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Additional submitted attachment is included below.

1 Andrew Kingsdale, SBN 255669
2 Law Office of Andrew S. Kingsdale
3 633 Battery Street, Suite 110
4 San Francisco, CA 94111
5 Phone: 415-548-1950
6 Fax: 415-795-4397
7 Email: andrew@kingsdalelaw.com

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF SAN FRANCISCO**
10 **UNLIMITED JURISDICTION**

11
12 HELPING HAND TOOLS and ROBERT
13 SIMPSON,

14 Petitioners,

15 v.

16 CALIFORNIA ENERGY RESOURCES
17 CONSERVATION AND DEVELOPMENT
18 COMMISSION,

19 Respondent.

20 DELTA ENERGY CENTER LLC,

21 Real Party in Interest.
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Case No. :

**PETITION FOR WRIT OF MANDATE
(Pub. Res. Code § 25901)**

Complaint Filed: April 7, 2017
Department: N/A
Trial Date: N/A

1 **Introduction**

- 2 1. Petitioners request the Court issue a writ of mandate ordering the CALIFORNIA ENERGY
3 RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION (“Energy
4 Commission”) to set aside a recent power plant certification amendment, and require the
5 power plant’s owner to suspend all activities until a formal amendment process addresses
6 various environmental impacts and violations of law, as required under the Warren Alquist
7 Act, Public Resources Code section 25000 *et seq.* and the California Environmental Quality
8 Act, Public Resources Code section 21000 *et seq.*
- 9 2. The Energy Commission certified an 880 MW gas-fired power plant called the Delta Energy
10 Center (“DEC”) in 2000. On January 29, 2017, a large fire broke out at DEC during a
11 mechanical malfunction, rendering the facility’s steam generator inoperable. The root cause
12 of the fire is still unknown. Nevertheless, DEC’s owner petitioned to amend its permit so
13 that it may continue to operate without the steam generator for an indeterminate amount of
14 time, but at least through the summer of 2017. Without using the steam generator, the
15 power plant will have to operate in a far less efficient “simple cycle” mode, as opposed to
16 the more efficient “combined cycle” mode for which it was originally certified.
- 17 3. Delta LLC’s petition to amend contained almost no analysis of the various factors that are
18 required for power plant certification under the Warren-Alquist Act and CEQA—such as the
19 amendment’s potential impacts on air quality, biological resources, and worker safety and
20 fire protection. Energy Commission’s staff analyzed the proposed “simple cycle” operation
21 and also provided very little discussion and concluded there would be no environmental
22 impacts or potential violations of law.
- 23 4. Within only twelve days of the staff’s report, the Energy Commission then approved the
24 amendment, without providing the public adequate opportunity to comment, without
25 referring significant environmental impacts to relevant agencies, and without deciding
26 significant environmental impacts and violations of law brought to its attention based on
27 substantial evidence, in violation of its duties under the Warren-Alquist Act, CEQA, and the
28 California and United States Constitutions.

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Parties

- 5. Petitioner HELPING HAND TOOLS (“Helping Hand”) is a California non-profit organization that has members throughout California. Helping Hand aims to preserve and protect the environment from human harm, primarily through civic participation and public comment. Helping Hand has a long track record of commenting on and improving power plant siting decisions throughout California, such as with the Russell City Energy Center, Avenal Energy Center, Marsh Landing Energy Center, Carlsbad Energy Center, Palmdale Hybrid Project, and many others.
- 6. Petitioner ROBERT SIMPSON is an individual and resident of California. He is the Executive Director of Helping Hand. He and Helping Hand member Bob Sarvey both commented at the March 8, 2017 Energy Commission’s business meeting regarding the amendment for the Delta Energy Center Power Plant Project (“DEC”).
- 7. Respondent CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION (“Energy Commission”) is a state agency under California Natural Resources Agency, and was created pursuant to California Public Resources Code § 25200 *et seq.* The Energy Commission is responsible for certification and compliance of thermal power plants 50 megawatts (MW) and larger, including all project-related facilities in California, including the Delta Energy Center Power Plant Project.
- 8. Real party in Interest DELTA ENERGY CENTER LLC (“Delta LLC”) owns and operates the Delta Energy Center power plant (“DEC”).

Jurisdiction, Venue, Standing, and Timeliness

- 9. This Court has jurisdiction pursuant to California Public Resources Code sections 25901 and 21080.5(g), California Code of Civil Procedure (CCP) sections 1085 and 1094.5, as well as article VI, section 10 of the California Constitution.
- 10. This case is properly classified as an unlimited case, and therefore within the jurisdiction of this Court, because it is not of the types listed as limited civil cases in CCP § 86, 86.1 or 87.

