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**STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission**

In the Matter of:)

Petitions to Amend the)

Docket No. 07-AFC-06C

Carlsbad Energy Center Project)

Supplemental Brief of Rob Simpson

The FSA states;

“It is possible that bird collisions with the amended CECP exhaust stacks and other facilities could occur. The amended CECP exhaust stacks would be approximately 90-feet tall (65-feet at grade), reducing the likelihood of stack collision as compared to the licensed project. Bird mortality is significantly lower at towers shorter than 350 feet (Karlsson 1977; Longcore et al 2008). Because the amended CECP exhaust stacks would be significantly shorter than the existing EPS exhaust stack or licensed CECP exhaust stacks, the amended CECP would pose a reduced collision risk to birds.”

The statements ignorance of the deadly higher temperature, higher velocity plumes with a greater intermittent frequency over a greater area, which is distinct from the existing or prior approved projects makes the statement absurd. The proposed project relies on the Federal Aviation Administration closing the airspace above the project so it does not knock planes out of the air, a condition that none of the prior projects required, but the proposal denies any possible effects on federally protected avian species.

The new stacks at the very least may displace avian flight patterns and place them at greater risk of interaction with aircraft. The Commission must inform the FAA that its federal action, which would enable this development, may result in the negative impacts associated with protected avian resources and that consultation with USFWS is required. See attached; Memorandum of Agreement Between the Federal Aviation Administration, the U.S. Air Force, the U.S. Army, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture to Address Aircraft-Wildlife Strikes Carlsbad 2003_08_03_wetlands_FAAmitigationmoa

The FSA states; “Comment: Mr Simpson asks a series of questions relative to avian risk from the stacks. Response: The Energy Commission closely monitors all projects under its jurisdiction, including solar thermal, coal- and gas-fired. Evidence of significant and predictable injury or mortality from thermal or exhaust plumes has not been reported or documented at other power plants; has not been noticed at the Encina plant, and is not expected to occur with the proposed CECP project.”

The response fails to respond to my comments. The audacious statement also completely ignores the significant avian injury and mortality reported at the Ivanpah facility. The Commission’s Ivanpah failure is a world renowned environmental catastrophe as reported in the Scientific American and virtually every other media outlet. The Commission is well aware of the USFWS investigation of this matter. See Attached, Carlsbad avian-mortality-solar-energy-ivanpah-apr-2014. The Commission is again completely ignoring its

environmental responsibility in Carlsbad. The velocity of the plume would likely disperse dead birds well beyond the project boundary. The Commission has cited no study or report that could possibly lead to a different conclusion than the fact that the plume could harm migrating and local birdlife.

The FSA states; “The question of impacts associated with thermal plumes and/or exhaust stacks has been raised in previous siting cases. In 2009, the Contra Costa County Airport Land Use Commission (ALUC), filed a letter with the Energy Commission requesting data on potential avian—specifically raven- attraction to the Mariposa Energy Project (MEP) cooling stacks. The MEP consultants performed a literature review investigating avian interactions exhaust stacks and plumes (CH2M Hill, 2010)². This technical paper included interviews with CEC senior biologist Rick York, and failed to identify any significant mortality or injury associated with these project features at operating power plant sites.”

The referenced study had nothing to do with avian mortality and so would not be expected to identify significant mortality or any mortality. The study was to determine if ravens would utilize thermal plumes and thereby create a hazard to aviation. The velocity of Mariposa cooling stacks is not similar to the plume proposed in this proceeding.

The FSA states; “Staff has conducted an updated literature review, and, as mentioned, has no further internal Energy Commission data or published data that would indicate impacts would occur with a frequency or intensity that would have an adverse biological effect.

This is a woefully inadequate; stick your head in the sand, substitute for analysis. The Commission has made no attempt to study the actual projects effect on the environment. There can be no question that the thermal plumes may have an adverse effect on endangered and migratory birds. “This approach is flawed for conservation assessments because it lumps all birds together without regard for their status as rare or common. analysis for individual species can indicate significant impacts” (Carrete et al., 2009).

