William B. Rostov (State Bar No. 184528)
EARTHJUSTICE
426 17 St., 5th Floor
Oakland, California 94612
Tel: (510) 550-6725; Fax: 510-550-6749
wrostov@earthjustice.org

Attorney for Intervenor
Center for Biological Diversity

DOCKET
07-AFC-6
DATE JUN 29 2011
RECD. JUN 29 2011

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	)	DOCKET NO: 07-AFC-6
CARLSBAD ENERGY CENTER PROJECT	)	CENTER FOR BIOLOGICAL DIVERSITY'S COMMENT ON THE ERRATA AND NEW MOTION FOR EVIDENTIARY HEARING

INTRODUCTION

The Errata to the Presiding Member's Proposed Decision ("Errata") in the Carlsbad Energy Center Project ("Project") proceeding further illuminates the arbitrary nature of the process and the inadequate analysis pursuant to the California Environmental Quality Act, Public Resources Code Section 21000, *et seq*. ("CEQA"). The PMPD and Errata (collectively "Revised PMPD") disregard CEQA's requirement to consider probable future projects in the cumulative impacts and no project alternative analyses because they fail to consider the three probable future projects for which SDG&E has entered into Power Purchase Agreements (PPAs), including Pio Pico Energy Center, Escondido Energy Center, and Quail Brush Power (collectively "Plants"). Fundamentally, CEQA requires an agency to inform its decisionmakers and the public about the environmental impacts of its decision, which the Revised PMPD fails to do. The Errata erroneously dismisses the Plants as too improbable. Furthermore, the Commission arbitrarily picks and chooses what new information to include in the Revised PMPD, accepting new evidence from California Energy Commission Staff ("Staff") while prohibiting evidence from other parties. Thus, the Center for Biological Diversity (the "Center") moves for a new evidentiary hearing to consider all of the evidence on this topic. The Center urges the Commission to either deny approval of the Project or alternatively, to substantially revise the PMPD, correcting its factual and legal deficiencies.[1]

[1] See Center's Comments on the PMPD for a further discussion of the PMPD's deficiencies. For a procedural history please see Center's Motion for Clarification Re: Continuance of the Commission Hearing on the PMPD; Motion to Set an Appropriate Date for the Commission's Final Hearing on the PMPD; Motion for Reconsideration at 1-3, filed June 27, 2011.

ARGUMENT

I. The Commission Failed to Comply with CEQA by Not Considering Three Probable Future Power Plants in the Cumulative Impacts Analysis

The Revised PMPD is legally deficient because the cumulative impacts analysis did not fully consider the Plants as probable future projects. CEQA requires "a list of past, present, and probable future projects producing related or cumulative impacts." (Cal. Code of Regs., tit. 14 § 15130(b)(1)(A).)[2] Probable future projects include "not only approved projects under construction and approved related projects not yet under construction, but also unapproved projects currently under environmental review with related impacts or which result in significant cumulative impacts." (CEQA Guidelines, Discussion Following § 15130.)[3] By taking official notice of the Plants, even for the limited purpose of acknowledging that SDG&E has proposed to enter into the contracts (Errata at 30, n. 5), the Commission recognized that the Plants are all in various stages of permitting, and this triggers CEQA review.

Once the Errata recognized the existence of the Plants, the Commission had an obligation to study the environmental impacts in both the cumulative impacts and alternatives analyses. Instead, the Commission dismisses the Plants as "far from certain," implying that they may never be built, but the Commission is using the wrong standard under CEQA. (Errata at 31-32.) The Court in *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75, responding to the City's refusal to consider four high-rises still in review in the EIR, "reject[s] the argument that, because some of the projects under review might never be built, it was reasonable for the

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[2] Hereinafter, all references to Cal. Code of Regs., tit. 14 §§ 15000 *et. seq.* are "CEQA Guidelines."

[3] <http://ceres.ca.gov/ceqa/guidelines/art9.html> as of June 22, 2011

Commission not to consider any of them in its cumulative analyses. Such argument is without merit." Moreover, an agency is required to assess the cumulative impacts of a project, even though future regulatory actions would be necessary to approve that project. (*Mountain Lion Coalition v. Fish and Game Com.* 214 Cal.App.3d 1043, 1048, 1050 [court upheld order requiring state agency to assess cumulative impacts of future hunting seasons, even though future regulatory actions would be necessary to approve such seasons]; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 739-41 [proposed development projects must be included in cumulative impacts analysis].)

