DOCKETED

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City of Carlsbad

Office of the Mayor

August 18, 2010

DOCKET
07-AFC-6
DATE AUG 18 2010
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The Honorable James D. Boyd
The Honorable Anthony Eggert
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: Carlsbad Energy Center Project (07-AFC-6)

Dear Presiding Commissioner Boyd and Commissioner Eggert:

When NRG Energy applied three years ago to construct a new power plant on its 95-acre oceanfront property in Carlsbad, it raised the concerns of the city's elected officials and residents alike.

The city early in the process registered its objection to the Carlsbad Energy Center Project application, which failed to recognize the precious nature of our city's – and our state's – coastal resource. Reluctantly, the city and the Redevelopment Agency joined the proceedings as intervenors, and subsequently filed comments on the application, submitted data requests, provided testimony and commented on the PSA and FSA. That process has consumed hundreds of hours of staff time and resources and required the services of outside experts.

We in Carlsbad wish to stress that our residents are not strictly opposed to a power plant. We have hosted the Encina Power Station on our shore for almost 60 years. Our City Council determined that if we must host another power plant for possibly another half century, at the very least it should be moved away from our coast, a valued jewel for our residents and visitors alike.

Our cause has not been one of "Not in My Back Yard," but of cooperation and conciliation. Recognizing our regional responsibility, we offered other potential sites to host a power plant, with the hope that all parties could reach a consensus on a new plant in a better location.

Our efforts were not greeted warmly by NRG, and we subsequently partnered with Pattern Energy to submit a bid to SDG&E to build a plant on one of those alternative sites. That

bid was not approved, but we learned a great deal about the state's energy needs through that process.

When it became clear that the applicant was going to press forward with its irresponsible plan, the Carlsbad City Council and the Housing and Redevelopment Commission saw it as their duty to represent our residents assertively and forthrightly to prevent another mammoth industrial plant from blighting our coast.

The city and Redevelopment Agency have registered concerns over land uses, visual impacts and the safety of plant workers, residents, travelers, and emergency personnel. A brief summary of the city's position on these issues is as follows:

- The CECP is inconsistent with land-use LORS, including our General Plan and Zoning, which have been developed and enforced to protect the beauty and unique nature of this coastal city;

- The CECP is inconsistent with the Carlsbad Redevelopment Plan, organized under state law, whose mission is to eliminate blight and provide meaningful employment and affordable housing through appropriate development;

- The CECP is inconsistent with the California Coastal Act, which has established a goal of removing heavy industry that is not coastal-dependent from our shores, where other alternatives exist;

- The CECP's tall stacks and massive building will wall off the coast, creating a visual impact that will degrade the city's views and frustrate efforts to protect view sheds; and

- The CECP does not conform with the state fire code and will create significant safety hazards for workers, residents, visitors and emergency personnel due to its confined location.

The city and the Redevelopment Agency recognize that this Commission has the authority to "override" LORS and significant adverse environmental impacts. Your staff has acknowledged that an override may be necessary in the Land Use area. The city believes that at least five additional overrides are necessary for you to determine that the CECP is necessary for the public's convenience and necessity.

However, unlike solar facilities that help the state meet its GHG and RPS goals, and unlike previous projects where overrides were necessary to meet state electric loads, the CECP offers no such benefit.

We respectfully urge this Commission to refuse to make override determinations or to adopt the "no project" alternative, and by doing so reject this ill-conceived project. We thank the California Energy Commission staff for its time, professionalism, and the committee for carefully weighing our position.

Respectfully,

Bud Lewis

Claude A. "Bud" Lewis
Mayor and
President of the Housing and Redevelopment Commission

JG

cc: City Council
City Attorney
City Manager
Proof of Service List (Revised 6/14/2010)

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

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

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

August 18, 2010

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

August 18, 2010

Pursuant to the Committee Briefing Order (dated July 12, 2010), Intervenors City of Carlsbad and Carlsbad Redevelopment Agency hereby file their Opening Brief in Opposition to CECP and on the Requested Briefing Topics.

EXECUTIVE SUMMARY

Introduction

Intervenors City of Carlsbad (City) and South Carlsbad Redevelopment Agency (Redevelopment Agency) respectfully invite the Committee's attention to the following brief, which addresses the topics set forth in the Committee Briefing Order and Revised Schedule, dated July 12, 2010, provides a concise summary of the grounds for denial of the Application for Certification of the Carlsbad Energy Center Project (CECP), and requests official notice of additional relevant materials.

Summary Of Arguments

The Application for Certification of the CECP should be denied for the following reasons:

1. **The CECP does not comply with the California Coastal Act, Public Resources Code section 30000, et seq. (Coastal Act), and is inconsistent with important state policies which the Coastal Act is intended to achieve.** The proposed location of a large industrial facility in a sensitive coastal location is

patently inconsistent with Coastal Act policies concerning scenic and visual resources, marine resource protection, coastal access and recreation, and land use priorities. The CECP also is not a "coastal dependent" facility and thus cannot meet the statutory requirements for approval of a project which is inconsistent with Coastal Act policies. In addition, the staff's failure to consider the State Water Resource Control Board's policy on once-through-cooling (OTC Policy) in their analysis of the CECP's compliance with the Coastal Act renders that analysis inadequate and incomplete. Staff's analysis of the CECP's compliance with the Coastal Act assumed that existing Units 1 through 5 of the Encina Power Station (EPS) would remain in place. However, as acknowledged elsewhere in the Final Staff Assessment (FSA) and in staff testimony during the public hearings, these units are slated for retirement under the OTC Policy by December 31, 2017, only a few years after any likely date for the commencement of construction of the CECP. The failure to consider the retirement of Units 1 through 5 resulted in an incomplete analysis which significantly understates the CECP's impacts on the statutory policies and requirements of the Coastal Act. All of these issues should have been addressed in the mandatory report which the Coastal Commission is required to prepare and submit to the Commission pursuant to section 30413(d) of the Coastal Act. The FSA's analysis of Coastal Act compliance cannot, as a matter of law, serve as a substitute for the report the Coastal Commission is required to provide. Even if the law allowed a substitute report, which it does not, the report should be prepared by the City, which is responsible for implementing the local coastal plan, rather than Commission staff. The law and the evidence which support this ground for denying the CECP are discussed in detail below in sections I.A.3, I.B, I.C, II.A.1, II.B and II.H of this brief.

2. **The FSA's failure to consider the State Water Resource Control Board's (SWRCB) "Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" (OTC Policy) in its analysis of the CECP's significant environmental impacts renders that analysis inadequate and incomplete.** Although the SWRCB formally adopted the OTC Policy on May 4, 2010, the

SWRCB began its environmental review and the draft policy was available several months before publication of the FSA. In addition, since 2008, the Commission staff participated in an Interagency Working Group on the OTC Policy, working on, among other things, the timetable for retiring coastal power plants such as EPS Units 1 through 5. The FSA's failure to consider the impending retirement of Units 4 and 5 pursuant to the OTC Policy as part of the CECP violates CEQA's threshold requirement to include all phases of a project, including reasonably foreseeable future activities, in the project description. At minimum, the FSA should have included the shutdown of Units 4 and 5 as a probable future project in the analysis of the CECP's cumulative impacts. The FSA's inclusion of the retirement of Units 4 and 5 in its analysis of cumulative impacts on GHG emissions and visual resources, but not in connection with the CECP's cumulative impacts on land use, water supply and biological resources, renders that analysis inadequate and incomplete. The law and the evidence which support this ground for denying the CECP are discussed in detail below in sections I.A.3, I.B and II.B of this brief.

3. **The CECP does not comply with the requirements of the California Fire Code to design emergency access roads with sufficient width to allow adequate fire and rescue operations.** Contrary to the staff's duty to show due deference to the comments and recommendations of local agencies on matters within their jurisdiction, the FSA ignored the recommendations of City fire officials that the design of the emergency access in and throughout the CECP is inadequate and will interfere with the performance of fire and other emergency equipment and personnel. The evidence shows the proposed CECP site is in a highly constrained location, hemmed in by an interstate freeway, railroad tracks and an environmentally sensitive lagoon. Because of the site's constraints, the proposed access roads into and throughout the site are deficient and will delay incident response times and provide insufficient space for fire and emergency equipment deployment and operation. The design's reliance on fire suppression systems and its provision for inadequate emergency access is neither prudent nor lawful. A recent explosion at a power plant in Middletown, Connecticut,

illustrates the dimensions of the type of disaster that could occur. For these reasons, the Carlsbad Fire Department recommends the lower perimeter access road be a minimum of 50 feet wide and the upper "rim" road be a minimum of 25 feet wide and extend around the entire facility. The law and the evidence which support these recommendations are discussed in detail below in sections I.A.1 and II.A.4 of this brief.

4. **The CECP does not comply with the Community Redevelopment Law, Health and Safety Code section 33000, et seq. (CRL), and is inconsistent with important state policies regarding the elimination of blight which the CRL is intended to achieve.** The proposed site of the CECP is located within the boundaries of the South Carlsbad Coastal Redevelopment Plan (SCCRP). The Redevelopment Agency serves as an administrative arm of the State in carrying out the provisions of state redevelopment law and the SCCRP in the plan area. The FSA mistakenly considered the SCCRP to be a local LORS matter, disregarding the importance of the state redevelopment law and policies. The CECP has refused to comply with the requirements for permission to locate in the SCCRP area. Nonetheless, the evidence shows the CECP would not meet the requirement to serve an "extraordinary public purpose" and would increase, rather than eliminate, blight in the redevelopment area by introducing another large, long-term industrial facility in a sensitive coastal location, with no plan for removing and redeveloping the site of the obsolete power plant next door. The law and the evidence which support this ground for denying the CECP are discussed in detail below in sections II.A.3 and II.E of this brief.

5. **The CECP does not comply with the City's laws, ordinances, regulations and standards (LORS) and is inconsistent with important local policies and objectives concerning land use.** State law provides for a hierarchy of local land use LORS, beginning with the General Plan and proceeding with increasing specificity to Specific Plans, zoning ordinances and conditional or special use permits. All permits, zoning ordinances and specific plans must be consistent with the General Plan, which is required by state law to contain mandatory

"elements" or provisions for land use, circulation, housing, conservation, open space, noise and safety. Although even the courts defer to the expertise of local government in interpreting and applying its own land use laws, and the Commission's regulations require it, the staff failed to give due deference to the City's comments and recommendations regarding the CECP's inconsistency with local land use LORS. Instead, the FSA found the CECP would comply with local LORS, relying nearly exclusively on its determination that the CECP would be a permitted use under the City's "PU" or public utility zoning classification. However, the FSA's analysis failed to consider the CECP's inconsistency with the Carlsbad General Plan policies and objectives that apply to the proposed site. The evidence shows the CECP will not comply with at least 14 General Plan policies and objectives and will violate the Agua Hedionda Land Use Plan's 35-foot height limitation. The FSA also failed to consider whether a merchant plant like the CECP can be considered a permitted use in the City's "PU" zone when it neither is a public utility nor has a contract to sell power to a public utility. The City's frustration with the disregard of its General Plan and the lack of due deference to its interpretation of its own land use laws led the City Council to adopt an urgency ordinance in October 2009, temporarily prohibiting the development of new or expanded power plants in the coastal zone. The law and the evidence which support this ground for denying the CECP are discussed in detail below in sections II.A.2, II.C, II.D, II.I, II.J and II.K of this brief.

6. **There is not sufficient evidence to support an override under the Warren-Alquist Act (Act) for the CECP's non-compliance with state and local LORS or under the California Environmental Quality Act (CEQA) for the CECP's unmitigated significant impacts.** The applicant has not shown that the facility is required for public convenience and necessity as required by section 25525 of the Act. In fact, the weight of the evidence is to the contrary. The latest Integrated Energy Policy Report (2009) did not identify a critical need for the proposed project to meet statewide or regional electricity demand or to ensure reliability. In addition, the local utility, San Diego Gas & Electric Company, has not executed a contract or other agreement indicating an interest in purchasing

power from the CECP. Commission staff also testified that the other system benefits attributed to the CECP can be met by other facilities or at other locations. The applicant also has not shown that there are no feasible alternative locations which could avoid or substantially lessen the CECP's unmitigated significant impacts as required by section 21002 of CEQA. The evidence also does not show that the benefits of the CECP outweigh its unavoidable significant impacts on the environment. Accordingly, there is not substantial evidence in the record to support a statement of overriding considerations under CEQA. The law and the evidence which support this ground for denying the CECP are discussed in detail below in section V of this brief.

Request For Official Notice

Pursuant to California Code of Regulations, title 20, section 1213, the City and the Redevelopment Agency respectfully request the Commission take official notice of the following matters:

1. The "Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" adopted by the State Water Resources Control Board on May 4, 2010;

2. The "I-5 North Coast Corridor Project Draft Environmental Impact Report/Environmental Impact Study" published by the California Department of Transportation in June, 2010;

3. The "Application for Certification" filed by Pio Pico Energy Center, LLC (2010-AFC-01) with the California Energy Commission on June 30, 2010; and

4. The testimony of the Honorable Sebastian Giuliano, Mayor, Middletown, Connecticut, and Edward Badamo, Fire Chief, South Fire District, Middletown, Connecticut, before the U. S. House of Representatives, Committee on Education & Labor, Workforce Protections Subcommittee, on June 28, 2010.

The Commission may take official notice of any generally accepted matter within its field of competence and of any fact which may be judicially noticed by the courts of this

state. (20 Cal. Code Reg. § 1213.) The courts of this state may take judicial notice of the official acts of the legislative, executive and judicial departments of the United States and of any state of the United States. (Evid. Code § 452(c).)

The Commission should take official notice of the "Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" adopted by the State Water Resources Control Board on May 4, 2010 (SWRCB OTC Policy) because it is an adopted policy of an executive department of the State of California which is particularly relevant to the proposed CECP. The draft OTC Policy has been discussed by the staff, parties and witnesses throughout this proceeding and is referred to in the FSA (*See, e.g.,* FSA, p. 4.1-118; Reporter's Transcript [RT], 2/01/10, pp. 65-66 [M. Monasmith]; RT, 2/03/10, pp. 405, 414 [D. Vidaver].) In addition, the adopted OTC Policy was filed by counsel for the Commission shortly after its adoption. (*See* Memorandum and attachments re: Post-Evidentiary Hearing Developments, dated May 27, 2010, from R. Ratliff.)

The Commission should take official notice of the "I-5 North Coast Corridor Project Draft Environmental Impact Report/Environmental Impact Study" published by the California Department of Transportation in June, 2010, (Caltrans EIR/EIS) because it is an official publication of an executive department of the State of California which is particularly relevant to the proposed CECP. In addition, the Caltrans EIR/EIS provides the most up-to-date information regarding the I-5 widening project, which is one of the cumulative projects analyzed in the FSA and discussed by the staff, parties and witnesses throughout this proceeding. (See, e.g., FSA, pp. 4.5-35, 4.10-15, 4.12-26 through 4.12-29; RT, 2/02/10, pp. 96-98 [K. Siekmann], 171-172 [W. Walters], 253-257 [M. Gale].)

The Commission should take official notice of the "Application for Certification" filed by Pio Pico Energy Center, LLC with the California Energy Commission on June 30, 2010, (Pio Pico AFC) because it is an document contained in the official records of an executive department of the State of California which is particularly relevant to the proposed CECP. The City and Redevelopment Agency believe the CECP does not comply with state and local laws, ordinances, regulations and standards (LORS) applicable to the proposed project and site. If the Commission were to decide to

approve the CECP, overrides of the project's non-compliance with state and local LORS would be required. (Pub. Res. Code § 25525.) In recent cases in which the Commission has considered overrides, one of the Commission's primary concerns was the need for the proposed project. As discussed more fully in the following sections of this brief, there is relevant, material information in the Pio Pico AFC which demonstrates that approval of the CECP is not needed to meet the energy needs of the San Diego region or the State of California.

The Commission should take official notice of the testimony of the Honorable Sebastian Giuliano, Mayor, Middletown, Connecticut, and Edward Badamo, Fire Chief, South Fire District, Middletown, Connecticut, before the U. S. House of Representatives, Committee on Education & Labor, Workforce Protections Subcommittee, on June 28, 2010, concerning the explosion on February 7, 2010, at the Kleen Energy Power Plant in Middletown, Connecticut (Kleen Energy testimony). The Kleen Energy testimony should be officially noticed because it is part of an official proceeding before a legislative committee of the United States and is particularly relevant to the CECP's worker and fire safety issues which were the subject of extensive testimony during in the public hearings and are addressed below in this brief. (See, e.g., RT, 2/04/10, pp. 9-144[C. Heiser, K. Crawford, J. Weigand, A. Greenberg, F. Collins].)

