

STATE OF CALIFORNIA**Energy Resources Conservation
And Development Commission****In the Matter of:****Application for Certification
for the Carlsbad Energy Center Project****Docket No. 07-AFC-6****ENERGY COMMISSION STAFF RESPONSE TO COMMITTEE ORDER****I. INTRODUCTION**

The Carlsbad Committee's November 9, 2011, order describes evidentiary hearing topics and sets a schedule. Energy Commission staff (Staff) has already filed its testimony on the previously listed topics, and will not provide further testimony. This brief addresses two additional issues listed in the Committee's order: (1) the relevance of the federal Prevention of Significant Deterioration (PSD) permit, and any findings the Commission should make with regard to it; and (2) the adoption by the City of Carlsbad (City) of recent numerous changes to its land use ordinances and general plan, and how such changes affect the consistency determination that the Commission must make with regard to the project.

II. THE FEDERAL PSD PERMIT IS IRRELEVANT

The Carlsbad Energy Center Project (CECP) must now satisfy new federal requirements to obtain a PSD permit for greenhouse gas (GHG) emissions, a provision that came into effect in July of this year. (40 C.F.R. § 52.21(b)(49)(v)(a) [2011].) The PSD permit is a "preconstruction permit," in that a project may not be constructed until the permit is obtained and becomes final. (40 C.F.R. § 52.21(b)(43) [2011].) The San Diego Air Pollution Control District (APCD), the agency that would typically permit projects absent the Commission's preemptive permit, has not adopted requirements for

federal PSD requirements that are incorporated into the State Implementation Plan. Because it has not done so, federal PSD requirements are implemented by a purely federal permit, issued by the U. S. Environmental Protection Agency (EPA).

Federal law allows the EPA Regional Administrator to delegate his responsibility for the issuance of PSD permits to state agencies. (40 C.F.R. §52.21(u) ([2011].) When state agencies assume this delegate role, they “stand in the shoes” of EPA, and may only apply the same federal requirements that EPA itself would require. (*In re West Suburban Recycling and Energy Center, L.P.* (6 E.A.D. 692, 707 (EAB 1996).)¹ Even if issued by a delegated state agency, the permit is issued under the authority of the Regional Administrator himself (see 40 C.F.R. § 124.41 [2011]), and the permit remains legally an EPA-issued permit. (*Greater Detroit Res. Recovery Auth. v. U.S.E.P.A.* (6th Cir. 1990) 916 F.2d 317, 320-321 [“Permits issued under such a delegation are considered to be EPA issued permits.”] 323-324 [“By statute the PSD remains an EPA-issued permit” despite delegation]; *West Suburban, supra*, at p. 695, fn. 4.)

Currently, there is no PSD delegation agreement between EPA Region 9 and the APCD, although apparently there have been discussions between the two agencies over a potential delegation. But it makes no difference whether the permit is issued by the APCD pursuant to delegation or by Region 9 itself—in either case it is a purely federal EPA permit, satisfying purely federal requirements. (*West Suburban, supra*, at pp. 703-707.) *State law issues are excluded from any consideration in the permit or in the appeal of such permits.* (See, e.g., *West Suburban, supra*, (6 E.A.D. 692, 698 (EAB 1996); *In re Sutter Power Plant* (8 E.A.D. 680, 690 (EAB 1999); *In re Tondu Energy Co.* (9 E.A.D. 710, 717 (EAB 2001).) If not contested, the permit is final 30 days after issuance. (40 C.F.R. § 124.19(f)(1) [2011].) If it is contested, it becomes a “final agency action” if and when Environmental Appeal Board (EAB) rejects a petition for review. (*Ibid.*) This final federal decision is then subject to judicial review only in the

¹ The cited references are to the published decisions of the EPA’s Environmental Appeals Board (EAB), which rules on challenges to PSD permits issued by delegated state agencies or by the EPA regional administrators.

federal courts of appeal. (42 U.S.C. § 7607(b)(1); *Greater Detroit Res. Recovery Auth. v. U.S.E.P.A.*, *supra*, 916 F.2d 317, 321.)

