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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	)	DOCKET NO: 07-AFC-6
CARLSBAD ENERGY CENTER PROJECT	)	CENTER FOR BIOLOGICAL DIVERSITY'S COMMENTS ON MARCH 28, 2012 REVISED PMPD

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INTRODUCTION

Throughout this process, the Center for Biological Diversity (the "Center") has made numerous arguments regarding the failure of the Commission to comply with the California Environmental Quality Act, Public Resources Code §§ 21000 *et. seq*. In addition, the Center has commented on procedural flaws in the process. The Revised Presiding Member's Proposed Decision ("PMPD") continues these failures. For example, the Commission can only justify approval by choosing to ignore its own statute and regulations. To compound this procedural error, the Commission Staff ("Staff") now proposes approval of the project even though they are aware that the testimony that Staff sponsored contains errors that California Independent Systems Operator ("CAISO") is correcting in another parallel forum. To make matters worse, this incorrect testimony underlies PMPD's override findings. Despite this, Staff, Applicant and CAISO urge the Committee to proceed. If the Committee continues to reject the Center's arguments and insists on moving forward, Staff should be required to correct the record with new testimony, and the parties should be given an appropriate opportunity to cross-examine witnesses related to this testimony to ensure the integrity of the process. [1]

Furthermore, the process continues to unduly burden Intervenors. If the Committee had issued the PMPD on schedule, the hearing would have been one day before the end of the comment period. Instead, the Committee set the hearing on the PMPD on April 19th and requested written comments by April 17th, ten days before the Comment deadline on a several hundred page document with the stated purpose of facilitating a more informed discussion. (Notice of Availability of the Revised Presiding Member's Proposed Decision and Notice of

[1] When CAISO presented its testimony, Intervenors protested that the information was new and incomplete. Power of Vision requested that the CAISO testimony be stricken, but the Commission overruled the objections and proceeded. (Evidentiary Hearing Transcript, December 12, 2011 ("Tr.") at 116:6 – 118:10.) This current procedural problem is an unfortunate, but foreseeable outcome of the rulings in the December 2012 evidentiary hearing.

Committee Conference and Notice of Full Energy Commission Hearing, March 28, 2012, p. 2.) By doing so, the Committee placed an additional burden on Intervenors. The Center makes initial comments to highlight some points but given the shortened amount of time to prepare, the Center may file additional comments on April 27th rather than filing complete comments at the end of the comment period. The Center notes that the PMPD was issued a week later than originally projected by the Committee, but the Committee did not adjust the date of the PMPD hearing to compensate for the delay in the release of the PMPD, potentially affecting effective public participation. (*cf*. Committee Ruling on Motions to Strike Staff Greenhouse Gas Filing and City of Carlsbad Request to Take Official Notice and Committee Timetable for Release of Revised Presiding Member's Proposed Decision and Comments Hearing, p. 2, March 6, 2012 ["March 6, 2012 Ruling"] to Notice of Availability, p.2.)

The Center's arguments regarding the improper project description (omitting the use of Liquefied Natural Gas ("LNG")) and the Committee's failure to analyze greenhouse gases have been extensively briefed in the Centers Comments on the PMPD, dated June 8, 2011. Since the Committee's rejection of the Center's arguments did not materially change from the original to the revised PMPD, the Center incorporates those comments by reference.[2] In these comments, the Center further highlights the fallacy of the PMPD's greenhouse gas analysis stemming from Staff testimony at the last evidentiary hearing.

I. The Commission Cannot Justify Ignoring Its Own Statute and Regulations.

The Commission will violate the Warren-Alquist Act, Public Resources Code §§ 25000 *et. seq*., and its own regulations if it adopts the Revised Presiding Member's Proposed Decision for the Carlsbad Energy Center Project. The Committee refuses to make the requisite findings

[2] These comments do not address Staff's February 2, 2012 Memorandum on the greenhouse gas issues since the PMPD does not rely on it.

under the Warren-Alquist Act which 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." (Pub. Resources Code § 25523(d)(1); see also 20 Cal. Code Regs. § 1752.3(a).) Additionally, the PMPD also does not "reference [] the bases for each of the findings and conclusions in the decision." (20 Cal. Code Regs. § 1751(b).) The Commission's disregard of its own standards, and reliance on hypothetical conjectures about a federal air permit, directly prejudice the public process.

