurrently herewith.) However, we do not believe that this one condition satisfies the requirement for "extraordinary public purpose" for the CECP. The scale and impact of the proposed CECP will have a significant negative impact on the visual quality of the area, future land uses, and will only add another blighting influence. Therefore, we believe the standard for this "extraordinary public purpose" finding must be higher, and that it has not been met through the current conditions for approval.

The City of Carlsbad and the Carlsbad Redevelopment Agency appreciate the efforts of this Committee in seeking to accelerate the demolition and remediation of the existing Encina units 1-5 plant and structure.

In addition to required changes in Finding of Fact-5, the City and Redevelopment Agency request that the following amendments to the PMPD:

1. The PMPD, at page Land Use 14, states that the "redevelopment plan was to convert the industrial land west of the railroad tracks to another, more appropriate land use"

Revise to indicate that the Plan includes 550 acres, including the lands west of the railroad tracks.

2. The PMPD, at page Land Use 14 states: "One of the plan's goals is to "facilitate the redevelopment of the Encina Power Generating Facility to a physically smaller, more efficient power generating plant".

Add: “The Redevelopment Agency testified that, at the time the Plan was created, the assumption was that the smaller plant would blend into the existing community.” (Feb 1, 2010 Tr. 107)

#### **4. Necessity for Override Findings and Lack of a Basis for Override**

The CECP is a gas-fired unit that, among other things, does not meet the coastal dependency requirements of the California Coastal Act, does not meet the emergency access requirements established by the Fire Chief that were supported by lessons learned from the Palomar fire., and does not have any extraordinary public benefit as required by the Redevelopment Agency. PMPD did not recommend that the Commission make any override determinations. The City of Carlsbad firmly believes, however, that if the Committee fully considers the weight of the evidence and still proposes to approve the project as proposed, they will need to override multiple state and local legal requirements.

#### Applicable Laws

California Public Resources code section 25525 outlines the required findings necessary for an override determination. The CEC must be able to satisfy the following two requirements:

- (a) “the facility is required for public convenience and necessity”
- (b) “all other alternatives are infeasible”

#### Public Convenience and Necessity

The Commission has always approached an override cautiously, stating that a LORS override is “an extraordinary measure which . . . must be done in as limited a manner as possible.” (Eastshore Final Decision, page 453, citing Metcalf page 469) An override has been approved for only four fossil fuel-fired power plants in the past 15 years and in

cases where there is expressed need for additional statewide or local area generation capacity<sup>4</sup>.

The PMPD indicates that the CECP meets several specific objectives (page Alternatives 2). These correspond to supposed electrical system and environmental benefits of the project. These objectives (in italics) and their standing are as follows:

- *“Meets the expanding need for new, highly efficient, reliable electrical generating resources that are dispatchable by the CAISO, and are located in the “load pocket” of the San Diego region”* – SDG&E’s stated in their recent filings with the California Public Utilities Commission (CPUC) that they have entered into power purchase agreements with three new natural gas power plants located within the SDG&E load pocket<sup>5</sup>. In addition to meeting SDG&E’s expected power demands through 2018 (SDG&E Testimony, page 10), these three units will provide:

“...environmental friendly, quick start generation units utilizing the most advanced and efficient gas-fired technologies. They also provide the starting and/or ramping capabilities required by the Commission to accommodate sudden changes in resources or loads.” (SDG&E Application, page 5)

This filing demonstrates that it is not necessary to locate a new power plant in the coastal zone and that the CECP is not necessary to meet this objective.

- *Improves San Diego regional electrical system reliability through fast starting generating technology, creating a rapid responding resource for peak demand situations, and providing a dependable resource to backup intermittent renewable resources like wind generation and solar* – As noted above, the

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<sup>4</sup> Please see the City of Carlsbad’s opening brief for additional discussion on the circumstances surrounding previous override decisions.

<sup>5</sup> The two filings are: SDG&E, Application Of San Diego Gas & Electric Company (U 902 E) For Authority To Enter Into Purchase Power Tolling Agreements With Escondido Energy Center, Pio Pico Energy Center And Quail Brush Power, May 19, 2011 and SDG&E, Prepared Direct Testimony Of San Diego Gas & Electric Company In Support Of Application For Authority To Enter Into Purchase Power Agreements With Escondido Energy Center, Pio Pico Energy Center And Quail Brush Power, May 19, 2011

projects selected by SDG&E will provide fast start capability, all of the units would be capable of being dispatched from "...a cold, "idle" state to full load within 10 minutes." (Testimony, page 28, 32, 37) In addition, SDG&E states that "...these generation facilities will help to mitigate the effects of intermittency associated with increased development of renewable generation." (Application, page 6)

- *Allows the retirement of existing EPS Units 1, 2, and 3, and assists in the retirement of the South Bay power plant and the eventual retirement of existing EPS Units 4 and 5* – According to the "Implementation Plan for Compliance with California Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" submitted by Cabrillo Power I LLC to the California Water Resources Control Board in March 2011, EPS Units 1, 2, and 3 will be retired regardless of construction and operation of the CECP: "Upon successful commercial operation of the Carlsbad Energy Center Project (CECP), but no later than December 31, 2017, EPS Units 1-3 will be retired..." (page 3) More importantly, the power purchase agreements signed by SDG&E ensure the region has sufficient power to meet load and retire all 960 megawatts of the Encina Power Station without construction and operation of the CECP. As stated in their testimony:

"For this application, SDG&E recommends that the Commission assess not only SDG&E's need in 2015 but also through 2018 on the reasonable assumption that the Encina Power Plant will be retired in full at the end of 2017. SDG&E assumes the retirement of Encina units 1, 2, and 3, representing a total of 320 MW by 2013, with the remaining capacity to be retired in 2017." (Testimony, page 10)

- *Modernize existing aging electrical generation infrastructure in north coastal San Diego County, which includes the retirement of aging once-through cooling (OTC) facilities. Retiring the use of OTC is an objective shared by the energy and environmental agencies in California, including the California Public Utilities Commission (CPUC), California Energy Commission (CEC), CAISO, and publicly owned utilities* – This objective is essentially a rephrasing on the second objective stated above with a more explicit reference to the state's OTC policy. This policy was also considered and incorporated into SDG&E's assessment and decision to sign three new power purchase agreements (Testimony, page 10).
- *Utilize existing infrastructure to accommodate replacement generation and*

*reduce environmental impacts and costs* – The three PPAs signed by SDG&E all utilize previously disturbed lands. Two of the projects (Pio Pico and Escondido Energy Center) are located at existing power plants, presumably utilizing existing infrastructure. The third plant (Quail Brush) is located adjacent to an existing landfill. If the PMPD considers the benefit of utilizing existing infrastructure to be an environmental benefit, it is arguable that there is any benefit to the CECP location. If the PMPD considers the location to offer economic benefits to the CECP, we assert that the CEC is not in a position to make this determination.

- *Meet the commercial qualifications for long-term power contract opportunities in southern California* – As evidenced by the results of SDG&E’s lengthy and exacting long term procurement planning process that was approved by the California Public Utilities Commission and described in SDG&E’s testimony (page 17), the CECP does not meet the commercial qualifications for long-term power contract opportunities in the SDG&E load pocket where it is located. That is a clear indication of the public convenience and necessity of the project. As California Independent System Operator and CEC staff testified during the hearings:

MR MCCLEARY: “Frankly, the investment in a plant such as CECP is dependent on their ability to compete for and win a contract with the utility, it is not assured...” (Transcript, 2/3/10, Page 157 Beginning with line 6)

MR. LAYTON: “...if 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.” (Hearing transcript, 2/3/10, Page 258, Line 21)

MR. VIDAVER: “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 from that that San Diego doesn't feel it's necessary.” (Hearing Transcript, 2/3/10, Page 341 Line 17)

It is clear from the testimony provided in hearings over a year ago that the electricity system benefits provided by the CECP are typical at best. As discussed extensively in the City’s previous brief, they clearly do not rise to the high standard the CEC has used in the past to justify an override. The present reality of the SGD&E power purchase contracts indicate that the CECP’s typical system benefits can better be provided by other power plants.

### Alternatives

The PMPD discusses the alternatives presented by the City and Redevelopment agency and the staff. A review of these alternatives reveals that they are feasible, especially the “no project” alternative. In the PMPD, the Committee stated:

“If the proposed CECP were not built, certain environmental benefits from the new power plant would not be realized. For instance, all five EPS units would continue to operate “as is” into the foreseeable future and retirement of the EPS circa 1950’s Units 1 through 3 would be indefinitely delayed. The result would be relatively inefficient electrical generation utilizing over 220 million gallons of ocean water per day for once-through cooling that would otherwise cease to occur.” (Page Alternatives 16)

This statement is incorrect. As noted earlier, the project owner stated that Units 1 through 3 would be replaced by 2017 regardless if the CECP was built and the results of SDG&E’s procurement process ensure that all five Encina Power Station units will be closed without relying on the CECP. This only amplifies the testimony provided by CEC staff that the environmental benefits of eliminating once-through cooling from the Encina Power Station can be provided by a power plant built anywhere:

MR. VIDAVER: No, they require replacement infrastructure which can take the form of transmission, which allows for additional imports into local reliability areas in which many of these plants are located. Or they can take the form of no longer being necessary due to reductions 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.* (Hearing Transcripts, 2/3/10, Page 275 Line 23, emphasis added)

Mr. VIDAVER: ...However, even given -- given the retirement of all of the units at South Bay, the energization of the Sunrise Powerlink and expected development of both gas-fired peaking and renewable resources in the San Diego basin, that *the retirement of all five of the units at Encina would require some kind of infrastructure development, whether it be capacity in the San Diego area or*

*expanded transmission.*(Hearing Transcript, 2/3/10, Page 275 Line 23, emphasis added)

Regarding the no project alternative, the PMPD also states:

“Although the identification of a definite No Project Alternative development scenario is not possible, “No Project” would almost certainly result in efforts to find new sites for dispatchable gas-fired generation that would meet similar project objectives to those of the CECP – providing load pocket reliability and reducing OTC with ocean water. To meet such objectives, the new generation sites would have to be in the San Diego urban area. Any such new generation facility would likely have higher environmental impacts than CECP, particularly if built at a greenfield site, which generally has greater environmental and community impacts than brownfield redevelopment projects like the CECP. Potential environmental impacts from the No Project alternative would result in greater fuel consumption and air pollution because the CECP would not be brought into operation in a timely manner to displace production from the older, less efficient EPS that has higher polluting air emissions.” (Page Alternatives 16)

This statement is also incorrect. The results of SGD&E’s procurement process define the no project alternative. Without the CECP, SDG&E will obtain power from three new natural gas power plants, located in the SDG&E load pocket, providing electricity system reliability, and reducing ocean water cooling. According to SDG&E, all of the proposed projects are located on previously disturbed land (Testimony, pages 28, 33, and 37), will be available in 2012 and 2014 (Testimony, pages 29, 33, and 37)<sup>6</sup>. Consequently the “no project” alternative will provide the same or greater environmental benefit as the CECP.

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<sup>6</sup> Although the Proposed Decision says the CECP will be operational in late summer 2014 (page Project Description 4), this is highly doubtful since the CECP has not initiated any compliance activities, is not likely to start construction prior to June 30, 2011 and hence come under additional review by the U.S. EPA, does not have a NPDES permit from the Regional Water Quality Control Board, and does not have a power purchase agreement. The probable consequence of CECP approval is redesign of the project to better correspond to market needs and a subsequent amendment of the CEC decision.

Finally, the PMPD states:

As we discuss above, adoption of the No Project Alternative—denial of this application for certification—would not likely maintain the status quo because market and regulatory forces are likely to cause other sites in the San Diego urban area to be considered for development with a modern, efficient, dispatchable, generator. Because those sites are likely to be less intensely developed than the EPS site, perhaps even undeveloped, they are likely to give rise to greater levels of environmental impact than the construction of CECP as proposed on the EPS site. Thus the No Project Alternative is not environmentally superior to the CECP, nor are the alternative sites or technologies, renewable resources, or conservation and demand-side management. The proposed project is the environmentally superior alternative. (Page Alternatives 17)

Again this statement is incorrect. While the “no project” alternative will not maintain the status quo, the proposed sites selected by SDG&E are also disturbed, two of the sites use existing infrastructure and, because two of them will be permitted by the CEC, are not likely to have greater levels of environmental impact than the CECP. None of the sites are located in the coastal zone, next to heavy recreational use areas, in areas considered visual blight slated for redevelopment, or immediately adjacent to a major freeway and rail line.

#### **5. Conformance with CEQA – Flawed alternatives analysis and lack of a Reasonable Range of Alternatives**

The PMPD does not comply with CEQA’s fundamental requirement to evaluate a reasonable range of alternatives because it did not consider any alternative site outside the City of Carlsbad. Although the CECP is intended to serve SDG&E and the San Diego County region, the FSA did not consider any alternative location outside the City of Carlsbad. In addition to the evidence submitted throughout these proceedings, evidence recently brought to the Committee’s attention confirms there are at least three

alternative sites in the San Diego Region which can fulfill the project objectives and avoid a number of the CECP's potential significant impacts. (See Application of San Diego Gas & Electric Company (U 902 E) for Authority to Enter into Purchase Power Tolling Agreements with Escondido Energy Center, Pio Pico Energy Center and Quail Brush Power ("SDG&E Application"), filed with the California Public Utilities Commission on May 19, 2011.) These alternative sites are located in SDG&E's service territory and include sites in the same location as an existing generation facility (Escondido Energy Center), on a previously disturbed site adjacent to the Otay Mesa combined cycle power plant (Pio Pico Energy Center), and near the Sycamore Canyon Landfill (Quail Bush Energy Project). SDG&E's filings demonstrate that these alternative sites can and will fulfill the fundamental objectives of the project while avoiding the significant adverse impacts associated with the CECP's proposed coastal location. The SDG&E filings also demonstrate that the PMPD's rejection of the "No Project" alternative is erroneous. Under the No Project alternative, if the CECP were not approved, the projects identified in the SDG&E filings would be built and would meet the power generation needs of the region, would promote the water quality goals of the SWRCB's OTC Policy and would fulfill all of the fundamental goals of the proposed project.

## **6. Conformance with CEQA – Future Water Supply without Encina Units 4 & 5**

The PMPD found there were two potential sources of industrial water supply for the CECP: recycled water from the City or desalinated ocean water. The PMPD concluded that compliance with the recommended Conditions of Certification will cause direct impacts to water resources to be less than significant. However, this conclusion is erroneous because the source of recycled water is unknown, the future source of ocean water is uncertain, and the recommended conditions of certification would not reduce the CECP's direct impacts below significance. Moreover, the PMPD failed to address the impact of the SWRCB's OTC Policy on long-term water supply. Soils & Water-8 is inadequate to mitigate the CECP's significant direct impacts on recycled water supply because no source of recycled water has been identified and there is no assurance an agreement to provide recycled water could be reached even if a supplier were identified. Accordingly, to the extent it allows the CECP to rely on recycled water for its water

supply, the PMPD is erroneous and the impacts remain significant and unmitigated. Condition of Certification Soils & Water-4, which requires NRG to obtain approval of a WDR Order allowing discharge of CECP industrial wastewater to the Pacific Ocean prior to operation of the ocean-water purification system, is not a substitute for the required analysis and will not mitigate the significant potential impacts on long-term ocean-water supply. (FSA, p. 4.9-28.) Although Soils & Water-4 may provide sufficient mitigation in the near term, before EPS' deadline for complying with the OTC Policy, it is clearly insufficient to reduce impacts to the long-term supply of ocean water below significance and fails to consider what will happen if the CECP is not allowed to use ocean water as its source of supply. Accordingly, the CECP's direct impact on desalinated water supply remains significant and unmitigated.

## **COMMENTS ON PROPOSED DECISION**

In addition to the previous legal problems, the City has comments on specific parts of the PMPD. This section discusses the City's overall concern on the Committee's perceived rush to judgment on this project and then presents specific section-by-section comments.

### **1. Fast-Track Decision**

The City previously expressed its concern about the 37-day race to reach a decision on this case given the 15 months of no action between the evidentiary hearings and release of the PMPD. While the Committee did not give a reason for its rush to judgment, the City understands it is to allow the applicant time to start construction before June 30, 2011, and avoid the requirements of the new U.S. Environmental Protection Agency's Prevention of Significant Deterioration (PSD) and greenhouse gas emission reduction rules. If this is correct, the City is concerned that the Committee actions may be imprudent because it is highly unlikely that the applicant will be able to begin construction prior to June 30, 2011. There are approximately 35 proposed conditions of certification in the Proposed Decision that require submittals to the CEC

Compliance Program Manager 30 days or more before the start of construction (see Attachment 1). Our understanding is that the applicant has not submitted any of these submittals. In addition, the applicant does not have a NPDES permit from the Regional Water Control Board or a Final DOC and Authority to Construct from the Air Quality Management District. The consequence is reduced time for the parties and public to review and respond to any modifications to the PMPD resulting from the evidentiary hearings held on May 19, 2011 as well as reduced time for the full Commission to consider comments on the PMPD and any modification. A more significant consequence may be the missed opportunity to further reduce greenhouse gas emissions from a power plant that may operate in California for 30 or more years. Rather than going to construction, the result of the Commission's approval of this project is more likely to be another permitted but unconstructed power plant or an amendment for a different project. These likely outcomes also argue against the Commission certifying this site.

## **2. Introduction**

Page 2 of the Introduction to the PMPD states that: "The Applicant expects commercial operations to begin by summer of 2012." This contradicts with the bullet points that follow which state that commercial operations will begin "late summer 2013." All of this is based on the assumption that the applicant begins construction "second quarter 2011". The second quarter of 2011 is essentially over and, as discussed above, the applicant has not initiated the pre-construction compliance process with the CEC or other necessary permits such as their NPDES permit from the Regional Water Quality Control Board. Because the applicant does not have a power purchase agreement, it is questionable whether it will begin construction at all.

## **3. Project Description**

Pages 4 and 5 of the PMPD list the applicant's project objectives. The City does not believe these objectives can be translated into benefits or justification for override as discussed earlier. Regarding the 6<sup>th</sup> and 9<sup>th</sup> bullets, the City notes the applicant has stated in its filing to the State Water Resources Control Board (SWRCB) that Encina

Units 1-3 will be retired regardless of construction on the CECP and that SDG&E has signed power purchase agreements that will allow retirement of all five Encina units. These actions will substantially reduce ocean water use without requiring construction of the CECP in the coastal zone.

The Committee also included the applicant's objective of using reclaimed water although, as stated during the PMPD hearing, the City offered reclaimed water for the project if the applicant funded the system expansion but it refused to do so.

Regarding the fourth finding of fact on page 6, while the City agrees that the record supports a finding that the applicant has described its objectives, it is the City's position that there is insufficient evidence in this record to support a finding that those objectives are a sufficient basis for approving the project much less support an override.

#### **4. Project Alternatives**

Page 1 of the Project Alternatives states: "The CECP will contribute significant electricity energy and capacity to an identified 'load pocket', as well as local and regional electrical transmission grid support in San Diego County and the greater Southern California region." This statement is questionable since the CECP does not have a power purchase agreement, has been determined not to be needed by SDG&E through its procurement process, and is likely never to be built. The statement should be modified to reflect these uncertainties.

Alternatives Page 15 discusses what the Committee considers "two critical project objectives of the CECP". Both of these critical objectives will be met by the alternative projects selected by SDG&E through its procurement process eliminating the necessity for the CECP.

Finding of Fact 6 on page 18 is no longer supportable. The results on the SDG&E procurement process essentially define the "no project" alternative and their testimony before the CPUC demonstrate that the alternatives projects they selected will provide

system benefits including support for renewable integration.

Finding of Fact 7 on page 18 is incorrect. The record does not support the statement that the CECP is a “clean, renewable source of new generation”. Natural gas is not considered a clean, renewable energy resource.

As noted in previous comments, the City does not agree with the Committees conclusions on other findings of fact.

## **5. Worker Safety/Fire Protection**

The Worker Safety/Fire Protection discussion needs to be updated and recirculated to reflect testimony from the evidentiary hearing on May 19, 2011. As discussed above, the testimony of the Carlsbad Fire Department and letter from the Escondido Fire Department following the Palomar fire support the requirement of a 50-foot access road in the pit and 25-foot rim road. The revised PMPD should include the following condition reflecting these requirements:

**WORKER SAFETY-XX:** Prior to the start of construction, the project owner shall include in the initial engineering designs required in GEN-2 and subsequent site plans at least a 50-foot Emergency Access Lane around the base of the CECP (lower rim road) and at least a 25-foot wide Emergency Access Lane at the top of the CECP (upper rim road) or other emergency access requirements mutually agreed to by the project owner and the Carlsbad Fire Department.

**Verification:** The project owner shall include the required emergency access lanes or other emergency access requirements mutually agreed to by the project owner and Carlsbad Fire Department in all drawings and plans submitted to the CBO.

This section should also include the new condition regarding the fire water supply system agreed to by the parties at the hearing on May 19, 2011.

## 6. Soil and Water Resources

Condition Soil & Water-4 of the PMPD is incomplete because it omits the requirement that the CECP must obtain a National Pollutant Elimination Discharge System (NPDES) permit as well as a Waste Discharge Order (WDO). During the proceedings, the evidence showed that the proposed CECP will require an NPDES permit. (RT, 2/4/2010, pp. 193-196.) This fact is noted by the PMPD, which states: “The Applicant has submitted a Report of Waste Discharge NPDES Application to the SDRWQCB [San Diego Regional Water Quality Control Board] for operation of the ocean-water purification system and subsequent discharge of 2,855 gpm to the Pacific Ocean. Approval by the SDRWQCB is required prior to operation of the CECP ocean-water purification system.” (PMPD, Soil and Water Resources, p. 9.) The applicant has applied for such a permit with the RWQCB. (Ex. 39, Docket Log No. 47586, dated 8/15/08, NPDES Permit Application for the Carlsbad Energy Center Project.)

The granting of such a permit for the proposed CECP’s desalination plant is by no means certain. Michelle Mata, a water resources control engineer with RWQCB, testified that to obtain a permit, the applicant must demonstrate that the project uses “the best available site, design, technology and mitigation measures to minimize the mortality of marine life.” Ms. Mata further testified that the “Regional Water Board evaluates intake alternatives such as vertical and horizontal beach wells, slant [wells], new open ocean intakes or modification to the existing structure.” (RT, 2/4/2010, p.196) Thus the PMPD’s statement — “[T]he actual ecological effects due to any additional entrainment from the CECP would not be significant. (Ex. 35, § 5.2.4.2)” (PMPD, Soil and Water, p. 11) — is beyond the purview of the Committee. The RWQCB is likely to regard any additional entrainment by the proposed CECP as significant, in light of the new OTC Policy.

Thus Finding of Fact 3 — “The Conditions of Certification, below, are adequate to ensure that construction and operation of the CECP will comply with LORS and will not create significant adverse impacts to the matters addressed in the technical discipline of Soils and Water Resources,” (PMPD, Soil and Water, p. 14) — is flawed. Furthermore,

Condition of Certification Soil and Water-4 should be rewritten to include the NPDES permit as follows:

**SOIL&WATER-4:** The project owner shall submit to the San Diego Regional Water Quality Control Board (SDRWQCB) all information required by the SDRWQCB to obtain a Waste Discharge Requirements (WDR) Order and National Pollutant Discharge Elimination System (NPDES) permit for the discharge of CECP industrial wastewater to the Pacific Ocean. The project owner shall submit to the CPM all copies of correspondence between the project owner and the SDRWQCB regarding the WDR Order within 10 days of its receipt or submittal.

**Verification:** At least two weeks prior to the operation of the CECP oceanwater purification system, the project owner shall submit to the CPM a copy of the approved WDR Order and NPDES permit for the discharge of CECP industrial wastewater to the Pacific Ocean.

The project owner shall submit to the CPM the annual water quality monitoring report required by the SDRWQCB in the annual compliance report. The project owner shall notify the CPM of all WDR Order and NPDES permit violations, the actions taken or planned to bring the project back into compliance with the WDR Order and NPDES permit, and the date compliance was reestablished.

The PMPD at page 8 discusses the water sources available to the CECP. This discussion does not adequately portray the reclaim option for plant cooling water. It is clear that recycle water has always been an option for the CECP, but an agreement for this water is dependent upon a agreement to fund the “next block” of recycle water expansion. (Tr. May 19, 2011 Page 58-62) Part of this agreement would address a cost sharing provision whereby CECP would get repaid for this investment when new reclaim customers come on-line. The City urges the Committee to modify the language of condition SOIL&WATER-8 to describe this water option as follows:

**SOIL&WATER-8:** If the project owner relies on recycled water for CECP water supply, the project owner shall provide the CPM two copies of the executed Recycled Water Purchase Agreement (agreement) with the recycled water producer and the City of Carlsbad (City) for the supply and delivery of tertiary treated recycled water to the CECP. This agreement shall include a provision for the project owner to fund the “next block” of recycle water expansion and include a cost sharing provision whereby the project owner shall be repaid for this investment when new reclaim customers come on-line unless the City and project owner agree to other provisions. The CECP shall not connect to the City’s recycled water pipeline without the final agreement in place. The project owner shall comply with the requirements of Title 22 and Title 17 of the California Code of Regulations and section 13523 of the California Water Code.

**Verification:** No later than 180 days prior to the connection to the City’s recycled water pipeline, the project owner shall submit two copies of the executed agreement for the long-term supply and delivery of tertiary treated recycled water to the CECP. The agreement shall specify a maximum delivery rate of 840 gpm and shall specify all terms and costs for the delivery and use of recycled water by the CECP.

No later than 60 days prior to connection to the City’s recycled water pipeline, the project owner shall submit to the CPM a copy of the Engineering Report and Cross Connection inspection and approval report from the California Department of Public Health and all water reuse requirements issued by the San Diego Regional Water Quality Control Board.

