

No. S203634

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

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CITY OF CARLSBAD and THE CITY OF CARLSBAD  
AS SUCCESSOR AGENCY TO THE FORMER  
CARLSBAD REDEVELOPMENT AGENCY,

*Petitioners,*

v.

ENERGY RESOURCES CONSERVATION AND  
DEVELOPMENT COMMISSION,

*Respondents.*

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CALIFORNIA COASTAL COMMISSION, and  
CARLSBAD ENERGY CENTER, LLC,

*Real Parties-In-Interest*

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**PETITION FOR WRIT OF MANDATE;  
SUPPORTING MEMORANDUM AND EXHIBITS  
VOLUME I of III**

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## PETITION FOR WRIT OF MANDATE

Petitioners City of Carlsbad, et al., bring this Petition for a writ of mandate under California Public Resources Code section 25531, and by this verified Petition allege:

1. Petitioner City of Carlsbad ("City") is a California municipal corporation and a charter city. Petitioner has standing to bring this Petition since it has formally intervened in the proceedings before the Energy Commission but more fundamentally will affect the quality of life for 110,000 residents of the City of Carlsbad for a very long time, perhaps 50 years. City brings this Petition on its own behalf and on behalf of its residents and visitors.

2. Petitioner City of Carlsbad as successor agency to the former Carlsbad Redevelopment Agency represents the Redevelopment Agency as intervenor and has the obligation and duty to enforce the Redevelopment Laws pursuant to Health and Safety Code section 34173(b).

3. Respondent Energy Resources Conservation and Development Commission is a commission within the Resources Agency of the State of California created pursuant to California Public Resources Code section 25200.

4. Real Party-In-Interest the California Coastal Commission is a commission within the Resources Agency of the State of California created pursuant to California Public Resources Code section 30300.

5. Real Party-In-Interest Carlsbad Energy Center LLC, a subsidiary of NRG Energy, Inc. (NRG), which owns the existing Encina Power Station in the City of Carlsbad, County of San Diego, California, is the applicant for Application No. 07-AFC-6 for Certification (AFC) for the Carlsbad Energy Center Project (CECP), which is the subject of this Petition.

6. This Petition is based on the Memorandum and declarations that follow, all of which are incorporated herein by reference.

WHEREFORE, Petitioners pray that:

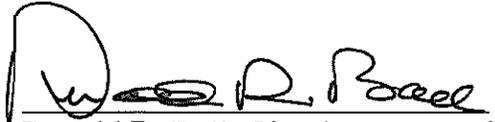
1. For an order ordering the Commission to prepare and submit to this Court a full transcript of the proceedings in case number 07-AFC-6 so this Court may determine whether or not the Commission has proceeded in a manner not required by law or exceeded its jurisdiction;

2. Petitioners be awarded their costs of suit, including reasonable attorneys' fees; and

3. Petitioners be awarded such other relief as may be just and proper.

DATED: *June 25, 2012*

Respectfully,

  
Ronald R. Ball, City Attorney and  
General Counsel

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## **I. INTRODUCTION**

This is the story of one overburdened state agency without the resources to completely undertake its responsibilities as required by law and another state agency without the will to require compliance. When the law became too expensive to follow, the Coastal Commission Executive Director declined to follow it and the Energy Commission simply ignored it or paid lip service to those legal responsibilities. Although this process should have taken only 12 months (Public Resources Code §25540.6), it extended to five years and the Energy Commission became frustrated with the length and expenditure of time so it rubber stamped applicant's application in the end. This is not the way to instill confidence in government. Although repeatedly requested to do so, it failed to follow the law and exceeded its jurisdiction in reaching its final decision.

There are no other administrative remedies to exhaust. Petitioner has filed a petition for reconsideration (see Exhibit B) but that does not toll the time for judicial review (Public Resources Code §§25530 and 25531). The last and only hope is for review of these flawed proceedings by this honorable Court.

## **II. STATEMENT OF ISSUES**

1. Did the California Energy Commission fail to proceed in a manner required by law when it did not obtain a coastal report from the California Coastal Commission for the licensing of a power plant in the coastal zone in Carlsbad, California?
2. Did the California Energy Commission fail to proceed in a manner required by law when it determined the proposed project complied with the Coastal Act with the possible exception of one issue – the potential of visual blight suggested by the City – and then

overrode this without relying on the required coastal report prepared by the California Coastal Commission?

3. Can the California Energy Commission override inconsistencies in the Coastal Act without preparing its own coastal report and ignoring the only substantive analysis prepared on the issue – a report prepared by the City?

4. Can the California Energy Commission override unspecified inconsistencies in the California Coastal Act by adopting a blanket finding overriding all inconsistencies?

5. Did the California Energy Commission properly apply sections 30101 and 30260 of the Coastal Act?

6. Did the California Energy Commission fail to comply with Public Resources Code section 25523(d)(1) when it did not meet and consult with the local governing entity after it identified inconsistencies with the local law?

7. Did the California Energy Commission proceed in excess of its jurisdiction when it preempted the local fire official?

8. Did the California Energy Commission fail to override amendments to the 2000 edition of the California Fire Code?

These issues are of statewide importance since communities throughout the state will or may be hosts to future power plants in which similar issues may arise. These issues are especially important since they are likely to impact every California coastal community that is home to an existing power plant.

### III. FACTUAL BACKGROUND

These proceedings before the California Energy Commission are called Proceedings for an Application for Certification (07-AFC-6). It was proposed by the applicant in 2007 and eventually approved without substantial modification in 2012. All of the proceedings were transcribed and all of the assignments of error are contained in them. This petition must be filed within 30 days of the docketing of a final decision which was made by the Commission on May 29, 2012 and docketed on June 1, 2012. A true and correct copy of that decision is attached as Exhibit A.