In the interest of conserving resources, copies of the foregoing documents are available on-line as follows:

- The SWRCB OTC Policy is available at: http://www.swrcb.ca.gov/water_issues/programs/npdes/cwa316.shtml
- The Caltrans EIR/EIS is available at: http://www.dot.ca.gov/dist11/Env_docs/I-5NCCDraft.html
- The Pio Pico AFC is available at: http://www.energy.ca.gov/sitingcases/piopico/index.html
- The Kleen Energy testimony is available at: http://edlabor.house.gov/hearings/workforce-protections/

The City and Redevelopment Agency will make printed copies of the foregoing documents available upon request by the Commission or any party of record.

For the foregoing reasons, the City and Redevelopment Agency respectfully request that the Commission take official notice of the SWRCB OTC Policy, the Caltrans EIR/EIS, the Pio Pico AFC and the Kleen Energy testimony.

COMMITTEE TOPICS

I. PROJECT'S ENVIRONMENTAL IMPACTS

I.A. ARE THERE ARE ANY UNMITIGATED SIGNIFICANT DIRECT, INDIRECT, OR CUMULATIVE ENVIRONMENTAL IMPACTS OF THE CARLSBAD ENERGY CENTER PROJECT (CECP)?

The Carlsbad Energy Center Project (CECP) will have direct, indirect or cumulative unmitigated significant impacts on Worker Safety and Fire Protection, Visual Resources, and Water Resources.

I.A.1 <u>Worker Safety & Fire Protection:</u> The CECP Will Have Unmitigated Significant Impacts on Emergency Access and Public and Worker 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 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 City fire 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 applicant's 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.

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

Throughout the three-year application process, the project applicant has 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).[1]

[1] 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

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. As stated by NRG's safety expert, Frank Collins of Shaw Group:

> MR. McKINSEY: So, what is the role for municipal fire response in a power plant like this?
>
> MR. COLLINS: In a power plant like this the primary role of the fire department is as a backup to the fixed suppression systems for large fires. For very small fires they wouldn't need to respond because this fire would be too small to actually actuate one of the fixed systems. Or it would be something that the plant, like a small trash bucket fire, something you can normally typically put out with a fire extinguisher. Or some of the suppression systems you would be required to come in and I would say mop up, because they may not fully extinguish, or you might have smoldering embers or something, that they need to get in and access. Again, this is all for property protection.

(RT, 2/04/10, pp. 17-18.)

In response, Carlsbad Operation Chief Heiser testified, "(I)n my experience I've never

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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).

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 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://edlabor.house.gov/hearings/workforce-protections/.)

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." (http://edlabor.house.gov/hearings/workforce-protections/.)

By their very nature, accidents are often impossible to predict. However, disasters like the Kleen Energy plant explosion reinforce City fire officials' position that fire suppression systems are merely one part of an effective safety design, which must also include adequate planning and facilities for fire and emergency response.

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)

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

Contrary to their obligation to give due deference to a local agency on matters within its jurisdiction, staff rejected City fire officials' determination that the road encircling the plant within the sunken bowl must be 50 feet wide in order to provide adequate access for emergency vehicles. Instead, the FSA recommended a road only 28 feet wide, insisting that would provide ample space for "all emergency vehicles and especially fire trucks" responding to any location within the bowl. (FSA, p. 4.14-13.)

Carlsbad Operation Chief Heiser testified, however, that 28 feet is inadequate because emergency crews need sufficient space to park, remove equipment and leave room for other emergency vehicles to pass. For example, the City's ladder truck, which is primarily responsible for rescue, is 10 feet wide, 13 feet high and 56 feet long. Its operational footprint is about twice that – 20 feet wide by 90 feet long. A road only 28 feet wide would allow only 4 feet on either side of the ladder truck, which would restrict firefighters' work space and leave insufficient space for other emergency vehicles to pass at a time when quick response is critical. In Chief Heiser's words,"50 feet seems to be a reasonable width to safely conduct fire ground and rescue operations." (RT, 2/04/10, pp. 54-55.) In addition, Fire Marshal Weigand testified that the turning radii for fire apparatus were not depicted, posing another problem for emergency responders. (RT, 2/04/10, p. 61.)

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 Of Adequate Width Around The Plant.

The proposed project originally included a "rim road" which encircled the CECP approximately 30 feet above the depressed bowl containing the plant. However, the latest version of the CECP plan eliminates the portion of the rim road between the plant and the I-5 freeway.

A diagram of the plant grounds submitted to the CEC on February 1, 2010, shows a rim road that encircles the plant on only three sides, but not between the CECP and the freeway. NRG attorney John McKinsey confirmed the change, saying, "(O)ur analysis of the potential widening of I-5 does not have that [rim] road there." (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.)

NRG sought to diminish the significance of the lack of adequate emergency access on the rim road through its safety expert Frank Collins, who has one year of volunteer firefighting experience. Mr. Collins 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.

Contrary to 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.

I.A.2 <u>Visual Resources:</u> The Proposed CECP Will Have Unmitigated Significant Direct, Indirect and Cumulative Environmental, Visual and Aesthetic Impacts.

Are the visual and aesthetic impacts from the proposed power plant, which blocks ocean and scenic views for residents, visitors and passing motorists from key observation points significant?

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")[2]. 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 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, II. 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 <u>any</u> local visual or aesthetic standards and thus

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[2] 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. The City respectfully requests that the Committee take notice of it.

results in unmitigated significant impacts on Visual Resources.

I.A.3 <u>Water Supply:</u> The CECP Will Have Unmitigated Significant Impacts On Water Resources.

The CECP will have unmitigated significant direct and cumulative impacts on water resources. The FSA's conclusions that direct project impacts can be mitigated below significance and that cumulative impacts will be insignificant are contrary to the law and are not supported by the evidence.

Direct Significant Impacts On Water Supply Are Unmitigated.

Energy Commission Staff evaluated two 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.

Recycled Water - With respect to recycled water, 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.)

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.4th 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.4th 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.3d 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, the CECP's direct impacts on recycled water supply remain significant and unmitigated.

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.4th 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].)

Recognizing the importance of this issue, the Regional Water Quality Control Board (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.4th 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, 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. Accordingly, the CECP's direct impact on desalinated water supply remains significant and unmitigated.

Cumulative Significant Impacts On Water Supply Are Unmitigated.

The FSA stated 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." (FSA, p. 4.9-18.) The FSA's conclusion that cumulative impacts will not be significant is invalid because it is contrary to admissions contained in the FSA itself and violates basic CEQA principles.

Recycled Water - With respect to the supply of recycled water, 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.

Ocean Water - With respect to the supply of ocean water, the FSA's 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.4th 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 Alikely 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.

I.B. IS THE POTENTIAL SHUT DOWN OF ENCINA UNITS 4 AND 5 PART OF THE PROJECT AND MUST THE IMPACTS OF SUCH A SHUTDOWN BE EVALUATED AS PART OF THE CECP?

The Potential Shutdown Of Encina Units 4 And 5 Are Part Of The Project And The Impacts Of Such A Shutdown Must Be Evaluated As Part Of The CECP.

The impacts of the potential shutdown 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 would violate CEQA's proscription against piecemeal review and thereby understate the environmental effects of the whole project. At minimum, the shutdown of Units 4 and 5 must be evaluated as a cumulative project to ensure that the combined effects of the shutdown and the CECP are not overlooked.

The Shutdown Of Units 4 And 5 Must Be Evaluated As Part 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.

At Minimum, CEQA Requires The Shutdown Of Units 4 And 5 To Be Evaluated As A Cumulative Project.

NRG is likely to argue 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 the shutdown 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.)

NRG 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.

The potential shutdown of Units 4 and 5 is part of the project and its impacts must be evaluated as part of the CECP. Even if the shutdown were treated as a separate activity, CEQA would require it to 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 or understated.

I.C. HAS A REASONABLE RANGE OF PROJECT ALTERNATIVES BEEN EVALUATED?

A Reasonable Range Of Project Alternatives Has Not Been Evaluated.

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).)

The California Coastal Act (Coastal Act) also requires consideration of alternative locations. Section 30260 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 requires consideration of the relative merit of available alternative sites for an applicant's service area. (Pub. Res. Code § 30264.)

The FSA's analysis of alternatives is inadequate for two reasons. First, the range of alternatives was improperly limited to alternate locations in the City, rather than to 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.

The FSA Failed To Consider A Reasonable Range Of Alternatives In The CECP's Proposed Service Area.

An environmental document must consider a reasonable range of alternatives or alternative locations. (14 Cal. Code Reg. § 15126.6(a).) 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.) With respect to alternative locations, "[t]he key question and first step in the analysis is whether any of the significant effects of the project would be avoided or substantially lessened by putting the project in another location." (14 Cal. Code Reg. § 15126.6(f)(2)(A).)

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 section 30264 of the Coastal Act, which 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 the City.

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.) Despite acknowledging 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.

The FSA's failure to consider alternative locations outside the City not only violates CEQA's requirement to consider a reasonable range of alternatives, but also 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.

The FSA Improperly Used Certain Project Objectives To Exclude Meaningful Consideration Of Reasonable Alternatives.

CEQA requires an environmental document to include a statement of objectives of the proposed project. (14 Cal. Code Reg. § 15124(b).) 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 FSA failed to comply with CEQA's requirements regarding the use of project objectives in the analysis of alternatives 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 FSA placed 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].)[3] The alternate sites thus were found wanting in comparison with the

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[3] 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-

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.)

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

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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].)

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.

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].)

SDG&E waived its confidentiality requirements regarding the RFO process, and the City freely disclosed that it partnered with Pattern Energy to submit a bid at either of two alternative sites the City has put forward. (RT, 2/03/10, pp. 435 ff [J. Garuba].) Moreover, the Chula Vista-based Pio Pico project disclosed in its license application to the CEC that it has received an offer of a PPA from SDG&E, meaning SDG&E found the Pio Pico proposal and site preferable to competing projects, including the CECP and the Carlsbad/Pattern proposal. (Pio Pico Energy Center, 2010-AFC-01, § 2.0.) As David Vidaver, staff electricity generation systems specialist, observed: "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." (RT, 2/03/10, p. 341 [D. Vidaver].)

Mr. Vidaver also confirmed that an alternative location could meet both the fundamental project objective of providing dependable power generation in the project service area and the increasingly important objective of retiring Units 4 and 5: "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*." (Emphasis added.) (RT, 2/03/10, p. 325 [D. Vidaver].) Thus, there is no evidence that the CECP must be located on the proposed coastal site in order to provide reliable electrical generating resources, to improve San Diego regional electrical system reliability, or to meet other stated project goals.

The FSA compounded these 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 FSA 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 which require due deference to a local agency's recommendations over matters within their jurisdiction, but also it disregards the City's willingness and ability to provide a feasible alternative location. (20 Cal. Code Reg. § 1744.)

Finally, the discussion of alternative locations for the Oaks North site included errors and omissions which should be corrected. Robert Mason, a witness for NRG, testified that the Oaks North site is incompatible with the McClellan-Palomar Airport Land Use Compatibility Plan (ALUP), which is the San Diego Airport Regional Authority's blueprint for uses in the vicinity of the airport in Carlsbad. Mr. Mason also said the Oaks North site is in Zone 6 and "no new sites or land acquisitions for a power plant the size of CECP can occur in that zone."

However, the McClellan-Palomar ALUP, which was adopted on January 25, 2010, and amended March 4, 2010, states:

> (3) Power Plants: Construction or expansion of power plants is "incompatible" in Safety Zones 1, 2, and 5. In Safety Zones 3, 4, and 6, these facilities are "'conditionally compatible" – these land uses may be modified, replaced, or expanded on existing sites, but no new sites or land acquisition for expansion of existing sites is allowed. *The limitations on new sites and land acquisition do not apply in Safety Zone 6 for peaker plants.* (Emphasis added).

(McClellan-Palomar ALUP, p. 3-38.) The City and Pattern Energy proposal to SDG&E was for just such a peaker plant.

Similarly, Scott Debauche's testimony regarding the altitude that planes must fly to clear a power plant at Oaks North was incorrect. Mr. Debauche testified that the FAA's David Butterfield conducted a safety risk assessment (RT, 2/03/10, p. 431) and that Mr. Butterfield concluded planes should avoid flying lower than 1000 feet over a power plant at that location. (Presentation Slides 5-7, Ex. 183.) Mr. Butterfield's assumptions were based on preliminary information provided to the CEC by the City, but staff did not adjust its analysis after more concrete data and site elevations were available. In fact, shorter stack heights at a peaker plant would allow greater clearance for aircraft. As a result, both the fleet and Oaks North sites would likely meet the threshold identified by Mr. Butterfield.

I.D. HAS THE FSA PROVIDED A COMPLETE CUMULATIVE ANALYSIS WHICH INCORPORATED APPLICABLE FORESEEABLE PROJECTS?

The FSA's Analysis Of Cumulative Impacts Is Inadequate Because It Did Not Consider All Probable Future Projects With Related Impacts.

Staff is required to analyze the cumulative impacts of a proposed project. (*Friends of the Old Trees, supra,* 52 Cal.App.4th at p. 1393; 20 Cal. Code Reg. Appendix B, subdiv. (g)(1).) To be adequate, the analysis of cumulative impacts must satisfy four requirements: first, it must consider the combined impacts of the proposed project and all other past, present and probable future projects with related environmental impacts; second, it must identify the geographic scope of the area affected by the cumulative impacts and provide a reasonable explanation of the geographic limitation used; third, it must provide a reasonable analysis of whether the cumulative projects may result in a significant impact on the physical conditions in the affected area; and fourth, the analysis and conclusions regarding the cumulative impacts must be supported by facts, data or other substantial evidence. (14 Cal. Code Reg. § 15130(b)(1)-(5).)

As discussed below, the FSA's failure to comply with two of these requirements causes the analysis of the CECP's significant cumulative impacts to be inadequate and incomplete.

The FSA Failed To Evaluate All Of The Probable Future Projects With Related Environmental Effects.

An 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), § 13.41, 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 cumulative impacts will be inadequate. (*Friends of the Eel River, supra,* 108 Cal.App.4th at p. 868.)

The list of cumulative projects must include all past, present and probable future projects with related environmental effects. (14 Cal. Code Reg. § 15130(a)(1),

(b)(1)(A), 15355.) In compiling the list, the lead agency must consider the nature of the environmental resource affected and the location and type of project under review. (14 Cal. Code Reg. § 15130(b)(2).) This ensures that the analysis of cumulative impacts on a particular resource includes all of the projects on the list which may have impacts related to the resource in question.

There are six projects which should have been included on the list of cumulative projects analyzed in the FSA:

- the I-5 North Coast Widening Project (I-5 Widening);
- the Carlsbad Seawater Desalination Project (CSDP);
- the Carlsbad/Vista Sewer Upgrade Project;
- the LOSSAN Corridor Double-Tracking Project (LOSSAN); the Coastal Rail Trail; and
- the decommissioning of EPS Units 4 and 5 pursuant to the SWRCB's OTC Policy.

Each of these projects should have been evaluated in connection with every environmental resource on which they would have a related impact.

The FSA's analysis of cumulative impacts is incomplete because it omits relevant projects from the list of cumulative projects which should have been considered in the analysis of several resource areas. Although it considered some of these six projects in connection with some resources, the FSA failed to consider them in all of the resource areas in which they may have related impacts and failed to provide any explanation for why they were omitted from the analysis of relevant resource areas.

One example of how the FSA's omission of a reasonably foreseeable future project from the list of cumulative projects resulted in an understatement of cumulative impacts is the decommissioning of Units 4 and 5. The FSA acknowledged that the retirement of facilities using once-through cooling (including EPS Units 1-5) pursuant to the SWRCB's OTC Policy is a likely event. (FSA, p. 4.1-118.) As discussed in section 1.B above, the

potential shutdown of Units 4 and 5 should have been evaluated as part of the CECP. At minimum, however, this future action should have been evaluated as a cumulative project in all resource areas where it may have related impacts. (*Berkeley Keep Jets Over The Bay Com. v. Board of Port Commr.* (2001) 91 Cal.App.4th 1344, 1362-1363.)

However, the FSA failed to do so. Although it considered the decommissioning of Units 4 and 5 in the analysis of cumulative impacts on GHG emissions and Visual Resources (FSA, pp. 4.1-118, 4.12-24), the FSA did not include it on the list of cumulative projects considered with respect to Land Use, Biological Resources, or Soil and Water Resources. As a result, the FSA clearly understates the potential cumulative impacts on the impingement and entrainment of biological resources and on the CECP's anticipated water supply that will occur when the CECP no longer can use the existing EPS water discharge stream as its source of the 4.32 million gallons/day of seawater needed for industrial use and dilution purposes. (FSA, pp. 4.2-18 B 4.2-19.)

