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VIA ELECTRONIC FILING

Mr. John Heiser, Project Manager
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

**Re: Huntington Beach Energy Project - Petition to Amend (12-AFC-02C)
Additional Response to Coastal Commission Comments**

Dear Mr. Heiser:

On August 15, 2016, Coastal Commission Staff docketed a "Report" regarding the Huntington Beach Energy Project ("HBEP") Petition to Amend ("PTA"), which was adopted by the Coastal Commission during its August 10, 2016 meeting (hereinafter "Comments"). Coastal Commission Staff previously provided Project Owner AES Huntington Beach Energy, LLC's ("Project Owner") representative Robert Mason of CH2M Hill with a draft version of the Comments on July 28, 2016. Project Owner submitted comments¹ on the draft Comments to Coastal Commission Staff on August 3, 2016, a copy of which has been uploaded to the docket for this proceeding at TN# 212753.² For the reasons set forth herein and in Project Owner's August 3, 2016 comments, the Coastal Commission Comments shall be treated by CEC Staff and the Siting Committee as comments from an interested agency, pursuant to Public Resources Code section 30413(e).

Pursuant to section 1769 of title 20 of the California Code of Regulations, the scope of CEC Staff's analysis of the PTA is limited to an evaluation of the impacts of the proposed modifications on the environment and the proposed modifications compliance with LORS.

¹ Project Owner's August 3, 2016 comments to Coastal Commission Staff (TN# 212753) are incorporated herein by reference.

² Coastal Commission Staff responded to Project Owner's comments in an August 9, 2016 Addendum, but did not include responses to submitted comments in the text of the adopted Comments. Coastal Commission Staff's responses to comments received on the draft Comment document are available at <http://documents.coastal.ca.gov/reports/2016/8/w7c-8-2016.pdf>.

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Further, CEC Staff's evaluation of a PTA must be consistent with the requirements of CEQA Guidelines section 15162, which governs the requirements for subsequent environmental review under CEQA after a project has been approved. Section 15162 limits additional environmental review to "substantial changes" that will result in greater environmental impacts than what was analyzed in the Final Decision, and provides for reliance on the Final Decision for areas that will not have substantial changes.

The Amended HBEP does not include any "substantial changes" that will result in new significant environmental impacts or a substantial increase in the severity of previously identified significant effects that would require additional analysis. (CEQA Guidelines, § 15162.)

As Project Owner noted in its comments to Coastal Commission Staff on the draft Comments and as set forth in detail below, regardless of the title of the Coastal Commission Comments, any written comments or "report" provided by the Coastal Commission in the Amended HBEP PTA proceedings are as a matter of law participation by the Coastal Commission pursuant to Public Resources Code section 30413(e). Further, the Comments are contrary to the Final Decision, are not supported by evidence in the evidentiary record for the HBEP PTA proceeding, and are unnecessary.³ Therefore, the recommendations contained therein should be rejected.

I. The Public Resources Code Clearly Delineates The Coastal Commission's Role To Provide "Comments" In Proceedings Before The California Energy Commission

The Public Resources Code clearly delineates the role of the Coastal Commission to provide comments, at their discretion, in proceedings before the California Energy Commission ("CEC"). The Warren-Alquist Act and the Coastal Act, as well as the implementing regulations for both statutes, clearly provide that the Coastal Commission has the discretion to offer "comments"

³ In the underlying AFC proceeding, the Final Decision analyzed each comment and proposed mitigation measure received from the Coastal Commission. The Final Decision notes that it "incorporates . . . the Report recommendations for further mitigation to the extent they are feasible and would not result in a greater adverse impact. The feasibility of any proposed mitigation in the July 2014 Report is measured, in part, against whether the record establishes the existence of an impact and whether the proposed mitigation is then proportionate to that identified impact. (See, e.g. CEQA Guidelines, tit. 14, §§ 15126.4, subd. (a)(4)(B); 15364.)" (Final Decision at p. 6.1-13 (emphasis added).) For the Amended HBEP, there are no impacts in the issue areas raised by the Coastal Commission that are greater than those previously analyzed- in fact, the same issues were previously adjudicated in the Licensed HBEP Final Decision. Thus, no mitigation, conditions, or recommendations as set forth in the Comments are "feasible."

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during CEC AFC proceedings.⁴ The Amended HBEP is a modification to the existing Licensed HBEP, which completed the AFC process with the issuance of a CEC Final Decision on October 29, 2014. Since the Coastal Commission may offer comments in an AFC proceeding, it is equally clear that Coastal Commission participation in an amendment proceeding, if any, is in the form of comments, not a report.

The Coastal Commission mistakenly assumed that since the Coastal Commission chose to provide comments in the Amended HBEP proceedings before the CEC, the requirements of Section 30413(d) apply. This is incorrect. The only regulation that governs the requirements for the modification of an existing CEC license is Section 1769 of the CEC Siting Regulations. The CEC may approve proposed modifications only if it can make the findings set forth in Section 1769(a)(3)(A)-(D) of the CEC Siting Regulations. There are no other regulatory or statutory requirements that apply to amendment proceedings.

The Commission Staff's Comments should not be reviewed or treated as a "30413(d) Report" as so labeled by the Coastal Commission. Public Resources Code section 30413(d) only applies to notice of intention ("NOI") proceedings. Specifically, Section 30413(d) provides that "the [Coastal] commission shall analyze each *notice of intention* and shall, prior to completion of the preliminary report required by Section 25510, forward to the [CEC] a written *report* on the suitability of the proposed site and related facilities specified in that notice." The language of Section 30413(d) is abundantly clear on its face that the requirements for a "report" from the Coastal Commission pertain to NOI proceedings. While NOI proceedings are required for certain kinds of powerplant siting, new thermal natural gas-fired powerplant facilities are statutorily exempt from the NOI process. (Pub. Resources Code, § 25540.6(a)(1).) The Amended HBEP is not in a NOI proceeding at the CEC.

As further evidence in support of the arguments set forth herein, on August 2, 2004, the Legislative Counsel provided an opinion stating that the plain language of Section 30413(d) applies only to NOI proceedings. (*See* Attachment A hereto at pp. 6-7.) Specifically, the Legislative Counsel determined that "the report made by the Coastal Commission pursuant to subdivision (d) of Section 30413 is submitted only in response to a NOI, and the AFC-only procedure does not include a NOI proceeding." The Legislative Counsel concluded that "the statutory requirement that the Energy Commission include such specific provisions in its

⁴ The appropriate role of the Coastal Commission in CEC proceedings was addressed at length in the AFC proceeding for the Licensed HBEP. Arguments submitted by the Applicant in the Licensed HBEP AFC proceeding are incorporated herein by reference, and are available in, but may not be limited to, TN#s 202669, 202959, 202980, 67020.

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decision on an AFC . . . is inapplicable in an AFC-only procedure established under Section 25540.6.” (*Id.* at p. 7 (emphasis added).⁵)

The Coastal Commission Comments also inappropriately cite to an April 14, 2005 Memorandum of Agreement between the CEC and the Coastal Commission (“MOA”) as “describ[ing] the manner in which the two Commissions will coordinate their respective reviews and identifies the process for the CEC to consider the Coastal Commission’s findings and recommended specific provisions.” (Coastal Commission Comments at p. 5.) The express language of the MOA, however, states that “[t]he purpose of this agreement is to ensure timely and effective coordination between the Energy Commission and the Coastal Commission during the Energy Commission’s review of an Application for Certification (AFC) of a proposed site and related facilities under Energy Commission jurisdiction.” (Emphasis added.)

The Commissions’ outline of their “respective roles and responsibilities” in the MOA does not, and cannot, change statutory requirements.⁶ As discussed above, the obligations of the Coastal Commission with respect to a PTA are clear under the plain language of the Coastal Act.

⁵ In a brief filed with the California Supreme Court (*City of Carlsbad v. California Energy Resources and Development Commission, et al.* (Case No. S203634), the CEC Chief Counsel argued that 30413(d) reports are not relevant in AFC-only proceedings. (*See* Attachment B hereto at pp. 6-7, 16-20.) As further support to that argument, the CEC relied on a 1990 document filed by the Coastal Commission in an NOI proceeding wherein the Coastal Commission also noted that its role in AFC-only proceedings is dictated by Section 30413(e):

The Coastal Commission’s role with respect to the AFC . . . would be similar to that discussed above with respect to the NOI [Fn. omitted.] The major difference is that the Coastal Commission is not required to submit a report to the Energy Commission. The Coastal Commission is nevertheless authorized, “at its discretion, to participate fully” in the proceeding pursuant to section 30413(e).

(*See* Attachment C hereto at pp. 3-4.) Therefore, it follows that the same 30413(e) participation- and nothing more- applies to an amendment proceeding.

⁶ The MOA is not law and cannot change or create statutory requirements. The intentions set forth in the MOA for Coastal Commission participation in AFC proceedings do not negate the direction provided to the Coastal Commission in the Coastal Act. The entire lawmaking authority of the State of California is vested in the legislature. (*County of Sonoma v. Comm’n on State Mandates* (2000) 84 Cal.App.4th 1264, 1280.) As administrative agencies, the limits of the Coastal Commission’s and the Energy Commission’s powers and authority are defined in their enabling statutes, and as administrative agencies, they cannot “expand or enlarge [their] power in the absence of either express or implied legislative authority.” (*Am. Fed’n of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1041; *20th Century Ins. Co. v. Quackenbush* (1998) 64 Cal.App.4th 135, 139 (“An administrative agency or official may exercise only those powers conferred by statute.”).) Nor can administrative agencies “engage in rulemaking, including interpreting and implementing a statute, through informal procedures such as oral

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Project Owner acknowledges that the Coastal Commission may choose to participate in any CEC-related proceedings. In fact, the Public Resources Code makes it abundantly clear for non-NOI proceedings, the Commission has discretion to participate, or not, in CEC proceedings: “The commission *may*, at its *discretion*, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority.” (Pub. Resources Code, § 30413(e) (emphasis added).)

Regardless of the title of the Coastal Commission Comments, any written comments or “report” provided by the Coastal Commission in the Amended HBEP PTA proceedings are as a matter of law participation by the Coastal Commission pursuant to Section 30413(e) and not a “report” as defined in Section 30413(d) as the latter is only applicable in NOI proceedings. Thus, the CEC shall treat the Comments as comments of an interested agency.

Further, as Project Owner noted in its comments to Coastal Commission Staff on the draft Comments and as set forth in detail below, the comments and recommendations submitted by the Coastal Commission are contrary to the Final Decision, are not supported by evidence in the evidentiary record for the HBEP PTA proceeding, and are unnecessary. Therefore, they should be rejected.

announcements, internal memoranda, or written and oral correspondence with affected parties.” (*B.C. Cotton, Inc. v. Voss* (1995) 33 Cal.App.4th 929, 951.) Where a statute does not appear to have the meaning informally assigned to it by the decision making body of an administrative agency and the agency’s director, and the statute has not been interpreted and implemented through an appropriate administrative rulemaking process, the agency may not give the statute a meaning that is not apparent from its terms and statutory setting by engaging in informal, ad hoc decision making. (*Id.* at p. 952.) Even assuming that the MOA requires the Coastal Commission or the Energy Commission’s informal interpretations of their implementing statutes be given some consideration, agency interpretations must be rejected where contrary to statutory intent (*Pacific Legal Found. v. Unemployment Ins. App. Bd.* (1981) 29 Cal.3d 101, 111) or when the proposed interpretation ignores the plain meaning of the statute (*Indian Springs v. Palm Desert Rent Review Bd.* (1987) 193 Cal.App.3d 127, 134, 135.) The Energy Commission has sought to encourage Coastal Commission participation in AFC proceedings for coastal facilities, both by proposing and signing the MOA, and by directly requesting participation, but these acts in no way legally bind the Energy Commission to treat the Coastal Commission Comments in this or any other PTA proceeding as anything more than comments from an interested agency as contemplated by Section 30413(e).

II. The Amended HBEP Does Not Involve Substantial Changes That Will Result In Greater Environmental Impacts Than What Was Previously Analyzed For The Licensed HBEP

As noted above, analysis of a PTA is limited to an evaluation of the impacts of the proposed modifications on the environment and the proposed modifications compliance with LORS. Further, CEC Staff's evaluation of a PTA must be consistent with the requirements of CEQA Guidelines section 15162, which governs the requirements for subsequent environmental review under CEQA after a project has been approved. Section 15162 limits additional environmental review to "substantial changes" that will result in greater environmental impacts than what was analyzed in the Final Decision, and provides for reliance on the Final Decision for areas that will not have substantial changes. The Amended HBEP does not involve any "substantial changes" that will result in greater environmental impacts than what was analyzed in the Final Decision for the Licensed HBEP. Thus, the requirements for subsequent environmental review on the topics raised in the Coastal Commission Comments are not triggered by the Amended HBEP.

A. The Final CEC Decision Determined That There Are No Wetlands On The HBEP Site And No Changes Regarding The Use of the Former Tank Area On the Project Site Are Part Of The Amended HBEP

Project Owner's consultant completed a wetland determination in November 2012 (TN# 69020), which concluded that none of the three wetland indicators set forth in California Code of Regulations, title 14, section 13577 (hydrophytic vegetation, hydric soil, and/or wetland hydrology) were present within the former fuel oil tank containment basin on the HBEP site. The Wetland Determination Data Form dated November 30, 2012 shows the United States Fish and Wildlife ("USFWS") National Wetlands Inventory ("NWI") classification as PUBFx and PUSCx, which are the same classifications identified in the PTA. However, the Coastal Commission Comments incorrectly now state that "there now appear to be two areas of Coastal Commission-jurisdictional wetlands within the proposed project footprint" (Comments at p. 9) and cites the 2015 NWI figures addressed in the PTA as the basis for the Comments. The Coastal Commission fails to acknowledge that the NWI classifications were addressed in the underlying AFC proceeding, none of the three wetland characteristics were present at the sample location, and there has been no physical change in environment since the Final Decision.

