



STATE OF CALIFORNIA
Energy Resources Conservation
And Development Commission

In the Matter of:) Docket No. 02-AFC-1
)
Application for Certification)
for the BLYTHE ENERGY PROJECT, PHASE II)
)
_____)

**ENERGY COMMISSION STAFF'S RESPONSE TO INTERVENOR
CARMELA F. GARNICA'S PETITION FOR RECONSIDERATION**

I. Introduction

On December 14, 2005, the California Energy Commission (Energy Commission) adopted the Commission Decision certifying the Blythe Energy Project, Phase II (BEP II). On January 13, 2006, Intervenor Carmela F. Garnica filed a petition for reconsideration of this decision. The petition references a document entitled, "Demand to Correct or Cure Violations of the Bagley-Keene Open Meeting Act," (Demand to Correct) which was filed by Ms. Garnica on December 17, 2005. Within these two documents, Ms. Garnica argues that the Commission should reconsider its certification of BEP II because: 1) the Commission violated the Bagley-Keene Open Meeting Act (Open Meeting Act); 2) Ms. Garnica was not served the comments submitted by the United States Environmental Protection Agency (EPA) until the day before the adoption hearing; and 3) Ms. Garnica has obtained additional information about possible Occupational Health and Safety Act violations at BEP I. As discussed below, none of these factors constitute an error of fact or law that would support reconsideration of the BEP II certification.

II. The Energy Commission Fully Complied With the Open Meeting Act.

The Open Meeting Act requires all state bodies to provide notice of its meetings at least 10 days in advance of the meeting. (Government Code section 11125(a).) On December 1, 2005, Hearing Officer Garret Shean served all parties, including Ms. Garnica, with notices for both the Committee Workshop on Comments on Presiding Member's Proposed Decision (Committee workshop), scheduled for December 13, 2005, and the Commission Hearing (adoption

hearing), scheduled for December 14, 2005. Setting aside whether the Open Meeting Act even applies to the December 13, 2005 Committee workshop, these notices were served and placed on the Energy Commission's website 12 and 13 days before the meetings, respectively, and clearly satisfied the 10-day notice requirement cited above. Both of these notices also included a description of the meeting agenda, the name, address, and telephone number of several people who could provide further information in advance of the meeting, and the Energy Commission's web address, all in compliance with Open Meeting Act requirements.

Ms. Garnica claims that the Energy Commission violated the Open Meeting Act by not providing 10 days' notice of the errata and by not providing the address of the internet site where notices required by the Open Meeting Act are made available. As discussed below, neither of these assertions is valid.

A. The Open Meeting Act's 10-Day Noticing Requirement Only Applies to Meeting Notices and Not To Any Other Documents.

Ms. Garnica cites Government Code section 11125(a) as support for her claim that the Commission erred in not providing at least 10 days between the distribution of the Committee's Errata Regarding the Presiding Member's Proposed Decision (PMPD) and the December 14 adoption hearing. This section, however, refers solely to notices of meetings and does not extend to any other type of notice; there is no indication in the statute or in case law that this requirement applies to documents released by a state body. The errata contained only minor changes that, in addition to providing clarification of the record, simply altered a few conditions to reflect the air district's rules require EPA's approval of the proposed offsets. There is no requirement that the Energy Commission release minor errata for any specified length of time prior to adopting a decision.

In addition to her misplaced reliance on the Open Meeting Act, Ms. Garnica mischaracterizes the errata. She complains that she did not receive adequate notice that the "Commission would ignore the EPA's comments and recommendations." (Demand to Correct, p. 2.) In fact, the errata represents the Committee's efforts to respond to EPA's comments and concerns expressed in a November 22, 2005 letter and at the December 13 Committee Workshop. At the conclusion of that workshop, EPA was satisfied with the Committee's proposed revisions to two air quality conditions of certification in the PMPD. Thus, the changes can in no way be characterized as ignoring EPA's comments.

B. The Energy Commission Fully Complied with the Requirement to Identify the Energy Commission's Internet Site.

Ms. Garnica does not provide any explanation for her claim that the Energy Commission violated the Open Meeting act by not placing its internet address on meeting notices. The Open Meeting Act requires that all meeting notices of a state body include "the address of the Internet site where notices required by [the Act] are made available." (Government Code §11125(a).) The Energy Commission's main internet site is www.energy.ca.gov. From this site, interested persons can easily access notices uploaded to the web in fulfillment of Open Meeting Act requirements. This address is clearly identified in the letterhead of each of the notices at issue. Therefore, both notices were in full compliance with Open Meeting Act requirements.