The Errata improperly ignores the Plants by stating that they "do not presently exist." (Errata at 31.) This is impermissible. "[A]ny future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review should be considered as probable future projects for the purposes of cumulative impact." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-28.) To be included in the SDG&E Power Purchase Agreement application, the Plants invested a significant amount of time and money during the application phase. (See City of Carlsbad Motion to Take Official Notice, Application of SDG&E for Authority to Enter into Purchase Power Agreements with Escondido Energy Center, Pio Pico Energy Center and Quail Brush Power ["SDG&E Application"].) SDG&E plans to rely on these Plants to meet its reliability needs. (*Id.* at 3, 13.) Additionally, the Commission itself recognizes that the Plants are probable. For example, the Errata states that Pio Pico's Application for Certification is pending before this very Commission in its discovery phase. (Errata at 31.) The Errata even incorporates Pio Pico into "Greenhouse Gas Table 3, Pending Projects in

San Diego Basin."[4] (Errata at 4.) Quail Brush and Escondido must also be analyzed in the cumulative impacts section. The Errata states that Quail Brush is likely to require Commission approval. (Errata at 31.) Likewise, the Commission cannot simply ignore Escondido Energy Center because its permitting status is unknown. (See *San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 75 [rejecting "the argument that the Commission was entitled to ignore projects that have not passed all regulatory hurdles"].) For all the Plants, the process of obtaining PPAs requires significant foresight, time, and attention. (See generally SDG&E Application [detailing information necessary for PPA application].) By dismissing these projects as too speculative, the Commission is also dismissing CEQA's requirements to consider the cumulative impacts of future projects.

Since the Plants would achieve the same aims as the Project, CEQA requires that their cumulative impacts be considered. CEQA mandates a cumulative impacts analysis of a proposed project where its possible environmental effects are "individually limited but cumulatively considerable." (Pub. Res. Code § 21083(b)(2).) "[A]n agency may not . . . [treat] a project as an isolated 'single shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations . . . . To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster." (*Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 408 [quoting *NRDC v. Callaway* (1975) 524 F.2d 79, 88 [referring to NEPA]].) Here, the Commission refuses to consider how the operation of the Plants in combination with the Project will affect greenhouse gas emissions. There is no discussion of whether approval of both the Project and the Plants would create excess capacity and unnecessary environmental impacts. Furthermore, there

[4] The Center notes that merely including the Pio Pico plant in a table is not the same as a meaningful cumulative impacts analysis.

is no discussion of how the Plants will affect local reliability. The Commission hides behind the excuse that the information about the PPA came too late in the permitting process (Commission's Order at 2), but the Commission cites to no provision that requires or allows it to spurn significant new information that undermines its findings. (See Center's Comments on the PMPD at 15-20 [further discussing the flaws in the cumulative impacts analysis].) On the contrary, the Commission appears to not want to discuss topics that show obvious flaws in its review. The court in *San Franciscans for Reasonable Growth* aptly described a similar situation: "The only reason we can infer for the Commission's failure to consider and analyze this group of projects was that it was more expedient to ignore them. However, expediency should play no part in an agency's efforts to comply with CEQA." (151 Cal.App.3d at 74.)

II. The No Project Alternative is Legally Deficient Because It Fails to Consider the Three Power Plants

The No Project Alternative does not accurately consider the effects of the three officially noticed SDG&E Plants. CEQA requires consideration of a No Project Alternative, which is "a factually based forecast of the environmental impacts of preserving the status quo." (*Planning & Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 917.) The analysis should be grounded in reality and not "analyze a set of artificial assumptions that would be required to preserve the existing physical environment." (CEQA Guidelines Section 15126.6(e)(3)(B).) Here, the environmental analysis of the No Project Alternative is legally deficient because it relies upon a set of artificial and inaccurate assumptions and does not consider the Plants for which SDG&E has signed Power Purchase Agreements. The proposed Plants are sufficiently probable to require analysis under CEQA. (See *Mountain Lion*, 214

Cal.App.3d at 1048, 1050; see Center's Comments on the PMPD at 27-28 [discussing flaws in the No Project Alternative analysis].)

