

## DOCKETED

<b>Docket Number:</b>	07-AFC-06C
<b>Project Title:</b>	Carlsbad Energy Center - Compliance
<b>TN #:</b>	204359
<b>Document Title:</b>	Project Owner's Post-Evidentiary Hearing Brief
<b>Description:</b>	N/A
<b>Filer:</b>	Dee Hutchinson
<b>Organization:</b>	Locke Lord LLP
<b>Submitter Role:</b>	Applicant Representative
<b>Submission Date:</b>	4/24/2015 12:49:56 PM
<b>Docketed Date:</b>	4/24/2015

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

**In the Matter of:**

**Petitions to Amend The  
CARLSBAD ENERGY CENTER PROJECT**

**DOCKET NO. 07-AFC-06C**

**Petition to Amend the Carlsbad Energy Center Project (07-AFC-06C)**  
**Project Owner's Post-Evidentiary Hearing Written Brief**

**I. INTRODUCTION**

On May 31, 2012, the California Energy Commission ("CEC"), pursuant to its exclusive power to certify thermal power plants with a generating capacity of more than 50 MW, licensed the Carlsbad Energy Center Project (the "CECP"). The owner of the CECP, Carlsbad Energy Center LLC ("Project Owner"), filed a Petition to Remove on April 29, 2014, and a Petition to Amend on May 2, 2014 (collectively, the "PTA"). The PTA seeks post-certification amendments to the CECP pursuant to Title 20, Section 1769 of the California Code of Regulations. The CEC held Evidentiary Hearings on the PTA on April 1 – April 2, 2015. Following the Evidentiary Hearings, the Carlsbad Amendments Committee (the "Committee") notified the parties of the opportunity to brief issues. Accordingly, Project Owner submits its Post-Evidentiary Hearing Brief to address areas that benefit from briefing.

**II. TOPICS**

**A. An Override Finding is Unnecessary for the Cumulative Visual Impacts of I-5 Widening Because Impacts Can and Will Be Mitigated.**

Caltrans, the state agency responsible for highway planning, construction, and maintenance, has proposed a project along the Interstate-5 ("I-5") North Coast Corridor to widen the highway. (TN-204130, p. 30, lines 8-22.) At the Evidentiary Hearings, Staff's Visual Resources expert, Dr. William Kanemoto, testified that Staff concluded that although "the cumulative impacts of the amended project, in combination with the I-5 widening, would potentially be significant. . . the

impact could be reduced to a less than significant level [by implementing condition of certification VIS-5].” (TN-204130, p. 38, lines 14-19.) Nonetheless, Dr. Kanemoto testified that Staff was recommending an override finding “out of an abundance of caution” despite the fact that Staff believed “mitigation can and will be achieved. . .” (TN-204130, p. 49, lines 4-20.) Project Owner disagrees with the assessment that the Committee should make an override finding for the impacts of I-5 widening. Conditions of certification (“COCs”) VIS-2 and VIS-5 specifically address the visual impacts of I-5 widening. Implementation of these COCs will mitigate those visual impacts to a less than significant level along the CECP boundary by ensuring adequate visual screening of the power plant and its related facilities.

*i. VIS-2 and VIS-5 address the loss of vegetative screening which is the reason the I-5 widening FEIS/FEIR considers the CECP to contribute to a cumulative visual impact along the highway corridor.*

The I-5 North Coast Corridor Final Environmental Impact Statement / Final Environmental Impact Report (“FEIS/FEIR”) found that the cumulative effect of I-5 widening created unmitigable visual impacts. (TN-204130, p. 47, lines 10-24.) However, the finding of unmitigable cumulative impacts is not specific to the CECP; it is a conclusion drawn when considering the effect on visual resources along the entire I-5 North Coast Corridor project area.<sup>1</sup> (*Id.*)

Under CEQA Guidelines for determining the significance of the environmental effects of a project, “[t]he mere existence of significant cumulative impacts caused by other projects alone shall not constitute substantial evidence that the proposed project’s incremental effects are cumulatively considerable.” (14 Cal. Code Regs. § 15064(h)(4).) While I-5 widening results in cumulative impacts along the entirety of the corridor, that alone is not substantial evidence that the CECP’s incremental effects are cumulatively considerable in evaluating the CECP. This is particularly true in this instance, because the reason the CECP is listed as contributing to a cumulative visual impact in the FEIS/FEIR is that widening requires the removal of vegetation that screens the power plant from public view. (TN-Pending, FEIS Chapter 3, p. 3.25-18.)

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<sup>1</sup> In total, 41 projects contributed to the finding of a significant cumulative visual impact along the corridor that cannot be entirely mitigated. (TN-Pending, FEIS Chapter 3, p. 3.25-17.)

