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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)	DOCKET NO: 07-AFC-6
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CARLSBAD ENERGY CENTER PROJECT)	MEMORANDUM OF POINTS AND
)	AUTHORITIES IN SUPPORT OF THE
)	CENTER FOR BIOLOGICAL
)	DIVERSITY'S PETITION FOR ORDER
)	DIRECTING RESPONSE TO DATA
)	REQUESTS
_____)	

INTRODUCTION

Intervenor Center for Biological Diversity (the "Center") hereby submits the following points and authorities in support of its Petition for Order Directing Response to Data Requests.

The Center served a set of data requests to develop a more complete picture of the Carlsbad Energy Center Project's ("Project" or "CECP") greenhouse gas emissions. (Declaration of William Rostov ("Rostov Decl.") Exhibit A.) Applicant Carlsbad Energy Center, LLC ("Applicant") refused to provide any information to the Center. (Rostov Decl. Exh. B.) The Center petitions the Siting Committee ("Committee") to issue an order directing Applicant to answer the Center's data requests.

ARGUMENT

The Committee should direct Applicant to answer all of the Center's data requests, because Applicant's objections are meritless. Applicant's timeliness argument ignores the specific facts of the proceeding. The proceeding is in a relatively early stage even though a year has passed since the AFC was deemed complete. The Committee has outlined the delay in the proceeding: "The matter has not progressed in the time projected in the Committee Schedule where by the Preliminary Staff Assessment was to be filed in April 2008 and the Final Staff Assessment in May 2008. We are now in October and do not have either document." (Committee Order Re: Status Reports, Oct. 14, 2008.)

Applicant acknowledges that the Center is allowed to file data requests that have a good cause basis after the first 180 days of the proceeding has elapsed, but nonetheless makes a timeliness objection. *See* 20 Cal. Code Reg. § 1716(e) (committee can allow data requests "for good cause shown"). Applicant urges the Committee to adopt a bright line rule that any Intervenor who intervenes after 180 days have elapsed in a proceeding automatically does not have good cause to request information. (Rostov Decl. Exh. B at 2.) Applicant argues that the Center's "delay in intervening in the CECP proceeding – almost ten months after the CECP AFC was complete – is not good cause for Petitioner to issue its data requests after the six-month regulatory period for requesting information has passed." (*Id.*) If Applicant's proposed rule were accepted, it would make the good cause exception to 20 Cal. Code Reg. § 1716(e) meaningless.

The Center has good cause for its data requests, because within the context of the schedule in this case, the data requests were timely. The timeliness of data requests should be considered in relation to the issuance of the Preliminary Staff Assessment ("PSDA"). In a

proceeding that is exactly on schedule, the 180-day period typically extends fifteen days after the filing of the PSA. (Public Participation in the Siting Process: Practice And Procedure Guide, CEC (Dec. 2006) at 46.) In this case, if the Applicant would have answered the Center's data requests without objection, the answers would have been provided almost a month before the new projected date for the release of the Preliminary Staff Assessment ("PSA").¹ Moreover, Applicant's timeliness objection is inconsistent with its own actions. Applicant filed a major amendment to the AFC on July 25, 2008, almost three months after the initial 180-day period expired. This amendment necessitated additional data requests after the 180 day period.² (See City of Carlsbad's Status Report #2 at 2-3.) In addition, it is more judicially efficient to develop relevant information before the hearings. The Center, as an Intervenor, has the right to explore the basis for the Applicant's greenhouse gas estimates at the hearings on the Application. The hearings will be more efficient if available information is provided at an earlier date in response to data requests.

The Center also has good cause for its data requests, because the data requests were designed to provide a complete set of data on the potential greenhouse gas emissions from the Project. The Air Resources Board recently summarized the legal effect of adding additional greenhouse gases to the atmosphere:

There is a scientific consensus that human activities, chief among them the burning of fossil fuels, profoundly affect the world's climate by increasing the atmospheric concentration of GHG beyond natural levels. Contributing additional GHG pollution to the atmosphere leads to higher global average temperatures, changes to climate, and adverse environmental impacts here in California and around the world. Climate change,

¹ Applicant's responses were due October 24, 2008. (Rostov Decl. ¶5.) When the Center served its data requests, no date was set for the PSA. The Staff subsequently stated that the PSA would be released on November 21, 2008. (Staff Status Report 2, October 24, 2008.)