The FSA also failed to evaluate a complete list of cumulative projects with respect to other environmental resources. For example, the FSA failed to consider emissions from the I-5 Widening Project in its discussion of cumulative impacts to Public Health. (FSA, pp. 4.7-27, 28.) Similarly, the discussion of cumulative impacts from GHG emissions is limited to the state's power plants and failed to consider the GHG emissions of any of the projects on the cumulative project list.

In other resource areas, the FSA simply failed to identify which cumulative projects were considered. With respect to GHG emissions, for example, the FSA discussed the CECP's cumulative impacts in the context of its effect on the electricity system. (FSA, pp. 4.1-119, 123.) In doing so, the FSA assumed substantial increases in power generation from renewable sources and the replacement of high GHG-emitting generation, but failed to identify these sources or to explain how they meet CEQA's threshold requirement for consideration as probable future projects. (FSA, pp. 4.1-114-118.)

The FSA's consideration of other impact areas suffers from the same defect. With respect to traffic impacts, the FSA acknowledged that "[t]raffic associated with future

residential and commercial developments within the area would further contribute to congestion on these affected roadways," but failed to identify any of these future developments. (FSA, p. 4.10-16.) Similarly, the discussion of Soil and Water Resources referred to "[c]umulatively significant impacts to the water quality of Agua Hedionda Lagoon or the Pacific Ocean," but failed to identify the projects which may cause or contribute to the cumulative impacts. (FSA, p. 4.9-19.) The same problem occurred with respect to Public Health, where the FSA referred to nearby projects that may contribute to a public health impact, but failed to identify any of the projects on the list. (FSA, p. 4.7-22.) The FSA's analysis of cumulative impacts to Noise and Vibration and Waste Management also identified only some of the cumulative projects considered and referred the reader to other documents to figure out the identity of the rest. (FSA, pp. 4.6-13, 4.13-15.) The FSA's failure to identify the cumulative projects considered in the analysis of cumulative impacts causes it to be fatally deficient. (*San Joaquin Raptor/Wildlife Rescue Center, supra,* 27 Cal.App.4th at pp. 740-741.)

The FSA Failed To Provide Facts, Data Or Other Substantial Evidence In Support Of Its Conclusions Regarding Cumulative Impacts.

The assumptions and conclusions in the analysis of cumulative impacts must be supported by facts, data, reports or studies. A conclusory discussion of cumulative impacts, unsupported by facts, is insufficient. (*Joy Road Area Forest & Watershed Assn., supra,* 142 Cal.App.4th at p. 676; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 429.)

The FSA does not provide facts, data or other evidence in support of the assumptions and conclusions in the discussion of cumulative impacts for many resource areas. For example, the FSA concluded it was highly unlikely that the CECP, the CSDP and other unidentified remaining projects could create a significant cumulative noise impact, but provided no facts or data in support of this conclusion. (FSA, p. 4.6-13.) The FSA also concluded that the cumulative impact on recycled water supply will not be significant, even though the source of a recycled water supply is unknown. (FSA, p. 4.9-18.) The FSA provided no facts, data or studies in support of either this conclusion or staff's

belief that a reliable supply of water will be available prior to operation of the CECP. In addition, the FSA did not provide any facts, reports or studies in support of its conclusion that implementation of proposed conditions of certification and compliance with LORS will avoid or reduce cumulative impacts to biological resources below significance. (FSA, p. 4.2-17.) The FSA's failure to provide facts, data or other substantial evidence in support of its conclusions renders the analysis of cumulative impacts inadequate.

II. PROJECT'S LORS COMPLIANCE

II.A. DOES THE PROPOSED PROJECT COMPLY WITH FEDERAL, STATE, AND LOCAL LAWS, ORDINANCES, REGULATIONS, OR STANDARDS (LORS), INCLUDING THE CALIFORNIA COASTAL ACT, THE COMMUNITY REDEVELOPMENT LAW, AND THE CITY'S GENERAL PLAN, ZONING, AND OTHER REGULATIONS?

II.A.1 The CECP Does Not Comply With The Resource Protection Policies Of The Coastal Act.

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.

II.A.2 The CECP Does Not Comply With The Goals, Policies And Requirements Of The Carlsbad General Plan, Specific Plan 144 And Related Zoning Provisions.

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 FSA erroneously concluded that the CECP would comply 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.4th 99, 142.) Moreover, because LORS such as the City's General Plan reflect a range of competing interests, 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.*)

What staff considers to be "complex and layered" land use LORS are simply a fact of life for the City and other municipalities in California. State law has established a hierarchy of land use laws. The General Plan is at the top of this hierarchy and is considered the "constitution for future development" in a city. (*See, e.g.*, Gov. Code § 65300, *et seq*.; *Milagra Ridge Partners,Ltd. V. City of Pacifica* (1998) 62 Cal.App.4th 108, 118.) The General Plan is followed in descending order by specific plans, precise development plans, zoning regulations and conditional or special use permits. (*See, e.g.,* Gov. Code § 65450, *et seq*. [Specific Plans], § 65800, *et seq.* [zoning regulations].)

The propriety of virtually any local decision affecting land use and development depends on its consistency with the General Plan and its elements. (*Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1182.) The mandatory elements or components of a General Plan include Land Use, Circulation, Housing, Open Space, Conservation, Noise and Safety. (Gov. Code § 65300.) 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.)

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.

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. Barbiero], pp. 227-228 [S. Donnell].)

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. As discussed more fully below in section V of this brief, there is insufficient evidence in the record to support an override of the CECP's non-compliance with these important land use LORS.

II.A.3 The CECP Does Not Comply With The Community Redevelopment Law.

State Law: Community Redevelopment Law

The Committee must determine whether the CECP complies with all applicable state and local laws, ordinances, regulations and standards (LORS). Unfortunately, the FSA reflects a fundamental misunderstanding of redevelopment law, erroneously considering it a matter of local, rather than state, LORS and dismissing the separate interests of the Carlsbad Redevelopment Agency, which functions as an arm of the State of California in redevelopment matters, as being the same as the City's local land use interests. Contrary to the FSA's conclusion, the CECP does not comply with state LORS concerning redevelopment.

On February 1, 2010, the Committee heard testimony regarding the CECP's compliance with the Community Redevelopment Law (CRL), Health and Safety Code section 33000, *et seq*.[4] On behalf of the project applicant, Ronald Rouse, a land-use attorney, testified that the CECP would meet the "extraordinary public purpose" requirement of the South Carlsbad Coastal Redevelopment Project Plan (SCCRP), which governs the redevelopment area in which the proposed CECP site is located. (RT, 2/01/10, pp. 86-88.)

Mr. Rouse's testimony was directly contradicted by Murray Kane, an expert in redevelopment law,[5] who testified that the CECP would not serve an extraordinary public purpose because it (1) intensifies current industrial use of the property, (2) does

[4] Unless otherwise indicated, all citations in this section shall be to the California Health and Safety Code.

[5] Commission Senior Staff Counsel Richard Ratliff acknowledged Mr. Kane's expertise. (RT, 2/01/10, p. 131, ll. 18-23.) Mr. Kane also has been cited by the California Supreme Court as an expert in redevelopment law. (*See Marek v. Napa Community Redevelopment Agency* (1988) 46 Cal.3d 1070, 1085.)

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not provide for a public use, (3) does not provide a plan for demolition of the existing power plant that will fall into disuse, and (4) does not provide for future redevelopment of the site as required by California redevelopment law. (RT, 2/01/10, pp. 94-96.)

At the conclusion of the redevelopment testimony, the Hearing Officer asked Mr. Kane whether the Carlsbad Redevelopment Agency acts as a state agency in its enforcement of redevelopment law and, if so, whether the agency must be given an opportunity to determine whether the CECP serves an "extraordinary public purpose" as required under the SCCRP (RT, 2/01/10, p. 145). Mr. Kane confirmed that the Redevelopment Agency is an administrative arm of the state, charged with carrying out the important state policies regarding redevelopment and, therefore, must be given the opportunity make the findings, or to make a recommendation to the CEC regarding the findings, required by the SCCRP and California redevelopment law. (RT, 2/01/10, pp. 145-147.)

As discussed below, 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 planning, land use and construction policies within the boundaries of the SCCRP area ensures the statewide purposes of redevelopment are achieved. Contrary to the FSA's misunderstanding, the Redevelopment Agency addresses state concerns, separate and apart from the City's local land use issues.

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

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.4th 1414, 1425.)

The FSA's analysis of the CECP's compliance with LORS is inadequate and, as a matter of law, incorrect 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 Carlsbad 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 FSA'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.

The Carlsbad 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.4th 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.4th 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. §§ 33336, 33338.)

Although NRG has 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.

The Carlsbad 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." Although NRG's refusal to submit a redevelopment permit application has prevented the Redevelopment Agency from fulfilling this responsibility, the evidence adduced in these proceedings makes clear that the CECP would not 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.

II.A.4 Worker Safety LORS

NRG has proposed a project that represents a significant risk to the public and firefighting personnel. The risk is sufficiently great to force the Carlsbad Fire Department to invoke California Fire Code section 503.2.2 and require that the perimeter road in the "pit" be at least 50 feet wide and the upper rim road be at least 25 feet wide. (Direct Testimony, pp. 3-4, or A. 10, A.12)

1. The California Fire Code contemplates situations exactly like that presented by the CECP application. The code prescribes an unobstructed minimum width of 20 feet for access roads (24 Cal. Code Reg. § 503.2.1) and authorizes 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.)

2. Three City fire officials testified that the CECP roads were too narrow and needed 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:

   a. 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.)

b. 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.)

3. 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.)

4. 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 :

a. 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)

b. 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.)

c. 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.)

d. 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.)

5. The applicant did not respond to Carlsbad fire officials' requests for detailed information that would have enabled them to prepare a complete fire operations plan for the CECP. This lack of response prevented a resolution of critical public safety issues concerning the width of emergency access roads necessary to allow effective fire and rescue operations in the extremely confined space presented by the CECP. Lacking such information, City fire officials made their best determinations and recommendations to protect life and property using available data. Although this Commission may determine that an "override" is justified, it should do so only after carefully weighing the hazards posed by a gas-fired power plant with apparent access impediments in an already constrained location.

II.B. IS THE PROJECT "COASTAL DEPENDENT"?

The Proposed CECP Is Not A Coastal Dependent Facility And Thus Cannot Be Approved At A Location Within The Coastal Zone.

The proposed CECP site is in an area that has a certified Land Use Plan (i.e., the Agua Hedionda Land Use Plan), but not a fully certified Local Coastal Plan (LCP). Prior to the certification of an LCP, a project can only be approved by the Coastal Commission if it is fully consistent with the policies of Chapter 3, sections 30200 *et. seq*., of the Coastal Act. (Pub. Res. Code § 30604(a).). As discussed above, the CECP is not fully consistent with the Coastal Act because it will have significant impacts on visual resources, marine resources, access and recreation and because it is not a Coastal Act priority use. As Ralph Faust discussed in his direct testimony, an industrial project that is not fully consistent with the policies of Chapter 3 can only be approved pursuant to section 30260 if it is a "coastal dependent" industrial facility. (Direct Testimony, R. Faust, pp. 10-11.)

Section 30260 states in pertinent part:

> [W]here 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…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.

(Pub. Res. Code § 30260.)

Thus, an industrial facility that is not fully consistent with the policies of the Coastal Act may not be approved unless it is coastal-dependent and it meets the three criteria of section 30260. As the evidence makes clear, the proposed CECP is inconsistent with several of the resource protection policies of the Coastal Act. In order to be a coastal-dependent industrial facility, a project must meet the following definition set forth in

section 30101:

> 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.

Despite the plain and unambiguous language of section 30101, the applicant and the staff assert the project is coastal-dependent because it is being placed on the site of an existing coastal-dependent industrial facility. The existing EPS is coastal-dependent because it requires once-through ocean-water cooling in order to operate and thus needs a site adjacent to the sea in order to function. That is not the case with the proposed CECP, which is capable of operating without seawater and could function perfectly well in a non-coastal location.

While locating the CECP adjacent to the existing EPS site may make economic sense for the applicant because it already owns the land and some of the infrastructure, none of these matters of convenience makes a project coastal-dependent. The statutory definition is simple and clear and, as the uncontested testimony of Ralph Faust demonstrates, the Legislature's intent was to move all industrial development that is not coastal dependent and fully consistent with the Coastal Act out of the coastal zone. The CECP is not consistent with the policies of the Coastal Act and thus cannot be approved at its proposed location within the coastal zone.

Because the proposed CECP is not a coastal-dependent industrial facility and is not fully consistent with the policies of the Coastal Act, the proposed location of the plant within the coastal zone is not "compatible…with the goal of protecting coastal resources" (Pub. Res. Code § 30413(d)(1).) Because the CECP would occupy land which, after implementation of the SWRCB's OTC Policy by December 31, 2017, could be better used for coastal-dependent recreational use over the life of the project, its proposed location "would conflict with…planned coastal-dependent land uses at or near the site." (Pub. Res. Code § 30413(d)(2).)

The proposed CECP site is adjacent to one of the nineteen Department of Fish and

Game designated lagoons and near the shoreline. Due to its height and industrial mass, the CECP will impair the “scenic and visual qualities” of this coastal area. Since it is not “sited and designed to protect views to and along the ocean and scenic coastal areas,” the CECP will have significant adverse effects on the aesthetic values of the area. (Pub. Res. Code §§ 30251, 30413(d)(3).) Because the proposed CECP will continue to draw significant water resources from the Agua Hedionda Lagoon after the existing EPS plant is shut down under State OTC Policy, with impingement and entrainment effects on marine resources continuing for perhaps 40 more years, the CECP will have significant “adverse effects on fish and wildlife and their habitats.” (Pub. Res. Code § 30413(d)(4).) Finally, there are no feasible measures which could mitigate or minimize the significant adverse impacts of the CECP’s proposed location on coastal resources or prospective coastal-dependent uses. However, all of these significant impacts could be avoided entirely by moving the CECP to a suitable alternative location outside the coastal zone.

II.C. IS THE CECP A "PUBLIC UTILITY" UNDER THE CODES OF THE CITY OF CARLSBAD?

The City Of Carlsbad Has Determined That The CECP Is Not A Public Utility As Defined By The Carlsbad Municipal Code.

Staff and the applicant rely heavily upon the City's zoning designation of "P-U" in arguing that the CECP is consistent with the City's zoning and other land use regulations. Chapter 21.36 of the City's zoning regulations contains a zone entitled "P-U Public Utility". This zoning specifies a minimum lot size, but notes that lot width and depth as well as setbacks and height limits are to be determined by a precise development plan. This zone does not apply to the proposed CECP.

Is A Public Utility Defined By Ownership Or Function?

Staff determined that the CECP is consistent with City zoning:

> Based on the proposed CECP's zoning and land use designation for Public Utilities ("PU" and "U", respectively), and the fact that both designations allow for electrical generation allow for electrical generation, staff concludes that the proposed CECP is consistent with the City of Carlsbad Zoning Ordinance.

(FSA, p. 4, 5-22.)

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.

Carlsbad Has Informed The Staff And Commission That The CECP Fails To Quality As A Public Utility.

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, 2/02/10, p. 20.)

The City Council 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.

The City’s Zoning Regulations Lead To The Conclusion That The CECP Is Not A “Public Utility.”

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 City recognizes that if the CECP were to be developed and owned by a public utility such as SDG&E, then it would conform to the existing underlying land use designations.

State Utility Regulation Supports The Distinction Between Merchant And Regulated Power Plants.

California 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."

Investor Owned Utilities, such as SDG&E, are subject to the jurisdiction of the CPUC, but entities, such as the applicant, that generate power for resale to regulated public utilities, are not. An additional requirement has been imposed by the California courts. That is, 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.) 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.)

II.D. IS A COMPREHENSIVE UPDATE OF CITY SPECIFIC PLAN 144 REQUIRED FOR CECP?
AND
IS A PRECISE DEVELOPMENT PLAN IN THE NATURE OF A SPECIFIC PLAN OR A PERMIT SIMILAR TO A CONDITIONAL USE PERMIT?

A comprehensive update of City's Specific Plan 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) .)

This conclusion requires an explanation of the hierarchy of land use documents in Carlsbad as in other California cities which control and direct land use within their jurisdictions. Sitting above all is the General Plan with which all other documents must be consistent. Beneath the General Plan is a Specific Plan, which must contain all of the elements of a General Plan and applicable to a specific area. It is discretionary on behalf of the legislative body as to whether or not a Specific Plan is required for any particular parcel or area.

Beneath the General Plan and Specific Plan is the Zoning Ordinance, which implements the former documents and sets forth development standards within the zone and separates uses into those permitted by right, those permitted on certain conditions and those prohibited. In Carlsbad, unless a use is specifically permitted, it is prohibited. In the Utilities ("U") and the Public Utility ("PU"), Zones, a Precise Development Plan is required prior to the issuance of a building permit or any other entitlement for use.