The Comments state that "the previously approved project was based in part on there being no identified wetland areas within the project footprint." (Comments p. 4.) This statement is true. The Comments are in error, however, in the assertion that the "currently proposed project . . .

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includes two areas of known or likely wetlands that would be directly affected by project activities.” (*Id.*) As stated above, Project Owner’s consultant completed a wetland determination in November 2012 (TN# 69020), which concluded that none of the Section 13577 wetland indicators were present at the sample location within the former fuel oil tank containment basin on the HBEP site.

Moreover, according to USFWS (2016a), the NWI maps are not evidence of “known or likely wetlands”⁷:

“the Service’s objective of mapping wetlands and deepwater habitats is to produce reconnaissance level information on the location, type and size of these resources. The maps are prepared from the analysis of high altitude imagery. Wetlands are identified based on vegetation, visible hydrology and geography. A margin of error is inherent in the use of imagery; thus, detailed on-the-ground inspection of any particular site may result in revision of the wetland boundaries or classification established through image analysis. **The accuracy of image interpretation depends on the quality of the imagery, the experience of the image analysts, the amount and quality of the collateral data and the amount of ground truth verification work conducted.** [emphasis added].”

Based on this disclaimer, it is not appropriate to use NWI maps and designations as a basis for making determinations because field verification is needed. The NWI also provides the following geodatabase user caution: “These spatial data are not designed to stand alone. They were originally developed as topical overlays to the U.S. Geological Survey 1:24,000 or 1:25,000 scale topographic quadrangles or digital imagery. Note that coastline delineations were drawn to follow the extent of wetland or deepwater features as described by this project and may not match the coastline shown in other base maps. **The map products were neither designed nor intended to represent legal or regulatory products.** [emphasis added].” (USFWS, 2016b⁸). Therefore, use of NWI data is for reconnaissance level information only and should be used with caution.

⁷ United States Fish and Wildlife Service (USFWS). 2016a. National Wetlands Inventory – Data Limitations, Exclusions, and Precautions, available at: <https://www.fws.gov/wetlands/data/Limitations.html>.

⁸ United States Fish and Wildlife Service (USFWS). 2016b. National Wetlands Inventory - Geodatabase User Caution, available at: <https://www.fws.gov/wetlands/Data/Wetlands-Geodatabase-User-Caution.html>.

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As previously noted, the PUBFx code refers to a palustrine system (P) with an unconsolidated bottom (UB) that has a semipermanently flooded water regime (F), which has been excavated (x) (USFWS, 2016c⁹). According to USFWS (2016c), the PUSCx code refers to a palustrine system (P) with an unconsolidated shore (US) that has a seasonally flooded water regime (C), which has been excavated (x). As defined in the NWI, palustrine systems include “all nontidal wetlands dominated by trees, shrubs, persistent emergents, emergent mosses or lichens, and all such wetlands that occur in tidal areas where salinity due to ocean-derived salts is below 0.5 ppt. It also includes wetlands lacking such vegetation, but with all of the following four characteristics: (1) area less than 8 ha (20 acres); (2) active wave-formed or bedrock shoreline features lacking; (3) water depth in the deepest part of basin less than 2.5 m (8.2 ft) at low water; and (4) salinity due to ocean-derived salts less than 0.5 ppt.” (USFWS, 2016c.) The former fuel oil tank containment basin at HBEP does not meet all of these four characteristics. Furthermore, the former fuel oil tank containment basin does not have semipermanently flooded water regime, which is defined as having surface water that persists throughout the growing season in most years and when surface water is absent, the water table is usually at or very near the land surface (USFWS, 2016c).

The draft Comments failed to acknowledge the November 2012 wetland determination of the HBEP site and the final Comments dismiss this information (provided by Project Owner in its August 3, 2016 comment letter to Coastal Commission Staff), merely stating “The document concludes that the area did not include wetlands; however, that assessment was not conducted consistent with Commission guidelines.” Contrary to the Comments’ assertion, none of the three Section 13577 wetland indicators were present at the sample location on the HBEP site.

The HBEP site wetland determination response stated, in part, the following:

The California Energy Commission (CEC) biologist, Anwar Ali, made an additional request during the Huntington Beach Energy Project (HBEP) workshop on November 14, 2012, that the Applicant complete an Arid West Region wetland determination data form for one soil pit within the fuel oil tank containment basin (the data form available in USACE, 2008). The completed Arid West Regional data form and photo log (showing the one soil pit) are included in this supplemental response. As documented in the attached data form and photo log completed by Melissa Fowler, Biologist, CH2M HILL, Inc., none of the three wetland indicators set forth in Section 13577 (hydrophytic vegetation, hydric soil,

⁹ United States Fish and Wildlife Service (USFWS). 2016c. National Wetlands Inventory - Decoder, available at: <https://fwsmapservices.wim.usgs.gov/decoders/swi.aspx>.

and/or wetland hydrology) is present within the fuel oil tank containment basin on the HBEP site (SP-01).

The Final Decision concluded that no wetlands existed on the HBEP site. This conclusion holds true even when considering the Coastal Commission's definition of wetlands, given that the CEC already determined that the Licensed HBEP is consistent with all applicable State LORS with respect to wetlands and the 2012 wetland determination found none of the three Section 13577 indicators at the sample location. In fact, CEC Staff's Preliminary Staff Assessment and Final Staff Assessment for the Licensed HBEP state the following in concluding that no wetlands exist at the HBEP site:

The fuel oil containment basin associated with Unit 5 of the existing Huntington Beach Generating Station is identified by the National Wetland Inventory (NWI) as PUBFx, a palustrine system with an unconsolidated bottom, which is semipermanently flooded and has been excavated (USFWS 2013). The applicant delineated the potential wetland within the containment basin and found that it did not meet any of the three parameters for classification as a wetland (i.e., presence of hydrophytic vegetation, substrate is predominately undrained hydric soil, and substrate saturated with water or covered by shallow water at some time during the growing season of each year) (HBEP 2013a). Staff confirmed this condition during its site visit.

(See FSA at p. 4.2-28 (TN# 202405); PSA Part A at p. 4.2-33 (TN# 200828).) There is no new information and no physical changes associated with the Amended HBEP related to wetlands on the project site since the CEC adopted the Final Decision. Since the Amended HBEP does not involve any substantial changes, the requirements for subsequent environmental review on this issue are not triggered by the Amended HBEP.

B. The Final CEC Decision Approved the Use of the 3-acre Newland Street Construction Worker Parking Area and Amended HBEP Does Not Include Changes Regarding the Use of This Area

The use of approximately three (3) acres along Newland Street for construction worker parking was evaluated throughout the Licensed HBEP AFC proceedings. The inclusion of the 3-acre Newland Street site was thoroughly evaluated during the proceedings as a construction worker parking area and the Coastal Commission provided comments related to parking proposed in the Licensed HBEP proceeding. (TN# 202701.) The Final CEC Decision Commission Adoption Order states that the "HBEP will, with implementation of the Conditions of Certification, avoid

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any substantial adverse environmental effects on nearby state, regional, county, and city parks; and areas for wildlife protection.” Use of the 3-acre Newland Street site is part of the Licensed HBEP and is not part of the requested amendments to the Final CEC Decision, does not constitute “substantial changes” that will result in greater environmental impacts than what was analyzed in the Final Decision, and, therefore, is not under consideration in the CEC PTA proceedings.

Similar to the discussion above, the Comments also incorrectly rely on “new information made available since the Coastal Commission’s previous review” as the basis for including comments on the potential for wetlands at the area on Newland Street proposed for use as construction worker parking. (Comments at p. 10, fn.3.) The Comments actually cite to a 2007 Mitigated Negative Declaration (“MND”) prepared by the City of Huntington Beach related to the Newland Street Widening Project for support, and claim that this is “new information made available since the Coastal Commission’s previous review [in July 2014].” However, a 2007 MND is not new evidence or information not previously available to the Coastal Commission Staff, CEC Staff, the City of Huntington Beach, Project Owner, or any other interested party in the Amended HBEP PTA proceeding or the Licensed HBEP AFC proceeding. (*See* CEQA Guidelines, § 15162.) Moreover, as discussed above, the issues were adjudicated and decided in the subsequent 2014 CEC approval of the Licensed HBEP.

The Comments later conclude that the proposed Newland parking area “includes areas of Commission-jurisdictional wetlands” and requests that the parking area be removed from the license. (Comments at p. 19.) However, as Coastal Commission Staff noted in their August 9 response to comments, there is no evidence in the 2007 MND to support the claim that the designated parking area may contain wetlands. The mere footnote reference in the Comments to a superseded, nine year-old City document, and the wetland locations generally referenced therein, are outside the area already licensed for construction parking as part of the Licensed HBEP. Moreover, the MND is not new information triggering subsequent environmental review.

Based on the foregoing, since there is no evidence that the Newland Street construction parking area contains wetland and since the Amended HBEP does not propose any changes in the use of the Newland Street parking area that was previously evaluated by the CEC, the requirements for subsequent environmental review on this issue are not triggered by the Amended HBEP.

C. The Amended HBEP Does Not Involve Substantial Changes That Will Result in Greater Noise or Biological Resources Impacts Than Those Previously Analyzed and the Amended HBEP Will Comply With All Existing Conditions of Certification Related to Noise and Biological Resources

The Coastal Commission acknowledges that “the currently proposed project’s equipment and activities are largely the same as the previously proposed project.” (Comments at p. 14.) The Comments then incorrectly rely on arguments made by CEC Staff that were refuted by Project Owner’s expert witness and rejected by the CEC during the Evidentiary Hearing for the Licensed HBEP, as reflected in the Final CEC Decision. Thus, the CEC has already expressly and preemptively ruled on the very state law requirements that the Comments seek to impose.

On the topic of noise impacts on biological resources, the CEC Final Decision provides the following resolution in favor of the Licensed HBEP:

Energy Commission staff recommended Condition of Certification **BIO-9** that would have required noise monitoring and noise management during the nesting season (February 1 to August 31). Staff premised this condition on the project’s contribution to increased ambient noise levels, particularly during pile-driving activities. For most areas of the project, Energy Commission staff initially suggested that the project owner be required to monitor construction and demolition noise. Any noise over 60 dBA, or 8 dBA over ambient conditions, whichever was greater, would require additional noise mitigation measures. For an area known as M5, Condition of Certification **BIO-9** would require continuous noise monitoring during construction and demolition activities within 400 feet of the fence line. (Ex. 2000, pp. 4.2-33 – 4.2-36.)

At the July 21, 2014 [evidentiary hearing], Energy Commission staff indicated that it would modify Condition of Certification **BIO-9**. The modifications would continue the requirement for noise monitoring, but would not treat the ambient noise and exceedance as thresholds for action. Instead, Condition of Certification **BIO-9** would now require a “meet and confer” process to determine whether the cause of the increase to ambient noise levels was the result of construction and demolition activities or due to weather, traffic, or other conditions unrelated to the HBEP. (07/21/14 RT 176:12-177:17.)

Applicant, on the other hand, contends that construction and demolition noises

do not impact birds in the same way as humans, given bird anatomy and physiology.

Applicant's witness, Dr. Robert Dooling, testified that human hearing would be graphed as roughly bowl-shaped, with people hearing less well at low and high frequencies. Bird hearing, when graphed in connection with human hearing, appears as a "V" shape in the middle of the bowl. The placement of the "V" in the graph is based on the frequencies at which birds vocalize. Construction noise occurs at low frequencies outside of the vocalization range of birds. Thus, concluded Dr. Dooling, birds are not as impacted by construction noise as humans. (07/21/14 RT 178:1-178:23; Ex. 1127.)

We find Dr. Dooling's testimony to be persuasive. We also find that special status species, such as the light-footed clapper rail, are not currently breeding in Magnolia Marsh. We further note that it is speculative that the restoration activities in the marsh will, in the long-term, support nesting habitat of these bird species of special concern. (See discussion of the light-footed clapper rail, above.) We thus decline to impose Condition of Certification **BIO-9**.

(Final Decision at pp. 5.1-22 - 5.1-23.) Thus, the issues were adjudicated and decided by the CEC and are not before the CEC in the Amended HBEP proceeding.

In addition, the Comments incorrectly state that the Amended HBEP would "bring major noise and vibration-generating power plant components even closer to the sensitive species in the adjacent ESHA/wetland area than the previously proposed project and would create even more significant adverse effects." (Comments at p. 14.) This statement is false. While the Amended HBEP has a different general arrangement than the Licensed HBEP, the equipment associated with the Amended HBEP will not be located any closer to the ESHA/wetland area than the Licensed HBEP. In addition, the Licensed HBEP would have included an 8' wall on the wetland side of the facility for the attenuation of noise, and the Amended HBEP includes a 50' wall. Project Owner is not seeking any changes to the existing Noise or Biological Resources Conditions of Certification as part of the Amended HBEP.

Since the Amended HBEP does not involve any substantial changes that will result in greater environmental impacts related to noise and biological resources than what was previously analyzed for the Licensed HBEP, the requirements for subsequent environmental review on this issue are not triggered by the Amended HBEP.

