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DOCKET	
07-AFC-6	
DATE	Dec.05 2011
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Attorney for Intervenor
 Center for Biological Diversity

STATE OF CALIFORNIA
 State Energy Resources
 Conservation and Development Commission

In the Matter of:)	
)	DOCKET NO: 07-AFC-6
)	
CARLSBAD ENERGY CENTER PROJECT)	CENTER FOR BIOLOGICAL
)	DIVERSITY’S DECEMBER 5 FILING IN
)	RESPONSE TO COMMITTEE ORDER IN
)	PREPARATION FOR DECEMBER 12
)	EVIDENTIARY HEARING AND MOTION
)	TO STRIKE
)	

In this filing, the Center for Biological Diversity (the “Center”) submits argument regarding the federal PSD requirements, provides times for cross-examination at the December 12th Evidentiary Hearing, and moves to strike a portion of the Applicants’ testimony that refers to the public comments of Dennis Peters from the ISO. The Center is not submitting opening testimony.

I. The Record Is Insufficient for the Committee to Make a Finding about Compliance with the Federal PSD Requirements.

With respect to the Federal PSD requirements, the Committee requests the parties “to submit evidence and argument on the project’s ability to comply with federal PSD requirements and the likely operating conditions of that permit. To the extent that such evidence is unavailable or speculative, explain why.” (Nov. 9, 2011 Order, p. 3.) The necessary evidence is

unavailable because the Applicant filed testimony that is incomplete and speculative. In addition, Commission Staff (“Staff”) presents no testimony, opting instead to argue about the need for a PSD finding and opining on the result of the PSD permitting.

Applicant’s testimony demonstrates that the record is insufficient to make a finding pursuant to Public Resources Code Section 25523(d)(1) and Cal. Code Regs., tit. 20, Section 1752.3(a). The Applicant has not even completed a PSD permit application; preparing the application will take three to four months after the Applicant starts it. (Carlsbad Energy Center LLC’s Supplemental Testimony, Exhibits, Witness List, and Time Estimates for Examination of Witnesses [“Applicant’s Testimony”] p. 17.) In addition, the Applicant has not even clearly stated whether PSD applies; it states that “the Proposed Project may trigger PSD review for GHG emissions and could possibly trigger PSD review for additional criteria pollutants. . . . The Applicant has not made final assessments of either time period, or of the net emissions increase for purposes of PSD applicability, at this time.” (Applicant’s Testimony, p. 14.) The Committee should not make findings when the Applicant will not even commit to the contours of the final permit. (*See* section 1748(d) [“Except where otherwise provided by law, the applicant shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility”].)

Moreover, the Commission cannot comply with Section 1744(c) which requires “each responsible agency’s assessment of compliance” to “be presented and considered at hearings on the application held pursuant to Section 1748.” Since the Applicant has not even started a PSD permit application, EPA, the responsible agency, cannot make an assessment of compliance.

(See Letter from Deborah Jordan, USEPA, to George Piantka, NRG, re: New PSD Applicability Determination [July 18, 2001], attached as Exhibit A.)¹

The Applicant also makes untenable assertions about the baseline period commencing as early as January 2007 based on the assertion that “construction could begin as early as 2012.” This statement is not supported by its own testimony, which estimates that the PSD permitting could take two to three years, and that is assuming no delay in the permitting process. (Applicant’s Testimony, p. 17.) In addition, EPA rejected the Applicant’s last formulation of the baseline. (Exhibit A.) Finally, there is no evidence in the record that the Applicant has secured financing and is ready to begin construction. In fact, the Applicant submits testimony showing that financing is an issue. (Applicant’s Testimony, pp. 6-7.) Without a sound factual basis for the baseline, the Committee should not rely on the Applicant’s assertions. (See section 1748(d).)

The Applicant also asserts its belief that the project will comply with Best Available Control Technology (“BACT”) for greenhouse gases based on the Palmdale permit, but the applicant ignores the fact that a BACT analysis is a top down analysis that is done on a case by case basis. (42 C.F.R. section 52.21(b)(12).) By definition, the top down analysis could change the configuration of the project. In addition, even the numbers presented by the Applicant’s testimony demonstrate that EPA will have to do a new evaluation of the Project’s BACT for greenhouse gases. The Project’s estimated emissions on a lbs of CO₂/MWh basis are higher than the Palmdale permit limit: 774 lbs. CO₂/MWh for Palmdale versus 890 lbs. CO₂/MWh for the Project. (Applicant’s Testimony, p. 15.) Even if the Palmdale permit was relevant, there is

¹ The Center does not believe that this letter has been made part of the evidentiary record although it has been previously submitted to the Committee. If it is not in the record, the Center requests that the Commission take official notice of the letter since the decision in the letter triggered the additional consideration of the PSD requirement and the letter provides the basis for EPA’s most current thinking on the PSD issue. Alternatively, the Center moves to have the letter admitted into evidence for the reasons articulated in this footnote. If not in the evidentiary record, this could be designated as Exhibit 648.

absolutely no evidence showing that EPA would adopt a higher permit level than it adopted in the Palmdale permit.

