STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	Docket No. 07-AFC-6
	)	
Application for Certification for the	)	
Carlsbad Energy Center Project	)	
	)	
_____	)	

ENERGY COMMISSION STAFF
REPLY BRIEF

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Energy Commission Staff (Staff) believes that most of the issues raised by other parties in their opening briefs have been adequately addressed in Staff's Opening Brief, and will avoid repeating previous discussion addressing such issues. Only issues requiring further elaboration are addressed below. Attached to this document are the Staff's responses to Applicant's suggested revisions of proposed Conditions of Certification.

I. COMMISSION STAFF IS NEITHER REQUIRED NOR ALLOWED TO MERELY DEFER TO A LOCAL AGENCY DETERMINATION THAT A PROJECT IS INCONSISTENT WITH LORS.

The City of Carlsbad (City) argues that the provision in the Commission's regulations that an interested agency shall be given "due deference" regarding LORS matters "within that agency's jurisdiction" requires both Staff and the Energy Commission itself to slavishly accept local agency conclusions regarding LORS conformity. The City is wrong.

The "due deference" regulatory provision the City relies on is California Code of Regulations, Title 20, Section 1744(e). However, Section 1744(e) is preceded by Section 1744(d), and the two provisions must be read together. Section 1744(d) provides:

> If the applicant or any responsible agency asserts that an applicable mandate cannot be complied with, the commission staff shall *independently verify the non-compliance, and advise the commission of its findings in the hearings."* (Emphasis added.)

Staff's duty to independently evaluate and verify, and advise the Energy Commission of its conclusions, is entirely inconsistent with the servile role that the City contends is required. While the Staff spent considerable time discussing with the City its land use and fire safety requirements, Staff's independent FSA analysis (required by Section 1744(d)) disagreed with the City's conclusions.

In this proceeding the City is a party, and its position on the CECP project is highly partisan. The City's objective is to obstruct licensing of the project, and it has interpreted its LORS consistent with that objective. Staff would ill-serve the Energy Commission to merely parrot the City's objections.

Staff's independent judgment regarding alleged LORS inconsistencies is required by the regulations cited above. The cited provisions have no application to the Energy Commission itself, which must make its decision based on the record before it.

II. THE CITY'S BRIEF IS CONFUSED REGARDING CUMULATIVE IMPACTS AND THE POTENTIAL CLOSURE OF ENCINA UNITS 4 AND 5.

A. Although the Potential Closure of Units 4 and 5 Is Uncertain and Not a Cumulative Impact, Such Closure Would Be Beneficial to the Extent Attributed to CECP.

Older coastal power plants use once-through cooling (OTC) for their boilers. OTC has significant adverse environmental consequences for marine life, and state and federal policy is to gradually eliminate this source of environmental harm. Modern power plants such as the Carlsbad Energy Center Project (CECP) are air-cooled and do not use water for cooling; in fact, their use of water is relatively small. Thus, it is a positive result, from an environmental preservation viewpoint, to replace older OTC facilities with

modern generating infrastructure that reduces or eliminates OTC. CECP will itself have to use a small amount of ocean water currently used by Encina units 1-5 because the City claims it has no recycled water to sell to CECP. However, by replacing Encina units 1-3, CECP will eliminate the amount of OTC used to serve those older facilities. In addition, the small amount of desalinated water drawn by CECP is a "parasitic" use of the OTC cooling that will continue to be used by units 4 and 5, and does not add to the amount of water drawn from the ocean. (Exh. 200, pp. 4.2-16, 18.)

In several places scattered through its brief, the City contends that the FSA provided an insufficient cumulative impact analysis, primarily because it failed to consider the future closure of units 4 and 5 to be a "cumulative impact" of the project (or, alternatively, a "forseeable consequence of the initial project"). (See City Opening Brief, pp. 22, 25, 28-29, 31, 47-49.) This claim is ironic, as the closure of some or all of the Encina Power Station (EPS) has been a constant centerpiece of the discussion of impacts since the AFC was filed. But the fact is that the shutdown of units 4 and 5 is neither a cumulative impact nor a forseeable consequence of the project.