CEC Staff, mindful that I-5 widening will likely occur at some future date alongside the CECP property boundary, has proposed specific provisions in COCs VIS-2 and VIS-5 to mitigate the visual impacts associated with the removal of existing vegetative screening when the Caltrans right-of-way is expanded to accommodate widening. VIS-2 requires Project Owner to provide and maintain perimeter landscaping to reduce the visibility of power plant structures by screening them to the greatest feasible extent with strategically placed evergreen trees and shrubs. (Exhibit 2001, Final Staff Assessment Supplement Appendix A, pp. 102-104.) VIS-2 also obligates Project Owner to plant supplemental tall trees along the site's I-5 boundary but outside of the anticipated Caltrans right-of-way. (*Id.*) In short, VIS-2 requires project owner to provide and maintain sufficient vegetative screening both before and after I-5 widening.

VIS-5 is intended to reduce the visual impact of I-5 widening to less than significant levels by requiring Project Owner to take appropriate action and provide adequate landscape screening. (TN-204130, pp. 38 – 39.) Under VIS-5, Project Owner is required to work with Caltrans to develop a mitigation plan that accommodates widening while at the same time preserving adequate levels of screening and hazard protection. (Exhibit 2001, Final Staff Assessment Supplement Appendix A, pp. 107-109.) As part of that plan, Project Owner must establish a landscaping buffer zone along the CECP/I-5 boundary that can accommodate a tree canopy of sufficient height and density to screen CECP features. (*Id.*) Staff believes that the visual impacts of I-5 widening can and will be mitigated. (TN-204130, p. 49, lines 18-20.)

By requiring Project Owner to install adequate vegetative screening, both VIS-2 and VIS-5 address the reason the CECP was listed as contributing to cumulative visual impacts along the I-5 widening corridor. Staff believes that the cumulative visual impacts caused by I-5 widening can be mitigated. Therefore, there is no reason for finding a significant cumulative impact that requires an environmental override.

ii. *Caltrans will be involved in mitigating the visual impacts of I-5 widening.*

During the Evidentiary Hearing, the question was raised as to whether Caltrans would be involved in mitigating the visual impacts of the I-5 widening along the CECP boundary. (TN-204130, p. 49, lines 21-24; TN-204131, pp. 247-248.) Though the FEIS/FEIR concluded that cumulative visual impacts could not be fully mitigated along the I-5 North Coast Corridor (TN-204130, p. 47, lines 10-24; TN-Pending, FEIS Chapter 3, p. 3.25-21), this conclusion does not absolve Caltrans of its responsibility to act to minimize the effects because “CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible.” (See 14 Cal. Code Regs. 15021(a).) Further, this is a joint project with the Federal Highway Administration, which is obligated to “[u]se all practicable means consistent with the requirements of [NEPA] and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions on the quality of the human environment.” (40 CFR § 1500.2(f).) Under Title 23 of the Code of Federal Regulations, “it shall be the responsibility of the [agency applicant], in cooperation with the [Federal Highway Administration], to implement those mitigation measures stated as commitments in the environmental documents prepared pursuant to [the regulation prescribing the policies and procedures of the Federal Highway Administration for implementing the NEPA].” (23 CFR § 771.109(b).) In the FEIS/FEIR, Caltrans incorporated avoidance, minimization, and mitigation measures into an Environmental Commitments Record which includes measures to take regarding visual resources. (TN-Pending, FEIS Chapter 4, p. 4-37; TN-204344, pp. D-9 – D-23.) Caltrans will be responsible, in cooperation with the Federal Highway Administration, to implement those measures. Even though the I-5 corridor project will have unavoidable significant effects on the environment, Caltrans is required to minimize the impacts of widening pursuant to their obligations under both CEQA and the Federal Highway Administration’s NEPA policies and procedures.

Intervenor Terramar Association suggested that Caltrans has indicated that they will not be involved in any mitigation related to the I-5 widening in the vicinity of the CECP. (TN-204131, pp.

247 – 248.) Julie Baker, of intervenor Power of Vision, contradicted Terramar Association on that point at the Evidentiary Hearing. Ms. Baker testified that she understands Caltrans' position to be that they will mitigate on Caltrans property but not on the Project Owner's property. (TN-204131, p. 248, lines 1 – 8.) This approach is consistent with the COCs proposed by CEC Staff. Project Owner, not Caltrans, is required to make supplemental tall tree plantings outside of the anticipated right-of-way to provide adequate screening. (Exhibit 2001, Final Staff Assessment Supplement Appendix A, pp. 102-104.) Further, the onus is on Project Owner to work with Caltrans to develop a mitigation plan that provides a landscape planting buffer zone that exists on portions of the CECP site, the Caltrans right-of-way, or both. (Exhibit 2001, Final Staff Assessment Supplement Appendix A, pp. 107-109.) Similarly, Project Owner is required to consult with Caltrans on the erection of a safety-barrier that helps prevent line-of-sight viewing of the power plant site from the I-5 shoulder. (*Id.* at p. 152.)