## **7. Land Use**

On page 10 of the local impact assessment discussion, the PMPD notes the CEC’s obligation to “...require, as a condition of certification of any facility contained in the application, that an area be established for public use...” (Public Resources Code §

25529.) The Committee then adopts the CEC staff's recommendation that the Coastal Rail Trail be used to meet this obligation. As the City has stated previously, such a recommendation is absurd. The Coastal Rail Trail is a project the City has been working on since the mid-1990s, has had a conceptual alignment since 2001, and has had a dedicated alignment since 2006. (Written Testimony, p. Donnell-17; Hearing Transcript, February 1, 2010, p. 206, l. 10.) For the Committee to establish a condition requiring the City and applicant to agree to the location of the trail or have the applicant pay funds is not establishing any new area or benefit for public use. The Coastal Rail Trail is already established for that use and the City has the ability to make it happen. The City is willing, however, to work with the applicant to develop the Coastal Rail Trail in conjunction with the demolition and removal of the Encina Power Station and future redevelopment of the entire site. Consistent with this intent, the City requests the Commission amend the wording of condition LAND-1 to read as follows:

**LAND-1:** The project owner shall dedicate an easement for the Coastal Rail Trail within the boundaries of the overall Encina Power Station Precise Development Plan area in a location mutually agreed upon with the City of Carlsbad located west of the north/south AT&SF/North County Transit District Rail Corridor within six months following the start of construction of the CECP or by January 2017, whichever comes first.~~180 days from the start of construction.~~ Construction of the Coastal Rail Trail shall be completed no later than the completion of demolition and removal of the Encina Power Station Units 1 through 5, all associated structures and the black start unit or a date mutually agreed to by the project owner and the City of Carlsbad.

~~If the project owner and the City of Carlsbad cannot reach agreement on the location of the easement (for example due to public safety and security reasons) the project owner shall provide funds to the City of Carlsbad for use in the development of the Coastal Rail Trail within the City of Carlsbad. The project owner shall provide funding to the City of Carlsbad for development of the Coastal Rail Trail as approved by the Compliance Project Manager~~

~~(CPM) within 180 days of the start of construction. The amount and payment of funds will be determined by an independent appraisal of property within the boundaries of the Encina Power Station that would have been provided for a Coastal Rail Trail easement. The project owner shall submit the names of three independent appraisers to the City of Carlsbad for review and comment and the CPM for review and approval of one appraiser to perform the appraisal. Alternatively, the project owner and City of Carlsbad mutually select an appraiser for approval by the CPM. The property owner shall pay all costs associated with the appraisal.~~

**Verification:** The project owner shall provide the CPM proof of easement dedication ~~or appraisal and payment to the City of Carlsbad~~ within 180 days of the start of construction.

If the Commission does not make this change and forces development of the Coastal Rail Trail on the west side of the railroad tracks, this will change the selected alignment of the trail and necessitate additional costs for construction of the trail at the northern end of the property. As Mr. Donnell of the City testified at the February 2, 2010 hearing: "Our engineering department estimates that the rail trail as built would cost about a million dollars less than if it were on the west side due to the trail on the west side being longer, due to the need for an under-crossing below the railroad bridge, and due to the need for additional retaining walls." (Hearing Transcript, February 2, 2010, p. 8.) The City request that the additional \$1,000,000 cost be borne by the project owner if the CECP is constructed and be incorporated into condition LAND-1.

To meet the obligations of Public Resources Code Section 25529 and provide additional public access, the Commission should require the applicant, as the City recommend in its Brief dated August 18, 2010, page 108 and as the Commission has in other cases, to dedicate 20 acres of land at the most northern end of the NRG property that is adjacent to lagoon and at a critical transition point for the Coastal Rail Trail to public use. The City recommends the following condition to satisfy this requirement at a minimum level:

**LAND-4:** The project owner shall dedicate a minimum of 20 acres of land on the most northern end of the NRG property (adjacent to lagoon and north of existing power plant) for public access and public coastal recreational amenities to the Carlsbad Redevelopment Agency at no cost prior to the start of commercial operation. The project owner shall fully remediate the dedicated land at no cost to the Agency. The project owner shall also dedicate to the Agency such land as is necessary to provide public access to the 20 acres from Carlsbad Boulevard at no cost to the Agency.

**Verification:** The project owner shall provide the CPM documents demonstrating that a minimum of 20 acres of land on the most northern end of the NRG property (adjacent to lagoon and north of existing power plant) and such land as is necessary to provide public access to the 20 acres from Carlsbad Boulevard have been fully remediated and deeded to the Carlsbad Redevelopment Agency.

## **8. Socioeconomics**

During the May 19, 2011 hearing, the City expressed concern regarding the need to require the applicant to pay or reimburse the City for all necessary and appropriate costs, fees, and taxes. The CEC staff explained that such payments were customary and the Committee asked the City to submit any adopted fee schedules. This fee schedule is included as Attachment 2. The City also proposes the following new condition:

**SOCIO-XX:** The project owner shall pay or reimburse the City of Carlsbad for costs incurred in accordance with actual services performed by the City that the City would normally receive for a power plant or transmission line application in the absence of Energy Commission's jurisdiction. These costs include: the citywide Public Facilities Fee imposed by City Council Policy #17; the License Tax on new construction imposed by Carlsbad Municipal Code

Section 5.09.030; and CFD #1 special tax (if applicable), subject to any credits authorized by Carlsbad Municipal Code Section 5.09.040; any applicable Local Facilities Management Plan fee for Zone 3 and Zone 13, pursuant to Chapter 21.90.

**Verification:** The project owner shall provide proof of payment prior to the start of commercial construction.

## 9. Visual Resources

The City and the Redevelopment Agency are alarmed about the significant cumulative visual impacts which will result from the placement of the CECP in its preferred location along with the foreseeable widening of Interstate 5. There can be no doubt that the freeway will be widened; the only question is what configuration will finally be adopted. It is without question that the existing berm and screening will be removed, making the CECP highly visible to hundreds of thousands of motorists and other citizens every day. The PMPD discusses this issue without adopting any hard requirements or performance standards that will alleviate this environmental impact. The City and the Redevelopment Agency believe that the Commission should specify, in condition VIS-5, the requirement that 75 feet of berm space be provided for screening. This 75-foot figure comes from staff testimony (FSA, page 4.12-28).

**VIS-5** In order to address potential cumulative visual impacts resulting from I-5 widening, the Applicant shall maintain a permanent 75-foot buffer zone, including the existing vegetative visual screening, on the eastern portion of the CECP site, between the existing NRG fence line and storage tank perimeter road. This measure shall be coordinated with Conditions of Certification **LAND-1** and **HAZ-8**. The existing landscape screening within the buffer zone shall be maintained and enhanced per Condition of Certification **VIS-2** after start of project construction. The buffer zone shall be kept available to maintain existing visual screening, accommodate future possible I-5 widening to the extent necessary, and to accommodate both future hazard

protection features and visual screening.

In addition, the Applicant shall work with Caltrans to develop a Mitigation Plan for accommodating the widening project while maintaining visual screening of the CECP to acceptable levels. This plan could include complete or partial avoidance of the CECP site, complete or partial berm retention or replacement, complete or partial retention of existing landscape screening, and replacement screening as needed. The objective of the plan shall be to accommodate the I-5 widening within the designated buffer zone to the extent that encroachment is unavoidable, while providing needed hazard protection and acceptable levels of visual screening of the power plant.

If construction of a new landscaped berm west of the existing berm and proposed future Caltrans right-of-way is determined to be the most feasible measure to address potential cumulative impacts of the I-5 Widening Project, then design and construction of the new berm shall be implemented at the earliest feasible time, in order to maximize growing time for trees planted on the new berm. Landscaping of a replacement berm shall include installation of large-container (24-inch box or larger, as needed), fast-growing evergreen trees in sufficient density to provide comparable or better visual screening of the CECP site than currently exists, within the shortest feasible period. Trees shall be selected and located so as to achieve substantial screening within a period of five years from start of project operation.

The plan shall, at a minimum, include the following components:

- a. a record of discussions, meetings and planning activities conducted with Caltrans;
- b. the conclusions of these coordination activities;
- c. a detailed Mitigation Plan providing plans, elevations, cross- sections or other details, including a detailed list of plants and container size, sufficient to fully convey how the objectives of effective visual screening of the CECP are to be achieved; and
- d. a proposed construction schedule.

**Verification:** At the earliest feasible time, Applicant shall coordinate with Caltrans to discuss specific hazard and visual mitigation strategies. Following publication of the I-5 Widening DEIS, Applicant shall work with Caltrans to devise a specific Cumulative Impact Mitigation Plan for accommodating hazard protection and visual screening.

Following coordination and plan development with Caltrans, the project owner shall submit a draft of the Cumulative Impact Mitigation Plan to the City of Carlsbad for review and comment and to the CPM for review and approval. The project owner shall submit any required revisions within 30 days of notification by the CPM. The project owner shall not implement the plan until receiving approval from the CPM. After receiving approval, the project owner shall commence implementation of the Mitigation Plan at the earliest feasible opportunity, and shall commence implementation not later than 180 days after plan approval. The project owner shall notify the CPM within seven days after implementing the approved plan that the plan is ready for inspection. Planting must be completed and approved by the CPM prior to start of project operation.

## **ASSIGNMENTS OF ERROR IN PROPOSED DECISION**

### **I. PROJECT DESCRIPTION.**

Section I of the PMPD provides the project description of the CECP. The PMPD assumes that existing Units 1 through 3 would be permanently retired if the CECP is approved and that Units 4 and 5 will continue generating electricity regardless of the outcome of this proceeding. (PMPD, Project Description, p. 1.) The PMPD is erroneous because the project description omits a reasonably foreseeable future phase of the CECP: the retirement of Units 4 and 5 pursuant to the State Water Resource Control Board's ("SWRCB") once-through cooling policy ("OTC Policy") by the end of

2017, only a short time after the projected commencement of CECP operations.

The impacts of the anticipated retirement of EPS Units 4 and 5 must be evaluated as part of the CECP because CEQA requires environmental review of all phases of a project, including reasonably foreseeable future activities. Excluding the shutdown of Units 4 and 5 from the evaluation of the CECP violates CEQA's proscription against piecemeal review and thereby understates the environmental effects of the whole project. At minimum, the SWRCB's OTC Policy must be evaluated as a cumulative project to ensure that the combined effects of the shutdown of Units 4 and 5 and the CECP are not overlooked.

**A. The PMPD's Description Of The Project Is Incomplete Because It Fails To Include The Retirement Of Units 4 And 5 As A Reasonably Foreseeable Future Phase Of The CECP.**

An accurate project description is the sine qua non of an informative and legally sufficient environmental review. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730.) A project description that omits an integral component of the project may result in an environmental document that fails to disclose all of the impacts of the proposed project. (*Santiago County Water District, supra*, 118 Cal.App.3d at p. 829.)

"Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (14 Cal. Code Reg. § 15378(a).) The term "project" is given a broad interpretation in order to maximize protection of the environment. (*San Joaquin Raptor/Wildlife Rescue Center, supra*, 27 Cal.App.4th at p. 730.) A narrow view of a project can result in the fallacy of division in which environmental considerations are overlooked by chopping a large project into smaller parts and focusing on isolated parts of the whole. (*Ibid.*)

A project description must include all phases of the project, including reasonably foreseeable future activities. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.) In *Laurel Heights*, the Supreme

Court set forth a two-prong test for determining whether reasonably foreseeable future activities must be included in the project description and analyzed in an EIR:

We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. (Ibid.)

Applying the *Laurel Heights* test to the facts here leads to the conclusion that the anticipated shutdown of Units 4 and 5 is part of the CECP. First, there is substantial evidence that the shutdown is a reasonably foreseeable consequence of the initial project. NRG has described the CECP as “the first phase of its plan to shut down the older plant when it is no longer needed for system reliability.” (FSA, p. 4.8-16, & 9.) Once the CECP becomes operational, NRG proposes to retire Units 1, 2 and 3 and begin the planning process for retiring Units 4 and 5. (FSA, p. 4.8-7.) “NRG has indicated it may be possible to retire Encina Power Station by 2015.” (FSA, p. 4.8-16, & 10.) NRG must comply with the OTC Policy by December 31, 2017. (SWRCB, “Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling,” May 4, 2010.)

The FSA considered the retirement of Units 4 and 5 to be a “likely event” pursuant to the SWRCB’s OTC Policy. (FSA, pp. 4.1-118 through 4.1-119.) Staff also testified at the public hearings that the retirement of the entire Encina facility, including Units 4 and 5, is the only feasible way to comply with the OTC Policy. (RT, 2/03/10, p. 405, ll. 14-21 [D. Vidaver].) Because the shutdown of Units 4 and 5 is a reasonably foreseeable consequence of the CECP, it satisfies the first prong of the Supreme Court’s test for determining that it is a foreseeable future activity which must be included in the CECP project description.

Second, there is substantial evidence that the anticipated shutdown of Units 4 and 5 will be significant in that it will likely change the scope or nature of the initial project’s environmental effects. For example, the shutdown of Units 4 and 5 will significantly change the scope of the CECP’s impacts on water resources. The FSA assumed the

applicant would use one of two potential sources of water for industrial and landscape purposes: (1) tertiary treated recycled water from the City of Carlsbad (City), or (2) desalinated ocean water produced on-site. (FSA, p. 4.9-5.) However, the City indicated it will not be able to meet the CECP's demand and an alternate source of recycled water is unknown. (FSA, p. 4.9-14.)

Since a source of recycled water is unknown, the CECP must rely on desalinated ocean water. (FSA, p. 6-22 ["no alternatives to desalinization exist for the CECP"].) The CECP will require a maximum intake of approximately 4.32 million gallons of ocean water per day (mgd) for operation and outfall dilution. (FSA, p. 4.9-16.) The FSA assumes this water would be available under the EPS' existing Waste Discharge Requirements, which allow the intake and discharge of up to 857 mgd of seawater for use as once-through cooling of Units 1 through 5. (FSA, p. 4.9-16.) However, this assumption does not take into account the potential shutdown of Units 4 and 5 pursuant to the SWRCB's policy on OTC, which would eliminate the use of ocean water under EPS' existing WDR. Because the anticipated shutdown of Units 4 and 5 would change the scope of the CECP's effects on water supply, it satisfies the second prong of the Supreme Court's test for determining that it is a foreseeable future activity which must be included in the CECP project description.

The courts repeatedly have ruled that activities which relate to the source of water or other necessary public services must be considered part of the project. In *Santiago County Water District, supra*, 118 Cal.App.3d 818, the Court of Appeal held that an EIR for a mining project was inadequate because it failed to include "a description of the facilities that will have to be constructed to deliver water to the mining operation, or facts from which to evaluate the pros and cons of supplying the amount of water that the mine will need." (*Id.* at p. 829.) The court emphasized:

The construction of additional water delivery facilities is undoubtedly one of the significant environmental effects of the project. As such, a description of the necessary construction had to be included if the EIR was to serve its informational purpose. (Citations omitted.) Because of

this omission, some important ramifications of the proposed project remained hidden from view at the time the project was being discussed and approved. This frustrates one of the core goals of CEQA. “Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal . . . and weigh other alternatives in the balance. An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.

(*Id.* at pp.829-830; see also *San Joaquin Raptor/Wildlife Rescue Center, supra*, 27 Cal.App.4th at pp. 729-732 [EIR for residential development deemed inadequate because it failed to consider a necessary sewer expansion as part of the proposed project].)

The courts have made clear that future activities which affect the delivery of water or other necessary public services must be evaluated as part of the proposed project. Here, the shutdown of Units 4 and 5 may eliminate the CECP’s only source of non-potable water. Because it is a reasonably foreseeable consequence of the initial project and will likely change the scope of the initial project’s environmental effects, the shutdown of Units 4 and 5 must be evaluated as part of the CECP.

**B. The PMPD’s Failure To Consider The Anticipated Retirement Of Units 4 And 5 Results In Unlawful Piecemeal Environmental Review.**

The PMPD acknowledges the CECP must use ocean water discharge from Units 4 and 5 for its water supply, but it fails to evaluate the anticipated retirement of Units 4 and 5 as part of the proposed project. The PMPD is erroneous because 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.

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.4<sup>th</sup> 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 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 these 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 previous evidence that SDG&E 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 (Pio Pico Energy Center, 2010-AFC-01, pp. 2-2 - 2-3), and more recent evidence that SDG&E has applied to the PUC for authority to enter into three power purchase tolling agreements which will make continued operation of Units 4 and 5 unnecessary. (See City of Carlsbad’s and Carlsbad Redevelopment Agency’s Motion to Take Official Notice, filed June [X], 2011.)

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.

**C. At Minimum, CEQA Requires The SWRCB’s OTC Policy To Be Evaluated As A Cumulative Project.**

Staff and the project applicant have argued that the shutdown of Units 4 and 5 is an uncertain future activity which should not be evaluated as part of the CECP. This argument is contrary to CEQA’s basic requirement to consider the whole project, including foreseeable future activities that will change the nature or scope of projects environmental effects. Nonetheless, even if the shutdown of Units 4 and 5 were not considered part of the CECP, CEQA would require shutdown pursuant to the SWRCB’s OTC Policy to be evaluated as a cumulative project to ensure that the combined impacts of the separate parts are not overlooked.

In *San Joaquin Raptor/Wildlife Rescue Center, supra*, 27 Cal.App.4th 713, the Court of Appeal held that an EIR for a residential development was inadequate because it failed to consider a necessary sewer expansion as part of the project. The court also explained that CEQA would require evaluation of the combined effects of the sewer expansion and the proposed project even if they were considered separate projects:

Moreover, even assuming the sewer expansion was severable from the development project, the FEIR still did not comply with CEQA. Public Resources Code section 21083, subdivision (b) requires the cumulative effects of two separate projects which are “individually limited but cumulatively considerable” to be addressed in the EIR. Thus, even were the sewer expansion deemed to be a separate “project,” Public Resources Code section 21083 requires that the cumulative environmental effects of the development project plus the “expansion project” must be considered in the EIR.

*(Id. at p. 733.)*

The applicant concedes the shutdown of Units 4 and 5 should be evaluated as a cumulative project. (See, e.g., Exhibit 146, & 5.) Although the FSA considered the shutdown in its analysis of certain cumulative impacts, such as GHG emissions and visual resources (FSA, pp. 4.1-118, 4.12-24), it failed to do so with respect to other impacts, such as water supply, that will be significantly affected by the decommissioning of Units 4 and 5.

In its analysis of cumulative impacts on desalinated water supply, the FSA identified “the existing EPS water discharge stream” as the source of necessary seawater and evaluated the impacts of the CECP and the Carlsbad Seawater Desalination Plan (CSDP) on this water supply. (FSA, pp. 4.9-18 through 4.9-19.) However, the FSA did not consider the shutdown of Units 4 and 5 in the cumulative analysis of water supply impacts. Since the shutdown of Units 4 and 5 pursuant to the SWRCB’s OTC Policy could eliminate the use of seawater for project operations, it should have been included on the list of cumulative projects for water supply impacts. The FSA’s failure to consider the shutdown in the analysis of cumulative water supply impacts causes the analysis to be incomplete and inadequate.

## **II. PROJECT ALTERNATIVES.**

Section II of the PMPD addresses alternatives to the proposed project. The PMPD concluded that the FSA analyzed a reasonable range of alternatives and provided an adequate review of alternative sites, that no site alternative is capable of meeting the project objectives, that the No Project alternative would not provide electrical system benefits, and that without the CECP, the State and region would not benefit from clean renewable source of new generation that the CECP would provide. The PMPD's conclusions are erroneous for the following reasons.

### **A. A Reasonable Range Of Alternatives In The CECP's Proposed Service Area Has Not Been Evaluated.**

The FSA's analysis of alternatives is inadequate for two reasons. First, the range of alternatives was improperly limited to alternate locations in Carlsbad and failed to consider other locations in the project's service area. Second, the range of alternatives was artificially limited by focusing on the few project objectives which alternative sites may not achieve, rather than the majority of the objectives which they could achieve.

CEQA requires an environmental document to discuss a reasonable range of alternatives to the proposed project, or to the location of the project, which would feasibly attain most of the objectives of the project but would avoid or substantially lessen any of the significant impacts of the project. (14 Cal. Code Reg. § 15126.6(a) - (c).) With respect to alternative locations, the key question is whether putting the project in another location would avoid or substantially lessen any of the significant impacts of the project. (14 Cal. Code Reg. § 15126.6(f)(2).)

There is no ironclad rule for determining the range of alternatives to be discussed. (*Ibid.*) Instead, the nature and scope of the alternatives to be studied is governed by the "rule of reason." (14 Cal. Code Reg. § 15126.6(f).) Under this rule, the environmental document must discuss enough alternatives to permit a reasoned choice with respect to environmental concerns. (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-751.) The scope of alternatives reviewed

must be considered in light of the nature of the project, the project's significant impacts, relevant agency policies, and other material facts. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477.)

In addition to CEQA's requirements, the nature and location of the CECP require compliance with other statutory requirements. Because it proposes to locate in the coastal zone, the CECP is subject to the California Coastal Act (Coastal Act), which requires new or expanded coastal dependent industrial facilities to evaluate whether alternative locations are feasible and less environmentally damaging. (Pub. Res. Code § 30260.) Section 30264 of the Coastal Act also requires the Commission to determine whether the proposed site would have "greater relative merit pursuant to the provisions of Section 25516.1 than *available alternative sites and related facilities for an applicant's service area* which have been determined to be acceptable pursuant to the provisions of Section 25516." (Emphasis added.) (Pub. Res. Code § 30264.) Part of the Warren-Alquist Act (Act), section 25516.1 provides that, where a proposed site is located in the coastal zone, "no application for certification may be filed pursuant to Section 25519 unless the commission has determined, pursuant to Section 25514, that such site and related facility have greater relative merit than *available alternative sites and related facilities for an applicant's service area* which have been determined to be acceptable by the commission pursuant to Section 25516." (Emphasis added.) (Pub. Res. Code § 25516.1.)

The statutory requirement for proposed new power plants to consider the relative merits of available alternative sites in the applicant's service area is consistent with CEQA's requirement that projects with regionally significant impacts must be considered in a regional context. (14 Cal. Code Reg. § 15126.6(f)(1).) Unfortunately, the FSA failed to consider a reasonable range of alternative locations in "the applicant's service area." Rather than considering the regional nature of the proposed project and the statutory requirements of the Act and Coastal Act, the only alternative sites considered in the FSA are in located in Carlsbad.

According to the AFC, the CECP is intended "to meet the electrical resource needs

defined by SDG&E” and to “ensure a reliable source of energy supply and local and regional electrical transmission grid support in San Diego County and the southern California region.” (AFC, 07-AFC-06, p. 2-1.) These goals are repeated in the project objectives cited in the PMPD. (PMPD, “Alternatives,” p. 2.) Although the CECP is intended to serve SDG&E and the San Diego County region, the FSA did not consider any alternative location outside the City of Carlsbad.

Evidence recently brought to the Committee’s attention shows the PMPD reached an erroneous conclusion. The Application of San Diego Gas & Electric Company (U 902 E) for Authority to Enter into Purchase Power Tolling Agreements with Escondido Energy Center, Pio Pico Energy Center and Quail Brush Power (“SDG&E Application”), filed with the California Public Utilities Commission on May 19, 2011, confirmed there are at least three alternative sites in the San Diego Region which can fulfill the project objectives and avoid a number of the CECP’s potential significant impacts. (See City of Carlsbad and Carlsbad Redevelopment Agency Motion to Take Official Notice, filed June [X], 2011.) These alternatives sites are located in SDG&E’s service territory and include sites in the same location as an existing generation facility (Escondido Energy Center), on a previously disturbed site adjacent to the Otay Mesa combined cycle power plant (Pio Pico Energy Center), and near the Sycamore Canyon Landfill (Quail Bush Energy Project).

This evidence also shows that there are alternative sites outside the City of Carlsbad which could achieve the fundamental goals of the CECP. As stated by SDG&E in its application to the PUC for approval of power purchase tolling agreements with the Escondido Energy Center, Pio Pico Energy Center and Quail Bush Energy Project:

“Each of the three subject contracts represents environmentally friendly, quick start generation units utilizing the most advanced and efficient gas-fired technologies. They also provide the starting and/or ramping capabilities required by the Commission to accommodate sudden changes in resources or load. Further, these generation facilities will help to mitigate the effects of intermittency

associated with the increased deployment of renewable generation. In addition, each of these facilities will provide reliable capacity during periods of peak load.” (SDG&E Application, pp. 5-6.)

The PMPD’s conclusions regarding the range of alternatives evaluated are plainly erroneous. The FSA’s failure to consider alternative locations outside the City of Carlsbad violates CEQA’s requirement to consider a reasonable range of alternatives and fails to comply with the Coastal Act’s requirements to determine whether the proposed site has greater relative merits than alternative sites in the CECP’s service area. Had the FSA complied with these statutory requirements, it would likely have reached the appropriate conclusion that the CECP is not the best possible proposal in the best possible location.

**B. The PMPD Erroneously Rejected The “No Project” Alternative.**

The PMPD rejects the “No Project” alternative on the grounds that the No Project Alternative would require all five EPS units to continue to operate “as is” into the foreseeable future, would delay the retirement of EPS Units 1 through 3 indefinitely, would require new sites to be found in the San Diego region, would cause increased air pollution from running older units longer, and the CECP can utilize the plant’s infrastructure. The PMPD is erroneous for several reasons.

First, the SDG&E Application calls into question each of the five stated reasons for rejecting the No Project alternative. The SDG&E Application and filed testimony seek approval for signed power purchase agreements (“PPAs”) with three projects: Escondido Energy Center (45 MW), Pio Pico Energy Center (305 MW) and Quail Brush Power (100 MW). The documents filed by SDG&E with the PUC contain the following relevant information:

- With the PPAs, “SDG&E assumes the retirement of Encina units 1, 2 and 3, representing a total of 320 MW by 2013, with the remaining capacity to be retired in 2017. (Anderson testimony, page 10);

- All three sites with PPAs are in the San Diego region (Application, page 3);
- The three proposed projects have on-line dates of 2012, 2014 and 2014; and
- Two of the three proposed projects would be located at existing power plants.

SDG&E issued a Request for Offers in 2009, pursuant to SDG&E's 2006 commission approved long-term procurement plan. From the bids received, SDG&E negotiated and chose the three listed projects as those that best fit its system needs and relevant state energy policies.

Second, the PMPD completely ignores the SWRCB's OTC Policy. Contrary to the PMPD's conclusion, EPS Units 1 through 5 would not continue to operate indefinitely into the future nor would there be increased air pollution from having to run older units longer. In fact, the OTC Policy requires Units 1 through 5 to be retired by December 31, 2017, thereby terminating their emission of air pollutants. The PMPD's failure to consider the OTC Policy renders its conclusions regarding the No Project alternative plainly erroneous.

Third, there is no dispute that the No Project alternative would require another power plant to be built elsewhere in the San Diego area. However, as the evidence in the SDG&E Application shows, there are three alternative sites in the San Diego region which SDG&E has determined will provide the additional power generation needed. These alternative sites also would eliminate an industrial use in the Coastal Zone, thereby fulfilling the goals of the California Coastal Act and avoiding the impacts of the CECP, which would prolong and intensify a heavy industrial use in the Coastal Zone.

