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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:) Docket No. 07-AFC-6
)
) MOTION FOR PREEMPTIVE
) RESCISSION OF CERTIFICATION
)
)
Carlsbad Energy Center Project)

Applicant NRG has made a material false statement in these proceedings in a letter sent to certain Carlsbad residents and has thus made known its intention to violate multiple conditions of certification and jeopardized the integrity of the public participation process in these proceedings. Pursuant to Pursuant to Public Resources section Code 25534(a)(1), Intervenor Rob Simpson moves that the Commission preemptively revoke certification of the Carlsbad Energy Center Project.

In this alternative, Intervenor Rob Simpson moves that this Commission hearing be continued so that the material false statement can be corrected, the public correctly informed as to the status of this project, and the Applicant directed to cease and desist any construction activity until all certifications of compliance are verified.

Kerry Siekmann, representative for Intervenor Terramar and Carlsbad resident received the attached letter from NRG on June 28, 2011. In this letter dated June 24, 2011, the applicant declares that it will begin construction on June 30th, 2011.

This letter has served as de facto notice to the public June 24th that the project has been approved for construction to begin on June 30th. This is a material false statement that has likely negatively impacted public participation. NRG has led the public, most importantly the nearest residents, to believe that, as of June 24th, NRG had a right to begin construction June 30th. This certainly has the potential for a chilling effect on public participation – why would the public bother to participate in a proceeding for a project that they have been led to believe has already been approved?

NRG cannot legally begin construction on June 30th and was fully aware of this when it sent the letter. The compliance manager has refused to provide Mr. Simpson's counsel with the compliance matrix or any specific information regarding what NRG had submitted thus far making it impossible to do a complete analysis of NRG's ability to begin construction on June 30th. But, there are a number of legal requirements, both within and in addition to the conditions of certification, that NRG has not and cannot comply with by June 30th making it impossible for it to legally begin construction June 30th.

Pursuant to Pub. Res. Code 25534(a)(1), "The commission may, after one or more hearings, amend the conditions of, or revoke the certification for, any facility for any of the following reasons: (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant."

1. NRG has not filed a Notice of Intent or developed a Storm Water Pollution Prevention Plan as required by the Clean Water Act

NRG has not submitted a Notice of Intent to the State Water Resources Control Board for enrollment under the NPDES General Permit for Construction Activities. To be eligible for the use of the NPDES General Permit for Construction Activities, NRG must file a Notice of Intent and develop a Storm Water Pollution Prevention Plan (SWPPP). This is required, prior to the start of any construction, per condition of certification SOIL&WATER-1 and under the Clean Water Act. The document NRG submitted and posted to the CEC website June 29, 2011 as their "Storm Water Plan" is actually a document "developed to allow Cabrillo Power LLC to minimize the potential discharge of pollutants in storm water discharges from the Cabrillo Power LLC Encina Power Station facility." The document was not prepared for this project and is not in any way a valid SWPPP for this project. NRG's attempt to try and reuse an old SWPPP shows not only poor judgment but also bad faith.

SOIL&WATER-1: The project owner shall comply with the requirements of the San Diego County Municipal Storm Water Permit (Order R9-2007- 0001, NPDES No CAS0108758) and City of Carlsbad (City) Municipal Code Title 15, Chapter 15.12. The project owner shall develop and implement a Tier 3 Construction Storm Water Pollution Prevention Plan (Construction SWPPP) for the construction of the CEC site, laydown and parking areas, and all linear facilities. The Tier 3 Construction SWPPP shall be submitted to the City for review and comment and to the CPM for approval and shall contain all of the elements required by the General Permit for Construction Activities (WQO-99-08-DQM), the Municipal Permit (Order R9-2007-0001), and the City's current Storm Water Standards Manual.

Verification: Prior to site mobilization, the project owner shall submit to the Compliance Project Manager (CPM) a copy of the Tier 3 Construction SWPPP that has been reviewed by the City and retain a copy on site. The project owner shall submit to the CPM all copies of correspondence between the project owner and the City regarding the Tier 3 Construction SWPPP within 10 days of its receipt or submittal. This information shall include copies of the Notice of Intent and Notice of Termination submitted to the State Water Resources Control Board for enrollment under the NPDES General Permit for Construction Activities.

2. NRG has not complied with any conditions of certification that require it submit information to the Carlsbad Fire Department or the City of Carlsbad.

The following conditions of certification require NRG to submit information to the Carlsbad Fire Department or City of Carlsbad prior to the start of construction. These requirements are found within the conditions, not verification procedures, and so the CEC staff cannot utilize their limited power to modify verification to exempt NRG from complying.

NRG had not submitted this information by June 24th and could not meet the submittal deadlines, either 30 or 60 days prior to site mobilization, by June 30th. The CEC staff cannot preemptively modify verification requirements before a project is approved and so NRG could not rely on a claimed modification of these deadlines to zero days.

Conditions of Certification that Require Submittals to the City of Carlsbad or Carlsbad Fire Department Prior to Site Mobilization or Construction
<p>WORKER SAFETY-1 “The Construction Emergency Action Plan and the Fire Prevention Plan shall be submitted to the Carlsbad Fire Department for review and comment prior to submittal to the CPM for approval.</p> <p>Verification: At least 30 days prior to the start of construction, the project owner shall submit to the CPM for review and approval a copy of the Project Construction Safety and Health Program. The project owner shall provide a copy of a letter to the CPM from the Carlsbad Fire Department stating the fire department’s comments on the Construction Fire Prevention Plan and Emergency Action Plan.</p>
<p>WORKER SAFETY-6 . The final blueprints for the site shall be submitted at least 30 days prior to the start of site mobilization to the Carlsbad Fire Department for review and comment and to the CPM for review and approval.</p> <p>Verification: At least 60 days prior to the start of site mobilization, the project owner shall submit a copy of the final site blueprints to the Carlsbad Fire Department for review and comments and to the CPM for review and approval. The project owner shall also submit to the CPM a copy of the transmittal letter to the CFD.</p>
<p>WASTE-2 Prior to removal of the aboveground storage tanks (ASTs), the project owner shall complete a SDCDEH Hazardous Waste Tank Certification form and obtain a permit from the City of Carlsbad Fire Department. Prior to demolition of the ASTs, SDCDEH and the Fire Department must acknowledge the form is complete, and provide written concurrence that the information presented is adequate to comply with permitting requirements for removal. This</p>

information and written concurrence must be submitted to the CPM for review and approval.

