



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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DOCKET

07-AFC-6

DATE APR 27 2012

RECD. APR 27 2012

In the Matter of:

APPLICATION FOR Certification of the Carlsbad
Energy Center Project

DOCKET No. 07-AFC-6

**ENERGY COMMISSION STAFF COMMENTS ON REVISED
PRESIDING MEMBER'S PROPOSED DECISION**

Commission staff (Staff) believes the RPMPD is basically sound and well-considered. Even so, Staff recommends the following changes to make it even better. All proposed changes are consistent with evidence in the record.

ALTERNATIVES (p. 3-21)

Finding of Fact Number 7: This finding is erroneous, as the CECP is not a renewable facility. It should be replaced with the following additional findings, which are consistent with the RPMPD analysis and supported by substantial evidence in the record:

7. The City of Carlsbad proposed several site alternatives to CECP, and late in the proceeding supported a "no project" alternative based on proposed generation projects at Pio Pico, Quail Brush, and Escondido (the "PPA Alternatives"); all of these alternatives were evaluated in testimony from the parties, and particularly by staff.

8. Even if CECP is constructed, the CAISO has indicated that Encina Units 4 and 5 will still be required for electric reliability until further generation or transmission upgrades allow their decommissioning.

9. If CECP is not constructed, the CAISO has indicated that Encina units 4 and 5 will be required by the CAISO to stay on line indefinitely, delaying compliance with the State's Once-Through Cooling Policy directed at reducing impacts to the marine environment.

10. The "PPA Alternatives" are less efficient than CECP, and would have higher criteria pollutant emissions and GHG emissions per MW/hr. than CECP.

11. Installation of photovoltaic projects or other local renewable generation is not capable of providing the local reliability needs that CECP, as a project objective, is intended to satisfy.

12. CECP is environmentally preferable to other alternatives, including both the "PPA Alternatives" and the site alternatives proposed by the City in Carlsbad.

13. If all conditions are implemented

RELIABILITY (p. 5.3-5)

Finding of Fact Number 8 is objectionable, as it does not acknowledge that the project has a reliable water supply that would guarantee CECP's reliability. It should be replaced with the following two findings, consistent (actually verbatim) with those in **Soils and Water Resources**, with subsequent findings renumbered:

8. *Reclaimed water necessary for CECP's daily industrial needs is not currently available without a significant expansion of the City's wastewater treatment infrastructure.*

9. *If reclaimed water is unavailable, CECP will rely on an on-site, reverse osmosis treatment system to derive necessary industrial water, generated from a maximum of 4.3 million gallons per day (mgd) of seawater.*

10. The CECP will be designed

GREENHOUSE GAS (GHG) EMISSIONS

At p. 6.1-3, there is discussion of CECP's compliance with the policies and requirements of AB 32, including CARB's new "cap and trade" regulations. Staff recommends that this "cap and trade" discussion be broken into separate paragraphs supplemented as follows:

CARB has adopted regulations for the "cap and trade" of carbon dioxide emissions and other climate warming emissions. This program is now in effect, and will add to the market forces driving towards the most efficient fossil-fuel fired generation, and the CECP, like all power plants, will be subject to such "cap and trade" provisions. As we discuss below, we find that CECP will not result in a significant cumulative adverse GHG impact because its operation will actually reduce GHG emissions "compared to the existing setting" because of its greater efficiency compared to the plants that it will replace or displace in the loading order. (See Cal. Code Regs., tit. 14, § 15064.4(b)(1).) The current policy of relying on efficient gas capacity for reliability, coupled with renewable generation to meet state Renewable Portfolio Standards requirements, will greatly reduce fossil-fired energy generation, as indicated by Greenhouse Gas Table 4 (taken from Exh. 200, p. 4.1-115). The table forecasts a reduction in non-renewable generation of more than 36,000 gigawatt hours by 2020 (compared to 2008), even as gas-fired generation capacity is added to the system for reliability in order to back up and integrate renewable generation.

Moreover, we note that CARB's newly adopted "cap and trade" program will require the purchase of allowances or offsets for all GHG emissions, with a cap on total power plant emissions in order to meet AB 32 requirements. Thus, the CECP must completely comply with "regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions" adopted by a public agency through a public review process "to mitigate the projects incremental contribution of greenhouse gas emissions." (Cal. Code Regs., tit. 14, §15064.4(b)(3).) CECP's required compliance with this program is an additional basis for finding that CECP's emissions are not a significant impact on the environment. (Cal. Code Regs., tit. 14, § 15064.4(b).)