As discussed in Staff's Opening Brief, the project as proposed is the construction of CECP and the closure of EPS units 1-3. Closure of EPS units 4 and 5 was never considered part of the project, because the California Independent System Operator (CAISO) has made clear that those units are necessary to maintain local reliability until sufficient generation and transmission is built to provide reliable service to the San Diego reliability area, or "load pocket." (*E.g*., 2/3/10 RT 276-277.) The CAISO has continued to indicate that CECP alone, while sufficient to close units 1-3, is not by itself sufficient to close units 4 and 5, and that those units must remain on line until additional resources are in place. (*Ibid*.) This reliability concern is strongly reflected in the State Water Board's recently adopted "Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling" ("Water Board Policy") for the State's aging once-through cooling (OTC) facilities.

Thus, it is clear that the closure of units 4 and 5, whenever or however that should occur, is not part of the CECP "project," nor is it a "cumulative impact" of the CECP project. Moreover, to the extent that CECP contributes to the eventual closure of units 4 and 5, or that such closure is "forseeable," CECP's contribution to such closure is a *positive* environmental consequence, not subject to the requirements of CEQA disclosure. Nevertheless, Staff has never avoided the discussion of the potential for closure of units 4 and 5. When units 4 and 5 are eventually closed, it will be a result of additional generation projects such as CECP that replace those units as the anchor for local system reliability. This is an important benefit of the project, and one that Staff has identified as a basis for "override" findings—if such findings were necessary.

The City also argues or implies that the use of ocean water by CECP is *additive* to the OTC marine impact, particularly if one assumes that units 4 and 5 will close in accordance with the schedule in the Water Board Policy. This ignores that the Water Board Policy requiring closure of units 4 and 5 is predicated on replacement infrastructure being available to ensure electric reliability. Paragraph "1.I." of the Introduction to the Water Board Policy links the fulfillment of the "implementation schedule" to the "need to maintain reliability of the electric system as determined by the energy agencies." (Water Board Policy, p. 2.) The Water Board Policy elsewhere provides an elaborate consulting mechanism (with the energy agencies, including the CAISO) that links the closure of individual dates of OTC facilities with achieving electric reliability through new and replacement infrastructure. (See, e.g., Water Board Policy paragraphs 1.I., J., and K. [Introduction, p. 2], 2.B. [Final Compliance Dates, pp. 6-8], 3 [Implementation Provisions, pp. 9-12].) In other words, units 4 and 5 are only likely to be closed when and if projects such as CECP are licensed and built to enable that closure to occur without compromising electric reliability. The closure will not be automatic.

Thus, the timing of closure for units 4 and 5 is uncertain, if only because replacement energy infrastructure is hard to site. The Energy Commission recently rejected the AFC for another San Diego generating project (Chula Vista), and the City wants CECP to be

rejected as well. So it is uncertain when units 4 and 5 will close, and the Water Board Policy does not exclude the possibility that units 4 and 5 could run indefinitely using either a closed cycle cooling system (reducing OTC by 93 percent) or using mechanical screening (or "operational controls") to greatly reduce "impingement mortality." (Water Board Policy, pp. 4-5.)[1]

CECP's use of a relatively small amount of desalinated ocean water (0.25 mgd/day, compared with the baseline unit 1-3 use of 23.6 mgd/day) is thus not additive; the project's effect is to greatly reduce the use of OTC pumping. This positive effect would, of course, be even greater if units 4 and 5 shut down because of CECP (with or without additional generation or transmission infrastructure).