D. The Amended HBEP Does Not Involve Substantial Changes That Will Result in Greater Traffic Impacts Than Those Previously Analyzed and the Amended HBEP Will Comply With All Existing Traffic and Transportation Conditions of Certification

The Coastal Commission Comments also recommend specific information be included in the Traffic Control Plan required by TRANS-3 related to cumulative projects. However, the Comments fail to acknowledge that Project Owner docketed additional details regarding cumulative traffic impacts during the course of the PTA proceeding. (See TN#s 210262, 210567; see also Project Owner's PSA Comments at pp. 9-10 (TN# 212379) and Project Owner's Response to City's PSA Comments at pp. 4-5 (TN# 212752).) Cumulative traffic impacts were thoroughly analyzed during both the Licensed HBEP AFC proceeding and during the current Amended HBEP PTA proceeding, and those analyses demonstrate that there will be no significant project or cumulative impacts on traffic.¹⁰ Accordingly, public beach access will not be impacted. Project Owner is not seeking any changes to the existing Traffic Conditions of Certification as part of the Amended HBEP.

¹⁰ Although Coastal Commission Staff acknowledged Project Owner's February 10, 2016 filing (TN# 210262) in their August 9 response to comments, they misconstrued the analysis contained therein. The August 9 response to comments mistakenly state "truck trips associated with implementation of the Ascon Landfill RAP will result in significant and unavoidable impacts . . ." to several nearby intersections that provide public access to the shoreline." In fact, Project Owner's February 10 filing actually provides:

"The Ascon Landfill EIR found that truck trips associated with implementation of the Ascon Landfill RAP will result in significant and unavoidable impacts to the following Beach Boulevard intersections during the a.m., mid-day, and/or p.m. peak hour . . . Based on this finding, the Ascon Landfill Remedial Action Plan EIR includes the following mitigation measure:

Mitigation Measure RTFAF-1: The Project shall limit the maximum hourly one-way haul truck trips during each of the PM peak hours (4 pm to 5 pm, and 5 pm to 6 pm) to 10 utilizing Beach Boulevard (10 in-bound trips per hour and 10 out-bound trips per hour), and 15 utilizing Brookhurst Street (15 in-bound trips per hour and 15 out-bound trips per hour).

The HBEP PTA does not propose to use Beach Boulevard or Brookhurst Street for construction-related traffic and, therefore, HBEP will not contribute to cumulative traffic impacts associated with the Ascon Landfill RAP."

(Emphasis added.) In addition, the Coastal Commission also relies on the position that the 2016 analysis does not include an evaluation of the additional impacts that may result from the proposed Poseidon Project. What the Coastal Commission fails to acknowledge, however, is that the cumulative impacts of the Poseidon project and the Ascon Landfill project were thoroughly analyzed during the Licensed HBEP AFC proceedings.

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Since the Amended HBEP does not involve any substantial changes to traffic and transportation that will result in greater environmental impacts than what was previously analyzed for the Licensed HBEP, the requirements for subsequent environmental review on this issue are not triggered by the Amended HBEP.

III. CONCLUSION

For the reasons set forth above, the Coastal Commission Comments shall be treated by CEC Staff and the Siting Committee as comments from an interested agency, pursuant to Public Resources Code section 30413(e). Further, as demonstrated herein and in Staff's Preliminary Staff Assessment, the Amended HBEP does not include any "substantial changes" that will result in new significant environmental impacts or a substantial increase in the severity of previously identified significant effects that would require additional analysis pursuant to Section 15162 of the CEQA Guidelines.

As previously noted, Project Owner welcomes and appreciates Coastal Commission participation in the Amended HBEP PTA proceedings currently pending before the CEC as provided by Section 30413(e) of the Coastal Act.

Please feel free to contact me if you have any questions or need additional information.

Very truly yours,



Melissa A. Foster
MAF:jmw

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August 2, 2004

Honorable Patricia C. Bates
4116 State Capitol

**CALIFORNIA ENERGY COMMISSION; CALIFORNIA COASTAL COMMISSION;
CERTIFICATION OF SITE AND RELATED POWER FACILITIES - #12178**

Dear Ms. Bates:

You have asked several questions with respect to the certification of a site and related power facilities under Section 25540.6 of the Public Resources Code.¹ The first question is whether, on an application for certification pursuant to Section 25540.6, the California Coastal Commission is required to submit a report pursuant to subdivision (d) of Section 30413 of the Public Resources Code.

Generally, and with certain exceptions, the Warren-Alquist State Energy Resources Conservation and Development Act (Div. 15 (commencing with Sec. 25000); hereafter the Energy Act) requires every person proposing the construction of a thermal powerplant and related facility to obtain certification of the site and related facility from the California Energy Resources Conservation and Development Commission (hereafter the Energy Commission; see Secs. 25110 and 25120, and Sec. 25500).

By way of background, under the Energy Act the procedures for certification of a site and related power facilities are contained in Chapter 6 (commencing with Section 25500) of Division 15, and generally require the filing of a notice of intention (hereafter NOI) to submit an application for certification of a site and related facility (Sec. 25502), followed by the filing of an application for certification (hereafter AFC) of a site and related facility (Sec. 25519). For five specified types of projects, however, the requirement of a NOI is eliminated and the only procedure required is an application for certification of a site and related facility (Sec. 25540.6; hereafter the AFC-only procedure). The NOI proceeding primarily determines the suitability of the proposed sites to accommodate the facility and to meet the demand for electrical energy

¹ All section references are to the Public Resources Code, unless otherwise indicated.

and capacity (Sec. 25502), whereas the AFC proceeding considers whether a particular site and related facility are suitable for certification (Sec. 25519).

In the NOI proceeding, the Energy Commission is required to prepare and make public a summary and hearing order on the NOI (Secs. 25502 and 25510). Following the summary and hearing order on the NOI, the Energy Commission is required to commence adjudicatory hearings culminating in the final report of the commission which is, in turn, subject to a hearing or hearings (Secs. 25513 and 25515). If the NOI is approved by the Energy Commission, the AFC proceeding is commenced upon the filing of an application for certification of a site and related facility (Secs. 25516 and 25519). The Energy Commission is required to hold hearings and issue a written decision on the AFC, stating its findings (Sec. 25523). The Energy Commission's decision is subject to reconsideration (Sec. 25530), and judicial review by the Supreme Court of California (Sec. 25531).

The power of the Energy Commission to certify sites and related power facilities is declared to be "exclusive," and a certificate issued by the Energy Commission in accordance with the power facility and site certification program prescribed by Chapter 6 (commencing with Section 25500) is in lieu of any permit, certificate, or similar document required by a state, local, or regional agency for use of the site and related facilities, and supersedes any applicable statute, ordinance, or regulation of any state, local, or regional agency (Sec. 25500; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 879).

The California Coastal Act of 1976 (Div. 20 (commencing with Sec. 30000; hereafter the California Coastal Act) establishes the California Coastal Commission (Secs. 30105 and 30300; hereafter the Coastal Commission) with specified jurisdiction over prescribed areas along the state's coastline designated as the coastal zone (Art. 3 (commencing with Sec. 30330), Ch. 4, Div. 20; Secs. 30103 and 30103.5). The Coastal Commission participates in proceedings with respect to the certification of a site and related power facility to be located in the coastal zone (Sec. 30413).

Section 30413 reads as follows:

"30413. (a) In addition to the provisions set forth in subdivision (f) of Section 30241, and in Sections 25302, 25500, 25507, 25508, 25510, 25514, 25516.1, 25523, and 25526, the provisions of this section shall apply to the commission and the State Energy Resources Conservation and Development Commission with respect to matters within the statutory responsibility of the latter.

"(b) The commission shall, prior to January 1, 1978, and after one or more public hearings, designate those specific locations within the coastal zone where the location of a facility as defined in Section 25110 would prevent the achievement of the objectives of this division; provided, however, that specific locations that are presently used for such facilities and reasonable expansion thereof shall not be so designated. Each such designation shall include a description of the boundaries of those locations, the objectives of this division which would be so affected, and detailed findings concerning the significant

adverse impacts that would result from development of a facility in the designated area. The commission shall consider the conclusions, if any, reached by the State Energy Resources Conservation and Development Commission in its most recently promulgated comprehensive report issued pursuant to Section 25309. The commission shall transmit a copy of its report prepared pursuant to this subdivision to the State Energy Resources Conservation and Development Commission.

“(c) The commission, after it completes its initial designations in 1978, shall, prior to January 1, 1980, and once every two years thereafter until January 1, 1990, revise and update the designations specified in subdivision (b). After January 1, 1990, the commission shall revise and update those designations not less than once every five years. Those revisions shall be effective on January 1, 1980, or on January 1 of the year following adoption of the revisions. The provisions of subdivision (b) shall not apply to any sites and related facilities specified in any notice of intention to file an application for certification filed with the State Energy Resources Conservation and Development Commission pursuant to Section 25502 prior to designation of additional locations made by the commission pursuant to this subdivision.

“(d) Whenever the State Energy Resources Conservation and Development Commission exercises its siting authority and undertakes proceedings pursuant to the provisions of Chapter 6 (commencing with Section 25500) of Division 15 with respect to any thermal powerplant or transmission line to be located, in whole or in part, within the coastal zone, the commission shall participate in those proceedings and shall receive from the State Energy Resources Conservation and Development Commission any notice of intention to file an application for certification of a site and related facilities within the coastal zone. The commission shall analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the State Energy Resources Conservation and Development Commission a written report on the suitability of the proposed site and related facilities specified in that notice. The commission's report shall contain a consideration of, and findings regarding, all of the following:

“(1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.

“(2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.

“(3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.

“(4) The potential adverse environmental effects on fish and wildlife and their habitats.

“(5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.

“(6) The degree to which the proposed site and related facilities could reasonably be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.

“(7) Such other matters as the commission deems appropriate and necessary to carry out this division.

“(e) The commission may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its powerplant siting authority. In the event the commission participates in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.

“(f) The State Energy Resources Conservation and Development Commission shall forward a copy of all reports it distributes pursuant to Sections 25302 and 25306 to the commission and the commission shall, with respect to any report that relates to the coastal zone or coastal zone resources, comment on those reports, and shall in its comments include a discussion of the desirability of particular areas within the coastal zone as designated in such reports for potential powerplant development. The commission may propose alternate areas for powerplant development within the coastal zone and shall provide detailed findings to support the suggested alternatives.” (Emphasis added.)

To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers' Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). When the language of a statute is clear, its plain meaning should be followed (*Droeger v. Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 38).

With respect to a NOI proceeding, subdivision (d) of Section 30413 requires the Coastal Commission to analyze each NOI proposing a site and related facilities to be located within the coastal zone, and to prepare a written report for the Energy Commission on the suitability of the proposed site and related facilities that considers specified matters and makes certain findings. Subdivision (d) of Section 30413 requires the Coastal Commission to submit this report to the Energy Commission prior to the Energy Commission preparing and making public a summary and hearing order on the NOI pursuant to Section 25510.

Section 25540.6 establishes the AFC-only procedure for certification in certain circumstances, and reads as follows:

“25540.6. (a) Notwithstanding any other provision of law, no notice of intention is required, and the commission shall issue its final decision on the

application, as specified in Section 25523, within 12 months after the filing of the application for certification of the powerplant and related facility or facilities, or at any later time as is mutually agreed by the commission and the applicant, for any of the following:

“(1) A thermal powerplant which will employ cogeneration technology, a thermal powerplant that will employ natural gas-fired technology, or a solar thermal powerplant.

“(2) A modification of an existing facility.

“(3) A thermal powerplant which it is only technologically or economically feasible to site at or near the energy source.

“(4) A thermal powerplant with a generating capacity of up to 100 megawatts.

“(5) A thermal powerplant designed to develop or demonstrate technologies which have not previously been built or operated on a commercial scale. Such a research, development, or commercial demonstration project may include, but is not limited to, the use of renewable or alternative fuels, improvements in energy conversion efficiency, or the use of advanced pollution control systems. Such a facility may not exceed 300 megawatts unless the commission, by regulation, authorizes a greater capacity. Section 25524 does not apply to such a powerplant and related facility or facilities.

“(b) Projects exempted from the notice of intention requirement pursuant to paragraph (1), (4), or (5) of subdivision (a) shall include, in the application for certification, a discussion of the applicant's site selection criteria, any alternative sites that the applicant considered for the project, and the reasons why the applicant chose the proposed site. That discussion shall not be required for cogeneration projects at existing industrial sites. The commission may also accept an application for a noncogeneration project at an existing industrial site without requiring a discussion of site alternatives if the commission finds that the project has a strong relationship to the existing industrial site and that it is therefore reasonable not to analyze alternative sites for the project.” (Emphasis added.)

Because Section 25540.6 eliminates the requirement for a NOI in an AFC-only procedure, the Coastal Commission is not required to submit in that procedure the report required in a NOI proceeding under subdivision (d) of Section 30413. The intent of the Legislature in enacting Section 25540.6 was to establish an expedited certification procedure for specified types of facilities by removing the NOI requirement and shortening the AFC process to 12 months (Assembly Rules Committee, Office of Assembly Floor Analyses, 3rd reading analysis of Senate Bill No. 1805 (1977-78 Regular Session), as amended August 22, 1978).

In addition, the failure of the Legislature to change the law in a particular respect when the subject is generally before it, while changes in other aspects of that subject are made, is indicative of an intent to leave the law as it stands in the aspects not amended (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596). In that regard, when Section

25540.6 was enacted in 1978 (Stats. 1978, c. 1010), the Legislature also amended Section 30413 (Stats. 1978, c. 1013), but did not amend Section 30413 to require in a proceeding under Section 25540.6 that the Coastal Commission submit the report required by subdivision (d) of Section 30413.

Accordingly, we conclude that in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission is not required to submit the report that is required by subdivision (d) of Section 30413 of the Public Resources Code in a NOI proceeding.