The proposed power plant is inconsistent with the Carlsbad General Plan when all of its elements are read together. The elements of the General Plan must be internally

consistent and none are superior to any other. The City Council must look at the entire General Plan when approving a proposed use. The CECP is inconsistent with a number of elements, goals and policies of the Carlsbad General Plan. City staff testified that the proposed power plant is inconsistent with at least 14 goals and policies of the General Plan. (RT, 2/01/10, p. 204, ll. 2-7). Since the CECP is inconsistent with goals and policies of the General Plan, including its Circulation, Open Space and Conservation elements, it could not be approved by the City Council.

Assuming, for the sake of argument, that the CECP were consistent with the General Plan (which the City Council has determined it is not), the City Council would need to determine whether it is an appropriate use under the Zoning Code. Although generation of electrical energy is a permitted use in the public utility (P-U) zone, it is not permitted without a precise development plan. Unless a Precise Development Plan were approved by the City Council, the proposed CECP use would not be allowed and would be inconsistent with the Zoning Ordinance. If a Precise Development Plan were approved by the City Council, it would contain any or all of the conditions set forth in section 21.36.050 of Exhibit 411. (CMC, Ch. 21, § 21.36.050.)

A Specific Plan is a legislative act and requires approval of the City Council. It is beyond argument that there has been no comprehensive specific plan amendment for this 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.) In this case, 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. 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.

Is A Precise Development Plan In The Nature Of A Specific Plan Or A Permit Similar To A Conditional Use Permit?

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).

II.E. DOES THE WARREN-ALQUIST ACT PREEMPT THE CITY REDEVELOPMENT AGENCY'S PERMITTING AUTHORITY?

There Is An Apparent Conflict Between Provisions Of The Community Redevelopment Law And The Warren-Alquist Act Which Can Be Harmonized By Recognizing The Important State Policies Each Statute Is Intended To Achieve.

The FSA's misunderstanding of the CRL, and the project applicant's refusal to provide required information to the Redevelopment Agency, has created an apparent conflict between provisions of the CRL, which prohibit a redevelopment agency from delegating its responsibilities to any other agency, and the Warren-Alquist Act (Act), which confers exclusive jurisdiction on the CEC over power plant siting proceedings. This issue of first impression can be resolved by requiring the project applicant to provide the information needed by the Redevelopment Agency to determine whether the CECP complies with the SCCRP. Unless this occurs, the CECP will not comply with state LORS regarding redevelopment.

The applicant's refusal to comply with the requirements of the SCCRP presents an issue of first impression concerning the relationship between the Warren-Alquist Act (Act) and the CRL. The Act provides that the issuance of a certificate by the Commission is in lieu of any permit or similar document required by any other state or local agency and shall supersede any applicable state or local statute, ordinance or regulation. (Pub. Res. Code § 25500.) However, the CRL expressly prohibits a redevelopment agency from delegating its responsibilities to any other entity, "unless a provision of this part specifically provides for that delegation." (Health & Saf. Code § 33121.5.)

Where provisions of separate statutory schemes appear to conflict, they should be read together in a way that will harmonize the provisions and achieve the separate policies and objectives of both statutes. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.)

The Redevelopment Agency does not question the powers and duties of the CEC in the

siting of power plants. However, the importance of the state policies declared by the Legislature in the CRL, and the designation of redevelopment agencies as arms of the state in carrying out these policies, indicate that greater consideration is due the goals, objectives and requirements of the CRL than is found in the FSA. The FSA's dismissive treatment of the SCCRP as a local LORS, in comparison to the extensive analysis devoted to the CECP's compliance with other state laws, is inadequate and incorrect. (*Compare* FSA, pp. 4.5-10 through 4.5-18 *with* p. 4.5-28.)

Despite the apparent conflict between the Act and the CRL, both statutes provide for cooperation with other agencies. Section 33220(e) of the CRL authorizes redevelopment agencies to enter into agreements with other agencies with respect to "any of the powers granted by this part of any other law." Section 25519(h) of the Act requires the CEC to consider the comments and recommendations of "state agencies having jurisdiction or special interest in matters pertinent to the proposed site."

The apparent conflict between the Act and the CRL can be harmonized by requiring NRG to submit sufficient information to the Redevelopment Agency for it to make the necessary findings whether the proposed project complies with the requirements of the SCCRP. The Redevelopment Agency's findings would be submitted to the CEC as the recommendations of a state agency with jurisdiction over the proposed site. CEC staff then would consider these findings in determining whether the CECP complies with state LORS regarding redevelopment.

If this proposed solution were declined, the result would be an FSA which erroneously considered the CECP's compliance with state redevelopment law as a local LORS issue and a project which does not comply with state LORS regarding redevelopment. The project applicant's refusal to provide the information required for the Redevelopment Agency to carry out its duties as an arm of the State with respect to redevelopment conflicts with state LORS and an override would be necessary to allow the project to proceed.

II.F. DOES THE WARREN-ALQUIST ACT PREEMPT THE CITY'S APPROVAL AUTHORITY OVER THE STORMWATER POLLUTION PREVENTION PLAN?

Like all cities in the United States, the City is subject to the Clean Water Act ("CWA"), 33 USC section 1251 *et seq*. In California, the requirements of the CWA are implemented by the Porter-Cologne Act, Water Code section 13000 *et seq*., through the nine Regional Water Quality Control Boards. In San Diego, the San Diego Regional Water Quality Control Board (RWQCB) issues plans and permits in consultation with affected cities. (Water Code § 13240.) Water Quality Control Plans are similar to a city's General Plan and are available online at www. waterboards.ca.gov/plnspols/index.html.

Before any wastewater can be discharged from the proposed plant that could impact water quality or beneficial uses, a waste discharge order must be obtained from the RWQCB. (Water Code § 13269.) This involves both a state permit and a federal permit. (33 USC §§ 1311(a), 1342(b); 23 Cal. Code Reg. § 2235.1.)

In Carlsbad, the CWA is implemented through the National Pollution Discharge and Elimination System (NPDES) and Chapter 15.12 of the Carlsbad Municipal Code[6]. The federal law does not exempt the proposed CECP from obtaining such a permit. (Pub. Res. Code § 25500.) Therefore, a permit from either the RWQCB or the City, acting in its administrative capacity under the CWA, is required prior to approval or as a condition of licensing the proposed CECP.

[6] Carlsbad Municipal Code Chapter 15.12 does not appear in the list of exhibits, however, it is a public law and the Commission is respectfully request to official notice of it. It is published at www.library.municode.com.

II.G. DOES THE WARREN-ALQUIST ACT GIVE THE CALIFORNIA ENERGY COMMISSION THE AUTHORITY TO DECIDE WHETHER AND WHERE THE RAIL TRAIL CAN BE BUILT ON THE PROJECT SITE?

The short answer to this question is "no" as explained below. The Energy 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 Coastal Rail Trail. Although it can condition the applicant not to voluntarily dedicate land to the City in a certain location, the Energy Commission cannot prevent a city from acquiring it involuntarily from the applicant. Proposed Condition Land-1 is neither workable nor honors or appreciates the powers and duties of the City Council of the City of Carlsbad regarding the location of the Coastal Rail Trail system.

The Carlsbad City Council was the lead agency for the entire 43-mile proposed Coastal Rail Trail System. The City Council has the ultimate authority of deciding where the location of a public facility will best serve its citizens. It has decided that the best location for the proposed Coastal Rail Trail 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; the Eminent Domain Law and 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 Land-1 fails to appreciate these fundamental powers and duties. Therefore, proposed Condition Land-1 should be stricken and the proposed CECP relocated to accommodate the Coastal Rail Trail. New Condition Land-1 should be inserted is identified in Table 1 (attached).

II.H. MUST THE COASTAL COMMISSION ISSUE A REPORT BEFORE THE ENERGY COMMISSION CAN ACT ON THE PROJECT'S APPLICATION?

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, Straightforward 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.

The Coastal Commission Is Required To Prepare A Report Pursuant To Section 30413 (D) For Every Power Plant Proposed To Be Placed In The Coastal Zone. In The Absence Of Such A Report The CEC Must Make The Findings Required By Section 30413 (D) Based Upon The Evidence In The Record.

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.”[7]

This distinction is particularly significant in Chapter 5 of the Coastal Act (sections 30400 through 30420) which is explicit is 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, 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).

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

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 necessary, perhaps 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.

In the FSA, staff concedes that the CECP must demonstrate consistency with Coastal Act policies. (FSA, p. 4.5-10.) Unfortunately, the FSA'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, staff's conclusion in the FSA 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.

II.I. DOES THE RECENTLY ADOPTED CITY URGENCY ORDINANCE CS-070, PROHIBITING THE PROCESSING OF PERMIT APPLICATIONS FOR POWER PLANTS, HAVE ANY EFFECT ON THE COMMISSION'S PROCESSING OR CONSIDERATION OF THE CECP APPLICATION FOR CERTIFICATION (AFC)?

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.) Therefore, the proposed CECP is inconsistent with the local law and cannot be approved unless the Energy Commission adopts an override pursuant to its authority under Public Resources Code sections 25500 and 25523(d)(1).

II.J. WHAT SPECIFIC CITY DEVELOPMENT STANDARDS (HEIGHT LIMITS, SETBACKS, FIRE EQUIPMENT ACCESS, ETC.) APPLY TO THE PROJECT AND DOES IT COMPLY WITH THOSE STANDARDS?

The CECP fails to meet the following City development standards.

1. Structure Height. The Agua Hedionda Land Use Plan calls for a height limit of thirty-five feet. Additionally, the City zoning which is most appropriate for a merchant facility like the CECP is Planned Industrial, which specifies a height limit of thirty- five feet, with protrusions not to exceed forty-five feet. (CMC, § 21.34.070.)

2. Land coverage and setback requirements. Section 618 of the South Carlsbad Redevelopment Plan authorizes the Housing and Redevelopment Commission 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.

3. Imaginative and innovative plan. 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.

4. 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.

5. Carlsbad Fire Code standards are addressed in detail above in sections I.A.1 and II.A.4 (Worker and Fire Safety) of this brief.

II.K. WHAT DEFERENCE, IF ANY, SHOULD BE GIVEN TO THE CITY'S INTERPRETATION AND APPLICATION OF ITS LORS?

The California Energy Commission Staff Failed To Give Due Deference To The City And The Redevelopment Agency On Matters Within Their Jurisdiction and Expertise.

The Act is clear in its requirement that Energy Commission staff defer to the comments and recommendations of entities such as the City and the Redevelopment Agency on matters within their jurisdiction. Energy Commission guidelines section 1744 (e) states:

> Comments and recommendations by an interested agency on matters within that agency's jurisdiction shall be given due deference by Commission staff.(20 Cal. Code Reg. § 1744(e).)

Section 1744(e) promotes the sound state policy of recognizing the expertise of interested agencies on matters within their jurisdiction. This provision is not optional. The use of the term "shall" clearly indicates the mandatory nature of the required deference. Once an agency that would have had jurisdiction, but for the permitting jurisdiction of the Energy Commission, files comments and recommendations, the agency's comments and suggestions must be give due deference by the Commission staff.

The "Due Deference" Standard.

The meaning of "due deference" required by section 1744(e) is clear and unambiguous. The plain meaning provided in various dictionaries is "submission," "courteous yielding" and "yielding to the judgment of others."

The "due deference" standard is not a novel concept. California courts routinely give due deference to the determinations of administrative agencies on matters falling within their jurisdiction:

> When we review an agency's decision for consistency with its own general plan, we accord great deference to the agency's determination. This is

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

(*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142; see also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 373-374.)

Similarly, in his article “Chevron, Take Two: Deference to Revised Agency Interpretation of Statutes” (64 U Chi L. Rev 681 (1997)), David Gossett quotes the United States Supreme Court:

> The court continued in a footnote: “The Court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” Thus, if a statute is ambiguous and an agency’s interpretation of the statute is reasonable, a court must defer to the agency even if, in the court’s view, the agency is wrong.

(*Id.* at p. 7.)

Exceptions To The Due Deference Standard.

At various times the Commission has restricted the applicability of the due deference standard. Staff’s reply and comments to the PMPD in the Chula Vista Energy Upgrade Project proceeding (07-AFC-4) urged the Commission to defer to the City of Chula Vista

and spoke to the standard restrictions:

> The Commission has on occasion rejected a City's interpretation of its ordinances where such interpretation is implausible or result-driven, or where such ordinances implement what are in effect "permit-like" requirements.

The City's land use regulations have been in place for many years. There have been no changes to these regulations following the filing of the CECP's application. The Redevelopment Agency was established in 1976 and SCCRP, the redevelopment plan for the area which includes the proposed site of the CECP, was adopted in 2000. One need look no further than the Carlsbad Desalination Plant proceedings to see that the City's regulations are interpreted in a similar manner with respect to the CECP. The City's comments and recommendations regarding the CECP's non-conformance with state redevelopment and local land use LORS are not "result-driven."

The Commission Staff Asked For And Received Comments And Recommendations From The City.

On November 2, 2007, Commission staff filed a request for agency participation which sought comments and recommendations. Again, on March 26, 2008, staff requested the City's position on land uses in Carlsbad. The City responded to these requests with the following points:

a. <u>Land Use.</u>
   - City land use regulations require a complete update of SP 144 (*see* City Council Resolution No. 98-145).
   - The City Council could not make a General Plan consistency determination for the CECP.
   - The City's zoning regulations require a Precise Development Plan to determine consistency.
   - Compliance with the Agua Hedionda Land Use Plan should be achieved with a complete update of SP 144.

b. <u>Redevelopment Agency</u>

- Consistency with the Redevelopment Plan could be determined with an update of SP 144 and an application to the Redevelopment Agency.
- A finding of extraordinary public purpose would be required for consistency.

c. Coastal Act

- An update of SP 144 is required before conformance with the AHLUP or the Coastal Act could be determined.

(Exhibit 401.) In order to further educate the staff, City representatives traveled to Sacramento to meet with staff and to provide their opinions, findings and determinations regarding state redevelopment and land use regulations.

With regard to Fire Safety in the Worker Safety area, the Carlsbad Fire Department on many occasions attempted to obtain information necessary to enable it to assess the CECP's compliance with applicable fire safety regulations. (*See, e.g.*, Data Request 142, issued on March 23, 2009; Petition to Compel Response to Data Request 142; and letter from Chief Crawford to the CECP, dated March 30, 2009.)

Eventually, the failures of the CECP to provide required site information, to prosecute its SP 144 filing, to file with the Redevelopment Agency and to provide site information for fire safety compelled the City to perform its analyses without the benefit of the information ordinarily provided through those local processes.

The City's Formal Position Regarding The CECP's Lack Of Conformance With Redevelopment And Land Use Regulations.

On numerous occasions the City and Redevelopment Agency demonstrated to the Commission staff that construction and operation of the CECP would violate local land use regulations and would be inconsistent with the policies of the Redevelopment Agency. Following issuance of the FSA, the City gave a briefing to a joint meeting of the City Council and the Redevelopment Agency, which resulted in the adoption of two resolutions:

a. City Council Resolution No. 2009-323, dated December 22, 2009, which determined "that the proposed CECP does not comply with applicable land

use and related regulations." (Exhibit 400.) The City Council also determined that the CECP would create public safety impacts.

b. Housing and Redevelopment Commission of the City of Carlsbad Resolution No. 482, dated December 22, 2009, which found that "the proposed CECP does not comply with the South Carlsbad Coastal Redevelopment Plan from a land use compliance perspective . . . and does not provide for an extraordinary public purpose with related findings for such as required by the Plan." (Exhibit 401.)

These actions were taken because the staff failed to follow the clear mandate of section 1744(e) to give due deference to the City's and the Redevelopment Agency's comments and recommendations. Because staff failed to do so, the Committee, and the Commission, should accord the comments and recommendations of the City and the Redevelopment Agency the deference required by law and accept the considered opinions of these agencies on the matters within their jurisdiction.

Staff Failed To Follow And Violated The Spirit Of The Due Deference Requirement.

Energy Commission staff utilized an erroneous standard in considering the City's interpretation of its own regulations. On page 4.5-18 of the FSA, staff stated: "When determining LORS compliance, staff is permitted to rely on a local agency's assessment of whether a proposed project is consistent with that agency's zoning and general plan." (Emphasis added.) The staff's approach is wrong and clearly violates the Commission's own guidelines. Absent a showing of "result-driven" or permit-like regulations or determinations, the staff is required to give due deference to matters within the City or Redevelopment Agency's jurisdiction.

