

benefit by requiring the future retirement of Encina unit 1-5. Errata, pages 30-35. So, for the purpose of artificially manufacturing compliance with LORS, this Commission looks 5 to 10 years into the future.

At the same time, the plan refuses to address the impact of the requirement that Encina units 1-5 be retired. This Commission has turned a blind eye to the required event planned just a few year down the road, to evade necessary review of applicable federal laws, including the Clean Water Act, the Endangered Species Act, the Porter-Cologne Water Quality Control Act, and other laws addressing coastal land use and water use.

Where convenient, the CEC argues that the shutdown of Encina units 4 and 5 might not happen and if it does happen, it is unknown when it will happen. The CEC thus concludes that it does not need to pursue investigation into this “imprecise potential event.”

Commission claims the Shutdown of Encina units 4 and 5 is only a possibility and, if it does happen, no one has any idea when it will happen

“EPS Units 4 and 5, part of an EPS expansion that occurred in the late 1970s, would continue generating electricity regardless of the outcome of this proceeding.” PMPD, Project Description page 1

“Even though the existing EPS steam boiler Units 1, 2, and 3 would be retired upon successful commercial operation of the new CECP generating units, the remaining EPS Units 4 and 5 would continue operating.” PMPD, Land Use, page 7.

“Uncontroverted evidence further establishes that any future shutdown of EPS Units 4 and 5, as well as the construction of the Coastal Rail Trail, are also imprecise potential events which currently defy meaningful analysis.” Errata, page 36.

“The parties have widely-differing positions about the timing of the shut-down of EPS units 4 and 5.” Errata, page 23.

“The timing of the closure of ESP EPS units 4 and 5 is uncertain, as the Water Board’s OTC Policy leaves open the possibility that they will continue to run after 2017 if they continue to be essential to electric system reliability, and also allows compliance with the Policy by mechanical or operational methods of reducing impacts.” Errata, pages 20-21.

“The City and other intervenors have contended that the Water Board’s new OTC Policy will require the shutdown of EPS units 4 and 5 at the end of 2017, and that the CECP should thus be

analyzed as a “stand alone” use of ocean water that will cause some (albeit comparatively minor) impingement and entrainment of marine biota. This contention is incorrect for two reasons. First, the OTC Policy does not require the shutdown of units 4 and 5 at the end of 2017. Rather, it requires the significant reduction of entrainment and impingement effects by that date. The Policy specifically provides a performance standard to meet this requirement, allowing reduction by mechanical (e.g., such as booms or screens) or performance (e.g., reduced pumping) methods. The Commission should not speculate on how the Policy requirements will be met by EPS. In addition, the OTC Policy is very clear that the 2017 date is subject to review based on the electricity reliability needs of the State, and that it may be revised to allow operation until such time as the units are no longer necessary for San Diego’s electric reliability.” Errata, page 23.

At the same time, the CEC has relied upon the shutdown of units 1-5, including units 4 and 5, to prove extraordinary public purpose as required by the South Carlsbad Coastal Redevelopment Project Area Plan.

Commission claims that the removal of Encina units 4 and 5 will occur as a condition of certification to be applied for by July 1, 2016, started within 6 months of CPUC approval, and completed within 36 months

“However the Applicant has committed to planning for the removal and redevelopment of the portion of the EPS complex containing Units 1 through 5 once all of the units are no longer needed for the reliable operation of the electricity system.” Errata, page 1.

“Conditions LAND-2 and LAND-3 requir[e] the planning, permitting and financing of the eventual removal and redevelopment of the existing EPS power plant.” Errata, page 32

“On or before July 1, 2016, project owner shall submit applications for required permits and approvals for demolition, removal, and remediation of the Encina Power Station (Units 1 through 5), associated structures, the black start unit and the exhaust stack. . . Within six months following approval by the CPUC, project owner shall demonstrate to the satisfaction of the CPM that it has shut down Units 1 through 5 of Encina Power Station and the black start unit, and commenced the demolition, removal, and remediation. . . . Within 36 months of the start of demolition, removal, and remediation, the project owner or its parent company shall demonstrate

to the satisfaction of CPM that demolition and removal of the Encina Power Station Units 1 through 5.” Errata, page 35.