² It is interesting to note that Applicant has selectively used this timeliness objection. On October 21, 2008, Applicant responded to some of the CEC Staff data requests that were served on behalf of the City of Carlsbad. (See CECP Data Responses, Set 3A.) Those data requests were filed a week before the Center's.

caused by ‘collectively significant projects taking place over a period of time,’ is a quintessential cumulative impact.³

As part of its CEQA analysis, the Energy Commission must assess the greenhouse gas emissions and provide a full assessment of the Project’s emissions sources. (Office of Planning and Research Technical Advisory, “CEQA and Climate Change,” June 19, 2008 at 5) (“Lead agencies should determine whether greenhouse gases may be generated by a proposed project, and if so, quantify or estimate the GHG emissions by type and source.”) After reviewing the docket and the applicant’s responses to previous data requests, the Center found that Applicant provided incomplete information on the impacts of its Project, especially with respect to its greenhouse gas emissions. The Center’s data requests seek information concerning emissions estimates and assumptions made by the applicant, clarification on the anticipated use of LNG at the project and its impacts on climate change, and how the project will meet Applicant’s goal of meeting the “expanding need” for electrical generation in the San Diego area.

Moreover, providing responses to these requests is not burdensome or prejudicial to Applicant. While a few of Petitioner’s requests require some additional analyses of the project’s impacts, most require either a ‘yes’ or ‘no’ or simply the provision of data used in making certain assumptions. For example, one data request simply requested the two year time period in a ten year range that Applicant used to calculate greenhouse gas emissions. (Rostov Decl. Exh. A p. 3 Request No. 2.)

Applicant’s objection that it has provided sufficient information on greenhouses gas emissions makes little sense on its face. Applicant concludes that the greenhouse gas

³ Preliminary Draft Staff Proposal Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under the California Environmental Quality Act, California Air Resources Board (Oct. 24, 2008) at 3 (citing the IPCC 4th Assessment Report, Working Group II, Summary for Policymakers, Figure 2 and 14 Cal. Code Regs. (“CEQA Guidelines”) § 15355(b)) (attached as Exh. C to Rostov Decl.)

information that it provided was sufficient, because the CEC Staff did not request additional information about the Applicant's greenhouse gas emissions. (Rostov Decl. Exh B. at 2-3). Applicant's position would defeat the purpose of having a proceeding that involves parties other than the CEC Staff. Moreover, "any party may request from the applicant any information reasonably available to the applicant which is relevant to the notice or application proceedings or reasonably necessary to make any decision on the notice or application." 20 Cal. Code Regs. § 1716(b). All of the information requested by the Center is relevant because it is related to information already provided by the Applicant. In addition, information requested about greenhouse gas emissions is "reasonably necessary" for the Energy Commission to perform a legally adequate CEQA analysis of the Project's potential effects on global warming.

Applicant's reference to the lack of a threshold of significance for greenhouse gases also makes little sense. Thresholds of significance are designed to provide a cut-off for when environmental analysis is not necessary. 14 Cal. Code Regs. § 15064.7(a). The proposed power plant will be a major emitter of greenhouse gases. It is inconceivable that any threshold of significance would find that the Project's greenhouse gases emissions would not have a cumulative significant impact on global warming. The Air Resources Board recently proposed a threshold of 7,000 tons of carbon dioxide equivalent for industrial sources (Rostov Decl. Exh. C.) and the Center is advocating for a "zero" threshold as the most scientifically defensible in a variety of contexts. The data requests are designed to provide a full estimate of the greenhouse gas emissions from the Project.⁴ Even if some theoretically high threshold was created, the

⁴ Requiring the consideration of all reasonably foreseeable GHG emissions caused by the project, including emissions occurring outside California, such as the emissions from the use of LNG, is consistent with current CEQA law. Under CEQA, "effects" or "impacts" include "[i]ndirect or secondary effects which are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." CEQA Guidelines § 15358(a). "[I]ndirect or secondary effects may include . . . related effects on air and water and other natural systems,

responses to the data requests would still be needed to determine on which side of the threshold the Project fell.

Finally, Applicant makes a meritless jurisdictional argument on a subset of data requests regarding electric reliability. Applicant objects to two questions regarding electric reliability arguing that “the information requested is within the purview of the CEC, as the state’s primary energy policy and planning agency. Applicant is a private electricity generator and does not have jurisdiction to address electricity reliability requirements for the San Diego region.”

(Rostov Decl. Exh. B at 3.) This is an odd objection since one of the goals of the project is “meeting the expanding need for new, highly efficient, reliable electrical generating resources located in the load center of the San Diego region.” (AFC Executive Summary at 1-3.) With this objection, the Applicant is essentially arguing that it should not be required to provide information related to one of the goals of the Project. Applicant’s objection is inconsistent with 20 Cal. Code Reg. section 1716(b), because the information requested is related to its application. In addition, this objection implies that Applicant does not possess information to show that its Project meets its own goals. If this is the case, Applicant can respond to the data request stating as much.

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including ecosystems.” *Id.* With regard to emissions generated outside California, CEQA already provides that “[a]ny emissions or discharges that would have a significant effect on the environment in the State of California are subject to CEQA where a California public agency has authority over the emissions or discharges.” Guidelines § 15277.

CONCLUSION

For the foregoing reasons, the Center requests that the Committee make a finding that the Center's data requests are based on good cause and order Applicant to respond to all of the Center's data requests.

DATED: November 10, 2008



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