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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 POST DECEMBER 12, 2011
) EVIDENTIARY HEARING BRIEF
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INTRODUCTION

After a four-year process, the record in this proceeding is still insufficient. The Siting Committee cannot comply with the minimum standards for an adequate Presiding Member's Proposed Decision ("PMPD"). The record contains no evidence showing Applicant's compliance with the Federal Prevention of Significant Deterioration ("PSD") regulations. Since the U.S. Environmental Protection Agency ("EPA") rejected Applicant's non-applicability determination, Applicant has not filed any documentation with EPA regarding its PSD permitting. Energy Commission Staff ("Staff"), presented with nothing to analyze, can only make unsupported guesses about a possible future permit. Oral testimony further reveals that the Commission's analysis of greenhouse gas emissions is inadequate. The alternatives analysis is also incomplete. In fact, Staff admitted that its analysis was limited because of the time constraints put on it by the Committee. The California Environmental Quality Act ("CEQA") does not condone an incomplete analysis due to artificial time constraints placed on agency staff.

LEGAL STANDARD

The Commission's regulations establish the required elements for a PMPD. "The presiding member's proposed decision shall be based exclusively upon the hearing record, including the evidentiary record, of the proceedings on the application. The presiding member's proposed decision shall contain reasons supporting the decision and reference to the bases for each of the findings and conclusions in the decision." (20 Cal. Code Regs. § 1751(a) & (b).)

The Warren-Alquist Act requires "[f]indings regarding the conformity of the proposed site and related facilities with . . . applicable air and water quality standards, and with other applicable local, regional, state, and federal standards, ordinances, or laws." (Public Resources Code § 25523(d)(1).)

ARGUMENT

I. Testimony Confirms that There Is No Basis for the PMPD to Support a Conformity Finding with the Federal PSD Regulations.

Testimony and evidence received during the evidentiary hearing further affirm the Center's position that the Carlsbad Energy Center Project's ("Project") certification should be delayed, because the record does not contain sufficient information for the Siting Committee to make the required findings in the PMPD. (*See* Center for Biological Diversity's December 5 Filing in Response to Committee Order in Preparation for December 12 Evidentiary Hearing and Motion to Strike at 1-4.) Since EPA reversed itself and found that its original applicability determination was issued in error (Exh. 457), Applicant admits to having taken no steps to comply with the federal PSD requirements. (December 12, 2011 Evidentiary Hearing Transcript ("Tr.") at 202:3-8.) Applicant has not done enough analysis to determine whether PSD applies. (Tr. at 203:1-8, 205:13-18). Applicant's witness, Mr. Rubenstein, refuses even to speculate on whether the greenhouse gas emissions from the Project would trigger the need for a PSD permit: "I have a firm practice of not eyeballing PSD applicability determinations because people tend to get in trouble when I do that." (Tr. at 206:1-3.) Yet, in contradictory prior written testimony, he refers to another PSD permit to eyeball or argue by analogy that the Project would receive a PSD permit addressing greenhouse gas issues. (Exh. 199G at 14-15.) Mr. Rubenstein's written testimony also asserts that the Project complies with BACT for criteria pollutants, based on the analysis in the PMPD. (Exh. 199G at 14-15.) Mr. Rubenstein makes these statements even though he recognizes that EPA makes a BACT determination on a "case by case basis"

predicated on the facts presented to the agency, none of which are presented to the Commission or to EPA.¹ (Exh. 199P at 7.)

Mr. Moore, representing the San Diego Air Pollution Control District (“SDAPCD”), agrees that EPA will make the BACT determination based on its own analysis. (Tr. at 198:18, 200:5-8.) At best, Mr. Moore can only “speculate” to the result. (Tr. at 198:20.) He does explain that “EPA would likely use slightly different procedures than [SDAPCD] use to do the air quality impact analysis,” (Tr. at 200:5-7) including a different time period for meteorological data. (Tr. at 200:16:19.)

Mr. Walters, Staff’s witness, avers that, based on his experience, EPA will not issue a PSD permit for the Project that is more stringent than SDAPCD’s conditions (Trans. at 208:22 – 209:2), but this is purely speculation and is not based on evidence in the record. Mr. Walters readily admits that he has not reviewed a permit application or data from an applicability determination, because Applicant has started neither. (Tr. at 207:15-23.) In addition, Mr. Walters has not even checked if EPA has ever issued a PSD permit with greenhouse gas limits for a mid-merit natural gas plant similar to the Project. (Trans. at 209:14 – 210:11.) Mr. Walters does confirm that EPA will engage in extensive analysis before it makes its decision (Tr. at 208:13-14) and that the Commission did not impose permit conditions related to greenhouse gases. (Tr. at 209:3-6.) EPA may set greenhouse gas permit conditions as part of its BACT analysis that the Commission did not impose. (Exh. 456 at 4-5.)