A review of the record indicates that there should be no doubt that Caltrans will mitigate. As Dr. Kanemoto pointed out in his testimony, Caltrans' I-5 project design guidelines depict its intent to landscape along the CECP site with Category I native landscaping in the Caltrans right-of-way as a form of mitigation measure. (TN-204130, pp. 46-47.) Gary Barberio, representing the City of Carlsbad, testified that he was aware of a number of projects in the local area in which Caltrans has entered into cooperative arrangements to mitigate. (TN-204131, pp. 26 - 27.) A review of the FEIS/FEIR further sheds light on the intention of Caltrans to provide mitigation. The FEIS/FEIR: contains an Environmental Commitments Record detailing commitments to minimize impacts to visual resources (TN-204344); requires Caltrans to consult with local officials and property owners along the corridor during the project design period for potential aesthetic options (TN-Pending, FEIS Chapter 3, p. 3.7-92); includes general design guidelines for freeway landscaping that Caltrans will perform as part of its mitigation obligations under CEQA (TN-Pending, FEIS Chapter 3, p. 3.7-144; TN-204347); contains an extended discussion of mitigation required to minimize visual resources impacts along the corridor (TN-Pending, FEIS Chapter 3, pp. 3.7-92 – 3.7-116);

and states that mitigation measures requiring regular maintenance and which are out of Caltrans' right-of-way will be implemented if the local entity is willing to maintain the mitigation measure in perpetuity. (TN-Pending, FEIS Chapter 3, p. 3.7-93.) Any worry that Caltrans will not perform mitigation that it is legally obligated to perform is unfounded given that Caltrans has a record of cooperative mitigation in the region and has committed to minimizing the I-5 project's significant cumulative effects on visual resources.

*iii. An override finding is not required because mitigation is feasible and VIS-5 incorporates specific performance criteria for developing the VIS-5 mitigation plan.*

An override finding is required when a project will result in significant environmental impacts that cannot be mitigated but "the benefits of the project outweighs the unavoidable significant adverse environmental effects." (20 Cal. Code Regs. § 1755(d).) Dr. Kanemoto recommended such an override out of an abundance of caution because "a final specific mitigation measure cannot be specified at this time." (TN-204130, p. 49, lines 4-7.) Yet, as discussed above, he also testified that Staff believes mitigation can and will be achieved through the Visual Resources conditions of certification proposed for the project.

Under CEQA, "when mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process. . . the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." (*Sacramento Old City Assn. v. City Council*, (1991) 229 Cal. App. 3d 1011, 1028-29 (quoting Remy et al., Guide to the Cal. Environmental Quality Act (1991 ed.) pp. 200-201, fn. omitted).)

Similarly, the CEC has not required a final specific mitigation plan to be articulated prior to approval when mitigation is feasible but practical considerations prevent devising precise measures at the time of licensing. For example, in the original CECP licensing proceeding, the Commission obligated Project Owner to submit a proposed facility closure plan for review and

approval at least twelve months prior to the commencement of closure activities to prevent adverse impacts to public health and safety and the environment. (Exhibit 3001, Commission Decision, pp. 4-11 – 4-12.) At the time of licensing, the project did not appear to present any special or unusual closure issues. (*Id.* at p. 4-11.) Nonetheless, the Commission devised a condition of certification flexible enough to deal with whatever specific situation / project setting exists at the time of closure due to the impossibility of forecasting those conditions at this time. (*Id.*) The condition established specific performance criteria for the closure plan. (*Id.* at p. 412). The plan was required to identify and discuss impacts and mitigation, identify a schedule of activities for closure of the plant and its facilities, identify equipment that would remain on-site after closure and its future use, and discuss conformance with applicable laws, ordinance, regulations, standards and local / regional plans in effect at the time of closure. (*Id.*) Under these specific performance criteria, the Commission assured that a closure plan would provide effective mitigation even though its specifics could not be devised at the time of licensing.

As previously discussed, Staff has testified that mitigating the cumulative visual impact from I-5 widening is feasible and they believe it can and will occur. Project Owner's visual resources expert, Dr. Thomas Priestley, also testified that he did not have concerns about the ability to provide adequate screening because it was feasible to maintain the plantings required.

(TN-204130, p. 30.) Actual I-5 widening along the CECP boundary is projected to take place ten to fifteen years from now. (TN-204130, p. 92.) Much like with the closure plan in the original proceeding, mitigation is known to be feasible but there are some practical considerations that prohibit devising a final mitigation measure at this time. For example, the configuration of the I-5 widening project and the exact right-of-way have not been finalized. (TN-204130, pp. 48-49.) Those details would impact the final form of a mitigation measure.

