DOCKET
04-AFC-1
DATE MAY 17 2006
RECD. MAY 18 2006

BEFORE THE
STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

Application for Certification For the San Francisco Electric Reliability Project	Docket No. 04-AFC-1

OBJECTION TO REQUEST FOR SUBPOENA OF NANCY KATYL
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

TO: Commissioner Boyd

Pursuant to 20 Cal. Code of Regs. § 1203(b), Intervenor CAlifornians for Renewable Energy (CARE) has applied to the Committee for issuance of a subpoena by the Commission compelling the attendance of Nancy Katyl, of the San Francisco Bay Regional Water Quality Control Board (Water Board), at the next scheduled hearing of this matter relating to the topic of alternatives, on March 22, 2006 at 9:00 a.m.

The Water Board and Nancy Katyl (collectively, Water Board) hereby object to CARE's request.

Applicable Law

The Chair or presiding officer has the authority to "[i]ssue subpoenas and subpoenas duces tecum at the direction of the commission, on his motion or upon application of any party. The application of a party shall be supported by a declaration of good cause." (20 Cal. Code of Regs. § 1203(b).) The Commission's regulations do not address the subpoena requirement further. The Administrative Procedure Act allows a person served with a subpoena to object to the subpoena by moving to quash or seeking a protective order. (Ca. Gov. Code § 11450.30.) The Commission may quash a subpoena on its own motion. (*Id.*) Since the Commission has not yet issued a subpoena a motion to quash would be premature. However, the Water Board's objection to the issuance of the subpoena in the first instance in consistent with this provision of the APA and eliminates the need to have a subpoena issued before moving to quash it.

CARE's Request for Subpoena

CARE based its request on two factors: materiality and necessity. Neither argument supports issuance of the subpoena.

Materiality: CARE argues that Ms. Katyl's testimony is necessary and material to rebut a number of allegedly incorrect statements made by the Applicant's witnesses, Ms. Gallardo, Mr. Cheung, and Mr. Feldman of Geomatrix Consultants, Inc. CARE argues that supplemental testimony has "identified the need to identify and implement the specific remedial and/or risk management measures that should be applied to the site through the appropriate regulatory process, but defers the performance of the Human Health Risk Assessment (HHRA), Screening-Level Ecological Risk Assessment (ERA),

development of a Site Cleanup Plan (SCP) and Risk Management Plan (RMP) until after the projects development approval is granted by the CEC." However, the Water Board has not approved a cleanup plan or identified any measures to be applied at the site. The Water Board has not received the pending Remedial Investigation report. Ms. Katyl has only reviewed raw data that are inadequate to allow any determination about corrective action measures. Her testimony regarding cleanup at this point would be purely speculative.

Until recently, the Water Board had not worked on the site since about 2000, when certain deed restrictions were filed for the property. Ms. Katyl has only worked on the site since late 2005. She has no personal knowledge regarding the deed restrictions or any activities that occurred at the site in 2000 or prior, other than what she has read in the file or learned from discussing it with others.

Necessity: CARE argues that Ms. Katyl is needed to provide rebuttal testimony in the form of a general description of the Water Board's Spills, Leaks, Investigations, and Cleanups (SLIC) program. General information about the SLIC program is not necessary to this proceeding. CARE has made no showing that Ms. Katyl's testimony would differ in any way from that of Commission staff, or, for that matter, testimony provided by the Applicant. For example, there is no showing that Ms. Katyl's testimony is necessary to correct any proposed mitigation about which any party has already provided testimony or other evidence. Therefore, CARE has not established that Ms. Katyl's testimony is necessary to "rebut" anything.

The Water Board has full jurisdiction to establish appropriate cleanup remedies. After receiving and reviewing the Remedial Investigation report and any other necessary documentation, the Water Board will correct any deficiencies it finds with any *potential* cleanup measures that any party to this proceeding has identified in the record. After receiving that documentation, the Water Board will establish cleanup requirements or determine that no further cleanup action is required.

CARE also argues "the testimony of Ms. Katyl is critical to these proceedings as the Committee must decide whether this project is feasible and cost effective in light of the cost of yet to be identified mitigation measures for onsite contamination." However, cost feasibility and cost effectiveness are not among the findings that the Commission must make in the certification process. Such testimony is therefore neither necessary nor material. At this time, Water Board staff has no information on cost or feasibility of mitigation measures for this site anyway.

Conclusion

Ms. Katyl's testimony would add nothing to this proceeding. Also, as stated above, Ms. Katyl has little personal knowledge about the site. The Water Board respectfully urges the Commission to deny the request for subpoena.

In the alternative, if the Commission determines that a Water Board witness is necessary to provide this testimony, Stephen Hill would be a more appropriate witness. Mr. Hill is the Division Chief of the Toxics Cleanup Program. He would be better able to testify because his division oversees most of the SLIC cases at the Water Board. Please note, however, that Mr. Hill also has very little personal knowledge about the site, being two supervisory levels up from the project manager and given the Water Board's

hiatus from this site since 2000. For the same reasons discussed above, the Water Board does not believe Mr. Hill should be called as a witness in this proceeding, either.

Respectfully submitted,

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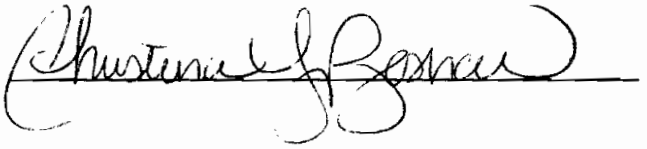
DECLARATION OF SERVICE

I, Christina L. Bashaw declare that on May 17, 2006, I transmitted the attached OBJECTION TO REQUEST FOR SUBPOENA OF NANCY KATYL, CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD by electronic mail addressed to those identified on the Proof of Service list below. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct. I also transmitted the original and one paper copy to the Docket Unit by depositing them in the United States mail at Sacramento, California with first class postage thereon fully prepaid and addressed to Docket Unit at the address on the Proof of Service list.

Date: May 17, 2006



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