

OPINION NUMBER 87-2

DATE: February 13, 1987

SUBJECT: San Diego Energy Recovery (SANDER) Site;  
Compliance with provisions of the  
California Environmental Quality Act  
(CEQA) regarding Applicability of the  
"Early Activities" Exemption

REQUESTED BY: Coleman Conrad, Deputy City Manager

PREPARED BY: Curtis M. Fitzpatrick, Assistant City  
Attorney and Rudolf Hradecky, Deputy  
City Attorney

QUESTION PRESENTED

May the Planning Department, Planning Commission and City Council consider applications for discretionary land use approvals such as a rezoning and general and community plan amendments concerning the site of the SANDER Plant without immediate full compliance with the provisions of the California Environmental Quality Act?

CONCLUSION

The Planning Department, Planning Commission and the City Council may consider applications for discretionary land use approvals such as a rezoning and general and community plan amendments concerning the site of the SANDER Plant without immediate full compliance with the provisions of the California Environmental Quality Act because these considerations are exempt from immediate environmental review in accordance with provisions of the Warren-Alquist Act (Public Resources Code Section 25000 et. seq.).

BACKGROUND

In April, 1985, the City Council gave conceptual approval to the terms of a Service Agreement for the SANDER project and directed the City Manager to complete negotiations on the Agreement and other elements necessary for project approval. The

Manager was directed to return to Council at the "earliest appropriate time." The Manager considered the "earliest appropriate time" to be after the completion of the full environmental review and permit issuance by the California Energy Commission (the "Commission"). However, it has now become apparent that land use issues respecting the site of the SANDER plant may have to be addressed before the Commission may validly issue a permit.

The principal issue now before us concerns land use

determinations involving a rezoning and general and community plan amendments for the SANDER site at Kearny Mesa being acquired from the U.S. Navy. That property is presently shown as "General-Industrial" in the General Plan and Progress Guide, and as "Industrial" in the Serra Mesa Community Plan. The property is presently zoned as M-1A and A-1-10. It has been proposed that the property be rezoned as M-1B to accommodate the SANDER plant. Councilmember McCarty, the City Manager and Planning Director have requested our views with respect to the legality of a pending application for appropriate plan changes and rezoning.

#### ANALYSIS

Although a waste-energy plant may generally be compatible with an industrial or general-industrial zoning classification, there may be questions whether that designation would specifically include a 60.5 megawatt waste-energy plant with associated solid waste management facilities (recycling centers etc.). As part of the permitting and certification process which is pending, the Commission is required to consider whether the project conforms to applicable state and local law and ordinance.

The pertinent provisions in this regard and relating to the Commission's authority under the Warren-Alquist Act are codified in Public Resources Code section 25525 as follows:

The commission shall not certify any facility contained in the application when it finds, pursuant to subdivision (b) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity. In no event shall the commission make any finding in conflict

with applicable federal law or regulation.

The basis for such findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523.

Furthermore, Public Resources Code section 25523 requires the Commission to make findings regarding such conformity. Zoning is one area involving local ordinances where conformity may become an issue when the site is not precisely zoned for an intended use.

In the past, this issue has been considered from a number of perspectives, the most important of which has been the necessity

for prior environmental review pursuant to the California Environmental Quality Act ("CEQA")(Public Resources Code section 21000 et. seq.). Under normal zoning processes, environmental review is necessary before the City Council may adopt a zoning ordinance, either through a full environmental impact report (EIR), a negative declaration, or through statutory exemption. If it can be fairly argued that a project may have a significant effect on the environment, environmental review is required. Public Resource Code section 21151; *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75, 118 Cal.Rptr. 34, 529 P.2d 66 (1974). This review extends to the earliest discretionary approval applicable to a project, including land use. See Public Resource Code section 21080 (a); *Christward Ministry v. Superior Court*, 184 Cal.App.3d. 180, Cal.Rptr. (1986). Obviously, any environmental review of the SANDER project involves a wide variety of factors, including health risk assessments and air quality determinations, which would also apply to the land use decisions affecting the project unless there is some exemption from review pursuant to provisions of CEQA.