In response to such practical considerations, Staff has articulated specific performance criteria for a mitigation plan that will ensure effective mitigation when it becomes necessary. Project Owner will have an obligation through VIS-2 to implement and maintain vegetative screening as

well as supplemental tree plantings outside of the anticipated right-of-way. (Exhibit 2001, Final Staff Assessment Supplement Appendix A, pp. 102-104.) Under VIS-5, Project Owner will develop a mitigation plan to ensure acceptable levels of screening and hazard protection by accommodating I-5 widening within a buffer zone. (*Id.* at pp. 107-109.) The plan will include a landscape planting buffer zone to accommodate replacement screening which incorporates, among other things, large-container fast-growing evergreen trees in sufficient density to provide comparable or better visual screening than currently exists. (*Id.*) The plan must contain: a record of discussions, meetings, and planning activities conducted with Caltrans; the conclusions of these coordination activities; a detailed mitigation plan providing plans, elevations, cross-sections or other details, including a detailed list of plants and container size sufficient to convey how effective visual screening will be achieved; plans for the visual design of security barriers; conformance to the Carlsbad Landscape Manual and the Caltrans Design Guidelines as possible; and a proposed construction schedule. (*Id.* at pp. 108-109.) The final plan will be submitted to the City of Carlsbad for review and comment and to the Compliance Project Manager (“CPM”) for review and approval. (*Id.* at p. 109.) While a final detailed plan is not available at this time, one that mitigates significant impacts will be developed per the specific performance criteria that bind Project Owner and will require final approval of the plan by the CPM.

An override is unnecessary because there is no unmitigated significant adverse environmental effect. Staff has expressed confidence that: (1) VIS-5 is feasible; (2) there is ample reasonable expectation that Caltrans will work with Project Owner; (3) Caltrans has a legal obligation under CEQA to address the significant impacts of their project; (4) Project Owner will follow through on its obligations under the COCs that govern the project; and (5) visual impacts can be mitigated (TN-204130, p. 48, lines 5-24.) Between Caltrans’ legal obligations, Project Owner’s obligations under the license, and the feasibility of mitigation, an override finding made out of an “abundance of caution” is unnecessary.

**B. The CECP is Consistent With the California Coastal Act.**

Intervenors Terramar Association and Power of Vision argued in their opening testimony that, because the CECP does not use ocean water in its processes, it is not coastal-dependent and therefore violates the California Coastal Act. (Exhibit 3045, p. 30 and Exhibit 4014, p. 5.) Coastal-dependency, however, is not a requirement for development in the coastal zone. As the CECP is consistent with the Coastal Act, it can be permitted without the need for an override.

*i. The CECP is not required to be a coastal-dependent development.*

A coastal-dependent development or use is “any development or use that requires a site on, or adjacent to, the sea to be able to function at all.” (Pub. Resources Code § 30101.) The existing Encina Power Station is a coastal-dependent facility because of its use of ocean water to provide once-through cooling. (Exhibit 3002, Commission Decision, p. 8.1-7.) The amended CECP does not use ocean water in its processes; however, that does not mean it is barred from placement within the coastal zone.

Coastal-dependency, under the California Coastal Act, is significant in two major respects. First, within the coastal zone, coastal-dependent projects are accorded priority over other types of developments. (Pub. Resources Code §§ 30001.5(d), 30255.) Second, coastal-dependent industrial facilities that are inconsistent with California Coastal Act can still be permitted under certain conditions. (Pub. Resources Code § 30260.) The Legislature’s preference for coastal-dependent development within the coastal zone, even when such development might conflict with other provisions of the California Coastal Act, does not preclude other types of development in the coastal zone. (See, e.g. Pub. Resources Code § 30255 which establishes priority for coastal-dependent facilities but then addresses placement of coastal-related facilities within the coastal zone.) As Staff notes, most projects approved in the coastal zone are not coastal-dependent development. (Exhibit 2000, Final Staff Assessment, p. 4.6-22.)

The CECP makes use of and necessitates existing infrastructure located on or adjacent to the coastal-dependent Encina Power Station, such as the SDG&E natural gas transmission

pipeline and the Encina 230 and 138 kV switchyards, to facilitate power generation. (Exhibit 2000, pp. 5.4-5 and 5.5-4.) One of Staff's identified project objectives is to use existing infrastructure to accommodate replacement generation so as to avoid developing power generating facilities at greenfield locations. (Exhibit 2000, p. 1-4.) This approach is consistent with a 1985 Coastal Commission report which encouraged expansion of existing power plant sites if new plants are necessary and a 1980 Energy Commission report analyzing reasonable power plant expansion in the coastal zone which gave practical consideration to the use of on-site ancillary support facilities and locations within existing site boundaries. (Exhibit 2000, pp. 4.2-14 – 4.2-15.) As a result, the project is dependent on the Encina Power Station and its appurtenant facilities. Being a project that is "dependent on a coastal-dependent development or use," the CECP is a coastal-related development. (Pub. Resources Code § 30101.3.) Coastal-related developments should be accommodated within reasonable proximity to coastal-dependent uses when appropriate. (Pub. Resources Code § 30255.)