Fundamentally, Mr. Walters’s testimony illustrates that Staff’s approach to analyzing compatibility with PSD requirements is categorically different than its analysis of the air

¹ Mr. Rubenstein also criticizes the City’s analysis of the applicability of the PSD regulations to the Project’s greenhouse gas emissions. (Exh. 199P at 6; *cf.* Exh. 456 at 2-3.) However, he refuses to do his own calculations. (Exh. 199P at 6.)

permitting performed by the Air Districts. Staff actually reviews the data and makes substantive comments during the air-permitting process. (Tr. at 206:18 – 207:14.) This latter approach satisfies the analysis required for a PMPD, unlike speculating on a permitting process that Applicant has not even begun. Such speculation does not provide an adequate record for the PMPD nor does it conform to Staff’s standard practice when air analyzing air issues.

Hearing Officer Kramer’s suggestion of creating a post-certification condition requiring the Project’s compliance with its PSD obligations (Tr. at 219:12-21) is inconsistent with the Warren Alquist Act and the Commission’s own regulations. Even if it has been Commission practice to allow similar conditions in the past, that practice does not change the record before the Committee or justify non-compliance with the Commission’s own regulations and statutory requirements. In an earlier order, the Committee stated that it need not wait for a “final decision from federal authorities” on a PSD permit, but did request additional evidence regarding the permit process. (Rulings on Motion to Postpose Evidentiary Hearing and Request to Take Official Notice and Revised Committee Scheduling Order, Nov. 9, 2011, p. 3.) Now, Applicant, in effect, requests that the Committee make a compliance finding for the PSD permitting or pursue an *ultra vires* alternate method of approval even though Applicant has not even started the PSD permit process and not presented the necessary additional information to the Committee regarding the Project’s PSD permitting. The Committee should find that the record does not contain sufficient information to make the finding required by Public Resources Code §25523(d)(1). (See 20 Cal. Code Regs. § 1748(d) [“the applicant shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility”].)

Moreover, under these conditions, the Commission cannot comply with its regulation section 1744(c) which requires “each responsible agency’s assessment of compliance” to “be presented and considered at hearings on the application held pursuant to Section 1748.” Since Applicant has not even started a PSD permit application, EPA, the responsible agency, cannot make an assessment of compliance. Obviously, no assessment of compliance from EPA was presented at the evidentiary hearing.

II. Staff’s Analysis of Greenhouse Gas Emissions Is Predicated on Assumptions that Undermine It.

Staff testimony demonstrates that the premise of the PMPD’s greenhouse gas analysis is flawed. Staff and the PMPD maintain that building a new major source of greenhouse gas emissions will actually result in a net benefit to the environment because the Project will replace less efficient natural gas plants, thereby displacing more emissions than those created by the Project. (*See, e.g.*, Exh. 229, GHG at 9-10; PMPD, GHG at 17-18.) Throughout the process the Center has maintained that this “displacement theory” has insufficient support in the record because Staff is unable to identify which emissions will be displaced and in which amounts. (*See, e.g.* Center’s Comment on the PMPD at 1-2, 4-20.)

The testimony of both Mr. Decker, Applicant’s witness, and Mr. Jaske, Staff’s witness, provides new support for the Center’s position. This testimony reveals an alternative scenario where the Project could be used to replace power from a power plant that produces fewer greenhouse gas emissions than the Project would. (Tr. at 160:14-16; Tr. at 158:17-21, 159:13-17.) For example, Mr. Decker states the Project “could certainly displace or the project could provide real power in lieu of that being provided by San Onofre.” Tr. at 160:14-16. Under this scenario, the net emissions of the Project would increase, because, as Mr. Jaske testified, there are no direct greenhouse gas emissions from San Onofre. (Tr. at 160:20-22.) In contrast, the

PMPD estimates the Project's total potential greenhouse gas emissions as 846,076 metric tons of CO₂ equivalent.² (PMPD, GHG, at 9, Table 1.) Thus, the PMPD's finding that "[n]ew gas-fired generation units, when added to the electric generation and transmission grid, replace or displace the generation of existing units that are less efficient" is not supported by this testimony. (Errata to the PMPD at 5, Finding No. 7.)