- 1 11. Venue is proper under CCP § 395 and 401(1) because the Energy Commission is a state
2 agency and the California Attorney General has an office in San Francisco.
- 3 12. Petitioners have performed all conditions precedent to filing this action and have exhausted
4 all available administrative remedies to the extent required by law.
- 5 13. Petitioners have standing because they participated both in writing and in person at the
6 adjudication and are “aggrieved person[s]” under Pub. Res. Code § 25901.
- 7 14. This Petition is timely because it was filed “within 30 days after the commission issues its
8 determination on any matter specified in this division.” Pub. Res. Code § 25901. The
9 commission approved the permit on March 8, 2017 and this petition is filed on April 7,
10 2017.
- 11 15. Petitioners raised all factual and legal objections during the administrative proceeding and
12 are not introducing any new evidence or arguments.

13 **Standard of Review**

- 14 16. Under Public Resources Code section 25901(a), titled “Writ of mandate for review,”
15 “Within 30 days after the commission issues its determination on any matter specified in this
16 division, except as provided in Section 25531, any aggrieved person may file with the
17 superior court a petition for a writ of mandate for review thereof.” Section 25901(b) states:
18 “The decision of the commission shall be sustained by the court unless the court finds (1)
19 that the commission proceeded without, or in excess of its jurisdiction, (2) that, based
20 exclusively upon a review of the record before the commission, the decision is not supported
21 by substantial evidence in light of the whole record, or (3) that the commission failed to
22 proceed in the manner required by law.”

23 **Timeline and Background**

- 24 17. Delta LLC is the owner of the Delta Energy Center Power Plant in Pittsburg, California.
25 [Applicant’s Petition for Temporary Safety Modification TN # 216134.]¹ Delta Energy
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27 _____
28 ¹ “TN” numbers refer to documents on the Energy Commission’s dockets for the Delta Energy Center Power Plant Project, available at <http://www.energy.ca.gov/sitingcases/delta/index.html>. They contain the entirety of the administrative record for this adjudication.

1 Center is an 880 MW combined cycle natural gas fired power and it is the second highest
2 greenhouse gas emitting power plant in the state. TN # 216430 at page 17.

3 18. On Sunday, January 29, 2017 at approximately 3:42 PM, there was a mechanical
4 malfunction that resulted in an inferno that engulfed a large part of the plant and created
5 significant damage to the facility. As of the filing of this petition both the Delta LLC and the
6 Energy Commission do not know the cause of the fire.

7 19. On February 21, 2017, Delta LLC filed for an “Applicant’s Petition for Temporary Safety
8 Modifications” under California Code Regulation, title 20, section 1769. Although titled
9 “Petition for Temporary Safety Modification” the petition’s main request was authorization
10 to run the power plant in simple cycle mode instead of the combined cycle it was originally
11 permitted for. The petition stated that the amendment was needed while repairs were made
12 to the steam generator, but no deadline was given for the repairs. Despite this significant
13 change in operational mode, Delta LLC claimed, “The proposed project revisions are
14 consistent with all applicable LORS. This Petition is not based on new information that
15 changes or undermines any basis for the Final Decision. The assumptions, rationale,
16 findings, and other basis of the Commission Decision for DEC are still applicable to the
17 project, as temporarily modified.” And regarding potential environmental impacts, Delta
18 LLC dispensed with fourteen environmental disciplines (such as air quality, public health,
19 socioeconomics, and fire protection) within three pages, concluding that operating the plant
20 in simple cycle mode for an indefinite amount of time would have no significant
21 environmental impacts. TN # 216134 at 3-1 to 3-3. Delta LLC did not list any of the experts
22 who prepared the document nor does the Petition provide any evidence for its conclusions.

23 20. Just three days later, the Energy Commission staff docketed a “Staff Analysis of the Petition
24 to Amend Commission Decision - Delta Energy Center.” The Staff report also concluded,
25 with very little analysis and discussion, that the proposed amendment would cause no
26 significant environmental impacts or LORS violations. TN # 216227. Staff did not consider:
27 the potential cumulative effects on air quality of running DEC in simple cycle mode;
28 whether modifying DEC to run simple cycle mode would violate Clean Air Act permit

1 requirements, or require further analysis under the Clean Air Act; whether worker safety and
2 fire protection conditions to certification required updating in light of the recent fire; or
3 potential impacts of the higher-temperature thermal plume on birds and aircraft. Staff did
4 acknowledge that the community surrounding DEC now is an environmental justice
5 population—unlike when the facility was certified in 2000—but concluded this did not
6 require any changes to socioeconomic certification conditions.