In this instance, developing the CECP as a coastal-related development on the same property as the Encina Power Station is appropriate given that: (1) the area is already zoned under the Agua Hedionda Land Use Plan for utility-usage (Exhibit 2006, Agua Hedionda Land Use Plan, p. 14); (2) the existing infrastructure supports power-generation and its use with the CECP avoids the need to develop such infrastructure in areas unaccustomed or unsuited to this type of industrial development (Exhibit 2000, Final Staff Assessment, p. 1-4); (3) the eventual decommissioning and removal of the Encina Power Station has a positive visual impact on the coastal area and benefits marine organisms by eliminating the local use of once-through cooling as part of power generation (*Id.*); (4) it fits the character of adjacent industrial developments such as the Poseidon desalination facility and soon-to-be-built Agua Hedionda Sewer Lift Station replacement (Exhibit 2000, Final Staff Assessment, p. 4.3-19); and (5) it makes use of the existing and adjacent sewer pipeline that will serve CECP's wastewater discharges and the adjacent future recycled water line that will serve

CECP's industrial water needs, both of which are covered under the City of Carlsbad's Will Serve letter. (Exhibit 102.)

Even if the project is not a coastal-related development, locating the CECP on the same property as the Encina Power Station is consistent with the California Coastal Act's requirement that new industrial development within the coastal zone be located within, contiguous with, or in close proximity to existing developed areas able to accommodate the industrial development.<sup>2</sup> (Pub. Resources Code § 30250(a).) The site is already zoned for utility use under the Agua Hedionda Land Use Plan. The project will use existing on-site infrastructure, including the sewer line that serves the nearby Agua Hedionda Sewer Lift Station. It will also make use of planned infrastructure such as the recycled water line that will be constructed in the same right-of-way as the sewer line.<sup>3</sup> Further, the project is consistent with other adjacent industrial developments such as the Poseidon desalination facility and the Agua Hedionda Sewer Lift Station replacement. Placement of the CECP on the Encina Power Station property is therefore compliant with Section 30250.

Finally, Section 30264 of the Coastal Act allows, regardless of other Coastal Act requirements, for new or expanded thermal generating power plants to be located in the coastal zone if the CEC determines the proposed site to have greater relative merit than available alternative sites for the applicant's service area. (Pub. Resources Code § 30264.) This statute requires the determination to be made pursuant to Sections 25516 and 25516.1 of the Warren-Alquist Act. (*Id.*) Those sections are only applicable in processing Notices of Intention rather than the Application for Certification originally considered or the petitions for post-certification amendments currently before the CEC. (Exhibit 3002, p. 8.1-10.) However, in the original CECP proceeding, the CEC determined that the questions presented in Section 30264 had been satisfied through the analysis conducted to override LORS inconsistencies and CEQA impacts. (*Id.*) The

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<sup>2</sup> Public Resources Code Section 30260 of the California Coastal Act, which encourages coastal-dependent industrial facilities to locate within existing sites, does not bar non-coastal-dependent industrial facilities from doing the same.

<sup>3</sup> The easement for this line has already been provided to the City of Carlsbad.

CEC concluded that the proposed project site is superior to the identified alternatives and that Section 30264 is therefore an avenue to coastal act compliance. (*Id.*) If the Commission decides to conduct an override analysis of the Agua Hedionda Land Use Plan's height limitation in its decision on the PTA, the same result should be achieved here.

While the California Coastal Act gives coastal-dependent projects priority for development over other projects, the CECP is not required to be coastal-dependent. As a coastal-related development, a new industrial development, or a new or expanded thermal power plant, it is appropriate to locate the CECP within the coastal zone at the site of the existing Encina Power Station.

*ii. The CECP is consistent with the standards that govern the permissibility of proposed developments within the coastal zone.*

The 2012 Commission Decision found that the original CECP was consistent with the Coastal Act, but adopted an override due to intervenors' concerns that the project would add visual blight to the project area and negatively impact marine organisms through the continued use of ocean water for cooling. (Exhibit 3002, p. 9-10; Exhibit 2000, p. 4.6-14.) The amended project addresses those concerns by removing the Encina Power Station building, removing the Encina Power Station's 400-foot tall stack, eliminating each of the five generation units (1 through 5) that rely on the use of ocean water for cooling, and eliminating the ocean-water purification system from the project design. (Exhibit 2000, pp. 4.6-12 – 4.6-13, 4.6-18, 5.6-20.) In the Final Staff Assessment, Staff concluded that the amended CECP greatly reduces the environmental impacts of the previously licensed project and determined that the amended CECP is consistent with the Coastal Act. (*Id.* at 4.6-14.)

The presence of the amended CECP within the fenced perimeter of the Encina Power Station is a significant factor in finding consistency with the Coastal Act. The project repurposes a tank farm location at Encina which houses out-of-service fuel oil tanks that are adjacent to existing public utility zoned industrial uses (e.g. sewer lift station, desalination facility, and a utility switchyard) for needed, public serving electricity generation. (Exhibit 2000, p. 1-3.) As previously