Significantly, CECP's relatively minor use of ocean water will be "parasitic" to pumping for units 4 and 5 for so long a time as those units operate. (Exh. 200, pp. 4.2-16, 18.) Even assuming closure of units 4 and 5, the EPS intake/outfall is also intended to be used by the Carlsbad Seawater Desalination Project (CSDP), a project which is already licensed and is nearly adjacent to CECP. (Exh. 35 [PEAR analysis], pp. 5-11 to 12, 5-49 to 50.) The CSDP will draw at least 100 times the amount of water used by CECP, and this water will come through the same intake and outfall infrastructure currently used by Encina units 1-5, which is also the same infrastructure from which CECP will draw its "parasitic" water. (*Ibid*.) Assuming this forseeable use, CECP's OTC water use would continue to be "parasitic" rather than additive even if units 4 and 5 shut down entirely in the future. It is thus reasonable to assume that CECP's relatively small "parasitic" use of ocean water will involve no increased use of ocean water in the future *even if one assumes the eventual closure of units 4 and 5.*

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[1] The City's Opening Brief repeatedly cites Staff testimony as stating that "retirement of the entire Encina facility is the only feasible response to the OTC policy." (See, e.g., City Opening Brf., pp. 24, 31.) However, when one looks at the cited Staff testimony of David Vidaver in the February 3 transcript, the City's attribution is clearly erroneous. (2/3/10 RT, p. 405.) Moreover, the Water Board Policy speaks for itself, and does not require closure of OTC facilities, but rather the reduction of OTC impacts. (See Water Board Policy, Paragraph 2, pp. 4-5.) The City's statement at page 31 of its Opening Brief that the FSA states that retirement of units 4 and 5 are a "likely event" in light of the Water Board Policy (citing FSA pages 4.1-118 and 119) is also erroneous.

Although closure of units 4 and 5 is not a cumulative impact, and would not be an "adverse" impact, the Staff has—for the sake of caution and completeness—recommended a condition of certification that requires Applicant to inform multiple state and federal wildlife agencies of such closure when it occurs so the agencies can determine compliance of CECP with Section 316(b) of the federal Clean Water Act. (Exh. 200, p. 4.2-26 [BIO-9].) At that point the Water Board will presumably determine whether a new NPDES permit is required for CECP.

Anticipating this requirement, CECP has already applied for a new NPDES permit for its small desalination facility, and that application is currently being analyzed by the Regional Water Board. (2/4/10 RT pp. 196-203.) Pursuant to this process the Regional Board will determine whether the existing intake/outfall system is "best technology available," or whether changes would be required upon the closure of units 4 and 5. (*Ibid.*) CECP will be required to satisfy any additional requirements the Regional Board may impose that are connected with any future shutdown of units 4 and 5. This is not, as the City submits, the "deferral of required analysis" regarding the project, as the project does not include or require the shutdown of units 4 and 5, and such shutdown is beneficial in any case. Nor is the case cited by the City, *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, pertinent to this proceeding. *Sundstrom* involved the issuance of a negative declaration for a project with direct impacts that were neither analyzed nor addressed by the lead agency; all of this was deferred to a later date, and the court's decision properly held that such deferral was improper. (*Id.,* at pp. 305-310.)[2] This contrasts sharply with the situation here, where shutdown of units 4 and 5 is not part of the project, is not a cumulative impact, is not certain in a given timeframe, and is not environmentally adverse in any case.

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[2] *Sundstrom* emphasized language in CEQA Guideline Section 15062(b)(1), which requires an EIR "*when any aspect of the project, either individually or cumulatively,* may cause a significant effect on the environment." (*Sundstrom v. County of Mendocino, supra,* at p. 309 [emphasis in original].) As discussed above, the closure of units 4 and 5 is not part of the project, nor is it a cumulative effect of the project. Moreover, significant impacts, whether direct or cumulative, are by definition "adverse change" to the environment (Cal. Code Regs., tit. 14, § 15384), while the closure of units 4 and 5 will constitute a significant environmental benefit that is an express goal of the Water Board Policy.