When the original PMPD was drafted, the CARB "cap and trade" program was not yet effective; this may explain the omission of any discussion of the program under the "AB 32" discussion at p. 6.1-2, or the passing acknowledgement in the discussion of "CEQA Guidelines on GHG Emissions" on p. 6.1-4. However, the program is now in effect, and CECP will be required to

comply with it, so the omission of any discussion of the important criterion in Section 15064.4(b)(3) should be rectified, and discussed in both of these RPMPD sections. The relevance of the “cap and trade” provisions has been discussed by Staff in its testimony, and the new CEQA Guideline provisions became the law of the State in January 2011.

Under its “Findings of Fact,” Staff recommends the following additions, all of which are consistent with the testimony on this issue, and with discussion in the RPMPD:

2.a. When it operates, CECP will reduce GHG emissions compared to the existing setting, as it will operate to replace or displace less efficient gas-fired generation.

2b. CECP will be required to comply with CARB’s newly effective “cap and trade” regulations that implement AB 32.

7.a. Even with increased gas-generation capacity like CECP to keep the electric system reliable, renewable energy to meet RPS requirements will supplant gas-fired generation, reducing non-renewable generation by more than 30,000 gigawatt hours by 2020.

12. Intermittent renewable generation needs flexible, fast-ramping dispatchable generation, such as the CECP, in order to be integrated effectively into the electricity system in quantities necessary to meet the State’s Renewable Portfolio Standard .

16. Given the current and projected long-term plentitude of inexpensive natural gas supplies, it is speculative to assume that CECP will be fueled with liquid natural gas (LNG).

17. If Southern California gas-fired power plants were to be fueled with LNG in the future, and assuming LNG has a higher carbon content, a more efficient generating facility such as CECP will result in even greater reductions in GHG emissions than would otherwise be emitted from the gas-fired plants used to secure electric system reliability.

18. As required by the criteria expressed in the Avenal AFC precedent decision, the CECP will not increase the overall system heat rate; will not interfere with generation from existing renewable generating sources; and will reduce system-wide GHG emissions. [This currently is part of the “Conclusions of Law,” but should also constitute important Findings of Fact.]

RESPONSE TO COMMENT

Intervenor Center for Biological Diversity (CBD) commented at the April 19, 2012, RPMPD hearing that the potential closure of the San Onofre Nuclear facility, which testimony indicates would elevate the importance of future generation at the CECP/Encina Power Station site, belies the Staff “theory” that CECP will displace less-efficient gas-fired generation.

CBD’s comment is incorrect. First, there is no shortage of expert testimony from the California Independent System Operator (CAISO) and Staff that “economic dispatch” of gas-fired generation is not a “theory,” but a fact regarding electric system operation. (E.g., Exh. 200, pp. 4.1-108 to 4.1-115.) This testimony about how power plants are dispatched is uncontradicted by any testimony, CBD’s rhetorical statements notwithstanding, and is an operating principle of California’s electrical system that has been frequently acknowledged by all agencies dealing with energy issues, whether the Energy Commission, CAISO, or the California Public Utilities Commission .

The testimony in December 2011 regarding San Onofre was to the effect that closure of that facility would create greater reliance on gas-fired generation to satisfy reliability needs, and that the Carlsbad location for such generation is even more important in such circumstances. (Exh. 230, p. 3.) This fact in no way contradicts the “economic dispatch” of the most efficient gas-fired facilities in place of older, less efficient ones. If anything, closure of San Onofre means that a more efficient facility such as CECP has even greater benefits for GHG reduction, as it will displace older, less efficient peaking facilities that would otherwise run more often should San Onofre close.

AIR QUALITY

Footnote 10, at p. 6.2-22 is no longer correct, inasmuch as the EIR/DEIS for the I-5 “widening project” has long since been published. Staff recommends that it be revised to recognize the published document, as follows:

The Interstate 5 North Coast Corridor Project Draft Environmental Impact Report/Environmental Impact Statement (“DEIR/DEIS”) was published for the I-5 project after the evidentiary hearings had occurred. Regarding construction impacts, the two-paragraph construction impacts section states that the project would not adversely impact air quality, and that cumulative impacts would be less than significant. It also indicates that only “Phase 1 activities” (occurring before 2020) could occur within a timeframe coinciding with construction of CECP; Phase 2 and Phase 3 activities (including the replacement of the Aqua Hedionda Lagoon Bridge) would not occur until after 2021. However, as reflected in the testimony at hearing, even Phase 1 activities in Carlsbad are reported to be several years in the future, at a date not yet determined. It is thus speculative to assume that construction of these projects will overlap, and the construction impacts would be temporary and (with mitigation) less than significant even if they should.