discussed, such siting is consistent with characterizing the project as either a coastal-related development, a new or expanded thermal power plant, or a new industrial development. It also means that siting the CECP: (1) does not interfere with public access and recreation (Pub. Resources Code §§ 30210 – 30224); (2) does not result in significant degradation to adjacent environmentally sensitive habitat areas and parks and recreation (Pub. Resources Code § 30240(b)); (3) does not convert land suitable for agricultural use to nonagricultural use or impact the long-term productivity of soils and timberlands (Pub. Resources Code §§ 30242 – 30243); (4) will not adversely impact cultural resources (Pub. Resources Code § 30244); and (5) is visually compatible with surrounding areas and actually enhances the visual quality in a visually degraded area through the removal of the Encina Power Station and its stack. (Pub. Resources Code § 30251.) The project also maintains marine and biological resources, and potentially enhances them, with the previously discussed elimination of once-through cooling in this section of the coastal zone. (Pub. Resources Code §§ 30230 – 30236.) Finally, the Project Owner, as part of the CECP, has committed to dedicating an easement for the Coastal Rail Trail which improves public access to coastal resources and satisfies a requirement of the Warren-Alquist Act. (Exhibit 2000, p. 4.6-13.) For all of the reasons stated above, this project is consistent with the provisions of the Coastal Act and an override is unnecessary.

**C. The Project Meets the Requirements for a LORS Override of the 35-foot height limit in the Agua Hedionda Land Use Plan.**

The Agua Hedionda Land Use Plan, a Coastal Commission-approved Local Coastal Program, regulates development of the area of the Carlsbad Coastal Zone. The plan limits buildings to a maximum of thirty-five feet in height. (Exhibit 2006, p. 16.) The exhaust stacks associated with the CECP are 90 feet tall (65 feet at grade). (Exhibit 2000, p. 4.11-13.) Project Owner does not necessarily agree that an exhaust stack is a building for the purposes of the Agua Hedionda Land Use Plan. However, numerous types of structures have been held to be buildings

by California courts.<sup>4</sup> Given that the original CECP decision found that the 139-foot stacks were inconsistent with the height limitation (Exhibit 3002, p. 9-9.), Project Owner accepts that the 90-foot stacks of the amended CECP similarly present a laws, ordinances, regulations, or standards (“LORS”) issue.

To certify a facility that does not conform to LORS, the Warren-Alquist Act requires finding: (1) the facility is required for public convenience and necessity; and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (Pub. Resources Code § 25525).

*i. The project is required for public convenience and necessity.*

While courts have not interpreted the meaning of “public convenience and necessity” within the context of Public Resources Code Section 25525, the CEC has consistently applied the flexible standard set forth in Public Utilities Code Section 1001 to interpret the meaning of the phrase. (See, e.g. El Segundo Power Redevelopment Project (00-AFC-14), Final Decision at p. 296 (Feb. 2, 2005).) Section 1001 gives broad discretion to determine the factors material to public convenience and necessity. (*California Motor Transport Co. v. Public Utilities Comm’n* (1963) 59 Cal.2d 270, 275.) The meaning “must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found.” (*San Diego & Coronado Ferry Co. v. Railroad Comm’n* (1930) 210 Cal. 504, 510.)

Rather than determine that “necessity” means “indispensably requisite,” the CEC has previously decided that a facility that is “highly important to the public convenience and desirable for the public welfare may be regarded as necessary.” (See *Metcalf Energy Center* (99-AFC-3), Final Decision at p. 464 (Sept. 24, 2001); see *also* *El Segundo Power Redevelopment Project* (00-AFC-14), Final Decision at p. 296 (Feb. 2, 2005).) In previous licensing proceedings, to inform its determination, the CEC looked to the Warren-Alquist Act’s findings on the essential nature of electrical energy to the health, safety and welfare of the people of California and its economy.

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<sup>4</sup> See *San Diego County v. McClurken* (1951) 37 Cal.2d 683, 689 for a listing of odd structures that have been determined to be buildings.

(See, e.g. Metcalf Energy Center (99-AFC-3), Final Decision at p. 463 (Sept. 24, 2001); see also El Segundo Power Redevelopment Project (00-AFC-14), Final Decision at p. 296 (Feb. 2, 2005).) The CEC concluded that, since those projects "provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy," they were required for public convenience and necessity. (Metcalf at p. 464; El Segundo at p. 297.)

This project serves public convenience and necessity because it provides reliable energy supply essential to the well-being of California's people and its economy. The project ensures regional electrical reliability and provides fast-response peaking generation that responds to the sudden and unplanned retirement of the San Onofre Nuclear Generating Station in June of 2013. (Exhibit 2000, FSA, p. 1-3.) The CECP further serves public convenience and necessity by: (1) displacing less-efficient generation from existing natural gas-fired plants (Exhibit 2000, FSA Appendix AQ-1, p. AQ1-21); (2) helping integrate additional renewable energy into the electricity system as an efficient fast-start / fast-ramping resource (Exhibit 2000, FSA Appendix AQ-1, AQ1-23); (3) providing the extraordinary public benefit resulting from the removal of the Encina Power Station and its 400-foot tall stack which will also lead to the elimination of once-through cooling for generation at the site (Exhibit 2000, FSA, pp. 4.2-1 and 4.6-12.); (4) removing large out-of-serve fuel oil tanks, the land of which will be repurposed for the CECP (Exhibit 2000, FSA, p. 1-3); and (5) reusing an existing site and its infrastructure to avoid greenfield development for new electrical generation. (Exhibit 2000, FSA, p. 1-4.)