Finally, in an attempt to support its contentions set forth above, the City repeatedly claims that the FSA "considered the shutdown of Units 4 and 5 as a cumulative project with respect to GHG emissions and visual resources, [but] failed to do so with respect to desalinated water supply," citing pages 4.1-118 and 4.12-24 of that document. (City Opening Brf., pp. 29, 47.) The claim does not survive close scrutiny. Regarding the FSA analysis for GHG, the cited reference is to the inclusion of Encina units 1-5 in the table (Greenhouse Gas Table 11) listing all OTC units with their 2008 capacity and energy output. Such is hardly analysis concluding that the closure of units 4 and 5 are cumulative effects that must be considered with the project to determine some presumed aggregated adverse impact. The citation to the FSA's Visual Resources analysis is hardly more compelling: under the cumulative impacts discussion is the mere acknowledgement that "at some point in the future" units 4 and 5 will be decommissioned, and that the City "envisions complete removal of the existing EPS generating plant . . . and rezoning the entire site to non-industrial coastal dependent uses," constituting the basis for the City's opposition to the project. (Exh. 200, pp. 4.12-24 and 25.) Nowhere in either cited section is there any suggestion that the closure of units 4 and 5 is a cumulative impact, nor that closure, when considered together with the project, creates an impact that is somehow "significantly adverse."

B. Other Contentions by the City Regarding Water or Cumulative Impact Analysis Are Incorrect.

The City claims that the FSA's water analysis is insufficient because the Conditions of Certification include a provision that would allow CEPC to use recycled water should it become available. (City Opening Brf., p. 22.) Since the City has said that there is insufficient recycled water for the project, it contends that this provision does not comply with CEQA because the analysis and recommended mitigation do not identify the project's source of water, citing *Vineyard Area Citizens for Responsible Growth*, a recent California Supreme Court decision. The City is wrong, and the case is inapplicable.

The City is correct that CEQA (and the cited court case) does require agencies to identify a reliable water resource in CEQA analysis, but as the City should know, Staff has done so. The FSA discusses Applicant's Project Enhancements and Refinements (PEAR) filing, a July 2008 amendment to its AFC, in which it proposes to use desalinated ocean water with a reverse osmosis system. (Exh. 200, p. 4.9-6, 15-16.) The FSA also discusses Applicant's original proposal to use recycled water purchased from the City, and the City's professed inability to supply such water for CECP. (*Id.*, at p. 4.9-14.)

Thus, the project (and the FSA analysis) does not rely on an undefined water source; it relies on a small desalination facility described in the PEAR amendment document and discussed in the FSA. Staff also included a Condition of Certification providing that CECP may use recycled water, if such should subsequently become available, as an *alternative* to the small desalination facility. (*Id*., at p. 4.9-30 [Soil & Water 8].) It added this alternative path to compliance because state policy generally prefers recycled water use to use of marine water (*see* Water Board Policy, Para. 1.M., p. 4), and because the City's statements about the availability of recycled water have been inconsistent with regard to CECP. For instance, even while it maintains that there is inadequate recycled water to supply CECP, the City has assured Staff that the City would be able to provide adequate recycled water for a project similar to CECP if it were sited inland at a different site. (See Exh. 200, pp. 6-5 to 6-14 [FSA Project Alternatives analysis states that reclaimed water is available for alternative site locations, based on City's representations].) These City-articulated positions are impossible to reconcile. Staff thus proposes including a recycled water compliance alternative, given the possibility that the City may in the future conclude that it does have adequate water, as well as the alternative possibility that Applicant may force the City to provide recycled water pursuant to state law. Either way, including this alternative compliance path avoids the need for a project amendment should CECP gain access to the City's recycled water in the future.