### **C. The PMPD Improperly Emphasized Certain Project Objectives To Exclude Meaningful Consideration Of Reasonable Alternatives.**

Under CEQA, the analysis of alternatives must evaluate a reasonable range of

alternatives “which would feasibly attain most of the objectives of the project.” (14 Cal. Code Reg. § 15126.6(a).) The statement of objectives identifies “the underlying purpose of the project” and is intended to “help the lead agency develop a reasonable range of alternatives.” (*Ibid.*) Project objectives cannot be written so narrowly as to compel the conclusion that only the proposed project can meet them, thereby precluding the implementation of reasonable alternatives. (*Kings County Farm Bureau v. Hanford* (1990) 221 Cal.App.3d 692, 736.) As long as an alternative can achieve the fundamental purpose of a project, it should not be rejected simply because it would not attain other project objectives. (*In re Bay-Delta, et al.* (2008) 43 Cal.4th 1143, 1165.)

The PMPD erroneously sanctions the FSA’s failure to comply with CEQA’s requirements regarding the use of project objectives in two ways. First, the FSA placed undue emphasis on the project objective to utilize existing EPS infrastructure and thus skewed the analysis in favor of the CECP and against alternative sites. Second, the FSA failed to consider the SWRCB’s OTC policy and the rapidly approaching deadline for retiring EPS Units 4 and 5, thereby understating the benefits of alternative non-coastal locations.

The AFC described the fundamental objective of the CECP as follows:

[T]o develop the CECP to meet the electrical resource needs as defined by San Diego Gas & Electric (SDG&E). This includes contributing to electricity reserves that will ensure a reliable energy supply and local and regional electrical transmission grid support in San Diego County and the southern California region.

(AFC, 07-AFC-06, § 2.1, p. 2-1; see also FSA, p. 6-3 [“The CECP’s primary objective is to provide a reliable source of electrical generation to an energy dependent region of California.”].)

Although all of the alternative locations considered could meet this fundamental objective, the PMPD places undue emphasis on another objective in reaching its conclusion that none of the alternate locations were environmentally superior to the

CECP. In its analysis of the alternative sites recommended by the City, the FSA emphasized their distance from transmission and natural gas lines. Staff also testified that proximity to transmission lines was a prime consideration and questioned whether rights-of-way for new lines serving alternative sites could be acquired. (RT, 2/03/10, p. 430 [N. Vahidi].)<sup>7</sup> The alternate sites thus were found wanting in comparison with the proposed project because they could not achieve the project objective of “utiliz[ing] existing infrastructure to accommodate replacement generation and reduce environmental impacts and costs.” (FSA, p. 6-4, 6-6 through 6-11.)

The Commission has cautioned against the use of narrow project objectives which prejudice viable alternatives. Previous Commission decisions have found that defining project objectives too narrowly can artificially limit the range of reasonable alternatives considered and result in an inadequate analysis of alternatives. (Chula Vista Energy Upgrade Project, 07-AFC-4, Final Commission Decision (June 2009), pp. 25-26.) In a situation similar to that here, the Commission specifically found that a project objective to reuse existing infrastructure artificially limited the range of alternatives considered and was a poor yardstick by which to measure alternative locations:

The project objectives formulated by Applicant and Staff include, in one form or another, the reuse of the existing plant’s infrastructure such as project linears. While it may be advantageous to reuse existing infrastructure as long as it is serviceable and up-to-date if the reuse does not create or perpetuate adverse environmental impacts, the evidence shows that in this case there are disadvantages that could be avoided by the use of a site in a General Industrial-Zoned area of Chula Vista.

(*Id.* at p. 25.)

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<sup>7</sup> The issue of rights of way was not an impediment to the fleet-services or Oaks North site because city of Carlsbad controls those. (RT, 2/03/10, p. 441 [J. Garuba].) In addition, in their bid to SDG&E, the City and Pattern Energy proposed undergrounding high-voltage lines to eliminate related impacts. Although staff could not have known that fact, the FSA’s failure to consider undergrounding high-voltage lines reflects the fact that the alternatives analysis was too narrowly defined. In addition, the analysis didn’t compare the benefits of an alternative outside the Coastal Zone versus the detriment of the CECP’s prolonging heavy industrial uses in the Coastal Zone. (RT, 2/03/10, pp. 445-446 [J. Garuba].)

The FSA's comparison of the alternative locations to the CECP also was skewed by its failure to recognize and accord sufficient weight to recent developments concerning the project objective to "[a]llow the retirement of existing EPS Units 1, 2 and 3, and assist in . . . the eventual retirement of existing Units 4 and 5." (FSA, p. 6-4.) The FSA acknowledged in the GHG analysis that the SWRCB's proposed OTC Policy was likely to be adopted and would require retirement of the existing EPS units. (FSA, pp. 4.1-118, 4.1-119.) A few months after the FSA was published, the SWRCB formally adopted the OTC Policy and set a deadline of 2017 for termination of once-through cooling of Units 1 through 5.

Despite its impending adoption by the SWRCB, the FSA did not consider the effect of the OTC Policy on the relative merits of the CECP and the alternative locations. Had the FSA given appropriate weight to the importance of the state interests addressed in the OTC Policy and the proximity of the deadline for retiring Units 4 and 5, it undoubtedly would have concluded that one or more of the alternative locations would achieve this project objective far more effectively than the CECP.

CEC staff's reasons for rejecting alternate locations in Carlsbad also conflict with the evidence in the record. For example, CEC staff asserts that the Maerke, 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 FSA's over-emphasis on the "existing infrastructure" objective and its under-emphasis on the OTC Policy's effect on the same objective also led to its rejection of the "No Project" alternative:

In addition, the 'No Project' alternative would likely result in other energy projects needed to provide generating capacity and displace aging OTC generation, and such projects would not make use of the existing EPS infrastructure. Thus, the 'No Project' alternative would require the existing EPS units to continue to operate. In addition, the 'No Project' alternative would likely result in other projects similar to the CECP that would be constructed elsewhere in the San Diego area, with a resulting increase in environmental impacts from the siting and operation of additional power plants that likely would not use existing industrial and transmission infrastructure.

(FSA, p. 6-1.) The FSA's reliance on the "existing infrastructure" objective as the driving determiner of the alternatives analysis is contrary to the Commission's decision in the Chula Vista Energy Upgrade Project, to the Coastal Act's goal of removing, not preserving, heavy industrial uses in the coastal zone, and to the SWRCB's OTC Policy to phase out coastal power plants.

The FSA's focus on certain subsidiary objectives also distracts attention from evidence

which suggests the CECP will not be able to meet the project's fundamental objective. There is no evidence that the CECP has obtained, or will obtain, a power purchase agreement (PPA) to deliver power to SDG&E. Asked to illuminate the public as to whether or not it had received an offer from SDG&E to purchase electricity generated by the CECP, NRG refused to answer, citing company policy. (RT, 2/03/10, p. 358 [J. McKinsey].)

The evidence in the recently filed SDG&E Application confirms that alternative sites, and not the CECP, will be the only ones which can accomplish the fundamental project objective of providing dependable power generation in the SDG&E service area. The SDG&E Application shows that the Escondido Energy Center, Pio Pico Energy Center and the Quail Brush Power are preferable to the CECP for accomplishing the power generation goals of the region.

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 previous briefs, CEC staff alleged 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].)

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.*) As a result, the PMPD’s conclusion that the CECP can best accomplish the project objectives is not supported by and conflicts with the evidence in the record.

The PMPD compounds the deficiencies in the alternatives analysis by failing to give due deference to the City’s expertise and jurisdiction over local land use and visual resource determinations. Although the City has shouldered the regional burden of hosting a power plant at the existing EPS site for over 50 years, it offered to continue to host a new power plant at an appropriate inland location. Despite the City’s avowed willingness to do so, and its jurisdiction over the local land use regulations applicable to the proposed alternative sites, the PMPD disagreed with the City’s determination regarding consistency with local land use LORS and concluded that the alternative sites were inconsistent with local land use regulations and had greater visual impacts than the proposed site. This conclusion not only fails to comply with the Commission’s guidelines regarding due deference to a local agency’s recommendations over matters within its jurisdiction, but also it disregards the City’s willingness and ability to provide a

feasible alternative location. (20 Cal. Code Reg. § 1744.)

### **III. WORKER SAFETY AND FIRE PROTECTION.**

Section V.D of the PMPD addresses the CECP's impacts on worker safety, fire protection or emergency services. The PMPD concludes that the design of the CECP, with a 28-foot minimum width and partial rim road, affords satisfactory access for fire and emergency responders. The PMPD based this conclusion on a staff survey of access widths at other power plants and the low probability of a "major event." The PMPD's conclusion that the CECP will not have a significant impact on worker safety, fire protection or emergency services is erroneous for the following reasons.

#### **A. The CECP Will Have Unmitigated Significant Impacts on Emergency Access and Public Safety.**

CEQA requires an environmental document to analyze potential health and safety problems that may result from implementation of a proposed project. (14 Cal. Code Reg. § 15126.2(a).) A project will have a significant impact on the environment if it results in inadequate emergency access, interferes with an adopted emergency response plan, or exposes workers or the public to hazardous conditions. (*Ibid.*; see also 14 Cal. Code Reg., Appendix G, §§ VII(g), XVI(e).)

The City produced voluminous evidence that the CECP will have the following unmitigated significant impacts on emergency access and worker and public safety:

- The 28-foot width of the access road in the depressed bowl that encircles the CECP is inadequate in that it is substantially narrower than the 50-foot width required for adequate emergency access;
- The 8-foot width of the "rim road" that will allow access from three of the plant's four sides is inadequate in that a 25-foot wide rim road that encircles the entire plant is necessary for adequate emergency access; and

- The design of the access route from Carlsbad Boulevard to the CECP will interfere with emergency access and slow emergency response time by requiring fire and emergency vehicles to make several 90-degree turns.

The testimony of Carlsbad Fire Department officials established that the proposed access is inadequate on all fronts because it slows the arrival of emergency vehicles and rescue personnel, limits their mobility after they arrive on the CECP site, and prevents access from above the bowl in the event that the road within the bowl is inaccessible.

These impacts result from the constrained nature of the proposed site and the misconception that fire suppression systems are an adequate substitute for adequate emergency access and planning. The site is hemmed in by Agua Hedionda Lagoon on the north, the Los Angeles-San Diego railroad tracks on the west, and the Interstate 5 freeway on the east. In addition, Caltrans is in the process of widening Interstate 5, which will push the western edge of the freeway to within 120 feet of the CECP, eliminating most of the existing buffer between I-5 and CECP. The nature and intensity of uses surrounding the proposed site will result in unmitigated significant direct and cumulative impacts on emergency access and public safety by reducing an already constrained space and creating unsafe and inadequate conditions for firefighters responding to emergencies at the proposed plant.

**B. The Proposed 28-Foot-Wide Road Within The Bowl Is Too Narrow To Permit Emergency Personnel To Do Their Jobs.**

The PMPD's conclusion that a 28-foot wide access road will be adequate for fire and emergency responders disregards City fire officials' determination that a road encircling the plant within the sunken bowl of that width will not provide adequate access for emergency vehicles. In reaching this conclusion, the PMPD failed to appropriately consider the laws of the State of California and the City of Carlsbad regarding fire safety. The issue involves the statutory requirements for dealing with access road widths at the extremely constrained CECP site, which ultimately affects the protection of fire personnel and citizens.

The California Fire Code prescribes the basic statewide requirements for fire protection and contemplates situations exactly like that presented by the CECP application. California Fire Code Section 502.1 defines a “fire lane” as “[a] road or other passageway developed to allow the passage of fire apparatus.” Section 503.2.1 requires an unobstructed minimum width of 20 feet for access roads. Section 503.2.2 authorizes local fire officials to require greater width where necessary to provide adequate access: “The fire code official shall have the authority to require an increase in the minimum access widths where they are inadequate for fire or rescue operations.” (24 Cal. Code Reg. § 503.2.2.)

At the PMPD hearing, staff witness Greenberg testified that, with regard to the Section 503.2.2 powers given local fire officials, there needs to be a stated reason, not just opinion. (Hearing Transcript, May 19, 2011, p. 165.) The Carlsbad fire officials provided reasons supporting their requirement for wider access, supported by facts gathered through actual experience, including their assessment of the potential threat, the ability to maneuver emergency apparatus, distance from walls, narrow corridors and other site conditions. (RT, May 19, 2011, pp. 177-179.)

At the PMPD hearing, the Committee requested the parties to address “lessons learned” from two power plant fires – the Kleen Energy fire in Connecticut and the Palomar fire in Escondido. Based upon discussions with the Escondido Fire Chief, the after-action reports of the incident, the experience of Carlsbad Fire Chief Heiser, and a letter to the Committee signed by Chief Lowry of the Escondido Fire Department, Chief Crawford felt more strongly than ever that a 50-foot lower perimeter road and a 25-foot upper rim road are required. (Hearing Transcript, May 19, 2011, p. 127.)

Voluminous evidence in the record supports the need for these requirements. Three City fire officials have testified that the CECP roads are too narrow and need to be wider to ensure the safety of workers, the public and emergency personnel. Fire Chief Kevin Crawford, Operations Chief Chris Heiser and Fire Marshal James Weigand, who together represent more than 80 years of firefighting experience, testified regarding the

inadequate emergency access which would result from locating the CECP site in a constrained space. (Direct Testimony, Crawford, p. 4, Heiser, p. 4, Weigand, pp. 3-5; RT, 2/4/10, pp. 51-56.)

These fire officials are familiar with the City's emergency equipment, personnel and tactics and carefully evaluated the proposed CECP site and fire plan. Based on this expertise and review, the City's fire officials made the following recommendations:

1. Increase the width of the lower perimeter road from 28 feet to 50 feet. The CECP proposes a perimeter road inside the bowl only 28 feet wide. (RT, 2/04/10, p. 36, ll. 21-25.) City fire officials pointed out that a 28-foot wide road would leave only four feet on each side of a fire truck, which would not provide sufficient room for emergency equipment and personnel to deploy and operate, or for other emergency vehicles to pass. Accordingly, the City's fire officials unanimously recommended the lower perimeter road be at least 50 feet wide. (Direct Testimony, Crawford, p.4; RT, 2/04/10, pp. 55, 87.)
2. Increase the width of the upper rim road from 8 feet to 25 feet. The CECP proposes an upper rim road only 8 feet wide. City fire officials testified that an 8-foot wide road would be completely inadequate to accommodate emergency vehicles in an already constrained space. In addition, the future widening of I-5 will extend the freeway westward so near the CECP's eastern wall that it will leave no space for the rim road between the CECP and the freeway. (RT, 2/04/10, p. 77 [McKinsey].) The Carlsbad Fire Department requires an upper rim road at least 25 feet wide in order to provide adequate access for emergency equipment and personnel. (Direct Testimony, Crawford, p. 4.)

The Fire Department is responsible for the safety of Carlsbad residents, visitors, property and its own emergency personnel. The design of the CECP's interior roads presents a significant hazard to emergency personnel. Chief Heiser testified it would be difficult for a firefighter to escape an incident in the pit, saying: "(A) firefighter in full protective clothing . . . isn't going to run up even a

gradual slope effectively.” (RT, 2/04/10, p. 105.) Fire Marshal Weigand confirmed that it would be “impossible for my folks to get out” in the event of an unforeseen incident. (RT, 2/04/10; p. 56.)

The California Fire Code expressly authorizes fire officials to increase the required width of access roads where they are inadequate for fire and rescue operations. (24 Cal. Code Reg. § 503.2.1.) Based on their firefighting experience and their knowledge of department equipment and personnel, the senior staff of the Carlsbad Fire Department required increased widths for the CECP’s emergency access roads for the following reasons :

Access. Firefighting equipment requires sufficient space to allow emergency personnel to perform their duties. Chief Heiser testified that a ladder truck is 56 feet long and 10 feet wide and requires a minimum of 5 feet on either side of the vehicle to enable rescue workers to extract equipment, set up operations and execute their mission. Chief Heiser testified that such a vehicle needs a minimum of at least 20 feet for firefighters to be able to access the truck and equipment. (RT, 2/04/10, p. 53)

Passing. To operate safely within the “pit,” emergency vehicles need sufficient space to pass other vehicles. A 28-foot road width is insufficient to allow other vehicles to pass an emergency vehicle that requires a 20-foot-wide footprint. Chief Heiser testified that 50 feet is a reasonable width to ensure adequate space for fire and rescue operations. (*Id.*, p. 55.)

Turning. The emergency access roads must be designed to accommodate the turning requirements of fire and other emergency vehicles. The CECP, as designed, would force emergency apparatus to make a series of 90-degree turns to gain access to and maneuver within the plant grounds in order to reach an actual emergency. These turns, combined with the narrow roadways, will slow response times and put plant workers in danger. (Direct Testimony, Heiser, p. 4) As Fire Marshal Weigand testified, “fire apparatus don’t make 90-degree turns.” (*Id.* p. 61.)

Clear Roadways. The California Fire Code authorizes fire departments to require “Fire Apparatus Access Roads.” (24 Cal. Code Reg. § 503.1.) Fire access roads are intended to “provide fire apparatus access from a fire station to a facility....” (24 Cal. Code Reg. § 502.1.) The CECP did not require that either the perimeter or rim road be a fire access road, which would require they remain clear of parked vehicles. (RT, 2/04/10, p. 115 [Holden].) Chief Crawford testified that cars parked on the roads would create obstructions for emergency vehicles. (*Id.*, p. 94.)

The PMPD’s characterization of this testimony as “CFD’s desire to optimize its working environment” trivializes the experience and expertise of professional fire fighters and the enormity of the risks inherent in their jobs. Clear testimony about insufficient space to access the site and operate emergency equipment effectively, on a subject entrusted by California law to the discretion of local fire officials, has nothing to do with “optimizing” working conditions and everything to do with performing critical emergency functions safely.

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 CECP does not conform with the requirements of the California Fire Code. 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.

The PMPD fails to protect fire fighting personnel and the general public by virtually ignoring Section 503.2.2. The PMPD’s discussion of Section 503.2.1 includes only two

references on page 4 and no discussion of Section 503.2.2 at all. The PMPD appears to treat California Fire Code Section 503.2.2 as a guideline or suggestion. It is not. Section 503.2.2 is a requirement of state law. Although the Commission has the power either to enforce the Fire Code or to override it, the Commission cannot simply ignore the Fire Code.

The Commission has two legal choices: enforce the law or override the law. In the PMPD, Condition of Certification Worker Safety-6 reads, in part, as follows: “The access roads, below-grade perimeter road, and ramps shall be no less than 28 feet wide.” If the Commission decides to enforce the law, the City recommends the Commission adopt the following condition of certification in place of Worker Safety-6:

**WORKER SAFETY-XX:** Prior to the start of construction, the project owner shall include in the initial engineering designs required in GEN-2 and subsequent site plans at least a 50-foot Emergency Access Lane around the base of the CECP (lower rim road) and at least a 25-foot wide Emergency Access Lane at the top of the CECP (upper rim road) or other emergency access requirements mutually agreed to by the project owner and the Carlsbad Fire Department.

**Verification:** The project owner shall include the required emergency access lanes or other emergency access requirements mutually agreed to by the project owner and Carlsbad Fire Department in all drawings and plans submitted to the CBO.

If the Commission decides to override the law, the record should be clear that there is a responsibility that goes with the Commission substituting its judgment for that of the Carlsbad Fire Department in matters of worker and public safety. The City respectfully requests the Committee respect the extensive Fire Code and operating experience of City fire officials and carefully consider the implications of rejecting the Fire Department’s evidence of the necessity 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.

**C. The CECP And The Proposed Widening Of The I-5 Freeway Will Have An Unmitigated Significant Cumulative Impact On Emergency Access By Allowing Insufficient Room For A Continuous Rim Road Around The Plant.**

The CECP originally included a “rim road” which encircled the proposed plant approximately 30 feet above the depressed bowl in which the plant would be located. However, the diagram submitted to the CEC on February 1, 2010, shows a rim road that encircles the plant on three sides, but not between the CECP and the freeway. (RT, 2/03/10, p. 63.) Moreover, this partial road is only 8 feet wide, far too narrow for most emergency vehicles, and is designed for only “light duty fire truck access.” (Rebuttal Testimony, Witnesses and Exhibits, Jan. 29, 2010, Exhibit 190.)

The PMPD accepted the testimony of staff and the applicant’s expert, which sought to diminish the significance of the lack of adequate emergency access on the rim road. The applicant’s expert Frank Collins, *who has one year of volunteer firefighting experience*, testified that, “talking strictly from a fire-fighting standpoint, the rim road does not provide me any benefit due to the height and the types of construction” of the proposed project. He also testified that fires need to be fought at grade level and that other power plants are not required to have a secondary road. (RT, 2/04/10, p. 24.) However, Mr. Collins failed to consider the possibility that the rim road may be useful for more than spraying water on flames, or that, unlike the CECP site, other plants are not constrained by a freeway, railroad tracks and a body of water.

Refuting Mr. Collins’ testimony, Carlsbad Fire Marshal Weigand emphasized that the rim road is necessary to provide access to the bowl in the CECP’s constrained space. He testified there are foreseeable emergencies, such as a hazardous materials incident, where deployment of firefighters into the pit would not be feasible and people must be evacuated. In such an instance, the rim road would serve as vital emergency access and would provide an escape route for firefighters who encounter an unexpected hazard. Finally, Fire Marshall Weigand testified that the proposed 8-foot width of the rim

road, which could accommodate “light-duty fire trucks,” would be unusable in an emergency because the Carlsbad Fire Department has no such vehicles. (RT, 2/04/10, p. 62.) Accordingly, he recommended the rim road be maintained at a width of 25 feet. (Carlsbad Direct Testimony, 1/04/10, Weigand, p. 4.)

In his testimony on potential visual impacts, Mr. William Kanemoto said he determined from meetings with Caltrans officials that the widening of I-5 “would result in removal of some or all of the existing berm and vegetation currently screening the CECP site.” (RT, 02/03/10, pp. 12-13.) He also testified that, although the access road inside the plant bowl would remain, there was not sufficient room for a rim road between the CECP and the freeway.

In rebutting the City’s position on cumulative impacts, staff produced a visual showing that the CECP would not necessitate the removal of the tree-covered berm, and would therefore provide a visual screen. This graphic, however, proves the City’s position that the proposed solution results in a cumulative impact that jeopardizes worker and public safety by situating the freeway’s western edge 105 to 120 feet from the CECP’s eastern wall. This solution would leave only 30 feet between the CECP wall and the vertical wall buttressing the berm. (Staff’s Prehearing Conference Statement, VIS-1.) It should be noted that the CECP has not proposed nor designed such a vertical wall.

The staff’s proposed solution not only eliminates the rim road, but would reduce the lower emergency road to a width less than 30 feet. The lower road would travel north and south inside the bowl between two vertical obstructions — one consisting of the CECP wall and the other of the wall supporting the berm. This configuration would effectively trap firefighters responding to emergencies in a tunnel 90 feet from the freeway, with no egress east or west, and would not leave sufficient space for other emergency equipment to pass. More importantly, this severely constrained space would provide no room for rescue personnel to stage for an emergency in this location.

Furthermore, the close proximity of three regional facilities — the railroad, the freeway and the CECP — increases the likelihood of a cascading effect, in which a major emergency at one will have repercussions for the others. With the future western edge

of the freeway pushed within 120 feet of the plant, a large-scale incident at the CECP could halt freeway and rail traffic. It would also stretch Carlsbad Fire Department assets to the maximum and affect the response to emergencies elsewhere. Such potentially disastrous situations demonstrate the City's point that the project site is severely constrained and results in unmitigated significant cumulative impacts that preclude adequate emergency access and threaten worker and public safety.

**D. The Proposed Access Route On Plant Grounds Is Inadequate Because It Will Delay Emergency Response Time.**

Fire Marshal Weigand testified that CECP design impedes emergency response through the primary access route via Carlsbad Boulevard. After entering the grounds, the site plan requires fire engineers to make a series of 90-degree turns and then drive up a ramp over the railroad tracks to reach the plant. Once across the tracks, the engineer would be required to make an additional set of 90-degree turns to the location of the emergency. (Rebuttal Testimony, Witnesses and Exhibits, 1/29/10, Exhibit 190.)

Carlsbad Fire Operation Chief Heiser, who is tasked with preparing tactical responses to emergencies in the City, testified that the repeated right-angle turns and the crossing over the tracks push the response time beyond the six minutes claimed in the FSA. He noted, "Increased response times will increase the morbidity and mortality of patients." Chief Heiser also testified that the plant's proximity to two major transportation arteries — the Los Angeles-San Diego rail line and Interstate 5 — could have a direct impact on those routes in the event of a major incident. (Carlsbad Direct Testimony, Heiser-4, 5.)

**E. The Potential Impacts To Emergency Access And Worker And Public Safety Have Been Understated.**

Throughout the three-year application process, the project applicant understated the dangers posed by a combined-cycle generating plant and provided no detailed emergency plan. The original application's section on "Fire Safety and Emergency Response" is only one-half page long and does not guarantee rapid access to the project for fire and emergency vehicles or address access to structures taller than 100

feet. (AFC, 07-AFC-6, pp. 5.16-20).<sup>8</sup>

The AFC and ensuing proceedings have generally ignored the greatest potential hazard presented by the plant — a major fire or explosion sparked by natural gas lines fueling the plant's combustion — taking the view that such an event has been engineered out of the realm of possibility and is so unlikely that it need not be addressed as a condition for certification. (RT, 2/04/10, pp. 14-18 [F. Collins], pp. 32, 133-135 [A. Greenberg].)

As designed, the CECP site could accommodate only a small fraction of the equipment and emergency personnel needed to respond to a major incident. The applicant has dismissed Carlsbad fire officials' concerns, terming the department a "backup" to the CECP's well-engineered systems. (RT, 2/04/10, pp. 17-18 [F. Collins].)

In response, Carlsbad Operation Chief Heiser testified, "(I)n my experience I've never been referred to, when responding to an emergency, as a backup entity. Our focus is life, environment and property, none of which are truly addressed adequately with a fire protection system." (RT, 2/04/10, p. 71.) Chief Heiser further testified that fire suppression systems are intended both to prevent disasters and to give emergency personnel sufficient time to respond and perform their duty. Although fire suppression systems are helpful in minimizing an event, Chief Heiser cautioned: "But if they worked every time you wouldn't need us. And the reality is that they buy time to allow us to get into position. They don't make the bad things go away." (RT, 2/04/10, p. 72.)