Similarly, the Commission has attempted to sweep considerations of the impending once through cooling (OTC) rule and any accompanying criticisms under the rug. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733 [an EIR "must contain sufficient detail to help ensure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug."].) The Commission must consider the future environmental impacts of the OTC rule. By labeling the environmental effects of the OTC rule as "assumptions" (Errata at 31) the Commission has provided nothing more than bare conclusions on the OTC rule. Instead, the Commission should engage in a reasoned analysis of the potential outcome of the OTC rule. (CEQA Guidelines Section 15126.6(e)(3)(B).) The Errata does not provide sufficient information to foster informed public participation and enable the decision makers to consider the environmental factors necessary to make a reasoned decision.

III. Changed GHG Findings in the Errata Are Not Supported by the Evidence

Though it refused to consider relevant new information submitted by other parties, the Commission revised its GHG findings in the Errata with new information for which it fails to provide a basis—as required by Cal. Code of Regs., tit. 20 § 1751(b)—and reaches new conclusions that are not supported by the evidence. The Errata asserts that "[n]ew gas-fired generation units, when added to the electric generation and transmission grid, replace or displace the generation of existing units that are less efficient." (Errata at 5.) There is no evidence cited for this conclusion. In fact, the addition of this statement further demonstrates the Center's contention that the criteria created by the Commission in this

case for assessing the environmental significance of GHGs generated by new projects would allow the permitting of any and all new natural gas plants without regard for the GHG emissions generated by such projects or for the cumulative impact on global warming. (See Center's Comments on the PMPD at 13-20.)

The Errata also claims that the Project's heat rate of 7,147 Btu/kWhr "would make it significantly more efficient than nearly all other regional gas-fired generating units." (Errata at 5.) Yet the Commission does not consider the many new projects that have come online, pending projects, and recent retirements (such as the South Bay plant) when drawing this comparison. The Errata lists six new or pending projects that are not included in the PMPD's list of plants that it uses to compare heat rates for the greater San Diego area. (Compare Errata at 4-5 and PMPD at 13.) The heat rate for Otay Mesa, a large new power plant in the San Diego basin, is not included in this list, nor is Orange Grove or the Pio Pico project, which the Errata adds to the list of pending projects. Without this updated information and analysis thereof, there is no evidence to support the Errata's statement that the Project is "significantly more efficient than nearly all other regional gas-fired generating units." (Errata at 5.)

Furthermore, the Commission's statement in the Errata that "The CECP's quick start and fast ramping capabilities will help integrate additional of [sic] renewable generation into the electricity system, which is necessary to further reduce system GHG emissions from the electricity generation system" (Errata at 5) is unsupported by the evidence (see Center's Comments on the PMPD at 11-13) and is, in fact, contradicted by evidence offered by the Center in a report by the California ISO. (*Id*. at 24-25.) The Commission refused to consider this evidence, claiming it was submitted too late, even

though the Errata itself adds references to a new California ISO report from December 31, 2010. (Errata at 4.)

IV. The Commission Committed Procedural Errors That Require Reopening the Evidentiary Record.

The Commission cannot arbitrarily pick and choose what information to add to the Errata, but that is exactly what it has done. The Errata incorporated new information from the Staff Response while prohibiting other parties from introducing new material into the evidentiary record. (Commission's Order on the Motions of City of Carlsbad, Center for Biological Diversity, and Robert Simpson ["Commission's Order"] at 1-2 (served on June 20, 2011).) For example, the numbers in Greenhouse Gas Table 3 (Errata at 4) are sourced directly from Commission Staff's Response to the PMPD. (Energy Commission Staff's Response and Comments to the Presiding Member's Proposed Decision at 7.) Additionally, the Errata cites to a December 31, 2010 CAISO analysis (Errata at 4) after denying the Center's request to take official notice of six other CAISO documents. (Commission's Order at 1-2; Center's Response in Support of City of Carlsbad's Motion to Take Official Notice and the Center's Motion to Take Official Notice and Re-Open the Evidentiary Record ["Center's Motion"] at 2, Exhibits B-E, I-J.) There is no indication that the Commission conducted any updated analysis based on the new facts included in the Errata.

