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State of California
California Energy Commission

In the Matter of
Application for Certification for the
Amended Carlsbad Energy Center Project
(CECP)

Docket No. 07-AFC-6C
April 24, 2015

Terramar Issues for Briefing

- 1. Terramar contends that both the Carlsbad Energy Center Project (CECP) and the Amended Carlsbad Energy Center Project (ACECP) violate the California Coastal Act as neither project is coastally dependent and the California Energy Commission (CEC) has not shown the site “to 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](#). (Section 30264 Thermal electric generating plants)” as required under Section 30264.**
- 2. Terramar contends that the ACECP is too large for the proposed site causing a cumulative unmitigable visual condition when the I-5 is widened, as confirmed by CEC staff. Terramar contends that a smaller, superior alternative of 400MW (or less) would eliminate the unmitigable visual condition, creating a superior alternative to the ACECP.**
- 3. The ACECP does not conform with LORS and violates the height limitation of the Agua Hedionda Land Use Plan. The Warren Alquist Act, Section 25525, requires that the commission must determine that the facility is required for public convenience and necessity in order to override the LORS. Terramar contends that based on the Preliminary**

Decision of the CPUC, the need for 600MW of fossil fuel generation is unfounded and the commission must consider a lesser need.

Briefing Issue #1

Terramar contends that both the Carlsbad Energy Center Project (CECP) and the Amended Carlsbad Energy Center Project (ACECP) violate the California Coastal Act as neither project is coastally dependent and the California Energy Commission (CEC) has not shown the site “to 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](#). (Section 30264 Thermal electric generating plants)” as required under Section 30264.

On August 18, 2010, the City of Carlsbad (City) docketed their opening brief opposing the licensing of the Carlsbad Energy Center Project (CECP). On page 2 of the City's brief (Exhibit 3008, TN203788), the City summarized their concerns. The City of Carlsbad stated that the “CECP is inconsistent with the California Coastal Act...”

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 exists.

Terramar agrees and contends that both the CECP and the ACECP are inconsistent with the California Coastal Act.

Terramar will demonstrate that these projects are not coastally dependent and CEC has not shown the site “to 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](#)”, as required by Section 30264 of the Coastal Act.

It is first necessary to illustrate that neither the ACECP nor the CECP are “coastal-dependent developments”. With the introduction of the “Will Serve Letter” from the Carlsbad Municipal Water District to NRG, (docketed on 1/8/15 into the ACECP Compliance Docket Log, TN 203507, Exhibit #102), it is clear that coastal waters are in **no way** needed for the ACECP or the CECP. Both the CECP and the ACECP have no reliance on “the sea” to be able to function in any way. According to the California Coastal Act the definition of Coastal-dependent development or use is:

Section 30101 Coastal-dependent development or use

"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.

Therefore, neither the ACECP nor the CECP are "coastal-dependent development or use". Neither project requires anything from the "sea to be able to function at all".

The California Coastal Act does address coastal industrial development in Article 7. Industrial Development, begins with Section 30260 entitled "Location or expansion". This section specifically allows only coastal-dependent industrial facilities. As the ACECP and the CECP are not "coastal-dependent development or use" they do not qualify as a use in this section.

Section 30260 Location or expansion

Coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites and shall be permitted reasonable long-term growth where consistent with this division. However, where 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 and Sections 30261 and 30262 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.

Sections 30261, 30262, and 30263 refer to uses outside of the scope of this project and uses other than that of the ACECP and the CECP.

Section 30264 of Article 7 entitled "Thermal electric generation plants", is relevant to the CECP and the ACECP.