The applicant and CEC staff gave little weight to the City's concerns and paid little heed to the Carlsbad Fire Department's repeated requests for information needed to enable emergency officials to make necessary recommendations for worker and public safety. (See, e.g., Data Request 142, issued March 23, 2009, Petition to Compel Response to Data Request 142, and letter from Chief Crawford to the CECP dated March 30, 2009.) Although Fire Officials met once with the applicant, they received no response to the

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<sup>8</sup> Although the AFC recommended a condition requiring a portable automatic cardiac defibrillator on site during construction and operations (AFC, p. 5.16-33), Carlsbad Operation Chief Chris Heiser testified that the majority of cardiac cases cannot be treated by such equipment and require the attention of a trained medical technician. (Carlsbad Direct Testimony, Jan. 4, 2010, Heiser-5).

other requests for information. (City of Carlsbad Direct Testimony, Jan. 4, 2010, Crawford, p. 2.) The applicant's failure to provide required site information for fire safety compelled City safety officials to perform their own analyses without the benefit of those documents.

Although the applicant and CEC staff emphasized the importance of prevention systems, Fire Marshal Weigand testified that engineered systems do not obviate the need for sound safety planning. (RT, 2/04/10, p. 60.) This concern was borne out by events elsewhere shortly after the evidentiary hearing for the CECP closed, when a Kleen Energy combined-cycle power plant exploded while under construction in Middletown, Connecticut, killing six workers and injuring more than two dozen people. The disaster led to a hearing on June 28, 2010, before the Workforce Protections Subcommittee of the U.S. House Committee on Education and Labor, where Fire Chief Ed Badamo of the South Middletown Fire District testified that the incident required the efforts of 18 fire departments, 8 ambulance services, 6 police departments, 6 emergency management Agencies, 16 community emergency response teams, the American Red Cross, the Salvation Army, and several other supporting agencies. (<http://democrats.edworkforce.house.gov/hearings/2010/06/examining-the-tragic-explosion.shtml>.)

Echoing Chief Heiser's testimony here, Middletown Mayor Sebastian N. Giuliano testified that precautionary measures must not upstage the need for a well-planned tactical response: "While prevention is always the best and wisest investment, the nature of the response to an incident can make the difference between minimization of harm and having a situation spiral out of control." (Ibid.)

Testimony presented at the May 19, 2011 PMPD hearing on lessons learned from the recent fire at the Palomar power plant in Escondido reinforced the need for sound emergency response planning. The fire at the Palomar power plant began on December 22, 2010, at one of the transformers located within the power plant site. The Escondido Fire Department responded to the emergency, and called in several agencies to assist, including the San Diego County Air Pollution Control District, San Diego County

Department of Environmental Health, a hazardous materials team from the San Diego City Fire Department, the U.S. Marine Corps Camp Pendleton Fire Department, and neighboring fire departments. There also was a large police response. The incident commander shut down Citracado Parkway adjacent to the plant site for strategic and safety reasons, set up a command post on Citracado Parkway, and instituted a shelter-in-place advisory for a one-mile radius around the fire location. The incident commander waited until he was sure the facility was de-energized before sending firefighters in to fight the fire, and attempted to control the fire using Class B foam. The initial attempts to control the fire using Class B foam failed because of the fire's extremely high temperature. The fire was located in a transformer, which used mineral oil for insulation. The oil ignited and burned so hot that the foam could not extinguish the fire. There also was a danger of spreading the fire by pouring water on it. The incident commander decided to allow the fire to burn until its intensity was reduced to a point where suppression with foam was possible. The fire was extinguished approximately 27 hours after it began.

By their very nature, accidents are often impossible to predict. However, as Chief Crawford testified, disasters like the Kleen Energy plant explosion and the Palomar power plant transformer fire reinforce City fire officials' position that

1. Although unexpected, emergencies at power plants happen and plant owners and emergency personnel must be prepared to handle them.
2. Adequate access within a power plant must be provided to reduce the chance that power plant vehicles, other equipment, and emergency response vehicles do not unnecessarily impede access to and around the emergency site.
3. Access around the perimeter of a power plant on and above a constrained greatly facilitates access and response during an emergency. (Crawford Written Testimony, May 19, 2011, p. 5.)

Chief Crawford concluded his testimony by saying that: “Based on the incidents at Kleen Energy and Palomar, I feel more strongly than ever that, under the authority of California Fire Code section 5.3.2.2 I require a 50-foot lower road and a 25-foot upper rim road.” (Crawford Written Testimony, May 19, 2011, p. 7.) A letter from Chief Lowry of the Escondido Fire Department submitted following the Palomar fire, supported Chief Crawford’s requirements.

#### **IV. SOIL AND WATER RESOURCES.**

Section VI.B of the PMPD addresses the CECP’s impacts on water supply. The PMPD concluded that the Conditions of Certification concerning the CECP’s proposed water supply were sufficient to ensure that construction and operation of the project would not create any significant adverse impacts. The PMPD’s conclusion is erroneous because it is based on staff’s analysis that is contrary to the law and is not supported by the evidence.

##### **A. The CECP Will Have Unmitigated Significant Impacts On Water Supply Resources.**

The PMPD relied on the staff’s evaluation of two potential sources of industrial water supply for the CECP: recycled water from the City and desalinated ocean water. (FSA, pp. 4.9-5 through 4.9-6.) The FSA concluded that compliance with the recommended Conditions of Certification will cause direct impacts to water resources to be less than significant. (FSA, p. 4.9-27.) This conclusion is invalid because the source of recycled water is unknown, the future source of ocean water is uncertain, and the recommended conditions of certification would not reduce the CECP’s direct impacts below significance.

##### **1. Recycled Water.**

With respect to recycled water, the PMPD fails to recognize that the FSA admitted that a sufficient supply will not be available from the City and that an alternate source of recycled water for both present and long-term needs is unknown. (FSA, p. 4.9-14.) In

an effort to address this deficiency, the FSA recommended Condition of Certification Soils & Water-8, which would require NRG to enter into an agreement with a “yet to be determined” producer to provide a long-term supply of recycled water. (FSA, pp. 4.9-14, 4.9-30.) As stated in the PMPD, Condition of Certification Soils & Water-8 does not identify who will provide a long-term supply of recycled water to the CECP. (PMPD, Soils and Water Resources, p. 17.)

The analysis of recycled water supply and the recommended mitigation do not comply with CEQA. An environmental document must identify the source of water for a proposed project. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 428.) Where the source of water is unknown, the lead agency cannot simply assume a solution. (*Id.* At p. 431.) The “unanalyzed impacts of unknown water sources” cannot be mitigated by making project implementation contingent on finding a source of water. (*Id.* at p. 429.)

The courts repeatedly have ruled that mitigation measures like Soils & Water-8 are inadequate. In *Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal.App.4<sup>th</sup> 342, for example, the county believed that impacts to water supplies would not be significant because the project applicant was in the process of reaching an agreement with a water supplier to provide sufficient water to serve the project. (*Id.* at p. 372.) The appellate court held this approach was inadequate because “the necessary agreements have not yet been reached, and as the Project has no control over those agreements, it cannot ensure that they will be reached.” (*Id.* at p. 373.)

The court reached the same result in *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3<sup>d</sup> 818, where the county sought to mitigate the water supply impacts of a proposed mining project by adopting the following condition:

Prior to commencement of mining operations or the issuance of a sand and gravel extraction permit, the operator shall establish an adequate water supply and appurtenant system to supply the water needs of the mining operation, processing plant and reclamation irrigation.

(*Id.* at p. 828.) The court ruled that this condition was inadequate to reduce impacts below significance because there was no assurance that the intended source of water would be sufficient for the project and current users, or whether additional facilities would be needed to deliver water to the project. (*Id.* at p. 829-831; *see also Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 205-206 [where source of water is unknown, mitigation measure prohibiting issuance of building permits until source of water is identified is inadequate].)

Soils & Water-8 is inadequate to mitigate the CECP's significant direct impacts on recycled water supply below significance. No source of recycled water has been identified and there is no assurance an agreement to provide recycled water could be reached even if a supplier were identified. Accordingly, to the extent it allows the CECP to rely on recycled water for its water supply, the PMPD is erroneous and the impacts remain significant and unmitigated.

## **2. Ocean Water.**

With respect to the desalinated ocean-water supply, the CECP proposes an on-site purification system that would draw seawater from the Encina Power Station (EPS) once-through cooling discharge channel. (FSA, p. 4.9-6.) The FSA concluded that a sufficient supply of ocean water will be available under the EPS' existing Waste Discharge Requirements (WDR) Order, "which allows the intake and discharge of up to 857 million gallons per day (mgd) of seawater for use as once-through cooling of Units 1 through 5." (FSA, p. 4.9-16.)

The CECP will have unmitigated significant direct impacts on desalinated water supply as a result of the State Water Control Board's (SWRCB) policy on once-through cooling (OTC Policy). The OTC Policy requires coastal power plants to reduce their intake of seawater for once-through cooling by a minimum of 93 percent. (See "Policy on the Use of Coastal and Estuarine Waters for Power Plan Cooling," adopted May 4, 2010.) Coastal power plants are expected to comply with the new policy either by dramatically reducing their intake of ocean water or by shutting down. (R. Ratliff, "Post-Evidentiary Hearing Developments," docketed May 28, 2010.) Staff testified that the retirement of

the entire Encina facility is the only feasible response to the OTC Policy. (RT, 2/03/10, p. 405, ll. 14-21 [D. Vidaver].) Since EPS Units 1 through 5 must comply with the OTC Policy by December 31, 2017, the existing EPS discharge channel will not be available to provide a long-term supply of ocean water for the CECP's desalination system.

CEQA requires the analysis of water supply impacts to look beyond the first few years of project operations and to consider potential impacts on future supplies. (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4<sup>th</sup> at p. 431.) An environmental document must identify the source of future water supplies and evaluate the likelihood of their actually being available. (*Id.* at p. 432.) If the anticipated source of future supply is uncertain, the environmental document must identify possible replacement sources and examine the potential environmental impacts associated with those contingencies. (*Ibid.*)

The FSA assumed the existing EPS intake channel would provide an adequate long-term supply of ocean water for CECP's desalination system. However, this assumption failed to consider the impacts of the potential shutdown of Units 4 and 5 pursuant to the SWRCB's OTC Policy on the availability of ocean-water supply after December 31, 2017. This omission is particularly significant in light of the fact that desalinated ocean water is "the only source of water [CECP] can get for the site." (RT, 2/01/10, pp. 259-260 [N. Vahidi].) Although the OTC Policy was formally adopted one year ago, the PMPD makes no reference to its potential effect on the availability of ocean water as a source of water supply for the CECP.

Recognizing the importance of this issue, the RWQCB asked NRG to explain the potential impacts of the shutdown of Units 4 and 5 on the CECP's water supply. (Docket 07-AFC-6 (December 17, 2009), Correspondence from NRG to Michelle Mata, San Diego Regional Water Quality Control Board; Exhibit 142.) Rather than providing the requested information, NRG stated it would address the issue "if at some point in the future EPS Units 4 and 5 are to be retired." (*Ibid.*) However, the RWQCB made clear that postponing consideration of this critical issue is not acceptable: "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.*” [Emphasis added.] (RT, 2/04/10, pp. 201-202 [M. Mata].)

The RWQCB’s desire to evaluate uncertainties regarding the source of ocean water for the CECP’s desalination system now, and not at some later date, is precisely what CEQA requires. Since the CECP will rely on ocean water from the existing EPS discharge stream for its long-term water supply, the likelihood of that water actually being available must be evaluated now. (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4<sup>th</sup> at p. 432.) The potential shutdown of Units 4 and 5 pursuant to the OTC Policy may eliminate the project’s anticipated source of future supply. Accordingly, the FSA should have identified possible replacement sources and examined the potential environmental impacts associated with those contingencies.

Condition of Certification Soils & Water-4, which requires NRG to obtain approval of a WDR Order allowing discharge of CECP industrial wastewater to the Pacific Ocean prior to operation of the ocean-water purification system, is not a substitute for the required analysis and will not mitigate the significant potential impacts on long-term ocean-water supply. (FSA, p. 4.9-28.) Although Soils & Water-4 may provide sufficient mitigation in the near term, before EPS’ deadline for complying with the OTC Policy, it is clearly insufficient to reduce impacts to the long-term supply of ocean water below significance. Moreover, the PMPD and the FSA on which it relies failed to consider what will happen if the CECP is not allowed to use ocean water as its source of supply. Accordingly, the CECP’s direct impact on desalinated water supply remains significant and unmitigated.

**B. Cumulative Significant Impacts On Water Supply Are Unmitigated.**

The PMPD’s reliance on the staff’s analysis of cumulative impacts on water supply and the adequacy of the Conditions of Certification is misplaced. The FSA’s conclusion that cumulative impacts to water resources could occur through the use of recycled water or ocean water, but “no expected significant cumulative effects to area water resources would occur” is erroneous because it is contrary to admissions contained in the FSA itself and violates basic CEQA principles.

## **1. Recycled Water.**

With respect to the supply of recycled water, the PMPD incorporates the FSA's faulty discussion. The discussion of cumulative impacts in the FSA disproves the conclusion that impacts will not be significant. The FSA admits (1) "the applicant does not have a commitment from the City for the supply of recycled water," (2) "the source [of an available supply] is unknown," and (3) "the cumulative impacts on the supply of recycled water is [sic] unknown." (FSA, p. 4.9-18.) In light of these admissions, the FSA's conclusion that cumulative impacts on recycled water supply would be insignificant is clearly erroneous. Cumulative impacts on recycled water supply are significant and unmitigated because the source of recycled water and the CECP's cumulative impacts on recycled water supply are unknown.

The FSA's conclusion of no significant cumulative impacts also is contrary to several basic CEQA requirements. First, an environmental document cannot assume that an adequate water supply will be available; it must identify a potential source for water and discuss the likelihood that supply will actually be available. (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, 40 Cal.4th at p. 432.) The environmental document also must show that an intended source of water "has enough water to serve the project and the current users." (*Napa Citizens for Honest Government, supra*, 91 Cal.App.4th at p. 373.) Finally, the environmental document must consider the need for additional water delivery facilities and potential impacts associated with their construction. (*Santiago County Water District, supra*, 118 Cal.App.3d at pp. 829-830.)

The FSA's discussion of cumulative impacts does not satisfy any of these requirements. Since the source of recycled water is unknown, there is no information on whether a potential source has enough water to serve the CECP and current users. There also is no evaluation of whether additional water delivery facilities will be needed to connect the source of recycled water (wherever it may be) to the City for delivery to the CECP. Absent this essential information, the project's cumulative impacts must be considered significant and unmitigated.

Second, an environmental document must provide a detailed statement setting forth all

significant environmental effects of a proposed project. (*Stanislaus Natural Heritage Project, supra*, 48 Cal.App.4th at p. 197.) The FSA cannot satisfy this requirement because it admits “the cumulative impacts on the supply of recycled water is [sic] unknown.” (FSA, p. 4.9-18.) In light of this admission, the conclusion that cumulative impacts on recycled water supply will be insignificant is patently invalid.

Third, an environmental document’s assumptions and conclusions concerning cumulative impacts must be supported by facts, data or other substantial evidence. (*Joy Road Forest & Watershed Assn. v. Cal. Dept. Of Forestry & Fire Protection* (2006) 142 Cal.App.4th 656, 676.) In the *Joy Road* case, the appellate court held the staff analysis of cumulative impacts on water supply “was woefully inadequate [because] no facts, statistics, reports or studies are identified to support the contention that the decrease in fog drip will not result in a decrease in the water supply.” (*Ibid.*) The court emphasized that the analysis and conclusions regarding water supply must be supported by substantial evidence, which includes “facts [and] reasonable assumptions based on fact,” but does not include “speculation [or] unsubstantiated opinion.” (*Id.* at p. 677; 14 Cal. Code Reg. § 15384.)

Here, the FSA’s conclusion that cumulative impacts to water supply will be insignificant is based on the project applicant’s and staff’s “belief” that a reliable supply of recycled water will be available to serve the CECP. (FSA, p. 4.9-18.) No facts, data or other evidence are provided which supports this belief. In light of the FSA’s admission that the source of recycled water is unknown, the *belief* that a reliable source of such water will be available to serve the CECP is merely unsubstantiated opinion, which is plainly inadequate to support a conclusion of no significant impact.

## **2. Ocean Water.**

With respect to the supply of ocean water, the PMPD accepted the FSA’s erroneous conclusion that cumulative impacts will be insignificant is based on the assumption that the cumulative projects, CECP and the Carlsbad Seawater Desalination Project (CSDP), will use only a small fraction of the ocean water presently available under the EPS’ existing WDR Order. (FSA, pp. 4.9-18 through 4.9-19.) However, the FSA’s

analysis of cumulative impacts is incomplete and its conclusion of no significant impact is invalid because they fail to take into account the potential shutdown of Units 4 and 5 pursuant to the SWRCB's OTC Policy.

An environmental document must analyze the potential cumulative impacts of a project. (*Friends of the Old Trees, supra*, 52 Cal.App.4th 1383, 1393; see also 20 Cal. Code Reg., Appendix B, subdiv. (g).) The analysis of cumulative impacts is only as good as the list of projects it uses. (Kotska and Zischke, *Practice Under The California Environmental Quality Act* (2d ed. 2009), p. 650.) If a relevant project is omitted from the list of cumulative projects, the type and severity of potential cumulative impacts will be understated and the analysis of such impacts will be inadequate. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 868.)

At the public hearings, staff testified they did not consider the potential shutdown of Units 4 and 5 in the cumulative impact analysis because it was not a reasonably foreseeable project when the FSA was prepared and the impact of the SWRCB's OTC Policy on Units 4 and 5 was a matter within the jurisdiction of for the RWQCB. (RT, 2/04/10, pp. 228-230 [M. Monasmith], pp. 233-234 [R. Ratliff].) Although they undoubtedly acted in good faith, staff reached the wrong conclusion.

CEQA required the potential shutdown of Units 4 and 5 to be included in the analysis of cumulative impacts because CEC staff was well aware of the draft OTC policy at the time the FSA was prepared, and the CEC participated in its development. (*Friends of the Eel River, supra*, 108 Cal.App.4<sup>th</sup> pp. 868-871.) In addition, CEQA prohibits leaving the analysis and mitigation of cumulative impacts on ocean water supply to the RWQCB, despite its jurisdiction over ocean-water discharge. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309 ["trusting the RWQCB and the applicant would work out some solution in the future" constitutes improper deferral of required analysis and mitigation].)

The failure to consider the potential shutdown of Units 4 and 5 with respect to cumulative impacts on water supply is inconsistent with the FSA's consideration of the shutdown as a cumulative project in other impact areas. The FSA included the

SWRCB's OTC Policy in the analysis of cumulative greenhouse gas emissions, treating the retirement of coastal facilities pursuant to that policy as a "likely event" and acknowledging EPS Units 1 through 5 were subject to it. (FSA, pp. 4.1-118 through 4.1-119.) The FSA also considered the shutdown of Units 4 and 5 as a cumulative project in the analysis of impacts to visual resources. (FSA, p. 4.12-24.)

Although it considered the shutdown of Units 4 and 5 as a cumulative project with respect to GHG emissions and visual resources, the FSA failed to do so with respect to desalinated water supply. The FSA provided no explanation for the omission, which resulted in a serious understatement of the cumulative impacts that will occur when the CECP no longer can use the existing EPS discharge stream as a source of ocean water. These impacts are significant since the CECP needs 4.32 million gallons of ocean water per day for industrial use and dilution purposes. (FSA, p. 4.9-6.)

The FSA's conclusion that the cumulative impacts on water resources are insignificant is clearly wrong. The admission that both the source of recycled water and the cumulative impacts on recycled water supply are unknown compels the conclusion that the CECP's cumulative impacts on recycled water are significant and unmitigated. The FSA's consideration of the shutdown of Units 4 and 5 in the cumulative analysis of some impact areas, but not with respect to the long-term supply of desalinated water, establishes the project's cumulative impacts on desalinated water supply also are significant and unmitigated.

### **C. The CECP Will Have Unmitigated Significant Impacts On Long-Term Water Supply.**

In its briefs, the applicant stated 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 PMPD 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.4<sup>th</sup> 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 PMPD 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. The Analysis Of Ocean Water Impacts Is Erroneous Because It Used The Wrong Baseline For Evaluating Potential Significant Impacts.**

The PMPD concludes the CEPC will not 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 conclusion 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.4<sup>th</sup> 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 actual amount of water 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. The PMPD repeats this misleading statement, making no attempt to correct previous misstatements: “The EPS has a SDRWQCB (San Diego Regional Water Quality Control Board) Waste Discharge Requirements (WDR) Order (R9-2006-0043) for the intake and discharge of up to 857 million gallons per day (mgd) of seawater for use as once-through cooling of Units 1 through 5.” (PMPD, May 2011, Soil & Water, p. 9) 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.4<sup>th</sup> 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.4<sup>th</sup> 556, 579-580 [attorney's letter regarding potential impacts constitutes argument and unsubstantiated opinion, not substantial evidence].)

**E. The Analysis Of Ocean Water Impacts Is Erroneous Because It Failed To Analyze The CECP's Impacts Over The Life Of The Project.**

The PMPD echoes CEC staff in touting the purported 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 emphasized 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, EPS Units 1 through 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 1-5 would 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.

The proposed CECP will not cause the retirement of Units 1- 3, as stated in the PMPD. ("EPS Units 1, 2, and 3 (circa 1950 steam boilers that provided the initial electrical generation) would be permanently retired once the CECP is approved and operational." PMPD, May 2011, p. 1) Rather, Units 1-3 will be shut down as a result of the SWRCB new OTC Policy, as stated by the applicant in a filing with the State Water Board: "In the event that the repowering of CECP is not completed by the Compliance Date [Dec. 31, 2017], Cabrillo will retire Units 1-3 and cease withdrawing approximately 225 MGD of seawater." (Implementation Plan for Compliance with California Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling, Cabrillo I LLC, Encina Power Station, March 2011, p. 32)

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.4<sup>th</sup> 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* (9<sup>th</sup> 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.4<sup>th</sup> 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.’”].)

## **V. CONSISTENCY WITH THE CALIFORNIA COASTAL ACT.**

Section VII.A.3 of the PMPD addresses the CECP’s consistency with the California Coastal Act. The PMPD concludes that the California Coastal Commission is not required to submit a formal report pursuant to Public Resources Code section 30413(d) and a 1990 Coastal Commission report concerning the project site is not relevant. The PMPD further concludes the CECP will be consistent with local zoning and will benefit the marine environment, is a “coastal dependent” facility in its own right as well as a permissible expansion of an existing coastal dependent use, will not harm an

environmentally sensitive area, and will promote the public access policies of the Coastal Act. These conclusions are erroneous for the following reasons.

The PMPD fails to properly apply the provisions of the Coastal Act with respect to the approvability of the CECP in the coastal zone. The PMPD misapplied the Coastal Act by ignoring the standard for approval of coastal dependent industrial facilities as well as the undisputed testimony regarding that standard. Instead, as demonstrated below, the PMPD assumed the conclusion of coastal dependency rather than applying the clear and specific statutory standard set forth in Public Resources Code Section 30101.

**A. The Coastal Commission Should Have Participated In This Proceeding And Provided A Written Report On The Suitability Of The Proposed Site.**

The City's And the Redevelopment Agency's position regarding the California Coastal Commission's mandatory duty to provide a report pursuant to Public Resources Code Section 30413(D) has been clear and consistent throughout these proceedings:

- The Coastal Commission has a mandatory, non-delegable duty to prepare a report for the Commission's consideration.
- Since the Coastal Commission has not prepared or submitted the required report for the Energy Commission's consideration, the CECP proceedings are incomplete and the requested license should be denied until the required report is submitted.
- If, over the City's and Redevelopment Agency's objection, the Energy Commission determines to proceed, the evidence in the record supports denial.

**B. Public Resources Code Section 30413 Requires The Coastal Commission To Provide A Formal Report In These Proceedings.**

With respect to the responsibilities of the Coastal Commission in relation to the exercise by the Energy Commission of its jurisdiction in the coastal zone, Public Resources Code section 30413(d) provides:

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 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 shall participate in those proceedings 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. The Coastal Commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in that notice. The Coastal Commission's report shall contain a consideration of and findings regarding all of the following:

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

minimize conflict with existing or planned coastal-dependent land uses at or near the site, and promote the policies of this division.

7. Such other matters as the Coastal Commission deems appropriate and necessary to carry out this division.

(Pub. Res. Code § 30413(d).)

When the Legislature used the word “shall” in this section, it expressed the intent that the Coastal Commission participate in these proceedings and file the report containing the seven findings set forth above. The Legislature’s use of the word “shall” mandates an action, as opposed to its use of the word “may,” which permits but does not require it. In section 30413, the difference is made clear by the distinction between the language used in subdivision (d) which uses the mandatory “shall,” as compared to subdivision (e) which uses the discretionary “may.”<sup>9</sup>

This distinction is particularly significant in Chapter 5 of the Coastal Act (sections 30400 through 30420) which is explicit in delineating the relative responsibilities of the Coastal Commission and the other various state agencies in matters where their respective jurisdiction may overlap. In these sections in particular, the Legislature sought “to minimize duplication and conflicts” among state agencies by carefully distinguishing between the uses of “shall” versus “may.”

The report required by section 30413(d) also is specifically contemplated as a necessary Coastal Commission action in the Memorandum of Agreement (MOA) between the Energy Commission and the Coastal Commission, which is intended to clarify the roles and duties of each commission during review of proposed projects at existing coastal power plant sites. (Memorandum of Agreement Between The California Energy Commission and the California Coastal Commission Regarding The Coastal Commission’s Statutory Role in the Energy Commission’s AFC Proceedings, April 14,

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<sup>9</sup> The Legislature appreciates the distinction between the terms “shall” and “may” and included in Public Resources Code section 30413(e) the provision that the Coastal Commission may, at its discretion, participate in other proceedings conducted by this commission but that it must participate in proceedings with respect to thermal power plants to be located within the coastal zone.

2005.) The MOA by its terms reflects a “common understanding of the statutory and regulatory requirements of each Commission during the AFC review.” (MOA, p. 3). The MOA reflects the statutory requirement by using mandatory language such as “must provide” regarding the Coastal Commission’s duty to provide the report required by section 30413(d).