*ii. There are not more prudent and feasible means to achieve the public convenience and necessity.*

During the Evidentiary Hearings, Staff's representative, Steve Kerr, testified that the override findings for the licensed CECP still apply to the amended CECP. (TN-204131, p. 144, lines 11-15.) He also testified that the amended CECP presents additional benefits over the licensed CECP that other means of achieving the public convenience should be weighed against (TN-204131, p. 143.) Those additional benefits are: the shutdown and decommissioning of the Encina Power Station facility with the elimination of once-through cooling and the 400 foot stack;

removal of Encina Power Station support structures;<sup>5</sup> enhanced ability to serve the region's electrical needs with flexible fast-start generation that helps integrate renewables; reduced visibility of the new units and stacks; improved site access and mobility for fire suppression; the use of recycled water; and increased conformity with LORS. (*Id.*)

In both the original and amended CECP proceedings, Staff engaged in rigorous analysis of alternatives. A review of that analysis quite clearly demonstrates that none of the alternatives provide a more prudent and feasible means of achieving public convenience and necessity. In the original CECP proceeding, Staff analyzed five candidate alternative sites in the project's service area. (Exhibit 2000, FSA, p. 4.2-16.) Two of those sites were rejected because they did not meet screening criteria. (*Id.* at p. 4.2-17.) The other three sites could not meet most of the project's objectives and would result in greater impacts than the CECP. (*Id.* at p. 4.2-18.) The analysis applied then is still relevant to the consideration of the amended CECP and "no off-site location has been identified that would avoid or substantially lessen any significant environmental effects of the proposed modification project." (*Id.*)

Other means of achieving additional capacity in the electrical system such as distributed generation, energy efficiency and demand response are not considered viable alternatives to this type of project and are unable to provide the benefit of removing the existing Encina Power Station and its stack. (*Id.* at pp. 4.2-6 – 4.2-13.) Other technology alternatives, such as solar and wind, require locations with very specific characteristics and do not meet the need for efficient and reliable peaking resources located in the "load pocket" of the San Diego region. (*Id.* at p. 4.2-19.) A reduction in the generating capacity of the CECP does not avoid or substantially reduce the environmental impacts from the project and would still require an override of the Agua Hedionda Land Use Plan height limitation. (*Id.* at p. 4.2-21.) A no-build scenario would necessitate the Encina Power Station to continue to operate until the State's once-through cooling ("OTC") policy compliance date of December 31, 2017, and without replacement generation to meet the

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<sup>5</sup> Such as the large out-of-service fuel oil tanks that will be removed to make room for the CECP generating units.

generation need to which the Encina Power Station currently provides; and furthermore, the no-build scenario would not meet the benefits of visual improvements by removal of the Encina Power Station and its stack nor would it provide the marine environment benefits of the elimination of once-through cooling. (Exhibit 2000, FSA, at p. 4.2-21; *Id.* at p. 4.2-23.) Finally, as previously discussed, the licensed CECP does not present the full benefits of the amended CECP which include reduced visual impact and the removal of the Encina Power Station. In short, there are no more prudent and feasible means of achieving the public convenience and necessity provided by the amended project.

**D. The Project Under CEC Review Has Not Changed and the CPUC Proceeding is Irrelevant to the Commission’s Evaluation of the PTA.**

Intervenor Robert Sarvey testified at the Evidentiary Hearing that Project Owner had proposed building a smaller 500 megawatt project in the California Public Utilities Commission (“CPUC”) proceeding to evaluate San Diego Gas & Electric’s Application to Partially Fill the Local Capacity Requirement Need Identified In D.13-03-004 and Enter into a Power Purchase Tolling Agreement with Carlsbad Energy Center LLC. (TN-204131, pp. 158-159.) He further testified that the project design is not stable and is floating up and down depending on CPUC’s ultimate decision. (*Id.*) Mr. Sarvey appears to have misunderstood Project Owner’s proposal to CPUC.<sup>6</sup> Project Owner’s actual proposal provided that, if CPUC will not authorize SDG&E to procure the full output of the CECP, a power purchase agreement be approved initially authorizing 500 megawatts of procurement from five of the six LMS-100 units with the potential to add the sixth unit to the agreement automatically under certain conditions. (Exhibit 6008, p. 13.) If CPUC does not authorize the inclusion of the sixth unit in the power purchase tolling agreement, Project Owner sees other commercial opportunities for the unit including a separate power purchase agreement

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<sup>6</sup> Though the CPUC proceeding is irrelevant to the CEC’s consideration of the PTA, Project Owner feels it necessary to point out Mr. Sarvey’s mistake given the certainty with which he testified that Project Owner had proposed building a smaller project.

or operation as a merchant generating unit.<sup>7</sup> The project, in terms of design and capacity, remains the project proposed in the PTA.