Notwithstanding any other provision of this division, except subdivisions (b) and (c) of Section 30413, new or expanded thermal electric generating plants may be constructed in the coastal zone if the proposed coastal site has been determined by the State Energy Resources Conservation and Development Commission to 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 (Section 30264)

Section 30264 requires that for the ACECP or CECP to be constructed in the coastal zone the CEC must determine the project site has “*greater relative merit pursuant to the provisions of Section 25516.1 (Warren Alquist Act) than available alternative sites and related facilities for an applicant’s service area*”. And Section 25516.1 states:

§ 25516.1. Finding of relative merit of available alternative sites

If a site and related facility found to be acceptable by the commission pursuant to Section 25516 is located in the coastal zone, the Suisun Marsh, or the jurisdiction of the San Francisco Bay Conservation and Development Commission, 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.

Per Section 25516.1 the commission must determine if the ACECP and the CECP sites “*have greater relative merit than available alternative sites and related facilities for an applicant’s service area*”. “*No application for certification may be filed pursuant to Section 25519 unless the commission*” has made such determination whether the CECP or ACECP have greater merit than alternative sites.

Though this section of the Warren Alquist Act is referring to projects that have submitted a Notice of Intent, the Coastal Act clearly states that the provisions of Section 25516.1 apply when determining if a thermal electric generation plant can be legally licensed in the Coastal Zone. Therefore, the commission must follow Section 25516.1 and make the determination regarding alternative sites before receiving an AFC in order to follow the guidelines provided by the California Coastal Act.

The commission made their determination in the CECP licensing by overriding the California Coastal Act, but only after the Application for Certification (AFC) had already been filed. Also, the commission only looked at alternative sites in the City of Carlsbad and not the applicant’s service area, which is the requirement. Finally on May 31, 2012, the Commission Decision approving the Carlsbad Energy Center Application for Certification was docketed. According to this document (TN203721, Exhibit #3002, page 370) the CEC decided it was necessary to create an override of the California Coastal Act.

Although we believe that the CECP is consistent with the Coastal Act requirements, given the vociferous opposition from the City of Carlsbad and other project opponents, we will assume, for the sake of argument that the proposed project is not consistent with the Act and adopt overrides for any inconsistencies that might be found.

Overrides are not a common occurrence for the CEC to declare. Terramar takes the overrides made by the CEC very seriously, and agrees that the CECP does in fact violate the California Coastal Act.

In the case of the ACECP, the CEC again has not followed the requirement that states;

“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.

Not only has the CEC accepted the AFC before evaluating alternative sites, there have been no alternative sites considered at all for this project. The AFC for the ACECP only refers to the rejected alternative sites from the CECP projects and **no** new alternative site in the entire SDG&E area has been considered for the ACECP.

According to Section 25516 of the Warren Alquist Act, the commission is required to make sure that a “good faith effort” was made by the applicant to find an alternative site and related facility. If none can be found then “the commission must find that additional electric generating capacity is needed to accommodate the electric power demand forecast”, then the commission “shall designate, at the request of and at the expense of the person submitting the notice, a feasible site and related facility for providing the needed electric generating capacity”.

Terramar has seen no effort on the part of the commission to perform the required duties clearly explained in Section 25516.

§ 25516. Approval of notice; necessity for alternative site and related facility proposals; exception

The approval of the notice by the commission shall be based upon findings pursuant to Section 25514. The notice shall not be approved unless the commission finds at least two alternative site and related facility proposals considered in the commission's final report as acceptable. If the commission does not find at least two sites and related facilities acceptable, additional sites and related facilities may be proposed by the applicant which shall be considered in the same manner as those proposed in the original notice.

If the commission finds that a good faith effort has been made by the person submitting the notice to find an acceptable alternative site and related facility and that there is only one acceptable site and related facility among those submitted, the commission may approve the notice based on the one site and related facility. If a notice is approved based on one site and related facility, the commission may require a new notice to be filed to identify acceptable alternative sites and related facilities for the one site and related facility

approved unless suitable alternative sites and related facilities have been approved by the commission in previous notice of intention proceedings.