Despite these requirements, the Coastal Commission did not file the report mandated by section 30413(d). Instead the Coastal Commission’s executive director filed a letter (docketed on October 16, 2007) stating that, because of substantial workload and limited resources due to budget constraints, the Coastal Commission was unable to complete the section 30413(d) report. It is not clear if this letter was filed with the consent of the Coastal Commissioners or on the unilateral action of the executive director. And while the Coastal Commission may be facing significant budget constraints, this does not excuse it from performing its mandatory, non-delegable duty to file such a report as part of the CECP review process. The report is a pre-requisite to the Energy Commission’s analysis of the impacts of the CECP. If it is a question of money, the applicant should be required to provide the funding necessary for the Coastal Commission to fulfill its statutory obligation to prepare the required report.

When a state or local agency fails to execute a mandatory duty required by law, court may order such compliance by way of a writ of mandate pursuant to Code of Civil Procedure sections 1085 or 1094.5. In this case, the City and Redevelopment Agency could either file litigation against the Coastal Commission seeking a court to order it to prepare the required report or request the Energy Commission to suspend the proceedings or deny the permit until the required report is prepared. The City and the Redevelopment Agency have chosen to pursue the latter remedy at this time.

The Legislature intended the protection of coastal resources to be fully considered and ensured in the Energy Commission’s approval of power plants. Section 30413(d) would be completely meaningless if that were not the case, and the law applicable to the CEC’s consideration of power plant approvals also makes clear that these impacts must be considered.

The PMPD concedes that the CECP must demonstrate consistency with Coastal Act policies. (FSA, p. 4.5-10.) Unfortunately, the PMPD's analysis of the CECP's consistency with coastal resource protection policies did not properly measure the impacts of the CECP. In fact, only two of the eleven environmental topics in the FSA even referenced the California Coastal Act as a LORS considered in their analysis:

- Air Quality – California Coastal Act not listed (page 4.1-3, 4, 52)
- Biological Resources - California Coastal Act not listed (page 4.2-2, 3, 17), discussion of impact on aquatic species (page 4.2-16)
- Cultural Resources - California Coastal Act not listed (page 4.3-2, 3, 20)
- Hazardous Materials - California Coastal Act not listed (page 4.4-3, 4, 18)
- Land Use - California Coastal Act listed (page 4.5-1, 2, 10 to 15) (States on page 4.5-14 how biology and visual discussed how CECP would comply with Section 30240 of the Coastal Act but there was no corresponding discussion)
- Noise And Vibration - California Coastal Act not listed (page 4.6-1, 6, 10)
- Public Health - California Coastal Act not listed (page 4.7-2, 25)
- Socioeconomic Resources - California Coastal Act not listed (page 4.8-1)
- Soil And Water Resources - California Coastal Act not listed (page 4.9-2, 7 to 9)
- Traffic And Transportation - California Coastal Act not listed (page 4.10-2, 20)
- Visual Resources - California Coastal Act listed (page 4.12-2, 32)

In particular, the PMPD's conclusion that the CECP is consistent with the policies of the Coastal Act because it is a coastal-dependent industrial facility simply ignores the clear language of the Coastal Act.

In the absence of the Coastal Commission report required by Section 30413(d), and in the face of the inadequate CEC staff analysis of coastal resource impacts, the City prepared a report regarding the CECP's consistency with the Coastal Act's resource protection policies. (Exhibit 420, Conformance Report.) As the evidentiary record

demonstrates, the Coastal Commission has delegated to the City permitting authority under the Local Coastal Plan (LCP) and, as a result of this delegation, the staff of the City has developed extensive experience interpreting and applying the policies of the Coastal Act in the review of proposed development in the areas of the City's coastal zone for which an LCP is certified. In light of this extensive experience, the conclusions of the City staff in the Conformance Report should be given great weight. Among these conclusions are that the proposed CECP is inconsistent with the visual resource policies, the biological resource policies and the access policies of the Coastal Act. The weight of the evidence also demonstrates that the proposed CECP is inconsistent with the coastal resource policies of the Coastal Act and that its significant impacts cannot be mitigated.

**C. The PMPD's Conclusion That A Formal Report From The Coastal Commission Is Not Required Is Erroneous.**

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.

The law and evidence discussed above 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.4<sup>th</sup> 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 shall participate in those proceedings 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, the Coastal Commission itself has never made any findings, prepared any report, or participated in

any other way in this proceeding. (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 propose the continued use of ocean water.

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. The PMPD seeks 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 Commission 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 Commission 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.

Given their extensive experience in interpreting and applying the Coastal Act, 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.)

**D. The CECP Is Not A Coastal Dependent Facility And Thus Cannot Be Approved At A Location In The Coastal Zone.**

Under the Coastal Act, development proposed to be located within the coastal zone must be found to be "in conformity with (the policies of) Chapter 3 (commencing with Section 30200)" of the Coastal Act. (Pub. Res. Code § 30604(a).) Under narrowly defined circumstances, development that is not in conformity with Chapter 3 may still be

approved. One such circumstance is provided in Public Resources Code section 30260, which provides that:

“...where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.”

That is the Coastal Act provision upon which the PMPD relies in finding the proposed CECP to be consistent with the Coastal Act. There is no question in the record that the proposed CECP is inconsistent with the policies of Chapter 3 of the Coastal Act. The PMPD does not assert otherwise. Instead, it purports to find that the project is a coastal dependent industrial facility, and thus to find that the CECP is consistent with Section 30260. However, nowhere in the PMPD is there any attempt to find that the proposed CECP is consistent with Section 30101, which clearly defines coastal dependent development. That section provides that a “coastal-dependent development or use” means “any development or use which requires a site on, or adjacent to, the sea to be able to function at all”.

As the record and Proposed Decision makes clear, the CECP will not require a site on or adjacent to the sea to be able to function at all. (FSA, p. 3-2; PMPD, Project Description, p. 3.) While the original units of the Encina Power Station relied on a once-through cooling technology that required a location adjacent to the sea, the CECP is designed to use either ocean water or reclaimed water.<sup>10</sup> The technology can, in fact, use water from virtually any source. Because it does not require a site on or adjacent to

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<sup>10</sup> As City staff testified at the PMPD Hearing (Hearing Transcript, page 58 line 10 to page 64 line 13) as well as in its written testimony (City Testimony, page Garuba-14, Question 25 and 26) and at the hearing on February 3, 2010 (Hearing Transcript, page 467 line 13 to page 468 line 23), City reclaimed water has been and is available to the applicant for use in this power plant if they are willing to fund the necessary system upgrades.

the sea to be able to function at all, the CECP does not meet the definition of coastal dependent development. (See Direct Testimony of Ralph Faust, p. 9.)

Perhaps aware that the proposed project is not consistent with Section 30101, the PMPD attempts a convoluted side-step by attempting to rely upon the language of Section 30260. The PMPD begins by quoting Section 30255, which provides that coastal dependent developments have priority over other developments on or near the shore line. It then finds that the CECP is “located at the existing EPS, which is a ‘coastal dependent use’...inasmuch as it uses once-through cooling technology”. It then notes that Section 30260 encourages coastal dependent uses to expand “within existing sites”, and on this basis asserts that the CECP is consistent with the Coastal Act policy that prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the Coastal Zone.

The flaw in this argument is that the PMPD assumes the conclusion of coastal dependency without ever comparing the proposed plant’s technology with the specific definition of “coastal dependent development” in Section 30101. The basic fact that the PMPD ignores is that the CECP is perfectly capable of functioning at a site that is not on or adjacent to the sea. Since that is the case, the CECP is not a coastal dependent development. While Section 30260 encourages coastal dependent uses to locate or expand within existing sites, the CECP is not a coastal dependent use, and thus does not meet the terms of that section.

The fact that the existing EPS is coastal dependent because of its dated technology is irrelevant to the issue of whether the proposed CECP is coastal dependent. Nor is it accurate or relevant in the context of the present proposal to suggest, as is stated in the PMPD, that the Coastal Act “prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the coastal zone”. The choice is not where in the coastal zone to locate the CECP; the choice is whether to locate it in the coastal zone at all. The only power plants that are permitted to locate in the coastal zone despite being inconsistent with the policies of Chapter 3 of the Coastal

Act are those that meet the definition of coastal dependent development. This brings the analysis right back to PRC section 30101, the definition of “coastal dependent development” that the PMPD completely ignores. Because the proposed CECP does not meet the Legislative definition of coastal dependency, it cannot be found to be consistent with the Coastal Act, and thus cannot be approved as consistent with LORS.

As a secondary justification, the PMPD asserts that “because the City of Carlsbad is unable to supply reclaimed water...to the project for cooling and other industrial purposes, it is necessary that CECP use its proposed ocean-water purification system”. This attempt to buttress the already announced conclusion is specious. The CECP may need a source of water for cooling and other industrial purposes but there is no necessity that the operation of the CECP depends upon the particular water to be used being drawn from the ocean. The amount of water that the plant needs can come from non-ocean sources. The need for water is an issue that can and should be analyzed as part of an overall evaluation of possible alternative sites outside of the coastal zone. Location of this facility within the coastal zone cannot be approved consistent with the Coastal Act since the facility does not need to be located “on or adjacent to the sea to be able to function at all”. (Pub. Res. Code § 30101.)

After its only reference to Section 30101, the PMPD makes a number of assertions regarding the convenience of locating the CECP at the EPS site. These include: that co-location “facilitates its proposed ocean-water purification system for supplying water to its air-cooled cooling system”; that it “allows the CECP to utilize the (EPS) plant’s infrastructure...thereby avoiding offsite construction of new linear facilities; and that it “would avoid the need to develop in areas of Carlsbad unaccustomed or unsuited to this type of industrial development”. But none of these arguments of convenience are even slightly relevant to the question of whether the proposed CECP is coastal dependent. (See Direct testimony of Ralph Faust, p.10).

The PMPD reads Section 30260 of the Coastal Act as if it said: “non-coastal dependent industrial facilities that are related in purpose to existing coastal dependent industrial

facilities shall be encouraged to locate or expand within existing sites....” This interpretation would allow non-coastal dependent industrial facilities to continue to be placed on or adjacent to the sea indefinitely, regardless of technological improvements that make such location decisions inconsistent with the clear and specific Legislative policy to keep such facilities that are not otherwise consistent with the Coastal Act out of the coastal zone. The policy reasons for avoiding this outcome were eloquently stated by Carlsbad City Manager Lisa Hildabrand in her testimony at the evidentiary hearing on February 1, 2010. (RT, February 1, 2010, at pp. 209-213 [L. Hildabrand].) But it makes no technical legal sense either. There is not a shred of evidence in the legislative history to support the interpretation of the PMPD. Nor, most important, is it consistent with the plain language of Sections 30101 and 30260 of the Coastal Act. For all of these reasons the proposed CECP cannot be found to be consistent with the Coastal Act, is not a coastal dependent industrial facility, and thus cannot be approved.

**E. The CECP Is Not Consistent 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 Ralph 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.)

The CECP is inconsistent with the coastal resource policies of the Coastal Act in four principal areas: scenic and visual impacts, marine resource impacts, access and recreation impacts and land use priority impacts.

**Scenic and Visual Impacts -** In the FSA, staff concluded that the proposed CECP would not have an adverse "aesthetic" impact under CEQA and would comply with applicable laws, including the Coastal Act. The staff did not articulate an objective standard for its conclusion that the aesthetics of the proposed project are consistent with the Coastal Act. Whatever subjective standards staff used in applying its "aesthetic" analysis, there is no basis for the FSA's conclusion that the proposed plant complies aesthetically with the Coastal Act.

The principal flaw in the FSA analysis is that it uses the wrong standard for review. Staff analyzed the proposed visual impact assuming that the existing development would remain in place, and minimized the visual impact of the CECP in the context of

the more obtrusive existing Encina facility. Staff characterized the exhaust stack as a “prominent regional landmark,” as if it were a tourist destination which tourists flock to Carlsbad to see for its “uncluttered architectural form” and its “visual dominance.” (FSA, p. 4.12-5.) But that is not the analysis that the Coastal Commission would apply for two reasons.

First, to the extent that the CECP would co-exist with the present Encina power plant in the Carlsbad coastal zone, it adds mass and height and scale to the already existing industrial facility. This additional presence, in all its dimensions, detracts from the quality of the scenic and visual resources of the coast and is contrary to the policy of the Coastal Act. (Pub. Res. Code § 30251.) That policy requires new development to be sited and designed to protect the scenic and visual qualities of coastal areas and to protect views to and along the ocean. Although an industrial facility such as the CECP might still be approved by the Coastal Commission pursuant to the special provisions of the Coastal Act that pertain to coastal dependent industrial facilities (to be discussed below), the CECP could not be found to be fully consistent with the scenic and visual qualities policies of the Coastal Act. (Pub. Res. Code §§ 30251 and 30260.)

Second, as the testimony of Ralph Faust made clear, the Coastal Commission would not analyze a project with the assumption that an existing facility would remain in place when there was reason to believe that it would be removed. (RT, 2/01/10, pp. 186-188.) This “temporal” aspect to coastal analysis would apply here because the SWRCB’s OTC Policy require that existing power plants like Encina Units 1 through 5 to comply with new marine protection policies by December 31, 2017, or cease operation. Staff testified that the only feasible way for the Encina facility to comply with these new standards will be to cease operation not later than December 31, 2017. (RT, 2/03/10, p. 405, ll. 14-21 [D. Vidaver].) As the uncontroverted testimony of Ralph Faust makes clear, the Coastal Commission would look at coastal resource impacts over the life of the project, and thus analyze the visual impacts as if the existing EPS facility were not there. (RT, 2/01/10, pp. 186-187.)

Section 30251 of the Coastal Act provides in part:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas ... to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

(Pub. Res. Code § 30251.)

If CEC staff had examined the visual impacts of the CECP absent the existing Encina facility, as the Coastal Commission would have done, they would have found a large industrial facility that, with its visual dominance, grossly interferes with “the scenic and visual qualities” of Carlsbad’s coastal zone and is not “sited ... to protect views to and along the ocean.” (Pub. Res. Code § 30251.) Visually, the proposed CECP is a behemoth, occupying approximately 23 acres and with two exhaust stacks, two HRSG’s and nine transmission poles stretching from 50 to 100 feet above the level of the existing earth berm (as seen from I-5), and higher from other vantage points.

Looking at the visual simulation from the Key Observation Points (KOP) in the FSA, the proposed CECP is visible as a significant industrial presence in virtually every one. To conclude, as does the FSA, that the visual impact is insignificant because the existing plant is still more visible entirely misses the point. The extensive, particular and uncontested testimony of the City representatives regarding the importance to the Coastal Commission of protecting the visual resources of the coastline weighs heavily here. (Exhibit 420, Conformance Report pp. 12-16.) A massive industrial facility that blocks and dominates views to and along the coast, even if purportedly “mitigated” by partial screening, is a significant impact and is inconsistent with section 30251 of the Coastal Act.

The staff and applicant, however, approach mitigation in an aggressive manner that attempts to hide the project. As depicted in Exhibits 170 and 171, the applicant creates a visual wall that actually exaggerates the facility’s visual dominance and creates a green barrier with its own visual impact. (RT, 2/02/10, pp. 254-255.) Attempting to hide

something that blocks scenic coastal views with something else that blocks scenic coastal views is neither conformance with a policy nor mitigation of an impact to it; it is itself a visual impact. The CECP is not consistent with the visual resource policies of the Coastal Act.

**Marine Resources** - The proposed CECP is also inconsistent with the marine resource protection provisions of the Coastal Act. As the Conformance Report makes clear, the withdrawals of water from Agua Hedionda lagoon would equal 4.32 million gallons per day, resulting in an estimated annual entrainment of 22.7 million fish larvae from the lagoon. (Exhibit 420, Conformance Report, pp. 15-16.) CEC staff discounts this impact on the basis that the water needed by the CECP will be drawn from EPS Units 4 and 5 discharge flows, which are now legally withdrawn from the lagoon. But again, the staff ignores the state OTC Policy that will result in the closure of Encina Units 1 through 5 in 2017.

The uncontested testimony of Ralph Faust regarding the appropriate Coastal Act analysis is pertinent. (RT, 2/01/10, pp. 186-188.) The Coastal Commission would analyze these marine impacts as if the EPS were not operating, as in fact will be the case for most of the projected operating life of the CECP. Withdrawals of this magnitude are a significant Coastal Act impact, particularly given that Agua Hedionda Lagoon is one of the 19 coastal wetlands given special protection in section 30233(c). (Pub. Res. Code §§ 30230, 30231, 30233.)

As noted above, none of the existing EPS units can reasonably be expected to operate after 2017, leaving 40-50 years of CECP operation without the benefit of the project's anticipated water supply. The only available supply of water in that magnitude is from the EPS intake, which would have the precise entrainment and impingement impacts that staff asserts would be avoided. These effects make the proposal inconsistent with the above-cited marine resource protection policies of the Coastal Act. Since the CECP is not a coastal-dependent industrial facility and cannot qualify for approval under the standards of section 30260, the proposed project cannot be found to be consistent with the Coastal Act.

**Coastal Access and Recreation** - The proposed CECP is also inconsistent with the Coastal Act provisions regarding coastal access and recreation. (Pub. Res. Code §§ 30210-30224.) As the Conformance Report makes clear, the project does virtually nothing to meet the requirements of either the Coastal Act or of the Energy Commission's power plant siting regulations. (See 20 Cal. Code Reg. §1752(e).) Condition of Certification Land-1 requires the applicant to dedicate an easement for the Coastal Rail trail in a mutually agreeable location within the boundaries of the EPS, or if no agreement can be reached, to fund Coastal Rail Trail improvement elsewhere in Carlsbad. City staff properly raised the question whether this provided any additional mitigation to what the City already required in the Poseidon project.

More important, Scott Donnell of the City emphasized that the location of the proposed easement west of the railroad tracks conflicted both with the proposed location of the trail as envisioned in the Poseidon permit decision, and with the proposed location of the trail in relation to the existing trail elements and to the necessary location of the crossing of Agua Hedionda Lagoon. (City of Carlsbad Direct Testimony, 1/4/2010, Donnell, p. 7.) This effectively means that the applicant will be able to purchase a theoretical trail segment (based on an appraisal of available and comparable property) that will not translate into any real trail segment, because the theoretical segment will not connect to the actual trail segments at either end. Condition Land-1 neither provides maximum public access to and along the coast, as required by the Coastal Act, nor provides for the acquisition, establishment and maintenance of an area along the coast, as is required by Commission guidelines section 1752(e). Moving the CECP project to a site outside of the coastal zone would avoid these impacts altogether.

**Land Use** - The proposed CECP's inconsistencies with the recreational policies of the Coastal Act are related to the project's inconsistencies with the "priority use" provisions of the Act, and can be discussed together. As noted earlier, the SWRCB's OTC Policy will eliminate the use of coastal power plants that utilize once-through cooling as expeditiously as possible, and at the EPS by 2017. From a Coastal Commission perspective, all of the land presently covered by the EPS should be presumed to be empty and available for an analysis of possible future development at that time. As

discussed in the testimony of Ralph Faust (RT, 2/01/10, pp. 10-11, 16-18), an analysis of Coastal Act priorities for possible future development would preclude any industrial use except one that is coastal-dependent and would tend to favor a visitor-serving recreational use. (Pub. Res. Code §§ 30221, 30222 and 30413 (d) (1), (2).) Because the industrial land use cannot be justified under the Coastal Act based upon the continued existence of the site as a coastal-dependent industrial facility, the CECP cannot be approved under section 30260, and must be wholly consistent with the Coastal Act. The CECP's proposed land use is not a Coastal Act priority, is not coastal dependent, and is contrary to the recreational and priority use policies of the Coastal Act.

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. 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.

## **VI. CONSISTENCY WITH COMMUNITY REDEVELOPMENT LAW.**

Section VII.A.4 of the PMPD addresses the CECP's consistency with local land use LORS, including consistency with California's Community Redevelopment Law ("CRL"), Health and Safety Code section 33000, *et seq.*, and the South Carlsbad Coastal Redevelopment Project Area Plan ("SCCRP"). The PMPD concludes that the purposes of the CECP are compelling, but may not rise to the level of an "extraordinary public purpose" as required by the SCCRП.

The PMPD invites additional testimony and argument concerning whether or not the applicant has demonstrated the extraordinary public purpose required by the SCCRП.

This issue involves the express requirements of the CRL set forth in California Health and Safety Code Section 33037(c) that redevelopment plans contain “appropriate continuing land use and construction policies”, that the implementation of such policies are “governmental functions of state concern” and that the determination of these policies by the redevelopment agency is “a matter of legislative determination.” Such policies are legally required to be included in all redevelopment plans (Health & Safety Code § 33333), which also must include adequate safeguards to be sure that the work of redevelopment will be carried out pursuant to the redevelopment plan (Health & Safety Code § 33336). Section 33338 also requires the Redevelopment Agency to impose covenants, conditions and restrictions prescribed by the City Council to implement the goals and objectives of the redevelopment plan.

The Commission is charged with “making findings on the conformity of a site and the applicable local, regional state and federal standards, ordinances or laws.” [Emphasis added.] (Pub. Res. Code § 25523(d)(1).) The PMPD cannot ignore the applicant’s failure to show compliance with these statutorily authorized construction and land use policies and requirements, as legislatively determined and established by Carlsbad’s Redevelopment Agency. The California Legislature expressly found enforcement of these redevelopment plan policies is expressly found to be “in the interest of health, safety and welfare of the people of the State and of the communities in which the areas exist.” (Health & Saf. Code § 33037(c).) Accordingly, they must be enforced by the Commission.

The PMPD also appears to assume that the CRL and the SCCRP are matters of local, rather than state, LORS. The PMPD’s tentative conclusion that the CECP does not meet the “extraordinary public purpose” requirement is correct and should be affirmed. However, the PMPD’s assumptions that the CRL is a matter of local concern and the Redevelopment Agency acts as an agent of the City are erroneous for the following reasons.

**A. The CECP Is Not Consistent With The Community Redevelopment Law And Will Not Serve An Extraordinary Public Purpose As Required By The Applicable 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).

The PMPD erroneously adopts the CEC staff's claim that 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 SCCRP.

The PMPD's characterization of the Redevelopment Agency's recommendation as "City-centric" is of little benefit to the Commission 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. The PMPD's assumption that the Redevelopment Agency's concerns are "city-centric" highlights the PMPD's misunderstanding of the purpose of redevelopment agencies and its 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, the PMPD's and CEC's staff mischaracterization of 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. Throughout these proceedings, the City has expressed 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 failure 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 previously refused 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.

Pursuant to the SWRCB's OTC Policy, the entire Encina facility will cease to operate by the end of 2017. 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 shows the PMPD's conclusion regarding the CECP's consistency with the SCCRP is erroneous. Accordingly, the City and the Redevelopment Agency submit that the Commission 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 an extraordinary public benefit as required by the applicable redevelopment plan.

**B. The Redevelopment Agency Acts As An Arm Of The State In Redevelopment Matters And Is A Separate Entity From The City.**

Although it acknowledges the requirement for the CECP to demonstrate it will provide an extraordinary public benefit, the PMPD appears to consider the Redevelopment Agency and the SCCRP to be matters of local, rather than state, LORS. This assumption is plainly erroneous. The Legislature has declared important state policies regarding redevelopment and established the means for achieving them in the CRL. The Redevelopment Agency serves as an arm of the State in carrying out these policies. As such, the Redevelopment Agency's implementation of the SCCRP within the plan boundaries ensures the statewide purposes of redevelopment are achieved. Contrary to the PMPD's assumption, the Redevelopment Agency addresses state concerns, separate and apart from the City's local land use issues.

A redevelopment agency acts as "an administrative arm of the state since it pursues a state concern and effectuates a state legislative policy." (*Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 168.) As an arm of the state, a redevelopment agency is a separate legal entity from the city that established it:

The redevelopment agency and the 'community' are not one and the same governmental entity. The redevelopment agency, by state law, exists 'in each community' with certain limited powers and functions – it is not the same entity as the community within which it exists.

(*Pacific States Enterprises, Inc. v. City of Coachella* (1993) 13 Cal.App.4<sup>th</sup> 1414, 1425.)

The PMPD presumably relied on the FSA's analysis of the CECP's compliance with LORS, which is incorrect as a matter of law because it considered redevelopment to be a matter of local rather than state concern. (See, e.g., FSA pp. 1-9, 4.5-3, 4.5-28.) Despite the Redevelopment Agency's efforts to educate staff regarding its status as a separate public entity responsible for effectuating state policies, including its

intervention as a separate entity in these proceedings, staff erroneously insisted that “the interests of the City, as well as its representation, would appear to be the same for both the redevelopment agency and the City.” (Energy Commission Staff Response to Petition to Intervene from South Carlsbad Coastal Redevelopment Agency, posted August 12, 2009.)

The CRL is a state, not local, law. The Legislature has made clear that a redevelopment agency is an administrative arm of the State of California which carries out state policies relating to redevelopment. The PMPD’s treatment of the Redevelopment Agency as an arm of the City and its plans and policies as local LORS is not only incorrect as a matter of law, but also fails to accord important state policies the deference mandated by the California Legislature.

**C. The Redevelopment Agency Addresses Matters Of Statewide Concern In Implementing The South Carlsbad Coastal Redevelopment Project.**

The fundamental purposes of the CRL are to eradicate blight, to provide meaningful employment opportunities to all economic segments, and to provide affordable housing for lower income residents. (Health & Saf. § 33071; *Redevelopment Agency of the City of Berkeley, supra*, 80 Cal.App.3d at 169.) The Legislature recognized that blighted areas present difficulties and handicaps which cannot be corrected except by redeveloping all or substantial portions of such areas. (Health & Saf. § 33036(b).) Therefore, the Legislature emphasized that state policy required the development and redevelopment of blighted areas to be protected and promoted “through all appropriate means,” including appropriate planning and continuing land use and construction policies. (Health & Saf. §§ 33036(d), 33037(a).)

Development projects proposed within a redevelopment area must comply with the planning and land use requirements of the applicable redevelopment plan. (*PR/JSM Rivara LLC v. Community Redevelopment Agency of the City of Los Angeles* (2010) 180 Cal.App.4<sup>th</sup> 1475, 1482-1483.) Because a redevelopment plan sets forth “a comprehensive method or scheme of action” to carry out a particular redevelopment project, a development proposal must be evaluated with reference to the whole

redevelopment plan. (*Eller Media Company v. Community Redevelopment Agency* (2003) 108 Cal.App.4<sup>th</sup> 25, 39.)

The Redevelopment Agency is responsible for enforcing these statutory duties in its administration of the SCCRP. In doing so, the Redevelopment Agency determined that the existing power plant constitutes a blighting condition on the community. As explained in connection with the adoption of the SCCRP, the existing power plant has surpassed its useful life, there is no plan for its removal, the adjoining residential neighborhoods, beaches, and lagoon are subjected to air emissions and aesthetic impacts, as “the 400-foot tall facility is clearly visible from single family homes, a public park, and Carlsbad State Beach,” and hazardous materials have been used at the plant. (Ex. 1, pp. B-4, B-6). The determinations of blight are final and conclusive and are not subject to challenge in this proceeding. (*Redevelopment Agency of the City and County of San Francisco v. Del-Camp Investments, Inc.* (1974) 38 Cal.App.3d 836, 841.)