### IV. ARGUMENT

#### **A. The Energy Commission Has Failed to Obtain a Report from the California Coastal Commission and to Consider that Report Prior to Overriding It.**

When a power plant is proposed to be located in the coastal zone, the law requires a report to be prepared by the California Coastal Commission and submitted to the Energy Commission for its consideration. Under Public Resources Code section 25519(d) if the site of a proposed gas-fired power plant is proposed to be located in the coastal zone then the Energy Commission must transmit a copy to the California Coastal Commission for its review and comments. Since it is undisputed that no review and comments from the Coastal Commission were obtained, the Energy Commission concluded it was unnecessary, would prolong the proceedings and did not apply in this situation (FD §8.1-5, 6). (“We need not wait for a Coastal Commission report before adopting this decision” Final Decision §8.1-6 (hereinafter “FD”).)

#### **Since a Report Was Not Prepared It Could Not Be Considered in Reaching a Final Decision.**

In the case of a power plant to be located on a site in the coastal zone, the Energy Commission must include specific provisions to meet the

objectives of the Coastal Act as may be specified in a report submitted by the California Coastal Commission. (Public Resources Code §25523(b).)

In this case, this was not done.

Instead, the Energy Commission relied on its own staff for its opinions that the proposed power plant was consistent with the Coastal Act (FD §8.1-8, 9). In this regard, the Energy Commission failed to proceed in the manner required by law. In fact, the Commission stated the City had no authority other than the law to support its position (“They cite no authority for that proposition [coastal-dependency] beyond the [Coastal] Act.” FD §8.1-8.) The law required the Energy Commission to include specific provisions of the report submitted by the Coastal Commission to ensure that the objectives of the California Coastal Act were met (Public Resources Code §25523(b)). Instead of proceeding as required by law, the Energy Commission determined to override the few inconsistencies that its staff pointed out and any other inconsistencies that “might be found.” (FD §8.1-10). This did little to cure this failure.

**B. The Energy Commission Did Not follow the California Coastal Act.**

A comprehensive report prepared and submitted by the Coastal Commission is a necessary predicate for the Final Decision by the Energy Commission. It did not obtain this report, however, it attempted to override a few inconsistencies with the Coastal Act that it discovered without the benefit of this report (Public Resources Code §30413(d)). The problem with this approach is that the Energy Commission did not have any evidence to support an override of these inconsistencies with the Coastal Act. The best evidence of the inconsistency with the Coastal Act was a coastal report prepared by the Coastal Commission on this very site in 1990. That report found that a power plant at this same location was inconsistent with the Coastal Act. (A true and correct copy of that report is

attached to this Petition as Exhibit C.) If that were not enough, the City of Carlsbad which has a local coastal program under the California Coastal Act prepared its own report and submitted it to the Commission for its consideration finding that this plant was inconsistent with the Coastal Act in many ways (e.g. scenic and visual impacts, marine resources, coastal access and recreation and land use.) The Energy Commission did not mention this report much less override it in its Final Decision. (A true and correct copy of that report is attached to this Petition as Exhibit D.) Instead, it distinguished the 1990 Coastal Report but did not reject it and determined it has “no dispositive value” (FD §8.1-6).

**C. Consistency with the California Coastal Act**

The final decision discusses the CECP’s consistency with the California Coastal Act. It concludes that the California Coastal Commission is not required to submit a formal report pursuant to Public Resources Code section 30413(d) and the 1990 Coastal Commission report concerning the project site is not relevant.<sup>1</sup> The decision further concludes that although the CECP is inconsistent with local zoning, it will benefit the marine environment, is a “coastal-dependent” facility in its own right as well as a permissible expansion of an existing coastal dependent use, will not harm an environmentally sensitive area, and will promote the public access policies of the Coastal Act. These conclusions are errors because: The decision fails to properly apply the provisions of the Coastal Act with respect to the approvability of the CECP in the coastal zone. The Commission misapplied the Coastal Act by ignoring the standard for

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<sup>1</sup> In what is in effect an admission by the Commission that it had no factual basis to conclude the proposed project was consistent with the Coastal Act, it attempted to bolster its conclusion of consistency by referring to an Oxnard decision (FD §8.1-8) which did not interpret the Coastal Act but instead Oxnard’s L.C.P., which provisions do not apply to Carlsbad. In addition, that decision arose in another county, over 100 miles from the site from a project owner which the Commission did not have jurisdiction. Yet, mysteriously the Commission concluded that the 1990 report, prepared on this very site, is “not dispositive.”

approval of coastal-dependent industrial facilities as well as the undisputed testimony regarding that standard. Instead, as demonstrated below, the decision assumes the conclusion of coastal dependency rather than applying the clear and specific statutory standard set forth in Public Resources Code section 30101.

**D. The Coastal Commission Should Have Participated in this Proceeding and Provided a Written Report on the Suitability of the Proposed Site.**

The City's and the former Redevelopment Agency's position regarding the California Coastal Commission's mandatory duty to provide a report pursuant to Public Resources Code section 30413(d) has been clear and consistent throughout these proceedings:

- The Coastal Commission has a mandatory, non-delegable duty to prepare a report for the Commission's consideration.
- Since the Coastal Commission has not prepared or submitted the required report for the Energy Commission's consideration, the CECP proceedings are incomplete and the requested license should be denied until the required report is submitted.

**E. Public Resources Code Section 30413 Requires the Coastal Commission to Provide a Formal Report in these Proceedings.**

With respect to the responsibilities of the Coastal Commission in relation to the exercise by the Energy Commission of its jurisdiction in the coastal zone, Public Resources Code section 30413(d) provides:

“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 [Coastal 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.”

Public Resources Code §30413(emphasis added).