Public Resources Code section 21080(b)(6) provides that certain preliminary activities taken by a public agency relating to certain facilities are exempt from initial environmental review provided certain conditions are later satisfied and met. That section reads as follows:

- (b) This division shall not apply to the following:

\* \* \*

- (6) Actions undertaken by a public agency relating to any thermal powerplant site or facility, including the expenditure, obligation, or encumbrance of funds by a

public agency for planning, engineering, or design purposes, or for the conditional sale or purchase of equipment, fuel, water (except groundwater), steam, or power for a thermal powerplant, if the powerplant site and related facility will be the subject of an environmental impact report or negative declaration or other document, or documents, prepared pursuant to a regulatory program certified pursuant to Section 21080.5, which will be prepared by the State Energy Resources Conservation and Development Commission,

by the Public Utilities Commission, or by the city or county in which the powerplant and related facility would be located; provided that the environmental impact report, negative declaration or other document, or documents, shall include the environmental impact, if any, of the action described in this paragraph.

A thermal powerplant is defined in Public Resource Code section 25120 as follows:

"Thermal powerplant" means any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto. Exploratory, development, and production wells, resource transmission lines, and other related facilities used in connection with a geothermal exploratory project or a geothermal field development project are not appurtenant facilities for the purposes of this division.

In our view, this definition includes a 60.5 megawatt facility such as SANDER as entitled to statutory exemption.

We may observe that the requirements for exemption from initial environmental review would be satisfied by virtue of the later Commission environmental review process applicable to a thermal powerplant pursuant to a regulatory program mandated by

Public Resource Code section 21080.5. Land use issues, as an early activity, may be considered in light of such circumstances.

The early activity exemption of Public Resource Code section 21080(b)(6) applies to "actions relating to any thermal powerplant site or facility ...." It includes but is not limited to the "expenditure, obligation or expenditure of funds for planning, engineering or design purposes." Ibid. Zoning is an integral part of the siting of a plant or facility. This relationship, broadly interpreted, would permit the view that rezoning is permissibly exempt. This broad interpretation is in agreement with an opinion of the Attorney General issued in 66 Ops. Cal. Atty. Gen. 340, 343 (1983) in interpreting the scope of the exemption of section 21080(b)(6). The Attorney General opined that the language of subsection (b)(6) was intended to be a broad exemption within the early activities exemption relating

to thermal powerplants, unlike certain other exemptions which were limited in their scope by the express language of the statute. Therefore, if it is determined to be a prerequisite for the City to consider a rezoning of the SANDER site in advance of the Commission's final action on the permit, the early activities exemption under section 21080(b)(6) may be applicable to avoid an incongruous result or application of law affecting the Commission's process.

A decision to rezone should be based on the following factors, all of which are integral to our thought processes concerning the exemption and to the implementing City action:

1. That the rezoning be narrowly defined to be a "General Industrial - SANDER Project plant (waste to energy) and associated solid waste management facilities;"
2. That the rezoning be effective and conditioned expressly upon the Commission issuing a permit for precisely that activity.

We reason that the act of specific rezoning in this fashion would not permit any other zoning or use of the property without an EIR. It does not commit the City Council to any other discretionary approvals, and the City Council would retain the full and unfettered discretion to approve or disapprove a Service Agreement with Signal Environmental Systems. This is particularly germane in view of the fact that the Commission will be conducting a full environmental review in which health risk assessments and air quality standards and considerations must be

fully analyzed and addressed as part of its process and which would bear directly upon the feasibility of going forward with the Service Agreement. It is also pertinent that this would avoid duplication of effort and unnecessary expenditure of public resources and money.

By virtue of the Commission's process, the City will be presented with a full scale comparison study and document upon which final City Council action on the Service Agreement may proceed, consistent with community concerns for quality of life issues and the City's need to effectively manage its solid waste problems. Obviously, if the risks are unacceptable the reality of such a facility being permitted by the Commission, let alone approved by the City, is remote. Conversely, full development of these environmental concerns during the Commission permit process will allow and expedite the later informed action by the City Council. It is axiomatic that the process does and will involve full consideration of these important issues at some point in the

process.

It is therefore our opinion that consideration of the rezoning under the conditions we have outlined above would allow for compliance with the law and yet be consistent with the orderly development and consideration of SANDER.

Respectfully submitted,  
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By

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APPROVED:

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