Regarding cumulative operational impacts, the DEIR/DEIS states that the proposed project would reduce particulate emissions compared to the current baseline, and that toxic emissions from freeway traffic would also likely be reduced by the widening project. (DEIR/DEIS, pp. 3.14-6, 3.14-9.) These would be reductions from the current baseline conditions currently included in the Staff’s air quality analysis. Moreover, the CECP operation and the I-5 freeway widening impacts will be in different locations due to the different types of emission sources and the relative buoyancy of CECP turbine emissions, which will be dispersed much further downwind. Therefore, significant cumulative impacts from the CECP operation and the I-5 widening project should not occur.

Among clean up edits, Air Quality Table 7 should be “CECP Worst-Case Annual Emissions” (deleting “Hourly”). Air Quality Tables 9 and 11 should add Exhibit 226 to the source citation.

The federal Prevention of Significant Deterioration (PSD) permit is discussed in the RPMPD at p. 6.2-26. Staff agrees generally with the discussion and its conclusions. However, given the continuing claims of intervenors regarding the importance of this separate permit, Staff recommends that the RPMPD include a somewhat more elaborate discussion on the matter, and would substitute the following discussion in its place:

9. Prevention of Significant Deterioration (PSD) Permit

Although the issue is yet unsettled, and there is no final determination of applicability, it is possible if not likely that CECP will require a PSD permit for GHG emissions to satisfy new federal requirements for such. (See 12/12/2011 Tr. p. 190.) The PSD is a “preconstruction

permit," in that a project may not be constructed until the permit is obtained and becomes final. (40 C.F.R. § 52.21(b)(43)[2011].) The San Diego Air Pollution Control District (APCD), the agency that would normally issue any permit absent Energy Commission's preemptive statute, has not adopted requirements for its State Implementation Plan regarding federal PSD provisions. Because it has not done so, federal requirements are implemented through a separate federal permit, issued by the U.S. Environmental Protection Agency (EPA). For CECP, EPA Region 9 would grant the federal permit unless such authority is delegated to the APCD; either way, the permit remains a separate federal permit. (40 C.F.R. § 124.41 [2011]; Greater Detroit Res. Recovery Authority v. U.S.E.P.A. (6th Cir. 1990) 916 F.2d 317, 320-321 ["Permits issued under such a delegation are considered to be EPA-issued permits."])

When EPA or its delegate issues such permits, the permit applicant must satisfy purely federal requirements, and state law requirements are excluded from any consideration in the permit or in the appeal of such permits. (See, e.g., *In re West Suburban Recycling and Energy Center*, L.P. (6 E.A.D. 692, 698 (EAB 1996); *In re Sutter Power Plant* (8 E.A.D. 680, 690 (EAB 1999); *In re Tondo Energy Co.* (9 E.A.D. 710, 717 (EAB 2001).) ¹ EAB decisions are final 30 days after issuance as a final agency action, unless contested at the EAB or on appeal from the EAB to the U.S. District Courts of Appeal. (42 U.S.C. §7607(b)(1).)

Thus, if CECP must obtain a PSD permit, it is a federal permit issued by EPA, cannot address state law issues, and is appealable solely at EAB and subsequently the federal Ninth Circuit Court of Appeals. It follows that the Commission has no purview over this federal permit, nor does it enforce the provisions that it implements.²

Power plant applicants at the Commission, when they are required to get a PSD permit, apply to EPA after they have obtained their state permit because it is EPA's preference that state and local permits be issued first. (12/12/2011 Tr. pp. 191-191.) In fact, EPA will typically wait until state permitting is finished before issuing its PSD. (*Ibid.*) Staff testified that the application of the State's NSR requirements, supplemented by any further mitigation required by the Commission, are so stringent that attainment of a subsequent PSD permit does not normally require any changes to a project or its emissions, or any further mitigation, beyond that required by the State permit. (*Id.*, at pp. 208-209.)

Intervenors contend that the Commission cannot issue a license absent a finding that the project conforms to federal PSD requirements, citing Public Resources Code Section 25523(d)(1), which requires a finding of project conformity with "applicable local, regional, state, and federal standards." They further contend that such a finding of conformity cannot be made until EPA issues such a permit, or at least until the Commission (or perhaps its staff or the air district) performs the PSD analysis that it believes EPA would itself do.