When the Legislature used the word “shall” in this section, it expressed the intent that the Coastal Commission participate in these

proceedings and file the report containing the seven findings set forth above. The Legislature's use of the word "shall" mandates an action, as opposed to its use of the word "may," which permits but does not require it. In section 30413, the difference is made clear by the distinction between the language used in subdivision (d) which uses the mandatory "shall," as compared to subdivision (e) which uses the discretionary "may."<sup>2</sup>

This distinction is particularly significant in Chapter 5 of the Coastal Act (sections 30400 through 30420) which is explicit in delineating the relative responsibilities of the Coastal Commission and the other various state agencies in matters where their respective jurisdiction may overlap. In these sections in particular, the Legislature sought "to minimize duplication and conflicts" among state agencies by carefully distinguishing between the uses of "shall" versus "may."

The report required by section 30413(d) also is specifically contemplated as a necessary predicate to Energy Commission action in the Memorandum of Agreement between the Energy Commission and Coastal Commission, which is intended to clarify the roles and duties of each commission during review of proposed projects at existing coastal power plant sites. (Memorandum of Agreement Between the California Energy Commission and California Coastal Commission Regarding the Coastal Commission's Statutory Role in the Energy Commission's AFC Proceedings, April 14, 2005, (MOA) Exhibit E.) The MOA by its terms reflects a "common understanding of the statutory and regulatory requirements of each Commission during AFC review" (MOA, page 3.) The MOA reflects the statutory requirement by using mandatory language

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<sup>2</sup> The Legislature appreciated the distinction between the terms "shall" and "may" and included in Public Resources Code section 30413(e) the provision that the Coastal Commission may, at its discretion, participate in other proceedings conducted by this commission but that it must participate in proceedings with respect to thermal power plants to be located within the coastal zone.

such as “must provide” regarding the Coastal Commission’s duty to provide the report required by section 30413(d).

Despite these requirements, the Coastal Commission did not file the report mandated by section 30413(d). Instead the Coastal Commission’s executive director submitted a letter (docketed on October 16, 2007) stating that, because of substantial workload and limited resources due to budget constraints, the Coastal Commission was unable to complete the section 30413(d) report. There is no evidence in the record that this is a result of Coastal Commission action. There is no evidence that the Coastal Commission ever considered the proposed plant and no notice to the public of any Commission discussion or action. A public entity may not act except at a noticed and public meeting (Bagley-Keene Open Meeting Act, Government Code section 11120, et seq.) And while the Coastal Commission may be facing significant budget constraints, this does not excuse it from performing its mandatory non-delegable duty to file such a report as a part of the CECP review process. The report is a pre-requisite to the Energy Commission’s analysis of the impacts of the CECP. If it is a question of money, the applicant should have been required to provide the funding necessary for the Coastal Commission to fulfill its statutory obligation to prepare the required report.

The Legislature intended the protection of coastal resources to be fully considered and ensured in the Energy Commission’s approval of power plants. Section 30413(d) would be completely meaningless if that were not the case, and the law applicable to the CEC’s consideration of power plant approvals also makes clear that these impacts must be considered.

The decision concedes that the CECP must demonstrate consistency with the Coastal Act policies. Unfortunately, the decision’s analysis of the CECP’s consistency with coastal resource protection policies did not

properly measure the impacts of the CECP. In fact, only two of the eleven environmental topics in the decision even referenced the California Coastal Act as a Laws, Ordinances, Regulations and Standards (LORS) considered in their analysis:

- Air Quality – California Coastal Act not cited;
- Biological Resources – California Coastal Act not cited, discussion of impact on aquatic species;
- Cultural Resources - California Coastal Act not cited;
- Hazardous Materials - California Coastal Act not cited;
- Land Use - California Coastal Act listed but there was no corresponding discussion;
- Noise and Vibration - California Coastal Act not cited;
- Public Health - California Coastal Act not cited;
- Socioeconomic Resources - California Coastal Act not cited;
- Soil and Water Resources - California Coastal Act not cited;
- Traffic and Transportation - California Coastal Act not cited;
- Visual Resources – with the exception of one section (Public Resources Code §30251), California Coastal Act not further cited;

In particular, the decision concludes that the CECP may not be consistent with the policies of the Coastal Act and requires an override but then does not make the findings required by Public Resources Code section 25523(b).

In the absence of the Coastal Commission report required by Section 30413(d), and in the face of the inadequate CEC staff analysis of coastal resource impacts, the City prepared a report regarding the CECP's consistency with the Coastal Act's resource protection policies (Exhibit D, Conformance Report.) As the evidentiary record demonstrated, the Coastal Commission has delegated to the City permitting authority under the Local

Coastal Plan (“LCP”) and, as a result of this delegation, the staff of the City has developed extensive experience interpreting and applying the policies of the Coastal Act in the review of proposed development in the areas of the City’s coastal zone for which an LCP is certified. In light of this extensive experience, the conclusions of the City staff in the Conformance Report should be given great weight. Among these conclusions are that the proposed CECP is inconsistent with the visual resource policies, the biological resource policies and the access policies of the Coastal Act. The weight of the evidence also demonstrates that the proposed CECP is inconsistent with the coastal resource policies of the Coastal Act and that its significant impacts cannot be mitigated.

**F. The Decision’s Conclusion that a Formal Report from the Coastal Commission Is Not Required Is Erroneous.**

Obviously the perspectives of the Coastal Commission are important to the resolution of the Coastal Act conformance issues in this proceeding. CEC staff’s unease with the City’s land use regulations for coastal locations confirms the need for and the importance of the Coastal Commission’s participation in this proceeding. It is precisely the careful scrutiny which the Coastal Commission gives development in sensitive coastal areas that leads to the layered local land use LORS which the Decision ignores or attempts to override.

