

## DOCKETED

<b>Docket Number:</b>	13-AFC-01
<b>Project Title:</b>	Alamitos Energy Center
<b>TN #:</b>	213733
<b>Document Title:</b>	Applicant Response in Support of Staff's Motion for Summary Adjudication
<b>Description:</b>	N/A
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<b>Submitter Role:</b>	Applicant Representative
<b>Submission Date:</b>	9/19/2016 4:21:17 PM
<b>Docketed Date:</b>	9/19/2016

STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Application for Certification for the ) Docket No. 13-AFC-01  
Alamitos Energy Center )

**AES ALAMITOS ENERGY, LLC’S  
RESPONSE IN SUPPORT OF ENERGY COMMISSION STAFF’S  
MOTION FOR SUMMARY ADJUDICATION**

Pursuant to Section 1211.5 of the Commission’s Rules of Practice and Procedure<sup>1</sup> and the Committee’s *Order Setting Deadline for Replies to Staff’s Motion for Summary Adjudication*<sup>2</sup> AES Alamitos Energy, LLC (the “Applicant”) provides this response in support of the California Energy Commission (“Commission”) Staff’s *Motion for Summary Adjudication* (“Staff’s Motion”).<sup>3</sup>

Staff’s Motion was brought in response to arguments raised by the Los Cerritos Wetlands Land Trust (“Trust”) in comments on the Preliminary Staff Assessment (“PSA”). The Trust argues that the PSA should have considered demolition of the Alamitos Generating Station Units 1-6 (“Alamitos Generating Station”) as part of the Alamitos Energy Center (“AEC”) project currently before the Commission.<sup>4</sup> As discussed below, the Trust’s arguments are incorrect.

The Applicant agrees with the analyses in the Staff’s Motion, and offers two additional reasons supporting the Staff’s conclusion that the Trust’s arguments should be rejected. First, the Trust’s interpretation of *Tuolumne County Citizens for Responsible Growth, Inc. v. City of*

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<sup>1</sup> California Code of Regulations, Title 20, Chapter 2.

<sup>2</sup> TN#: 213588.

<sup>3</sup> TN#: 213217.

<sup>4</sup> See, Staff Motion, p. 2.

*Sonora* (hereinafter, “*Tuolomne*”) is legally incorrect.<sup>5</sup> Second, the Trust’s arguments are premised upon incorrect facts. Because the arguments raised in the Trust’s PSA comments are legally and factually incorrect, the Committee should issue an order adopting the three findings set forth in the Staff Motion, as revised by the Applicant below.

**I. DISCUSSION**

The Trust asserts that the PSA’s “failure to consider [demolition of the Alamos Generating Station and the AEC] as a single project for the purpose of the CEC’s CEQA-equivalent analysis violates the statute.”<sup>6</sup> The Trust cites to *Tuolomne*, arguing that there are just “three items to be used to determine what constitutes the whole of the project: (1) relationship in time, (2) physical location; and (3) the entity undertaking the action.”<sup>7</sup> Based on the Trust’s analysis of these “three items”, the Trust argues that the “whole” of the AEC project must include the demolition of the Alamos Generating Station.<sup>8</sup> However, the Trust’s interpretations of the Court’s holding in *Tuolomne* are incomplete, at best. Further, even assuming *arguendo* that the Trust’s characterizations of the *Tuolomne* case are colorable, the Trust’s arguments are premised upon factual inaccuracies and thus fail.

**A. DEMOLITION OF THE ALAMITOS GENERATING STATION IS NOT A NECESSARY STEP FOR THE CONSTRUCTION AND OPERATION OF THE AEC.**

The Trust’s interpretation of *Tuolomne* does not accurately describe the “general principles” of the California Environmental Quality Act (“CEQA”) set forth in that case.

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<sup>5</sup> 155 Cal. App. 4<sup>th</sup> 1214 (66 Cal. Rptr. 3d 645).

<sup>6</sup> *Los Cerritos Wetlands Land Trust Comments on Preliminary Staff Assessment of Alamos Energy Center*, Docket No. 13-AFC-01 (dated Aug. 11, 2016, accepted for filing on Aug. 12, 2016) (hereinafter, “Trust Comments”), p. 11, TN #212764-1 to 4.

<sup>7</sup> Trust Comments, p. 11.

<sup>8</sup> Trust Comments, p. 11.

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Specifically, the Trust's arguments fail to identify and discuss the overarching general principle of CEQA articulated by the Court in *Tuolomne*: consideration of "how closely related the acts are to the overall objective of the project."<sup>9</sup> The *Tuolomne* Court stated, "The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the 'various steps which taken together obtain an objective.'"<sup>10</sup>

In *Tuolomne*, the Court applied these general principles and concluded that the proposed physical act, realignment of a road pursuant to a condition of approval, was "a step that Lowe's must take to achieve its objective" of opening and operating a home improvement center.<sup>11</sup> As a result, the Court concluded that the road alignment and the construction and operation of the home improvement center were part of a single CEQA project.<sup>12</sup>

In marked contrast, the demolition of the Alamos Generating Station is not a "step" that must be taken for the construction and operation of the AEC.<sup>13</sup> The demolition of the Alamos Generating Station is not necessary for construction of the AEC.<sup>14</sup> Instead, the AEC will be constructed on a separate "site" as that term of art is defined in the Warren Alquist Act.<sup>15</sup> Specifically, "The AEC will be constructed on the brownfield site of the existing AES Alamos Generating Station (AGS), and located on an approximately 21-acre site within a larger 71.1-acre

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<sup>9</sup> *Tuolomne* at 1226.