We disagree. EPA will do its own analysis if a permit is required. The testimony and briefs have explained that the federal PSD process, including its appeals, can take years to complete, and that EPA would prefer to see all state permits issued prior to completing its process. Moreover, the testimony is that projects licensed by the Commission have not been altered in any significant way by the subsequently issued federal PSD permit, either with regard to

¹ The cited references are to the published decisions of the EPA Environmental Appeals Board (EAB), which rules on challenges to PSD permits issued by delegate state agencies or by the EPA regional administrators.

² The Commission permit is for the federal requirements for New Source Review (NSR) required by the federal Clean Air Act. In California, NSR requirements are part of the State Implementation Plan for all air districts, and are thus issued as state law requirements, unlike the PSD requirements discussed here.

emissions levels or mitigation, and this has continued to hold true for the GHG PSD permit EPA recently issued for the Palmdale project. (12/12/2011 Tr., 208-209, 218, Exh.199N.) Staff testified that CECP would meet federal BACT requirements for PSD. (Exh. 230 [Walters, p.3] 12/8/2011 Tr p. 192.)

In light of the testimony referenced above, we believe that CECP will comply with federal PSD requirements, for two reasons. First, all the evidence persuasively indicates that CECP will have no difficulty complying with PSD requirements. Second, because the PSD permit is a pre-construction permit, CECP must comply with such requirements or it cannot be constructed. In other words, CECP will comply with federal law because it must comply with federal law.

For the Findings of Fact, Staff recommends the following additional finding, consistent with record, the applicable law, the testimony, and the discussion in the RPMPD:

11. *CECP will comply with federal PSD permit requirements for GHG.*

WORKER SAFETY AND FIRE PROTECTION

Staff believes that the Committee has addressed this complex and controversial issue well, but recommends the following changes or additions:

At pages 6.4-7 and 6.4-8, the decision states: "The loss of the existing above-grade ring road is offset by the required below grade perimeter road"

In fact, the testimony is without contradiction that the above-grade "ring" road is not "lost" at all; it remains when the project is built. Rather, a *portion* of this road may be lost in the future as the result of another project, *if* the I-5 widening project is built as scheduled, and *if* that project subsequently encroaches on the CECP site, as indicated by Caltrans. The extent of any encroachment will depend on which alternative configuration Caltrans ultimately chooses. Thus, the sentence should read:

"The *possible partial* loss of the "ring" road is offset"

The RPMPD states at page 6.4-11 that it has determined, based on the evidence presented, that the 28 foot road width is sufficient. It then goes further to state that the Commission's exclusive jurisdiction over permitting allows it, rather than the "fire chief or other designated authority" to determine the adequacy of that width. The City contends that the Fire Code is explicit, that the fire chief is the "designated authority," and that the RPMPD thus fails to comply with the California Fire Code.

Staff believes that it is somewhat unclear whether disagreeing with the fire authorities of a party that is adamantly opposed to the project actually creates the nonconformity the City claims. However, the prudent course for the Commission is to include in its override, to the extent any conflict exists, the California Fire Code provision regarding the authority of the "fire code official" to choose an arbitrarily expansive fire road to make a project impracticable.

Finally, Staff recommends that the paragraph responding to "Public Comment" be augmented as follows, consistent with the testimony and the RPMPD discussion:

Several members of the public expressed concerns that a fire at CECP might endanger the public, or the firefighters themselves. However, the record indicates that either risk is

exceedingly low. The project will have fire excess road widths exceeding those required by the California Fire Code (20 feet), and exceeding the width more recently adopted by the City of Carlsbad (24 feet). CECP will have an elaborate fire prevention design, including very limited fuel packets that can result in combustible fire, and there will be elaborate and extensive use of automatic fire suppression devices. (2/4/10 Tr. pp. 14-19.) The only major combustible source at the site is the natural gas that fuels the plant. Natural gas is not stored onsite, and conflagrations of this type are controlled by shut-off valves and allowed to burn out with whatever isolated fuel is there. (Ibid.) The only other combustible sources are oil in transformers and compressors, which are subject to automatic fire suppression.

The testimony indicates that the very purpose of power plant design is to avoid the need for fire department response even when there is a fire. (Id., at pp. 12-18.) Likewise, the need for "hazmat" response is described by expert testimony as very low. (E.g., Exh. 200, pp. 4.4-9-12.) Location near to a freeway is not an unusual situation for power plants, nor does it present appreciably more public risk. (2/4/10 Rt. at p. 135.)