The law and evidence discussed above compel the following conclusions: first, the Coastal Commission is required by state law to participate in these proceedings; second, the Energy Commission also is required by state law to obtain a report regarding the CECP’s consistency with the Coastal Act from the Coastal Commission; and third, if the Coastal Commission does not provide the required report, the Energy Commission should obtain it from the local agency which is experienced in and

otherwise responsible for applying the Coastal Act in the area in which the project proposes to locate.

Ordinary rules of statutory interpretation support the City's long-standing position that the Coastal Commission is required to participate in this proceeding. Although Public Resources Code section 25540.6 exempts thermal power plants using natural gas-fired technology from the obligation to submit a Notice of Intention, it does not exempt the Coastal Commission from participation when the proposed plant is located in the Coastal Zone. There is nothing in that section which addresses thermal power plants in the Coastal Zone. Since that section does not address power plants in the Coastal Zone, it cannot impliedly overrule the other provisions of the Warren-Alquist Act ("Act") that require the Coastal Commission's participation. (*N.T. Hill v. City of Fresno* (1999) 72 Cal.App.4th 977, 990 [implied repeal of statutory provision highly disfavored].)

Since section 25540.6 did not impliedly repeal other pertinent sections of the Act, other relevant statutory provisions must be examined. Public Resources Code section 30413(d) expressly requires participation by the Coastal Commission:

"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 [Coastal 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."

Public Resources Code §30413 (emphasis added).

Therefore, although Public Resources Code section 25540.6 exempts certain types of proposed thermal power plants from submitting a Notice of Intention, it does not exempt participation by the Coastal Commission. That is why in section 25519(d) the Legislature required the application for certification for a plant proposed in the Coastal Zone to be forwarded to the Coastal Commission for its review and comments.

It is uncontroverted that the Coastal Commission did not participate in this proceeding. Although the applicant characterized a letter from the Executive Director regarding insufficient staff resources as an action of the Coastal Commission, the Coastal Commission itself has never made any findings, prepared any report, or participated in any other way in this proceeding. (See Exhibit 195 [Docket No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07].) Moreover, this was before the applicant proposed the continued use of ocean water.

The necessity of a Coastal Commission report is underscored by the letter from the Executive Director of the Coastal Commission, which acknowledges the Coastal Commission's duty to review power plant proposals pursuant to the MOA and its duty to provide the report required by Coastal Act section 30214(d). (Exhibit 195 [Docket No. 42851, Letter from Peter Douglas to B.B. Blevins, posted 10/16/07].) The MOA between the Energy Commission and Coastal Commission, dated April 14, 2005 (Exhibit E), sets forth the Coastal Commission's role in AFC proceedings such as this one. Under the MOA, the Coastal Commission must submit a section 30413(d) report in time for the Energy Commission's proposed decision. The MOA has not been rescinded and remains in effect. It does not contain any provision authorizing one commission or the other to disregard its requirement. Accordingly, it provides the most reliable interpretation of the joint responsibilities of the Coastal Commission and the Energy Commission and is applicable to this proceeding.

In light of the letter from the Executive Director of the Coastal Commission, the 1990 Coastal Commission Report (“1990 Report”) is the only report from the Coastal Commission which relates to the proposed site. The 1990 Report concluded that a second power plant at this location would be inconsistent with the Coastal Act. The decision discounts the 1990 Report and seems to assume that if the CECP can be characterized as being “not as bad” as the previous SDG&E project, it must be consistent with the Coastal Act, without any analysis of where the bar of consistency is set. “We find the 1990 [Coastal Commission] report has no dispositive value in our analysis of the [proposed plant]” (FD §8.1-6). Notwithstanding this attempt to downplay its importance, the 1990 Report should be considered by the Commission as a clear indication of the disfavor with which the Coastal Commission would view any proposal to extend, for another 50 years, a heavy industrial use in this extremely valuable and sensitive coastal location.

The City understands that the Energy Commission cannot compel the Coastal Commission to perform its statutory duties to participate in this proceeding but this Court can. In the absence of a report, the Commission should have relied on the next best evidence regarding a project’s consistency with the Coastal Act from those with the most experience in applying the Coastal Act to the site in question.

The City’s planning staff has been interpreting the Coastal Act since its inception and issuing coastal development permits since the Agua Hedionda Land Use Plan was certified by the Coastal Commission. During this time, the City has reviewed over 700 applications for coastal development permits in the coastal zone. As a result of the City planning staff’s extensive, day-to-day, on-the-ground experience, no other party to this proceeding is better equipped to determine whether the CECP would be consistent with the Coastal Act.

Given their extensive experience in interpreting and applying the Coastal Act, City staff is in a better position than CEC staff to determine whether a site within the City's coastal zone is consistent with the Coastal Act. Just as CEC staff has extensive experience and expertise in evaluating, for example, the technical merit of a power plant proposal, so too the City staff is far more qualified than anyone else in these proceedings to evaluate whether a project within the City's coastal zone conforms with the Coastal Act.

**G. The CECP Is Not Consistent with Other Provisions of the Coastal Act.**

As pointed out in the City's California Coastal Act Conformance Report, the Legislature declared five guiding policies in the Coastal Act:

- a) Protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.
- b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.
- c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.
- d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.
- e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

(Pub. Res. Code § 30001.5.)

The City's Coastal Act Conformance Report established that the CECP does not conform with any of these policies. In particular, the Coastal Act Conformance Report concluded that:

The CECP continues the presence of an industrial facility in an otherwise scenic coastal area. It will also extend that industrial use long after the current coastal-dependent power plant units have exceeded their useful and economic lives. As a non-coastal dependent facility, the CECP takes away opportunities for other less intrusive and more coastal zone compatible uses to be developed. (Exhibit D, p. 21.)