III. Ms. Garnica had Notice that EPA Submitted Comments on the PMPD and was in Possession of those Comments Before the December 14 Adoption Hearing.

Ms. Garnica claims that the Energy Commission should also reconsider its decision because it did not serve her with comments submitted by EPA. EPA filed comments on the PMPD on November 22, 2005. These comments were simply a reiteration of EPA's comments sent to the Mojave Desert Air Quality Management District (MDAQMD) on December 26, 2002 and had been docketed in the BEP II proceeding on January 2, 2003. Staff had discussed EPA's concerns in detail in the Final Staff Assessment (pp. 4.1-27 through 28) and the notice for the December 13, 2005 Committee Workshop specifically identified that comments on the PMPD had been filed by EPA and that the Committee was considering changes to the PMPD to respond to these comments. This notice also provided the names and contact information of four people that could provide further information. Therefore, Ms. Garnica had ample notice that EPA had filed comments with regard to this project, had an indication of the substance of those comments, and knew where to get further information. Ms. Garnica also had the opportunity to ask for more information at the December 13, 2005 Committee Workshop, but chose not to participate or even indicate she had any concerns regarding the PMPD, even though she could have called using the toll-free line.

Ms. Garnica acknowledges that she received EPA's comments on December 13, 2005, along with the Committee's proposed changes to the PMPD. EPA's comments consisted of only 5 pages and could have easily been reviewed by Ms. Garnica in time for the adoption hearing on the following day. The errata were a similarly brief 7 pages. Again, Ms. Garnica chose not to participate or provide comments at the adoption hearing, even though she could have called using the toll-free line. Nor did she request additional time to review the two documents.

Ms. Garnica fails to explain what harm, if any, occurred. Her due process rights were not violated, and she was given ample notice that EPA had filed comments and sufficient opportunity to obtain further information about those comments. She did not avail herself of any of the opportunities to participate and, thus, cannot now claim that the decision should be reconsidered.

IV. CEQA Does Not Prohibit the Energy Commission from Requiring EPA Approval of Offsets in the Conditions of Certification.

Ms. Garnica claims that the decision contains “mitigation measures that are to be approved by US EPA at a later date” and that this violates the California Environmental Quality Act (CEQA). It appears that Ms. Garnica is referring to changes made to Conditions of Certification AQ-C9 and AQ-18 in response to comments made by EPA. AQ-C9 was changed to require the project owner to use only those Emission Reduction Credits (ERCs) that are determined by EPA to be real, enforceable, surplus, permanent, and quantifiable. AQ-18 was changed to require the project owner to show that EPA has approved any interpollutant offset ratio used. Both of these changes reflect current MDAQMD regulations requiring EPA approval on such matters.

Neither of these conditions delegate reporting or monitoring responsibilities to EPA as Ms. Garnica claims. Both conditions require the project owner to provide documentation to the Commission’s Compliance Project Manager proving compliance with the conditions. Nor are the conditions an inappropriate deferral of the formulation of specific mitigation strategies. The Commission has specifically identified the number of air quality offsets needed to mitigate the project’s impacts and comply with applicable laws, ordinances, regulations and standards (LORS). The only factors that might change are the actual source of the offsets and perhaps the offset ratio used. The requirement to mitigate and the amount of mitigation ultimately required remain the same.

As for Ms. Garnica’s concern over the use of PM-10 offsets to mitigate for the project’s generation of PM-2.5, the Commission has already determined, based on substantial evidence in the record, that because the project would not likely cause new PM-2.5 violations, or contribute to existing ones, the proposed use of PM-10 offsets is suitable. (Blythe Energy Project, Phase II Commission Decision, pp. 21-25.) No evidence to the contrary was submitted in the BEP II proceeding and Ms. Garnica does not provide any support for her contention that the Commission erred in finding the project would not result in any significant adverse air quality impacts.

V. The Energy Commission Properly Determined, Based on Substantial Evidence in the Record, that BEP II's Use of Anhydrous Ammonia Would not Result in any Significant Adverse Impacts.

Ms. Garnica's final argument in support of her Petition for Reconsideration involves the project's use of anhydrous ammonia. Ms. Garnica claims that: 1) an incident that occurred at the BEP I facility in 2004 calls into question staff's analysis; 2) the Energy Commission did not properly take into consideration this incident; and 3) new evidence supports reconsideration. As discussed below, the Energy Commission properly found that the project's use of anhydrous ammonia would not result in any significant adverse impacts and the report provided by Ms. Garnica is not new and does not support a contention that the Energy Commission erred in adopting the BEP II decision.