If the commission finds that additional electric generating capacity is needed to accommodate the electric power demand forecast pursuant to subdivision (e) of Section 25305 and, after the commission finds that a good faith effort was made by the person submitting the notice to propose an acceptable site and related facility, it fails to find any proposed site and related facility to be acceptable, the commission shall designate, at the request of and at the expense of the person submitting the notice, a feasible site and related facility for providing the needed electric generating capacity.

The California Coastal Act and the Warren Alquist Act place legal importance on the necessity of finding alternative sites. No alternative sites have been explored in the ACECP, nor has the commission designated anyone to search for a reasonable alternative site. The only alternative sites investigated for the ACECP had already been rejected in the CECP proceedings.

The City of Carlsbad's CECP Opening Brief quotes legal precedent that states reasonable alternative sites must be explored.

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.)

City of Carlsbad & Redevelopment Agency's Opening Brief Opposing CECP, TN#203788, Exhibit #3008, docketed 3/9/15, Page 45.

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.)

City of Carlsbad & Redevelopment Agency's Opening Brief Opposing CECP, TN#203788, Exhibit #3008, docketed 3/9/15, Page 47..

The fact that reasonable alternative sites have not been explored creates violations of both the California Coastal Act and the Warren Alquist Act. As with the CECP, in

order to license the ACECP, the CEC will need to override the California Coastal Act per Section 25525 just as they did for the CEC.

But an override of the California Coastal Act requires that the CEC must “*determine that the facility is required for public convenience and necessity*”.

§ 25525. Conformance with standards, ordinances and laws; exception

The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving 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 commission may not make a finding in conflict with applicable federal law or regulation. The basis for these findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523.

Terramar contends that “necessity” or “need” will be a difficult task for the CEC to determine, as the tolling agreement offered to the ACECP by SDG&E has been preliminarily denied at the California Public Utilities Commission.

Exhibit #4007, TN #203789, Docketed 4/2/15, Proposed Decision of Administrative Law Judge Yacknin, Decision Denying without prejudice San Diego Gas & Electric Company’s application for authority to enter into Purchase Power Tolling Agreement with Carlsbad Energy Center, LLC.

The California Public Utilities Commission (CPUC) is the agency in California that approves or denies the “need” for a project as stated in the FSA.

The amount of new natural gas-fired capacity needed to provide reliable service to the customers of the state’s investor-owned utilities, direct access providers, and community choice aggregators, over a ten-year planning horizon is determined in the California Public Utilities Commission’s (CPUC’s) Long-term Procurement Planning (LTPP) proceeding.

Page 162, CEC Amendment, Final Staff Assessment, TN#203696, Exhibit #2000, docketed 2/17/15

Conclusion

Terramar believes that constructing another power plant on the coastline of Carlsbad, California is in violation of the California Coastal Act and is a tragedy of

great proportion. The search for alternative sites has been all but nonexistent for the ACECP. The California Coastal Act was written to protect our coastline from projects like the CECF and the ACECP that could easily be sited away from the coastline. If the ACECP is licensed and constructed, future generations will look at this decision as the tragedy it is. They will wonder why a fossil fuel power station (that could be placed anywhere) was sited on the scarce resource of coastal land when even the CPUC had denied the ACECP.

Neither the CECF nor the ACECP are consistent with the California Coastal Act, and the CECF license should be overturned now that the project has lost all coastal dependence with the availability of recycled water.

Briefing Issue #2

Terramar contends that the ACECP is too large for the proposed site causing a cumulative unmitigable visual condition when the I-5 is widened, as confirmed by CEC staff. Terramar contends that a smaller, superior alternative of 400MW (or less) would eliminate the unmitigable visual condition, creating a superior alternative to the ACECP.

Section 30251 of the California Coastal Act provides the cornerstone of protection for the “*scenic and visual qualities of coastal areas*”.

Section 30251 Scenic and visual qualities

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 minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

In addition to the visual and scenic requirements of the California Coastal Act, the ACECP is located within the boundaries of the Agua Hedionda Land Use Plan. The project is also controlled by the provisions of the Carlsbad Scenic Preservation Overlay Zone.