The CECP is inconsistent with the coastal resource policies of the Coastal Act in four principal areas: scenic and visual impacts, marine resource impacts, access and recreation impacts and land use priority impacts.

**Scenic and Visual Impacts** – The Decision concludes that the proposed CECP would not have an adverse “aesthetic” impact under CEQA and would comply with applicable laws, including the Coastal Act. The staff Decision does not articulate an objective standard for this conclusion that the aesthetics of the proposed project are consistent with the Coastal Act. Whatever subjective standards were used in applying its “aesthetic” analysis, there is no basis for the decision’s conclusion that the proposed plant complies aesthetically with the Coastal Act.

The principal flaw in the Decision’s analysis is that it uses the wrong standard for review. The Decision assumes that the existing development will remain in place, and minimizes the visual impact of the CECP in the context of the more obtrusive existing Encina facility. The Decision refers to the exhaust stack as a “prominent regional landmark,” as if tourists flock to Carlsbad to see its “uncluttered architectural form” and its “visual dominance” (FD §8.5-6). But that is not the analysis that the Coastal Commission would apply for two reasons.

First, to the extent that the CECP would co-exist with the present Encina power plant in the Carlsbad coastal zone, it adds mass and height and scale to the already existing industrial facility. This additional presence, in all its dimensions, detracts from the quality of the scenic and visual resources of the coast and is contrary to the policy of the Coastal Act. (Pub. Res. Code § 30251.) That policy requires new development to be sited and designed to protect the scenic and visual qualities of coastal areas and to protect views to and along the ocean. Although an industrial facility such as the CECP might still be approved by the Coastal Commission pursuant to the special provisions of the Coastal Act that pertain to coastal-dependent industrial facilities (to be discussed below), the CECP could not be found to be fully consistent with the scenic and visual qualities policies of the Coastal Act. (Pub. Res. Code §§ 30251 and 30260.)

Second, the Coastal Commission would not analyze a project with the assumption that an existing facility would remain in place when there was reason to believe that it would be removed. This “temporal” aspect to coastal analysis would apply here because the State Water Resources Quality Control Board’s once-through cooling (OTC) Policy requires that existing power plants like Encina Units 1 through 5 comply with new marine protection policies by December 31, 2017, or cease operation. The Decision concedes that the only feasible way for the Encina facility to comply with these new standards will be to cease operation not later than December 31, 2017. The Coastal Commission would look at coastal resource impacts over the life of the project rather than simply examining its present impacts.

Section 30251 of the Coastal Act provides in part:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas ... to be

visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas.

Public Resources Code §30251 (emphasis added).

Had the Decision examined the visual impacts of the CECP absent the existing Encina facility, as the Coastal Commission would have done, it would have found a large industrial facility that, with its visual dominance, grossly interferes with “the scenic and visual qualities” of Carlsbad’s coastal zone and is not “sited ... to protect views to and along the ocean.” (Pub. Res. Code § 30251.) Visually, the proposed CECP is a behemoth, occupying approximately 23 acres and with two exhaust stacks, two heat recovery generators and nine transmission poles stretching from 50 to 100 feet above the level of the existing earth berm (as seen from I-5), and higher from other vantage points.

Looking at the visual simulation from the Key Observation Points (KOP), the proposed CECP is visible as a significant industrial presence in virtually every one. To conclude that the visual impact is insignificant because the existing plant is still more visible entirely misses the point. The importance to the Coastal Commission of protecting the visual resources of the coastline weighs heavily here. A massive industrial facility that blocks and dominates views to and along the coast, even if purportedly “mitigated” by partial screening, is a significant impact and is inconsistent with section 30251 of the Coastal Act.

The Decision attempts to hide the project by requiring painting and visual screening (FD §8.5-53) but actually creates a visual wall that exaggerates the facility’s visual dominance and creates a green barrier with its own visual impact. Attempting to

hide something that blocks scenic coastal views with something else that blocks scenic coastal views is neither conformance with a policy nor mitigation of an impact to it; it is itself a visual impact. The CECP is not consistent with the visual resource policies of the Coastal Act.

**Marine Resources** - The proposed CECP is also inconsistent with the marine resource protection provisions of the Coastal Act. As the Conformance Report makes clear, the withdrawals of water from Agua Hedionda lagoon would equal 4.32 million gallons per day, resulting in an estimated annual entrainment of 22.7 million fish larvae from the lagoon. The Decision discounts this impact on the basis that the water needed by the CECP will be drawn from EPS Units 4 and 5 discharge flows, which are now legally withdrawn from the lagoon. But state OTC Policy that will require the closure of Encina Units 1 through 5 in 2017.

The Coastal Commission would analyze these marine impacts as if the EPS were not operating, as in fact will be the case for most of the projected operating life of the CECP. Withdrawals of this magnitude are a significant Coastal Act impact, particularly given that Agua Hedionda Lagoon is one of the 19 coastal wetlands given special protection in section 30233(c). (Pub. Res. Code §§ 30230, 30231, 30233.)

As noted above, none of the existing EPS units can reasonably be expected to operate after 2017, leaving 40-50 years of CECP operation without the benefit of the project's anticipated water supply. The only available supply of water in that magnitude is from the EPS intake, which would have the precise entrainment and impingement impacts that staff asserts would be avoided. These effects make the proposal inconsistent with the above-cited marine

resource protection policies of the Coastal Act. Since the CECP is not a coastal-dependent industrial facility and cannot qualify for approval under the standards of section 30260, the proposed project cannot be found to be consistent with the Coastal Act.