Verification: At least 60 days prior to commencement of site mobilization, the project owner shall provide the form and permits to remove the ASTs to the CPM for review and approval. The project owner shall inform the CPM via the monthly compliance report, of the date when all ASTs were removed from the site.

SOIL&WATER-1: The project owner shall develop and implement a Tier 3 Construction Storm Water Pollution Prevention Plan (Construction SWPPP) for the construction of the CECF site, laydown and parking areas, and all linear facilities. The Tier 3 Construction SWPPP shall be submitted to the City for review and comment and to the CPM for approval and shall contain all of the elements required by the General Permit for Construction Activities (WQO-99-08-DQM), the Municipal Permit (Order R9-2007-0001), and the City's current Storm Water Standards Manual.

Verification: Prior to site mobilization, the project owner shall submit to the Compliance Project Manager (CPM) a copy of the Tier 3 Construction SWPPP that has been reviewed by the City and retain a copy on site.

TRANS-1 The project owner shall consult with the City of Carlsbad and prepare and submit to the Compliance Project Manager (CPM) for approval a Construction Traffic Control Plan and Implementation Program

Verification: At least 30 days prior to site mobilization, the project owner shall provide to the CPM a copy of the above-referenced documents and proof of implementation.

3. NRG has not met the requirements for exemption from the prohibition of construction between March 1st and August 15th

Condition of certification BIO-8 prohibits construction work between March 1 and August 15 to protect birds per the Migratory Bird Treaty Act. Construction may be allowed only if the Designated Biologist follows certain procedures. But, "No site or related facility activities shall commence until an approved Designated Biologist is available to be on-site" and, the Designated Biologist must be approved by the CPM. The Designated Biologist cannot be approved before the project is approved and so cannot have conducted the work necessary to qualify the project for the exemption from the prohibition before June 30th. Thus, NRG could not construct on June 30th as it falls between March 1 and August 15.

BIO-1 The project owner shall assign a Designated Biologist to the project. The project owner shall submit the résumé of the proposed Designated Biologist, with at least three references and

contact information, to the compliance project manager (CPM) for approval.

Verification: The project owner shall submit the specified information at least 90 days prior to the start of any site (or related facilities) mobilization. No site or related facility activities shall commence until an approved Designated Biologist is available to be on-site.

BIO-3 The project owner's CPM-approved Designated Biologist shall submit the résumé, at least three references, and contact information of the proposed biological monitor(s) to the CPM for approval.

Verification: The project owner shall submit the specified information to the CPM for approval at least 30 days prior to the start of any site (or related facilities) mobilization. The Designated Biologist shall submit a written statement to the CPM confirming that the individual biological monitor(s) has been trained, including the date when training was completed.

BIO-8 The project owner shall implement the following measures to manage its construction site (and related facilities) in a manner to avoid or minimize impacts to local biological resources:

6. avoid work between March 1 and August 15 to avoid impacts to birds protected under the Migratory Bird Treaty Act.

A. If this is not feasible, a survey shall be conducted for nesting birds within the project area.

B. Should an active nest be discovered, the Designated Biologist or biological monitor shall establish an appropriate buffer zone (in which construction activities are not allowed) to avoid disturbance in the vicinity of the nest.

i. Construction activities shall not commence until the Designated Biologist or biological monitor has determined that the nestlings have fledged or that construction activities will not affect adults or newly fledged young; OR

ii. The Designated Biologist or biological monitor shall develop a monitoring plan that permits the activity to continue in the vicinity of the nest while monitoring nesting activities to ensure that nesting birds are not disturbed.

Verification: All mitigation measures and their implementation methods shall be included in the BRMIMP. Implementation of the measures shall be reported in the monthly compliance reports by the Designated Biologist. Within 30 days after completion of project construction, the project owner shall provide to the CPM, for review and approval, a written construction termination report identifying how biological resource measures have been completed.

DATED: June 30, 2011.

Respectfully,

By: April Rose Sommer
April Rose Sommer

Attorney for Rob Simpson



June 24, 2011

Subject: Notice of Construction Activities at the Carlsbad Energy Center Project

To Whom It May Concern:

Initial construction for the Carlsbad Energy Center Project (CECP) located at 4600 Carlsbad Boulevard, Carlsbad, California 92008 is being planned to begin on June 30, 2011. Construction activities will occur between the hours of 7 am and sunset Monday through Friday, and between the hours of 8:00 am and sunset on Saturday (although non-noisy construction activities may occur after sunset if necessary).

Other activities related to the Carlsbad Energy Center Project are being planned and as the dates for these other construction activities are determined, NRG will mail another Notice to the community.

NRG is taking precautions to minimize impacts due to construction activities and has established a 24-hour per day telephone number for the public's use. If you have any questions, comments, or concerns regarding the CECP, please dial 760-710-2213.

Sincerely,

A handwritten signature in cursive script, appearing to read "George L. Piantka".

George L. Piantka, PE
Director, Environmental Business
NRG Energy, West Region

cc: Joseph Douglas, CEC