The CEC cannot have it both ways – either Units 4 and 5 will be shut down thereby triggering a showing of compliance with the applicable LORS (i.e. ESA, CWA), or the Units will not be shut down and the CEC has failed to prove any extraordinary public purpose.

2. The errata has changed the nature of this project and the analysis on effected issues must be redone in light of this change

Prior to the errata, this was a project that would use the water from Encina units 4 and 5. Now, this is a project that will use the water from Encina units 4 and 5 for a few years until these units are shut down. That defined point in the near future, signaling a major change to the operation of this facility, is addressed solely in a condition that, “In the event that EPS Units 4 and 5 (and their pumps that supply discharge water for desalination purposes by the CECP) cease to operate -- and the CECP will require intake of ocean water the project owner shall inform the appropriate resource agencies and coordinate regarding the compliance with Clean Water Act Section 316(b), and/or the Endangered Species Act requirements, as necessary.” PMPD, Biological Resources, page 18.

The errata has completely changed the nature of this project thus making the analysis of numerous critical factors inapplicable, inaccurate, obsolete, or contradictory.

Examples of Inaccurate, Inapplicable, or Obsolete Findings in the PMPD and Errata	
PROJECT DESCRIPTION	<p>“EPS Units 4 and 5, part of an EPS expansion that occurred in the late 1970s, would continue generating electricity regardless of the outcome of this proceeding.” PMPD, Project Description, page 1.</p> <p>“CECP would use evaporative air cooling, eliminating the daily need for large quantities of seawater for purposes of once-through cooling. The minimal industrial, wash-down and associated water necessary for CECP’s industrial steam and landscape irrigation would be approximately 700,000 gallons per day.</p> <p>It could be provided through one of two identified and analyzed water sources – desalinated seawater provided by the EPS ocean intake/discharge system, or reclaimed water provided by the Carlsbad</p>

	<p>Municipal Water District.” PMPD, Project Description, page 3.</p> <p>“Reclaimed water necessary for CECP’s daily industrial needs is not currently available without a significant expansion of the City’s wastewater treatment infrastructure.” Errata page 23</p>
<p>POWER PLANT RELIABILITY</p>	<p>“The long-term availability of fuel and water for cooling or process use, is necessary to ensure power plant reliability.” PMPD, Power Plant Reliability page 2.</p> <p>“The source(s) of industrial water for the project’s process, evaporative cooling, and miscellaneous plant uses will either be desalinated water produced on-site by the project’s ocean water purification system, or recycled water purchased from the City of Carlsbad Water Recycling Facility, and/or other water suppliers.” PMPD, Power Plant Reliability page 2.</p>
<p>ENVIRONMENTAL ASSESSMENT - BIOLOGICAL RESOURCES</p>	<p>“The timing of the closure of ESP EPS units 4 and 5 is uncertain, as the Water Board’s OTC Policy leaves open the possibility that they will continue to run after 2017 if they continue to be essential to electric system reliability, and also allows compliance with the Policy by mechanical or operational methods of reducing impacts. So long as units 4 and 5 continue to operate, CECP’s use of ocean water will be from the EPS system (taking and returning water to the ocean), and will not result in any cumulative OTC or new impact related to OTC. Moreover, even if one assumes the eventual shutdown of units 4 and 5, the relatively small use of seawater taken from the OTC system would not be a significant cumulative impact to marine biology, as discussed further in this Decision under the topic of Soil and Water Resources.</p> <p>“In the event of the shutdown of units 4 and 5, we have, at Staff’s suggestion (02/04/10 RT 266:24-267:6), included Condition BIO-9 to emphasize the need for possible future joint review and coordination. If the EPS Units 4 and 5 are in fact shut down in the future and this affects the CEC’s intake water supply, the appropriate regulatory agencies will then assess the proper course of action to be taken [retain footnote 3]. 35. Biological Resources, p. 10, Findings 10 – 11, revise as follows:</p>