**Coastal Access and Recreation** - The proposed CECP is also inconsistent with the Coastal Act provisions regarding coastal access and recreation. (Pub. Res. Code §§ 30210-30224.) As the Conformance Report makes clear, the project does virtually nothing to meet the requirements of either the Coastal Act or of the Energy Commission's power plant siting regulations (FD §8.1-37 and 20 Cal. Code Reg. §1752(e)). Condition of Certification Land-1 requires the applicant to dedicate an easement for the Coastal Rail trail in a mutually agreeable location within the boundaries of the EPS, or if no agreement can be reached, to fund Coastal Rail Trail improvement elsewhere in Carlsbad. City staff properly raised this question to the Commission whether this provided any additional mitigation to what the City already required in the Poseidon project.

The Proposed conditions to the proposed plant neither provide maximum public access to and along the coast, as required by the Coastal Act, nor provide for the acquisition, establishment and maintenance of an area along the coast, as is required by Energy Commission guidelines section 1752(e). Moving the CECP project to a site outside of the coastal zone would avoid these impacts altogether.

**Land Use** - The proposed CECP's inconsistencies with the recreational policies of the Coastal Act are related to the project's inconsistencies with the "priority use" provisions of the Act, and can be discussed together. As noted earlier, the SWRCB's OTC Policy will eliminate the use of coastal power plants that utilize once-

through cooling as expeditiously as possible, and at the EPS by 2017. From a Coastal Commission perspective, all of the land presently covered by the EPS should be presumed to be empty and available for use to allow for an analysis of possible future development at that time. An analysis of Coastal Act priorities for possible future development would preclude any industrial use except one that is coastal-dependent and would tend to favor a visitor-serving recreational use. (Pub. Res. Code §§ 30221, 30222 and 30413 (d) (1), (2).) Because the industrial land use cannot be justified under the Coastal Act based upon the continued existence of the site as a coastal-dependent industrial facility, the CECP cannot be approved under section 30260, and must be wholly consistent with the Coastal Act. The CECP's proposed land use is not a Coastal Act priority, is not coastal-dependent, and is contrary to the recreational and priority use policies of the Coastal Act.

The Decision is devoid of any evidence contradicting the City's report that the CECP does not conform with the overarching goals and policies of the Coastal Act. For these reasons, the City's report that the CECP does not conform with the guiding principles of the Coastal Act is the best evidence before the Commission on this issue and the finding to the contrary is not supported by any evidence.

**H. The CECP Is Not a Coastal Dependent Facility and Thus Cannot be Approved at a Location in the Coastal Zone.**

Under the Coastal Act, development proposed to be located within the coastal zone must be found to be "in conformity with (the policies of) Chapter 3 (commencing with Section 30200)" of the Coastal Act (Public Resources Code §30604(a).) Under narrowly defined circumstances, development that is not in conformity with Chapter 3 may still be approved.

One such circumstance is provided in Public Resources Code section 30260, which provides that:

“...where new or expanded coastal-dependent industrial facilities cannot feasibly be accommodated consistent with other policies of this division, they may nonetheless be permitted in accordance with this section and Sections 30261 and 30262 if (1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; and (3) adverse environmental effects are mitigated to the maximum extent feasible.” Public Resources Code § 30260 (emphasis added).

That is the Coastal Act provision upon which the Decision relies. There is no question in the record that the proposed CECP is inconsistent with the policies of Chapter 3 of the Coastal Act. The FD does not assert otherwise. Instead, it purports to find that the project is a coastal-dependent industrial facility, and thus to find that the CECP is permitted by Section 30260. However, only an unnecessary reverse osmosis addition to the proposed plant was considered coastal-dependent. “Thus the proposed project is both an expansion of a coastal-dependent use and a coastal-dependent use in its own right” (FD §8.1-7). Public Resources Code section 30101 provides that a “coastal-dependent development or use” means “any development or use which requires a site on, or adjacent to, the sea to be able to function at all.”

As the Decision makes clear, the CECP will not require a site on or adjacent to the sea to be able to function at all (“[the proposed project] would use evaporative air cooling, eliminating the daily need for large quantities of seawater...” FD §2.3). While the original units of the Encina Power Station relied on a once-through cooling technology that required a location adjacent to the sea, the CECP is designed to use either ocean water

or reclaimed water.<sup>3</sup> The technology can, in fact, use water from virtually any source. Because it does not require a site on or adjacent to the sea to be able to function at all, the CECP does not meet the definition of coastal-dependent development.

Perhaps aware that the proposed project is not consistent with Section 30101, the Decision attempts a convoluted analysis of Section 30260. The Decision begins by quoting Section 30255, which provides that coastal-dependent developments have priority over other developments on or near the shore line. It then finds that the CECP is “located at the existing EPS, which is a ‘coastal dependent use’ ... inasmuch as it uses once-through cooling technology.” It then notes that Section 30260 encourages coastal-dependent uses to expand “within existing sites,” and on this basis asserts that the CECP is consistent with the Coastal Act policy that prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the Coastal Zone.

The flaw in this argument is that the Decision assumes the conclusion of coastal dependency without ever comparing the proposed plant’s technology with the specific definition of “coastal-dependent development” in Section 30101. The basic fact that the Decision ignores is that the CECP is perfectly capable of functioning at a site that is not on or adjacent to the sea. Since that is the case, the CECP is not a coastal-dependent development. While Section 30260 encourages coastal-dependent uses to locate or expand within existing sites, the CECP is not a coastal-dependent use, and thus does not meet the terms of that section.

