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**STATE OF CALIFORNIA**  
State Energy Resources  
Conservation and Development Commission

In the Matter of: )  
) DOCKET NO: 07-AFC-6  
)  
) CENTER FOR BIOLOGICAL  
CARLSBAD ENERGY CENTER PROJECT ) DIVERSITY'S RESPONSE COMMENTS  
) ON SEPTEMBER 13, 2011 COMMITTEE  
) CONFERENCE DISCUSSION AND ON  
) SCHEDULE  
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The Center for Biological Diversity (the "Center") files the following comments on Committee Conference discussion on September 13, 2011 and the future schedule of the proceeding pursuant to the request by the Committee for comments on these topics.

**I. NRG's Request to Rescind Conditions Land-2 and Land-3 Should Be Denied.**

As the Committee recognized in its order, NRG raised new issues regarding the schedule and certain permit conditions. Ignoring its own request for delay and the legal reasoning of its motion filed on August 31, 2011, NRG made a new request to eliminate conditions LAND-2 and LAND-3 from the Presiding Member's Proposed Decision ("PMPD"). The hearing officer summarized NRG's position in his subsequent email to the parties: "the Applicant said

Conditions LAND-2 and LAND-3 relating to the demolition and removal of the existing Encina power plant would make it difficult, due to financial considerations, to build the Carlsbad Energy Center Project.” NRG is requesting that the Committee allow NRG to backtrack on permit conditions to which NRG has already agreed. At the Conference, NRG provided no legal justification for its request that the Committee remove these certain conditions from the PMPD. Therefore, this request should be rejected.

**II. The Committee Should Delay the Proceeding Until Analysis of NRG’s PSD Permit Can Be Included in the PMPD.**

In addition to denying NRG’s request, the Committee should delay the proceeding until the U.S. Environmental Protection Agency (“EPA”) issues a statement of basis for NRG’s PSD permit. Although NRG has backed away from its request to delay the proceeding, the legal reasoning in its brief is still correct and that reasoning justifies a delay. In its August 31st motion, NRG states:

As CBD correctly points out, it would be premature to hold further evidentiary hearings in September 2011 because the Presiding Member cannot issue a [Revised] Presiding Member's Proposed Decision (‘RPMPD’) until a full analysis of compliance with air quality laws is made. (20 Cal. Code Regs. § 1752.3(a).) Specifically, the RPMPD ‘shall include findings and conclusions on conformity with all applicable air quality laws.’ (*Id.*)

(*See also* Center’s Response to Staff’s Status Report #11 and City of Carlsbad’s Related Letter [“Center’s Response”], pp 2-3.) NRG’s change of heart does not change the law or its valid point that the RPMPD will not be able contain an analysis of compliance with the PSD permitting until EPA has taken action.

The proceeding should be delayed until EPA issues a statement of basis, a draft permit, on NRG’s PSD permit application. In its motion, NRG explains that it sought “to postpone the CECP licensing process until such time that the Committee will be able to

incorporate accurate findings and conclusions regarding CECP's conformity with applicable federal PSD regulations based on evidence in the record for this proceeding.” The Center agrees with NRG’s written motion that a RPMPD should not be issued until there is sufficient evidence in the record. (*See* Center’s Response, pp. 2-3.) However, NRG’s request to delay the schedule only until an applicability determination is made would not provide sufficient information for the record, because the determination would only state whether PSD applied. If PSD applied, a BACT (“best available control technology”) determination would need to be made. This BACT determination would be included in a statement of basis. Thus, the delay should be based on the issuance of the statement of basis, because this document would provide sufficient information to analyze conformity with the air laws. The length of the delay is unknown because NRG has not filed a PSD permit application or requested an applicability determination.

Staff’s argument at the Committee Conference that the proceeding should continue without the PMPD analyzing conformity with PSD, federal air law, is inconsistent with section 1752.3(a), a Commission regulation describing the contents of a PMPD. That section requires the PMPD to “include findings and conclusions on conformity with *all* applicable air quality laws. . . .” (Cal. Code Regs., tit. 20, § 1752.3(a) [emphasis added].) Staff’s argument is contrary to the plain language of section 1752.3(a) which applies to “all applicable air quality laws.” In addition, it also conflicts with the Warren-Alquist Act, which requires the Commission’s written decisions to include “[f]indings regarding the conformity . . . with other applicable . . . federal standards, ordinances, or laws.” (Pub. Resources Codes §25523(d)(1).) Staff also argued that Commission practice is to issue permits without waiting for a project’s PSD

permit. Even if it is Commission practice to provide no analysis of the PSD permit in the PMPD, this practice does not justify violating the Commission's regulation or the Warren-Alquist Act in this case or any other case. The federal clean air act is an air quality law and as such should be included in the PMPD's analysis.

Furthermore, NRG should not be rewarded for its shift in position. If the Committee were to remove Conditions LAND-2 and LAND-3 and change the schedule per NRG's new request, this would only further encourage NRG to continue playing the bait and switch game, *i.e.* taking one position at one time and then taking an inconsistent position at a later time when that suited its objective.

### **III. The Center Requests that the Schedule Accommodate the Unavailability of the Center's Counsel.**

Counsel for the Center has a trip scheduled to China from October 28<sup>th</sup> – November 20<sup>th</sup>, 2011. Counsel will be participating in a fifteen-day trip sponsored by the National Committee on US – China Relations in which eight environmental lawyers from the United States will travel to China to meet environmental law professionals in three cities in China. (*See* Exhibit A, invitation letter.) The trip is funded by a United States State Department grant. (*Id.*) Although the official trip is from November 4<sup>th</sup> – November 18<sup>th</sup>, Counsel has also planned a related vacation and is flying to China a week earlier than the official trip commences. Plane tickets have already been purchased and counsel has obtained a visa to visit China. (Exhibit B is a copy of the flight information.) Counsel will be unavailable for the whole length of the trip and will not be able to work on issues related to the proceeding. The Center currently plans on cross-examining witnesses at the evidentiary hearings and participating in any related pre-hearing conference. Given the length and distance of the trip, Counsel would also be unable to attend an evidentiary hearing and any related pre-hearing conference the day before the trip or day after

the trip.<sup>1</sup> As the Committee is aware, Counsel is the only attorney representing the Center in this matter, therefore, the Center respectfully requests that the Committee not schedule hearings or pre-hearing conferences from October 27th – November 21st. The Center also requests that the schedule include sufficient time, at least an additional week exclusive of October 27th – November 21st, for the Center’s counsel to review testimony and prepare for the evidentiary hearings.<sup>2</sup>

DATED: September 23, 2011



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<sup>1</sup> Counsel has been considering taking October 27<sup>th</sup> as a vacation day, but that has not been scheduled yet.

<sup>2</sup> The Center notes that the recent delay in the proceeding was triggered after NRG requested a delay of the evidentiary hearings. Already, the result of NRG’s motion is a delay of at least a month. Therefore, accommodating the Center should not have an appreciable effect on the proceeding.