At the very least, staff should have considered the City's and the Redevelopment Agency's analyses. Staff made a consistency finding based "on the LORS consistency analysis conducted by staff." (FSA, page 4.5-18) There are sound policy reasons to consider a local agency's determinations, apart from the mandatory language of section

1744(e). Common sense dictates that significant weight should be give to the comments and recommendations of the agency which has the most experience in evaluating projects' compliance with the agency's own regulations.

This Commission gave valuable guidance regarding the application of section 1744(e) in the Final Commission Decision in the Eastshore Energy Center proceeding. After stating that public agencies are presumed to have performed their official duties consistent with the law, the Commission stated:

> The Energy Commission has recognized this presumption by requiring the staff to give due deference to a local agency's recommendations regarding a project's conformance with LORS under that agency's jurisdiction. In order to overcome this legal presumption, a party must demonstrate bias through more than just inference and mischaracterization.

(Eastshore Energy Center, Final Commission Decision, p. 330.)

The City's And The Redevelopment Agency's Determinations Are Reasonable And Are Based Upon Its Regulations And The Circumstances Associated With The CECP.

a. Carlsbad General Plan. The testimony of Mr. Donnell, lists the fourteen areas where the CECP is inconsistent with the City's General Plan. An example of this inconsistency is Pattern Goal A.1 where the city determined that the CECP "will not enhance the environment." (Direct Testimony, 1/4/2010, Donnell, pp. 9-12.)

b. Carlsbad Zoning Ordinance. Mr. Donnell testified that even though the land is zoned "PU," a development must be consistent with the city's General Plan, must give due regard is given to the environment and must provide public improvements. Mr. Donnell concluded that the CECP is inconsistent with the City's zoning regulations.

c. Precise Development Plan. A PDP is required to assure compliance with the goals and policies of the General Plan. Due, in part, to the total lack of public improvements, Mr. Donnell concluded that the CECP does not comply with its Precise Development Plan.

d. Redevelopment Commission. Ms. Fountain determined that the CECP is inconsistent with the Housing and Redevelopment Commission requirement that the project demonstrate extraordinary public purpose. (Direct Testimony, p. 12.)

e. City of Carlsbad Fire Marshal James Weigand noted California Fire Code section 503.2.2, which 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." Chief Crawford concluded that the CECP should not receive a decision allowing construction, but if the CEC decides to license this facility, it should require a fifty-foot lower road and a 25-foot upper perimeter road. (Direct Testimony, Weigand, p. 3; Crawford, p. 4.) The staff should have acknowledged the expertise of the City's Fire Department and afforded its conclusions due deference.

The Commission Should Defer To The City And The Redevelopment Agency In Evaluating The Positions Of Other Parties.

The same logic behind section 1744(e) extends beyond staff analysis to the Commission itself.

The recognition that the City and the Redevelopment Agency are in the best position to evaluate a project's conformance with their own regulations should extend to the consideration of other party's showings. Although the applicant can provide its views of the City's and the Redevelopment Agency's regulations, the applicant should be held to a high standard in overcoming the presumed correctness of the City's and the Redevelopment Agency's analysis.

The Commission Should Give Great Weight And Due Deference To The City's And The Redevelopment Agency's Determinations.

The Commission, as opposed to the staff, has recognized the unique position of local agency determinations on at least two occasions:

In the East Altamont Final Decision, 01-AFC-4, August 20, 2003, at page 368, the Commission stated:

> Based upon our review of the record, the Committee is persuaded that we must give appropriate deference to Alameda County's interpretation of the ECAP.

And in the Eastshore Energy Center Final Decision, 06-AFC-6, October 8, 2008, at page 451, the Commission stated:

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

What Remedies Are Available To The Committee To Ensure Compliance With The Due Deference Standard?

The Committee could strike or disregard those portions of the staff testimony that reach conclusions different from the City and the Redevelopment Agency where appropriate. The better path would be for the Committee to accept the City's and the Redevelopment Agency's positions, as seen in the Eastshore and East Altamont decisions. The fabric of Energy Commission regulation provides an "override" option if certain requirements are met. This is the appropriate remedy if the Commission determines the CECP is needed by the State of California but according due deference to the City and the Redevelopment Agency puts the project in doubt.

II.L. WHAT RELEVANCE AND WEIGHT DO THE COMMISSION'S NOTICE OF INTENT PROCEEDINGS IN 1989 AND 1990 HAVE IN THIS PROCEEDING?

In The Absence Of The Coastal Commission Report Required By Section 30413(D), The Conclusions Of The Coastal Commission Report Prepared For A Similar Facility Is Relevant To The Energy Commission's Consideration Of The CECP.

In 1989, SDG&E proposed to construct a 460 MW combined cycle power plant on the EPS site immediately to the west of the proposed CECP site. The SDG&E project was similar in some respects (size, shape, location and primary fuel source), but significantly different in others (the need to use once-through cooling), from the proposed CECP. As required by section 30413(d), that the SDG&E proposal was submitted to the Coastal Commission for review and, in 1990, the Coastal Commission submitted the required report to the Energy Commission. In that report, the Coastal Commission concluded that the proposed SDG&E plant would have significant adverse impacts to coastal resources.

In his direct testimony, the City's Coastal Act expert, Ralph Faust, testified to the many similarities between the CECP and the SDG&E project, as well as to the differences between them. (Direct Testimony, R. Faust, pp. 12-14.) Mr. Faust emphasized that even though the projects are in some respects different, there are many similarities as well, in particular with respect to the projects' visual impacts, marine resource impacts and cumulative access and recreation impacts. These impacts caused the Coastal Commission to find that the proposed SDG&E power plant would be inconsistent with the policies of the Coastal Act. As Mr. Faust made clear, the proposed CECP and the SDG&E project are sufficiently similar to lead to the conclusion that the Coastal Commission also would find the CECP inconsistent with the Coastal Act.

The 1990 report relied primarily on visual and aesthetic impacts and on marine biological impacts for its conclusion that the proposed SDG&E project was inconsistent with protection of coastal resources. The marine biological impacts are not as significant for the CECP as for the 1990 expansion, but because it is not necessary to

withdraw any water from the lagoon for plant cooling, the proposed CECP withdrawals are entirely unwarranted. Any significant withdrawals of water from the lagoon will have entrainment and impingement effects that will substantially harm marine life in the lagoon and thus be in conflict with the marine protection policies of the Coastal Act. Similarly, as is discussed separately, the mass and scale of the new project, with its industrial character, are completely at odds with protection of the "scenic and visual qualities" of the coast. (Pub. Res. Code § 30251.) Only in relation to the existing Encina facility is the proposed CECP part of an industrial context, but this industrial context has nothing to do with coastal scenic and visual resources.

The mass and height of the new CECP facility would further degrade these coastal scenic and visual resources. Even if the existing Encina facility were not slated to be shut down in 2017 pursuant to the SWRCB's OTC Policy, the CECP would be inconsistent with Public Resources Code section 30251, just as was the proposed SDG&E project in 1990. Indeed, the CECP does nothing to minimize the alteration of natural land forms, protect views to and along the ocean and scenic coastal areas or to restore and enhance the visual quality in visually degraded areas. Since the removal of the existing Encina facility can now be assumed, this inconsistency becomes all the more glaring when contrasted with what this area could become if it were utilized for a priority coastal use. In conclusion, just as was the case with the proposed SDG&E plant in 1990, the proposed CECP, located in the coastal zone, is inconsistent with the Coastal Act. It cannot be considered a coastal-dependent facility since it does not require a site adjacent to the sea to be able to function. Therefore, the proposed CECP cannot be approved at a location in the coastal zone consistent with the Coastal Act and the protection of coastal resources.

III. OTHER ISSUES

III.A. WHAT IS THE RELEVANCE, IF ANY, OF THE STATUS OF ELECTRICITY PURCHASING CONTRACTS FOR CECP'S OUTPUT TO THE COMMISSION'S EVALUATION OF THE AFC?

Having a power purchase agreement is not a requirement for power plants licensed by the CEC. However, it is a clear indicator of whether a power plant is likely to be built and, if built, whether the power will actually be used or the facility was a waste of resources and source of impacts with no corresponding benefit to society.

A power purchase agreement between a utility and a power plant operator and approved by the California Public Utilities Commission is a clear demonstration on whether a local utility expects to use the power generated by a specific facility and how that facility fits into their short and long-term operations given the specific needs of their service area. As Mr. McCleary pointed out during the hearings:

> The Public Utilities Commission will look at this resource presumably as part of the long-term procurement plan proceeding, which is informed by the demand and supply planning that takes place at this Commission as well as the system reliability and transmission analyses that are performed by the California independent system operator. The Public Utilities Commission then reviews and approves long-term plans by each of the investor-owned utilities in conformance with those approved plans; the utilities conduct requests for offers or competitive auctions for power plants to meet the needs identified in the long-term procurement plan. After the results of those competitive auctions are in, the costs and the terms of the contract are brought to the Public Utilities Commission for final approval with an advisory process that includes rate-payer groups, although it does not include other market participants. So at the end of that process, you have a contract with – between the operator of a plant

> and the utility with the costs being set by the Public Utilities Commission, and cost recovery is not assured to the operator of the plant.
>
> 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… (RT, 2/3/10, p. 157.)

The CEC Staff witnesses emphasized this point by saying:

> 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. (RT, 2/3/10, p. 258.)
>
> 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. (RT, 2/3/10, p. 341.)

The lack of a power purchase agreement heightens questions on whether the continued long-term non-coastally dependent industrial use in the coastal zone, serious public safety concerns, and lack of conformance with the City's General Plan and visual standards is an appropriate use of this critical parcel.

IV. CONDITIONS OF CERTIFICATION

IV.A. DISCUSS THE CHANGES PROPOSED TO THE STAFF-RECOMMENDED CONDITIONS OF CERTIFICATION BY STAFF, THE APPLICANT OR ANY OTHER PARTY.

Proposed Conditions Of Certification

Based on a comprehensive review of the proposed application for the CECP, the City and the Redevelopment Agency have concluded that the proposed CECP does not comply with and/or is not consistent with all of the applicable planning and land use documents, including the General Plan and Coastal Act, and does not provide for the extraordinary public benefits required by the South Carlsbad Coastal Redevelopment Plan.

Both the City and the Redevelopment Agency have demonstrated in their respective testimony, written documentation and briefs provided over the past several years that if constructed, the proposed CECP will have significant negative impacts on the community, and those impacts have not been appropriately mitigated in the conditions of certification proposed by the CEC.

Recognizing that the CEC may approve the subject project over the objection of the City and the Redevelopment Agency, at a minimum it is critical that the CEC place appropriate conditions on the proposed CECP to address the City's and the Redevelopment Agency's land use and related concerns, include Coastal Act inconsistencies, and to provide the required extraordinary public benefits. From a very basic land use policy standpoint, the project should comply with at least the City of Carlsbad's General Plan Land Use Element policies and findings and Coastal Act land use priorities for coastal dependent industry and visitor-serving commercial recreational facilities. The proposed CECP does not currently comply with the following General Plan land use policies and the CEC has proposed no conditions to address the policies noted below:

a. A City which preserves and enhances the environment, character and image of itself as a desirable residential, beach and open space oriented community (Overall Land Use Pattern Goal A.1).

b. A City which provides for an orderly balance of both public and private land uses within convenient and compatible locations throughout the community and ensures that all such uses, type, amount, design and arrangement serve to protect and enhance the environment, character and image of the City (Overall Land Use Pattern Goal A.2).

c. Ensure that the review of future projects places a high priority on the compatibility of adjacent land uses along the interface of different density categories. Special attention should be given to buffering and transitional methods, especially, when reviewing properties where different residential densities or land uses are involved (Overall Land Use Pattern Policy C.3).

d. Screen all storage, assembly, and equipment areas completely from view. Mechanical equipment, vents, stacks, apparatus, antennae and other appurtenant items should be incorporated into the total design of structures in a visually attractive manner or should be entirely enclosed and screened from view (Land Use Element Industrial Policy C.14).

City/Agency Conditions Schedule A outlines the conditions of certification proposed by the City and Redevelopment Agency to address identified concerns regarding consistency with applicable land use policies, the negative impacts the CECP will have on the community, and to provide the extraordinary public benefits required for said project according to the South Carlsbad Coastal Redevelopment Plan.

It is important to note that in no way does the City and the Redeevelopment Agency believe that adoption of these conditions means the City or the Redevelopment Agency recommends the Commission approve this project. For reasons stated throughout its testimony, the City and the Redevelopment Agency firmly believe that it is inappropriate to locate this project on this site.

Attachment 1 outlines those conditions of certification supported by the City and the Redevelopment Agency as currently proposed by the CEC. The chart also indentifies the proposed CEC conditions of certification that the City and the Redevelopment Agency request be modified or revised as noted to address their concerns regarding impacts to be created by the proposed CECP.

City/Agency Conditions

Proposed City Of Carlsbad And Redevelopment Agency Conditions For The CECP

The City of Carlsbad and the Carlsbad Redevelopment Agency recommend the following Conditions of Certification be required in the event the Energy Commission approves the proposed CECP[8]:

EPS Removal

Impact - CECP represents an expansion or intensification of an industrial use which will have a negative financial impact on the community and is not consistent with the redevelopment goals for this neighborhood and the larger community. It does not conform to existing LORS including the General Plan, South Carlsbad Coastal Redevelopment Plan and California Coastal Act.

Proposed Condition 1

NRG shall, as a condition of the CECP replacing all or a portion of the Encina Power Station, demolish the Encina Power Station including its stack and turbine/generator buildings at such time as those facilities are no longer operational but no later than January 15, 2018. To ensure sufficient funds are available for that demolition, NRG will undertake a study of the estimated costs of demolition and establish an account and deposit sufficient funds for the demolition. The results of the study will be submitted to the CPM for approval no later than one year after licensing of the CECP by the Energy Commission with payment in full prior to the start of CECP's construction.

[8] In no way does the City and Agency believe that adoption of these conditions means the City or Agency recommend the Commission approve this project. For reasons stated throughout its testimony, the City and Agency firmly believe that it is inappropriate to locate this project on this site.

Coastal Access Enhancement

Impact - The CECP is a non-coastally dependent industrial use which does not conform to the policies of the Coastal Act and deprives the community of the development of appropriate visitor-serving commercial uses and other public benefit amenities, including recreational areas. Furthermore, as proposed, the CECP does not provide or improve coastal access for the public.

Proposed Condition 2

NRG 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. NRG will fully remediate the dedicated land at no cost to the Agency. NRG will also dedicate to the Agency such land as is necessary to provide public access to the 20 acres from Carlsbad Blvd. at no cost to the Agency. Land dedications will be made prior to the start of CECP's construction.

Proposed Condition 3

NRG shall dedicate a minimum of 28 acres of land on the existing Encina Power Station site to the City of Carlsbad at no cost to the City. Dedicated land shall be fully remediated, if necessary, prior to dedication to the City.

Proposed Condition 4

NRG shall construct public improvements to facilitate access and recreation as determined by the City at no cost to the City. NRG shall contribute no less than $10 million toward these improvements, which may include enhancements such as public parking lots, lagoon access, signalized or other safe pedestrian crossings of Carlsbad Boulevard, restrooms, and paths. Improvements will be paid in full prior to the start of commercial operations. NRG shall provide an additional $2 million per year for construction of public improvements for each calendar year the existing power plant operates past calendar year 2012 to compensate the community for the loss of use of said property for visitor-serving commercial uses and other public benefit amenities, including additional recreational areas.

Building Permit

Proposed Condition 5

NRG shall be required to obtain appropriate building permits from the City of Carlsbad, and shall pay 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. NRG shall also pay any applicable Local Facilities Management Plan fee for Zone 3 and Zone 13, pursuant to Chapter 21.90. All such taxes/fees shall be paid at issuance of building permit.

Proposed Condition 6

If the CECP precedes construction of the desalination plant, NRG shall be required to fulfill all conditions of approval required of the "Owner" to fulfill or those which the "Developer shall cause Owner or its successor in interest" to fulfill, all as expressed in Planning Commission Resolution No. 6088 for PDP 00-02.

Noise Impact

Proposed Condition 7

Prior to the start of commercial operations, NRG shall be required to fund all related costs for the installation of improvements required for a railroad quiet zone in the area of the proposed CECP (Carlsbad Village Drive, Tamarack Avenue, and Cannon Road).

Worker Safety Conditions

Impact - NRG has proposed a project, the CECP that represents a significant risk to fire fighting and civilian personnel due to inadequately sized access roads and points. Emergency access to the CECP is not adequate and presents a significant constraint to fire personnel's response to protect the CECP personnel, the citizens of Carlsbad and visitors and property. Potential harm to humans is the top priority.

Proposed Condition 8

NRG shall redesign the CECP to include 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).

Proposed Condition 9

NRG shall submit a fire suppression system that is appropriate for the proposed industrial use and is approved by the Carlsbad Fire Department.