The fact that the existing EPS is coastal-dependent because of its dated technology is irrelevant to the issue of whether the proposed CECP is

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<sup>3</sup> As City staff testified at the PMPD Hearing (Hearing Transcript, page 58, line 10 to page 64, line 13) as well as in its written testimony (City Testimony, page Garuba-14, Question 25 and 26) and at the hearing on February 3, 2010 (Hearing Transcript, page 467, line 13 to page 468, line 23), City reclaimed water has been and is available to the applicant for use in this power plant if they are willing to fund the necessary system upgrades.

coastal-dependent. Nor is it accurate or relevant in the context of the present proposal to suggest, as is stated in the Decision, that the Coastal Act “prefers on-site expansion of existing power plants to development of new power plants in undeveloped areas of the coastal zone” (FD §8.1-8). The choice is not where in the coastal zone to locate the CECP; the choice is whether to locate it in the coastal zone at all. The only power plants that are permitted to locate in the coastal zone despite being inconsistent with the policies of Chapter 3 of the Coastal Act are those that meet the definition of coastal-dependent development. This brings the analysis right back to PRC section 30101, the definition of “coastal-dependent development” that the Decision misapplies. Because the proposed CECP does not meet the Legislative definition of coastal dependency, it cannot be found to be consistent with the Coastal Act, and thus cannot be approved as consistent with LORS.

As a secondary justification, the Decision asserts that “because the City of Carlsbad is unable to supply reclaimed water...to the project for cooling and other industrial purposes, it is necessary that CECP use its proposed ocean-water purification system” (FD §8.1-7). This attempt to buttress the already announced conclusion is specious. The CECP may need a source of water for cooling and other industrial purposes but there is no necessity that the operation of the CECP depends upon the particular water to be used being drawn from the ocean. The amount of water that the plant needs can come from non-ocean sources. The need for water is an issue that can and should be analyzed as part of an overall evaluation of possible alternative sites outside of the coastal zone. Location of this facility within the coastal zone cannot be approved consistent with the Coastal Act since the facility does not need to be located “on or adjacent to the sea to be able to function at all” (Pub. Res. Code § 30101.)

After its only reference to Section 30101, the Decision makes a number of assertions regarding the convenience of locating the CECP at the EPS site. These include: that co-location “facilitates its proposed ocean-water purification system for supplying water to its air-cooled cooling system”; that it “allows the CECP to utilize the (EPS) plant’s infrastructure...thereby avoiding offsite construction of new linear facilities; and that it “would avoid the need to develop in areas of Carlsbad unaccustomed or unsuited to this type of industrial development” (FD §8.1-7). But none of these arguments of convenience are even slightly relevant to the question of whether the proposed CECP is coastal-dependent.

The Decision reads Section 30260 of the Coastal Act as if it said: “non-coastal dependent industrial facilities that are related in purpose to existing coastal-dependent industrial facilities shall be encouraged to locate or expand within existing sites....” This interpretation would allow non-coastal-dependent industrial facilities to continue to be placed on or adjacent to the sea indefinitely, regardless of technological improvements that make such location decisions inconsistent with the clear and specific Legislative policy to keep such facilities that are not otherwise consistent with the Coastal Act out of the coastal zone. The Energy Commission interpretation makes no policy sense and it makes no technical legal sense either. There is not a shred of evidence in the legislative history to support the interpretation of the Decision. Nor, most important, is it consistent with the plain language of Sections 30101 and 30260 of the Coastal Act. For all of these reasons the proposed CECP cannot be found to be consistent with the Coastal Act, is not a coastal-dependent industrial facility, and thus cannot be approved.

**I. The Proposed Power Plant Is Not Consistent with Chapter 3 of the Coastal Act and Is Not Coastally Dependent.**

The best evidence in this case indicates that the proposed power plant is not consistent with Chapter 3 policies of the California Coastal Act. It has been so concluded by the California Coastal Commission in a previous application at this location and by the Carlsbad city staff acting in their capacity as coastal planners under the local coastal program. Those inconsistencies can only be overridden for coastally dependent industrial facilities, however, this is not one of them. The proposed power plant is gas-fired and does not need ocean water for cooling or any other purpose. It does not need ocean water to function at all. It does not need to be adjacent to the sea to function at all. It simply does not meet the definition of a coastal dependent facility (Public Resources Code §30101). The applicant attempted to make the proposed power plant a coastal-dependent facility when it amended its application to include a small desalination facility for product water. The Commission accepted applicant's argument that this made the proposed power plant coastal-dependent and concluded that it was a "coastal-dependent use in its own right" (but "adopt overrides as a precaution" FD §9-10.) However, that water could be supplied by the City of Carlsbad if certain improvements to its reclamation plant were made. Reclaimed water from improvements to the plant would come from treated sewage water and not from the Pacific Ocean. This change did not make the proposed power plant coastal-dependent within the meaning of Public Resources Code section 30101.

**J. The Energy Commission Failed to Fulfill Its Duties to Meet and Confer with the Local Governing Agency.**

Although there was noncompliance with local laws, the Commission failed to meet and consult with the City Council.

If there is noncompliance with local laws then the Commission has a duty to consult and meet with the local governing agency in an attempt to correct or eliminate those noncompliances (Public Resources Code

§25523(d)(1)). In this case, there were numerous overrides of local laws including:

- Local General Plan
- Local Zoning Code
- Local Specific Plan
- Local Redevelopment Plan
- Local Coastal Program
- Local Fire Code
- Local Tax Code
- Local Development Impact Fees
- Local Construction License Tax

As set forth in the Declaration of Mayor Hall (attached as Exhibit F),<sup>4</sup> the Energy Commission has not contacted the City to attempt to resolve any of these inconsistencies after the Commission determined them.