To evaluate the biological significance of mortality, species or populations should be the unit of analysis...An analysis of the biological significance of avian mortality ...should consider other sources of human-caused mortality when those other sources are additive and can contribute to an assessment of cumulative impacts...First, per species estimates (or at least ranks) are needed. Then, for any particular species of concern, conservation action can be focused on a single source of mortality or address the cumulative effects of multiple sources. This decision cannot be made without some quantification of which bird species are killed by which causes or by integrating multiple sources of mortality into lifecycle models for individual species (Loss et al., 2012). longcore 2013

The Commissions wilful disregard of conducting meaningful analysis, and history in Ivanpah, plus other actions, constitutes systematic violation of the Endangered Species Act and Migratory Bird Act. I hereby formally request that the Commission, among other things, (i) prepare an environmental impact statement ("EIS") under NEPA analyzing the effects of all past, present, and reasonably foreseeable effects on migratory birds and endangered species; (ii) initiate formal consultation with the United States Fish and Wildlife Service ("FWS") pursuant to the ESA regarding the projects impact on various bird species; and (iii) take steps in accordance with the ESA and Migratory Bird Act to reduce bird mortality at the site. This is particularly appropriate in context of the Commissions apparent willingness to

subsume the Coastal Commissions Federal authority under the Coastal Zone Management Act.

The FSA states; “It is not uncommon for raptors and scavenging species such as vultures to utilize thermal currents to search for prey and carcasses. While it is possible that a raptor may be attracted to a thermal upcurrent emanating from the stacks, there is no data to suggest that a raptor could be injured or killed while doing so, and staff is unaware of any significant documented events of this nature; although it certainly is possible. The stacks would not provide roosting or nesting opportunities for birds or bats, and given the industrial characteristics and pervasive human presence on the CECP site, the data indicates that most wildlife would have sufficient environmental cues to avoid the site.”

The above admission that raptors may be affected by the thermal plume should be disclosed to the FAA for its consideration and consultation with USFWS, because the relocated raptors may pose a hazard to aircraft and themselves. The claim that wildlife would avoid the site contradicts the raptor attractant and lighting attractant, warmth from the facility may also attract wildlife. It also ignores that fact that the noise of turbines starting may startle birds into flight directly into the invisible inferno.

The FSA states; “The turbines will be operating on a fully industrial site. Birds that roost in the area would be expected to have acclimated to the various noises and lights associated with plant construction and operation.”

The offspring of roosting birds could not be expected to be born acclimated. The Commission should study the potential interruption of the life cycle.

The FSA states; “Response: Please see previous response regarding thermal plumes and exhaust stacks. Replacement of the stack with shorter stacks is, in general, preferable for avian species. The collision risk for avian species from the amended or licensed CECP are considered comparable. Collisions have not been demonstrated to occur with the Encina power plant facilities; and there is no evidence to suggest that the CECP site would introduce an avian attractant.”

This response does not state that shorter stacks are preferable for avian species in this facility. Merely that they are generally preferred. It further fails to consider the mile high plume. It also misstates the record which states; “Because of its proximity to Palomar Airport, the amended CECP exhaust stacks may require Federal Aviation Administration (FAA) aviation strobe lighting. Condition of Certification VIS-4 recommends white strobe lighting, which results in far less mortality than steady burning colored and flashing colored lights (Longcore et al 2008).” While stated in a backhanded manner this still identifies an avian attractant. Longcore 2008 further states; towers lit by white strobe lights can affect the path of birds during migration,..Birds can be killed at a tower whenever large numbers are flying near it at the same elevation as the tower. This can occur because the tower is tall or because it is placed topographically where birds are concentrated close to the ground...Radar studies can be conducted before siting a tower in an area that may concentrate night migrants so that the tower can be located to avoid such sites

Because the project is planned to be in the middle of an endangered bird sanctuary, directly in migratory bird paths and with a new technology with a much higher plume velocity than the existing or even previously approved project; the commission should actually study the effect

of the new stacks and related plumes, if it is to achieve any sort of credibility. That means that the Commission should inventory the avian species, including through radar, model potential impact results, and when proved necessary determine adequate mitigation.

The FSA states; “Comment: Please identify the distance between proposed electrical wires, identify the wingspan of a typical adult brown pelican, and demonstrate how the distance between the wires prevents avian electrocution and the associated threat to public health. Please identify the distance between proposed electrical wires, identify the wingspan of a typical adult brown pelican, and demonstrate how the distance between the wires prevents avian electrocution and the associated threat to public health.

Response: Pelicans exhibit behavior which is distinct from raptors. Raptors preferentially select power poles for perching and occasionally nesting. Pelicans are a pelagic bird and do not utilize power poles. No impacts of such nature have been demonstrated. Staff is unaware of pelicans posing a public health threat.”

The response is just more subterfuge. Pelicans perch on poles and wires, here’s a picture of one.