Visual and Blight Conditions

Impact - CECP represents a continuation of visual blight for the community. It does not conform to existing LORS including the General Plan and its design represents a significant departure from the aesthetic value that the Community has committed itself to for the past 50 years. The CECP also fails to achieve the goals and objectives set forth in the South Carlsbad Coastal Redevelopment Plan as established by the Carlsbad Redevelopment Agency. If constructed, the CECP will continue to be a source of blight for the South Carlsbad Coastal Redevelopment Area. Furthermore, The CRA has determined that as proposed, the CECP would not provide any extraordinary public benefit as is required.

Proposed Condition 10

NRG shall contribute not less than $5 million dollars to the Redevelopment Agency to be used for public improvements in the SCCRA. This contribution shall be made in full prior to the operational in-service date of the CECP.

Proposed Condition 11

NRG shall assist SDG&E/Sempra to relocate the EPS switchyard east of Interstate 5 concurrent with construction of the CECP, and to underground the electrical lines through the strawberry fields/SDG&E property. The location of the new switchyard shall be subject to approval by the City of Carlsbad and Carlsbad Redevelopment Agency.

Proposed Condition 12

NRG shall modify and/or enhance the design of the CECP to the satisfaction of the City and Redevelopment Agency to address the City of Carlsbad's applicable General Plan policies that require the quality screening of mechanical equipment, vents, stacks,

apparatus, antennae and other appurtenant items and to enhance the appearance of the project and eliminate a blighting influence. Integration of the equipment and related facilities into a Class A type office buildings is the most desirable design enhancement. Landscaping and other screening may be acceptable if these quality-designed enhancements meet the policies of the General Plan.

Proposed Condition 13

NRG shall improve the landscaping and fencing on the perimeter of their property to aesthetically enhance the area as a temporary measure until such times as the property can be redeveloped. Condition 13.b. of Planning Commission Resolution 6088 for PDP 00-02 shall be used as an example of relevant specifics

Land Use Conditions

Impact - The CECP as proposed does not comply with the applicable LORS, including the Coastal Act, the South Carlsbad Coastal Redevelopment Area Plan, and the City of Carlsbad's General Plan.

Proposed Condition 14

NRG shall revise the approved Precise Development Plan document for PDP00-02, including all text, development and land use standards, and graphics to reflect the CECP approval, with substantial written evidence to approve the precise development plan amendment, and shall submit said revised Precise Development Plan to the City and Agency for approval prior to construction.

Proposed Condition 15

NRG shall submit all final grading, building construction and landscape and irrigation drawings to the City of Carlsbad and Carlsbad Redevelopment Agency for review prior to approval of project for construction, and shall satisfactorily incorporate all comments of the City and Agency into any required redesign and/or corrections to said plans.

Proposed Condition 16

NRG shall financially participate and cooperate in the planning, dedication, and improvement of any future public pedestrian and bicycle paths between property and

the east side of Interstate 5 and the beach. This may include a path or paths underneath or over the interstate and along the south shore of Agua Hedionda Lagoon to Carlsbad Boulevard.

Proposed Condition 17

NRG shall have the entire drainage system designed, submitted to, and approved by the City Engineer, to ensure that runoff resulting from 10-year frequency storms of 6 hours and 24 hours duration under developed conditions, are equal to or less than the runoff from a storm of the same frequency and duration under existing developed conditions. Both 6-hour and 24-hour storm durations shall be analyzed to determine the detention basin capacities necessary to accomplish the desired results. Prior to the issuance of any certificate of occupancy, NRG shall demonstrate to the satisfaction of the City Engineer that site drainage from the new impervious surfaces which are part of the CECP has been captured for "source water intake for filtration and ultimate domestic use".

Proposed Condition 18

Prior to the issuance of any grading or building permits, NRG shall pay any required Planned Local Drainage Area (PLDA) fee as established in the Drainage Master Plan adopted by the City of Carlsbad at time of grading or building permit issuance for the portion of the property occupied by the CECP.

Proposed Condition 19

Prior to hauling dirt or construction materials to or from any proposed construction site within this project, NRG shall apply for and obtain approval from the City Engineer for the proposed haul route.

Soil and Water Conditions

Impact - The CECP as proposed would use ocean water for industrial purposes which hinders the successful implementation of the State Water Board policy to curtail the use of Once through Cooling for power plants.

Proposed Condition 20

NRG shall connect to the Carlsbad Municipal Water District system for reclaimed water. NRG will make all necessary reclaimed water system improvements as determined by the District at no cost to the District.

V. OVERRIDES

Discuss Whether The Commission Should Adopt Overrides And If So, On What Grounds, Citing Specific Facts And Conclusions Justifying An Override.

There are two types of "overrides" which may come into play in a power plant siting case. The first arises under CEQA and is required whenever a proposed project will have significant environmental impacts which cannot be reduced or avoided by feasible mitigation measures or alternatives. The second arises under the Act and is required whenever a proposed project does not conform to state or local LORS.

Under CEQA, where a proposed project will result in significant environmental impacts that cannot be mitigated, the project cannot be approved unless the agency finds (1) there are no feasible alternatives which could avoid or substantially lessen the unmitigated significant impacts, and (2) such impacts are acceptable due to overriding concerns. (Pub. Res. Code § 21002; 14 Cal. Code Reg. § 15092(b)(2).) In arriving at these overriding considerations, the agency must balance, as applicable, "the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project." (14 Cal. Code Reg., § 15093(a).) If, in the agency's judgment, the benefits of the proposed project outweigh the adverse environmental impacts, the impacts may be considered "acceptable" and the project may be approved. (Ibid.)

Under the Act, where a proposed project does not conform to state or local LORS, the Commission cannot license that project unless it determines that (1) the project is required for "public convenience and necessity," and (2) there are not more prudent and feasible means of achieving such public convenience and necessity. (Pub. Res. Code § 25525; 20 Cal. Code Reg. § 1752(k).) This determination must be based on the totality of the evidence of record and must consider environmental impacts, consumer benefits and electrical system reliability. (*Ibid*.) In essence, a project's lack of conformity with LORS must be balanced against its anticipated benefits.

Although the two statutory schemes require separate and different findings, both types of overrides require a similar balancing of benefits and impacts, as well as the consideration of feasible alternatives. These matters are addressed in the following discussion.

Overrides Under CEQA

The Benefits Of The CECP Do Not Outweigh Its Unavoidable Significant Impacts On The Environment.

The FSA concluded the CECP would have no unmitigated significant environmental impacts because all of the project's impacts could be mitigated below significance by the recommended conditions of certification. (FSA, p. 1-6.) However, as discussed in section 1.A above, this conclusion is incorrect and the CECP in fact will have unmitigated significant impacts on Land Use, Worker and Fire Safety, Visual Resources and Soil and Water Resources.

Where the impacts of a project are significant even after the application of all feasible mitigation measures, the project cannot be approved unless the agency determines that there are no feasible alternatives which could avoid or substantially lessen any of the unmitigated impacts. (14 Cal. Code Reg. §§ 15091(a)(3), 15092(b)(2)(A).) "Feasible" means capable of being accomplished within a reasonable time, taking into account economic, environmental, legal, social and technological factors. (14 Cal. Code Reg. §§ 15091(a)(3), 15364.) Siting the proposed project at an alternative location would avoid or substantially lessen the CECP's unmitigated significant impacts, and there is no evidence the alternative locations are infeasible.

The evidence shows the Carlsbad Oaks North Alternative (Oaks North) would avoid or substantially reduce the CECP's unmitigated significant impacts on Land Use, Worker and Fire Safety, and Visual Resources. The Oaks North site consists of 55 acres located on the eastern edge of the City's industrial corridor in a Planned Industrial Zone. (RT, 2/03/10, 439-441 [J. Garuba].) In the event the site required any changes in other land use regulations, the City has indicated its willingness to make such changes to

accommodate the CECP at that location. (*Id.* at p. 454.) The 55-acre size of the Oaks North site also would avoid the unmitigated impacts to Worker and Public Safety which result from emergency access problems inherent in the much smaller, highly constrained nature of the proposed CECP site. In addition, the topography of the Oaks North site, the City's willingness to underground transmission lines, and the substantially reduced amount of traffic in the area would substantially reduce visual impacts in general and would entirely avoid the impacts to coastal views associated with the CECP's proposed site. (*Id.* at pp. 441, 450, 483, 487-488.)

The evidence also shows the "No Project" Alternative would avoid all of the CECP's unmitigated significant impacts and would accomplish most of the project objectives. Under the "No Project" Alternative, the CECP would not be built, existing uses and activities in the project area would continue, and the CECP's unmitigated significant impacts on Land Use, Worker and Fire Safety, Visual Resources and Soil and Water Resources would be avoided.

Unlike other types of projects in which the "no project" alternative often is infeasible because it would not achieve fundamental project objectives, the "No Project" Alternative here would achieve <u>all</u> of the important project objectives identified in the FSA. First, it would achieve the fundamental project objective "to meet the electrical resource needs as defined by SDG&E." (AFC, 07-AFC-06, p. 2-1.) The evidence shows SDG&E recently engaged in an RFO process to address its power generation needs. (RT, 2/03/10, pp. 394, 448-449 [J. Garuba].) After the close of the CECP public hearings, the City learned that SDG&E awarded an offer to the Pio Pico project, which recently filed an application for certification with the Commission. (*See* Pio Pico Energy Center, 2010-AFC-01.) Staff confirmed that 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 . . . by any replacement capacity anywhere in the San Diego area." (RT, 2/03/10, p. 325 [D. Vidaver]; *see also* pp. 203 [Layton], 212-213 [McIntosh].) Thus, the "No Project" Alternative would meet the fundamental objective of the project to meet the electrical resource needs as defined by SDG&E.

The “No Project” Alternative also would meet other important project objectives, such as “facilitating the retirement of aging and inefficient EPS Units 1 through 3” and “eliminating the daily need for millions of gallons of ocean water for once-through cooling and any associated biological impingement and entrainment impacts.” (FSA, p. 3-3.) In the RFO, SDG&E stated its intent to retire aging infrastructure plants that utilize once-through cooling. (RT, 2/03/10, p. 449 [J. Garuba].) SDG&E’s selection of the Pio Pico project, and not the CECP, confirms the “No Project” Alternative meets the former objective; and the SWRCB’s adoption of the OTC Policy, which requires the termination of once-through cooling at EPS Units 1 through 5 by 2017, with or without the CECP, ensures the “No Project” Alternative will meet the latter objective.

The “No Project” Alternative also would meet the project objective of “providing short and long-term employment for skilled labor in [the] region” because SDG&E’s offer to the Pio Pico project indicates such employment opportunities will occur in the region even without the CECP. (FSA, p. 3-3.) The only project objectives the “No Project” Alternative would not meet are “using existing EPS infrastructure” and “interconnecting to the adjacent SDG&E electricity system and upgrading the utility’s transmission facilities.” (*Ibid.*) However, these objectives are of only slight importance, especially in light SDG&E’s determination that its electrical resource needs would be better met by a project other than the CECP. Accordingly, “No Project” is a feasible alternative which meet most of the project objectives and would avoid the project’s unmitigated significant impacts.

Because there are alternative sites which could avoid or reduce the project’s unmitigated significant impacts, the CECP cannot be approved unless there is substantial evidence that the alternatives are infeasible. (Pub. Res. Code § 21002.) In order to approve the CECP, therefore, the Commission must make specific findings, supported by substantial evidence, that each of the alternatives is infeasible. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1256.)

There is not substantial evidence in the record that either the Oaks North Alternative or the “No Project” Alternative is infeasible. Although the FSA makes references to the

fact that the alternative locations would have to connect to transmission lines some distance away and would not be able to take advantage of the existing EPS infrastructure, there is no evidence this would render the Oaks North Alternative financially infeasible. The fact that an alternative may be more expensive than the proposed project "is not sufficient to show that the alternative is financially infeasible." (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 883.) In fact, staff did not consider costs in assessing the alternative locations (RT, 2/03/10, p. 476 [Vahidi]) and omitted several significant infrastructure costs in their analysis of the CECP. (RT, 2/03/10, pp. 475-477 [Siekmann].) Similarly, while an alternative may be infeasible if it would not achieve fundamental project objectives, the evidence discussed above shows the Oaks North and "No Project" alternatives could meet all of the most important objectives of the project.

Assuming, for the sake of argument, that the alternatives were infeasible, the benefits of the CECP would not outweigh its adverse environmental impacts. The project benefits identified in the FSA, which are virtually identical to the project objectives, are illusory in that they will occur even if the CECP is denied. (FSA, p. 1-7.) As discussed above, the "retirement of existing EPS Units 1 through 3" and "eliminating the daily need for millions of gallons of once-through ocean-water cooling and its associated fish impingement and biological impacts" will be achieved through the SWRCB's OTC Policy and SDG&E's offer to the Pio Pico project. Similarly, SDG&E's selection of the Pio Pico project, and not the CECP, will meet "the need for new, more efficient, reliable electrical generating resources" in the San Diego region, thereby allowing the phasing out of aging coastal power plants like Encina.

The purported benefit of "accomplishing a brownfield (land that has already been developed as an industrial use) redevelopment of an existing power plant" is not a benefit at all, but instead is a backward-thinking concept which is directly contrary to the adopted redevelopment plan for the area. If the CECP is not approved, the Redevelopment Agency can use its powers as an administrative arm of the State to restore the Encina site to a "greenfield" use as soon as Units 1 through 5 are retired pursuant to the SWRCB's OTC Policy. (RT, 2/03/10, pp. 492-493 [J. Garuba].)

The public testimony of numerous concerned citizens received during the February hearings clearly established that locating the CECP at the proposed site would not be a public benefit to the surrounding community. Whatever minimal benefit might accrue from using the existing EPS infrastructure would be vastly outweighed by the CECP's incompatibility with the community character and state and local land use and redevelopment LORS. (RT, 2/03/10, pp. 445-446 [J. Garuba].)

The use of Encina's existing infrastructure should be accorded little weight as a project benefit because, in reality, it would be a serious burden to the community. The CECP's incompatibility with the surrounding area and its non-compliance with state and local LORS clearly outweigh the value of continuing to devote a valuable coastal site to a use which is contrary to the Coastal Act and the SWRCB's OTC Policy. This is not a "NIMBY" situation. Having shouldered the burden of hosting the existing Encina facility for over 50 years, the City simply asks that its recommendation regarding the location of a new power plant be accorded due deference. After all, "we're the ones that are going to have to live with it." (RT, 2/03/10, p. 452 [J. Garuba].)

Overrides Under The Warren-Alquist Act

The CECP fails to deliver sufficient local or statewide benefits to pass the public convenience and necessity test.

Because The CECP Will Not Comply With State And Local Laws, Ordinances, Regulations And Standards, The Commission Must Make "Override" Findings If It Intends To Approve The Project.

Public Resources Code section 25525 provides:

> The Commission shall not certify any facility when it finds . . . that the facility does not conform with any applicable state, local or regional standards, ordinances, or laws, unless the commission determines that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity. In making the determination, the commission

shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

The authority to override a project's non-compliance with LORS has rarely been invoked by the Commission. There have been only four recent proceedings where the project has been able to meet the override standard:

Morro Bay Power Plant Project (00-AFC-12)	June 15, 2004 (PMPD)
The Metcalf Energy Center (99-AFC-3)	September 2001
El Segundo Power Redevelopment Project	February 2005
Los Esteros Critical Energy Facility II	October 2006

The Eastshore Energy Center proceeding (06-AFC-6) is also instructive as the Commission considered and rejected an override request.

The Proposed CECP Does Not Comply With Applicable State, Local Or Regional LORS.