You have also asked whether, in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission in its review and comment under subdivision (d) of Section 25519 of the Public Resources Code is prohibited from submitting the information it would submit in a report required by subdivision (d) of Section 30413.

With respect to an AFC-only proceeding, subdivision (d) of Section 25519 requires the Energy Commission to transmit a copy of the AFC to the Coastal Commission for its review and comments, if the site and related facility are proposed to be located in the coastal zone, and the Coastal Commission may participate in the proceeding on the AFC as an interested party (see Sec. 25508 and subd. (e), Sec. 30413). Nothing in those provisions or in any other statutory provision prohibits the Coastal Commission from submitting to the Energy Commission, in its review and comments in an AFC-only proceeding, information similar to that contained in the report that the Coastal Commission is required, pursuant to subdivision (d) of Section 30413, to submit in a NOI proceeding. Moreover, the AFC-only procedure established by Section 25540.6 specifically requires three of the five types of projects exempted from the NOI requirement to include in the AFC a discussion of the applicant's site selection criteria, any alternative sites that the applicant considered for the project, and the reasons why the applicant chose the proposed site (subd. (b), Sec. 25540.6). These items are similar to the considerations regarding alternative proposed sites that the Coastal Commission is required to address in its report required by subdivision (d) of Section 30413 in a NOI proceeding.

Accordingly, we conclude that, in an AFC-only proceeding conducted pursuant to Section 25540.6 of the Public Resources Code, the California Coastal Commission in its review and comment under subdivision (d) of Section 25519 of the Public Resources Code is not prohibited from submitting the information it would submit in a report under subdivision (d) of Section 30413.

Finally, you have asked whether, on an application for certification made pursuant to Section 25540.6 of the Public Resources Code, the California Energy Commission is required by subdivision (b) of Section 25523 to include in its decision specific provisions to meet any comments the California Coastal Commission submits in its review and comments submitted to the Energy Commission pursuant to subdivision (d) of Section 25519 of the Public Resources Code.

The Energy Commission is required to prepare a written decision after the public hearing on an AFC that includes several items (Sec. 25523). Section 25523 specifically requires the Energy Commission, in the case of a site to be located in the coastal zone, to include in that

decision specific provisions to meet the objectives of the California Coastal Act, as may be specified in the report submitted by the Coastal Commission pursuant to subdivision (d) of Section 30413, unless the Energy Commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible (subd. (b), Sec. 25523).

However, the requirement that the Energy Commission include, in its decision on an AFC, specific provisions to meet the objectives of the California Coastal Act as may be specified in the report that the Coastal Commission is required to submit under subdivision (d) of Section 30413, does not apply in the instance of an AFC-only procedure established by Section 25540.6. The report made by the Coastal Commission pursuant to subdivision (d) of Section 30413 is submitted only in response to a NOI, and the AFC-only procedure does not include a NOI proceeding (see discussion above). Therefore, we conclude that the statutory requirement that the Energy Commission include such specific provisions in its decision on an AFC, unless they would result in greater adverse effect on the environment or would not be feasible, is inapplicable in an AFC-only procedure established under Section 25540.6.

Accordingly, we conclude that on an application for certification made pursuant to Section 25540.6 of the Public Resources Code, the California Energy Commission is not required by subdivision (b) of Section 25523 to include in its decision specific provisions to meet any comments the California Coastal Commission submits in its review and comments to the Energy Commission pursuant to subdivision (d) of Section 25519 of the Public Resources Code.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

Maria H. Hilakos Hanke by MC

By
Maria Hilakos Hanke
Deputy Legislative Counsel

MHH:kg

ATTACHMENT B

CONFORMED
COPY

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CITY OF CARLSBAD,

Petitioners,

v.

CALIFORNIA ENERGY
RESOURCES CONSERVATION
AND DEVELOPMENT
COMMISSION, et al.

Respondent, and

CARLSBAD ENERGY CENTER,
LLC

Real Party in Interest.

) Case No.: S203634
)

) California Energy Commission
) Docket No. 07-AFC-6
)

SUPREME COURT
FILED

'JUL - 9 2012

Frank A. McGuire Clerk
Deputy

RESPONDENT CALIFORNIA ENERGY COMMISSION'S
PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

Exempt from Filing Fees, Gov. Code § 6103

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CITY OF CARLSBAD,)	Case No.: S203634
)	
Petitioners,)	
)	California Energy Commission
v.)	Docket No. 07-AFC-6
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CALIFORNIA ENERGY)	
RESOURCES CONSERVATION)	
AND DEVELOPMENT)	
COMMISSION, et al.)	
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Respondent, and)	
)	
CARLSBAD ENERGY CENTER,)	
LLC)	
)	
Real Party in Interest.)	

RESPONDENT CALIFORNIA ENERGY COMMISSION'S
PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

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**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

CITY OF CARLSBAD,)	Case No.: S203634
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Petitioners,)	
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v.)	Docket No. 07-AFC-6
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COMMISSION, et al.)	
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Respondent, and)	
)	
CARLSBAD ENERGY CENTER,)	
LLC)	
)	
Real Party in Interest.)	

**RESPONDENT CALIFORNIA ENERGY COMMISSION'S
PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE**

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**CERTIFICATE OF INTERESTED ENTITIES
OR PERSONS
(Cal. Rules of Court, rule 8.208)**

Respondent California Energy Commission (“Commission”) is not an “entity” pursuant to Rule of Court 8.208, subdivision (C)(2), because it is a government agency. Real Party in Interest, Carlsbad Energy Center, LLC, is a private corporate entity, and is believed by the Commission to be an interest of the energy company NRG, Inc. Respondent California Energy Commission is unaware of any other entity in this proceeding that has a financial or other interest in the outcome of the proceeding.

Date: July 9, 2012



MICHAEL J. LEVY
Counsel for Respondent
California Energy Commission

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To the Honorable Chief Justice of California and the Honorable Associate Justices of the California Supreme Court:

**PRELIMINARY OPPOSITION
TO PETITION FOR WRIT OF MANDATE**

Respondent California Energy Resources Conservation and Development Commission (“Energy Commission” or “Commission”) respectfully requests that the Supreme Court deny the Petition for Writ of Mandate in this matter.

I. INTRODUCTION

This case involves the Energy Commission’s decision to license the Carlsbad Energy Center Project (“CECP”), a thermal power plant facility. CECP was licensed after an administrative proceeding that lasted nearly five years and after a very thorough environmental review. The process included numerous public events including public workshops, lengthy discovery, multiple pre-hearing conferences, at least three separate rounds of trial-type hearings where all parties were able to present evidence and cross-examine witnesses regarding any issues, and two (sequential) lengthy opinions proposed by the Commission committee overseeing the process.

Petitioner City of Carlsbad (“City”) participated actively throughout this lengthy process. Numerous government agencies also provided their comments and testimony, including the local air district, the Regional Water Quality Control Board, and state and federal wildlife agencies, as well as the California Independent System Operator. As might be expected from such a proceeding, the administrative record and environmental analysis for the project is very large, and includes thousands of pages of materials, charts, computer runs, photo simulations, and transcripts. The

Commission's decision contains more than 200 conditions of certification designed to ensure that environmental impacts are mitigated and that the health and safety of the public is protected.

With the required mitigation set forth in its conditions, the Commission concluded that CECP would result in no substantive significant adverse environmental impacts that are not fully mitigated. Although the Commission found that the project complied with most applicable laws, ordinances, regulations, and standards ("LORS"), the City made changes to its ordinances late in the proceeding with the purpose of obstructing the project. The Commission therefore made findings pursuant to its statute that the project is necessary for public convenience and necessity, regardless of not being consistent with the City's ordinances. The Commission made similar public convenience and necessity "override" findings directed to alleged inconsistencies with the California Coastal Act and the California Fire Code.

The City has been—and continues to be—unequivocally opposed to the project. It has raised nearly every conceivable objection to CECP in an effort to frustrate its licensing. All of the substantive issues raised by petitioners have been addressed by the Commission within its process.

The Commission ultimately licensed CECP, for reasons succinctly summarized in a brief from Commission staff regarding the significant environmental and electric reliability benefits of the project:

The record shows that CECP will replace aging and inefficient infrastructure—the once-through-cooling ("OTC") boiler facilities of Encina Power Station ("EPS") units 1-3 (which *will* be decommissioned when CECP goes on line—contrary to the City's claim) and, to some degree, the use of units 4-5 (which would

remain for the time being). Units 1-3 were built in the 1950s and are quite inefficient. They must be kept running at a low level, burning gas and pumping ocean water, so they can be ramped up to provide emergency backup for the system on the few occasions for which they are needed. CECF will provide a newer, more efficient, fast-ramping facility that need not be kept running to be available on short notice. It will not use OTC, thus avoiding its attendant biological damage. It will generate energy more efficiently, with fewer emissions (of both criteria pollutants and greenhouse gases) per megawatt hour, making the electric generating system more efficient and less damaging to the environment. Its power will be consumed in accordance with the laws of physics, which means at the nearest load—the City of San Diego and such places as the City itself. It will increase electric reliability for the City and the San Diego region as a whole. Its fast ramping capability will allow it to integrate renewable power from wind and solar sources much more effectively than the older units it replaces, a benefit to the environment consistent with state and federal energy policy. Ultimately, it would be part of the overall infrastructure necessary for the closure of the EPS facilities which rely on OTC. It would thereby facilitate the State Water Board’s newly adopted policy for such power plants, which can only be closed when modern replacement generation is ready. These benefits, detailed later in this brief, are very significant benefits not only to the City, but to the region and the State as a whole. (Pet. App., Exh. A, pp. 8.1-24 and 25.)¹

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¹ The Commission’s three-volume appendix (“CEC Appendix” provides pertinent parts of the record, including the “Final Staff Assessment,” or “FSA,” comprising part of the comprehensive environmental analysis for

ISSUES PRESENTED FOR REVIEW

- 1. Should the Court Dismiss the Petition, Where the City Violated Rules of Court 8.25 by Failing to Serve the Petition on Respondents Before Filing With the Court?**
- 2. Can the Energy Commission License the CECP Without a Report from the California Coastal Commission?**
- 3. Is CECP Consistent With the California Coastal Act?**
- 4. Did the Energy Commission Need to Further “Consult” with the City Regarding “Override” of City Ordinances?**
- 5. Did the Energy Commission Properly “Override” any Claimed Inconsistency with the California Fire Code?**

II. JURISDICTION OF THE SUPREME COURT

Public Resources Code section 25531, subdivision (a), states that “The decisions of the [energy] commission on any application for certification of a site and related [power] facility are subject to judicial review by the Supreme Court of California.”

IV. SCOPE OF REVIEW

The scope of review of Energy Commission power facility licenses is set forth in Public Resources Code section 25531, subdivision (b), which provides the narrowest scope of review that is consistent with the California Constitution:

No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination

the project. The Final Decision is Exhibit A of Petitioner’s Appendix. Page numbers correspond to the page numbers in the original documents..

of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the commission.

(Pub. Resources Code, § 25531, subd. (b).) For purposes of this Statement, the Commission assumes that the Court's inquiry as to "whether the commission has regularly pursued its authority" includes a determination as to whether the Commission's findings are supported by substantial evidence in the record. (*See Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506.)

V. STATEMENT OF THE CASE

A. The Energy Commission's Power Facility Certification Process

In California, the construction of any thermal power plant with a generating capacity of at least 50 megawatts ("MW," one million watts) requires a license ("certificate," in the language of the statute) from the Energy Commission. (Pub. Resources Code, §§ 25110, 25120, 25500.)² The Commission's certificate takes the place of all other state, regional, and local permits that otherwise would be required. (§ 25500.)

The Commission's Application for Certification ("AFC") process involves an extensive examination of all aspects of proposed power facilities, including environmental, health, safety, and other factors. (See §§ 25519 - 25523, 25525 - 25529; Cal. Code Regs., tit. 20, §§ 1741 - 1755.) The Commission serves as lead agency under the California Environmental Quality Act ("CEQA"). (§ 25519, subd. (c).) The process focuses on two

² Unless otherwise indicated, section citations in this Preliminary Opposition are to the Public Resources Code.

critical findings that the Commission must make: (1) whether a proposed facility will comply with all applicable laws, ordinances, regulations, and other standards (“LORS”) (§ 25523, subd. (d)(1)); and (2) whether it will cause any significant, unmitigable, adverse environmental impacts. (§§ 21080.5, subds. (d)(2)(A), (d)(3)(A), 21100, subd. (b).) The Commission may not approve a project that does not comply with applicable LORS, or that has a significant, unmitigable, adverse environmental impact, unless the Commission also determines that the project has overriding benefits. (§§ 21002, 25525; Cal. Code Regs., tit. 20, §§ 1752, subds. (b), (l), 1755, subds. (b) - (d).)

The Commission solicits participation by all state, local, and federal agencies with an interest in issues regarding power plant siting. (§ 25519, subds. (c) through (k).) This includes the California Coastal Commission (“Coastal Commission”). As will be discussed further below, the Coastal Commission’s participation in the licensing (“Application for Certification,” or “AFC”) process is discretionary; it is only required to file a report on compliance with the Coastal Act in Notice of Intent or “NOI” proceedings, a process which was not relevant to the CECP.