7 21. On March 6, 2017, Keith Casey, Vice President of Market and Infrastructure Development
8 for the California Independent System Operator Corporation (“CAISO”) submitted a one
9 page letter stating simply, without any supporting facts: “The Delta Energy Center is needed
10 for reliability for Summer 2017 and the ISO supports approval of an order granting the
11 Petition to Amend to make temporary modifications to the steam turbine condenser to run
12 the Delta Energy Center facility in simple-cycle mode.” TN # 216250

13 22. Petitioners Simpson and Sarvey submitted comment objecting to the proposed amendment
14 on March 7, 2016. Mr. Sarvey, a member of Helping Hand Tools, submitted CAISO report
15 detailing Summer Loads & Resources Assessment from summer 2016 as evidence that DEC
16 was not needed for reliability. TN # 216427. Mr. Sarvey also submitted an audit of DEC by
17 the California Public Utilities Commission detailing unsafe conditions. TN # 216428. Mr.
18 Simpson, on behalf of himself and Helping Hand Tools, also objected to the proposed
19 amendment and requested “a formal amendment proceeding and evidentiary hearing.” TN #
20 216340. Mr. Simpson included detailed argument about reliability need, environmental
21 justice, numerous environmental impacts, and proposing specific new conditions of
22 certification for DEC. Included in that comment is the conclusion that this amendment is
23 unnecessary, because this zone of California does not require the energy it creates. The
24 comment explains that CAISO, the entity that controls California’s power grid, predicts an
25 abundance of reserve electricity in the zone around the Delta Energy Center. CAISO
26 predicts that the area will have around 21.3% and 25.6% operating reserve margin when
27 they are required to only have a 15% reserve. *Id.* at 15-16 The comment also explains that
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1 another nearby peaker power plant(a power plant that is only used during “peak hours”) was
2 only used 1% of the it’s permitted run time because of lack of need. *Id.*

3 23. Mr. Sarvey and Mr. Simpson also objected that approval of the proposed DEC amendment
4 was premature until safety issues at the facilities were resolved. Explained Mr. Sarvey,
5 “Calpine has a long history of accidents at its power plants,” including numerous incidents
6 at Calpine (the parent Company of Delta Energy LLC) facilities.

7 24. On March 8, 2017—just twelve days after Energy Commission staff issued its analysis of
8 the petition—the Energy Commission approved the proposed amendment, without change,
9 at a Commission business meeting. Mr. Sarvey and Mr. Simpson gave oral comments at the
10 proceeding, but were limited to 2 minutes each. Mr. Simpson explained, once again, “there
11 is nothing in the amendment that says this is a temporary amendment. So Calpine could
12 decide that, we’re just going to run it forever in simple cycle.”² When the Commissioners
13 asked Commission staff about this issue, Commission staff responded, “This is not a
14 permanent amendment. You know, because the investigation is ongoing and we don't know
15 the root cause, right now our best guess is possibly a year. But we will revisit this when the
16 investigations further along. And if this is becoming a permanent situation we will insist that
17 an amendment be filed.”³ The Order Approving Petition to Amend does not contain any
18 language concerning the length of the permit. [TN # 216644]

19 25. Mr. Sarvey also raised the issue that Cal. Code Regs, title 20, Section 1769 governing
20 amendments specifically requires a 14-day public comment period, whereas the Commission
21 approved this amendment within twelve days. Commission staff responded:

22 MS. DeCARLO: Lisa DeCarlo, Energy Commission Staff Counsel. With
23 regard to the 14-day requirement mentioned by Mr. Sarvey, that's actually not
24 applicable in this instance. That's under section 1769(a)(2) of our Regulations, and
we are not proceeding the amendment through that section.

25 We're processing it through section 1769(a)(3), which is why we're here
before you asking for approval. So the 14-day requirement does not apply in this
26 instance.

27 COMMISSIONER DOUGLAS: And to be more specific, Ms. DeCarlo,

28 ² Transcript of the March 8th meeting, page 16 line 24-25 and page 17 line 1-2.

³ *Id.* at pg. 26 lines 10-16

1 maybe you could explain the difference between these two sections.

2 MS. DeCARLO: Sure. 1769(a)(2) is where staff is allowed to make its
3 determination, sua sponte, on its own after its own investigation, its own analysis,
4 without going to the Commission for approval. So then that's why a 14-day notice
5 is required to allow parties sufficient time, interested public, to review staff's
6 analysis and file an objection to a full if they so chose, in which case it would
7 bump it to a full Commission decision.

8 Whereas, 1769(a)(3) just goes straight to a Commission decision, either on staff's
9 own determination that this is warranted, or as a result of an objection under
10 1769(a)(2).