This scenario of possible closure of San Onofre raised by Mr. Jaske and Mr. Decker shows the fallacy of the uniform displacement theory advocated by Staff.³ The Project has an estimated life span of thirty years and within this time period the electric system will undergo significant change. Mr. Jaske's and Mr. Decker's scenario supports the Center's contention that the PMPD's greenhouse gas emission analysis does not conform with CEQA, because the PMPD cannot show that the total amount of greenhouse gas emissions from the Project will actually be displaced. (*See, e.g.*, Center's Comment on the Errata, June 29, 2001, at 6-7.) Without evidence that demonstrates displacement, the PMPD should assess whether the Project's greenhouse gas emissions are significant. (14 Cal. Code Regs. § 15064.4(b)(1); *see also* Center's Comment on the PMPD at 1-2, 4-20 for elaboration on the legal theory.)

III. The Record Contains a Flawed Alternatives Analysis, Because It Is Incomplete.

The alternatives analysis is incomplete. CEQA requires consideration of a No Project Alternative, which is "a factually based forecast of the environmental impacts of preserving the status quo." (*Planning & Conservation League v. Dept. of Water Resources* (2000) 83 Cal.App.4th 892, 917.) The analysis should be grounded in reality and not "analyze a set of

² The Center contends that emissions are much larger, because the PMPD fails to include the use of liquid natural gas ("LNG") in the Project description. (Center's Comments on PMPD at 28-35.)

³ It should be noted that both Mr. Jaske and Mr. Decker raised this issue as another new justification for the Project regarding reactive power. (Tr. 158:17-21, 160:16-20.) As such, all the ramifications of this scenario should be considered.

artificial assumptions that would be required to preserve the existing physical environment.” (CEQA Guidelines Section 15126.6(e)(3)(B).) Here, the No Project Alternative analysis is deficient because it relies upon incomplete analysis and unrealistic assumptions.

Mr. Monasmith candidly states that the supplemental alternatives analysis performed by Staff was much less extensive than its original analysis because the Committee did not provide Staff sufficient time to fully analyze the three Power Purchase Agreements projects (“PPAs”) submitted by San Diego Gas and Electric (“SDG&E”) as an alternative. (Tr. at 75:5 – 76:12.) Mr. Monasmith explains that the Final Staff Assessment was the result of a three year process and that Staff had a fraction of the time for its new analysis. (Tr. 75:25 – 76:8.) He continues, “[a]nd then the committee order that came out later in November in terms of the discussion on the PPA just would not have given us enough time to do a comparable analysis to what we did on the FSA or PSA.” (Tr. at 76:9-12.) “However, expediency should play no part in an agency's efforts to comply with CEQA.” (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74.)

Staff’s testimony is so unsettled that its written testimony is inconsistent with testimony made at the hearing, further showing that the analysis is incomplete. The written testimony states that “[i]f CECP is built, it is highly unlikely that additional generation would be required in the local reliability area. Likewise, if the three PPAs are licensed and built, it is unlikely that the additional generation provided by CECP would be needed, and would receive a PPA.” (Exh. 229 at 6.) In contrast, Mr. Jaske reports that ISO data from ISO information presented on December 8, a mere four days before the hearing, show both the PPA projects and the Project may be needed for reliability in the San Diego region in the future. (Tr. at 15:16-17.) Mr. Sparks also discusses this topic partially based on a one page slide, derived from a multi-slide

ISO power point presentation on December 8th. Applicant only introduced the one slide for the first time at the hearing. (See, e.g. Tr. at 49:10-50:24.) ISO had not released the underlying report upon which the Power Point was based. (Tr. 117:3-9.) Subsequent to the evidentiary hearing, the California Public Utilities Commission (“PUC”) submitted extensive comments on the ISO power point questioning the assumptions used as well as conclusions.⁴ This report concludes that ISO analysis “presents an overly conservative assessment of conditions in California.” (PUC Comments at 11.) Mr. Sparks explains that different assumptions were used in the ISO transmission planning studies than in the Long Term Procurement Proceeding, which had a lower load forecast and assumed more energy efficiency and demand response. (Tr. 88:16-25, 89:5-10.) The PUC proceeding analysis is based on Energy Commission forecasts (Tr. 62:24 – 64:2) from which the ISO departed. (PUC Comments at 9.) The effect of ISO’s underlying assumptions apparently have not been considered by Staff. Mr. Jaske explains that the Commission is “just now at the beginning stage of understanding” (Tr. 123:23-24) the best policy choices for OTC replacement. (Tr. 123:2 – 124:2.)