There are four distinct areas where the facility does not conform to local or state LORS. Staff has requested override findings for Land Use and the City has established the CECP also fails to comply with the laws and regulations of the South Carlsbad Coastal Redevelopment Agency, the California Coastal Commission and the determination of the City of Carlsbad Fire Department.

a. Land Use. Mr. Donnell testified that the CECP will be inconsistent with a number of the City's land use regulations, including its General Plan, Specific Plan 144, Zoning Code and Precise Development Plan. The Carlsbad City Council unanimously passed Urgency Ordinance CS-067 concerning these inconsistencies. Staff acknowledged that an inconsistency exists and asked the Commission to make an override determination. Both staff and the applicant claim the CECP conforms with the City's regulations, relying almost

entirely on zoning considerations. However, the zoning designations are only part of the LORS determination and, as a merchant facility, the CECP is not a public utility and cannot partake of "U" or "PU" zoning.

b. Carlsbad Redevelopment Agency. Both Mr. Kane and Ms. Fountain testified that the CECP will not satisfy the requirements of the South Carlsbad Coastal Redevelopment Plan. They testified that the CECP does not meet the "extraordinary public purpose" requirement and does not comply with other land use regulations. The Housing and Redevelopment Commission passed Resolution 482, which confirmed that the Housing and Redevelopment Commission concurs with the testimony of the City. (Exhibit 401.) Staff again relied on the "U" and "PU" zoning designations and the decommissioned tanks in their analysis. The CECP listed public purposes, but the testimony of Mr. Kane and Ms. Fountain described these "benefits" as normal for any power plant and not "extraordinary" in any sense.

c. California Coastal Commission. Mr. Faust testified that, in his expert opinion, the CECP is not a "coastal-dependent" facility. He and Mr. Barberio testified that the CECP also is not consistent with the several important policies of the Coastal Act. One of the basic observations of these witnesses was that the CECP is not a coastal dependent facility and it proposed location on the coast could not be approved under the Coastal Act. Disregarding both the Coastal Act and the SWRCB's OTC Policy, staff relied on the closure of Encina Units 1-3 (a foreseeable event in any case) and testified that the use of once-through-cooling water made the CECP a coastal-dependent facility.

d. Worker Safety. Fire Marshal Weigand noted, at page 3 of his prepared testimony, that California Fire Code section 503.2.2 provides a local fire official "shall have the authority to require an increase in the minimum access widths where they are inadequate for fire and rescue operations." The Fire Department chiefs recommended a 50-foot width for the lower perimeter road and a 25-foot width for the upper rim road. Staff's testimony went to the

> safety record of power plants, and the CECP witnesses testified that the plant will be safely designed. The City does not dispute that the CECP will be designed with safety in mind and that power plants have a good safety record in California. Nevertheless, when an incident occurs, the results can threaten lives and property of CECP workers, the general public, and emergency response personnel. The experience of the City's fire officials is that reliance on fire suppression systems, to the exclusion of provisions for adequate access for emergency equipment, is a recipe for disaster.

The Commission must make at least four separate override determinations because the CECP's lack of consistency involves different laws and regulations. While the FSA dealt with the Coastal Commission and Redevelopment Agency in its land use analysis, the Coastal Act and the Community Redevelopment Law are state, not local, laws and are administered by agencies which are distinct legal entities from the City.

How Should The Commission Interpret "Public Convenience And Necessity"?

The Commission has consistently recognized that the term "public convenience and necessity" comes from Public Utilities Code section 1001. There is no single definition of the term and the Commission has a certain amount of discretion in its interpretation: "It is well-settled by the judicial decisions interpreting Section 1001 that 'public convenience and necessity' has a broad and flexible meaning, and that the phrase 'cannot be defined so as to fit all cases.'"

(El Segundo Power Redevelopment Project, Final Decision, p. 296, *citing San Diego & Coronado Ferry Co. v. Railroad Commission* (1930) 210 Cal. 504, 511.)

Further, the Commission needs to approach an override cautiously. In applying the discretion described above, the Commission has previously stated that a LORS override is "an extraordinary measure which . . . must be done in as limited a manner as possible." (Eastshore Energy Center, 06-AFC-6, Final Decision, p. 453, *citing* Metcalf Energy Center, 99-AFC-3, Final Decision, p. 469.)

The CECP Has The Burden Of Proof In Demonstrating Compliance With State And Local LORS.

Commission regulations require that the applicant carry the burden of proof:

> The applicant has the burden of proof and producing evidence on each of the following:
>
> A reasonable likelihood that the construction and operation of the proposed facilities will comply with the federal, state, regional and local laws, standards, ordinances and land use plans which are applicable to the proposals.

(20 Cal. Code Reg. § 1723.5(a)(6).)

The Commission, for its part, is to consider "the totality of the evidence" In the record. (Pub. Res. Code § 25525; *see also* Los Esteros Critical Energy Facility II, Final Decision, p., and Eastshore Energy Center, Final Decision, p. 452.)

Commission Determinations Of Override Have Given Great Weight To The State's Need For Additional Power Generation As Enunciated In The Latest Integrated Energy Policy Report.

The Commission has only rarely determined that an override determination has been necessary. Where it has, a common thread in those decisions is the need for additional generation capacity either state-wide or for local area support. For example:

- ". . . California and the greater San Jose area face potentially serious electricity shortages" … "the San Jose/Silicon Valley area will at some point between 2003 and 2008 fail to meet WSCC criteria for prevention of voltage collapse and criteria for local area generation."

  (Metcalf Energy Center, Final Decision, September 21, 2001, p. 99.)

"Furthermore, the Commission's Integrated Energy Policy Report recognizes the need for increased supplies of electrical energy throughout the state within the next few years."

(Morro Bay Revised PMPD, June 15, 2004, p. 594.)

- ". . .the Commission's Integrated Energy Policy Report recognizes the need for increased supplies of electrical energy, especially in Southern California. . ."

  (El Segundo Power Redevelopment Project, February 3, 2005, p. 297.)

- "The Commission's 2005 Integrated Energy Policy Report conclusively established that substantial additions to the state's generating system are needed."

  (Los Esteros Critical Energy Facility II, Phase 2, October 11, 2006, p. 368.)

The 2009 Integrated Energy Policy Report does not contain a similar conclusion. To the contrary, the 2009 IEPR recognized that demand has dropped by over three percent both statewide and in the San Diego areas and noted that:

> The current forecast is markedly lower than the forecast in the 2007 Integrated Energy Policy Report, primarily because of lower expected economic growth in both the near and long term as well as increased expectations of savings from energy efficiency.
>
> (2009 Integrated Energy Policy Report, p. 3.)

The 2009 IEPR also stated that: "A lower demand forecast would require fewer central station generating facilities within load pockets to satisfy reliability criteria." (*Id.* at p. 176.)

Although the entire third chapter of the 2009 IEPR focuses on "Challenges to Achievement of a Vision for California's Future Electricity System," it does not make any mention of an urgent need for additional generation statewide or in the San Diego region. Instead, the report discusses the importance of the "loading order" and various

aspects of the future electricity system envisioned for the state, and the current and anticipated studies needed to deal with these issues

The Lack Of A Power Purchase Contract Is Another Indication That The CECP Is Not Necessary.

A merchant power plant is one that does not have an agreement with a utility to purchase the energy produced and instead relies on the market for the sale of its product. The record in this proceeding is bereft of any evidence that the CECP has a power purchase agreement with SDG&E. In fact when given the opportunity to state for the record that the CECP has such an agreement, NRG declined to do s.

The City acknowledges that a power purchase agreement is not a requirement for power plants licensed by the Commission or approved with an override. Of the five power plants where overrides were considered since deregulation, four of them were merchant plants and were approved with an override. Only one, Eastshore, had a power purchase agreement that the applicant later terminated. In denying an override in that case, the Commission stated that: "Power Purchase Agreements do not supersede LORS or vitiate the Energy Commission's authority to weigh the project's benefits against the LORS inconsistencies." (Eastshore Energy Center, 06-AFC-6, Final Decision, p. 460.)

However, a power purchase agreement approved by the California Public Utilities Commission is a clear demonstration of whether a local utility expects to use the power generated by a proposed facility and how that facility fits into their short and long-term operations given the specific needs of the service area. As Mr. McCleary pointed out during the hearings:

> The Public Utilities Commission will look at this resource presumably as part of the long-term procurement plan proceeding, which is informed by the demand and supply planning that takes place at this Commission as well as the system reliability and transmission analyses that are performed by the California independent system operator. The Public Utilities

> Commission then reviews and approves long-term plans by each of the investor-owned utilities in conformance with those approved plans; the utilities conduct requests for offers or competitive auctions for power plants to meet the needs identified in the long-term procurement plan. After the results of those competitive auctions are in, the costs and the terms of the contract are brought to the Public Utilities Commission for final approval with an advisory process that includes rate-payer groups, although it does not include other market participants. So at the end of that process, you have a contract with – between the operator of a plant and the utility with the costs being set by the Public Utilities Commission, and cost recovery is not assured to the operator of the plant.
>
> 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….
>
> (RT, 2/03/10, pp. 157-158.)

The staff witnesses emphasized this point in their testimony:

> MR. LAYTON: Again, 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.
>
> (RT, 2/03/10, p. 258, ll. 21-24.)
>
> 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.
>
> (RT, 2/03/10, p. 341, ll. 5-10.)

In the case of the San Diego load pocket, SDG&E issued a request for offers in June of 2009. SDG&E selected a short list in November of 2009, and is presumably negotiating

with the selected developers for system capacity and energy. SDG&E will likely continue their process regardless of the Commission's actions in this proceeding. There can be no presumption that the CECP will be constructed even if the Commission overrides the LORS inconsistencies and approves the application. The City believes it is not in the interest of the State of California to license an unneeded fossil fuel plant in a coastal location. At the very least, the Commission must take into account the merchant nature of this facility in its analysis.

The lack of a power purchase agreement also raises questions on whether the other project deficiencies, including the continued long-term industrial use of the coastal zone, the public safety concerns, and the lack of conformance with the City's General Plan and vision for this critical parcel, make the CECP an inappropriate candidate for the overrides needed to approve it.

An Override In This Case Cannot Be Supported Based On The Necessity For The CECP To Integrate Renewables, Retire Once-Through Cooling Power Plants, Or Reduce GHG Emissions.

Rather than discussing the need for additional generation as has been the pattern for the most of the previous documents, the 2009 IEPR discussed challenges associated with changes in the electricity system such as the need for energy efficiency, to reduce GHG emissions, to add more renewable generation, to integrate renewables into the grid, and to eliminate once-through cooling power plants.

With respect to renewable integration, the 2009 IEPR stated on pages 110 and 111 that:

> …as California's integrated electricity system evolves to meet GHG emissions reduction targets, the operational characteristics associated with increasing renewable generation will increase the need for flexible generation to maintain grid reliability. The report asserts that natural gas-fired power plants are generally well-suited for this role and that California cannot simply replace all natural-gas fired power plants with

> renewable energy without endangering the safety and reliability of the electric system. The report acknowledges that California will need to modernize its natural gas generating fleet to reduce environmental impacts, however. Overall, the report found that the future of natural gas plants will likely fill five auxiliary roles: 1) intermittent generation support, 2) local capacity requirements, 3) grid operations support, 4) extreme load and system emergencies support, and 5) general energy support.

The 2009 IEPR went further on page 111, however, by concluding that: "The question remains as to the quantity, type, and location of natural gas-fired generation to fill remaining electricity needs once preferred resource targets are achieved."

Regarding renewables integration, the hearings established that the CECP has some characteristics that may be needed of natural gas fired power plants to backstop renewable energy. CEC staff witnesses Layton acknowledged:

> The Carlsbad plant does meet some aspects of what the dispatchable generation would be expected to be in a higher-renewable, low-gHG environment.

(RT, 2/03/10, p*. 300*.)

In response to Mr. Rostov's question: "Did you show that this specific plant is critical to renewables integration?" Mr. Layton responded: "I believe the FSA analysis does not say that." (RT, 2/03/10, p. 311, ll. 15-18.)

Mr. Vidaver further explained that:

> 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.

> 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, ll. 14-25.)

The 2009 IEPR also discussed the SWRCB's (then draft) OTC Policy. It raised this issue, however, in the context of the multitude of other energy policy goals, including reducing GHG emissions. On page 173, the IEPR stated:

Thus far, these goals have been only weakly integrated. To coordinate planning, procurement, and permitting of power plants into an integrated system, decision makers must reconcile priorities, identify tradeoffs, and transform broadly framed objectives into concrete measures. Forming a unified vision and translating that vision into a blueprint of specific goals and objectives will provide a foundation for in-depth planning for specific generation and transmission projects. This statement clearly recognizes the importance of incorporating the planning studies currently underway by the CEC, Cal ISO and CPUC on closure of the power plants that use once-through cooling, including the entire Encina Power Station, and procurement processes such as SDG&E is actively engaged in into the Energy Commission's permitting decisions. This will achieve the objective stated later in the IEPR that "plants that are successfully permitted should be the ones with the characteristics that are most needed." (2009 IEPR, p. 221.)

While one of the objectives of the CECP is to close Encina Units 1-3 and eliminate their once-through cooling requirements, the 2009 IEPR did not identify the CECP as a facility necessary for OTC replacement. Instead, the IEPR again pointed to the need to develop a coordinated and carefully thought out plan:

> Within the broad umbrella of linking OTC mitigation to the development of replacement infrastructure, the state could propose many alternative plans. State agency policies emphasize preferred resource types, including energy efficiency and demand response, renewables, and distributed generation. Including these resources in the analysis will likely

result in a set of proposed replacement plants that do not rely strictly on conventional fossil power.

The results will be used as key inputs for an OTC power plant infrastructure replacement plan that would produce specific reliability designations, or retirement dates for specific power plants, as determined by the physical requirements in the load pocket and expected timing of replacement infrastructure development. The plan would identify, for each region, the required actions for eliminating reliance upon a power plant or unit using OTC. Most importantly, this plan would identify the complete set of infrastructure additions that, once operational, would allow OTC to be eliminated.

(2009 IEPR, pp. 175-176.)

The fact that there are multiple options for replacing the generation provided by the Encina Power Station was brought out many times during the hearings:

MR. VIDAVER: I serve on an interagency working group which advises the state water board regarding the retirement or replacement of the state's aging once-through cooled plants. The interagency working group has made it clear to the water board that the *closure of the state's once-through cooled facilities will in most cases require replacement infrastructure, either replacement generation or replacement transmission for those facilities and local reliability areas*. [Emphasis added.]

(RT, 2/03/10, p. 176, ll. 5-13.)

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. [Emphasis added.]

(RT, 2/03/10, p. 275, l. 23 – p. 276, l. 9.)

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*. [Emphasis added.]

(RT, 2/03/10, p. 276, l. 19 – p. 277, l. 1.)

These statements correspond with one of the conclusions of the 2009 IEPR:

Implementing the OTC mitigation policies discussed earlier in the chapter will affect the integration of renewables because it is unclear what characteristics replacement power will have and therefore how it could support renewable integration. OTC units may need to be replaced within the same local capacity area, elsewhere on the grid, or not at all. Replacement plants could be combustion turbines with relatively few hours of operation or new, efficient combined cycle plants that would operate more hours per year than the plants they replace.

(2009 IEPR, p. 188.)

Replacement of the two once-through cooling power plants in the San Diego area, South Bay and Encina, is one of the many considerations SDG&E is balancing in the procurement process it is currently engaged in. The results of that procurement process, coupled with the plans being developed by the energy agencies, will indicate what type of infrastructure, if any, is needed to replace the Encina Power Station.

The 2009 IEPR noted on page 1 that "…reducing greenhouse gas emissions is of

paramount concern…" Again, the report did not identify the CECP or any other specific power plant as critical to meeting this policy objective. While the IEPR recognized that some fossil fuel power plants would be needed to achieve lower GHG emissions in the electricity sector, it stated:

> Assessment of alternative futures that are compatible with these elements of the Climate Change Scoping Plan and system/local reliability requirements can identify options for reducing reliance upon fossil generation (either new green field plants or repowered existing plants) through these preferred resources or transmission system upgrades.

(2009 IEPR, p. 178.)

In discussing the role of natural gas power plants in a future electricity system that relies on energy efficiency and renewables and takes into account lower GHG emissions, the Commission stated that determining "What type of natural gas facilities might be added and when they are needed is complicated." (2009 IEPR, p. 189.) It went on to discuss a "bookend" study assessing the implications of different scenarios for meeting the state's OTC, renewables, and GHG reduction goals. The IEPR reported on the study's results:

> But the capacity factors for generic additions and OTC replacement combined cycles, which start out at normal baseload levels, drop much lower by 2020 in the two bookend cases, making the long-run cost-effectiveness of these combined cycles questionable. This suggests that the sample compliance path used in this study was not optimal if the large amount of CHP baseload is added. Baseload energy from "must take" CHP resources reduces the need for energy from combined cycle merchant plants, thus shifting them into a load following pattern of operations, which may not justify the incremental cost of combined cycle versus simple cycle combustion turbines. Thus, a key finding of the study is that none of these policies should be assessed in isolation. To test these conclusions, additional model runs could be done that lower the

> amount of must-take CHP and switch some of the OTC combined cycles to combustion turbines.

(2009 IEPR, p. 190.)

The key finding of the IEPR is important and applies directly to the issue of whether the Commission approves an override for the CECP based on any one policy objective: "…none of these policies should be assessed in isolation." Not only should the Commission consider the implications of the CECP in light of the policies discussed in the IEPR, but also it should consider other critical policies such as the Coastal Act and local policies as contained in the City's General Plan. The other key finding of the IEPR is that making a wrong decision can result in construction of a power plant that is questionable now and in the future. A power plant that is located in the coastal zone, conflicts with local land use policies and visions, and is questionable because it has not been fully analyzed does not warrant an override.