11 (Transcript of 03/08/2017 Business Meeting, 17-BUSMTG-01, TN#: 216643, 18:5
12 - 19:3)

- 13 26. At the March 8, 2017 meeting, the Energy Commission approved the petition to amend,
14 adopting the staff's recommendations, and made the following findings (TN# 216644,
15 attached hereto as "Attachment A"):

16 Based on staff's analysis, the Energy Commission concludes that the
17 proposed modifications will not result in any significant impacts to public health
18 and safety, or to the environment. The Energy Commission finds that:

- 19 • The petition meets all the filing criteria of Title 20, section 1769 (a), of the
20 California Code of Regulations, concerning post-certification project
21 modifications;
- 22 • The modification will not change the findings in the Energy Commission's
23 Final Decision, pursuant to Title 20, section 1755, of the California Code of
24 Regulations;
- 25 • The project will remain in compliance with all applicable laws, ordinances,
26 regulations, and standards, subject to the provisions of Public Resources Code,
27 section 25525;
- 28 • The modifications will be beneficial because the changes will allow the facility
to return to service to support the California Independent System Operator in
resource planning for Summer 2017;
- There has been a substantial change in circumstances since the Energy
Commission certification, justifying the modifications, the modifications are
based on information that was not available to the parties prior to Energy
Commission certification in that modifications are proposed as a result of the fire
that occurred on January 29, 2017, which rendered all three units of the facility
inoperable.

- 29 27. On information and belief, Energy Commission never referred this amendment petition to
30 any other local, state, or federal agencies that have jurisdiction over the environmental
31 and/or technical areas potentially impacted by the amendment.

1 28. On information and belief, Energy Commission conducted no outreach to the environmental
2 justice community surrounding DEC to inform and engage them in the petition to amend
3 process.

4
5 **Relevant Statutes and Regulations**

6 29. The power plant certification procedures under the Warren-Alquist Act, Public Resources
7 Code section 25000 *et seq.*, are a CEQA-equivalent programmatic Environmental Impact
8 Report(“EIR”), meaning that its procedures are intended to meet the same purposes as
9 CEQA. (See Pubic Resources Code §§ 21080.5, 25519(c), 25541.5.)

10 30. The Commission is required to, and has, adopted “rules and regulations as necessary to
11 insure that relevant duties pursuant to [the Warren-Alquist Act] are carried out.” (Pubic
12 Resources Code § 25539; *see generally* Title 20 CCR, sections 1741 *et seq.*, power plant
13 certification procedures for considering applications for certification.)

14 31. As the lead agency, the Commission is required to consult with other local, state, and federal
15 agencies to ensure compliance with all laws, ordinances, regulations, and statutes (“LORS”).
16 (See Pubic Resources Code § 25519(f).)

17 32. The Commission is prohibited from certifying any power plant if the certification would
18 violate and local, state, or federal LORS, unless it determines that the facility is required for
19 public convenience and necessity, and there are no more prudent and feasible means of
20 achieving such public convenience and necessity. (Pubic Resources Code § 25525; Cal.
21 Code Regs. tit. 20, § 1748(b)(4).)

22 33. California Code Regulation, title 20, section 1769 governing “Post Certification
23 Amendments and Changes” states, in relevant part:

24 **(a) Project Modifications**

25 **(1)** After the final decision is effective under section 1720.4, the applicant shall
26 file with the commission a petition for any modifications it proposes to the
27 project design, operation, or performance requirements. The petition must
28 contain the following information:

(A) A complete description of the proposed modifications, including new
language for any conditions that will be affected;

(B) A discussion of the necessity for the proposed modifications;

(C) If the modification is based on information that was known by the

1 petitioner during the certification proceeding, an explanation why the issue
2 was not raised at that time;

3 **(D)** If the modification is based on new information that changes or
4 undermines the assumptions, rationale, findings, or other bases of the final
5 decision, an explanation of why the change should be permitted;

6 **(E)** An analysis of the impacts the modification may have on the environment
7 and proposed measures to mitigate any significant adverse impacts;

8 **(F)** A discussion of the impact of the modification on the facility's ability to
9 comply with applicable laws, ordinances, regulations, and standards;

10 **(G)** A discussion of how the modification affects the public;

11 **(H)** A list of property owners potentially affected by the modification; and

12 **(I)** A discussion of the potential effect on nearby property owners, the public
13 and the parties in the application proceedings.

14 **(2)** Within 30 days after the applicant files a petition pursuant to subsection
15 (a)(1) of this section, the staff shall review the petition to determine the extent
16 of the proposed modifications. Where staff determines that there is no
17 possibility that the modifications may have a significant effect on the
18 environment, and if the modifications will not result in a change or deletion of a
19 condition adopted by the commission in the final decision or make changes that
20 would cause the project not to comply with any applicable laws, ordinances,
21 regulations, or standards, no commission approval is required and the staff shall
22 file a statement that it has made such a determination with the commission
23 docket and mail a copy of the statement to each commissioner and every person
24 on the post-certification mailing list. Any person may file an objection to staff's
25 determination within 14 days of service on the grounds that the modification
26 does not meet the criteria in this subsection.