A. The Commission Has A Duty to Follow Its Own Regulations.

Despite the axiomatic nature of the proposition that an agency must follow its own statute and regulations, the Committee insists that this is not the case. The PMPD is apparently arguing that since the Prevention of Significant Deterioration ("PSD") permitting is federal, the Commission rules do not apply.[3] (PMPD, Air Quality, p. 6.2-26.) This argument is inconsistent with the Warren-Alquist Act and the Commission's regulations, neither of which limits the Commission's analysis to state laws only. For example, 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).)

The PMPD's position is also inconsistent with a prior ruling by the Committee. The Committee stated that "Public Resources Code §25523(d)(1) requires findings regarding compliance with federal standards . . . ." (Rulings on Motion to Postpose Evidentiary Hearing

[3] This argument is unclear because there is a word missing from the PMPD's explanation. "The PSD is a federal permit, issued either by the local air district under delegated authority or by US EPA, in either case not subject to the Energy Commission's [Sic]." (Revised Presiding Member's Proposed Decision, March 2012, Air Quality, p. 6.2-26.)

and Request to Take Official Notice and Revised Committee Scheduling Order, Nov. 9, 2011, p. 3). This ruling required additional evidence "on the project's ability to comply with federal PSD requirements and the likely operating conditions of that permit." (*Id*.) As discussed *infra*, the testimony related to these topics is insufficient for the Committee to make the requisite PMPD findings. Not only has the Applicant not put forth its conclusions about whether PSD will apply, it has not provided sufficient data in its filing to evaluate the potential permit or even filed a PSD application with EPA.

The PMPD's proposed condition requiring the Project's future compliance with its PSD obligations does not cure the Commission's failure to follow its own regulations. An administrative agency is bound by and must follow its own regulations. (*S. Cal. Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1105-06 [agency "failed to proceed in the manner required by law" when it violated its own regulations]; *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 622 ["*EPIC*"] [same].) The PMPD disregards the Commission's regulations and states: "To be clear that construction cannot begin until the PSD permit is either issued or found inapplicable, we add Condition **AQ-SC11** to that effect. Compliance with federal law is assured because the project cannot go forward until the permit is obtained or found unnecessary." (PMPD, Air Quality, p. 6.2-26.) This condition does not change the record before the Committee or justify non-compliance with the Commission's own regulations and statutory requirements.

Ensuring that the Commission bases its decision on the hearing record, and not on speculative compliance assumptions, guarantees public oversight and general accountability throughout the certification process. The applicable requirements go to the heart of the protective measures imposed on the Commission and, as such, must be enforced. (*See Epic*, 170

Cal.App.3d at 623 [failure to follow regulations prejudices public process]; *Edison*, 140 Cal.App.4th at 1106 [violation of procedural requirements are prejudicial]; see also *In Re: Russell City Energy Center*, 2008 WL 3047431, *4 (Jul. 29, 2008) [Citing 20 Cal. Code Regs. § 1744, EPA's Environmental Appeals Board stated that "the [Commission] process serves as a procedural umbrella under which the [Commission] coordinates and consults with multiple agencies in charge of enforcing relevant laws and standards to ensure that a facility, as proposed, will satisfy such mandates."].) Thus, the lack of analysis undermines the environmental protections embedded in the Act and prejudices the public process.

B. The PMPD Is Not in Compliance with Commission Regulations.

The Commission's PSD discussion fails to pass legal muster. The PMPD states:

> There is some disagreement among the parties about whether the CECP will be subject to a PSD permit for its GHG emissions. The PSD is a federal permit, issued either by the local air district under delegated authority or by US EPA, in either case not subject to the Energy Commission's [Sic]. Some of the Intervenors argue that the Energy Commission cannot issue its certification until after the PSD permit is issued or a determination that no permit is required is made. (See, eg, the Center for Biological Diversity's brief dated January 10, 2012.)
>
> Staff's expert witness testified that it was unlikely that US EPA would require anything by way of design or operations features beyond those already required by the SDAPCD and reflected in our conditions of certification below. Rather than hold up approval, adding additional delay before construction can begin following approval of a PSD permit, we believe it best to go forward with our approval at this time.

(PMPD, Air Quality, p. 6.2-26.)