The conflicting evidence presented by Staff is indicative of a problem throughout this proceeding: The justification for the Project has been and is a moving target. The Project was originally intended to ensure the retirement of the South Bay power plant and Units 1 -3 at the Project’s site and facilitate the retirement of Units 4 and 5. (Errata to the PMPD at 2.) However, since the Project was proposed, South Bay has been shut down. (*Id.* at 30.) Furthermore, in its

⁴ California ISO 2011/2012 Transmission Plan, Comments of the Staff of the California Public Utilities Commission on December 8, 2011 Presentation Materials and Discussion, December 22, 2011 (“PUC Comments”). The City requests that this document be given Official Notice. (Intervenors, City of Carlsbad and Carlsbad Redevelopment Agency, Motion for Official Notice of CPUC comments to California ISO dated December 22, 2011, filed January 9, 2012.) The Center supports this request for the reasons articulated in the motion. In addition, in the interest of fairness, the PUC Comments should be admitted. (*See* discussion of document *infra.*)

written testimony, Staff recognizes that “[p]lanning assumptions used in the 2010 LTPP indicate that, should preferred resources be developed in targeted amounts, Encina 1-5 could be retired and local capacity requirements still be met even if the CECP were not constructed.” (Exh. 222 at 2 [Footnotes omitted].) In addition, SDG&E has argued to the PUC that its three PPA projects will facilitate closure of all of the units at Encina. (Tr. at 174:15-19; Exh 454 at RA-17; Exh. 455 [Response f].) The Division of Ratepayer Advocates argues that less capacity, not even the three PPA’s, are needed for this replacement and reliability. (Tr. at 67:7-17; Exh. 451 at 11-13.)

Staff also justifies the project on its ability to integrate renewables. (*See, e.g.*, Exh. 229 at 4.) While the record shows that this may be the type of plant that could help integrate renewables, there is no specific showing that this plant is necessary or sited appropriately to do so. Mr. McIntosh, a previous ISO witness, states: “My testimony is that you can get those attributes at other locations; I’m just talking about those are the type of machines we need.” (2/3/10 Reporters Transcript (“RT”) 203:4-6; see also 2/3/10 RT:225:24-226:12.) According to Mr. Theaker, Applicant’s Witness, the PPAs would also provide flexibility for renewable integration. (Tr. at 78:20-24.) There has been no demonstration that the investment in the Project will optimize renewable integration.

Without a firm foundation in its previous justifications for the Project, ISO now raises for the first time the specter that the Project is needed to fill a future 20 MW reliability gap for an “Encina subarea” that could occur in a rare circumstance. (Tr. 83:13-84:11, 87:7-25.) Yet, Mr. Sparks testified that a one million dollar fix could alleviate this problem, without any need for the Project. (Tr. 91:16-22.) Nonetheless, building on the ISO analysis, Mr. Jaske also now suggests that the Carlsbad desalinization plant may also require local generation; a possible 50 MW need at Encina. (Tr. at 141:21 – 142:4.) Yet, the Staff admittedly did not consider a 50

MW alternative that could fill this need, because a full analysis was not done. (Tr. 142:8-20.) Surely, Staff should have considered this obvious reasonable alternative when it raised the specific capacity need. Mr. Garuba testified that the City would be willing to consider a sub-50 megawatt plant to fill this need. (Tr.2-6.) Will the Committee approve a 540 MW power plant to meet an unlikely need for 20-50 MW without considering the alternative of a smaller, appropriately sized plant?

CONCLUSION

The record remains incomplete. Applicant fails to present the Committee with sufficient evidence to make the required finding of compatibility with air quality laws; Staff's testimony cannot fill in the blanks. The Committee should stay the proceeding until Applicant makes a sufficient PSD showing upon which the PMPD can base a finding.

Additionally, the greenhouse gas and alternatives analyses are insufficient because Staff has presented conflicting evidence that undermines these analyses. Furthermore, the licensing of this project faces an additional hurdle because it requires an override determination. The evidence does not support an override.⁵ The recent evidentiary hearing further revealed that there is little justification to approve the Project as constituted except Applicant's desire to have the Project licensed.

DATED: January 10, 2012



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⁵ Other Intervenors elaborate on the override issue.



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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**APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT**

**Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 11/29/2011)**

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on January 10, 2012, I served and filed copies of the attached CENTER FOR BIOLOGICAL DIVERSITY'S POST DECEMBER 12, 2011 EVIDENTIARY HEARING BRIEF. 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: [\[www.energy.ca.gov/sitingcases/carlsbad/ index.html\]](http://www.energy.ca.gov/sitingcases/carlsbad/index.html).

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

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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.



Jessie Baird