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July 7, 2009

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VIA EMAIL AND US POSTAL SERVICE

Mike Monasmith, Siting Project Manager
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

DOCKET	
07-AFC-6	
DATE	JUL 07 2009
RECD.	JUL 07 2009

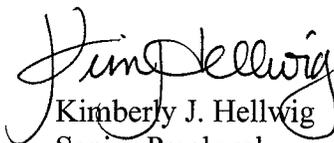
**Re: Carlsbad Energy Center Project (07-AFC-6)
Response to Executive Director Jones' Approval of Application for Confidential Treatment**

Dear Mr. Monasmith:

On behalf of Carlsbad Energy Center LLC ("Applicant"), please find enclosed for docketing correspondence to Executive Director Melissa Jones in response to her letter partially approving Applicant's request for confidential treatment of data regarding emission reduction credits as such relates to the Carlsbad Energy Center Project.

Should you have any questions regarding this correspondence, please do not hesitate to contact Mr. McKinsey at (916) 447-0700.

Very truly yours,


Kimberly J. Hellwig
Senior Paralegal

Enclosure

cc: See Attached Proof of Service List



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July 7, 2009

JOHN A. MCKINSEY
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VIA HAND DELIVERY

Melissa Jones, Executive Director
California Energy Commission
1516 Ninth Street, MS-15
Sacramento, CA 95814

**Re: Carlsbad Energy Center Project (07-AFC-6)
Response to Letter Approving Application for Confidential Treatment**

Dear Ms. Jones:

I am writing in response to your letter of June 18, 2009, which granted in part Carlsbad Energy Center LLC's ("Applicant") request for confidential treatment of documents ("Submitted Information") concerning confidential data related to emission reduction credits ("ERC") for the Carlsbad Energy Center Project ("CECP"). The contract for the purchase of ERCs requires Applicant to keep the Submitted information confidential, including in regulatory proceedings like the CECP Application for Certification ("AFC") proceeding. Applicant's original request, and this response, are made in an effort to comply with this contractual confidentiality requirement.

Although your letter concludes the Submitted Information is a confidential trade secret held by Applicant, one essential point in your letter requires further discussion: the appropriate timing for disclosure to the public of the Submitted Information pursuant to the host of statutes and regulations that govern this issue, including the Public Records Act, the Clean Air Act, the Warren-Alquist Act, and the California Environmental Quality Act. In accordance with these laws and regulations, Applicant requests that the California Energy Commission ("CEC") maintain the confidentiality of the Submitted Information until after Applicant has exercised its rights under the ERC purchase agreement or Applicant's obligation to keep this information confidential has terminated.

As your letter correctly notes, Applicant relied primarily upon Government Code section 6254.15 of the Public Records Act in requesting confidential treatment of the Submitted Information by the California Energy Commission ("CEC"). This provision expressly protects corporate proprietary information, including trade secrets, from disclosure by a public agency when the information is provided to that agency for the purpose of permitting a private company to locate or expand a facility within California. (Gov. Code § 6254.15; *see also* Gov. Code §§ 6254(f), (k); Evid. Code § 1060.) Government Code section 6254(k) clearly permits the CEC to maintain the confidentiality of Applicant's Submitted Information at least until the San Diego



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Air Pollution Control District (“SDAPCD”) has issued an Authority to Construct, rather than at the issuance of a Preliminary Determination of Compliance (“PDOC”).¹

Your letter also states that “[t]he term of confidentiality needs to be carefully specified to ensure conformance with the policies of both the [EPA] and the Energy Commission.” However, neither the Warren-Alquist Act nor the Clean Air Act provides direction to the CEC to ignore the statutory guidance regarding the protection of trade secrets discussed above. The CEC has a clear duty under the Warren-Alquist Act to include findings in its written decision on CECP’s AFC regarding the conformity of the proposed facility with applicable air quality standards and SDAPCD Rules. (Pub. Res. Code § 25523(d)(1).) The CEC cannot make a finding that CECP conforms with applicable air quality standards unless SDAPCD certifies that, prior to the licensing of CECP, complete emissions offsets for the proposed facility have been identified and will be obtained by Applicant within the time required by SDAPCD Rules.² The Warren-Alquist Act specifically places the duty to verify the existence and legality of ERCs with SDAPCD, rather than the CEC. Hence, the CEC has no obligation to include details on CECP offsets in the information it analyzes and presents to the public as part of its proceeding on the CECP AFC; rather, the CEC can rely on SDAPCD to analyze Applicant’s compliance with emission offset requirements under its Rules and the Clean Air Act.