The Commission presents no analysis of the applicant's conformity with federal law. For example, the PMPD states that "[t]here is some disagreement among the parties about whether the CECP will be subject to a PSD permit for its GHG emissions," but fails to analyze the evidence and fails to make a conclusion about PSD applicability. (*Id.*) In addition, the

PMPD's statement is not supported by the record. Since the U.S. Environmental Protection Agency ("EPA") rejected Applicant's non-applicability determination, Applicant admits to having taken no steps to determine compliance with the federal PSD requirements. (Tr. at 202:3-8.) The applicant flatly refuses to state whether PSD applied and refuses to enter the necessary analysis, facts or PSD application into the record. (Tr. at 206:1-3, 203:1-8, 205:13-18, Exh. 199G p. 17.) The PMPD should not say that there is a "disagreement" when the Applicant will not even present sufficient evidence on its PSD permitting. (*See* 20 Cal. Code Regs. § 1748(d) ["Except where otherwise provided by law, 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"].)

Additionally, the PMPD's PSD discussion fails to cite the record as required by section 1751(b). This potentially makes rebuttal of the PSD argument a moving target and lessens the ability of parties to focus their critique. Moreover, the Commission cannot comply with 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 the Applicant has not even started a PSD permit application, EPA, the responsible agency, cannot make an assessment of compliance. (*See* Exh. 457 [letter from EPA informing Applicant that it must comply with PSD].)

Without a cite, the PMPD also makes the untenable statement that "Staff's expert witness testified that it was unlikely that US EPA would require anything by way of design or operations features beyond those already required by the [San Diego Air Pollution Control District]." (PMPD, p. 6.2-26.) The PMPD fails to mention that Staff's statement is purely speculation and is not based on evidence in the record. Mr. Moore, representing the SDAPCD, explains that

EPA will make the Best Available Control Technology ("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 198:20-21.) 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.)

Moreover, Mr. Walter, the staffer who testifies on this topic, 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, he 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. (Tr. at 209:14 – 210:11.) Moreover, he admits 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 from its analysis of the air 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 the Commission's standards for analyzing air issues.[4] Despite this,

[4] The PMPD also incorrectly describes the Center's position stating that "[s]ome of the Intervenors argue that the Energy Commission cannot issue its certification until after the PSD permit is issued or a determination that no permit is required is made." (PMPD, Air Quality, p. 6.2-26.) The Center's position is that the Commission has a duty to analyze the conformity with PSD. The Center maintains that the Commission has not done this analysis, and

the Committee proposes to approve certification. The Center urges the Committee to change course.

II. The Commission Should Not Proceed, Because Making a Decision Based on the Current Inaccurate Record Conflicts with Legal Ethics.

Staff's refusal to withdraw and correct CAISO's testimony is contrary to ethical standards. California Rule of Professional Conduct 5-200 states that "[i]n presenting a matter to a tribunal, a member: . . . (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact . . . and (E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness."[5] Staff recognizes that the CAISO testimony it sponsored is incorrect and based on a calculation error. (*See* Commission Staff Response to City of Carlsbad's Request to Reopen Proceedings, p. 1 and n. 1, April 4, 2012 ["Staff Response April 4, 2012"].) Yet, in the interest of expediency, Staff urges the Commission to proceed with a decision based on this inaccurate testimony. (*Id*, pp. 1-2.) Although Staff recognizes that the facts are incorrect, Staff urges the Committee to maintain its decision based on a closed, incorrect evidentiary record. (*Id*.) In addition, Staff's opposition to the City of Carlsbad's request asserts new facts about the testimony, but these assertions conflict with the duty described in section 5-200(E), because Staff is not testifying as witness. Staff is simply trying to explain away the incorrect record, arguing that the record should remain incorrect. Furthermore, on Monday, April 16, CAISO's attorney submitted a letter that also asserts personal knowledge

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it cannot do the analysis because the record is incomplete. (*See* Center's Brief, p. 1, 4-5, Jan. 10, 2012; see also Center's Filing in Response to Committee Order in Preparation for December 12 Evidentiary Hearing And Motion to Strike, pp. 1-4, December 5, 2011.)

[5] While the California Rules do not define "tribunal," this Committee would meet the definition under the Model Rules of Professional Conduct (Federal Rules). The federal rules define tribunal to include an "administrative agency or other body acting in an adjudicative capacity." (Model Rules of Prof'l Conduct R. 1.0(m).) The definition also includes an ". . . administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter." (Model Rules of Prof'l Conduct R. 1.0(m).)

as fact; he too advocates expediency over a public process that corrects the record. (Letter of Andrew Douglas to Committee Chair Karen Douglas, April 16, 2012.)