To address these blighting conditions, the SCCRP contains appropriate planning and continuing land use and construction policies with which a project that proposes to locate in the redevelopment area must comply. Among other things, SCCRP Section 601 requires a proposed project (1) to demonstrate that it serves an extraordinary public purpose, (2) to submit a precise development plan which sets forth the development standards for the project, and (3) to obtain a Redevelopment Permit. (Exhibit 2.) These requirements effectuate state redevelopment law which requires the SCCRP to contain adequate safeguards to ensure that a proposed project will carry out the goals and objectives of the redevelopment plan. (Health & Saf. Code §§ 33336, 33338.)

Although NRG made no attempt to comply with the planning, land-use and construction requirements of the SCCRP, the FSA treated the CECP’s non-compliance as a local matter relating to “the City’s interpretation of its complex and layered land use ordinances.” (FSA, p. 1-9.) The FSA’s truncated consideration of the SCCRP’s requirements as local, rather than state, LORS is wrong as a matter of law. The FSA’s failure to evaluate the CECP’s non-compliance with the SCCRP, with the same deference afforded other state LORS, wrongfully disregards the important state policies

embodied in the CRL and effectuated through the SCCRP. (20 Cal. Code Reg. § 1744(e).)

The FSA's failure to adequately analyze the CECP's non-compliance with the SCCRP may preclude approval of the project by the Commission. Pursuant to Title 20 of the California Code of Regulations, section 1755(b), a project "shall not" be certified unless "the commission's findings pursuant to subsections (e), (f), and (k) of section 1752 are all in the affirmative." Section 1752(k) requires the Commission to determine if the noncompliance with the LORS "can be corrected or eliminated." The FSA does not provide a basis on which such findings can be made because the FSA incorrectly treated the SCCRP as a local LORS matter and disregarded the CECP's undisputed non-compliance with the SCCRP's requirements. Accordingly, the CECP cannot be approved without an override of its non-compliance with state redevelopment LORS.

**D. The Redevelopment Agency Is Charged With The Responsibility For Implementing Planning, Land Use And Construction Requirements That Will Achieve State Policies On Redevelopment.**

The Legislature has designated the redevelopment agency in each community as the agency with the authority and responsibility for carrying out the work of redevelopment pursuant to the adopted redevelopment plan. (Health & Saf. § 33336.) To ensure that state redevelopment policies are achieved, the redevelopment agency must assure that all development within the redevelopment plan area conforms to the redevelopment plan. (Health & Saf. § 33338.) Among other things, the redevelopment plan must specify the limitations on the type, size, height, number and proposed use of buildings in the redevelopment area. (Health & Saf. § 33333(b).)

Pursuant to the SCCRP, the Redevelopment Agency must make the threshold determination whether the CECP would serve an "extraordinary public purpose." NRG's refusal to submit a redevelopment permit application has prevented the Redevelopment Agency from fulfilling this responsibility. However, as discussed above, the evidence adduced in these proceedings makes clear that the CECP cannot meet this threshold requirement. (Direct Testimony of Debbie Fountain, pp. 5-6; RT, 2/01/10, pp. 94-97 [M.

Kane].)

The Redevelopment Agency also has a statutory duty to determine whether the CECP will promote the SCCRP's goal of eliminating blight. The evidence shows that such a finding could not be made in light of the fact that the CECP would intensify the industrial use of the property and does not make any commitment to remove the existing blighting conditions on the property (i.e., EPS Units 1-3). (RT, 2/01/10, pp. 95-96, 99, 125-127 [M. Kane], 108 [D. Fountain].)

NRG's refusal to submit an application has prevented the Redevelopment Agency from determining whether the CECP conforms to the SCCRP's development requirements. The applicant's failure to provide the Redevelopment Agency with sufficient information to make the findings required by the SCCRP requires the conclusion that the CECP does not comply with state LORS relating to redevelopment.

Section 601 of the Redevelopment Plan requires three things of the applicant, none of which were satisfied in this case: (i) to submit plans of the proposal to Carlsbad's Redevelopment Agency, (ii) to apply for a permit for such proposal, and (iii) to demonstrate extraordinary purpose arising from their proposal. Applicant did not even bother to submit their plans to the Redevelopment Agency as required by the Redevelopment Plan, nor did they even bother to apply for the required permit. And, as shown in the record, there is no showing of the required extraordinary public purpose.

The Committee reviewed the applicant's original submission and was moved to invite additional testimony and argument. Incredibly, the applicant submitted the same list of unsupported and conclusionary statements it gave the Committee last year. This list is just as insufficient this year as last year. Once again, there was no testimony committing the applicant to do anything of any kind at any time, let alone showing a commitment to actually achieve an extraordinary public purpose.

The uncontroverted testimony shows that merely decommissioning Units 1-3 or retiring any of the existing facilities does nothing to eliminate blight or to achieve any of the

purposes of the SCCRP. Absent a duty of the part of the applicant to demolish and remediate the subject property, the retirement of Units 1-3 actually will exacerbate blighting conditions by creating abandoned, obsolete and unremediated structures in the redevelopment area. In any event, the retirement of Units 1-3 is all but a fait accompli, as evidenced by SDG&E's recent application to the California Public Utilities Commission (No. 11-05-\_\_\_, filed May 19, 2011), and thus does not even result from applicant's efforts in connection with the CECP. As a result, it cannot be counted towards any purported showing of extraordinary public purpose.

The applicant's claims of additional tax revenues are without any support or foundation and without any analysis of the detrimental effect on property values caused by applicant's decommissioning and expansion plans. The applicant also tries to claim credit for the long-planned Coastal Rail Trail, which the CECP instead will actually obstruct. Such self-styled "steps toward" redevelopment do not constitute evidentiary support for the required finding of extraordinary public purpose.

Clearly there is neither legal nor evidentiary support in the record for the Commission to override the requirements of the CRL which apply to this case, nor to make the finding of extraordinary public purpose required by the SCCRP. In addition, the Commission should defer to the legislative determination of the Redevelopment Agency, which is the agency vested by law with the responsibility to enforce these matters of statewide concern, which has demonstrated experience in redevelopment matters, and which has determined that the applicant's proposal fails to show the required "extraordinary purposes".

## **VII. CONSISTENCY WITH LOCAL LAND USE LORS.**

Section VII.A.4 of the PMPD also addresses the CECP's consistency with local land use LORS, including the City's land use plans and ordinances. The PMPD's conclusion that the CECP would be consistent with the City's local land use plans and ordinances is erroneous for the following reasons.

**A. The PMPD Does Not Recognize the Inconsistency with Local Laws nor Recommend Overriding Them.**

The Commission is required to review a proposed facility to determine whether it complies with all applicable local laws, ordinances, regulations and standards (LORS). (20 Cal. Code Reg. §§ 1744(a), 1748(c).) Each agency responsible for enforcing local LORS is required to assess whether the facility will comply with them; Commission staff is required to ensure that all aspects of the facility's compliance with applicable laws are considered. (20 Cal. Code Reg. § 1744(b).) In doing so, staff is required to give "due deference" to the comments and recommendations of the local agency on matters within its jurisdiction. (*Id.* at § 1744(b).) If a proposed facility does not comply with local LORS, it cannot be approved unless the Commission "overrides" the non-compliance pursuant to Public Resources Code section 25525. (20 Cal. Code Reg. § 1752(k).)

The PMPD echoes the FSA's erroneous conclusion that the CECP would be consistent with local LORS. (FSA, pp. 1-9, 4.5-18.) In reaching this conclusion, the FSA relied on its belief that Specific Plan 144 (SP-144) and the associated Planned Development Permit (PDP) were "permit-like" and thus were pre-empted by the Commission's "in lieu" permit authority. (FSA, p. 4.5-36.) Nonetheless, staff referred to "ambiguity regarding the city's interpretation of its complex and layered land use ordinance" and recommended the Commission approve the CECP pursuant to its override authority under section 25525. (FSA, p. 1-9.)

The City agrees with the staff's conclusion that a Commission override of the CECP's non-compliance with land use LORS is necessary in order to approve the project. However, the City disagrees that there is any "ambiguity" regarding its interpretation of its own land use laws. In fact, staff's concern regarding ambiguity in the interpretation of land use LORS confirms the wisdom of the "due deference" requirement. Staff should have deferred to the City's interpretation of applicable land use LORS precisely because the City is the agency which adopted them and thus "has unique competence to interpret those policies when applying them." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4<sup>th</sup> 99, 142.) Moreover, because LORS such as the City's General Plan reflect a range of competing interests,

the City, as the agency which adopted them, “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.” (*Ibid.*)

## **B. The PMPD Decision Is Contrary To Fundamental Principles Of Land Use LORS.**

The PMPD considers the City's General Plan and subordinate land use plans regulations to be “a policy and regulatory puzzle.” However, what the PMPD finds to be puzzling is simply a fact of life for the City and other municipalities in California. State law has established a hierarchy of land use laws, with the General Plan at the top and followed in descending order by specific plans, precise development plans, zoning regulations and conditional or special use permits.

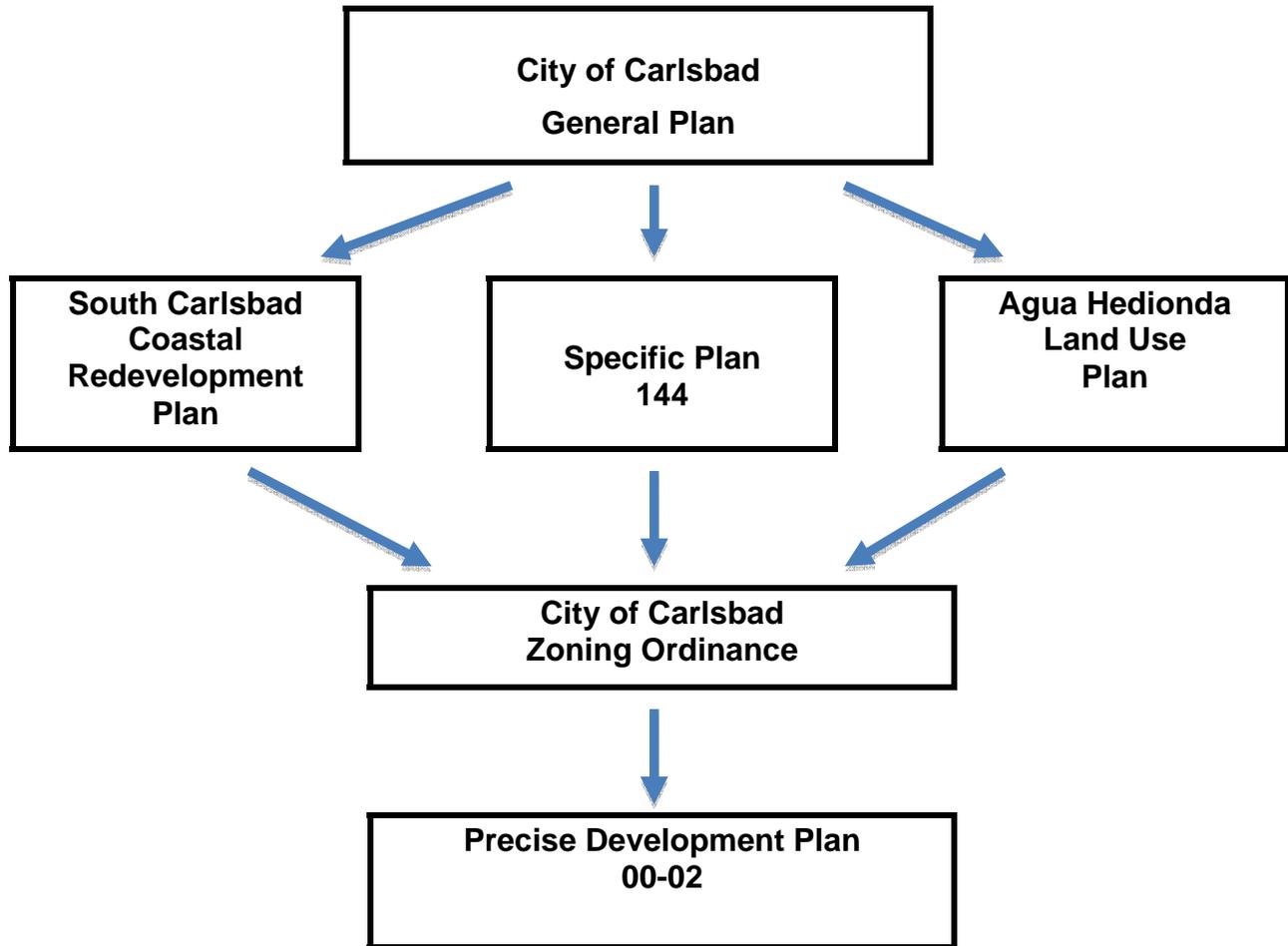
Beginning with the General Plan and proceeding down the hierarchy of land use laws, the LORS applicable to a particular site generally state the requirements for allowable development with increasing specificity:

- 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.4<sup>th</sup> 777, 785.)

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

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

**Figure 1**



The City also 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 its preamble 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.

**1. The CECP Is Inconsistent With The City’s General Plan.**

The General Plan sits atop the hierarchy of land use laws 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.) 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.) To be deemed consistent with a General Plan, a project must be compatible with the objectives, policies and programs specified in the applicable elements of the General Plan. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 354-55.)

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.)

Disregarding the hierarchy of land use LORS established by state law, the staff and applicant focused primarily on whether the CECP is consistent with the bottom rung: the “PU” zoning classification of the proposed site. (See, e.g., RT, 2/01/10, p. 233 [R. Rouse].) This myopic view of land use LORS disregards the extensive evidence presented by the City that the CECP does not comply with the City’s General Plan and has not complied with the requirements of SP-144, the Agua Hedionda Land Use Plan and the Precise Development Plan. The staff also appears to have disregarded the City’s concerns that the CECP does not fall within the letter or spirit of the “PU” zone,

which is intended to accommodate public utilities, not merchant plants proposed by private entities.

There is no dispute 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, the PMPD is erroneous in its conclusion that the CECP conforms with applicable land use LORS because it fits within these use designations. The CECP’s inconsistency with the other applicable elements of the General Plan renders this conclusion incorrect.

The PMPD’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.4<sup>th</sup> 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].)

The record contains substantial evidence that the CECP does not comply with land use LORS because it is inconsistent with the City’s General Plan, SP-144 and related requirements. For example, the City’s Senior Planner, Scott Donnell, identified the land use LORS in the City which apply to the proposed CECP. (Direct Testimony, S. Donnell, pp. 3-4.) He also described the applicable provisions of the General Plan and testified the CECP will be inconsistent with fourteen (14) objectives, policies and programs of the General Plan. (Direct Testimony, S. Donnell, pp. 9-12; RT, 2/01/10, p. 204, ll. 1-7.) In addition, Mr. Donnell explained SP-144’s role as the central planning document for the area of the City where the CECP proposes to locate and the reasons

for the requirement that the CECP prepare a comprehensive amendment to SP-144. (Direct Testimony, S. Donnell, pp. 5-8; RT, 2/01/10, p. 205, ll. 1-20.) Mr. Donnell also discussed the “PU” zoning classification and explained why a private merchant facility like the CECP, which is not a public utility itself and does not have a contract to sell power to a public utility, is more appropriately considered an industrial use which is not allowed by right in the “PU” zone. (Direct Testimony, S. Donnell, pp. 13, 15; RT, 2/01/10, pp. 198-199 [G. Barberio], pp. 227-228 [S. Donnell].)

The PMPD disregards this evidence based on the erroneous belief that “General Plans are, by their nature, somewhat self-contradictory.” (PMPD, § VII, p. 18.) This belief is patently incorrect as a matter of law. California is absolutely clear in its requirements that the mandatory elements of a General Plan must be internally consistent (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1995) 160 Cal.App.3d 90, 97) and all specific plans, precise development plans, zoning regulations and other land use regulations must be consistent with the elements of the General Plan (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183). Contrary to the PMPD’s erroneous conclusion, a project which conflicts with even a single General Plan policy may not be approved. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4<sup>th</sup> 1334, 1341; *San Bernardino County Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 753.)

The City also presented importance evidence through the testimony of its City Manager, Lisa Hildabrand, who explained the vision of the City for future use of the proposed CECP site and the adjacent Encina facility. (Direct Testimony, L. Hildabrand, pp. 3-6; RT, 2/01/10, pp. 208-213 [L. Hildabrand].) Ms. Hildabrand’s testimony is particularly important to the Commission’s determination regarding land use LORS for two reasons. First, her testimony articulates the underlying intent of the General Plan as the “constitution for future development” in the City. Second, her testimony expresses the City’s frustration with the lack of respect accorded the City’s determination as to the best location for such a facility. It was this frustration which led the City Council to adopt Urgency Ordinance CS-067, which prohibits new or expanded power plant facilities in

the coastal zone. (Exhibit 404; Direct Testimony, S. Donnell, p. 16.)

The staff's ultimate recommendation that an override is necessary with respect to land use LORS is correct. However, their reasoning for that recommendation is seriously flawed. Whether or not the CECP would be an allowable use in the "PU" zone is a question which can only be considered after the CECP is determined to be consistent with all of the mandatory elements of the General Plan and the requirements of SP-144. Contrary to staff's belief, SP-144 is not a "permit-like" regulation. As a matter of state law, SP-144 is a legislative action which must be "prepared, adopted and amended in the same manner as a general plan." (Gov. Code § 65453.) The evidence offered by the City shows that the CECP does not comply with any of these land use regulations and there is insufficient evidence in the record to support an override of the CECP's non-compliance with these important land use LORS.

## ***2. The CECP Does Not Constitute A "Public Utility" Under The City's General Plan and Zoning Ordinance.***

The PMPD concluded that the CECP was a "public utility" within the meaning of the City's General Plan and Zoning Ordinance. This conclusion is erroneous for the following reasons.

The PMPD agreed with the arguments of CEC staff and the applicant. Unfortunately, CEC staff's and the applicant's desire to confine the LORS consistency 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.)

Chapter 21.36 of the City's zoning code includes a land use designation of "P-U Public Utility," with permitted uses being "Utility production, storage, transmission and treatment uses; agriculture, recreation facilities". While there are definitions for over 130 terms used in the zoning regulations, there is no definition for "utility", "public utility" or "electric generation company."

However, the meaning of "public utility" can be determined by looking at the provisions

governing Planned Industrial (P-M) zones in Chapter 21.34. The City's regulations list over 180 allowed uses in the P-M zone, among them "Public and quasi-public" office buildings and accessory utility buildings and facilities which includes in its definition: "Such uses do not include water, sewer or drainage pipelines or utility buildings, facilities that are built, operated or maintained by a public utility to the extent they are regulated by the Public Utilities Commission." (CMC § 21.04.297) In other words, the Municipal Code contemplates that the types of uses that would be consistent with the "U" or PU" designation should be regulated under the jurisdiction of the California Public Utilities Commission (CPUC), and as such they are not considered appropriate for the Planned Industrial zone. It is clear that the City regulations contemplate CPUC-regulated facilities to be separate and distinct from non-CPUC regulated facilities. Therefore, if the CECP falls into any category, it would be P-M, Planned Industrial.

The staff's argument also ignores important state policies and the advances in power plant technology which staff and the applicant argue is a project benefit. 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.)

The City Council also has expressed concern that its regulations dealing with public utilities are out-of-step with an electric generation market that has changed markedly since the zoning regulations were first adopted. On October 20, 2009, the City adopted Emergency Ordinance CS-067, which imposed a moratorium on new generation facilities until the City is able to comprehensively review the regulations dealing with

utility and non-utility generation.

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.<sup>11</sup>

Ownership does not confer public utility status. Dedication of the facility or its product to the public is required. Although the "PU" and "U" designations allow for the construction of electric generation facilities, the CECP is not a public utility and has submitted no evidence that it has a long-term contract to sell its output to a public utility. The CECP, therefore, cannot be considered to be a public utility facility.

City witnesses Donnell and Barberio both testified that the CECP's designation as a public utility is questionable. Mr. Donnell pointed out that: "It is not regulated by the California Public Utilities Commission or any other regulatory body and the absence of a power purchase agreement with the regional provider of electricity, SDG&E, reinforces CECP status as a merchant power plant." (Donnell, Written Testimony, Page 13). Mr. Barberio testified that the CECP is "a merchant plant and not a public utility." (RT,

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<sup>11</sup> 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.

2/02/10, p. 20.)

State utility regulations support the distinction between merchant and regulated power plants. Public Utilities Code section 216(a) provides: “Public Utility” includes. . . electrical corporation . . . where the service is performed for or commodity is delivered to, the public or any portion thereof.” An additional requirement has been imposed by the courts: To be a public utility, there must be dedication of the utility property to the public use. (See *Thayer v. California Development Co.* (1912) 164 Cal. 117.) Investor owned utilities, such as SDG&E, are subject to the jurisdiction of the CPUC, but entities such as the applicant, which generate power for resale to regulated public utilities, are not.

Private providers of electric energy, for example, can become regulated by holding themselves out to serve the public. Since it does not exhibit any of the statutory or judicially identified characteristics of a public utility, the CECP is not a public utility. A similar situation was addressed in the Chula Vista Energy Upgrade (07-AFC-04) proceeding where the Commission stated: “The CVEUP, however, is to be owned and operated by MCC Energy, Inc. which is neither a public or publically controlled agency nor a utility company. MCC sells electricity to utilities but is not a utility. The CVEUP is therefore not a ‘public or quasi-public’ use.” (Chula Vista Energy Upgrade, 07-AFC-04, Final Decision, p. 293.)

### **3. *The CECP Is Not Consistent With SP-144.***

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].)

A comprehensive update of SP-144 is required before any permits for development within its boundaries can be issued. Public Resources Code section 25500 provides

that the issuance of a certificate by the Energy Commission is in lieu of any local permit. However, the update of the Specific Plan is not a local permit. Instead, it is a legislative act that can only be accomplished by the Carlsbad City Council in its legislative capacity (Government Code §§ 65301, 65450, *Yost v. Thomas* (1984) 36 Cal.3d 561, *City and County of San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099) or by the Energy Commission in its written decision when overriding the local legislative body (Public Resources Code § 25523(d)(1) .)

A Specific Plan is a legislative act and requires approval of the City Council. There has been no comprehensive specific plan amendment for the project area as would be required for any development within its boundaries. With the exception of the approved desalination project, which was a onetime exception for a small parcel, a Specific Plan is required for any new or changed land uses on the proposed site. (RT, 2/01/10, p. 202, ll. 16-23.)

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. Since the CECP has not obtained approval of a Specific Plan, the CECP is not consistent with the General Plan, the Specific Plan or the Zoning Ordinance. The applicant's failure to comply with SP-144 confirms the CECP does not conform with local LORS. Therefore, in order to approve the proposed project, the Commission would have to exercise its paramount jurisdiction and make the override findings required by Public Resources Code section 25525.

**4. *The CECP Is Inconsistent With The Requirement For A Precise Plan.***

Even if the CECP were deemed consistent with the General Plan and the Zoning Ordinance, the generation of electrical energy is not permitted in the P-U zone without a precise development plan. Unless a Precise Development Plan were approved by the City Council, the CECP would not be allowed and would be inconsistent with the Zoning Ordinance. In order to be approved, a Precise Development Plan must contain any or all of the conditions set forth in section 21.36.050 of Exhibit 411. (CMC, Ch. 21, § 21.36.050.)

The requirement of a Precise Development Plan for any development within the P-U Zone is a legislative act requiring approval from the legislative body. In this case, the legislative body is the Carlsbad City Council. The Precise Development Plan is a legislative act through which development within the P-U Zone can be made consistent with the Specific Plan and with the General Plan. It is not a development permit in itself and is not like the numerous required development permits under the local code. That is to say, development permits like a grading permit, a storm water permit, a sewer permit, a water permit, a fire permit and a building permit are necessary but not sufficient for development within this zone. The conditional use permit on the other hand, is a quasi-adjudicatory act which applies the existing standards to the proposed use. It is in this manner that conditions may be placed on uses that have already been determined by the legislative body to be conditionally allowed.

However, it is clear that the precise development plan can do more than a conditional use permit and must be processed in the same way as a zone change. (CMC § 21.36.040). Since it is not a permit but rather a legislative approval, a certificate by the Energy Commission cannot be substituted for it. . Absent the required specific plan amendment, the Commission would be required to make the findings and conduct the meet and confer process required by Public Resource Code sections 25525 and 25523(d)(1).

##### **5. *The CECP Is Inconsistent With Applicable Development Standards.***

The PMPD concludes that the CECP would be consistent with some development standards. In reaching this conclusion, however, the PMPD ignores the City's

arguments and continues its misapplication of state redevelopment law.

The PMPD states the CECP will be consistent with lot coverage and setback requirements, erroneously assuming there are no applicable setback requirements. This conclusion ignores the City's evidence that such standards are established pursuant to the SCCR and repeats the PMPD's previous misunderstanding of state redevelopment law. Section 618 of the SCCR authorizes the Redevelopment Agency to set land coverage, setback requirements, design criteria and traffic access. These elements are to "create an attractive and pleasant environment in the project area." By failing to comply with applicable state redevelopment LORS administered by the Redevelopment Agency, the project design fails to comply with state standards applicable in the redevelopment area of the City in which the proposed CECP site is located.

The PMPD also ignored other local LORS. For example, Carlsbad Municipal Code section 21.34.080 requires industrial projects to be planned to be "comprehensive, imaginative and innovative, embracing land, buildings, landscaping and their relationships." The CECP design is unimaginative and unattractive due to the site constraints which are discussed more fully above in section I.A (Worker and Fire Safety) of this brief. Carlsbad Municipal Code section 21.34.080 also requires provisions for "open space, circulation, off-street parking and other pertinent amenities." It further provides that structures "shall be well integrated, oriented and related to the topographic and natural landscape features of the site." (CMC, 21.34.080) The CECP fails to consider the Agua Hedionda Lagoon and the nearby beach and beachfront areas. The same code provision requires that the development be compatible with "surrounding land uses" and is not to "constitute a disruptive element to the community". The CECP will be a visually disruptive element and it is incompatible with future, foreseeable Encina site development.