RESPONSE TO COMMENTS BY CITY OF CARLSBAD REGARDING THE RPMPD

A new City comment that requires response: a statement on page 10 of the City's RPMPD comments states that Figure Worker Safety-1 "does not follow the requirements of turnarounds found [California Fire Code section] 503.2.5."

Section 503.2.5 provides: "Dead-end fire apparatus access roads in excess of 150 feet . . . in length shall be provided with an approved area for turning around fire apparatus."

There are actually no "dead-ends" within the power plant site in that a fire truck entering the "bowl" would not have to backup or turn around to exit the bowl. There are two ramps into and out of the bowl and thus the truck can drive down one and up the other. Also, all fire lanes have no "dead-ends." That is, a vehicle can drive from one end of any fire lane to the other and exit the site via one of the two ramps.

LAND USE

Staff believes that the RPMPD discussion of this topic is good, and agrees that an override is prudent, given the City's recent activities attempting to amend various ordinances to make them inconsistent with the CECP project. Staff supports the proposed override. Although Staff believes that CECP is consistent with the California Coastal Act, and urges such a finding, it also recommends a Commission override the Coastal Act as well, out of caution, to the extent there may be any arguable lack of conformity with that Act.

The City's comments on the RPMPD indicate that it does not understand the testimony it provided on the provisions of the California Coastal Act. The applicable provisions of the California Coastal Act are found in Chapter 3 of the statute ("Coastal Resources Planning and Management Policies"), Sections 30200 et. seq. Staff has testified that the project complies with those provisions. The City's witness, Mr. Faust, simply assumed that CECP did not comply, based on the City's representations of significant visual impacts. The RPMPD persuasively describes the absence of such a significant impact to Visual Resources. Staff believes there are no other colorable arguments that CECP does not comply with Chapter 3 provisions.

If a project complies with Chapter 3, as Staff (and apparently the Committee) believes, CECP is not required to be a "coastal dependent development or use." That is the testimony of Mr. Faust, former Chief Counsel for the Coastal Commission, testifying as the City's witness. (See, e.g., Exhibit 433 [Faust, p. 9].)

Of course, Staff believes that, in addition, the project *is* in fact coastal dependent, inasmuch as the City has control over other sources of water, and has in the past stated or suggested, both orally and in writing, that there would be none for the project. Based on these representations by the City, Staff insisted to the applicant in 2008 that it must either find a new water source or abandon the application. Applicant responded with an amendment to the AFC that proposes a small reverse osmosis system using the existing outfall for the Encina facility. Without this access to sea water, CECP is entirely dependent on a hostile local government to provide water at a reasonable price, and the project would likely be infeasible.

Accordingly, Staff recommends two additional Findings of Fact:

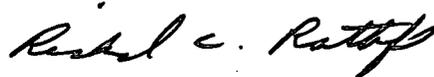
14. *CECP complies with the provisions in Chapter 3 of the Coastal Act.*

15. *CECP may not be able to purchase sufficient reclaimed water from the City of Carlsbad, making the project "coastal dependent."*

However, even with these additional findings, Staff believes that it is prudent for the Commission to include the California Coastal Act among the provisions it is overriding, to the extent that there is any inconsistency between the Act and the project. Such an approach is consistent with prior overrides of the Coastal Act in previous Commission proceedings involving projects with once-through cooling, such as the El Segundo and Morro Bay AFCs.

Date: April 27, 2012

Respectfully submitted,



RICHARD C. RATLIFF
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APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 3/27/2012)

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DECLARATION OF SERVICE

I, **Pamela Fredieu**, declare that on **April 27, 2012**, I served and filed a copy of the attached **Energy Commission Staff Comments on Revised Presiding Member's Proposed Decision**. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: **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 or Chief Counsel, as appropriate, in the following manner:

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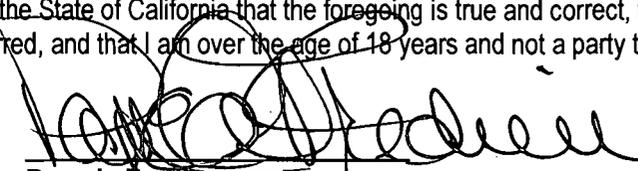
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.


Pamela Fredieu
Chief Counsel's Office
Legal Secretary