Staff is a party to the proceeding, just as the Center is a party, but the new evidence from each party was treated very differently. (See Cal. Code of Regs., tit. 20 § 1712.5 ["the staff of the commission shall be an independent party to all notice, application, and exemption proceedings"].) In the Errata, the Committee took new evidence into the Revised PMPD without re-opening the evidentiary record and without giving other parties

the opportunity to digest this information or to prepare responses. On the one hand, the Commission denied the Center's motion to reopen the evidentiary record and consider new information that showed that facts underpinning the PMPD were wrong. (See Center's Motion; Commission's Order; see also Center's Comments on the PMPD at 20-27.) On the other hand, the Commission took new evidence with no procedural request directly from the Staff. Staff slipped evidentiary changes into its Response to the PMPD, which the Committee adopted. (See e.g., Greenhouse Gas Table 3, Staff's Response and Comments to the PMPD at 7; Errata at 4.) The Commission's claim that "at some point the record must close" rings hollow when the Commission picks and chooses new evidence to incorporate into the Errata. To remedy these defects, the Commission should reopen the evidentiary record to allow consideration of the Center's and other intervenors' relevant evidence.

Since the Committee adopted new facts from Staff into the Revised PMPD and the evidentiary record, the Center makes a new motion to reopen the evidentiary record and now requests that the Commission hold a new evidentiary hearing on the greenhouse gas issues, cumulative impacts, and the alternatives analysis including all issues related to SDG&E's Application.[5]

CONCLUSION

For the foregoing reasons and the reasons in the Center's Comments on the PMPD, the Center respectfully requests that Commission deny the permit or, alternatively, require

[5] This request is independent of the Center's request that the Commission reconsider its denial of the Center's motion. (See Center's Motion for Clarification Re: Continuance of the Commission Hearing on the PMPD; Motion to Set an Appropriate Date for the Commission's Final Hearing on the PMPD; Motion for Reconsideration, filed June 27, 2011.)

that a new PMPD be completed with a legally defensible and factually accurate GHG analysis and No Project Alternative. As part of the preparation of a new PMPD, the Center requests a new evidentiary hearing.

DATED: June 29, 2011

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William B. Rostov
Earthjustice
Attorney for Center for Biological Diversity

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)

APPLICANT
Jennifer Hein
George Piantka, PE.
NRG Energy, Inc., West Region
5790 Fleet Street, Ste. 200
Carlsbad, CA 92008
jennifer.hein@nrgenergy.com
george.piantka@nrgenergy.com

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

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

COUNSEL FOR APPLICANT
John A. McKinsey
Stoel Rives, LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES
California ISO
E-mail Preferred
e-recipient@caiso.com

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

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

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Joseph Garuba,
Municipals Project Manager
Ronald R. Ball, Esq., City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008
E-mail Preferred
Joe.Garuba@carlsbadca.gov
ron.ball@carlsbadca.gov

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

Center for Biological Diversity
c/o William B. Rostov
EARTH JUSTICE
426 17th Street, 5th Floor
Oakland, CA 94612
wrostov@earthjustice.org

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

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

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

*Tim Olson
Adviser to Vice Chair Boyd
tolson@energy.state.ca.us

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

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

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

Jennifer Jennings
Public Adviser's Office
E-mail Preferred
publicadviser@energy.state.ca.us

*indicates change

DECLARATION OF SERVICE

I, Jessie Baird, declare that on June 29, 2011 I served and filed copies of the attached CENTER FOR BIOLOGICAL DIVERSITY'S COMMENT ON THE ERRATA AND NEW MOTION FOR EVIDENTIARY HEARING. The original of these documents, 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 documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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Sacramento, CA 95814-5512
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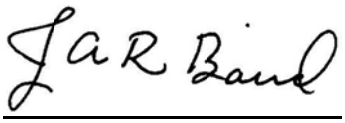
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