A. The Record Contains Ample Analysis of the BEP I Anhydrous Ammonia Incident and, in Response to this Analysis, the Energy Commission Adopted Conditions of Certification to Prevent Such an Incident at BEP II.

Ms. Garnica erroneously claims that the Committee's discussion of anhydrous ammonia in the errata was the first and only time the Committee considered the issue. In fact, staff first discussed the BEP I anhydrous ammonia leak in the Final Staff Assessment (FSA), released on April 29, 2005, and proposed conditions of certification to ensure that the same problem would not occur at BEP II:

Staff found that the scrubber on the containment building did work but that due to a lack of monitoring capability, power plant personnel were unaware of the efficiency of the scrubber and therefore properly implemented the Emergency Response Plan. Staff has made several recommendations regarding preventing this type of accidental release and resulting disruption of traffic on I-10 from occurring again and will reiterate those recommendations for the BEP II power plant in proposed Condition of Certifications [sic] HAZ-8 and HAZ-11. (FSA p. 4.4-9.)

No other testimony or evidence was provided that contradicted or called into question staff's conclusions. Therefore, the Committee determined, based on substantial evidence in the record, that with the proposed changes to the conditions of certification the project would not result in any significant adverse impacts from the use of anhydrous ammonia. The Committee reiterated this discussion and analysis in the errata in order to respond to the Center on Race, Poverty, and the Environment's (CRPE) comments that the project be required to use an alternative to anhydrous ammonia.

Ms. Garnica also claims that the anhydrous ammonia incident at BEP I invalidates staff's conclusion that the risk of a significant impact on I-10 due to anhydrous ammonia is 2 in 1,000,000, and, thus, very unlikely to occur. Actually, as a factual matter, the incident does not discredit staff's conclusion. As discussed in the Commission Decision, no anhydrous ammonia left the containment building. (Blythe Energy Project, Phase II Commission Decision, p.106.) The closure of I-10 was merely precautionary until it could be confirmed that anhydrous ammonia was not present and had not escaped the facility. The BEP I incident shows that the safeguards in fact did work. The only piece that was missing was the ability to confirm that the scrubber system was properly functioning so that the authorities could be assured that no anhydrous ammonia had left the containment building; this has been remedied by the adoption of staff's proposed changes to conditions of certification HAZ-8 and Haz-11.

B. The BEP I Inspection Report Provided by Ms. Garnica Does Not Support Her Contention that the Energy Commission Erred in Approving BEP II's Use of Anhydrous Ammonia.

In her Petition for Reconsideration, Ms. Garnica provides what appears to be an inspection report of the BEP I facility conducted by the Occupational Safety and Health Administration (OSHA). This report is not contained in the hearing record, but it refers to incidents that occurred March 30, 2005, well before the evidentiary hearings and, thus, was presumably available during the course of the AFC proceeding. If such information was available during the BEP II proceeding, it is inappropriate to consider it after the proceeding has been closed. Even if the Energy Commission were inclined to reopen the record to entertain this report, it does not support any claim that the Energy Commission erred in finding that BEP II will not result in any significant adverse impacts from its use of anhydrous ammonia.

Ms. Garnica does not explain how the report supports her contention that the Commission erred in finding that the project would not result in significant adverse hazardous materials impacts. By its very nature the OSHA report involves a worker safety matter and is not applicable to the Energy Commission's analysis of hazardous materials impacts. Additionally, Ms. Garnica fails to explain why an inspection report issued for BEP I should be imputed to BEP II; the two projects have different owners and there is nothing that indicates the violations are endemic to the design of the facility or that the same violations will occur under different owners. Moreover, while there is no indication as to the exact nature of the violations, none of the violations are listed as serious, willful, or even repetitive and the fines imposed are small, indicating that the violations were not likely severe. Therefore, the report does not appear to signify anything more than that OSHA is performing its obligations by inspecting facilities to ensure that they are complying with LORS and that it found some minor

violations at BEP I, which are in the process of being, or already have been, rectified.

VI. Conclusion

For the reasons discussed above, staff believes the Energy Commission should deny Ms. Garnica's Petition for Reconsideration.

DATED: January 30, 2006

Respectfully submitted,

LISA M. DECARLO
Staff Counsel