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DOCKET	
07-AFC-6	
DATE	<u>JUL 21 2011</u>
RECD.	<u>JUL 21 2011</u>

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:)
) DOCKET NO: 07-AFC-6
)
) CENTER FOR BIOLOGICAL
CARLSBAD ENERGY CENTER PROJECT) DIVERSITY'S RESPONSE TO STAFF'S
) STATUS REPORT #11 AND CITY OF
) CARLSBAD'S RELATED LETTER.
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California Energy Commission Staff's ("Staff") Status Report #11 sets forth a proposed schedule for Staff's testimony. The Center for Biological Diversity (the "Center") appreciates Staff's attempt to clarify the schedule, but the Center disagrees with Staff's proposal. Staff sets forth an anticipated date of August 11, 2011 for publishing supplemental testimony, and requests a hearing four to five weeks later. As the City of Carlsbad notes, Staff does not include an opportunity for Intervenor's to respond to Staff's testimony. (Letter of Ronald R. Ball to Commissioner Boyd and Hearing Officer Kramer [July 20, 2011] ("City Letter").) Furthermore, the schedule should account for EPA's recent revocation of the Prevention of Significant Deterioration ("PSD") applicability determination for the Carlsbad Energy Center Project

(“CECP”), and should allow the public and Intervenors to comment on Staff’s testimony prior to the hearing. The Center respectfully requests that the Committee consider an alternative procedure that addresses these concerns.

The same day that Staff filed its Status Report #11, the United States Environmental Protection Agency (“EPA”) withdrew its PSD applicability determination for CECP. (Letter from Deborah Jordan, USEPA, to George Piantka, NRG, re: New PSD Applicability Determination [July 18, 2001], attached as Exhibit A.) In this letter, EPA not only requires CECP to obtain a new PSD applicability determination, EPA unequivocally states that the prior determination cannot be used as precedent for a new determination. EPA admits that it made an error in its original finding because it used the wrong baseline. (*Id.*) This baseline determination also affects the baseline used in the San Diego Air Pollution Control District’s Determination of Compliance and should require a new Determination of Compliance. In addition, EPA states it “will also consider PSD applicability for greenhouse gases that might be emitted from the project.” (*Id.*) In sum, the new PSD applicability determination requires new analysis of air impacts.

It is premature to hold new evidentiary hearings because the Presiding Member’s Proposed Decision cannot issue until a full analysis of compliance with air quality laws is made. “The presiding member’s proposed decision shall include findings and conclusions on conformity with *all* applicable air quality laws. . . .” (Cal. Code Regs., tit. 20, § 1752.3(a) [emphasis added].) In addition, Section 1744(c) states that “each responsible agency’s assessment of compliance shall be presented and considered at hearings on the application held pursuant to Section 1748.” Since the PSD permitting is now at its initial stages, the evidentiary hearing would not comply with Section 1744 if it was held at the time Staff proposes, and

practically, it makes little sense to have the evidentiary hearing in September and then have an additional hearing to comply with Section 1744.

Moreover, the Center agrees with the City of Carlsbad's argument that the Committee should delay the evidentiary hearing in order to have a mechanism for introducing evidence from the CPUC proceeding on SDG&E's Application 11-05-023. (City Letter.) The Center also agrees with the City that the Committee should consider in the evidentiary process the new information on once through cooling that will be submitted to the State Water Board by the Statewide Advisory Committee on Cooling Water Intake Structures. That information will be available by October 1, 2011. (*Id.*)

If the Committee plans to move forward with evidentiary hearings, the Committee should consider the Staff's August 11, 2011 filing as a supplement to the Staff Assessment or a draft Staff Assessment. In that case, Staff should conduct a public workshop on its proposed testimony, take public comment, and then finalize its testimony—which should include a response to comments—for evidentiary hearings. This process would most likely shorten the evidentiary hearings, because the Parties and the public would have an opportunity to ask questions about the Staff's analysis prior to the hearings. In addition, the Commission should set a scheduling order that allows parties to file rebuttal testimony once Staff has issued its final testimony. The public and the parties should be afforded a full opportunity to respond to the supplemental testimony.

Alternatively, if the Commission is inclined to move forward with proceedings solely based on Staff's Status Report, the Center concurs with the City that Intervenors should have the opportunity to file rebuttal testimony to Staff's supplemental testimony before the requested evidentiary hearings. (City Letter.) However, the Center requests at least three weeks for filing

rebuttal to the testimony, because the Center's attorney has prior commitments.¹ The Center also requests that the Committee check with the parties regarding availability before hearing dates are set.