27 **(3)** If staff determines that a modification does not meet the criteria in
28 subsection (a)(2), or if a person objects to a staff determination that a
modification does meet the criteria in subsection (a)(2), the petition must be
processed as a formal amendment to the decision and must be approved by the
full commission at a noticed business meeting or hearing. The commission shall
issue an order approving, rejecting, or modifying the petition at the scheduled
hearing, unless it decides to assign the matter for further hearing before the full
commission or an assigned committee or hearing officer. The commission may
approve such modifications only if it can make the following findings:

(A) the findings specified in section 1748(b)(5), if applicable;

(B) that the project would remain in compliance with all applicable laws,
ordinances, regulations, and standards, subject to the provisions of Public
Resources Code section 25525;

(C) that the change will be beneficial to the public, applicant, or intervenors;
and

(D) that there has been a substantial change in circumstances since the
Commission certification justifying the change or that the change is based on
information which was not known and could not have been known with the
exercise of reasonable diligence prior to Commission certification.

1 **Allegations Common to All Claims**

- 2 34. Robert Simpson and Helping Hand tools have a beneficial interest in the Amendment
3 because most of its members live in California, Rob Simpson and other Helping Hand Tools
4 members participated at the March 8th Energy Commission and have participated in many
5 Energy Commission and other state environmental proceedings, and enjoy clean healthy air.
6 35. Petitioners do not have a plain, speed, and adequate remedy in the ordinary course of law.

7 **First Cause of Action**

8 **Violation of the Warren-Alquist Act**

9 **(14-Day Comment Period and Formal Amendment Requirements)**

- 10 36. Petitioners incorporate all preceding paragraphs as though set forth here.
11 37. Energy Commission failed to proceed in a manner required by law by approving Delta
12 LLC’s petition to amend only 12 days after Commission staff made its determination about
13 the proposed amendment. Contrary to Commission staff counsel’s explanation, under both
14 20 CCR 1769(a)(2) and (3) members of the public must be afforded 14 days to comment on
15 a proposed amendment.
16 38. Energy Commission also failed to proceed in a manner required by law because it did not
17 process Delta LLC’s petition to amend as a “formal amendment,” as required under 20 CCR
18 § 1769(a)(3). A formal amendment process requires substantially more analysis of potential
19 impacts, potential LORS violations, and outreach to the public and other agencies than
20 occurred prior to the Commission’s approval of this amendment.

21 **Second Cause of Action**

22 **Violation of the Warren-Alquist Act**

23 **(Petition to Amend Contents)**

- 24 39. Petitioners incorporate all preceding paragraphs as though set forth here.
25 40. Energy Commission’s determination that “The petition meets all the filing criteria of Title
26 20, section 1769 (a), of the California Code of Regulations, concerning post-certification
27 project modifications” was not supported by substantial evidence in light of the whole
28 record.

1 41. For example,

- 2 a. Section 1769(a)(1)(A) requires a petition to amend to include “A complete
3 description of the proposed modifications,” but Delta LLC’s petition provided only
4 an incomplete description of the amendment because it contained no definite time
5 limit on how long the facility would operate in less-efficient simple cycle mode.
- 6 b. Section 1769(a)(1)(E) requires a petition to amend to include “An analysis of the
7 impacts the modification may have on the environment and proposed measures to
8 mitigate any significant adverse impacts.” But Delta LLC’s petition contained no
9 analysis of cumulative air quality impacts by operating DEC in simple cycle mode,
10 or higher thermal plume temperature impacts on endangered or threatened migratory
11 birds.
- 12 c. Section 1769(a)(1)(F) requires “A discussion of the impact of the modification on
13 the facility's ability to comply with applicable laws, ordinances, regulations, and
14 standards.” But Delta LLC’s petition contained no analysis of how BAAQMD
15 regulations require emission calculations for changes in mode of operation, or how
16 the facility’s Title V permit under the Clean Air Act does not permit operation in
17 simple cycle mode, or how increased plume temperatures might result in incidental
18 takes under the Migratory Birds Act and Endangered Species Act.
- 19 d. Sections 1769(a)(1)(G), (H), and (I) pertain to the amendment’s potential effects on
20 members of the public. Again, Delta LLC did not even recognize the surrounding
21 community is an environmental justice community, and made no effort to reach out
22 to that community.