While Applicant concurs with your statement that “[t]he confidentiality of potential offset sources can only be maintained until that point when public participation in review of CECP’s proposed offsets becomes necessary,” Applicant does not agree that adequate public participation requires the disclosure of the Submitted Information at the present time, in direct contravention of the Public Records Act, when no other federal or state law or regulation directs the CEC to do so. The Clean Air Act regulations relied upon in your letter require that during the review of a new air pollutant source by a state or local agency under a state implementation plan (“SIP”), the public must be given an opportunity to comment on information submitted by owners and operators, including the air district’s analysis of the effect of the new source on ambient air quality and the agency’s proposed approval or denial (collectively, “New Source Information”).

¹ In fact, the SDAPCD issued the CECP PDOC on November 20, 2008. To that end, your letter may be interpreted to mean parties to the CECP proceeding may now be granted access to the Submitted Information.

² SDAPCD Rule 20.1(d)(5)(iii) requires that emission offsets be in effect and enforceable at the time of start-up of the emission unit requiring the offsets.

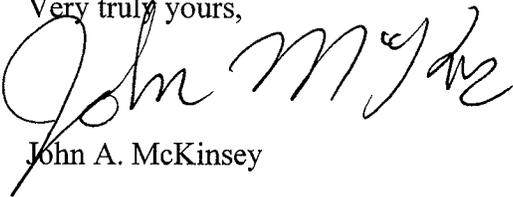


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(40 C.F.R. § 51.161.) Each SIP must set forth legally enforceable procedures on review of new sources, including procedures for the opportunity for public comment on New Source Information. (40 C.F.R. § 51.160.) These procedures must include, at a minimum, a 30-day comment period for submittal of public comments, availability of the New Source Information for public inspection in at least one location in the affected area, and notice in the area affected of the availability of the New Source Information. (40 C.F.R. § 51.161.)

The Clean Air Act regulations themselves do not elucidate whether the opportunity for public comment extends to all information, including trade secrets, submitted by an owner or operator during an air district's review of a new source. SDAPCD has promulgated its Rules to implement the California SIP. SDAPCD Rules 175, 176(b), and 177(g) protect trade secrets from disclosure pursuant to Government Code section 6254.7. In fact, on April 27, 2009, SDAPCD determined the Submitted Information is a trade secret pursuant to SDAPCD Rule 176(b). The express protection of trade secrets by statute advocates for a balance between providing for public participation in the environmental review process and protecting the confidential information of private entities, which includes sensitive information provided to regulatory agencies so that these agencies can ensure that private entities conform to the law. The SDAPCD Rules support the CEC also protecting trade secret information, while allowing for public review of non-trade secret information during the CECP AFC proceeding. For all the above reasons, Applicant requests that the CEC maintain the confidentiality of the Submitted Information.

Very truly yours,



John A. McKinsey

JAM:kjh

cc: Mike Monasmith, Siting Project Manager, CEC Staff
Proof of Service List for the CECP AFC Proceeding

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
FOR THE CARLSBAD ENERGY
CENTER PROJECT

Docket No. 07-AFC-6
PROOF OF SERVICE
(Revised 7/07/2009)

Carlsbad Energy Center Project

Response to Letter Approving Application for Confidential Treatment

CALIFORNIA ENERGY COMMISSION
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DECLARATION OF SERVICE

I, Elizabeth Hecox, declare that on July 7, 2009, I deposited copies of the aforementioned document in the United State mail at 980 Ninth Street, Suite 1900, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.



Elizabeth Hecox