## **6. *The CECP Is Inconsistent With The City's Moratorium On The Development Of New Power Plants.***

The PMPD is incomplete and erroneous because it does not address the CECP's

inconsistency with the City's moratorium on the development of new power plants in the Coastal Zone.

In California, charter cities such as Carlsbad may enact land use and development moratoria under their constitutional powers set forth in the California Constitution, Article 11, section 5. (See *also* Cal. Constitution, Art. 11, § 7, which applies to general law cities and counties.) In addition, cities are given statutory powers to enact moratoria under Government Code section 65858. Under that statutory authority, the City Council may exercise its discretion to enact a moratorium in order to protect the public safety, health and welfare when approvals of new developments would be prejudicial or in conflict with contemplated changes to the General Plan, any Specific Plan or zoning proposal under consideration.

In this case, the City Council adopted such an Urgency Ordinance on October 20, 2009 (Exhibit 404.) The Urgency Ordinance applies retroactively since it does not divest the applicant of any vested rights. (*City of Claremont v. Cruse* (2009) 177 Cal App. 4th 1153, 2009, rev. denied.) The Urgency Ordinance clearly prohibits the development or expansion of power plants within Carlsbad's entire Coastal Zone. The City Council recognized that the proposed CECP may be prejudicial to other proposed land uses in the Coastal Zone and that thermal electric power generating facilities are no longer coastal-dependent. In addition, the City Council recognized that the existing PU Zone no longer adequately distinguished the different kind of utilities that would be allowed within the zone. (Exhibit 404, p. 5.)

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. The CECP is plainly inconsistent with this ordinance. 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.

**7. The CECP Is Inconsistent With The Coastal Rail Trail.**

The Warren-Alquist Act does not give the Commission the authority to decide whether and where the Coastal Rail Trail (CRT) can be built on the project site. The Commission has jurisdiction over the applicant and siting of energy facilities. However, it does not have jurisdiction over the permitting or location of other public facilities like the CRT. Although it can condition the applicant not to voluntarily dedicate land to the City in a certain location, the Energy Commission cannot prevent the City from acquiring it involuntarily from the applicant. Proposed Condition of Certification LAND-1 is neither workable nor consistent with the powers and duties of the Carlsbad City Council regarding the location of the CRT system.

The Carlsbad City Council was the lead agency for the entire 43-mile proposed CRT system. The City Council has the ultimate authority to decide where the location of a public facility will best serve its citizens. It has decided that the best location for the proposed CRT is east of the railroad tracks, as provided in the conditions imposed on the Carlsbad Desalination Plant and the environmental documents approving its proposed location in the City. The CECP proceedings cannot disrupt, modify, vary or preempt the City Council's decision in that regard. (Cal. Constitution Art. 1, § 19; Eminent Domain Law, Code Civ. Proc. §§ 1230.010 *et seq.*)

The City Council makes the determination as to whether the public interest and necessity require a public project, whether it is planned or located in a manner that will be most compatible with the greatest public good and the least private injury, and whether the property is necessary for the project. (Code Civ. Proc. § 1240.030.) Proposed Condition of Certification LAND-1 fails to appreciate these fundamental powers and duties. Therefore, proposed condition should be stricken and the CECP should be relocated to accommodate the CRT.

The Commission has jurisdiction over the applicant and can require it to dedicate an easement for the CRT wherever the Commission determines is the best location. 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 Certification 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.

## **VIII. VISUAL RESOURCES**

Section VII.E of the PMPD addresses the CECP's potential impacts on visual resources. The PMPD concludes that the CECP's adverse impacts can be mitigated by implementation of Conditions of Certification VIS-1 through VIS-3. This conclusion is erroneous for the following reasons.

First, the fundamental visual question in this case is whether or not the proposed CECP will add to and extend the visual blight that exists because of the Encina Power Station, substantially damage or detract from the area's scenic resources, and degrade existing visual character or quality of the site and its surroundings. There is substantial evidence in the record that the CECP will do so. (See, e.g., RT, 2/03/10, pp. 22-29.) Although there is contrary evidence in the record, it is not credible and the impacts from the CECP must be mitigated, if possible. (RT, 2/03/10, p. 12, ll. 6-8, p. 16, ll. 9-16.)

Unfortunately, in this case, the mitigation proposed (a screen of trees) will result in a significant impact itself. The FSA failed to consider that it is not acceptable to plant trees on top of sewer lines as would be the case with the proposed mitigation. (RT; 2/03/10, p. 66, l. 20.) There have been no other alternatives suggested (e.g. lowering or relocating the plant, reducing its size, changing its architecture or other feasible alternatives).

CEQA requires a discussion of a project's consistency with relevant visual or aesthetic policies in applicable land use plans. (14 Cal. Code Reg. § 15125(d).) The proposed power plant exceeds the height limitations and violates other policies set forth in the General Plan, the Agua Hedionda Land Use Plan and the Carlsbad Zoning Ordinance. The applicant's experts testified that the plant could exceed the 35-foot height limit if a Specific Plan amendment is approved. However, no such amendment has been approved so the CECP remains in violation of the 35-foot height limitation. (Agua Hedionda Land Use Plan, Policy 1.9, Exhibit 412, p, 17).

All new development within the boundaries of the Agua Hedionda Land Use Plan is subject to the provisions of the Carlsbad Scenic Preservation Overlay Zone. (Carlsbad Municipal Code [CMC], Chapter 21.40, "S-P Scenic Preservation Overlay Zone")<sup>12</sup>. The intent and purpose of this zone is to supplement the underlying zone by providing conditional regulations for development to preserve and enhance outstanding views, scenic qualities with an eye toward contributing to and enhancing community pride and prestige. No development can proceed in this zone unless the Carlsbad Planning Commission issues a special use permit. (CMC, §21.40.100).

In order to regulate and control development Agua Hedionda Land Use Plan, the Planning Commission may issue a special use permit and impose conditions setting forth the development standards to enhance the appearance of a development and to preserve and protect scenic corridors and enhance the appearance of the environment

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<sup>12</sup> CMC Chapter 21.40 does not appear to be included in the record. However, it is a public law and is available online at [www.library.municode.com](http://www.library.municode.com). The City respectfully requests that the Committee take notice of it.

and contribute to community pride and prestige. Those development standards (which have not been applied to this project since it did not comply with the LORS) include provisions dealing with sign control, underground utilities, landscaping, architectural treatment, setbacks, side yards, height limitations, building bulk, spacing of buildings and other conditions necessary to protect the scenic resources of the community. (CMC §21.40.110). Since the CECP has neither applied for nor obtained such a permit, the CECP does not comply with applicable local land use plans.

The applicant's simulations portray the project and nothing else. (RT, 2/03/10, p. 53, ll. 12-20.) The applicant's images for the screening wall are also not realistic depictions. (RT, 2/03/10, p. 76, l. 14, and p. 77, ll. 6-9.). As the City's Planning Director aptly noted in his testimony:

We try to take the approach that landscaping is there to complement or accentuate the aesthetics of the project, not to be the primary means of making up for its aesthetic failings. (RT, 2/03/10, p. 28, ll. 9-12.)

The proposed CECP fails to meet any local visual or aesthetic standards and thus results in unmitigated significant impacts on Visual Resources.

Second, the proposed mitigation is not likely to be implemented due to insufficient space. 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 overridden.

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 briefs, 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. (Ex. 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 if a retaining wall is used. [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 between the

freeway and the power plant. 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.)<sup>13</sup>

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 Mendocino* (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

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<sup>13</sup> 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.]

Cal.App.4<sup>th</sup> 70, 92-93.) The can has come to rest on the west side of I-5, at the edge of 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.<sup>14</sup>

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

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<sup>14</sup> 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.

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].)

Third, the PMPD rejects the City's evidence that the CECP will have an unmitigated cumulative significant impact because it will prolong use of the site for industrial purposes after the existing Encina facility is retired. In doing so, the PMPD asserts that removal of the Encina facility is "not imminent" and that its retirement will not necessarily result in its removal from the landscape. This conclusion is patently erroneous for two reasons. First, retirement of the existing Encina is indeed "imminent." As discussed above, the PMPD erroneously omits any discussion of the SWRCB's OTC Policy, which requires the shutdown of the Encina facility by December 31, 2017, only a few years after the CECP's projected commencement of operations. Second, the PMPD ignores its own determination regarding the CECP's inconsistency with state redevelopment law, which found that the CECP would likely not meet the "extraordinary public benefit" requirement of the SCCRP unless it provided for removal of the existing Encina facility.

The PMPD is erroneous and internally inconsistent with respect to the CECP's significant adverse impacts on visual resources. The City has offered the Commission 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 CECP's 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.

## **CONCLUSION**

The absence of evidence of a strong, specific and urgent statewide or regional need for

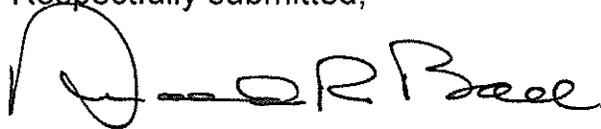
the CECP means that the Commission's decision basically boils down to a land use determination. Through their comments and recommendations in this proceeding, the City and the Redevelopment Agency have attempted to educate and assist the Committee in understanding the unique land use issues associated 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 Commission 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.

The City has always felt that the CECP is the wrong power plant at the wrong place. It appears that SDG&E, after spending months thoroughly evaluating its system and numerous generation options located within and outside their service territory, including the CECP, agrees. SDG&E has concluded that the CECP does not meet its system needs and there are other ways to meet in-basin electricity needs, fast start capability, and renewables integration. With the options it has selected, SDG&E also has determined that the entire Encina Power Station can be permanently retired and its use of ocean water discontinued. SDG&E's choices meet the needs of its customers and helps improve the environment. For the citizens of Carlsbad, SDG&E's choice of other power plants in non-coastal locations also provides hope that the coastal zone will no longer play host to energy facilities that can and should be located inland. The City

respectfully requests this Committee of the Energy Commission to show the same foresight and deny the CECP application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ronald R. Ball". The signature is written in a cursive style with a large initial "R" and a distinct "Ball" at the end.

RONALD R. BALL  
City Attorney and General Counsel

**ATTACHMENT 1**  
**CECP Conditions of Certification**  
**To Be Filed at Least 60 Days Prior to Construction**

The following are references to Conditions of Certification and Verifications found in the PMPD that require activity by the project owner at least 30 days prior to construction. Although the verification time requirements can be altered by the CPM, the breadth and depth of the preconstruction requirements indicates an inability on the part of CECP to start construction prior to July 1, 2011

A. Requirements of particular interest to the City of Carlsbad and the South Carlsbad Redevelopment Agency

WORKER SAFETY-6

At least 60 days prior to start of site mobilization provide final site blueprints to the Carlsbad Fire Department and the CPM

WORKER SAFETY-9

At least 60 days prior to the start of site mobilization provide final plans for monitoring access roads

WASTE-2

At least 60 days prior to the commencement of site mobilization provide form and permit from Carlsbad Fire Department permit to CPM

TRANS-7

At least 60 days prior to start of site mobilization provide a parking and staging plan to City of Carlsbad

B. Additional requirements

TSE-1

At least 60 days prior to the start of construction submit schedule, master drawing list and master specifications list to the CBO and CPM

AQ-SC-1

At least 60 days prior to the start of ground disturbance provide name, resume, qualifications and contact information for on-site AQCMM

AQ-SC-2

At least 60 days prior to the start of any ground disturbance provide AQCMP to the CPM

WORKER SAFETY-1

At least 30 days prior to the start of construction submit to the CPM Construction Safety and Health Program

WORKER SAFETY-3

At least 60 days prior to the start of site mobilization provide name and contact information for the Construction Safety Supervisor

WORKER SAFETY-4

At least 60 days prior to the start of construction provide proof of an agreement to fund safety monitor services

WORKER SAFETY-5

At least 60 days prior to the start of site mobilization provide proof that a portable automatic external defibrillator exists on site

WORKER SAFETY-7

At least 60 days prior to the start of site mobilization provide plans for the barrier

HAZ-7

At least 30 days prior to commencing construction notify CPM that a site-specific Construction Safety Plan is available

WASTE-3

At least 30 days prior to site mobilization provide resume of professional engineer or professional geologist

WASTE-5

At least 30 days prior to the initiation of demolition activities submit demolition section of the Demolition and Construction Work Management Plan

WASTE-6

At least 60 days prior to the commencement of structure demolition provide Asbestos Demolition Notification form to CPM

BIO-1

At least 90 days prior to any site mobilization provide the name and resume of the designated biologist

BIO-3

At least 30 days prior to the start of any site mobilization provide resume of designated Biologist

BIO-5

At least 60 days prior to the start of any project-related ground disturbing activities provide Worker Environmental Awareness Program

BIO-6

At least 60 days prior to the start of any project-related ground disturbing activities provide BRMIMP

CUL-1

At least 45 days prior to the start of ground disturbance provide a resume of the CRS

CUL-2

At least 40 days prior to the start of ground disturbance provide AFC, data responses and Confidential cultural documents to CRS

CUL-3

At least 30 days prior to the start of ground disturbance provide CRMMP

CUL-5

At least 30 days prior to the beginning of ground disturbance provide training program draft text

CUL-6

At least 30 days prior to the start of ground disturbance provide monitoring log form

CUL-7

At least 30 days prior to the start of ground disturbance provide a letter confirming authority of CRS to halt construction activities

PAL-1

At least 60 days prior to the start of ground disturbance submit resume of Paleontological Resource Specialist

PAL-2

At least 30 days prior to the start of ground disturbance provide maps and drawings to PRS and CPM

PAL-3

At least 30 days prior to ground disturbance provide copy of Paleontological Resource Monitoring and Mitigation Plan

PAL-4

At least 30 days prior to the start of construction provide Worker Environmental Awareness Program

TRANS-1

At least 30 days prior to site mobilization provide Construction Traffic Control Plan

TRANS-2

At least 30 days prior to site mobilization provide copies of approved FAA Form 7460-1

TRANS-4

At least 60 days prior to start of site mobilization submit Crossing Safety Plan

NOISE-3

At least 30 days prior to the start of ground disturbance provide noise control program

TRANS-4

At least 60 days prior to site mobilization provide a safety plan



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

APPLICATION FOR CERTIFICATION  
FOR THE **CARLSBAD ENERGY  
CENTER PROJECT**

Docket No. 07-AFC-6  
**PROOF OF SERVICE**  
(Revised 5/18/2011)

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DECLARATION OF SERVICE

I, Flora Waite, declare that on June 8, 2011, I served and filed copies of the attached **City of Carlsbad and Carlsbad Redevelopment Agency Comments and Assignments of Error re Presiding Member's Proposed Decision**, dated June 8, 2011. 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 the other parties in this proceeding (as shown on the *Proof of Service* list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO THE APPLICANT AND ALL OTHER PARTIES:

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

by personal delivery;

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

AND :

FOR FILING WITH THE ENERGY COMMISSION:

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

OR

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

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

  
Name

June 8, 2011  
Date

**CITY OF CARLSBAD  
MASTER FEE SCHEDULES**

**SECTION 2  
DEVELOPMENT-RELATED  
SERVICE FEES**



June 2010

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT RELATED SERVICE FEES  
JUNE 2010**

Fee Description		Current Fee
Additional Planning Inspections (first Insp included in plan check fee)		\$ 59
Adjustment Plat		\$ 1,194
Administrative Permit - <u>IODA</u>		\$ 190
Affordable Housing Credit Per Unit (Southeast and Southwest quadrants)		\$ 49,000
Affordable Housing Credit Per Unit (Northwest Quadrants)	(*)	\$ 142,000
Agricultural Mitigation Fee	(10)	\$ 10,000
Appeal - City Council (+ noticing costs) - fee is refundable if appeal is won		\$ 1,000
Appeal - Housing and Redevelopment Commission (+ noticing costs) fee is refundable if appeal is won		\$ 624
Appeal - Planning Commission (+ noticing costs) fee is refundable if appeal is won		\$ 613
Appeal - Redev. Design Review Board (+ noticing costs) fee is refundable if appeal is won		\$ 624
Building Permit Fees (65% of 2001 UBC 1-A)	(1)	
Building Plan Check - 65% of Bldg Permit (8% discount on repetitive plan checks)		
Building Code Enforcement		Court costs
Certificate of Compliance		\$ 969
Certificate of Compl. in lieu of Parcel Map		\$ 3,372
Certificate of Correction		\$ 753
Community Facilities District Annexation		\$ 1,271
Construction Change Review - Minor (fee plus \$155 per sheet)		\$ 451
Construction Change Review - Major (fee plus \$245 per sheet)		\$ 636
Coastal Development Permit (CDP) - Single Family Lot	(8)	\$ 999
CDP - 2 - 4 unit or lot subdivision (per unit or lot whichever is greater)	(8)	\$ 2,024
CDP - 5 or more unit or lot subdivision (per permit)	(8)	\$ 3,295
CDP Amendment = 50% of current permit cost		
CDP Emergency		\$ 410
CDP Exemption		\$ 226
CDP Extensions = 25% of current permit cost		
CDP - Non-Redevelopment Area - Minor Permit	(8)	\$ 794
CDP Non-Residential + 10 cents per square foot	(8)	\$ 897
Coastal Development Permit - Major & Minor RP's		\$ 615
Conditional Use Permit (25% discount may apply)		\$ 4,162
CUP - Minor		\$ 697
CUP - Amendment		\$ 2,240
CUP - Bio Habitat Preserve		\$ 784
CUP - Extension -Regular		\$ 841
DayCare Permit		\$ 195
DayCare Permit - Center Admin Pmt.		\$ 390
DayCare Permit - Extension		\$ 87
Developer Agreements - Deposit \$10,000 increments (Consistent with City payroll records + overhead)		Actual cost
Duplicate Tracing Fees - Final Parcel and Tract Maps - per sheet (+ \$32 per sheet)		\$ 21
Easement or Offer to Dedicate or Improve		\$ 605
EIA - All Others	(5)	\$ 1,604
EIA - Single Family	(5)	\$ 883
EIR Review (+ fbhr after the first 160 hrs of project planner or 40 hrs of Project Engineer)	(5)	\$ 18,619
EIR - Addendum (+ fbhr after 1st 10 hrs of project planner)	(5)	\$ 2,332
EIR - Focused/Supplemental (Requiring a Public Hearing) - (+ fbhr after the 1st 100 hrs of project planner or 20 hrs of project engineer)	(5)	\$ 12,526
Encroachment Agreement Processing		\$ 313
Environmental Monitoring Fee		\$ 215
Expedited Fire Plan Review Service Fee		Actual Cost + \$25
Fire Protection System Installation	(1)	
Fish & Game Fee - Negative Declaration - Set by Department of Fish and Game	(6)	\$ 2,060
Fish & Game Fee - EIR - Set by Department of Fish and Game	(6)	\$ 2,842
GIS Technical Services (per hour Technician plus overhead)		Actual Cost
GIS Technical Services (per hour Manager plus overhead)		Actual Cost
GIS Production of new documents (per hour Technician plus materials and overhead)		Actual Cost
GIS Digital Data Delivery (per hour Technician plus overhead)		Actual Cost
GIS Reproduction of Existing Documents (per hour Technician plus material and overhead)		Direct cost
GIS 2005 Natural Color Aerial Photography (2000'x3000' tile) in *.tif format		
GIS 2005 2' Topographic Contour Lines (2000'x3000' tile)		
General Plan Amendment - 0 - 5 Acres		\$ 3,962
General Plan Amendment - Over 5 Acres		\$ 5,714

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT RELATED SERVICE FEES  
JUNE 2010**

Fee Description		Current Fee
Grading Permit Application	(1)	
Grading Permit	(1)	
Grading Permit Investigation Fee (Consistent with City payroll records plus overhead)		Actual cost
Grading Permit Extension Fee		25% permit fee
Local Facilities Management Fees - As established by Council		
Hillside Dev Permit - Single Family Lot	(8)	\$ 1,153
Hillside Dev Permit - Other (Multiple Lots)	(8)	\$ 2,332
Hillside Dev Permit Amendment - Single Family Lot		\$ 656
Hillside Dev Permit Amendment - Other (Multiple Lots)		\$ 1,999
HMP - Permit - Single Family		50% Minor Fee
HMP - Permit - Amendment - Single Family Residence		75% Original fee
HMP - Permit - Minor (no on site habitat to be preserved)		\$ 513
HMP - Amendment - Minor		\$ 3,188
HMP - Permit - Amendment - Minor (no on site habitat to be preserved)		75% Original Fee
HMP - Permit - Major		\$ 3,628
HMP - Permit - Amendment - Major		75% Original Fee
HMP - Amendment - Major (+ fbhr after first 20 hours of project planner)		\$ 4,961
Improvement Agreement Extension - see Secured Agreement Proc. Ext.		
Improvement Construction Inspection Fee	(1)	
Improvement Plan Review (Plan Check)	(1)	
Exclusionary Housing Impact Fee (per unit)		2,925
Exclusionary Housing In-Lieu Fee (per market rate unit)		4,515
Hillside Development Permit Extension - Other (Multiple Lots)		25% of original fee
Hillside Development Permit Extension - Single Family Lot		25% of original fee
Inspection Overtime-per Hour (On Request) - each additional hour at \$70		\$ 108
Inspection - Additional Planning		\$ 86
Landscape Plan Check	(1)	
Landscape Inspection	(1)	
License Tax on New Construction - Mobile Homes		\$ 1,929
Lighting and Landscape District #2 Annexation		\$ 5,400
Local Coastal Plan - Amendment	(8)	\$ 5,791
Major Site Development Plan (Non Res) Extension		25% of original fee
Master Plan (+ fbhr after 1st 200 hrs project planner or 100 hrs project engineer)		\$ 38,786
Master Plan Pre-Submittal		\$ 6,596
Master Plan Amendment - (Minor) (+ fbhr after 1 <sup>st</sup> 20 hrs Proj. Planner or 7 hrs Proj. Eng.)		\$ 1,548
Master Plan Amendment - Major (+ fbhr after 1st 100 hrs project planner or 40 hrs of project engineer)		\$ 24,267
Minor Conditional Use Permit - Amendment		\$ 530
Minor Conditional Use Permit Extension		50% of original fee
Minor Site Development Plan Extension		25% of original fee
Neighborhood Improvement Agreements		\$ 441
Noticing Service (plus postage)		\$ 292
Oversize Load Permit - 1 trip (fee set by State)		\$ 16
Oversize Load Permit - Annual (fee set by State)		\$ 90
Park In Lieu Fee - Redevelopment Area		\$ 11,240
PD Res. Amendment - 4 or less	(2)	\$ 1,507
PD Res. Amendment - 5 to 50	(2)	\$ 5,747
PD Res. Amendment - 51 or more	(2)	\$ 7,749
PD Amendment- Non-Res - 4 or less	(2)	\$ 1,712
PD Amendment - Non-Res - 5 to 50	(2)	\$ 6,165
PD Amendment - Non-Res - 51 or more	(2)	\$ 8,349
PD Condo - Residential Additional Permit		\$ 349
PD Condo - Admin Amendment		\$ 328
PD/Condo - Minor Amendment		\$ 689
PD Res - 4 or less	(2)	\$ 2,798
PD Res - 4 or less Extension		25% of original fee
PD Res - 5 to 50	(2)	\$ 7,759
PD Res 5 to 50 Extension		25% of original fee
PD Res - 51 or more	(2)	\$ 12,259
PD Res - 51 or more Extension		25% of original fee
PD - Non-Res - 4 or less	(2)	\$ 2,798
PD - Non-Res - 4 or less Extension		25% of original fee

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT RELATED SERVICE FEES  
JUNE 2010**

Fee Description		Current Fee
PD - Non-Res - 5 to 50	(2)	\$ 7,759
PD - Non-Res - 5 to 50 Extension		25% of original fee
PD - Non-Res - 51 or more	(2)	\$ 12,259
PD - Non-Res - 51 or more Extension		25% of original fee
Permit Amendments Not Specifically Identified	(4)	
Planned Industrial Permit		\$ 4,315
Planned Industrial Permit - Amendment		\$ 1,937
Planned Industrial Permit Extension		25% of original fee
Planning Commission Determination - Single Family		\$ 938
Planning Commission Determination - Other		\$ 1,517
Planning Commission Discussion Item		\$ 615
Precise Development Plan		\$ 7,062
Precise Development Plan - Amendment		\$ 3,844
Preliminary Plan Review - Consistency Determination		\$ 656
Preliminary Plan Review - Major		\$ 656
Preliminary Plan Review - Minor		\$ 185
Preliminary Review - Redevelopment (minor or major)		\$ -
Quitclaim of Easement		\$ 636
Reapportionment Fees for 1911 Act Assessment Districts - (plus \$50 per parcel)		\$ 450
Redevelopment Permit Extension (Minor)		\$ 560
Redevelopment Permit Extension (Major)		\$ 651
Redevelopment Noticing Fee (Minor) – plus postage		\$ 217
Redevelopment Noticing Fee (Major) – plus postage		\$ 407
Redevelopment Permit (Admin.)		\$ 410
Redevelopment Permit (Minor) - plus noticing costs		\$ 1,527
Redevelopment Permit (Major) - plus noticing costs		\$ 2,798
Redevelopment Permit Amendment (Admin)		\$ 161
Redevelopment Permit Amendment (Minor) - plus noticing costs		\$ 548
Redevelopment Permit Amendment (Major) - plus noticing costs		\$ 1,345
Research and Design Time (By Written Request) - Per Hour - Minimum \$25.00 based on hours to completion.		Actual cost
Reversion to Acreage - (Consistent with City payroll records charged against a \$3,100 deposit)		Actual cost
Right of Way Permit - Minor-Non Construction		\$ 159
Right of Way Permit - Minor - <u>Construction</u>		\$ 323
Right of Way Permit - Utility (+ actual costs for Insp. and Sr. Insp. time)		\$ 687
Right of Way Permit - Utility (By Contract)		\$ 687
Satellite Antenna Permit		\$ 390
School Fees - (Set by School Districts, State Mandates Limits)		
Secured Agreement Proc. Extension		\$ 379
Secured Agreement Proc. Replace --> improvement plan revision fees if required		\$ 697
Segregation of Assessments - 1- 4 lots (Consistent with City payroll records plus overhead, consultant cost and recording fee)	(7)	Actual Cost
Segregation of Assessments - 5 lots or more - fee plus \$20 per lot (Consistent with City payroll records plus overhead, consultant cost and recording fee)	(7)	Actual Cost
Sidewalk Café Permit - Redevelopment		\$ 56
Sign Permit		\$ 56
Sidewalk Sign/Outdoor Display Permit, Redevelopment Area		\$ 56
Sign Program, Non RDA		\$ 979
Sign Program Amendment, Non RDA		\$ 589
Sign Program Permit, Redevelopment Area		276
Sign Program Permit Amendment, Redevelopment Area		\$ 67
Site Development Plan - Res. <= 4 units/lots		\$ 4,146
Site Development Plan		\$ 10,517
Site Development Plan Amendment (Minor)		\$ 2,768
Site Development Plan Amendment (Major)		\$ 7,124
Special Use Permit - Extension		25% of original fee
Special Use Permit - Scenic Corridor		\$ 3,239
Special Use Permit - Flood Plain		\$ 3,588
Special Use Permit - Flood Plain, Coastal High Hazard Area		\$ 2,593
Special Use Permit Amendment - Flood Plain		\$ 3,111
Special Use Permit Amendments - All Other		\$ 2,250
Specific Plan Amendment (Major) (+ fbhr after 180 hr proj planner or 30hrs Proj eng)		\$ 20,849