23 42. The petition to amend lacked the necessary content required by Section 1769(a), and
24 therefore the Commission’s decision to approve the amendment was not based on
25 substantial evidence.

26 **Third Cause of Action**

27 **Violation of the Warren-Alquist Act**

28 **(Consistency with Final Decision)**

1 43. Petitioners incorporate all preceding paragraphs as though set forth here.

2 44. Energy Commission’s determination that “The modification will not change the findings in
3 the Energy Commission’s Final Decision, pursuant to Title 20, section 1755, of the
4 California Code of Regulations” was not supported by substantial evidence in light of the
5 whole record.

6 45. For example,

- 7 a. It is undisputed that operating the DEC power plant in simple cycle mode, as allowed
8 for an indefinite period of time under the amendment, will be less efficient (fewer
9 MW produced per natural gas burned) than operating it in combined cycle mode.
10 Permitting this change directly conflicts with the Commission’s Final Decision
11 finding that: “As a highly efficient, state-of-the-art natural gas-fired power plant,
12 DEC is significantly more efficient than older power plants in the utility system.”
- 13 b. The stated purpose of the amendment is to return DEC to its originally certified
14 condition. The petition to amend states, “All repairs are intended to be made with
15 like-kind replacements and post-repairs, there will be no changes in the ‘project
16 design, operation, or performance requirements’ (20 CCR 1769(a)(1)).” But the
17 January 29, 2017 fire shows that the DEC facility, as originally designed and/or
18 operated, is not reliable or safe for workers. Restoring DEC to its originally certified
19 plan—during which a massive fire started and disabled its operation—directly
20 conflicts with the Commission Final Decision finding that: “DEC’s three parallel
21 trains of gas turbine generators/HRSGs, as well as the double circuit 230-kV
22 transmission lines provide inherent reliability.” It also contradicts the finding that
23 “The measures specified in the Conditions of Certification listed below will provide
24 adequate health and safety protection to workers during project construction and
25 operation.”
- 26 c. As Mr. Sarvey testified, operating DEC in simple cycle mode likely will cause
27 significant cumulative impacts to air quality because other less-efficient facilities
28 will have to make up for DEC’s lost capacity. This directly contradicts the

1 Commission's Final Decision finding that: "Operation of DEC in combination with
2 PDEF and the two existing Southern power plants in the Pittsburg-Antioch area will
3 not result in significant cumulative impacts to air quality."

4 d. Commission staff recognized that the community around DEC is now an
5 environmental justice community, meaning that it is more vulnerable to pollution
6 than other communities. This finding is significant, and directly contradicts the
7 Commission's Final Decision finding that: "There is no persuasive evidence of
8 environmental justice issues in this case."

9 46. The Commission requires further evidence under a formal amendment process to adequately
10 determine whether this petition to amend requires new and/or different conditions to
11 certification, as proposed by Mr. Simpson.

12 **Fourth Cause of Action**

13 **Violation of the Warren-Alquist Act**

14 **(Compliance with LORS)**

15 47. Petitioners incorporate all preceding paragraphs as though set forth here.

16 48. Energy Commission's determination that "The project will remain in compliance with all
17 applicable laws, ordinances, regulations, and standards, subject to the provisions of Public
18 Resources Code, section 25525" was made in excess of its jurisdiction, was not supported
19 by substantial evidence, and constituted a failure to proceed in a manner required by law.

20 49. The Commission proceeded in excess of its jurisdiction because the Commission may not
21 determine whether environmental impacts would be significant without first obtaining input
22 from other responsible agencies. For example, issues of air quality (including compliance
23 with Clean Air Act permit rule) should have been referred to the Bay Area Air Quality
24 Management District ("BAAQMD"), issues of incidental impacts on migratory birds should
25 have been referred to the U.S. Fish and Wildlife Service, and issues of impacts on aircraft
26 should have been referred to the U.S. Federal Aviation Administration.

27 50. The Commission's determination was not supported by substantial evidence, because among
28 other reasons, the amended DEC project would violate BAAQMD regulations regarding

1 changes at an existing emission source (such as under the amendment), as well as DER's
2 Title V permit conditions.

3 51. The Commission failed to proceed in a manner required by law because as the "lead
4 agency" it should have, but did not, refer questions of environmental impacts to other
5 responsible agencies before approving the amendment.

6 **Fifth Cause of Action**

7 **Violation of the Warren-Alquist Act**

8 **(Beneficial Modifications)**

9 52. Petitioners incorporate all preceding paragraphs as though set forth here.

10 53. Energy Commission's determination that "The modifications will be beneficial because the
11 changes will allow the facility to return to service to support the California Independent
12 System Operator in resource planning for Summer 2017" was not supported by substantial
13 evidence in light of the whole record.