The AFC process consists of several phases intended to foster full public involvement and ensure that the decision-makers have all relevant information. The phases include (1) determining whether the AFC has enough information so that meaningful analysis may begin; (2) development and exchange of additional information by all parties, through data requests and public workshops; (3) publication of a thorough, detailed assessment of all aspects of the project by the Commission’s staff of independent technical experts; (4) evidentiary hearings on contested issues, before a committee of two commissioners, in which any party may present

direct and rebuttal testimony and cross-examine witnesses; (5) publication of a proposed decision and comments thereon, with revisions in response to comments if appropriate; (6) consideration and the adoption of a final decision by the full Commission at a public hearing, and (7) if a party sets forth specific grounds for reconsideration addressing alleged errors of fact or law in the Commission's decision, an opportunity for reconsideration. (§§ 25523, 25525, 25530; Cal. Code Regs., tit. 20, §§ 1716, 1718, 1720, 1742.5 - 1755.) In the AFC process, the Commission's staff functions as an independent party to the proceeding. (Cal. Code Regs., tit. 20, §1712.5.)

The AFC process is entirely separate from the "Notice of Intent" (or "NOI") process which some kinds of facilities must satisfy *before* an AFC can be filed. The NOI process is a site screening process that focuses on the screening of alternative site locations, and is subject to separate statutory provisions and agency regulations. (Compare §§ 25502-25516.6 [NOI statutory requirements] with §§ 25517-25529 [AFC statutory requirements].) The City's Petition incorrectly conflates these two processes, thereby confusing and misstating the statutory duties of the Coastal Commission with regard to Commission proceedings.

In conducting licensing proceedings, the Energy Commissioners exercise the considerable technical and scientific expertise the Legislature requires them to have:

One member of the commission shall have a background in the field of engineering or physical sciences and shall have knowledge of energy supply or conversion systems; . . . one member shall have background and expertise in the field of environmental protection or the study of ecosystems; one member shall be an economist with background and experience in the field of natural resource management

(§ 25201.)

B. The Commission's Certified Regulatory Program Under CEQA

As is the case for nearly all discretionary governmental permits in California, the Commission's power plant certification process is subject to CEQA. (See §§ 21080, subd. (a), 25519, subd. (c).) In general, CEQA requires all state agencies to prepare an environmental impact report ("EIR") on any project they propose to carry out or approve that may cause a significant adverse environmental impact. (§ 21100, subd. (a).) However, when a state regulatory program requires the preparation of a written document that is the "functional equivalent" of an EIR, CEQA also provides that the Secretary of the Resources Agency may exempt the program from the portions of CEQA requiring an EIR. (§ 21080.5, subd. (a).) Such "certified regulatory programs" remain subject to the substantive provisions of CEQA, including the requirements that significant adverse impacts be mitigated where feasible. (§ 21080.5, subd. (d); Cal. Code Regs., tit. 14, § 15250.) However, many of the procedural requirements of CEQA do not apply to a certified regulatory program which, as in the Commission's case, may provide substantially greater opportunity for the public to probe assumptions that form the basis for the agency's analysis and to provide alternative analyses. The Resources Secretary certified the Commission's power facility certification program in 1981 and re-certified it in 2000, and the Commission's environmental review of CECP was conducted under the certified program. (See Cal. Code Regs., tit. 14, § 15251, subd. (k).)

C. The Carlsbad Energy Center Project

For nearly 60 years, the Encina Power Station (“EPS”) has operated on the California coast in the City of Carlsbad. It expanded in the 1970s, and is now proposing to expand, within its current boundaries, by adding the CECP. EPS is strategically located from an electric reliability standpoint; it provides essential electric reliability services in an urban “load pocket” in the San Diego region. However, EPS is an aging and obsolescent facility, with old “legacy” boiler units that are inefficient, and it is cooled by ocean water, imposing adverse impacts on marine biota. (Pet. Exh. 1 [Final Dec.] p. 3-19; CEC Exh.1 [FSA], p. 618.) It is the State’s policy to close and, if necessary, replace these old facilities with newer, smaller, more efficient ones. (Pet. Exh. 1 [Final Dec.] p.3-22 [Finding No. 9].) New power plant facilities are smaller, use modern technology that reduce air emissions, and do not rely on marine cooling, thereby reducing environmental impacts. (*Id.* at pp. 3-19, 22 [Final Dec.]

CECP is proposed for the EPS site, and is such a modernization project. It is smaller but far more efficient than the aging EPS units (and also more efficient than the typical electric generating “peakers”), has “fast start” capability, and can flexibly ramp its generation up and down to meet fluctuating demand. (*Id.* at pp. 2-2, 2-4, 3-2, 3-19 and 20,) This meets a critical reliability need in the San Diego “load pocket” (also called a “local capacity area” or “reliability area”), and will help integrate the fluctuating and growing contribution of renewable electric generation sources. (*Id.* at pp. 3-2, 3-20.) CECP also has the advantage of utilizing existing industrial and electric infrastructure, including transmission lines, switchyards, natural gas lines, and the EPS industrial site. (*Id.* at 3-20, 9-10 [Finding No. 5.f.]; CEC Exh.1 [FSA] at pp. 6-1, 6-4, 9-4 to 9-5.)

Even with such important and obvious benefits, CECP has been vigorously opposed by the City, which envisions opportunities for redeveloping the property in ways that will benefit its economy. The City has participated in the licensing proceeding and made every effort to frustrate the licensing of CECP. These efforts included incorrect claims that City ordinances did not allow the project, firm statements that no City reclaimed water was available for sale to the project, insistence that impractically wide fire access roads of unprecedented width be required, amendments to the general plan and zoning law to create inconsistencies with the project, and a last-minute ordinance adoption stating that the Commission—not the City—should provide “primary” emergency services. (*Id.* at pp. 2 and 3 [Findings No. 4 and 13].)

The City’s aggressive opposition has required redesign of some features of the project and lengthened the licensing proceeding. In response to the City’s position that it would (or could) not provide the reclaimed water necessary for CECP, the project was re-designed to use a reverse osmosis system to desalinate sea-water for project use. (CEC Exh. 1 [FSA] pp. 4.9-6, 4-9-14, 4.9; CEC Exh. 7.)

The Commission has acknowledged the City’s local preferences and considered its various claims, but found that the project has no substantive environmental impacts³ that cannot be mitigated to a level that is less than significant. The Commission originally proposed findings that CECP would be consistent with all applicable laws, but the City then changed various

³ The Commission found that the nonconformity of the City’s newly amended land use provisions resulted in a significant impact merely by virtue of the nonconformity, and made override findings, despite no underlying environmental impact. (Pet. Exh. 1, pp. 9-3, 9-10 [Finding No. 2].)

ordinances to obstruct such a finding. (See §D., below.) The Commission subsequently, and after further environmental analysis, found that the project has important local and statewide value and is necessary for the “public convenience and necessity,” overriding inconsistency with City ordinances, and also overriding alleged noncompliance with the provisions of the California Coastal Act, the California Fire Code, and the “non-substantive” CEQA impact for land use ordinance noncompliance.

The Commission’s overrides are based on the important benefits CECP provides. As the California Independent System Operator and others testified, CECP provides generation necessary for local and regional electric reliability, provides flexible support for the integration of fluctuating but growing renewable energy such as wind and solar generation, and will allow the shutdown of aging facilities that are less efficient, emit higher levels of pollution, and use once-through cooling with ocean water. (Pet. Exh. 1, p. 3-19, 9-3 to 9-4.) State policy adopted by the State Water Resources Control Board is to greatly reduce the use of once-through cooling in the near future, either by closing or radically revising older electric generating units such as those at EPS. (*Id.* at 7.2-10, 9-3.) CECP is essential for satisfying this policy in the near term. Finally, the CECP site in Carlsbad presently has elevated strategic value to the electric system given the uncertain and faltering generation from the San Onofre nuclear units. (5/31/12 Adoption Hearing Tr., pp. 290-291.[found at http://www.energy.ca.gov/business_meetings/2012_transcripts/2012-05-31_transcript.pdf])

The City intervened to become a “party” to the CECP proceeding, and raised myriad objections to the project, both substantive and procedural. The City’s opposition is partly responsible for the unprecedented length of the

CECP proceeding, as the Commission repeatedly attempted to address the various issues the City continued to raise, as detailed in the section below. The City's issues have been addressed in the lengthy administrative proceeding, and the objections raised in their petition are without merit.

D. The CECP Proceeding at the Commission

The application for CECP was filed on September 12, 2007. The original application proposed to use reclaimed water purchased from the City. In 2008, after several Commission staff workshops, the City stated publicly that it would have insufficient water to sell to CECP; in response the applicant amended its application in September 2008 to meet its water needs using ocean water provided by a reverse osmosis system. (CEC Exh. 1[FSA] pp. 4.9-14, 15.)

After repeated consultation with the City regarding its land use provisions, the Commission staff ("Staff") issued its preliminary environmental analysis ("Preliminary Staff Assessment," or "PSA") for public comment in December 2008. After public comment and additional workshops, as well as a comprehensive report on air quality impacts and requirements from the air pollution control district, Staff issued its Final Staff Assessment ("FSA"), a comprehensive environmental analysis required by CEQA, in November 2009. All parties filed testimony, and after a pre-hearing conference, four days of evidentiary hearings on all topics were held in February 2010. A principal issue at these hearings was whether CECP complies with the City's local ordinances and the California Coastal Act. (CEC Exh. 5 [evidentiary hearing excerpt].)

The CECP proceeding adjudicates an “Application for Certification” (as distinguished from a “Notice of Intent” site selection proceeding), and thus there is no statutory requirement for participation by the California Coastal Commission. Since the Coastal Commission informed the Commission that it did not intend to participate in the review of CECP (CEC Exh. 3), Staff independently analyzed compliance with the Coastal Act, as did Applicant and the City, with differing conclusions. Staff and the Applicant (and ultimately the Commission) found that CECP would comply with all Coastal Act provisions.

The two-Commissioner Committee⁴ for CECP issued the Presiding Member’s Proposed Decision (“PMPD”) on May 9, 2011, and subsequently held additional evidentiary hearings on the topics of Air Quality, Land Use, Worker Safety and Fire Protection, seismic safety, and Soil and Water, in response to issues raised by the City and other parties. As a result of the evidentiary hearings, the Committee published an errata to the PMPD in June 2011.

On June 30, 2011, the full Commission held a hearing to consider adoption of the PMPD as its Final Decision. However, pursuant to objections from various intervenors, including the City, that the environmental analysis was incomplete, the Commission remanded the Decision to the Committee for additional environmental analysis on the discrete issues subject to objection. The Staff subsequently filed additional analysis regarding project alternatives (alternative power plants proposed in

⁴ Pursuant to § 25211 and related regulations, Commission power plant siting proceedings are normally conducted by two members of the Commission, who comprise the “Committee” for the project, and who propose a Decision (the “Presiding Member’s Proposed Decision”) to the full Commission for adoption, rejection, or revision.

proceedings at the California Public Utilities Commission), electric grid reliability considerations raised by the California Independent System Operator, and Land Use Conditions of Certification 2 and 3. The Committee then requested additional topics for analysis, and all parties filed additional testimony on these topics and others. A final evidentiary hearing on these topics was held in December 2011.

The Committee issued its “Revised” PMPD (“RPMPD”), in essence a draft decision, in March 2012. After an extensive comment period, as well as objections from the City, the full Commission considered and adopted the RPMPD at a hearing on May 31, 2012, making it the Commission’s “Final Decision.” (The Final Decision is part of City’s Appendix.) The Final Decision made “override” findings for the recently amended City land ordinances. Although the Final Decision concluded that CECP complies with the Coastal Act, it also concludes that the project is warranted even if the intervenors’ position was accepted that the CECP was not in conformance with substantive Coastal Act provisions, and therefore included “override” findings. Similarly, the Commission made “override” findings for a singular provision in the State Fire Code that the City insists gives it authority to require infeasibly broad fire access roads, which the Commission found, based on an elaborate evidentiary record, were unrelated to public safety or safe provision of emergency services. (CEC Exh. 6, pp. 22-24.)

The numerous public workshops held by Staff, and the various evidentiary hearings and comment hearings held by the Committee, all occurred in the City of Carlsbad.

VI. ARGUMENT

A. **The Court Should Dismiss the Petition for Failure to Comply with Rule 8.25.**

The Rules of Court require the City to serve its Petition on Respondents and Real-Parties in-Interest *prior* to filing it with the Court. (Cal. Rules of Court, rule 8.25(a)(1).) The City failed to comply with this requirement.

The facts are straightforward. The City's proof of service states that it served respondent California Energy Commission by depositing a copy of the Petition with the United States Postal Service on June 27, 2012. In fact, the petition was delivered to the Commission via United Parcel Service (UPS) "ground service" on July 2, 2012, and was not delivered to UPS by the City until 8:24 pm on June 28th, 2012, after the close of business. (Applicant's⁵ App., pp. 2, 3.) Moreover, the docket of this Court indicates that the Petition was filed prior to the close of business on June 28th, 2012. Thus, the City served the Commission *after* the Petition was filed with this Court, not the day before it filed, as the proof of service indicates. Rule of Court 8.18 states that the reviewing court clerk must not file any record or other document that does not conform to these rules. However, in this case, the clerk could not have known that the Petition would not comply with Rule 8.25 because the proof of service wrongly indicated that the Petition had been served when in fact it had not. Had the proof of service correctly indicated that service had not been completed, the filing could not have been made. We therefore request that the court dismiss the Petition for failure to comply with the Rules of Court.

⁵ Applicant is the term used in this brief for real party in interest Carlsbad Energy Center, LLC.

B. No Coastal Commission Report or Participation is Required for the Energy Commission's AFC Licensing Process, and Coastal Act compliance was Thoroughly Considered.