Thus, the PSD permit is a federal permit issued by EPA, that cannot address state law issues, and is appealable solely at EAB and the federal Ninth Circuit Court of Appeals. It follows that the Commission has no purview over this federal permit, nor does it enforce the provisions it implements.²

In virtually all cases where PSD permits have been required for Commission projects,³ the permit has been issued subsequent to Commission licensing. The Commission has never made a “conformity finding” for PSD requirements, because they are by nature still subject to federal agency application and appeal, and because the project cannot be constructed if the requirements are not satisfied. Moreover, no Commission-licensed project that required a PSD permit has failed to receive one where it pursued its application. The air districts have often explained that this is in part because PSD requirements add little to the state’s New Source Review requirements for large stationary facilities, so the additional federal requirements are largely redundant. Thus, a “conformity finding” for federal PSD permits would not be meaningful, and at best speculative; but if past experience is an indication, Commission-licensed projects predictably will satisfy PSD permit conditions, as they have always done so.

If the Committee believes that it is required to engage in such predictions, there is good reason to predict that CECP will comply with applicable PSD provisions. EPA has not yet issued guidance for what a project must do to comply with PSD for GHG purposes, but Region 9 issued a PSD permit in October 2011 for the recently Commission-

² The Commission permit includes the requirements for New Source Review (NSR) required by the federal Clean Air Act. In California, NSR requirements are part of the State Implementation Plan, and are thus issued as state law requirements, unlike the PSD requirements discussed here.

³ At least until the new PSD provisions for GHG became effective, PSD permits only applied to “major sources” that had the “potential to emit” above certain statutorily defined “criteria pollutant” thresholds, making such permits inapplicable to peaker generation facilities or smaller baseload power plants. This means that the majority of Commission-licensed power plant projects did not require PSD permits.

licensed Palmdale project that includes a BACT determination for GHG emissions. BACT requirements imposed on Palmdale basically require “thermally efficient CTs [combustion turbines]” with a corresponding attainable emissions limit for GHG emissions. There is every reason to believe that CECP would meet requirements of this nature. Similarly, the PSD permit issued for the Russell City project by the Bay Area Air Quality Management District, a PSD-delegated agency, required modern, efficient combustion turbines and a corresponding GHG emissions limit as BACT for the “voluntary” PSD requirements that the project owner agreed to comply with.

Staff believes that the PSD permit issue is no more than a distraction. Findings of conformity regarding the future federal permit action (involving no EPA-published regulations or guidance) would be meaningless. If evidence to support a finding of “future compliance” with such a permit is needed, the Committee need look no further than the Palmdale PSD permit for evidence that CECP is likely to conform.

III. THE CITY HAS AMENDED ITS GENERAL PLAN AND ZONING ORDINANCES SUCH THAT THE PROJECT APPARENTLY WILL NOT CONFORM WITH SOME OF THEM.

In the evidentiary hearings held in February 2010, Staff testified that CECP conforms with all applicable LORS that apply to the project. This position was strongly opposed by the City, which argued that many of its land use provisions were not consistent with the project. Prior to reaching its position on conformity, Staff had spent much time considering the City’s unusually complex and layered morass of requirements, and determined that it could not agree with the City. Although the Staff defers to local governments to a significant degree in reaching its LORS-consistency conclusions, Staff felt compelled to provide its independent view because of the City’s adamant opposition to the CECP project.

One of the reasons for Staff’s conclusion is that the City uses some ordinances it describes as LORS in a manner that can only fairly be described as a permit, rather than as general standards of application. Adjudicatory permits are subsumed in the Commission’s permit as a matter of law. (Pub. Resources Code, § 25500.) A full

discussion of these complex issues of conformity is set forth in Staff's Opening Brief and Reply Brief.