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).

City of Carlsbad & Redevelopment Agency Opening Brief, page 26, TN#203788, Exhibit #3008

With the future widening of the I-5 along the ACECP site, visual and scenic qualities will be placed in jeopardy as noted by CEC staff. The loss of visual or scenic quality along the ACECP site would be a violation of the Coastal Act and CEQA, and CEC staff is proposing an override.

Staff also concluded that the cumulative impacts of the amended project, in combination with the I-5 widening, would potentially be significant in proposed condition of certification Vis 5 to address this. With this condition, the impact could be reduced to a less than significant level.

Finally, staff is recommending an override finding in relation to this cumulative impact which we just discussed.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 39

Terramar appreciates the conditions placed on the ACECP in their condition VIS 5, but we have significant concerns regarding the responsibilities placed on Caltrans for mitigation. CEC has no legal authority to make Caltrans perform mitigation and in fact received communication from Caltrans saying they do not intend to mitigate.

11) Caltrans is not proposing any landscaping between the I-5 expansion and the CECP site. The CECP owner will be providing the landscaping.

Details on Future I-5 Widening, TN 203474, Exhibit 4002, 12/22/2014

In fact, there is legal precedence confirming that CEC may not create a condition of an agreement with Caltrans as in VIS-5, as the project has no control over those agreements and can't ensure they will be reached.

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.)

Page 30, City of Carlsbad & Redevelopment Agency's Opening Brief Opposing CECP, TN#203788, Exhibit #3008, docketed 3/9/15

Dr. Kanemoto also voiced concern that Caltrans mitigation is outside of the authority of the CEC.

DR. KANEMOTO: Well, staff believes that the project will be successfully mitigated as both CalTrans and the applicant will have separate legal obligations to do so. However, the specifics of the final mitigation cannot be determined at this time because they rely in part on cooperation and agreements with CalTrans. Now, CalTrans, while subject to CEQA and required to negotiate with NRG is outside of CEC control; therefore, staff has conservatively been advised to identify the cumulative impact of the I-5 widening as potentially significant with the CEQA finding that the mitigation is at least in part within the authority of the other agency, which can and should provide such mitigation.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 38

Terramar is greatly concerned with the visual impacts at the “pinch points” that will be created along the I-5 when the widening of Interstate 5 occurs. Dr. Kanemoto discusses these “pinch points” in his presentation at the Evidentiary Hearing held on April 1, 2015. These “pinch points” are locations where there is not enough room to place the minimum amount of landscaping mitigation required with the future I-5 widening along the project site.

As shown, you can see two pinch points as noted by both Terramar and POV that are created by the proposed upper rim road in the vicinity of Units 6 through 9. The rim road is shown in yellow.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 43

Dr. Kanemoto continued his testimony saying that the minimum amount of landscaping should be at least 20 feet wide to provide adequate screening for such a large project.

We amended Condition Vis 5 to accommodate some flexibility, but our intent is not to provide license to have the entire buffer reduced very much because in

our minds 20 feet is a somewhat minimal width to provide adequate screening for such a, you know, large project.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 79

Terramar points out that CEC staff expert, Dr. Kanemoto, expressed that a 20' width of landscape mitigation should be required.

Really, a lot of what we're seeing with Terramar -- and we basically agree with a lot of the points Ms. Siekmann was making -- is that from the point of view of motorists, a lot of this green that needs to be added under the condition could consist of shrub -- dense shrub planting, lower shrub planting that will effectively block a lot of those views very quickly from the point of view of motorists, and that's one of our hopes. So 20 feet -- 20 feet just seemed like a minimal width. It's much narrower than the buffer zone being called for in the licensed project, and the reason we think that will work is because of the lower height of the project.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 79-80

Yet VIS-5 has been amended to allow the "pinch points" to be reduced below the 20' minimum width of landscape mitigation.