The CPUC proceeding and the CEC proceeding are separate and distinct processes before two different agencies. In the CPUC proceeding, San Diego Gas & Electric seeks authority to enter into a power purchase tolling agreement with the Project Owner. In the CEC proceeding, Project Owner seeks authority to construct a thermal power plant using six LMS-100 single-cycle generating units and authority to remove an existing power plant facility. The two proceedings, though they share related aspects, are independent of one another. CEC licensing, a thorough and considered process, is not tied to whether a project has obtained a particular utility contract. (See Pub. Resources Code § 25523 and 20 Cal. Code Regs. § 1752 for the factors that must be considered during the licensing process). The Warren-Alquist Act vests the exclusive power in the CEC to certify the thermal power plant proposed by Project Owner. (Pub. Resources Code § 25500, see also Pub. Resources Code §§ 25110, 25119, 25120). Even if CPUC issues a final decision authorizing a reduced contract capacity, that decision is irrelevant to the CEC's evaluation of the post-certification amendment to the CECP.

**E. Project Owner Has Designed a Project That Improves Upon Both the Existing Encina Power Station and the Currently Licensed CECP.**

Project Owner, in petitioning the CEC for a post-certification amendment, has engaged in a long and considered process to develop a project on the Encina Power Station site that improves upon both the existing facility and the licensed CECP. Staff testified that the redesigned project incorporates the benefits of the licensed CECP and adds additional benefits such as the removal of the Encina Power Station, an enhanced visual profile, the use of recycled water rather than the ocean water for plant processes, and increased conformity to LORS. (TN-204131, p. 143.)

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<sup>7</sup> While the statements of counsel are not sworn testimony, Project Owner refers the Committee to the discussion of this very issue at the Pre-Hearing Conference. (TN-203949, pp. 17- 18.) During that discussion counsel noted that there is no association between the number of units included in the eventual power purchase agreement and the number of units project owner seeks to build. Counsel further pointed out that any units not approved in the SDG&E PPTA could either be contracted under a different agreement or operated as a merchant. (*Id.* p. 18.)

The original CECP was vigorously opposed by the City of Carlsbad. Gary Barberio, on behalf of the City of Carlsbad, testified at the Evidentiary Hearings that the redesigned project has significant public benefits. Under the amended project, the CECP has a smaller environmental and physical footprint including facilities that are significantly lower in height and located in a thirty-foot deep bowl. (TN-204131, p. 17, lines 7 – 15.) The plant runs for less time and is restricted in operation hours. (*Id.* at lines 16 – 19.) The amended project also makes a commitment to decommission and demolish the Encina Power Station which removes a “very visible” visual blight that has been present in Carlsbad for over sixty years. (*Id.* at lines 20 – 25.) With the demolition of the EPS, the granting of an easement for the Coastal Rail Trail, and the eventual relocation of the SDG&E yard, a significant area of coastal land will be freed-up for non-industrial usage. (*Id.* at p. 21.) Public access to the ocean and beaches will be improved. (*Id.*)

Project Owner has tried to be responsive to the concerns of intervenors and other stakeholders in designing the project. The amended CECP grew out of a series of meetings between Project Owner, the City of Carlsbad, the Carlsbad Municipal Water District and San Diego Gas and Electric which resulted in a “Settlement Agreement.” (Exhibit 2000, p. 1-3.) That agreement provides the framework upon which some of the benefits over the licensed project are predicated such as the commitment to retire, decommission, demolish and remove the Encina Power Station. (*Id.*) As part of that process, and in response to stakeholder feedback, the transmission lines associated with the facility have been planned on the east side of the project site. By locating the transmission lines on the east side, the Project Owner avoids constraints associated with existing and planned underground utilities and the planned administration building / control room and natural gas meeting station. (Exhibit 2000, pp. 4.5-2, 4.5-8.) Doing so also addresses the City of Carlsbad’s concerns regarding the impacts of west side placement on future redevelopment of the area west of the railroad tracks and the impacts to views across the lagoon. (TN-204131, p. 38.) In response to Power of Vision’s concerns about the visual impacts of transmission poles along the eastern boundary of the site, Project Owner proposed relocating

some of the transmission poles into the bowl where it was feasible to reduce the profile of these transmission poles. (Exhibit 1012, p. 2.) Not every stakeholder suggestion can be accommodated and, in some instances, satisfying one stakeholder means upsetting another. However, Project Owner believes that the process of redesigning the CECP, and the input from stakeholders, has produced a superior project. The amended CECP will provide long-term benefits, not only to the Project Owner, but to the other stakeholders and the greater community. Project Owner thanks the intervenors, the City of Carlsbad, CEC staff and the Committee for the time and effort expended in reviewing the PTA.

### **III. CONCLUSION**

Project Owner believes that the record in this proceeding contains sufficient information upon which the Committee can issue a Proposed Decision containing comprehensive environmental analysis. The evidence supports a favorable decision on the Petition to Amend and Project Owner hopes for authorization to construct the amended CECP.