The distance between the proposed wires is less than the wingspan of pelicans which is an unmitigated risk to flying or perched pelicans because their wings could touch both wires at once and be electrocuted. Endangered pelicans are prevalent in the vicinity. The Commission is just ignoring another potential impact to endangered species. The Commission should study and mitigate these potential impacts. “Large, less maneuverable birds are more vulnerable to collisions with power lines, including Great Blue Herons (*Ardea herodias*), cranes (*Grus* spp.), swans (*Cygnus* spp.), and pelicans (*Pelicanus* spp.; Huckabee 1993). See attached; Bird Strikes and Electrocutions at Power Lines, Communication Towers, and Wind Turbines: State of the Art and State of the Science – Next Steps Toward Mitigation1

Overhead power lines remain a deadly threat to pelicans 🖨️ 🌐

http://www.spp.gr/index.php?option=com_content&view=article&catid=1%3Acompany-general&id=175%3A2015-03-26-13-14-55&lang=en

<https://news.google.com/newspapers?nid=1356&dat=19980328&id=4ORPAAAIBAJ&sjid=WQgEAAAIBAJ&pg=2795,2905225&hl=en>

These and other project effects could be actions which are likely to jeopardize the continued existence endangered species and result in the destruction or adverse modification of critical habitat." *Id.* § 402.10; *see also* 16 U.S.C. § 1536(a)(4). If an agency determines that an action "may affect" endangered or threatened species or critical habitats, the agency must initiate formal consultation with the [USFWS]

formally requested that the Commission, among other things, (i) prepare an environmental impact statement ("EIS") under NEPA analyzing the effects of all past, present, and reasonably foreseeable effects on migratory birds in the project region; (ii) initiate formal consultation with the United States Fish and Wildlife Service ("FWS") pursuant to the ESA regarding the projected impact on various bird species; and (iii) take steps in accordance to reduce bird mortality at the site. I also request that I be provided notice of and an opportunity to comment on proposed actions before they are granted.

This facility is planned in what may be one of the most biologically sensitive locations in the State. The Agua Hedionda Lagoon is located immediately to the north of the site. "The 400-acre Agua Hedionda Lagoon is one of the threatened coastal wetlands on the Southern California coastline. Draining 135,000 acres in the heart of the burgeoning metropolitan area of San Diego's north county, the Lagoon watershed is a sensitive and vital ecosystem. It is home to juvenile fish, crabs, hundreds of species of marine life and waterfowl, including an array of threatened and endangered species. It also provides a much needed respite for migrating birds. The Lagoon is unique in that it has many current uses such as a YMCA day camp, recreational boating, a mussel and abalone aquaculture facility, a white-sea bass breeding and research center and a power generating facility. The Lagoon's various usages, and the many activities and ecosystems it supports, makes it a distinctive and precious natural resource unlike any other." <http://www.aguahedionda.org/Watershed/Watershed.aspx>
In November 2000 the Agua Hedionda Lagoon was designated as a critical habitat for the tidewater goby. The California gnatcatcher which are found at the site was listed as Threatened by the [United States Fish and Wildlife Service](#) in 1993\

California Coastal Act Policy 30230 (Section 3.2.1)

With regard to ESA-listed seabirds, the Proposed Action must be consistent to the maximum extent practicable with Section 30230 of the California Coastal Act (California Coastal Act Section 30200-30265.5). The California Coastal Management Program enforces the federal CZMA and any other federal acts that relate to planning or managing coastal resources in California. As defined in California Coastal Act Section 30103, the coastal zone extends seaward from the shoreline to the State of California's outer limit of jurisdiction (3 nautical miles [nm]), including all offshore islands, and extending inland 1,000 yards from the mean high tide line. Federally controlled lands are not part of the coastal zone (15 C.F.R. § 923.33).

The standard of review for federal consistency determinations consists primarily of the principal component of the CCMP, namely the policies of Chapter 3 of the Coastal Act. Section A(6) of the Introduction to the CCMP also states, that, once incorporated into the CCMP, certified Local Coastal Programs (LCPs) "will be used in making federal consistency determinations". If an LCP that the Commission has certified and incorporated into the CCMP provides development standards that are applicable to the project site, the LCP can provide guidance in applying Chapter 3 policies in light of local circumstances. If the Commission has not incorporated the LCP into the CCMP, it cannot guide the Commission's decision, but it can provide background information.