The City also errs when it claims that the FSA did not, in the Public Health cumulative analysis, include consideration of toxic emission impacts from the increased traffic that may result from the I-5 widening project. (City Opening Brf., p. 47.) What the FSA actually says, if one checks the City's cited reference, is that Staff included, in its analysis of toxic air contaminants (TACs) in its health risk assessment, startup (worst case) emissions from CECP, combined with startup (worst case) emissions from units 4 and 5, combined with "background risk to public health from all other sources," which would include emissions from I-5 traffic. (Exh. 200, p. 4.7-28.) The discussion goes on to explain that the I-5 widening project is to occur several years in the future, and that such unknowable variables as increased fuel economy, declining emissions from vehicles, use of electric vehicles, and variable traffic levels would require, in essence, speculation regarding what background TAC levels would be in the future. (*Ibid.*) CEQA does not require idle speculation that I-5 TAC impacts will worsen in the future. (Cal. Code Regs., tit. 14, § 15145; *Laurel Heights Improvement Assn v. Regents of the Univ. of Calif. ("Laurel Heights II")* (1993) 6 Cal.4th 1112, 1137-1138 [CEQA Guideline Section 15145 provides that, where toxic air impacts are not susceptible to quantification, the particular impact is too speculative to require evaluation in the EIR] .)

Likewise, the City incorrectly claims that Staff's Public Health analysis fails to specifically identify projects that contribute to cumulative impacts. (City Opening Brf., p. 48.) In fact, the FSA states that the air district's list of projects "contained no facilities that meet the criteria for having potential cumulative public health impacts other than the existing Encina Power Station (EPS)." (Exh. 200, p. 4.7-28.) The FSA analysis goes on to explain "no other sources were identified" that would contribute to a cumulative effect, and that a cumulative effect for TACs only arises where the "plume sources" are very close. (*Ibid*.) In other words, the FSA did not identify specific additional sources for cumulative TAC impacts because there were no additional sources.

Similarly, the City incorrectly claims that Staff's cumulative Soil and Water analysis fails to identify additional cumulative projects that would contribute to cumulative impacts to the Agua Hedionda Lagoon. (City Opening Brf., p. 47.) The FSA merely states in the

cumulative impact section that stormwater impacts to the Lagoon are sufficiently mitigated by proposed conditions of certification Soil and Water 1 through 3, and would not be cumulatively significant. (Exh. 200, p. 4.9-19.) These conditions in essence require a Stormwater Pollution Prevention Plan (SWPPP) that meets the requirements of the Regional Water Control Board and the City's municipal code, which is the typical mitigation to control and avoid significant cumulative impacts of this nature. As for "other cumulative projects," no evidence in the record indicates the contribution of other such projects not included in the baseline that would require additional analysis. In other words, the purported defect is imaginary.

A similar imaginary claim is raised with regard to the Noise analysis, where the City also complains that additional projects are not identified. (City Opening Brf., p. 48.) But the City is wrong once more. The FSA includes reference to the list of potential noise contributing projects (from the AFC), and discusses the "one most likely to pose a potential for cumulative noise impacts"—the recently licensed desalination plant. (Exh. 200, p. 4.6-13.) The analysis concludes that the desalination plant is not likely to be noisy enough to contribute to a cumulative impact (at a predicted 35 dBA CNEL), and that this is similarly true for the other projects on the cumulative list referenced. (*Ibid.*)

The City's Opening Brief similarly mischaracterizes the Traffic and Transportation analysis, incorrectly alleging that the analysis failed to identify future developments. (City Opening Brf., p. 48.) In fact, the FSA analysis lists no fewer than six major projects in the area that were identified as potential contributors to cumulative traffic impacts: 1) the Flower Fields Project; 2) the I-5 Widening Project; 3) Carlsbad Seawater Desalination Plant Project; 4) the City of Carlsbad Capital Improvement Program; 5) the Los Angeles-San Diego (LOSSAN) Double-Tracking Project, and 5) the Coastal Rail Trail. (Exh. 200, pp. 4.10-16 and 17.)

The overall gist of the City's Opening Brief is to claim a seriously defective cumulative impact analysis in the FSA. But these claims do not withstand careful scrutiny.