<sup>10</sup> *Id.* at 1226 (citing to Robie et al., Cal. Civil Practice- Environmental Litigation (2005) § 8.7).

<sup>11</sup> *Id.* at 1227.

<sup>12</sup> See, *Id.* at 1226.

<sup>13</sup> See, *Supplemental Application for Certification of the Alamos Energy Center* ("SAFC"), p. 202, TN #206427-1. Also see, *Preliminary Staff Assessment for Alamos Energy Center* ("PSA"), p. 4.1-22 (July 2016), TN #212284.

<sup>14</sup> SAFC, p. 1-3.

<sup>15</sup> Pub. Resources Code §25119.

parcel.”<sup>16</sup> Construction of the AEC will not be conditioned upon demolition of the Alamitos Generating Station.

Demolition of the Alamitos Generating Station in the future could occur, consistent with the Memorandum of Understanding with the City of Long Beach, under terms that do not reference or relate to the construction and operation of the AEC in any way.<sup>17</sup> Therefore, the demolition of the Alamitos Generating Station is not a necessary “step” taken to obtain the objective of constructing and operating the AEC, and thus is not part of the “whole of the project” before the Commission.

**B. THE TRUST’S ARGUMENTS ARE FACTUALLY INCORRECT.**

Even if one assumed that the Trust’s legal characterizations of *Tuolomne* were accurate (which they are not), the Trust’s analyses are premised upon incorrect factual assertions. In addition to the general principle discussed above to determine whether two activities should be considered a single project, *Tuolomne* also considered the relationship in time and the physical location of the activities.<sup>18</sup> When these factors are applied to the facts in this case, the Trust’s arguments fail.

The Trust asserts that the demolition of the Alamitos Generating Station is related in time to the AEC because “[t]he Alamitos Generating Station will not be demolished until the AEC is approved to provide replacement generation.”<sup>19</sup> This statement is incorrect. The power purchase agreement for the AEC on a separate site has already been approved.<sup>20</sup> Decommissioning of the Alamitos Generating Station is currently driven by the State Water Resources Board’s Once-

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<sup>16</sup> SAFC, p. 1-1.

<sup>17</sup> See, *Memorandum of Understanding between AES and City of Long Beach*, TN# 206920 (dated Nov. 16, 2015).

<sup>18</sup> Trust Comments, p. 11.

<sup>19</sup> Trust Comments, p. 11.

<sup>20</sup> PSA, p. 4.4-22.

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Through Cooling Policy and electrical reliability needs as determined by the California Public Utilities Commission.<sup>21</sup> Significantly, “decommissioning” is not the same as “demolition”. Once decommissioned, there is no requirement that the Alamitos Generating Station be demolished.<sup>22</sup>

Instead, the demolition of the Alamitos Generating Station is driven by a voluntary commitment that AES entered into with the City of Long Beach.<sup>23</sup> The MOU’s provisions are not contingent upon any activities related to the AEC, but are instead contingent upon the receipt of future approvals by the City of Long Beach and other governmental entities for demolition to occur.<sup>24</sup> While it is reasonably foreseeable that the demolition of the Alamitos Generating Station may occur at some point in the future, the scope and timing of the demolition is speculative and not dependent upon the approval of the AEC on a separate site. Therefore, there is no relationship between the timing of the future demolition of the Alamitos Generating Station and the construction and operation of the AEC.

Finally, as to the physical location component of the *Tuolomne* decision, the Trust asserts that the Alamitos Generating Station and the AEC “occupy the same brownfield site.”<sup>25</sup> As discussed herein, the Trust fails to recognize that the AEC will be constructed on a separate site and does not require the demolition of the existing Alamitos Generating Station to proceed.<sup>26</sup>

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<sup>21</sup> See, for example, PSA, pp. 4.2-4 to 6; 15-16. Also see, California Public Utilities Commission (“CPUC”) General Order No. 167 (D.04-05-017 adopted May 6, 2004, as subsequently modified) (hereinafter, “G.O. 167”).

<sup>22</sup> See, PSA, pp. 4.2-16.

<sup>23</sup> *Memorandum of Understanding between AES and City of Long Beach*, § 1 (dated Nov. 16, 2015) TN# 206920.

<sup>24</sup> PSA, p. 4.2-16. Also see, G.O. 167.

<sup>25</sup> Trust Comments, p. 11.

<sup>26</sup> SAFC, pp. 1-1, 1-3.

## II. CONCLUSION

The Committee should issue an order adopting the three findings set forth in the Staff Motion, as revised by the Applicant below. The Applicant's proposed additions to Staff's requested relief are demarcated in underline below. Proposed deletions are shown in ~~striketrough~~.

- 1) The AEC project, for purposes of Staff's environmental analysis under CEQA and the Commission's certified regulatory program does not include the decommissioning or demolition of AGS units 1-6.
- 2) Since decommissioning or demolition of AGS is not part of the AEC project under review by ~~Staff~~ the Commission, the direct and indirect effects or impacts, as defined in CEQA, need not be considered in the Final Staff Assessment or Presiding Member's Proposed Decision.
- 3) The subject of the direct or indirect effects of the decommissioning or demolition of the AGS units 1-6 will not be a topic of consideration at the evidentiary hearings as such topics are not relevant to any decision that the Commission must make in its ~~Staff's~~ comprehensive environmental review of the AEC.

September 19, 2016

ELLISON, SCHNEIDER & HARRIS L.L.P.

By:   
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