For many years, the Energy Commission has encouraged Coastal Commission participation in its power plant licensing process. However, shortly after the CECP application was filed, the Coastal Commission's Executive Director informed the Energy Commission by letter that it would not participate in several new licensing proceedings, including the CECP proceeding. (CEC Exh. 3[October 16 letter from Peter Douglas, Executive Director for Coastal Commission].) The letter stated that "substantial workload and limited resources" were an important consideration, but further explained that the principal environmental issue of interest to the Coastal Commission was no longer in play:

We note that all the projects listed above [including CECP] are proposing to end the environmentally destructive use of seawater for once-through cooling and instead employ dry cooling technology, which the Coastal Commission has strongly supported during past power plant reviews. This move away from once-through cooling removes what has been the single most contentious and environmentally damaging aspect of past project proposals. It also reduces the Coastal Commission's concerns about the type and scale of impacts associated with these proposed projects and about the ability of these projects to conform to Coastal Act provisions. Although each of these proposed projects have the potential to cause other types of adverse effects to coastal resources, we trust that the Energy Commission staff will continue to thoroughly review these projects as it has done in the past AFC proceedings....

(Ibid.)

The City contends that the Energy Commission cannot license a power plant in an AFC proceeding absent a report from the Coastal Commission regarding consistency with the Coastal Act. (Pets. Brf., pp. 3-

4.) The City is incorrect, and its citations to the applicable law do not support its claim.

The City cites three statutory provisions to support its claim. The first is Section 25519, subdivision (d), which requires the Energy Commission to transmit a copy of any AFC to the Coastal Commission “for its review and comments.” (Pet. Brf., p. 3.) It is undisputed that the Energy Commission did so, and solicited Coastal Commission participation. But nothing in that statutory provision requires a report from the Coastal Commission.

The City also cites Section 25523, subdivision (b), a part of the Energy Commission’s statute, and Section 30413, subdivision (d), a corresponding provision in the Coastal Commission’s statute, as authority that a Coastal Commission report was required before CECP could be licensed. (Pet. Brf, pp. 4-9.) Again, these statutes do not require what the City alleges. Initially, we defer to the Coastal Commission’s interpretation of its statutes that Section 30413 in its entirety is directory and not mandatory. (See Coastal Commission’s Preliminary Opposition filed in this proceeding.) More fundamentally, the City has conflated the requirements of NOI proceedings (described above) with those of the AFC licensing proceedings, thereby confusing these requirements. The City’s interpretation is inconsistent with the statutes themselves, and with the Coastal Commission’s long-standing interpretation of its statutory duties under these provisions.

Section 25523 addresses the findings that the Energy Commission must make when it licenses a project (AFC proceeding). Subdivision (b) requires, for projects licensed in the coastal zone, “specific provisions to

meet the objectives of [the Coastal Act] *as may be specified* in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the [Energy] Commission specifically finds that the adoption of the provisions specified in the report would result in a greater adverse effect on the environment or . . . would not be feasible.” (Emphasis added.)

Section 30413, subdivision (d), of the Coastal Act describes the report referenced in Section 25523, subdivision (b), as follows:

(d) Whenever the [Energy] Commission exercises its siting authority and undertakes proceedings [for any power plant or transmission line] within the coastal zone, the [Coastal] Commission shall participate in those proceedings and shall receive from the [Energy] Commission *any notice of intention* to file an application for certification The [Coastal] Commission shall *analyze each notice of intention and shall, prior to completion of the preliminary report required by Section 25510, forward to the [Energy] Commission a written report on the suitability of the proposed site . . . specified in that notice.* The [Coastal] Commission’s report shall contain a consideration of, and findings regarding, all of the following: (Emphasis added.)

The language of Section 30413 make it abundantly clear that the requirements for a “report” from the Coastal Commission involves “notices of intent,” or the “NOI” as it is commonly referred to. NOI proceedings are required for certain kinds of power plant siting (e.g., nuclear facilities or coal plants), but not new gas-fired turbines. (§ 25540.6, subd. (a)(1).) Thus, the Carlsbad proceeding was not preceded by an NOI process that involved site selection, nor the report referened by Section 30413. Accordingly, Section 25510 (titled “Summary and Hearing Order on Notice of Intention to File the Application”) is irrelevant to the Carlsbad AFC proceeding, and no Coastal Commission report is statutorily required.

More important, the finding in Section 25523, subdivision (b), is inapplicable to CECP because it did not require any “report submitted by the Coastal Commission pursuant to . . . Section 30413.”

The above distinction between the statutory duty to provide the report in the NOI, compared to the discretionary ability to provide such a report in an AFC, is subject to long-standing legal interpretation by the Coastal Commission. A legal memorandum from the Coastal Commission’s attorney in 1990 described the NOI/AFC distinction as follows:

The Coastal Commission is required to submit a report during the NOI process to the Energy Commission on the suitability of the proposed coastal zone sites. The report must address a number of subject areas, pursuant to Public Resources Code section 30413(b). . . . Section 30413 provides that the Coastal Commission shall submit the report to the Energy Commission prior to the time that the Energy Commission completes its preliminary report on the issues presented in the NOI . . . [Para.] The Energy Commission will consider, but not be bound by the Coastal Commission’s recommendations in making its determination *as to which of the sites proposed in the NOI have greater relative merit.* [Para.] *The Coastal Commission’s role in the AFC Process. The Coastal Commission’s role with respect to the AFC . . . would be similar to that discussed above with respect to the NOI.* [Fn. omitted.] *The major difference is that the Coastal Commission is not required to submit a report to the Energy Commission. The Coastal Commission is nevertheless authorized, “at its discretion, to participate fully” in the proceeding pursuant to section 30413(e).* (CEC Exh. 4 (Memorandum of Deputy Chief Counsel Dorothy Dickey to Commissioner David Malcolm (May 23, 1990), pp. 3-4 [Emphasis added].)

Testimony at the evidentiary hearings for CECP established that Ms. Dickey was the Coastal Commission’s legal expert on how the Coastal Act provisions apply to power plant siting, that the memorandum was

apparently reviewed by the agency's chief counsel, and that no further agency letters, interpretations, or adopted regulations have occurred during the past 20 years that would have affected the legal analysis provided in the memorandum. (CEC Exh. 5, pp. 249-250[excerpt from 2/1/10 evidentiary hearing transcript].)

The City argues that the 2005 Memorandum of Agreement (MOA) between the Coastal Commission and the Energy Commission, providing for the Coastal Commission participation in power plant AFCs for coastal projects, creates a legally binding duty that the Coastal Commission must provide its "30413 report" before an AFC license can be issued. (Pets. Brf., p. 8.) Again, the City is incorrect. Such an interagency agreement does not change existing statutory law, or create new statutory duties. The Energy Commission has sought to encourage Coastal Commission participation in its proceeding for coastal facilities, both by proposing and signing the MOA, and by directly requesting participation, but these acts in no way legally bind the Coastal Commission to participate, nor does the lack of that participation put a stop to the power plant licensing process at the Energy Commission.

In sum, no participation or report is required from the Coastal Commission in an AFC proceeding, and no authorities render the energy Commission's certificate infirm in the absence of such a report.

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C. The Energy Commission Found CECP to Conform to the Coastal Act based on Substantial Evidence in the Record, But Overrode the Noncompliance that was Alleged by the City.

1. The Commission Concluded That CECP Conforms to the Coastal Act Based on Persuasive Substantial Evidence.

The City posits that because the Coastal Commission did not participate in the proceeding, the City provided the only analysis of CECP's conformity with Coastal Act provisions, which must lead to a finding that CECP does not conform. (Pets. Brf., pp. 10-11.) The City's claim is simply incorrect.

Both the Applicant and Commission Staff provided extensive analysis of CECP conformity with the Coastal Act in testimony and documents that were the subject of lengthy hearings. This analysis was anchored to additional environmental analysis of the substantive areas (e.g., Air Quality, Visual Resources, Biological Resources, Soil and Water Resources, Air Quality, Hazardous Materials Management, Cultural Resources) that are key to the protective provisions in Chapter 3 of the Coastal Act, such as visual resources and marine biological resources, that would be addressed by the Coastal Commission. (CEC Exh. 1 [FSA].) The Staff analyses also addressed the substantive issues that are the subject of Section 30413 when the Coastal Commission files such a report: project compatibility with coastal resources, including "aesthetic values," adverse "impacts to fish and wildlife," conformance with land use requirements, and mitigation of impacts. (§ 30413, subd. (d).) The FSA analyses were far more substantive than the largely superficial and partisan analysis prepared by the City, so it is hardly surprising that the Energy Commission relied on these more comprehensive analyses in its Final Decision.

Commission Staff analyzed compliance with the Coastal Act in the comprehensive analysis that it is required to provide regarding project impacts and project compliance with local law--the Final Staff Assessment. The Land Use section, prepared by an analyst with many years of experience analyzing coastal projects (CEC Exh. 5, pp 173-174), addressed the Coastal Act and concluded that “the project would be consistent with the land use related policies of the Coastal Act based on staff’s review of the project and applicable Coastal Act policies.” (CEC Exh. 1 [FSA], pp. 4.5-1, 4.5-11, 4.5-19, 4.5-36; CEC Exh. 6, p. 11.) The analysis goes further to discuss various Chapter 3 topics, including coastal access, environmentally sensitive habitats, industrial facilities, coastal dependent facilities, and the Coastal Rail Trail. (CEC Exh. 1 [FSA], pp. 4.5-5 through 20.) The conclusion of CECP consistency was in turn grounded on substantive analysis of the environmental resources that the Chapter 3 of the Coastal Act identifies as critical to coastal protection: public access and recreation (§§ 30210-30224), marine and aquatic resources (§§ 30230-30236), agricultural land and species habitat (§§ 30240-30242); and cultural resources (§ 30244).

Staff addressed all of these issues thoroughly in its FSA, supplemented by further testimony for hearings. The FSA alone provides some 50 pages of analysis of Visual Resource project impacts with numerous pictorial simulations, discussions of cumulative impacts, and discussion of the various criteria by which state and federal agencies evaluate visual impacts. (CEC Exh. 1 [FSA], 4.12-1 to 4.12-47.)

By comparison, the City’s “conformance report” visual analysis is four pages in length and conclusory by nature, with no simulations or criteria. The FSA’s Biological Resources analysis is 25 pages in length; the

City's report a mere two pages of partisan "analysis." (*Ibid.*, [FSA] partisan 4.2-1 through 4.2-26.) The FSA's Cultural Resources section is 30 pages in length, and the Air Quality section more than 90 pages, while the City's report addresses neither. Each of these FSA sections was prepared by persons with documented experience and expertise in the respective areas of analysis, whereas the City analysis was sponsored by a single City planning staffer.

Nor was the Energy Commission Staff the only party providing such analysis. Applicant also provided a comprehensive environmental analysis of many hundreds of pages in its application filing, along with hundreds of pages more analysis in its testimony for hearings. All of this analysis was sponsored by expert witnesses and subject to cross-examination. This included witness testimony on CECP's compliance with Chapter 3 provisions of the Coastal Act, as well as resource subject analyses (such as visual and biological resource assessments by experts in these areas) similar to that provided by the FSA. The City's argument is no more than a baseless claim that, because it presented some evidence, the Energy Commission was bound to accept the City's conclusions.⁶

The Energy Commission was understandably persuaded by different evidence, evidence that is substantial and of a more thoroughgoing nature, that was presented by Staff and other parties. The Final Decision concluded that "CECP is consistent with the Coastal Act," but "given the vociferous opposition from the City of Carlsbad and other project

⁶ The City's bold contention at page 21 of its verified Petition that "the Decision is devoid of any evidence contradicting the City's report that the CECP does not conform with . . . the Coastal Act," and that any "finding to the contrary is not supported by any evidence" is simply breathtaking given the volume of evidence pervading the administrative record.

proponents,” the Energy Commission adopted override findings “for any inconsistencies that might be found.” (Pet. Exh. 1, p. 8.1-10.) The Final Decision goes on to explain why CECP is consistent with regard to biological resources, sensitive habitat, and public access provisions of the Coastal Act. (*Id.*, at 8.1-10 through 14.) In other words, the Energy Commission found that CECP is consistent with the Coastal Act Chapter 3 requirements, but overrode any alleged inconsistencies as a precaution to legal challenge by the City.

2. The City Relies on a Dated and Irrelevant Document Regarding a Very Different Project to Assert Impacts and Lack of Conformity.

The City attempts to buttress its argument that the project has significant conflicts with the Coastal Act by filing a 1990 report from the Coastal Commission for an NOI proceeding that considered available siting alternatives for San Diego coastal power plants, (Pets. Brf., pp 4-5, 14; Pets. Exh. C.) This report does not support the City’s claims.

The 1990 report dealt with a different generation technology, a different project site, a different visual profile, and different impacts, as even a casual reading of it makes clear. The principal impact that the Coastal Commission was concerned with in the 1990 report was the fact that the NOI project it analyzed would have used now-obsolete “once-through cooling” (OTC) technology, which “would significantly increase the entrainment of species that use the lagoon as a nursery.” (Pets., Exh. C, p. 2.) Because this impact could not be mitigated, it found the entrainment impacts “not fully mitigable.” (*Id.*, at p. 16.) It also found impacts could not be mitigated from the “thermal plume” of heated water that would be expelled to the ocean by increased OTC (*id.*, at pp. 17-21); need for

dredging in Agua Hedionda Lagoon that would damage marine biota (*id.*, at p. 24); impacts to public access from the outfall structure (*id.*, at pp. 29-30); and risk of devastating impacts from oil spills due to off-loading of oil next to the lagoon. (*Id.*, at pp. 36-39.) None of these impacts have any relevance to CECP, as it is a modern, dry-cooled facility, does not utilize OTC, and does not burn oil—the relevant impact-causing factors considered in the 1990 report.