	<p>“10. The Water Board’s OTC Policy does not require the shutdown of EPS units 4-5, but rather the reduction of OTC impacts. The potential shutdown of EPS Units 4 and 5 is a speculative future event, and is not part of the present project.</p> <p>“11. The project’s relatively small use of seawater for its desalination unit will not have a significant cumulative impact to marine biota. As proposed, the CECP will not withdraw water from Agua Hedionda Lagoon. The project will thus not cause entrainment or impingement impacts upon biological resources.” Errata, pages 20-21.</p>
<p>ENVIRONMENTAL ASSESSMENT - SOIL AND WATER RESOURCES</p>	<p>“The intake for the ocean-water purification system would be from the existing EPS once-through cooling sea water discharge channel.” Errata, page 21.</p> <p>“While units 4 and 5 operate, CECP will draw its water from the discharge (output) part of the OTC system, using water already drawn in by EPS and circulated for cooling. CECP uses water already drawn from the ocean for cooling purposes and has no affect, positive or negative, on the impacts of drawing the water.</p> <p>“The City and other intervenors have contended that the Water Board’s new OTC Policy will require the shutdown of EPS units 4 and 5 at the end of 2017, and that the CECP should thus be analyzed as a “stand alone” use of ocean water that will cause some (albeit comparatively minor) impingement and entrainment of marine biota. This contention is incorrect for two reasons. First, the OTC Policy does not require the shutdown of units 4 and 5 at the end of 2017. Rather, it requires the significant reduction of entrainment and impingement effects by that date.</p> <p>The Policy specifically provides a performance standard to meet this requirement, allowing reduction by mechanical (e.g., such as booms or screens) or performance (e.g., reduced pumping) methods. The Commission should not speculate on how the Policy requirements will be met by EPS. In addition, the OTC Policy is very clear that the 2017 date is subject to review based on the electricity reliability needs of the State, and that it may be revised to allow operation until such time as the units are no longer necessary for San Diego’s electric reliability.</p>

	<p>““Even if one assumes the shutdown of EPS units 4 and 5, there is no evidence that the small desalination unit’s use of OTC water would have a significant cumulative impact. The City, in its EIR for the Carlsbad Seawater Desalination Project (CSDP), concluded that there would be no significant impact for using 304 mgd of OTC intake water for that project. CECP will use a maximum of 4.3 mgd, and the evidence indicates that this use will likewise not be cumulatively significant.”” (Note: the errata does not attribute this quote to any source.) Errata page 22</p>
<p>LOCAL IMPACT ASSESSMENT - LAND USE</p>	<p>“Even though the existing EPS steam boiler Units 1, 2, and 3 would be retired upon successful commercial operation of the new CECP generating units, the remaining EPS Units 4 and 5 would continue operating.” PMPD, Land Use, page 7.</p>

3. The errata has squarely put this project out of compliance with many LORS

The problems that the errata has created cannot be fixed by simply editing the document. The errata has changed the nature of the project to the point that the PMPD does not address the actual project being contemplated and cannot be shown to be in compliance with a number of LORS.

If the CEC approves this project based on the PMPD and errata, absent the required finding that it complied with federal and state laws including, but not limited to, the Clean Water Act, the Endangered Species Act, the California Endangered Species Act, and The Porter-Cologne Water Quality Control Act it will have unlawfully substituted its judgment for that of the expert agencies tasked with administering these laws.

The CEC has overstepped its authority by attempting to act, not only as a fire fighter and the Carlsbad City Council, but as the U.S. Fish and Wildlife Service, National Marine Fisheries Service, CA Water Control Board, and CA Department of Game and Fish.

Public Resources Code section 25525 forbids the CEC from “certify[ing] a facility” that “does not conform with any applicable state, local, or regional standards, ordinances, or laws.” Pub. Resources Code, §§ 25525, 25523, subd. (d)(1). Because the CEC is not an expert on all LORS,

it must rely on the advice of the agencies expert in a given applicable LORS. Pub. Resources Code, § 25519.