In the past two months the City has adopted new revisions to several of its layered land use provisions, including the City's zoning ordinance, its general plan, its specific plan, its precise development permit, its local coastal plan, and perhaps other provisions that may, or may not, constitute applicable LORS for the project. The City first submitted to the service list the full measure of these complex and lengthy revisions and adopting resolutions regarding these changes on October 15, 2011, attached to an email from the City Attorney.

The City Attorney's letter, as well as some of its accompanying resolutions, express a desire by the City to "clarify" that its applicable LORS are inconsistent with CECP. Unfortunately, the 72 pages of various provision changes and sometimes obtuse language do little to help the already rather muddled issue of whether CECP conforms to applicable LORS.

Despite all the muddled complexity, Staff has reached the following tentative conclusions based on the City's submittals:

1. The City *intends* that its ordinances be inconsistent with CECP, and its recent amendments to its various local provisions would appear to have been made to make the project inconsistent. Traditionally, the Commission is sensitive to local agency expressions and interpretations of its local provisions.
2. Although the most recent package of changes is a muddle (changes to ordinances that are only effective after Coastal Commission approval; changes to ordinances that pertain to permits; changes to ordinances that were being applied to CECP in a manner that can only be called "permit-like"; unclear language in the ordinance provisions themselves), it appears that the project would be inconsistent with at least some of the recently adopted provisions.

Staff tentatively⁴ believes that the following can be said of the recently adopted ordinances:

CS-158 (zoning ordinance change, including ZCA 11-05): the ordinance is not effective until approved by the California Coastal Commission, so it does not, at least at present, create inconsistency.

CS-159 (change to zoning ordinance for Precise Development Plan): The Precise Development Plan is used by the City as a permit. Thus, this change does not result in inconsistency.

CS-160 (changes to Specific Plan 144): Staff found that the project met the requirements of Specific Plan 144 as it existed previously, and that the City's proposed exogenous requirement of a completely new approved Specific Plan constituted what is in essence a permit, and was thus preempted by the Commission's permit. However, the City has now amended Specific Plan 144, changing its existing standards of general application to disallow the CECP project. Among such changes are removing provisions that would allow a CECP height commensurate with existing power plant buildings near the site, and instead requiring a 35 foot limit to the height of all non-transmission structures; removing the existing power plant use as a permitted use; and effectively disallowing generating facilities in the coastal zone that are greater than 50MW in generating capacity. Staff believes that the City's recent changes to Specific Plan 144 make the CECP inconsistent with its provisions. Moreover, the existing Specific Plan 144 can reasonably be considered a standard of general application, and thus an applicable LORS.

Resolution Number 2011-230 (General Plan Amendment 11-06 and Local Coastal Plan Amendment 11-06): Staff believes that the general plan amendment, though

⁴ Staff currently has no work authorization in place for the land use expert witness that it has relied on throughout the proceeding, which has affected its ability to thoroughly digest in such a short time the multitude of changes that it received from the City this week.

confusingly worded, restricts “public utilities” use to areas outside the coastal zone. This revision would make CECP inconsistent with provisions in the City’s general plan. The Local Coastal Plan amendment would appear to have a similar effect, but is not effective until approved by the California Coastal Commission. Thus, CECP is not inconsistent with this provision unless and until it is approved by that agency.

Staff is interested in hearing what the applicant and City have to say on these consistency issues. If Staff is correct regarding the inconsistency of the LORS specified above with the CECP project, the Commission will be required to make the findings specified in Public Resources Code Section 25525 if it is to license the project.

Date: November 18, 2011

Respectfully submitted,

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

**Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 9/19/2011)**

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I, Mineka Foggie, declare that on, November 18, 2011, I served and filed copies of the attached CEC Staff Response to Committee Order, dated November 18, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/carlsbad/index.html].

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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.

Originally Signed by
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