With regard to visual impacts, the 1990 report was for a much larger and more visually prominent project, at a different and more visible site within view of beaches, that could not be visually screened. (*Id.*, at pp. 33-34.) The 1990 report recommended “landscape screening” and “lowering the height of structures,” as well as lowering the plant grade” (meaning placing the project in a lower area). (*Id.*, at pp. 22-23; 32-34.) CECP, conversely, has chosen a site where it has incorporated all of these recommended measures. The structure and stacks are smaller and lower, and the project is located in an area below grade (30 feet), at a less prominent site, relatively well-screened by landscaping. (CEC Exh. 5, p. 180; CEC Exh. 6, p. 19.]

In short, the 1990 report has virtually no relevance to the impacts of the CECP project. These distinctions and issues of relevance were discussed in Staff and Applicant testimony, and subject to cross-examination at hearings. As a result, the Final Decision properly did not give weight to the document.

3. CECP is “Coastal Dependent.”

The issue of whether a project is in fact “coastal dependent” only arises where there is inconsistency with Chapter 3’s provisions. As already

discussed, CECP is consistent with Chapter 3 of the Coastal Act, and on that basis it is eligible to be permitted. Nevertheless, CECP is also “coastal dependent,” as it must be “by the sea to be able to function at all,” according to the definition in Section 30101 of the Coastal Act.

A facility that is not consistent with Chapter 3 provisions may still be permitted as a “coastal dependent facility” pursuant to Section 30260 if alternative locations are “infeasible or more environmentally damaging,” there is a benefit to “public welfare,” and environmental effects “are mitigated to the maximum extent feasible.” Since the Energy Commission has made these findings in its Final Decision (see, e.g., Pet. Exh. 1, p. 3-22 [Findings 10 and 12]; p. 9-10 [Finding 5]; p. 1-2 [Findings 2 and 3].)⁷ Therefore CECP can also (despite any lack of conformity) be licensed as a “coastal Dependent facility” pursuant to section 30260, if it must be on, or adjacent to, “the sea to be able to function at all.” (§ 30101.)

The Energy Commission determined that CECP must be on the sea in order to function because the City, which is the only source of reclaimed water that could be available for the project, has made it clear during the proceeding that it would not supply Applicant such water for the project. (CEC Exh. 7 [2008 letter from City to Mike Monasmith].) Because it has no other feasible source of water for its project, rendering the original proposed project infeasible, Applicant redesigned the project to include a reverse osmosis system drawing off the current OTC outfall structure to process the relatively small amounts of water this dry-cooled project will require. (CEC Exh. 1 [FSA], pp. 4.9-6, 15-16.) This use of ocean water is

⁷ The Final Decision includes more than 200 “Conditions of Certification,” many of them elaborate and detailed, specifying project mitigation that is

actually a non-additive “re-use” of a small amount of water already in the OTC system for the existing units not yet to be retired, does not cause additional marine entrainment, and (as Staff testified) is not a significant impact to water quality (*Id.*, at pp. 4.9-18, 19, and 27) or biological resources. (*Id.*, at pp. 4.2-16-18.) This substantial evidence informs the discussion (at Pets. Exh. 1, pp. 7.2-8 through 7.2-12) and supports the findings (at 7.2-14) in the Final Decision concluding that there is no adverse impact from the CECP desalination system.⁸

The City’s casual suggestion that it might expand its system to provide reclaimed water to CECP, negating CECP’s coastal dependency (Pets. Brf., p. 26), is entirely inconsistent with its adamant opposition to the project, and to its 2008 representation that it would not or could not provide such water. CECP is a project costing more than a half billion dollars, and it could not possibly be financed and constructed if its very feasibility was left in the hands of such an unyielding foe.

The City’s argument that CECP’s dry-cooled technology does not itself require a coastal location (Pets. Brf., p. 22) is correct, but entirely beside the point. The critical project objectives of the CECP are to provide

the basis for findings that potential adverse environmental impacts have been mitigated to a level that is less than significant.

⁸ City makes the specious argument that water is “available” if only the project is moved to another location away from Carlsbad (Pets. Brf., pp. 24, 26), ignoring the fact that Applicant owns the current site, with its significant transmission, switchyard, and natural gas infrastructure, and cannot feasibly relocate to a similar “greenfield” location. The argument ignores as well the significant electric system benefits of the Carlsbad location at the current facility that would be lost with an inland or less strategic coastal location. These benefits are discussed in the Final Decision (Pets. Exh. 1, pp. 3-13 and 14, 22; 9-3 to 9-9) and supported by copious evidence that was presented at hearing.

electric reliability services to the load pocket in which it is located, and to allow retirement of at least some of the aging EPS “legacy boiler” facilities using OTC for cooling, thereby harming marine biota. (CEC Exh. 1 [FSA] pp. 6-3 and 6-4.) A different location would satisfy neither of these critical project goals. (*Id.*, at pp. 6-18 to 6-19.)

Thus, the Energy Commission’s Final Decision took a “belts and suspenders” approach to the issue of Coastal Act compliance. It found (1) that CECP complies with the Chapter 3 substantive provisions and the Section 30413, subdivision (d) provisions; (2) that even if CECP did not comply with such provisions, it is a “coastal dependent” facility that would not be feasible without its coastal location; and (3) that even if the Final Decision findings regarding (1) and (2) should be determined incorrect as a matter of law, as the City advocates, the project offers such environmental and electric reliability benefits that “public convenience and necessity” requires the override of any nonconformity with the Coastal Act pursuant to Section 25525. These determinations are all supported by a variety of substantial evidence, and the City’s arguments fail to overcome any of them.

4. CECP is A Necessary Precedent to Achieving the Coastal Improvements that the City Claims are Required for Coastal Act Consistency.

With absolutely no citation to the Coastal Act or any other source of law, the City repeatedly contends that the Commission’s extensive environmental analysis of CECP impacts on coastal resources is inadequate because it ignores the “temporal aspect” of some idealized, more pristine coastline that could occur in the future and is the goal of the Coastal Act. (Pets. Brf., pp. 5, 16-18.) Stated differently, the City contends

that use of a CEQA “baseline” (current conditions) environmental analysis is inconsistent with analysis of Coastal Act consistency, which is instead based on some unstated coastal ideal. By this undefined “temporal” standard, the City claims that the existing EPS power plants at the site will magically disappear, making the CECP an unacceptable blight on a newly pristine coastal landscape.

As stated above, the City’s idealized “standard of review” is not found in the Coastal Act. If it were, one might fairly question whether any structures in the Coastal Zone could be approved by the City of Carlsbad or any other permitting agency. Rather, the Coastal Act Chapter 3 criteria are very broadly stated. Some examples: “maximum access . . . shall be provided (§30210); “development shall not interfere with the public’s right of access to the sea where acquired through use or legislative authorization” (§30211); recreational areas on the ocean should be protected (§ 30220 *et seq.*); “marine resources shall be maintained, enhanced, and where feasible restored” (§30230); biological productivity and water quality should be protected (§ 30231); oil spills and hazardous substance spills avoided (§30232); new dikes and dredging permitted subject to permit conditions (§ 30233); commercial fishing and recreational boating maintained and encouraged (§30234); environmentally sensitive habitat areas protected from development (§ 30240); agricultural uses maintained (§ 30241.5); new development located contiguous with existing development (§30250); scenic qualities considered and protected “to be visually compatible with surrounding areas” (§ 30251); coastal-dependent industrial facilities “shall be encouraged to locate or expand within existing sites and permitted reasonable long term growth” (§30260).

The Energy Commission’s environmental analysis reasonably concluded, based on abundant substantial evidence, that none of these Chapter 3 goals (nor any others) are inconsistent with CECP.

In other words, nothing in Coastal Act Chapter 3 inherently conflicts with CECP, and nothing in Chapter 3 supports the City’s “temporal” notion of some future idealized coastline where anthropomorphic development ceases to exist. Nor does Chapter 3 support the City’s notion that there is somehow a different “standard of review” for development projects that is inconsistent with the CEQA notion of “current conditions” as the “baseline” for analysis. (See, e.g., Cal. Code Regs., tit. 14, § 15125.)

However, even if one assumes that the City’s unwarranted (if vaguely defined) standard is correct, CECP satisfies it. The City argues that the Energy Commission erred by doing the visual analysis using an existing condition baseline, because the older, much more visually obtrusive EPS units will eventually disappear. (Pets. Brf., p. 16-17.) What this argument ignores is that these older, larger, uglier, more obtrusive facilities will only be closed and allowed to disappear if *something*—CECP or a similar project—replaces their current essential role in providing electric reliability to the City and the local region. (Pets. Exh. 1, p. 3-22 [Commission finding, based on CAISO testimony, that units 4-5 must continue to operate indefinitely unless CECP is constructed].) As a necessary precedent to the closure of the older and larger facilities, CECP is a project that will enable a future coastal region with smaller, less visually obtrusive, and more environmentally friendly electric power infrastructure.

In other words, CECP is consistent with a future vision of an aesthetically more pleasing coastline, and consistent with future redevelopment (which the City desires) of much of the land that the aging EPS facility currently occupies. (Pets. Exh. 1, p. 8.1-35 [Finding Nos. 8 and 9].) By greatly reducing OTC from units 1-3, which would immediately close, CECP will result in restoration and enhancement of marine resources, consistent with section 30230. (CEC Exh. 1 [FSA] pp. 3-2; 6-18.) Even by the City's innovative "temporal" standard, CECP will result in an improved coastal environment in the future using any of the applicable criteria in Chapter 3.

5. The California Coastal Commission is not a Real Party in Interest.

A real party in interest ordinarily is one who has a real, actual, material, or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action. (67A Corpus Juris Secundum (2012) Parties, § 23.) More succinctly stated, a real party in interest is "[a] person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome." (Black's Law Dict. (9th ed. 2009) p. 1232, col. 2.)

In this matter, the Coastal Commission has no interest in the subject matter of the action nor does it have a legal right to enforce the claim in question. Pursuant to the statutory scheme governing licensing of the project, it is the Energy Commission that has exclusive authority to grant the entitlement that is the subject of this action. (Pub. Resources Code, §25500.) The fact that the City – or the Coastal Commission for that matter – has the right to initiate an action against the Commission claiming that the Commission failed to comply with provisions governing the Coastal Commission's role in Commission licensing proceedings does not make the Coastal Commission a real party in interest. The city's petition is directed at the Energy Commission's actions and at the license granted by the

Energy Commission. The Coastal Commission should not be named as a real party, and should therefore be dismissed from this proceeding.

D. The Energy Commission has Fully Consulted with the City Regarding the Necessity to Override Inconsistency with City Ordinances.

The City has participated in the CECP proceeding practically since the day it was filed with the Commission. The docket is replete with documents, letters, testimony, and pleadings from the City contending that the CECP is inconsistent with the City's complex web of land use ordinances. Staff has made special efforts to understand the City's ordinances. In the early days of the proceeding this meant meeting and discussing the ordinances with City planning staff and the City Attorney. When Staff disagreed with various interpretations from the City, the City intervened and became a party to the CECP proceeding. As a party, it has attended every workshop and hearing, and pressed its case regarding its ordinances.

Ironically, the City *wants* its ordinances to be inconsistent with CECP. When it failed to convince the Commission that existing ordinances were inconsistent, it then went to the effort to change several ordinances to actually make them inconsistent. (Pets. Exh. 1, p. 8.11-1.) The City has viewed inconsistency with its land use provisions as a strategy for blocking the licensing of CECP.

Having gone to substantial effort to adopt changes to create inconsistency, the City now contends that Section 25523, subdivision (d)(1) requires that the Energy Commission itself, sitting as a state body, is obligated to "consult" with it, for no purpose other than to continue to

obstruct the project.⁹ The City has indicated, both in its brief and at hearing, that such consultation is in essence a process requiring a complex three-stage administrative minuet: First, action by the Commission to make findings of noncompliance; second, consultation with the affected agency; and third, a “re-do” of the Final Decision adoption, again with override findings.

No such minuet is required by the statute. As has always been its practice, Commission staff consults with any agency with laws or regulations that could be subject to a Commission override, in an attempt to avoid the necessity for override, including possible changes in either the law or the project that would avoid a conflict. Often conflict and the need for override have been effectively avoided in this manner. But when the local agency is intentionally attempting to obstruct a project by making its ordinances inconsistent with the project, Staff consultation, or any consultation, is clearly an act of futility, as the Commission found in its Final Decision. (Pets. Exh. 1, p. 8.1-35 [Finding No. 11].)

Even so, Staff and the Commission committee assigned to the CECP proceeding have discussed in forums both formal and informal the City’s views on the project, and the City’s desire that its laws be

⁹ As pertinent, Section 25523 provides: “The Commission shall prepare a written decision after the public hearing . . . which includes all of the following: (d)(1) Findings regarding the conformity of the proposed site with . . . applicable local, regional, state, and federal standards, ordinances, or laws. If the Commission finds that there is noncompliance with a state, local, or regional ordinance or regulation . . . it shall consult and meet with the state, local, or regional governmental agency concerned to attempt to correct or eliminate the noncompliance. If the noncompliance cannot be corrected or eliminated, the commission shall inform the state, local, or regional governmental agency if it makes the [override] findings required by Section 25525.

inconsistent with CECP. The City has now accomplished this inconsistency, and the Commission has adopted the required findings for override. Any further action would be unproductive, inconsistent with the expeditious licensing of power plants required by Legislature, and would have difficulty complying with the Bagley-Keen Open Meeting Act.

The Warren-Alquist Act emphasizes expeditious power plant licensing. (See, e.g., Pub. Resources Code, §§ 25009 [State’s need to “ensure the timely construction of new electricity generating capacity”], 25531, subd. (a) [judicial review of AFC decisions exclusively in this Court], 25540.6, subd. (a) [most AFCs, including natural gas facilities like CECP, must be reviewed and licensed within 12 months] , 25901, subd. (a) [30-day statute of limitations for judicial review].) A three-step requirement for post-decision consultation, even if was not pointless, would add significant time to a process that is already very difficult to complete within the prescribed statutory timeframe of 12 months. CECP has already been in the licensing process nearly five years.