III. CECP IS CONSISTENT WITH LAND USE LORS.

Most of the issues raised by the opening briefs are sufficiently addressed in Staff's Opening Brief. However, the following paragraphs elaborate further on some of the issues raised.

D. The Redevelopment Agency's Permit Authority is Pre-empted, Regardless of whether it is a State or Local Agency.

The City contends that the local redevelopment agency has separate discretionary authority over the project because it is actually a state agency pursuant to state law, since it "effectuates state legislative policy." (City Opening Brf., p. 61.) Accurate or not (and many "local agencies" effectuate "state legislative policy"), the asserted distinction does not matter. Public Resources Code Section 25500 preempts "any permit, certificate, or similar document required by any state, local, or regional agency, or federal agency to the extent permitted by federal law . . . and [the Energy Commission permit] shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency . . . ." (Pub. Resources Code, § 25500.) Like other local or state agencies, the redevelopment agencies' discretionary authority is preempted under state law by Energy Commission jurisdiction. Moreover, the City's claims that the FSA failed to address compliance with the South Carlsbad Coastal Redevelopment Project (SCCRP) is incorrect, as such was discussed in both the FSA and at the evidentiary hearings. Staff testified that CECP conforms to the SCCRP. (See, e.g., Exh. 200, pp. 4.5-28, 29.) The City's claim that "delegation" of Redevelopment Agency duties to the Energy Commission would be required for an Energy Commission preemptive license is incorrect; the Legislature has already made that delegation in Section 25500.

The City's claim that Applicant's failure to file a permit application for a Redevelopment Agency permit prevented the Redevelopment Agency from determining project conformance with the SCCRP (City Opening Brf., p. 65) is without merit. The Redevelopment Agency was a party to the proceeding, represented by the same

counsel that represents the City, and thus presumably had access to the AFC, the PEAR analysis, the PSA, the FSA, and other similar documents. Likewise, it had the ability to submit data requests. There is simply no necessity for a separate permit application to be the only way for the Redevelopment Agency to get necessary information regarding the project, and Applicant's decision not to file such a separate (and unnecessary) permit application is understandable given the Energy Commission's preemptive permit authority.

E. CECP Conforms to the Currently Existing—and Therefore Applicable—Specific Plan.

Staff's Opening Brief described the proposed process by which the City is claiming that there is an exogenous requirement that CECP must be subject to a new Specific Plan, and that this new plan is to be proposed by Applicant and subject to review and rejection by the City. (Staff Opening Brf., pp. 19-23.) This exogenous requirement is described by City witnesses as a "City Council policy." (2/1/10 RT 205.) The Staff Opening Brief explained that this purported LORS is inconsistent with the Government Code's requirements regarding specific plans, that it is inconsistent with any notion of a legislatively adopted "standard of general application" requirement, and that such an *ad hoc* process is effectively using the "specific plan" as a permit. (*Ibid*.)

Applicant's Opening Brief makes a similar point, but from a different and perhaps simpler perspective. That point is that the Government Code provisions for specific plans expressly require that a project be in compliance with "the *adopted* specific plan." (Govt. Code, §65455 [emphasis added].) The point is that the applicable LORS is the current adopted Specific Plan 144(h)—not some future version of Specific Plan 144 not yet adopted—that is the subject of the LORS compliance requirement . Both Staff (2/1/10 RT 174-178) and Applicant (2/1/10 RT 160-164) testified that CECP does conform to the current, "adopted" specific plan.

In other words, CECP complies with all applicable land use LORS that have been *adopted*, including Specific Plan 144(h). It need not comply with some as yet not adopted future version of that specific plan that the City says it would require, as a matter of "policy," were it permitting the project—effectively imposing the specific plan as a permit because the terms of a future specific plan are unknowable.