14 54. The only evidence to support this finding that DEC is needed for reliability-purposes is a
15 one-sentence statement from CAISO's Vice President of Market and Infrastructure
16 Development. But as explained by Petitioners, which are still waiting for a response to
17 document request from CAISO regarding this statement, CAISO has an operating reserve
18 margin will above the required amount, and other surrounding power plants are rarely used.

19 55. The fact that this amendment places no time limitation on simple cycle operation, which
20 likely will lead to a cumulative increase in pollutant emissions, also undercuts any argument
21 that this Amendment will be beneficial.

22 56. Finally, the Commission failed to address whether the amendment would be beneficial to the
23 local environmental justice community.

24 **Sixth Cause of Action**

25 **Violation of California Environmental Quality Act (CEQA)**

26 57. The Secretary for Resources has certified the Warren Alquist Act, Pub. Res. Code § 25000
27 et al as a CEQA certified regulatory program meeting the requirements of Pub. Res. Code §
28 21080.5.

- 1 58. That certification exempts the Commission from procedural requirements for EIRs and
2 certain other provision of CEQA contain in Pub. Res. Code § 2100-21189.3, but it does not
3 exempt the Commission from CEQA's substantive requirements.
- 4 59. Under the Commission's certified regulatory program, the Staff report for an Application for
5 Certification for power plant siting fills the role of an EIR under CEQA.
- 6 60. Any amendments to an AFC therefore trigger the same procedures as an amendment to an
7 EIR under CEQA, because the amendment proceeding was a discretionary approval of the
8 project. Under CEQA the Energy Commission is mandated to create a CEQA equivalent --
9 Subsequent, Supplemental or Addendum to an EIR depending upon the impacts of the
10 project. 14 CCR § 15160 et al.
- 11 61. At a minimum the Energy Commission must a CEQA-equivalent supplemental EIR because
12 "New information of substantial importance, which was not known and could not have been
13 known with the exercise of reasonable diligence at the time the previous EIR" and the
14 project has "New information of substantial importance, which was not known and could
15 not have been known with the exercise of reasonable diligence at the time the previous EIR"
16 and "Significant effects previously examined will be substantially more severe than shown
17 in the previous EIR" 14 CCR § 15162
- 18 62. The Energy Commissions "Staff Analysis of the Petition to Amend Commission Decision,"
19 is woefully inadequate as that "CEQA-equivalent document."
- 20 63. The Energy Commission is the lead agency for purposes under CEQA even within the
21 context of its certified regulatory program.
- 22 64. Therefore, the Energy Commission prejudicially abused its discretion in approving the
23 Modification Amendment because the Staff Analysis failed to analyze and make findings
24 with respect to important categories of potentially significant adverse effects of the project,
25 including, but not limited to the follow:
- 26 a. Air Quality: cumulative impacts from surrounding facility emission increases
27 required to make up to reduced output from DEC;
28

- b. Environmental Justice: incremental but significant impacts of increased pollutants on an already-overburdened low-income and minority community;
- c. Greenhouse Gas Emissions: increased greenhouse gas emissions per MW by operating in simple cycle mode;
- d. Public Service and Fire Protection: returning the facility to its exact same condition potentially fails to address fires and safety problems, given that the facility just experienced a significant fire; and
- e. Endangered Wildlife: increased plume temperatures could result in impacts to habitat and potentially direct impacts on birds.

65. The Energy Commission additionally proceeded in excess of its jurisdiction by approving the project because the Staff Analysis and Formal Amendment procedure did not comply with CEQA's substantive requirements in many respects, including, but not limited to the following:

- a. The Energy Commission failed to adequately inform the Public and address public comments.
- b. As the lead agency the Energy Commission should have and failed to consult *any* other agency regarding this amendment. Many other agencies have jurisdiction over the project as responsible agencies, including the City of Pittsburg, Contra Costa County, the California Department of Fish and Wildlife, U.S. Fish and Wildlife Service, and the Bay Area Air Quality Management District.
- c. The permit, as amended, lasts indefinitely without any further substantive environmental review. There is nothing in the permit that this it is temporary. The only promise is from a staff member who stated, "because the investigation is ongoing and we don't know the root cause, right now our best guess is possibly a year." These facts make the amendment improperly deferred and uncertain in violation of CEQA.

1 **Seventh Cause of Action**

2 **Violation of Due Process Clause of the California Constitution**

3 66. Article I, section 7(a) of the California Constitution states that “[a] person may not be
4 deprived of life, liberty, or property without due process of law....”

5 67. The Due Process Clause applies to arbitrary adjudicative procedures where a person is
6 deprived of a statutorily conferred benefit.