Section 30003 Compliance by public agencies All public agencies and all federal agencies, to the extent possible under federal law or regulations or the United States Constitution, shall comply with the provisions of this division

The FSA states; “Comment: Mr. Simpson expressed concern that the PSA only addressed the impact of nitrogen deposition on local flora and fauna (PSA, p. 4.3-20), but failed to discuss how any other air quality impacts from the CECP would affect flora and fauna, and the lagoon. Mr. Simpson requests that such impacts be analyzed.

Response: Staff analyzed the project, using the licensed CECP as the CEQA baseline. In the licensed CECP proceeding, nitrogen deposition was analyzed. With appropriate implementation of air quality, biological resource, and soil and water conditions of certification, the project would meet applicable LORS, and would reduce overall emissions in comparison with the licensed project. Staff is unaware of other, unmitigated air quality impacts as a result of the project. Please refer to staff’s Air Quality section for further description of air quality issues.”

The, so called, approved project should not be used as the baseline since it is not the actual condition on the ground and the project violated Federal Law. The Commission should study the potential effects of the project on the critical habitats and endangered species. The proposed project has different lighting effects, noise, plume characteristics and location than the prior proposed or existing project. The Commission has not employed the best scientific data available in this proceeding. Under the ESA, the Commission is required to make individual determinations as events arise concerning the risk posed to a threatened or endangered species by a particular action. It may not be feasible to prescribe the proper safeguards until the discrete stage is at hand.

The FSA states; “The AHLUP is the segment of the city’s LCP that applies to the Agua Hedionda Lagoon area and the EPS property. The AHLUP is a certified segment of the city’s LCP. The city does review projects in the coastal zone for consistency with the requirements of the LCP, but has not been granted authority to issue Coastal Development Permits (CDP), which normally requires project proponent/developers to apply directly to the California Coastal Commission to obtain a CDP for their projects. The Energy Commission license is in lieu of the Coastal Commission permit.”

The project is not coastal dependant, a fact that the city agrees with, and there is no meaningful consideration of alternative project locations. This is a violation of a section of the ESA, § 7(d), which provides that an agency "shall make no irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures"

The land is located seaward of the coastal zone boundary established by the state legislature effective January 1, 1977, it is subject to the permit requirements of the California Coastal Act. The State is charged with protecting a valuable resource and doing it in a manner consistent with the intent of the Coastal Zone Management Act to protect and wherever possible to restore significant natural resource critical areas. The Commission and the city do not have authority under the Federal Coastal Zone Management Act to issue a Coastal Commission permit. The Commission does not have a CZMA certified management program. The Commission must compel the Coastal Commission to participate in this proceeding or seek certification under the CZMA.

The Commission cannot rely on the Warren Alquist Act to modify Federal law, State law is pre-empted when it conflicts with the operation or objectives of federal law. It is a settled principle that an agency's interpretation of its statute is normally entitled to deference from the courts. The Commission should expect no such deference with respect to the Coastal Act,

ESA or CZMA. Under the CZMA, a myopic view of a project would be inappropriate. The decision-makers must integrate the full panoply of possibilities into a comprehensive plan. Thus, the states and the federal agencies must consider long-term effects as well as immediate effects in order to manage the coastal zone effectively.

Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)." *Silkwood v. Kerr-McGee Corp., supra*, at 248.

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities (emphasis added), including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§ 1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time. State of Cal. By and Through Brown v. Watt, 520 F. Supp. 1359 - Dist. Court, CD California 1981

While the Act assigns final responsibility for management to states with such a program, the federal agencies are given significant power over the policy choices which a state incorporates into its coastal management plan. Under the Act, the Secretary of Commerce may not give the required approval to the state's proposed plan "unless the views of Federal agencies principally affected by such program have been adequately considered". 16 U.S.C. § 1456(b). Another prerequisite for the approval of the Secretary of Commerce is a finding that the state's program "provides for adequate consideration of the national interest". 16 U.S.C. § 1455(c)(8).

The FSA states; "Comment Please explain whether the waters of Agua Hedionda are waters of the United States as defined in the Coastal Zone Management Act.
Response: Yes, the lagoon is considered a water of the U.S."

The project negatively directly affects Public navigable waters of the United States. The Commission should consider and mitigate this fact.

Section 30601 Developments requiring coastal development permit from Commission
(3) Any development which constitutes a major public works project or a major energy facility

See attached; Memorandum of Agreement Between the Federal Aviation Administration, the U.S. Air Force, the U.S. Army, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture to Address Aircraft-Wildlife Strikes
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