F. The Precise Development Plan is a Permit.

The City's Opening Brief contends (at p. 78) that the Precise Development Plan is a legislative act and therefore a LORS requirement. That document contains specific project requirements, and is by its very nature a project permit. (2/1/10 RT 175; 2/2/10 RT 41-43, 45-56; Exh. 200, p. 4.5-26.) It is also identified as a permit in the Applicant's 2007 application to the City for an amended Precise Development Permit and Specific Plan 144. (Exh. 7, e.g., p. 15 of specific plan application.) Notably, the City lists Precise Development Plans on its city website for land use permits on the list "Development Permits, P-2." (http:www.carlsbadca.gov/services/departments/planning/Documents/P2.pdf).

The City also contends that CECP fails to meet applicable development standards, but describes only general requirements that are unspecific, or worse, inapplicable. To the extent such development standards have been identified, they have been identified by Applicant in its applications to the City mentioned above. (See generally Exh. 7.) The difficulty of getting the City to specify such standards was discussed at the evidentiary hearing. (2/1/10 RT 177; 2/2/10 RT 44-45.)

IV. THE FSA'S DISCUSSION OF ALTERNATIVES WAS THOROUGH AND SUFFICIENT, AND ADDRESSED THOSE ALTERNATIVE SITE LOCATIONS IDENTIFIED BY THE CITY.

The City contends that the FSA Alternatives analysis was too narrow because (1) it focused on the location alternatives proposed by the City, rather than looking more broadly, and (2) it focused too sharply on project objectives not achieved by such alternatives rather than those that would be achieved. (City Opening Brf., pp. 36-37.)

The first complaint is a novel one: most CEQA litigation over the lead agency choice of location alternatives involves the charge that the agency failed to consider one or more alternative locations proposed by the commenter, and that the indifferent agency analyzed a "straw man" alternative location instead. Here the City's objection turns this upside down: apparently, instead of conscientiously analyzing the City's half-dozen proposed alternative site locations, Staff was supposed to be looking somewhere else entirely. Of course, had Staff done so, the City would be charging that the allegedly ideal locations that it had identified locally were ignored.

Staff was responsive to the City's alternative site proposals, and focused its alternative location analysis on those several sites. Which leads to the City's second complaint: that the Staff's analysis notes that those sites have greater environmental impacts than the existing site; that, in some cases, the alternative sites do not satisfy applicable LORS; that the alternative sites are less successful in satisfying project objectives. CECP has no unmitigated project impacts and is consistent with LORS, which does not appear to be the case for the "greenfield" sites proposed by the City.

Moreover, the City is incorrect that the alternative sites were eliminated for failure to satisfy project objectives. Rather than being eliminated, they were screened for "attainment of basic project objectives," and on that basis were analyzed in greater detail. (See Exh. 200, p. 6.4 [setting forth screening criteria], p. 6.5 to 6.6 [describing location alternatives that meet/do not meet screening criteria].) Three such sites were described as meeting project objectives and analyzed, but these sites were found to

have relatively higher environmental impacts than the CECP project site. (*Id.*, at pp. 6-8 to 6-14.) These impacts resulted partly, but not exclusively, from impacts related to the need for new linear infrastructure, including transmission lines. (*Ibid.*)

The basic requirement set forth by the CEQA Guidelines and the courts is that the "rule of reason" governs the alternative analysis. This rule does not require that every conceivable alternative be analyzed in the EIR; rather, "what is required is that the EIR give reasonable consideration to alternatives in light of the nature of the project." (*City of Rancho Palos Verdes v. City Council* (1976) 58 Cal.App.3d 869, 892.) The alternatives discussion in the FSA meets the requirement that alternatives and reasons for their rejection must "allow informed decision making," and must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public." (*Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.("Laurel Heights I")* (1988) 47 Cal.3d 376, 404-405.) No consideration of infeasibility for alternatives is required for an EIR if all significant impacts are reduced to less-than-significant levels by adopted mitigation measures. (*Laurel Hills Homeowners Assn. v. City Council* (83 Cal.App. 3d 515, 521.)