**K. The Commission Did Not Effectively Override the Fire Marshall.**

The Energy Commission attempted to override the Fire Marshall but did not override the State Fire Code (FD §9-9). The requirements of the Fire Marshall are established under the 2010 Edition of the State Fire Code (Title 24 of the California Code of Regulations, § 503.2.2). That was the LORS that should have been overridden; not the opinion of the Fire Marshall. More importantly, however, the Commission acknowledged the city amendments to the 2010 Edition of the State Fire Code and found it consistent with its decision but did not explain how or why it was consistent or how emergency response would be handled (FD §9-10). Such

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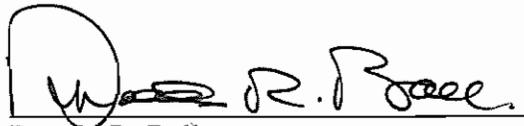
<sup>4</sup> The attached declarations are not for the purpose of introducing new evidence; the evidence is contained in the extensive administrative record before the Energy Commission. However, that record has not been prepared and unless this honorable Court orders the Commission to prepare it, it will not be prepared. The declarations are intended only to assist the Court in determining whether or not the record should be prepared and reviewed.

an important consideration of the public's future health and safety should not be left undecided.

## V. CONCLUSION

The Energy Commission has grown indifferent to some of the laws governing it perhaps because it has not had any case in its existence reviewed by this honorable Court. This is a case that merits review and instructions to the Energy Commission as to the limits of its powers and duties. If this case is not reviewed by this honorable Court, and the decision is allowed to stand, it will permit this Commission to continue to proceed in excess of its jurisdiction and in a manner not required by law so that every other similarly situated California coastal community will be involuntary hosts to future power plants.

Dated: June 25, 2012

A handwritten signature in black ink, appearing to read "Ronald R. Ball", written over a horizontal line.

Ronald R. Ball  
City Attorney for the City of Carlsbad and  
General Counsel for Carlsbad  
Redevelopment Agency

Allan J. Thompson  
Special Counsel for City of Carlsbad and  
Carlsbad Redevelopment Agency

**CERTIFICATE OF WORD COUNT**

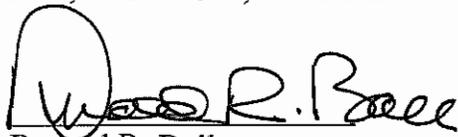
(Cal. Rules of Court, Rules 8.504(d)(1))

I, Ronald R. Ball, declare as follows:

I certify that the attached MEMORANDUM OF POINTS AND AUTHORITIES uses a 13 point Times New Roman font and contains 8,114 words, based on the word count of the computer program used to prepare this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 25<sup>th</sup> day of June, 2012, at Carlsbad, California.



Ronald R. Ball

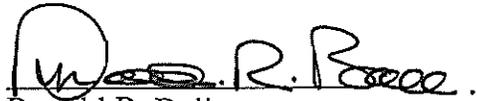
City Attorney for the City of  
Carlsbad and General Counsel for  
Carlsbad Redevelopment Agency

## VERIFICATION

I, Ronald R. Ball, am the City Attorney for the City of Carlsbad and the General Counsel for the former Carlsbad Redevelopment Agency, petitioners in this action and am authorized to execute this Verification on their behalf.

I have read the foregoing PETITION FOR WRIT OF MANDATE AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES and know the contents thereof. The same is true of my own knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing, including any attachments, is true and correct, and that this Verification was executed at Carlsbad, California on June 25<sup>th</sup>, 2012.



Ronald R. Ball  
City Attorney for the City of  
Carlsbad and General Counsel for  
Carlsbad Redevelopment Agency

## PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is City of Carlsbad, 1200 Carlsbad Village Drive, Carlsbad, CA 92008. On June 27, 2012, I served the following document(s):

### **PETITION FOR WRIT OF MANDATE; SUPPORTING MEMORANDUM AND EXHIBITS (VOLS. I, II and III)**

I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Carlsbad, California, addressed as follows:

California Supreme Court (Original  
and 13 Copies to):

Clerk of the Court  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102-4797

Attorney for California Energy  
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1516 Ninth Street MS-14  
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mlevy@energy.state.ca.us

California Energy Commission:

Docket Unit  
Attn: Docket No. 07-AFC-6  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
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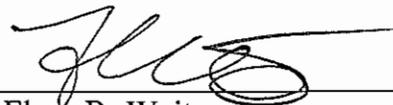
Real Party-In-Interest:

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San Diego, CA 92108-4402

Office of the Attorney General  
1300 "I" Street  
Sacramento, CA 95814-2919

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 27, 2012, at Carlsbad, California.



---

Flora R. Waite



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION  
FOR THE **CARLSBAD ENERGY  
CENTER PROJECT**

Docket No. 07-AFC-6  
**PROOF OF SERVICE**  
(Revised 3/27/2012)

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**DECLARATION OF SERVICE**

I, Flora Waite, declare that on Sept. 11, 2012, I served and filed a copy of the attached Petition for Writ of Mandate (Case No. S203634). This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: [[www.energy.ca.gov/sitingcases/carlsbad/ index.html](http://www.energy.ca.gov/sitingcases/carlsbad/index.html)].

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

**(Check all that Apply)**

**For service to all other parties:**

- Served electronically to all e-mail addresses on the Proof of Service list;
- Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked "hard copy required."

**AND**

**For filing with the Docket Unit at the Energy Commission:**

- by sending an original paper copy and one electronic copy, mailed with the U.S. Postal Service with first class postage thereon fully prepaid and e-mailed respectively, to the address below (preferred method); **OR**
- by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

**CALIFORNIA ENERGY COMMISSION – DOCKET UNIT**  
Attn: Docket No. 07-AFC-6  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

**OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:**

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission  
Michael J. Levy, Chief Counsel  
1516 Ninth Street MS-14  
Sacramento, CA 95814  
[mlevy@energy.state.ca.us](mailto:mlevy@energy.state.ca.us)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

  
\_\_\_\_\_  
Flora Waite