

DOCKETED

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**STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

**In the Matter of:
Petition to Amend
The Carlsbad Energy Center**

Docket No. 07-AFC-06C

**REPLY AND COMMENTS REGARDING APPLICANT RESPONSE TO MOTION
TO REISSUE THE PMPD AND REOPEN THE EVIDENTIARY RECORD AND
SIERRA CLUB COMMENTS, BY ROB SIMPSON**

The applicant responded to my motion to re-notice the PMPD, the hearing officer did not offer an opportunity for me to reply but also did not specifically preclude reply; My written comments and reply herein are to help the commission in its deliberations and may save the commission from having to hear them all verbally at the hearing. The applicant also responded to the Sierra Club Comments, despite no opportunity being offered, so they should not object to my response to theirs. See; Project Owner's Procedural Objection to Sierra Club's "Comments" on Petition for Reconsideration. It is unclear where the applicant derives the right to file objections (a type of motion) while contending that there is no right for anyone else to file motions.

The applicant first added a new definition to commission motion rules, then had the audacity to claim that California Department of Fish and Wildlife (CDFW) is not an interested agency, as defined by commission rules, and concluded that the 2014 email was adequate notice to the agency. The applicant did point out that the motion would have; "other legal significance...as a...complaint and request for investigation brought under Title 20, Section 1231." and so based on this suggestion it is also being filed as such, along with my 60 day notice to sue and petition for reconsideration.

The commission certainly has authority to consider the motion within the context of the original proceeding and the associated reconsideration proceeding. The rules have no limits on when motions can be filed. Under, 1712 "Right to Become a Party; Rights and Duties... each party shall have the right to...file motions, petitions, objections, briefs, and other documents relevant to the proceeding." The applicant has not argued that the motion is not relevant to the licensing or reconsideration proceeding(s) it is unclear how the applicant expects the commission to conduct the reconsideration hearing(s) without considering motions, indeed the applicants "opposition to the petitions and objection to Sierra Club" can be read as a motions. The issue of the commission failing to allow participation of the CDFW was squarely raised in the reconsideration petition and 60 Day Notice; the motion merely offers a way to deal with the violations.

1716.5. Motions, Hearings, Decision.

Any party may file a motion or petition with the presiding member regarding any aspect of the notice or application proceeding. Responses to the petition by other parties shall be filed within 15 days of the filing of the petition unless otherwise specified by the presiding member. The presiding member may set a hearing to consider argument on the petition, and shall, within 30 days of the filing of the petition, act to grant or deny the petition, in whole or in part, or schedule further hearings or written responses on the petition"

The applicant contention that the commission had no duty to notify CDFW defies logic and the plain language of the rules;

1714. Distribution of Copies to Public Agencies; Request for Comments.

(c) The executive director shall also transmit a copy of the notice or application to the Coastal Commission for any site located in the coastal zone, to the Bay Conservation and Development Commission (BCDC) for any site located in the Suisun Marsh or the jurisdiction of the BCDC, to the California Department of Fish and Game, to the Air pollution Control District in which the project is located, to the Water Resources Control Board in which the project is located, to all federal, state, regional, and local agencies which have jurisdiction over the proposed site and related facility, or which would have such jurisdiction but for the commission's exclusive authority to certify sites and related facilities pursuant to Chapter 6 (commencing with # 25500) of Division 15 of the Public Resources Code, and to any other federal, state, regional, or local agency which has been identified as having a potential interest in the proposed site and related facility, and shall request analyses, comments, and recommendations thereon.

It is clear that the rules identify CDFW as an interested agency, The decision has a number of references to CDFW, that obligate the applicant to interact with CDFW. Notably this interaction is no substitute for CDFW's opportunity to participate in the decision making process. The 2014 email was clearly regarding only one of the 2 amendments pending at the time.

25530. Reconsideration of decision or order; motion; petition

The commission may order a reconsideration of all or part of a decision or order on its own motion or on petition of any party.

Any such petition shall be filed within 30 days after adoption by the commission of a decision or order. The commission shall not order a reconsideration on its own motion more than 30 days after it has adopted a decision or order. The commission shall order or deny reconsideration on a petition therefor within 30 days after the petition is filed.

A decision or order may be reconsidered by the commission on the basis of all pertinent portions of the record together with such argument as the commission may permit, or the commission may hold a further hearing, after notice to all interested persons. A decision or order of the commission on reconsideration shall have the same force and effect as an original order or decision

1727. Final Report and Proposed Decision Hearings.

(a) The Commission or the assigned committee may hold one or more hearings to consider any statements of the parties on the final report and on the proposed decision, and the comments and recommendations of interested agencies and members of the public. Such statements may contain recommendations for amendments to the final report and proposed decision.

(b) The chairman or the presiding member may require that all statements by parties and other persons be filed in writing in advance of the hearings. No new or additional evidence shall be considered at the hearings under this section unless the commission or the assigned committee adopts a motion to reopen the evidentiary record. In such case, the commission or the assigned committee shall afford such notice to the parties as appears fair and reasonable under the circumstances, but in no event shall such notice be given less than ten days prior to the hearings

(c) If the commission grants a petition for reconsideration, or if on its own motion it orders reconsideration, then within 90 days, or within a longer period set by the commission for good cause stated, the commission shall hold a subsequent hearing, which may include

the taking of evidence, and shall decide whether to change the decision or order. In the absence of an affirmative vote of three members of the commission to change the decision or order, it shall stand.

(d) The commission may stay the effective date of all or part of a decision or order pending reconsideration thereof. The commission shall specify the length of the stay, which shall expire no later than the end of the period for action upon reconsideration, as established in or pursuant to subdivision (c) of this section.

NOTE: Authority cited: Sections 25218(e) and 25541.5, Public Resources Code. Reference: Section 25530, Public Resources Code.

Information Requirements for an Application

(H) Submit copies of any preliminary correspondence between the project applicant and state and federal resource agencies regarding whether federal or state permits from other agencies such as the U. S. Fish and Wildlife Service, the National Marine Fisheries Service, the U.S. Army Corps of Engineers, the California Department of Fish and Game, and the Regional Water Quality Control Board will be required for the proposed project.

1304. Power Plant Reports.

1. documentation of the "take" of terrestrial, avian and aquatic wildlife subject to legal protection under California Fish & G. Code s 2050 et seq., 16 U.S.C.A. s 1371 et seq., 16 U.S.C.A. s 1531 et seq., and 16 U.S.C. A. s 668 et seq. that occurred as a result of operation of the power plant

The applicant responded to the Sierra Club comments; "Sierra Club raises legal issues on two new topics, the project description and the greenhouse gas baseline, neither of which was raised in the petitions" This is completely false, the project description is inherently the issue at hand and the greenhouse gas baseline is the core of Mr. Sarvey and my petitions. The applicant went on in its response; "The Sierra Club "comments" therefore appear to present an attempt to circumvent the Petition for Reconsideration process by untimely filing a petition under circumstances where the other interested parties would not be able to respond to the arguments raised" The response demonstrates that the applicant was able to respond, and did in fact respond, mooting the silly argument. All of the Sierra Club issues are rightly before the commission at this time.

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