Legal ethics require the record to be reopened and made accurate, because the factual dispute is material to the decision. Rule 3.3(a) of the ABA Model Rules of Professional Conduct requires a lawyer to "correct a false statement of material fact or law previously made to the tribunal by the lawyer." The incorrect testimony materially supports the Commission's override which is necessary for approval. (PMPD, Override Findings, p. 9-8.) Dr. Jaske, Staff's witness, also bases his testimony on CAISO's testimony and exhibit. (*See, e.g.*, Tr. at 53:7 – 54:3.) Since the statements are material to the decision, the Commission should use the same procedures and hold a new evidentiary hearing addressing CAISO's testimony. In fact, the Committee requested the evidence on "grid reliability issues raised by the comments from CAISO during the June 30, 2011, Business Meeting." (Commission Order on Motions of Center for Biological Diversity, Robert Simpson, and Carlsbad Energy Center, LLC, (June 30, 2011) p. 1.) Now that the CAISO evidence presented at the evidentiary hearing is known to be incorrect, it needs to be corrected in a new hearing.

CEQA also requires the Committee to correct factual inaccuracies before the Commission makes its decision on the PMPD. At its most fundamental level, CEQA compels a "meticulous process" (*Planning & Conservation League v. Dep't. of Water Res.* (2000) 83 Cal.App.4th 892, 911) for providing "public agencies and the general public with detailed information about the effects of a proposed project on the environment." (*San Franciscans for Reasonable Growth v. City & County. of S.F.* (1984) 151 Cal.App.3d 61, 72.) The EIR, like the functional equivalent document, is "intended . . . ‚to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action,'"

serving as an accountability document that "protects . . . the environment" and "informed self-government." (*Id.*; *Sierra Club v. State Board. Of Forestry* (1994) 7 Cal. 4th 1215, 1229 [citing *Laurel Heights Improvement Association of S.F. v. Regents of the Univ. of Cal.* [*"Laurel Heights"*] (1988) 47 Cal.3d 376, 392].) By virtue of the incorrect testimony and evidence, the PMPD cannot comply with the informational purpose of CEQA.

III. The Revised PMPD Ignores the Center's New Argument on the Inadequacy of the Greenhouse Gas Analysis.

The PMPD's environmental analysis of the Project's greenhouse gas emissions is predicated on assumptions that undermine the analysis. Staff testimony at the recent evidentiary hearing 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.*, PMPD, Exh. 229; PMPD, GHG pp. 6.1-9-11, 6.1-17-18.) To achieve this result, Staff proposes and the PMPD improperly adopts a future actual test comparing an assumed version of the future to a baseline.

The testimonies of both Mr. Decker, Applicant's witness, and Mr. Jaske, Staff's witness, reveal an alternative future scenario where the Project could be used to replace power from a power plant that produces fewer greenhouse gas emissions than the Project would.[6] (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

[6] The Center has extensively challenged the choice of baseline. (*See, e.g.*, Center's Comment on PMPD (June 8, 2011) pp. 9-11.) However, the issue described above arises from the last evidentiary hearing and has not even been rebutted by any party. The PMPD simply ignores it.

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 CO_2 equivalent.[7] (PMPD, GHG, p. 9, Table 1.) Thus, the PMPD's factual 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. (PMPD, p. 6.1-19, Finding No. 7.) In fact, the PMPD based on Staff's analysis only comes to this conclusion by abandoning the standard test of comparing a baseline to a plant's potential to emit. 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.)

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. 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, pp. 6-7, June 29, 2001.) 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.) Staff's future scenario also assumes a zero sum future where natural gas power is not used to supply any future

[7] The Center contends that emissions are much greater, 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.)

growth. The potential to emit test should be used because it is impossible to predict the future as shown by Staff's own contradictory testimony.

CONCLUSION

The Committee should stay the proceeding until Applicant makes a sufficient PSD showing upon which the PMPD can base an adequate conformity finding. Additionally, the greenhouse gas remains insufficient. In fact, Staff 's testimony undermines this analysis. Furthermore, the licensing of this project faces an additional hurdle because it requires an override determination. Some of the evidence on which the override is based is erroneous. If the decision is not stayed, the Committee should require new testimony and a related hearing to fix the record.[8] The Center urges the Commission to either deny approval of the Project or alternatively, to substantially revise the PMPD, correcting its factual and legal deficiencies.

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[8] Other Intervenors elaborate on the override issue.