7 68. The Energy Commission’s own regulations as well as CEQA’s create a benefit in all
8 members that mandates the Energy Commission to hear public comment and respond to it.

9 69. Petitioners allege that their due process rights were violated by the shortened comment
10 period and by lack of a response to those comments.

11 **Prayer for Relief**

12 WHEREFORE, Petitioners pray for relief as follows:

- 13 1. For a preemptory writ of mandate ordering:
- 14 a. The California Energy Commission to set aside its approval of the amendment;
- 15 and
- 16 b. Real Party in Interest DELTA ENERGY CENTER LLC to suspend all project
- 17 activities until Respondent has taken necessary action to bring the project into
- 18 compliance with both CEQA and the Warren Alquist Act.
- 19 2. For Cost of suit;
- 20 3. For attorney’s fees as authorized by Code of Civil Procedure § 1021.5 and other provisions
- 21 of law; and
- 22 4. For such other and further relief as the Court deems just and proper.

23 DATED: April 7, 2017

Respectfully submitted,

25 

26 By: _____
Andrew Kingsdale
27 Attorney for Petitioners

ATTACHMENT 1

(California Energy Commission's Order Approving Petition to Amend,
March 8, 2017)

DOCKETED

Docket Number:	98-AFC-03C
Project Title:	Delta Energy Center Compliance
TN #:	216644
Document Title:	Order Approving Petition to Amend
Description:	N/A
Filer:	Cody Goldthrite
Organization:	California Energy Commission
Submitter Role:	Commission Staff
Submission Date:	3/21/2017 3:27:01 PM
Docketed Date:	3/21/2017

STATE OF CALIFORNIA

STATE ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:

Docket No. 98-AFC-03C

Delta Energy Center, LLC

ORDER APPROVING PETITION TO AMEND

On February 22, 2017, Delta Energy Center LLC, the owner/operator of the Delta Energy Center, submitted a petition requesting to modify the Delta Energy Center to make temporary modifications to the steam turbine condenser to run the facility in simple cycle mode. The modifications will allow the Delta Energy Center to continue repairs to the steam turbine while the facility returns to service in simple cycle mode to support the California Independent System Operator in resource planning for the summer of 2017. In simple cycle mode, Delta Energy Center would provide approximately 500 to 544 MW of capacity and voltage support to the applicable resource area.

On February 24, 2017, Energy Commission staff filed in the docket its analysis of the petition and concluded that there would be no additional significant environmental impacts associated with the proposed changes; the facility will remain in compliance with all laws, ordinances, regulations and standards; the changes will be beneficial by enabling the Delta Energy Center to support the California Independent System Operator in resource planning for the summer of 2017; and there has been a substantial change in circumstances since the Commission's certification justifying the changes.

STAFF RECOMMENDATION

Energy Commission staff reviewed the petition, concludes that it complies with the requirements of Title 20, section 1769 (a) of the California Code of Regulations, and recommends approval of Delta Energy Center, LLC's petition to modify the Delta Energy Center.

ENERGY COMMISSION FINDINGS

Based on staff's analysis, the Energy Commission concludes that the proposed modifications will not result in any significant impacts to public health and safety, or to the environment. The Energy Commission finds that:

- The petition meets all the filing criteria of Title 20, section 1769 (a), of the California Code of Regulations, concerning post-certification project modifications;
- The modification will not change the findings in the Energy Commission's Final Decision, pursuant to Title 20, section 1755, of the California Code of Regulations;
- The project will remain in compliance with all applicable laws, ordinances, regulations, and standards, subject to the provisions of Public Resources Code, section 25525;
- The modifications will be beneficial because the changes will allow the facility to return to service to support the California Independent System Operator in resource planning for Summer 2017;
- There has been a substantial change in circumstances since the Energy Commission certification, justifying the modifications, the modifications are based on information that was not available to the parties prior to Energy Commission certification in that modifications are proposed as a result of the fire that occurred on January 29, 2017, which rendered all three units of the facility inoperable.

CONCLUSION AND ORDER

The California Energy Commission hereby adopts staff's recommendation and approves the proposed project modifications to the Commission Decision for the Delta Energy Center requested in the Delta Energy Center's Petition for Temporary Safety Modifications. These modifications will not result in changes to Conditions of Certification.

IT IS SO ORDERED.

CERTIFICATION

The undersigned Secretariat to the Commission does hereby certify that the foregoing is a full, true, and correct copy of an Order duly and regularly adopted at a meeting of the California Energy Commission held on March 8, 2017.

AYE: Weisenmiller, Douglas, McAllister, Hochschild, Scott

NAY: None

ABSENT: None

ABSTAIN: None

Original Signed by

Cody Goldthrite
Secretariat