(Amended VIS-5, page 109, Carlsbad Energy Center Project Amendment FSA Supplement and CEC)

During the Evidentiary Hearings April 1, 2015, Project Owner's Visual Expert, Dr. Priestly was unaware of the visual requirements spelled out in CEQA and the California Coastal Act even though he acts as the visual specialist for the project owner. Dr. Priestly summarized his thoughts about this situation by minimizing the importance of the mitigation required at these "pinch points".

So, you know, bottom line, just because at the pinch points it may not be feasible to maintain the 20 feet, that's not the end of the world. There are ways that overall adequate screening of the project site for people traveling down I-5 can be maintained.

Testimony of Dr. Priestley, April 1, 2015 Evidentiary Hearing, TN204130, page 103

Per Dr. Kanemoto's testimony, the visual impacts could be severe enough that an override has been recommended by the CEC staff.

Finally, staff is recommending an override finding in relation to this cumulative impact which we just discussed.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page 39.

Terramar appreciates Dr. Kanemoto's concerns but objects to the idea of an override for these unmitigable impacts. There is no reason for an override to be considered, as these impacts should not be allowed to occur. It is the responsibility of the CEC to protect the "*Scenic and visual qualities*" of the coastal zone per Section 30251 of the California Coastal Act and not override them.

By choosing a superior alternative of a smaller project, the override would not be necessary. CEC staff must consider reducing the size of the ACECP at the "pinch points". By reducing the size of the project at the "pinch points" no unmitigable conditions would exist with the widening of the I-5 and no override would be necessary.

Terramar stated in our Briefing Topic #1 that CEC has not fulfilled their duty to find the project site has "*greater relative merit pursuant to the provisions of Section 25516.1 (Warren Alquist Act) than available alternative sites and related facilities for an applicant's service area*". And Section 25516.1 states:

§ 25516.1. Finding of relative merit of available alternative sites

If a site and related facility found to be acceptable by the commission pursuant to Section 25516 is located in the coastal zone, the Suisun Marsh, or the jurisdiction of the San Francisco Bay Conservation and Development Commission, 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.

A smaller ACECP would be a superior visual alternative to the current project. Terramar suggests that the project be reduced in the "pinch point" locations by two or three GE LM100 units of 100MW each, thereby eliminating the unmitigable impacts.

In the Alternatives Section of the Final Staff Assessment, CEC staff considered a smaller alternative in the FSA.

Staff analyzed a reduced capacity alternative that would consist of four GE LMS100s providing a net nominal output of approximately 421 MWs, instead of six GE LMS100s totaling 632 MWs as proposed for the amended CECP.

CECP Amendment, Final Staff Assessment, TN#203696, Exhibit #2000, docketed 2/17/15, page 210

Terramar points out that staff chose the alternative of eliminating Units 10 and 11 in their analysis. Terramar agrees with CEC staff that by reducing units 10 and 11, the visual impacts would continue to exist when the I-5 is widened along the project site.

However, eliminating Units 10 and 11 would not reduce impacts in the most constrained area for visual mitigation, in the area east of Units 6 through 9. From a visual perspective, elimination of Units 6 and 7 or 8 and 9 would cause a greater reduction in visual impacts.

CECP Amendment, Final Staff Assessment, TN#203696, Exhibit #2000, docketed 2/17/15, page 211

Terramar suggests the elimination of two to three LM100's at the "pinch points" to protect the I-5 from the possible unmitigable visual impacts.

As shown, you can see two pinch points as noted by both Terramar and POV that are created by the proposed upper rim road in the vicinity of Units 6 through 9. The rim road is shown in yellow.

Testimony of CEC staff, Dr. Kanemoto, April 1, 2015 Evidentiary Hearing, TN204130, page43.

By eliminating two or three of the LM100's, there would be room for the project to exist without the severe visual impacts, including the unsightly power poles that would exist with the widening of the I-5.

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).)