All of Staff's legal arguments about compliance with PSD requirements are unavailing. Staff first asserts that since the PSD requirements are federal that they should have no bearing on the Committee's decision. (Energy Commission Staff Response to Committee Order, Nov. 19, 2011 ("Staff Response") pp. 1-3.) However, in its Order, the Committee has apparently already rejected this position by stating that Public Resources Code section 25523(d)(1) "requires findings regarding compliance with federal authorities" such as PSD. (Nov. 9, 2011 Order, p. 3). Staff's assertion that the Commission's past practice did not include PSD findings² does not justify future noncompliance with Public Resources Code section 25523(d)(1) nor Cal. Code Regs., tit. 20, Section 1752.3(a) in this proceeding. Staff also recognizes the new greenhouse PSD requirements has made applicable to more Commission-licensed power plants. (Staff Response, p. 3, n. 3 and p. 1.) Staff opines that since other plants have received PSD permits that include greenhouse gas permit limits, the Commission can simply assume that EPA will do the same in this case. (Staff Response, pp. 3-4.) Such an assumption should not satisfy either the Commission's own regulations for PMPD findings or the Public Resources Code.

In sum, the record even with the Applicant's new testimony is insufficient for the Committee to make the requisite PMPD findings. Not only has the Applicant not put forth its conclusions about whether PSD will apply, it has not provided sufficient data in its filing to evaluate the potential permit. Albeit for different reasons, the Center agrees with Staff's statement that a "conformity finding" for federal PSD permits would not be meaningful, and at best speculative." (Staff Response, p. 3.) This statement is correct because the record is insufficient to support the requisite PMPD findings.

² Staff Response, pp. 3.

II. The Center Requests the Following Cross Examination

The Center divides cross examination by Party and Witness. If the Committee adopts a panel approach, the Center requests time equal to the sum of the time by topic.

A. Cross Examination for Staff Witnesses:

1. 30 Minutes for **Alternatives**: David Vidaver (or Mike Jaske, if Mr. Vidaver has not returned from vacation) and Will Walters.
2. 20 Minutes for **Air Quality**: Will Waters. The Center notes that Staff did not specifically designate a witness for the cumulatives and greenhouse gas analyses in its filed testimony. The Center assumes that Mr. Waters is the correct witness under this topic area. If not, the Center reserves the right to adjust its request at the prehearing conference to include those topic areas.
3. 40 Minutes for **System Reliability Issues Addressed by the Cal ISO at the June 15 Commission business meeting**: Robert Sparks and Dennis Peters.

B. Cross Examination for Applicant's Witnesses:

1. 15 Minutes for **Air Quality**: Gary Rubenstein
2. 5 Minutes for **System Reliability Issues**: Brian Theaker.

III. The Center Moves to Strike the Portion of the Applicant's Testimony that References Mr. Peters's Public Comment.

On page 9-10 of Applicant's Testimony, Applicant cites and quotes the public testimony of Mr. Peters of the ISO. Mr. Peters's statements were offered during a public comment period and were not offered as testimony. (June 30, 2011, CEC Business Meeting Transcript, p. 76:15-22.) The Center moves to strike the portion of Applicant's testimony that includes his public comment. Applicant should not be allowed to make Mr. Peters's prior public comments part of

the evidentiary record. It is noteworthy that Staff submitted testimony from ISO and indicated that it plans to call Mr. Peters as a witness.

DATED: December 5, 2011

A handwritten signature in black ink, appearing to read "William Rostov", with a long horizontal stroke extending to the right.

William B. Rostov
Earthjustice
Attorney for Center for Biological Diversity

ATTACHMENT 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", written in a cursive style.

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 11/29/2011)**

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DECLARATION OF SERVICE

I, Jessie Baird, declare that on December 5, 2011, I served and filed copies of the attached CENTER FOR BIOLOGICAL DIVERSITY'S DECEMBER 5 FILING IN RESPONSE TO COMMITTEE ORDER IN PREPARATION FOR DECEMBER 12 EVIDENTIARY HEARING AND MOTION TO STRIKE dated December 5, 2011. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[[www.energy.ca.gov/sitingcases/carlsbad/ index.html](http://www.energy.ca.gov/sitingcases/carlsbad/index.html)].**

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



Jessie Baird