The linchpin of the City’s argument is its claim that when the Warren-Alquist Act uses the term “commission,” the Act does not mean the agency entity, with its various staff, but rather can mean only *the five appointed Commissioners themselves*. Yet a check on the statute’s use of the term indicates that the word “commission” is variously used to describe either the agency entity (including its staff) or, in some cases, the five appointed Commissioners themselves.¹⁰

¹⁰ The State Administrative Procedure Act makes a distinction between the “Agency,” defined to include agency staff and other actors for the agency, and “Agency Head,” meaning the actual decision-making body vested with the ultimate legal authority of the agency. (Compare Govt. Code, §§ 11405.30 and 11405.40.) Unfortunately, no such distinction is

A word check of term “commission” as used in the Warren-Alquist Act indicates that it is used in the statute no less than 1400 times, assigning and placing countless and various duties on “the commission” and virtually none at all on “staff” or “commission staff.” Most of these duties, including the preparation of environmental documents and reports to the Legislature, are obviously intended for agency staff. To give a singular example, Section 25519, subdivision (c), states that “the commission shall be the lead agency,” and refers to environmental “documents prepared by the Commission,” although such documents are in fact prepared by agency staff.¹¹ Clearly the term was used by the Legislature in most instances to describe the collective agency entity, as any other interpretation would be impractical, while at other times it means the decision-makers themselves. Thus, the context of the term and the duty assigned is important to determining whether the duties assigned to “the commission” can reasonably be interpreted to mean the five decision-makers rather than the agency staff.

In the context of the duty to “consult” with an agency whose laws are inconsistent with a facility to be licensed, it would be highly impractical to the point of absurdity for the decision-makers of the agency to conduct such a task themselves. The Bagley-Keene Open Meeting Act requires that the decision-making body must meet in a noticed public meeting. (Govt. Code, §§11120 et seq.) The State Administrative Procedure Act includes

defined in the Warren-Alquist Act, which conflates the duties of these differing entities.

¹¹ The courts also use the term “commission” without differentiating the agency head from the agency itself. (See, e.g., *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118, Cal.App.4th 861, 879 [refers to the “Commission’s FSA,” meaning the “Final Staff Assessment” prepared by the Commission staff, analyzing the environmental impacts of the project and its consistency with applicable law].)

fundamental due process requirements that would seemingly require such a meeting to occur in the presence of the permit applicant and other parties with due process rights at stake in the decision. (See, e.g., Govt. Code, §11425.10, subd. (a).) The City has suggested that such a meeting may have to occur in some grand convocation with its own City Council, doubling the administrative and logistical burden for arranging such a bizarre and unnecessary meeting.

Such consultation by the decision-making body is impractical, time-consuming, and burdensome from an administrative standpoint, is unnecessary, and offers no advantages compared to viewing the consultation task as one for agency staff. Agency staff has expertise with the project and the local agency involved, is not required to meet in formal and noticed meetings in the presence of other parties with due process claims, and is capable of assisting any agency that wants to conform its laws to the project to do so.

Indeed, during its entire existence, the Energy Commission has relied on its staff to consult with local agencies on conflicts regarding local ordinances or statutes, often beginning with informal meetings or discussions early in the proceeding during the process of soliciting interested agency comments. This approach has been both efficient and successful. The strained reading that the City would give to Section 25523, subdivision (d)(1), would require the agency to move from a practical and successful approach to one that results in delay and uncertainty, is subject to manipulation, consumes precious state resources, and is arguably unworkable, with absolutely no benefit to the decision-making process.

While review of an agency's statutory interpretations is *de novo*, an agency's interpretation of its own statutes is nevertheless entitled to "consideration and respect";

An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to "make law," and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation."

(Yamaha Corp. of Am. V. State Bd. Of Equalization (1998) 19 Cal.4th 1, 7.)

In the context of the Energy Commission's power plant licensing process, the Energy Commission's interpretation of Section 25523, subd. (d)(1), is reasonable and should be affirmed. The City's petition posits neither reason nor authority why it should not be accorded respect.

E. The City Fails to Present any Evidence that the Energy Commission's Override of the California Fire Code is Invalid.

The City presents a series of incomprehensible sentences directed at the Commission's override findings regarding the California Fire Code. Although the heading for this section of the Petition alleges that the Commission did not "effectively" override the Fire Marshall, the City then states in the discussion that the Commission failed to override the State Fire Code. (Petition, p. 27.) The City further states that a specific portion of the Fire Code that establishes the "requirements" of the Fire Marshall -- Section 503.2.2 of Title 24 -- should have been overridden, rather than the opinion of the Fire Marshall. In addition to creating confusion about

whether the City is arguing that it is the Fire Marshall, his opinion, his requirements, or the Fire Code itself that the Commission should have overridden, these statements misstate the record. The very section that the City argues should have been overridden is in fact the exact section that the Commission *did* override – Section 503.2.2. (Pets. Exh. 1, p. 9-2, 9-9, 9-11.) The City’s baffling discussion fails to provide any facts or argument supporting a claim that the Commission did not comply with applicable legal requirements.

VII. CONCLUSION

For the foregoing reasons, the City’s Petition should be denied.

Date: July 9, 2012

By:



Michael J. Levy, Chief Counsel
Attorney for Respondent State Energy
Resources Conservation and
Development Commission

CERTIFICATE OF LENGTH OF BRIEF

Pursuant to Rule 8.204 subdivision (c)(1) of the California Rules of Court, I certify that this Statement In Opposition is 11,504 words long, not counting the Table of Contents, the Table of Authorities, and this Certificate.



MICHAEL J. LEVY
Counsel for Respondent
California Energy Commission

ATTACHMENT C

CALIFORNIA COASTAL COMMISSION

621 HOWARD STREET, 4TH FLOOR
FRANCISCO, CA 94105-3973
543-8555
Hearing Impaired/TDD (415) 896-1825



May 23, 1990

Commissioner David L. Malcolm
625 Third Avenue
Chula Vista, CA 92010

Dear Commissioner Malcolm:

I am responding to your request at the May meeting for an explanation of the Coastal Commission's role in power plant siting. I understand that you expressed a particular interest in the Commission's role with respect to the two power plants proposed in Chula Vista, which are the subject of separate proceedings at the Energy Commission.

Background

San Diego Gas and Electric (SDG&E) has submitted a Notice of Intent (NOI) to the Energy Commission which indicates, pursuant to Public Resources Code section 25113 SDG&E's intention to file a future application for a combined cycle power plant, fueled by natural gas with a capacity of approximately 460 megawatts. The Energy Commission's NOI process will evaluate 5 sites, one of which is in Chula Vista at the existing South Bay Power Plant. SDG&E has also submitted an Application for Certification (AFC) to the Energy Commission for a second power plant project. That project is a 140 megawatt expansion of the existing South Bay Power Plant in Chula Vista.

The Coastal Commission's role with respect to both power plant proposals is limited to providing advice to the Energy Commission, because that Commission has exclusive jurisdiction over thermal power plants of 50 megawatts or greater. The Energy Commission preempts the jurisdiction of all other state and local agencies (including the Coastal Commission)

1/ There are limited exceptions to the general premise that the Energy Commission preempts the Coastal Commission's permitting jurisdiction over new thermal power plants and power plant expansions. Some exceptions are:

- power plants with a capacity of below 50 megawatts. (See Public Resources Code section 25120.)
- power plants granted a Small Power Plant Exemption by the Energy Commission, under Public Resources Code section 25541. Such an exemption may only be granted for power plant projects of between 50

when it certifies a new or expanded power plant pursuant to Public Resources Code section 25500. In relevant part, section 25500 provides:

In accordance with the provisions of this division, the [Energy] commission shall have the exclusive power to certify all [thermal power plant] sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the [Energy] commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

The Coastal Act expressly recognizes the Energy Commission's exclusive jurisdiction over most power plant projects. Section 30600(a) exempts projects subject to section 25500 (which is quoted above) from the general requirement that any person who wishes to undertake a development in the coastal zone must obtain a coastal development permit. Section 30413(d) provides that the Coastal Commission shall participate in the Energy Commission's siting proceedings whenever a power plant is proposed in the coastal zone.

The Coastal Commission's Role in the NOI Process.

The Energy Commission will evaluate SDG&E's 5 proposed sites during the NOI process. It will determine whether two or more of those sites would be acceptable for future consideration in an Application for Certification proceeding.

The Coastal Commission is required to submit a report during the NOI process to the Energy Commission on the suitability of the proposed coastal zone sites. The report must address a number of subject areas, pursuant to Public Resources Code section 30413(b). Those subject areas are:

- and 100 megawatts. (Public Resources Code section 25541; Calif Code of Regs., Title 20, section 1936.)
- transmission line development beyond the location of the "point of junction with [the] interconnected transmission system", which is the limit of the Energy Commission's certification jurisdiction over the transmission line. (Public Resources Code sections 25107, 25110, and 25500, 60 Opsn. Cal. Atty. Gen. 239.)

Of the three exceptions noted, only the last is potentially applicable to the two projects proposed by SDG&E. In the event that SDG&E proposes any transmission line development beyond the point of interconnection in the coastal zone, the utility would be required to obtain a coastal development permit, unless the development constitutes repair or maintenance under Public Resources section 30610(d). (See also section 13252(a)(3) of Title 14 of the California Code of Regulations.)

- (1) The compatibility of the proposed site and related facilities with the goal of protecting coastal resources.
- (2) The degree to which the proposed site and related facilities would conflict with other existing or planned coastal-dependent land uses at or near the site.
- (3) The potential adverse effects that the proposed site and related facilities would have on aesthetic values.
- (4) The potential adverse environmental effects on fish and wildlife and their habitats.
- (5) The conformance of the proposed site and related facilities with certified local coastal programs in those jurisdictions which would be affected by any such development.
- (6) The degree to which the proposed site and related facilities could reasonable be modified so as to mitigate potential adverse effects on coastal resources, minimize conflict with existing or planned coastal-dependent uses at or near the site, and promote the policies of this division.
- (7) Such other matters as the commission deems appropriate and necessary to carry out the provisions of this division.

Section 30413 provides that the Coastal Commission shall submit the report to the Energy Commission prior to the time that the Energy Commission completes its preliminary report on the issues presented in the NOI. (Public Resources Code section 30413(d).) The Energy Commission staff has requested that the Commission submit a report that addresses those subjects by August 6, 1990. They have indicated that the Coastal Commission may elect to submit further analysis in early to mid-1991, when the formal adjudicatory hearing process occurs. The Energy Commission will include the Coastal Commission's comments in the final report it will produce at the end of the NOI process. (Public Resources Code section 25514(b).)

The Energy Commission will consider (but will not be bound by) the Coastal Commission's recommendations in making its determination of which of the sites proposed in an NOI have greater relative merit. If the Energy Commission approves the NOI, SDG&E would not have approval to commence construction of a power plant. That approval can only be obtained through the Application for Certification (AFC) process.^{2/}

^{2/} Regardless of what the Coastal Commission has recommended in the NOI proceeding, if the Energy Commission has approved a site in the coastal zone as one of the two (or more) sites of greater relative merit in its decision on the NOI, the Energy Commission may not accept an AFC for a project at the coastal site unless the Energy Commission determines that the approved coastal site has greater relative merit than the other approved site(s). (Public Resources Code section 25516.1.)

The Coastal Commission's Role in the AFC Process

The Coastal Commission's role with respect to the AFC for SDG&E's currently proposed 140 megawatt power plant expansion in Ghulia Vista would be similar to that discussed above with respect to the NOI.^{3/} The major difference is that the Coastal Commission is not required to submit a report to the Energy Commission. The Coastal Commission is nevertheless authorized, "at its discretion, to participate fully" in the proceeding pursuant to section 30413(e). (See also Public Resources Code section 25519(d).) The proceeding will commence soon and will be conducted using formal trial-type procedures. The Energy Commission will consider, but is not bound by the Coastal Commission's recommendations in making its determination whether to approve an AFC for the South Bay Power Plant expansion.^{4/} If the AFC is approved, SDG&E will have approval to construct the power plant.

Conclusion

I hope that this letter explains the Coastal Commission's role in power plant siting.

Very truly yours,

Dorothy F. Dickey

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^{3/} That project does not require a separate NOI because Public Resources Code section 25540.6 exempts various types of power plant projects from the NOI process. The two exemptions that are apparently relevant to SDG&E's proposal are those for modification of an existing facility, (subsection (b)) and for a power plant that demonstrates technologies not previously built or operated on a commercial scale (subsection (e)). Because an NOI is not required to precede the AFC for the South Bay Power Plant expansion, the limitation concerning coastal sites which is discussed in footnote 2 is not applicable.

^{4/} Public Resources Code section 30413(b) requires that the Coastal Commission designate specific locations in the coastal zone in which siting of a thermal power plant would be objectionable. The designated locations may not include "specific locations that are presently used for such facilities and reasonable expansion thereof"; thus the site proposed by SDG&E (an existing power plant site) was not so designated. In the event that a utility proposes a project on a site that has been designated by the Coastal Commission, the Energy Commission would be prohibited from approving an AFC for that site unless the Energy Commission makes specific findings. (Public Resources Code section 25526(a).) Those findings are that the proposed power plant "is not inconsistent with the primary uses of such land and that there will be no substantial adverse environmental effects and ... the approval of any public agency having ownership or control of such land is obtained."