City of Carlsbad & Redevelopment Agency Opening Brief, page 26, TN#203788, Exhibit #3008

During his presentation at the April 1 Evidentiary Hearings, Dr. Kanemoto did suggest the possibility of a 30 foot wall as mitigation at the "pinch points". The 30-foot wall would be used in place of landscape mitigation where a 20' width of landscape was not available. Terramar opposes a 30' wall for visual mitigation in the scenic coastal zone. Terramar would like to quote the Opening Brief of the City

of Carlsbad & Redevelopment Agency, as we could not have expressed our thoughts more perfectly regarding the impacts of a 30' wall.

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.

City of Carlsbad & Redevelopment Agency Opening Brief, page 59,
TN#203788, Exhibit #3008

Conclusion

Terramar contends that a superior alternative of reduced capacity for the ACECP could eliminate the necessity of an override of for unmitigable visual impacts that will be created when the I-5 widening occurs.

The ACECP is too massive and must be reduced to an appropriate size for the site, thereby conforming to the visual and scenic constraints required by the California Coastal Act, CEQA and the Agua Hedionda Land Use Plan.

Briefing Issue #3

The ACECP does not conform with LORS and violates the height limitation of the Agua Hedionda Land Use Plan. The Warren Alquist Act, Section 25525, requires that the commission must determine that the facility is required for public convenience and necessity in order to override the LORS. Terramar contends that based on the Preliminary Decision of the CPUC, the need for 600MW of fossil fuel generation is unfounded and the commission must consider a smaller project.

The ACECP violates the height restriction of the Agua Hedionda Land Use Plan. Per the testimony of Gary Barberio, Assistant City Manager of the City of Carlsbad, this violation of LORS would require a LORS override from the CEC.

***Prepared Direct Testimony of Gary Barberio, City of Carlsbad Amended CECP; 07-AFC-06C- Page 6, TN#203845, Exhibit #101
Land Use, Noise, and Transportation***

Q8. With regard to the LORS override of the 35-foot height limit, what is the City's current position?

A8. As noted above, the 35-foot height limit is the one city requirement for which the amended CECP is not in conformance. The city is not interested in amending or eliminating this standard as it is important in maintaining the city's character and visual profile in the on Hedionda segment of the city's Coastal Zone and would also require review and approval by the California Coastal Commission. The city agrees with CEC Staff that an "override" of this requirement is appropriate because of the numerous public benefits the project now provides.

In order to make an override the CEC must determine, per Section 25525 of the Warren Alquist Act, that the ACECP is required for public convenience and necessity. Terramar agrees with the City of Carlsbad that there will be numerous public benefits provided by the project with the tear down of the Encina Plant. Terramar wishes to focus on the determination of the "need" for the ACECP and its 600MW of fossil fuel capacity.

§ 25525. Conformance with standards, ordinances and laws; exception

*The commission may not certify a facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless **the commission determines that the facility is required for public convenience and necessity** and that there are not more prudent and feasible means of achieving 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 commission may not make a finding in conflict with applicable federal law or regulation. The basis for these findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523*

The recent preliminary decision of the CPUC denying the Tolling Agreement SDG&E offered to NRG for the ACECP provides great insight into the "need" issue for the ACECP fossil fuel capacity.

Summary

This decision denies San Diego Gas & Electric Company's application for authority to enter into a purchase power tolling agreement with Carlsbad Energy Center, LLC, without prejudice to a renewed application for its approval in the event that San Diego Gas & Electric Company's request for offers fails to produce more than the minimum required 200 megawatts of preferred resources and/or energy storage, or for approval of an amended purchase power tolling agreement with Carlsbad Energy Center, LLC, for a smaller project in the event that the request for offers produces more than the minimum 200 megawatts of preferred resources and/or energy storage but less

than the entirety of San Diego Gas & Electric Company's procurement authority.