In conclusion, the Center requests that the Committee not adopt the schedule proposed by Staff. Instead, the Committee should provide a process that addresses the revocation of the PSD applicability determination, considers all of the relevant information that will be available this fall, and provides the parties and the public with a meaningful opportunity to address Staff's supplemental assessment prior to evidentiary hearings.

DATED: July 21, 2011



William B. Rostov
Earthjustice
Attorney for Center for Biological Diversity

¹ Mr. Rostov has previously scheduled evidentiary hearings in a case before the California Public Utilities Commission. Those hearings are currently scheduled to be held from August 11 – August 19. Similarly, Mr. Rostov has plans to be out of town for part of the week after the Labor Day weekend, and has additional conflicts in September.

EXHIBIT A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

July 18, 2011

Mr. George L. Piantka, P.E.
NRG Energy Inc. – West Region
5790 Fleet Street, Suite 200
Carlsbad, California 92008

Subject: New PSD Applicability Determination Analysis for the Carlsbad Energy Center Power Project

Dear Mr. Piantka:

This letter is to inform you that the United States Environmental Protection Agency (EPA) is withdrawing as moot the Prevention of Significant Deterioration (PSD) applicability determination for the Carlsbad Energy Center Project (CECP) previously issued on October 13, 2010 and January 11, 2011. The analysis contained in that applicability determination was based on a projected actual construction date of June 30, 2011, and clearly stated that if “the project has not begun construction by this time, a new [applicability] analysis and determination will be required.” See PSD Applicability Analysis for the Carlsbad Energy Center Project at 2. In this case, the California Energy Commission did not issue the necessary approvals that would allow NRG to start construction by June 30, 2011, so NRG did not have authority to begin actual construction on the CECP by that date.

Accordingly, the prior applicability determination is no longer valid. In withdrawing this PSD applicability determination as moot, we also note that we have concluded that the analysis contained in it was made in error. As such, neither the overall determination nor the rationale and analysis contained therein can be relied upon to undertake actions related to the CECP or any other facility. In revoking this particular analysis, EPA emphasizes that there still may be specific permitting circumstances in which EPA may use the discretion provided by 40 CFR §52.21 (b)(48)(i) to select a different period for determining the baseline actual emissions, but the use of such discretion will be based on the particular facts of the permitting situation under consideration.¹

¹ EPA also notes that the discretion to consider a different period for calculating baseline actual emissions for determining PSD applicability is limited to applicability determinations performed by the Agency and other approved permitting authorities and may not be invoked independently by emission sources and/or permit applicants. See 40 CFR §52.21 (b)(48)(i) (limiting use of a different time period to the Administrator’s determination “that it is more representative of normal source operation”); 40 CFR §51.166 (b)(48)(i) (providing same discretion to approved permitting authorities).

EPA is committed to working with NRG to complete a new applicability determination for the CECP. If such a determination is requested, please be aware that EPA will also consider PSD applicability for greenhouse gases that might be emitted from the project. *See* 40 CFR §52.21 (b)(48)(v)(b); 75 Fed. Reg. 31514, 31527 (June 3, 2010). If you have any questions, please contact Shaheerah Kelly of the Air Permits Office at (415) 947-4156.

Sincerely,

A handwritten signature in black ink, appearing to read "Deborah Jordan". The signature is fluid and cursive, written over a light gray rectangular background.

Deborah Jordan
Director, Air Division

cc: Robert Kard, San Diego Air Pollution Control District
Steven Moore, San Diego Air Pollution Control District
Tom Andrews, Sierra Research
Mike Monasmith, California Energy Commission
Will Walters, Aspen Environmental Group
Joe Garuba, City of Carlsbad



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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 5/18/2011)**

APPLICANT

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on July 21, 2011, I served and filed copies of the attached, CENTER FOR BIOLOGICAL DIVERSITY'S RESPONSE TO STAFF'S STATUS REPORT #11 AND CITY OF CARLSBAD'S RELATED LETTER. The original of these documents, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [\[http://www.energy.ca.gov/sitingcases/carlsbad/index.html\]](http://www.energy.ca.gov/sitingcases/carlsbad/index.html).

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

For service to all other parties:

- X sent electronically to all email addresses on the Proof of Service list;
by personal delivery;
- X by depositing in the United States mail at Oakland, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

- X **sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);**

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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