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT RELATED SERVICE FEES  
JUNE 2010**

Fee Description		Current Fee
Specific Plan Amendment (Minor) (+ fbhr after 20 hr proj planner or 7hrs Proj eng)		\$ 1,348
Specific Plan (+ fbhr after 1st 200 hrs project planner or 60 hrs project engineer)		\$ 32,395
<b>Storm Water Pollution Prevention Plan Review</b>		
Tier Level 1 - Per Site - Low Inspection Priority	(11)	\$ 45
Tier Level 1 - Per Site - Medium Inspection Priority	(11)	\$ 49
Tier Level 2 - Per Site - Medium Inspection Priority	(11)	\$ 324
Tier Level 2 - Per Site - High Inspection Priority	(11)	\$ 324
Tier Level 3 - Up to 1 Acre - Medium Inspection Priority	(11)	\$ 502
Tier Level 3 - Up to 1 Acre - High Inspection Priority	(11)	\$ 651
Tier Level 3 - Each Subsequent Acre Or Portion Over One Acre - Medium Inspection Priority	(11)	\$ 60
Tier Level 3 - Each Subsequent Acre Or Portion Over One Acre - High Inspection Priority	(11)	\$ 75
<b>Storm Water Pollution Prevention Plan Inspection</b>		
Tier Level 1 - Per Site - Low Inspection Priority	(11)	\$ 54
Tier Level 1 - Per Site - Medium Inspection Priority	(11)	\$ 208
Tier Level 2 - Per Site - Medium Inspection Priority	(11)	\$ 790
Tier Level 2 - Per Site - High Inspection Priority	(11)	\$ 1,150
Tier Level 3 - Up to 1 Acre - Medium Inspection Priority	(11)	\$ 1,146
Tier Level 3 - Up to 1 Acre - High Inspection Priority	(11)	\$ 1,946
Tier Level 3 - Each Subsequent Acre Or Portion Over One Acre - Medium Inspection Priority	(11)	\$ 197
Tier Level 3 - Each Subsequent Acre Or Portion Over One Acre - High Inspection Priority	(11)	\$ 317
<b>Storm Water Management Plan</b>		
Plan Review Fee - Up To One Half Acre	(11)	\$ 308
Plan Review Fee - For Each Subsequent Acre Or Portion Over One Half Acre	(11)	\$ 111
Inspection Fee - Up to One Half Acre	(11)	\$ 259
Inspection Fee - For Each Subsequent Acre Or Portion Over One Half Acre	(11)	\$ 103
<b>Street Light Energizing Fee</b>	(1)	
<b>Street Name Change</b>		\$ 1,517
<b>Street Vacation - Regular</b>		\$ 3,100
<b>Street Vacation - Summary</b>		\$ 1,230
<b>Substantial Conformance Exhibit Rev.</b>		\$ 938
<b>Tentative Map Revision - 5- 49 Units/Lots + \$40ea 5+ (whichever is greater)</b>		\$ 3,818
<b>Tentative Map Revision - 50+ Units/Lots + \$15ea 49+ (whichever is greater)</b>		\$ 7,062
<b>Tentative Parcel Map Processing Fee (Minor Subdivision)</b>		\$ 3,531
<b>Tentative Parcel Map 1yr Extension (per application)</b>		\$ 1,368
<b>Parcel Map (Minor Subdivision) - Final</b>		\$ 3,115
<b>Tentative Tract Map Litigation Stay</b>		25% of orig. fee
<b>Tentative Tract Map - 5 -49 Lots/Units + \$110ea. &gt; 5 (whichever is greater)</b>		\$ 7,647
<b>Tentative Tract Map - 50+ Lots/Units + \$15ea 49+ (whichever is greater)</b>		\$ 15,283
<b>Tentative Tract Map Extension- 5 to 49</b>		\$ 2,680
<b>Final Tract Map (+ \$5 per Acre)</b>		\$ 6,939
<b>Third Party Review - plus consultant cost</b>		\$ 692
<b>Trails Plan Check &lt;= 1 mile in length</b>		\$ 970
<b>Trails Plan Check &gt; 1 mile in length</b>		\$ 2,024
<b>Trails Inspection (cost of staff time)</b>		\$ 660
<b>Variance - Administrative Redevelopment</b>		\$ 174
<b>Variance - Redevelopment</b>		\$ 390
<b>Variance - Engineering</b>		\$ 697
<b>Variance - Planning</b>		\$ 2,624
<b>Variance - Administrative (Planning)</b>		\$ 697
<b>Variance - Administrative (Planning) Recreational Vehicle Admin. Variance</b>		\$ 699
<b>Wireless Communication 3rd Party Review (vendor costs)</b>		Actual Cost
<b>Zone Change - 5 or fewer acres</b>	(9)	\$ 4,551
<b>Zone Change - 5.1 or more acres</b>	(9)	\$ 6,165
<b>Zone Code Amendment</b>		\$ 5,868
<b>Zoning Compliance Letter</b>		\$ 77
<b><u>Water District Service Fees</u></b>		
Preliminary Potable Water, Reclaimed Water, Sewer Analysis Review - (Use Improvement Plan Review Fees)		
Reclaimed Water Landscape Review - Use Improvement Plan Review fees		
Hydraulic Analysis Only - Included in Improvement Plan Review Fees		
Meter Installation Fees:		

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT RELATED SERVICE FEES  
JUNE 2010**

Fee Description	Current Fee
5/8"	\$ 331
Fire Protection	meter fee
3/4"	\$ 364
1"	\$ 403
1 1/2" - Turbo	\$ 1,158
1 1/2" - Displacement	\$ 628
2" - Turbo	\$ 1,388
2" - Displacement	\$ 776
3" (Consistent with City payroll records plus overhead)	Actual Cost
4" (Consistent with City payroll records plus overhead)	Actual Cost
6" (Consistent with City payroll records plus overhead)	Actual Cost
8" (Consistent with City payroll records plus overhead)	Actual Cost
Potable, Reclaimed and Sewer Improvement Plan Review - Use Improvement Plan Review Fees	
Potable, Reclaimed and Sewer Standards and Specifications (available on Internet)	No charge
San Diego County Water Auth. Capacity Charge - Set by SDCWA	
<b>Service Installation Fees</b>	
Fire Hydrant Lateral and Assembly (staff time consistent with City payroll records)	Actual Cost
Fire Sprinkler Lateral (staff time consistent with City payroll records)	Actual Cost
Utility Standards and Specifications (direct cost of reproduction)	Direct cost
Waste Water Discharge Permit	\$ 31
Waste Water Pretreatment:	
Class I (per month) - Existing user	\$ 200
Class II (per month) - Existing user	\$ 190
Class III (per month) - Existing user	\$ 30
Class I - One time fee for new users	\$ 270
Class II - One time fee for new users	\$ 270
Class III - One time fee for new users	\$ 80

**Notes:**

- (1) - See attached schedules and rate tables.
- (2) - Based on number of units or lots whichever is greater
- (3) - Fee Increases based on Annual Change in Engineering News Record as Established by Council by Ordinance.
- (4) - Any Permit Amendment not identified assessed at 50% of original cost.
- (5) - Plus fish and game department fee, if any. Environmental filing fees are set by Fish and Game Code 711.4
- (6) - Fees set by State Statute.
- (7) - For all Assessment Districts using 1915 Act Bonds.
- (8) - A 25% discount may apply when submitted with another application
- (9) - A 25% discount will apply when submitted with a General Plan Amendment
- (10) - AB 14,536
- (11) - Adjusts annually by CPI
- (\*)- Approved by Council on 12/2005, updated AB19183 9/07/2007

FIRE PROTECTION SYSTEM INSTALLATION FEES			Schedule #1	
	Plan Review	Inspection Fees		Total Fee
		Qty.	Cost	
<b>Automatic Sprinkler Systems</b>				
- Residential System	\$65	3 at	\$65 each	\$260
- Commercial System - 1st riser 1st floor				\$1,200
- ea add'l riser				\$600
- Tenant Improvement	\$65	1 at	\$65 each	\$130
<b>Fire Alarm Systems</b>				
- 1 to 25 Devices	\$60 minimum	1 at	\$65 each	\$125
- 26 or more Devices	\$100	2 at	\$65 each	\$230
<b>Other Fixed Fire Systems</b>				
- Hood and Duct	\$65	1 at	\$65 each	\$130
- Special Chemical Agent	\$65	1 at	\$65 each	\$130
- Standpipe	\$80	2 at	\$65 each	\$210
- Paint Spray Booth	\$80	2 at	\$65 each	\$210
Repeated Inspection on new construction		1 at	\$75 each	\$75

**GRADING PLANCHECK FEES**

Schedule #2

Amount	Current Fee
100 CY* or less	\$393
101 to 1,000 CY	\$786 for the first 100 cubic yards plus \$120 for each additional 100 cubic yards or fraction thereof.
1,001 to 10,000 CY	\$2,352 for the first 1,000 cubic yards plus \$120 for each additional 1,000 cubic yards or fraction thereof.
10,001 to 100,000 CY	\$3,702 for the first 10,000 cubic yards plus \$180 for each additional 10,000 cubic yards or fraction thereof.
100,001 to 200,000 CY	\$5,646 for the first 100,000 cubic yards plus \$285 for each additional 10,000 cubic yards or fraction thereof.
200,001 CY or more	\$9,058 for the first 200,000 cubic yards plus \$130 for each additional 100,000 cubic yards or fraction thereof.
* CY = Cubic Yards	

**GRADING PERMIT FEES**

**Schedule #3**

<b>Amount</b>	<b>Current Fee</b>
100 Cubic Yards (CY) or less	\$393
101 to 1,000 CY	\$398 for the first 100 CY plus \$65 for each additional 100 CY or fraction thereof.
1,001 to 10,000 CY	\$1,117 for the first 1,000 CY plus \$65 for each additional 1,000 CY or fraction thereof.
10,001 to 100,000 CY	\$1,846 for the first 10,000 CY plus \$130 for each additional 10,000 CY or fraction thereof.
100,001 to 200,000 CY	\$3,236 for the first 100,000 CY plus \$130 for each additional 10,000 CY or fraction thereof.
200,001 to 400,000 CY	\$4,777 for the first 200,000 CY plus \$195 for each additional 10,000 CY or fraction thereof.
400,000 to 1,000,000 CY	\$9,482 for the first 400,000 CY plus \$980 for each additional 100,000 CY or fraction thereof.
1,000,001 CY or more	\$16,544 for the first 1,000,000 CY plus \$710 for each additional 100,000 CY or fraction thereof.

IMPROVEMENT CONSTRUCTION INSPECTION FEES		Schedule #4
Cost of Improvements	Current Fee	
\$0 to \$20,000	5.5% - \$375 Minimum	
\$20,001 to \$50,000	\$1,561	for the first \$20,000 plus \$250 for each additional \$10,000 or fraction thereof.
\$50,001 to \$100,000	\$3,128	for the first \$50,000 plus \$125 for each additional \$10,000 or fraction thereof.
\$100,001 to \$250,000	\$3,909	for the first \$100,000 plus \$100 for each additional \$10,000 or fraction thereof.
\$250,001 to \$500,000	\$5,790	for the first \$250,000 plus \$105 for each additional \$10,000 or fraction thereof.
\$500,001 to \$1,000,000	\$9,399	for the first \$500,000 plus \$105 for each additional \$10,000 or fraction thereof.
\$1,000,001 or more	\$14,993	for the first \$1,000,000 plus \$105 for each additional \$10,000 or fraction thereof.

**IMPROVEMENT PLAN REVIEW FEES**

Schedule #5

<b>Cost of Improvements</b>	<b>Current Fee</b>
\$0 to \$20,000	\$ 1,256 plus 5% of value of improvements
\$20,001 to \$50,000	\$ 1,603 plus 4% of value of improvements - \$2,470 minimum
\$50,001 to \$100,000	\$ 2,068 plus 3% of value of improvements - \$4,090 minimum
\$100,001 to \$250,000	\$ 2,321 plus 2.5% of value of improvements - \$5,840 minimum
\$250,001 to \$500,000	\$ 7,021 plus 2% of value of improvements - \$13,910 minimum
\$500,001 to \$1,000,000	\$ 12,408 plus 1.5% of value of improvements - \$23,840 minimum
Over \$1,000,000	\$ 12,682 plus 0.75% of value of improvements - \$31,630 minimum

(Improvement Plan Check Fees are based on the current City of San Diego unit prices. This includes the cost of curbs, gutters, sidewalks, asphalt or concrete paving, storm drains, etc.)

<b>STREET LIGHT ENERGIZING FEES - (FY 10-11)</b>		<b>Schedule #6</b>
<b>Watts</b>	<b>Lumens</b>	<b>Current Fee</b>
40	5,500	\$60
80	9,600	\$89
100	13,700	\$105
150	20,600	\$142
250	34,200	\$217

Above fees are the cost for energizing each street light for 18 months and includes a \$30 charge per light for connecting the light to an SDG&E service point.

**LANDSCAPE INSPECTION FEES**

**Schedule #7**

<b>Cost of Improvements</b>	<b>Current Fee</b>
\$0 to \$20,000	\$548
\$20,001 to \$50,000	\$774 for the first \$20,000 of improvements plus \$20 for each additional \$10,000 or fraction thereof.
\$50,001 to \$100,000	\$1,087 for the first \$50,000 of improvements plus \$20 for each additional \$10,000 or fraction thereof.
\$100,001 to \$250,000	\$1,548 for the first \$100,000 of improvements plus \$150 for each additional \$100,000 or fraction thereof.
\$250,001 to \$750,000	\$1,860 for the first \$250,000 of improvements plus \$150 for each additional \$100,000 or fraction thereof.
\$750,001 and Over	\$2,942 for the first \$750,000 of improvements plus \$150 for each additional \$100,000 or fraction thereof.

**LANDSCAPE PLAN CHECK FEES**

Schedule #8

<b>Cost of Improvements</b>	<b>Current Fee</b>
\$0 to \$20,000	\$548
\$20,001 to \$50,000	\$779 plus 3.0% over \$20,000
\$50,001 to \$100,000	\$2,250 plus 1.5% over \$50,000
\$100,001 to \$250,000	\$3,413 plus 2% over \$100,000
\$250,001 to \$500,000	\$4,192 plus 0.15% over \$250,000
\$500,001 to \$1,000,000	\$5,120 plus 0.1% over \$500,000
Over \$1,000,000	\$7,759 plus 0.07% over \$1,000,000

**BUILDING PERMIT FEES - FY 09-10**

Schedule #9

**(65% of the 2001 Uniform Building Code Table 1-A fee schedule)****Fees are based on the 2006-07 Building Valuation Multipliers published by the San Diego Area Chapter of the International Code Council**

Total Valuation	Fee
\$1 to \$500	\$15.28
\$501 to \$2,000	\$15.28 for the first \$500 plus \$1.98 for each additional \$100, or fraction thereof, to and including \$2,000
\$2,001 to \$25,000	\$45.01 for the first \$2,000 plus \$9.10 for each additional \$1,000, or fraction thereof, to and including \$25,000
\$25,001 to \$50,000	\$254.31 for the first \$25,000 plus \$6.57 for each additional \$1,000, or fraction thereof, to and including \$50,000
\$50,001 to \$100,000	\$418.43 for the first \$50,000 plus \$4.55 for each additional \$1,000, or fraction thereof, to and including \$100,000
\$100,001 to \$500,000	\$645.93 for the first \$100,000 plus \$3.64 for each additional \$1,000, or fraction thereof, to and including \$500,000
\$500,001 to \$1,000,000	\$2101.93 for the first \$500,000 plus \$3.09 for each additional \$1,000, or fraction thereof, to and including \$1,000,000
\$1,000,001 and up	\$3,645.69 for the first \$1,000,000 plus \$2.05 for each additional \$1,000 or fraction thereof

**Other Inspections and Fees:**

1. Inspections outside of normal business hours (minimum charge - 2 hours)	\$65 per hour*
2. Reinspection fees	\$65 per hour*
3. Inspections for which no fee is specifically indicated (minimum charge - one-half hour)	\$65 per hour*
4. Additional plan review required by changes, additions or revisions to approved plans (minimum charge - one-half hour)	\$65 per hour*

\* Or the total hourly cost to the jurisdiction, whichever is greatest. This cost shall include supervision, overhead, equipment, hourly wages and fringe benefits of the employees involved.

Notwithstanding other provisions of this section, the building permit fee for factory built housing shall be twenty-five percent of the fee shown in Schedule #9, and the plan check fee shall be sixty-five percent of the building permit fee

<b>PLUMBING PERMITS FEES</b>	<b>Schedule #10</b>
<b>Fee Description</b>	<b>Fee</b>
Issuing each permit	\$20
Issuing each supplemental permit	\$10
<b>Unit Fee Schedule (in addition to items above)</b>	
For each plumbing fixture on one trap or a set of fixtures on one trap (including water, drainage piping and backflow protection therefore)	\$7
For each building sewer and each trailer park sewer	\$15
Rainwater systems - per drain (inside building)	\$7
For each cesspool (where permitted)	\$25
For each private sewage disposal system	\$40
For each water heater and/or vent	\$7
For each gas-piping system one to five outlets	\$5
For each additional gas-piping system outlet, per outlet	\$1
For each industrial waste pretreatment interceptor including its trap and vent, excepting kitchen-type grease interceptors functioning as fixture traps	\$7
For each installation, alteration or repair of water piping and/or water treating equipment, each	\$7
For each repair or alteration of drainage or vent piping, each fixture	\$7
For each lawn sprinkler system on any one meter including backflow protection devices therefore	\$7
For atmospheric-type vacuum breakers not included in above item:	
1 to 5	\$5
Over 5, each	\$1
For each backflow protective device other than atmospheric type vacuum breakers:	
2 inch diameter and smaller	\$7
Over 2 inch diameter	\$15
<b>Other Inspections and Fees</b>	
Inspections outside of normal business hours	\$30*
Reinspection Fee	\$30
Inspections for which no fee is specifically indicated	\$30*
Additional plan review required by changes, additions or revisions to approved plans, (minimum charge - one half hour)	\$30*

\*Per hour for each hour worked or the total hourly cost to the jurisdiction, whichever is greater. This cost shall include supervision, overhead, equipment, hourly wage and fringe benefits of all the employees involved.

<b>ELECTRICAL PERMIT FEES</b>		<b>Schedule #11</b>
<b>Fee Description</b>	<b>Fee</b>	
Issuance fee	\$10.00	
New construction for each ampere of main service, switch, fuse or breaker		
Per ampere, single-phase	\$0.25	
Per ampere, three-phase	\$0.50	
Per ampere 480 three-phase	\$1.00	
Service upgrade on existing building		
For each ampere or increase in main service, switch, fuse or breaker		
Per ampere, single-phase	\$0.25	
Per ampere, three-phase	\$0.50	
Per ampere 480 three-phase	\$1.00	
Remodel, alteration, no change in service		
Per ampere	\$0.25	
Or minimum	\$5.00	
Temporary service up to and including 200 amperes		
		\$10.00
Temporary service over 200 amperes \$10.00 plus \$10.00 per each 100 amperes over 200		
		\$10.00 plus
Test meter	\$25.00	
Minimum permit fee	\$10.00	

<b>MECHANICAL PERMIT FEES</b>		<b>Schedule #12</b>
<b>Fee Description</b>	<b>Fee</b>	
Issuance fee	\$15.00	
Furnace, Ducts, Heat Pumps (each)		
		\$9.00
Fireplace (each)		
		\$6.50
Exhaust Fan (each)		
		\$6.50
Install/relocate vent (each)		
		\$4.50
Hood (each)		
		\$6.50
Boiler/Compressor to 15 HP (each)		
		\$16.50

**CITY OF CARLSBAD  
MASTER FEE SCHEDULES**

**SECTION 3  
DEVELOPMENT-IMPACT FEES**



June 2010

**CITY OF CARLSBAD  
FEE SCHEDULE  
DEVELOPMENT IMPACT FEES  
JUNE 2010**

Fee Description	Note	Current Fee
<b>Fees Subject to Section 66000 of the California Government Code:</b>		
Bridge & Thoroughfare - per Single Family Unit (Outside CFD)		\$ 530
Bridge & Thoroughfare - per Condominium Unit (Outside CFD)		\$ 424
Bridge & Thoroughfare - per Apartment Unit (Outside CFD)		\$ 318
Bridge & Thoroughfare - all other - per Avg. Daily Trip (Outside CFD)		\$ 22
Bridge & Thoroughfare District #2 - Zone 5	(2)	\$ 291
Bridge & Thoroughfare District #2 - Zone 20	(2)	\$ 1,513
Bridge & Thoroughfare District #2 - Zone 21	(2)	\$ 1,222
Bridge & Thoroughfare District #3 - Fee per ADT	(2)	\$ 171
Local Facilities Mngt Plan/Amendment - fee + deposit in min. increments of \$5,000		\$ 10,000
Planned Local Drainage Fees	(1) (2)	
Public Facilities Fees - 3.5% of Bldg Permit Value (Outside CFD)		
Public Facilities Fees - 1.82% of Bldg Permit Value (Inside CFD)		
Sewer Benefit Area Fees	(1) (2)	
Traffic Impact Fee - Commrc'l/Indust Cost Per Trip (Out of CFD)	(2)	\$ 108
Traffic Impact Fee - Commrc'l/Indust Cost Per Trip (Inside CFD)	(2)	\$ 91
Traffic Impact Fee - Single Family (Outside of CFD 1) per ADT	(3)	\$ 270
Traffic Impact Fee - Condominium (Outside of CFD 1) per ADT	(3)	\$ 270
Traffic Impact Fee - Apartment (Outside of CFD 1) per ADT	(3)	\$ 270
Traffic Impact Fee - Single Family (Inside of CFD 1) per ADT	(3)	\$ 229
Traffic Impact Fee - Condominium (Inside of CFD 1) per ADT	(3)	\$ 229
Traffic Impact Fee - Apartment (Inside of CFD 1) per ADT	(3)	\$ 229
<b>Fees Subject to Section 66012 of the California Government Code:</b>		
Park In-Lieu Fees	(1)	
Sewer Connection (General Capacity all areas plus Sewer Benefit Area Fees)	(1)(2)	\$ 1,096
<b><u>Water District Fees</u></b>		
Major Facility Fee - Potable Water per EDU		
Major Facility Fee - Potable and Reclaimed Water Connection Fees:		
Meter Size 5/8" - Displacement	(2)	\$ 3,549
Meter Size 3/4" - Displacement	(2)	\$ 5,060
Meter Size 1" - Displacement	(2)	\$ 7,988
Meter Size 1-1/2" - Displacement	(2)	\$ 15,088
Meter Size 1-1/2" - Turbo	(2)	
Meter Size 2" - Displacement	(2)	\$ 22,771
Meter Size 2" - Turbo	(2)	
Meter Size 3" - Displacement	(2)	\$ 39,938
Meter Size 3" - Turbo	(2)	
Meter Size 4" - Displacement	(2)	\$ 62,125
Meter Size 4" - Turbo	(2)	\$ 177,501
Meter Size 6" - Displacement	(2)	\$ 115,376
Meter Size 6" - Turbo	(2)	\$ 355,000
Meter Size 8" - Displacement	(2)	\$ 136,367
Meter Size 8" - Turbo	(2)	\$ 497,167

Notes:

(1) - See attached schedules and rate tables.

(2) - Fee increases based on the annual change in the Engineering News Record Cost Index for Los Angeles as established by council approved ordinance.

(3) - Code 18.42.050 - Traffic Impact Fees will be adjusted annually as part of the Capital Improvement Program budget process, by two percent or the annual percentage change in the Caltrans Construction Cost Index (12 month index, whichever is higher).

PARK IN-LIEU FEES		Schedule A	
Quadrant	Value per Acre	Fee Per Unit	
District 1 - NW	977,000		
Single Family Detached & Duplex		\$	7,649
Attached (4 units or less)		\$	6,414
Attached (5 units or more)		\$	6,190
Mobile Home		\$	4,934
District 2 - NE	732,000		
Single Family Detached & Duplex		\$	5,728
Attached (4 units or less)		\$	4,804
Attached (5 units or more)		\$	4,636
Mobile Home		\$	3,696
District 3 - SW	732,000		
Single Family Detached & Duplex		\$	5,728
Attached (4 units or less)		\$	4,804
Attached (5 units or more)		\$	4,636
Mobile Home		\$	3,696
District 4 - SE	732,000		
Single Family Detached & Duplex		\$	5,728
Attached (4 units or less)		\$	4,804
Attached (5 units or more)		\$	4,636
Mobile Home		\$	3,696
The Park Fee ordinance establishes a method of determining park land values in each quadrant			

PLANNED LOCAL DRAINAGE AREA FEES - Schedule B				
Fee per gross acre		Current Fee		
Area / Basin Name		Low Runoff	Medium Runoff	High Runoff
A	Buena Vista Lagoon	\$5,270	\$10,480	\$22,837
B	Agua Hedionda Lagoon	1,970	3,797	8,535
C	Encinas Creek	1,912	2,705	8,287
D	Batiquitos Lagoon	1,813	2,966	7,857

<b>SEWER BENEFIT AREA FEES - Schedule C</b>	
	<b>Current Fee</b>
Area A	\$ 955
Area B	\$ 1,087
Area C	\$ 2,003
Area D	\$ 2,007
Area E	\$ 2,960
Area F	\$ 2,976
Area G	\$ 600
Area H	\$ 873
Area J	\$ 1,647
Area K	\$ 1,302
Area L	\$ 1,302
Area M	\$ 64

HABITAT MITIGATION FEES		Schedule D	
Fees Per Acre of Impact			
D.	Coastal Sage Scrub	\$	27,280
E.	Grassland	\$	13,640
F.	Ag. Disturbed Eucalyp. Wood.	\$	2,729