Page 5, Proposed Decision of Administrative Law Judge Yacknin, TN#203789, Exhibit 4007, docketed 3/9/2015

Deciding the “need” for capacity is the authority of the CPUC. The CECP Amendment, Final Staff Assessment states, “*The amount of new natural gas-fired capacity needed....is determined in the CPUC's Long-term Procurement Planning proceeding.*”

CEC staff failed to include that preferred resources and /or energy storage as new capacity are also the responsibility of the CPUC when preparing their Long-term Procurement Planning defining the “need”.

The amount of new natural gas-fired capacity needed to provide reliable service to the customers of the state's investor-owned utilities, direct access providers, and community choice aggregators, over a ten-year planning horizon is determined in the California Public Utilities Commission's (CPUC's) Long-term Procurement Planning (LTPP) proceeding.

Page 162, CECP Amendment, Final Staff Assessment, TN#203696, Exhibit #2000, docketed 2/17/15

In fact, per the Proposed Decision of Administrative Law Judge Yacknin, the lack of preferred resources were a critical part of why the SDG&E tolling agreement, with NRG for the ACECP, was denied by the CPUC.

Page 5, Proposed Decision of Administrative Law Judge Yacknin, TN#203789, Exhibit 4007, docketed 3/9/2015

Therefore, when deciding whether there is a “need” for 600MW of fossil fuel capacity, it is critical for the CEC to also consider the type of capacity needed in the San Diego area based on the guidelines of the Track 4 decision..

DECISION AUTHORIZING LONG-TERM PROCUREMENT FOR LOCAL CAPACITY REQUIREMENTS DUE TO PERMANENT RETIREMENT OF THE SAN ONOFRE NUCLEAR GENERATION STATIONS

1. Summary

This is the Track 4 decision in the 2012 long-term procurement proceeding. In this decision, we authorize Southern California Edison Company (SCE) to procure between 500 and 700 Megawatts (MW), and San Diego Gas & Electric Company (SDG&E) to procure between 500 and 800 MW by 2022 to meet local capacity needs stemming from the retired San Onofre Nuclear Generation

Stations (SONGS). SCE is required to procure at least 400 MW, and may procure up to the full 700 MW of authorized additional capacity, from preferred resources or energy storage. SDG&E is required to procure at least 200 MW, and may procure up to the full 800 MW of authorized additional capacity, from preferred resources or energy storage.

Page 5 of Decision Authorizing Long-Term Procurement for Local Capacity Requirements Due to Permanent Retirement of the San Onofre Nuclear Generations Stations, TN#203878, Exhibit #6006, docketed 3/13/15

The CPUC clearly stated in the Track 4 decision that the 800 MW of “needed” capacity must be from a combination of resources. At least 200MW must come from preferred resources or energy storage. The balance must come from a combination of resources, as stated by the CPUC in the Track 4 decision.

Once again the CPUC made a clear statement with the Proposed Decision of Administrative Law Judge Yacknin that the “needed” capacity must be a combination of resources.

The ACECP is only a fossil fuel project and cannot fulfill the “need” for preferred resources or energy storage required in the Track 4 decision.

As the ACECP does not properly serve the “need” as defined in the Track 4 decision in the 2012 long-term procurement proceeding, the CEC must consider a reduced “fossil fuel” project in order to support a finding of “need”. Only with a reduced ACECP can the CEC support an override of LORS.

Conclusion

The ACECP project violates the Agua Hedionda Land Use Plan height limitation. This is a LORS violation and requires an override. An override requires a finding of “public necessity and need”.

In order to support a finding of “need” for the fossil fuel capacity of the ACECP, the CEC must reduce the size of the project. The CPUC has clearly indicated on their Track 4 Decision and the Proposed Decision of Administrative Law Judge Yacknin that the “needed” capacity in the San Diego area be a combination of resources with more than 200MW of preferred resources or energy storage.

Therefore the ACECP must be reduced in capacity, as there is no “need” for 600MW of fossil fuel capacity in the San Diego Region.