While there are some measures available to the CEC to address noncompliance with state, local, or regional LORS, this is not the case for applicable federal laws. (Pub. Resources Code, §§ 25525, 25523, subd. (d)(1).) The Public Resources Code reinforces this most basic premise of the United States Constitution’s Supremacy Clause, “The commission may not make a finding in conflict with applicable federal law or regulation.” (Pub. Resources Code, § 25525.)

The Endangered Species Act and accompanying regulation grants the USFWS exclusive jurisdiction to make determinations regarding endangered terrestrial plants and animals and the NMFS jurisdiction to make determinations regarding endangered marine species. (16 U.S.C. § 1531, et. seq.; 50 C.F.R. 17.1, et. seq.). The California Endangered Species Act is administered by the California Department of Game and Fish (Cal. Fish and Game Code, § 2050 et. seq.); the Army Corp of Engineers administers Clean Water Act programs (33 U.S.C. § 1251, et. seq.); and the California Water Resources Control Board administers The Porter-Cologne Water Quality Control Act (Cal. Water Code § 13000 et. seq.)

CEC has shown that even if it had the authority to make determinations of federal law, the CEC lacks the expertise to make such determinations. The ONLY evidence the CEC relied upon to decree compliance with the ESA is the following conclusions in the staff assessment:

The proposed CECP would not withdraw water from Agua Hedionda Lagoon for project specific uses, and therefore would not result in impingement or entrainment impacts. NMFS, USFWS, and CDFG concur with staff’s determination (Chesney 2009; Koski 2009; Paznokas 2009.) However, if EPS Units 4 and 5 were to cease operations altogether, and their service and auxillary water pumps were no longer needed, the CECP would require intake water from Agua Hedionda Lagoon.

Staff Assessment, page 187.

This conclusion was drawn by an outside consultant, not even a CEC staff member, upon making a single “personal communication” each to a staff member at the NMFS, FWS, and CA Fish and Game on January 5, 2009. Staff Assessment, pages 4.2-27 – 4.2.28. No record of the content of these conversation was entered into evidence.

Furthermore, the errata establishes conclusively that units 4 and 5 will cease operation and will require intake water from the Agua Hedionda Lagoon. The only effort CEC has made to consult with the expert agencies on CWA, ESA, CESA, and Water Quality Act, were these three phone calls made over two years based on information that is no longer true.

Yet, the Commission has concluded “From a land use perspective, construction and operation of the CECP would not significantly impact environmentally sensitive habitat areas and parks, including the Agua Hedionda Lagoon and the recreational facilities surrounding the EPS site, because the CECP would be entirely within the fenced perimeter of the EPS, which is an existing power plant facility.” PMPD, Land Use, Page 8.

This conclusions is based on the consultant’s day of phone calls and purported review of the Habitat Conservation Plan covering all development in Carlsbad:

The proposed project is subject to several LORS including the North County Multiple Habitat Conservation Program and the Habitat Management Plan for Natural Communities in the city of Carlsbad. In general, these plans are protective of special status species and identified conservation areas (e.g., Agua Hedionda Lagoon). Staff determined that the proposed project would not result in significant impacts to special status species or sensitive habitat. Therefore, the proposed CECP would comply with federal, state, and local LORS pertaining to biological resources.

Staff Assessment, page 188.

The Habitat Management Plant splits the City of Carlsbad into a number of different zone (LFMZ’s) with restrictions on land use based on the rules for each zone. The consultant is so inept that she was not even capable of looking at a map and determining which zone this project would be located in. The staff report incorrectly determined that the project was only located in zone 1 (Staff Assessment, 4.2-3) – while it effects zone 1 and may be partially located there, the majority of this project is located in zone 3. There has been no actual analysis of LORS impacted by the conditions of certification

The CEC has not even make the minimum effort required to investigate compliance with the ESA and other LORS. The conclusion that the ESA is in applicable was based on a project description that has now been altered by the errata in such a way that the entire analysis must be adjusted. The staff assessment analysis was flawed to begin with and, in the context of the errata, is in error.

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Respectfully,

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