The CECP Fails To Provide Other Significant Consumer Benefits.

As a merchant plant, any purported consumer benefits of the CECP would be speculative and cannot be considered in this analysis. Those power projects that obtain power purchase agreements with SDG&E in the current RFO will be submitted to the CPUC. That agency will determine project benefits.

One of the items the Commission recognized in the El Segundo project that would serve the public convenience and necessity was to:

> reduce the impacts of the existing plant on the El Segundo and Manhattan Beach communities by replacing a 50-year-old facility with a cleaner, more efficient, and less-visually-intrusive project (removal of the existing tank farm, reduction in stack height, and change in equipment location will all reduce visual impacts).

(El Segundo Power Redevelopment Project, Final Decision, p. 297.)

Similarly, Morro Bay, the only other coastal power plant that was permitted by the CEC with an override, included:

> The Project's removal of three 450-foot tall stacks, demolition of the existing power plant, and the removal of six oil storage tanks as well as replacing these facilities with a new plant having a smaller visual effect, will improve the overall visual assessment of the power plant site.

(Morro Bay Power Plant Project, 00-AFC-12, Final Decision, p. 562.)

In the Morro Bay case, the Commission concluded that:

> The substantial evidence of record establishes that the Project will have a significant benefit upon the visual resources of Morro Bay. The new facility will be less than one third as tall as the existing plant, have significantly less visual bulk, and be located to improve most views in the area.

(Id. At p. 556.)

In the case of the CECP, the applicant is proposing to remove two existing oil tanks. However, rather than removing any of the existing Encina facility that is considered blight by the Redevelopment Agency, the CECP proposes to add another industrial facility to a sensitive coastal site, thereby significantly increasing the visual impacts of the facility.

The CECP Benefits To Electric System Reliability Are Ordinary At Best.

The override inquiry is to be reasonably related to the goals of the Commission and recognizes that electric energy is essential to the health, safety and welfare of the citizens of California. (*See* El Segundo Power Plant Redevelopment Project, Final Decision, p. 296.) As a merchant facility, the CECP cannot guarantee that any electric system benefits will occur. Nevertheless, a review of CEC final decisions that resulted in a LORS override shows that the Commission also considered the projects would have the following benefits:

a. Generate electricity for consumption in the local area (Metcalf, page 464; Morro Bay, page 597; Los Esteros, page 367; El Segundo, page 296, Eastshore, page 453): Without being on the current SDG&E short list, there is doubt that the CECP will ever be constructed. Because of this doubt, the record cannot support a finding that the CECP will provide capacity for the SDG&E or any other system.

b. Reduce transmission system overloads (Metcalf, page 99; Los Esteros, page 370): The evidence in the record cannot support any claims that the CECP will reduce transmission system overloads.

c. Improve system reliability (Los Esteros, page 370; Eastshore, page 453): Again, the record does not support claims to improving system reliability and instead raises doubt that the CECP will ever be constructed.

d. Reduce potential for voltage collapse or transmission line losses (Metcalf, page 99 and 262): There is no evidence that the CECP, if built, will improve the SDG&E or any other grid.

e. Flexible, peaking resources (El Segundo, Page 297; Eastshore, page 453): Not only is there substantial doubt that the CECP will be constructed, but if constructed it may be redundant to flexible, peaking units that are currently on the SDG&E short list.

f. Reduce natural gas consumption or improve fuel efficiency (Los Esteros, page 370; Eastshore, page 453): To reduce natural gas consumption, one would have to assume that the CECP is constructed and that it is more efficient than other units on the purchasers system. The record does not support such an assumption. Questions from Dr. Roe demonstrated that more fuel-efficient options are available.

g. Reduce the cost of electricity to consumers, reduce electricity prices (Metcalf, page 467; Los Esteros, page 371; Eastshore, page 453): There is no evidence in the record that the CECP will reduce electricity prices for

consumers. In contrast, staff witness Vidaver stated: “The construction of an operation at Carlsbad would not lower prices…” (RT, 2/03/10, p. 172, ll. 5-6.)

The overall benefits of CECP are similar in many regards to those of Eastshore:

> In the context of certain statutory factors that section 25525 requires us to examine –consumer benefits and electric system reliability – we find the benefits of EEC are modest at best. …There are no other major benefits of the project (provide electricity, somewhat reduce natural gas consumption and emissions due to the need to run older units, provide some reliability benefits, generate tax revenues) that would serve the public convenience and necessity. There is also no credible suggestion in the record that the level of benefits associated with the EEC is greater than could normally be expected with another project of a similar nature, nor does the record establish that the EEC will provide benefits to the system which are unique or of a highly compelling nature.

(Eastshore Energy Center, Final Decision, pp. 453-454.)

The CECP’s benefits contrast significantly with those of a project such as Metcalf, where the Commission concluded:

> Without the proposed project, no level of benefit/improvement to the electrical system would occur. In other words, generation needed to serve San Jose's loads would likely be delayed, as well as the attendant generalized electrical system benefits summarized above. This could lead to the necessity for increased use of more polluting generation, the need to more quickly construct other facilities, or the increased likelihood of blackouts. (Metcalf Final Decision, p. 455.)

> Moreover, the evidence shows that the area’s supply-demand imbalance and the need to augment electrical system reliability in the south Bay and the greater Bay Area require prompt action. The evidence establishes that the MEC is a substantial positive step in this regard, and is in fact the only

> identified major generation project capable of becoming reality within the near-term future." (Id. at p. 468.)

The Commission recognized an override was justified for Metcalf; it did not for Eastshore.

The CECP Does Not Present Any Outstanding Community Environmental Benefits.

One of the best comparisons is between the CECP and the Morro Bay and El Segundo projects. Like the CECP, both of these projects were located in the coastal zone and on the site of or adjacent to an existing power plant. Both replaced all or a portion of those existing power plants. Unlike the CECP, both of these projects provided outstanding community benefits In addition to significant electricity system benefits.

In the case of El Segundo, the applicant proposed to demolish the power plant unit it was replacing, to lower the stack height, and to develop a landscaping plan consistent with the needs of the community. As a result, the Commission determined that:

> …the El Segundo project will also serve the public convenience and necessity in several other ways. The project will…reduce the impacts of the existing plant on the El Segundo and Manhattan Beach communities by replacing a 50-year-old facility with a cleaner, more efficient, and less-visually-intrusive project (removal of the existing tank farm, reduction in stack height, and change in equipment location will all reduce visual impacts)….

(El Segundo Final Decision, p. 297.)

The existing Morro Bay power plant is more comparable than El Segundo to the existing Encina Power Station in terms of the height of its stacks, height and massiveness of the buildings, and dominant location in the community. In the Morro Bay case, the applicant proposed to remove the entire existing facility, including the stacks, even though the replacement power plant would be located on an adjacent site. The Commission

concluded that:

> The substantial evidence of record establishes that the Project will have a significant benefit upon the visual resources of Morro Bay. The new facility will be less than one third as tall as the existing plant, have significantly less visual bulk, and be located to improve most views in the area. (Morro Bay, Final Decision, p. 556.)
>
> The Project's removal of three 450-foot tall stacks, demolition of the existing power plant, and the removal of six oil storage tanks as well as replacing these facilities with a new plant having a smaller visual effect, will improve the overall visual assessment of the power plant site. (Id. at, p. 562.)
>
> The evidence of record conclusively establishes that the Project will make use of the existing Morro Bay Power Plant infrastructure while reducing impacts of the existing plant on the Morro Bay community. (Id. at p. 594.)

The CECP does not propose to remove any of the existing power plant it is replacing. Instead, the CECP proposes to add another very large, industrial-looking facility and two stacks to the site, and to continue the industrial nature of the area for another 30 to 40 years. The CECP's visual impacts, future biological impacts to the Agua Hedionda Lagoon, and fire safety implications for the workers and community clearly do not result in any community environmental betterment. Instead, these factors militate in favor of denying the CECP rather than approving it with an override.

An Override Is Not Appropriate For The CECP.

The decision clearly before the Commission in this case is whether it is appropriate to approve, through the granting of an override, a power plant:

- That is located in the coastal zone,
- That will rely on ocean water for cooling,

- That is inconsistent with the Redevelopment Agency objectives and requirements,
- That is inconsistent with the local General Plan and other land use requirements,
- That will preclude a City's vision for its future,
- That represents a public safety risk and does not reflect the Carlsbad Fire Department's concerns,
- That adds to visual blight and poses significant adverse visual impacts,
- That is not needed to provide statewide or local generation capacity,
- That does not have a contract with the local utility,
- That is not critical for renewable integration, once-through cooling facility retirement, or greenhouse gas emission reduction goals,
- That will not reduce rates for the ratepayers, and
- That can be built in a different location if it is determined to be necessary in the future.

This is not the set of circumstances that demand an override of a project that violates LORS and will result in environmental impacts. The conclusion on the CECP should be similar to the one reached by the Commission in denying an override for the Eastshore power plant:

> There are no other major benefits of the project that would serve the public convenience and necessity. There is also no credible suggestion in the record that the level of benefits associated with the EEC is greater than could normally be expected with another project of a similar nature, nor does the record establish that the EEC will provide benefits to the system which are unique or of a highly compelling nature.

(Eastshore Final Decision, p. 454.)

As stated in the 2009 IEPR:

> In several IEPR workshops, it became clear that siting fossil power plants will be increasingly difficult in California, suggesting that plants that are successfully permitted should be the ones with the characteristics that are most needed.

(2009 IEPR, p. 221.)

There Are More Prudent And Feasible Means Of Achieving Public Convenience And Necessity.

If the Commission nonetheless were to determine that a LORS override is appropriate for the CECP, it must then determine that there are not more prudent and feasible means of achieving the public convenience and necessity. Assuming that public convenience and necessity include benefits from the CECP to the environment, consumers, and the electric grid, there are more feasible pathways for achieving these benefits.

SDG&E is in the process of selecting generation units that will best serve its system and customers. Apparently, SDG&E believes the CECP does not provide these benefits. Once SDG&E completes its selection process, it will submit the executed power purchase agreements to the CPUC. The City believes the SDG&E effort represents the most prudent and feasible means of achieving public convenience and necessity benefits.

Conclusion.

The record in this proceeding cannot support any CECP benefits as there is no showing that the CECP will, in fact, be constructed. The Commission should not consider an override for a project that may never become a reality. With SDG&E continuing to meet its system needs through the outstanding RFO, the CECP, if approved, will be superfluous to the SDG&E system. Even if the CECP would cause no environmental or LORS violations, the Commission should carefully consider approving a fossil fuel

project on the coast. With the negative impacts that will result from construction and operation of the CECP, the Commission should decline to override.

Obligation To Meet And Confer

If the Commission determines that there is a noncompliance with state or local LORS, the Commission must meet with the governmental agency "to attempt to correct or eliminate the noncompliance. . ." (Pub. Res. Code § 25523(d)(1).) While the City has made its views known to the Commission and staff, the Commission has not yet made the required determination of noncompliance. The City and the Redevelopment Agency are prepared to meet with the Commission to discuss correcting or eliminating the many areas of the CECP noncompliance with state and local LORS.

VI. CONCLUSION

For the foregoing reasons, the City and the Redevelopment Agency respectfully request that the Commission deny the Application for Certification.

DATED: August 18, 2010

s/s Ronald R. Ball
Ronald R. Ball
City Attorney, City of Carlsbad
General Counsel, Carlsbad Redevelopment Agency

s/s Allan J. Thompson
Allan J. Thompson
Special Counsel for the City of Carlsbad and the Carlsbad Redevelopment Agency

ATTACHMENTS

CEC Proposed Conditions

Table 1

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
Air Quality		
AQ – SC1 through AQ – SC10	Acceptable	None
AQ – 1 through AQ 100	Acceptable	None
Biology		
Bio – 1 through Bio – 9	Acceptable	None
Cultural Resources		
Cul – 1 through Cul – 8	Acceptable	None
Hazardous Materials		
Haz – 1 through Haz – 8	Acceptable	None
Haz - 9	Unacceptable	See Land 1
Land Use		
Land - 1	Unacceptable	The project owner shall dedicate at no cost to the City an easement for the Coastal Rail Trail within the project boundaries of the CECP ~~over all Encina Power Station Precise Development Plan area~~ in a located east ~~west~~ of the north/south AT&SF/ North County Transit District Rail Corridor in a manner to accommodate the CRT.
Noise		
Noise – 1 through Noise 5 & 7	Acceptable	None

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
Noise – 6	Unacceptable	**NOISE-6** Noisy construction work relating to any project features shall be restricted to the times of day delineated below: Weekdays 7:00 a.m. to sunset ~~Saturdays 8:00 a.m. to sunset~~ No construction activity shall be permitted on Saturday or Sunday. Haul trucks and other engine-powered equipment shall be equipped with mufflers that meet all applicable regulations. Haul trucks shall be operated in accordance with posted speed limits and haul route permits issued by the City of Carlsbad. Truck engine exhaust brake use shall be limited to emergencies. For purposes of this condition, "noisy construction work" shall be defined as steam blows and any other project-related work that draws a legitimate noise complaint. A legitimate noise complaint refers to a noise caused by the construction of the CECP project, as opposed to another source, as verified by the CPM. A legitimate

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
		complaint constitutes either: a violation by the project of any noise condition of certification, which is documented by another individual or entity affected by such noise; or a minimum of three complaints over a 24-hour period that are confirmed by the CPM, the project owner, or any local or state agency that would, but for the exclusive jurisdiction of the Energy Commission, otherwise have the responsibility for investigating noise complaints or enforcing noise mitigation.
Public Health		
Public Health – 1	Acceptable	None
Soils and Water		
Soil&Water – 1 through Soil& Water – 8	Acceptable	None
Transportation		
Trans – 1 through Trans 8	Acceptable	None
Transmission Lines		
TLSN 1 through TLSN 4	Acceptable	None
Visual		
Vis – 1 through Vis – 5	Acceptable	None
Waste Management		
Waste – 1 through Waste -11	Acceptable	None

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
Worker Safety		
Worker Safety 1 through 5	Acceptable	None
Worker Safety 6	Unacceptable	**WORKER SAFETY- 6** The project owner shall ensure that the below-grade site fire lanes, access points, and ramps (with no more than a 10% grade) are constructed as per the dimensions shown in Revised Figure 2.2-1, with the exception that the Emergency Access Lane shall be at least 50 feet around the base of the CECP, and that at least two access points through the site perimeter and into the below-grade power plant site are available to the CFD and other emergency response providers. The final blueprints for the site shall be submitted at least 30 days prior to the start of site mobilization to the Carlsbad Fire Department for review, ~~and~~ comment, and appropriate approval and to the CPM for review and approval. A copy of the transmittal letter to, and the response from, the Carlsbad Fire Department shall also be sent to the CPM. Any requested changes in the fire lanes, ramps, and access points shall be made is writing to the CPM and the CBO for review, and approval after

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
		obtaining comments from the CFD. **Verification:** At least 60 days prior to the start of site mobilization, the project owner shall submit a copy of the final site blueprints to the Carlsbad Fire Department for review, ~~and~~ comments, and approval and to the CPM for review and approval. The project owner shall also submit to the CPM a copy of the transmittal letter to as well as response letter from ~~to~~ the CFD.
Worker Safety - 7 & 8	Acceptable	None
Worker Safety – 9	Unacceptable	**WORKER SAFETY-9** The project owner shall maintain the current dirt access road located on the western perimeter fenceline in a sufficient state so as to serve as an emergency response road. At a minimum, there shall be a 25 foot emergency access lane on the "rim" of the pit. NRG shall also submit a fire suppression system that is appropriate for the proposed industrial use and is approved by the Carlsbad Fire Department T~~t~~he project owner shall grant or dedicate an easement for the Coastal Rail Trail east of the Rail

Condition Category/ID #	Acceptable/ Not Acceptable	City/Agency Proposed Revisions
		Corridor on the CECP site. **Verification:** At least 60 days prior to the start of site mobilization, the project owner shall submit to the CPM for review and approval a copy of the final plans for maintaining this access road.
General Conditions		
Gen – 1 through Gen – 8	Acceptable	None
Civil – 1 though Civil – 4	Acceptable	None
Struc – 1 through Struc – 4	Acceptable	None
Mech – 1 through Mech – 3	Acceptable	None
Elec 1	Acceptable	None
Paleontolgoical		
Pal 1 through Pal 7	Acceptable	None
Transmission System Engineering		
TSE 1 through TSE 8	Acceptable	None

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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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 6/14/2010)

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DECLARATION OF SERVICE

I, Andrea DyKes, declare that on Aug. 18, 2010, I served and filed copies of the attached document re: CECP (07-AFC-6), dated Aug. 18, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/carlsbad/index.html]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

For service to 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 that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **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

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.