The City argues that Staff's conclusion on higher environmental impacts, or failure to meet project objectives, is driven by the fact that CECP relies heavily on existing infrastructure, including infrastructure necessary for water, natural gas, and transmission, while the newly proposed sites lack similar infrastructure. This observation is at least partly true, but such is an entirely rational basis for comparison. The linear requirements for power plant projects are often as difficult to site as the power plant itself, as transmission lines and pipelines often have significant environmental impacts and provoke public opposition.

The City suggests that the FSA Alternatives analysis fails to meet the requirement of Public Resources Code Section 25516.1, which requires that a proposed site *in a Notice of Intent proceeding* for a facility located in the coastal zone have "greater relative merit than alternative sites." (City Opening Brf., p. 37.) This charge fails for two

seemingly obvious reasons. First, the statutory provision is inapplicable, as it only applies to a Notice of Intent, whereas this is an AFC proceeding. Second, the FSA *did* evaluate the relative merit of the alternative site proposals, and found them to be relatively inferior. (Exh. 200, pp. 6-4 to 14 [summarized in Alternatives Table 2, at 6-12 to 6-14].)

The City contends that the "no project alternative" would satisfy all project objectives, based on the fact that another application for a project has been filed in the San Diego load pocket, and that said project has received a power purchase agreement. (City Opening Brf., pp. 116, 118.) Such a statement makes impossible assumptions: first, that the newly proposed project will in fact get licensed; second, that its generation would totally fulfill all reliability requirements. The first assumption is purely speculative, while the second is unsupported by any substantial evidence. Should it eventually turn out that such assumptions are correct, it seems unlikely that CECP would ever be built because it would not receive a power purchase agreement. But the Energy Commission cannot indulge in such speculative assumptions when considering whether CECP should be licensed, nor can the Staff do so for the purpose of its FSA analysis.

V. STAFF PROPOSES THAT A NEW CONDITION BE ADDED TO THE WORKER AND FIRE SAFETY CONDITIONS TO PROTECT AGAINST ACCIDENTS SIMILAR TO THE KLEEN ENERGY POWER PLANT EXPLOSION.

The City and others have requested official notice of the February 7, 2010, explosion at the Kleen Energy facility in Middletown, Connecticut. The accident resulted from "gas blows" used to remove debris from newly constructed gas lines. Such "blows" can lead to the introduction of natural gas to an ignition source. Staff does not oppose such official notice. The operations that led to that explosion are not allowed for power plants licensed by the Energy Commission, although such is currently handled through the compliance process. Staff believes that for future gas-fired projects there should be express conditions disallowing such "gas blows", a practice which Staff believes to be unsafe and entirely unnecessary. Staff notes that the American Society for Mechanical

Engineers (ASME) is currently considering a similar prohibition in its ASME Code for Pressure Piping Systems.

If the Committee agrees with Staff that a condition addressing this issue is desirable, Staff will draft a proposed condition for this purpose and distribute it to the parties for comment.

VI. CONCLUSION

The project's environmental impacts would be, with mitigation proposed in the FSA, mitigated to levels that are less than significant. Staff believes that the project satisfies all applicable LORS. The project has significant local, regional and statewide benefits. Among these benefits are reduction in the marine impacts of OTC, and reduction in GHG emissions by replacing an old, inefficient, and inflexible facility with a new, efficient, facility that allows flexible operation.
The project should be licensed.

Date: October 11, 2010

Attachment

_____
RICHARD C. RATLIFF
Staff Counsel IV

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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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 7/14/2010)

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DECLARATION OF SERVICE

I, Janet Preis, declare that on October 11, 2010, I served and filed copies of the attached **Energy Commission Staff Reply Brief**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/carlsbad/index.html]. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

For service to all other parties:

___x___sent electronically to all email addresses on the Proof of Service list;

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AND

For filing with the Energy Commission:

__x_ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

_____depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
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I declare under penalty of perjury 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.

___/s/ Janet Preis_____