DOCKET
03-AFC-2
DATE MAY 16 2006
REC'D MAY 16 2006

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	**Docket No. 03-AFC-2**
	)	
Application for Certification for the Los Esteros	)	
Critical Energy Facility – Phase 2	)	

APPLICANT'S STATUS REPORT #6

This is the sixth Status Report filed by the Applicant (Los Esteros Critical Energy Facility, LLC) describing the Applicant's efforts over the past six months to secure the review and approval by the City of San Jose of our application for rezoning for the Los Esteros Critical Energy Facility ("LECEF").

In December 2005 the City of San Jose Planning Director agreed that the Applicant would submit to the City of San Jose a draft Initial Study for the LECEF Phase 2 project and that the City will use the draft Initial Study to evaluate the environmental impacts of the LECEF Phase 2 project compared with the impacts that were analyzed in the original US Dataport EIR. If there were no significant environmental impacts for the Phase 2 proposal that were not analyzed in the original EIR or that were not proposed to be mitigated, the City agreed to prepare an Addendum to the original EIR.

The Applicant submitted the draft Initial Study to the City on January 9, 2006. The draft Initial Study concluded that the project would not result in any significant adverse impacts. After numerous requests from the Applicant for the City's response to the draft Initial Study, the City responded by letter dated April 18, 2006, from Joseph Horwedel, Acting Director of Planning, Building and Code Enforcement. (Attached.)

Mr. Horwedel states that the LECEF II project triggers the need for additional environmental review. Unfortunately, Mr. Horwedel does not describe the scope or nature of the additional review.

Mr. Horwedel also states the City of San Jose Planning Staff does not support the Applicant's use of the Emission Reduction Credits that have been approved by the Bay Area Air Quality Management District and by the Presiding Member's Proposed Decision. Mr. Horwedel states the City of San Jose Planning Staff will likely "require" additional mitigation. Again, unfortunately, Mr. Horwedel does not describe this additional mitigation.

As a consequence of Mr. Horwedel's letter of April 18, 2006, we are back to the same situation we were in last year. The City of San Jose apparently intends to undertake a process to review and approve LECEF II, but the City staff has not, as yet, determined or disclosed the process they intend to undertake.

In light of the City's inability to meet the schedule that was agreed upon in December 2005, Los Esteros Critical Energy Facility, LLC requests the assistance of the Commission Staff or the Committee to get this matter resolved.

May 16, 2006

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By Greggory L. Wheatland

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CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Department of Planning, Building and Code Enforcement
JOSEPH HORWEDEL, ACTING DIRECTOR

April 18, 2006

Mr. Mike Argentine
Calpine
4160 Dublin Boulevard
Dublin, CA 94568

Re: **PDC 05-001 -- Environmental Clearance for Phase II of Los Esteros Powerplant**

Dear Mr. Argentine:

Planning staff in coordination with the City Attorney's Office, has reviewed the Initial Study and related supplemental air quality material provided by Calpine to determine the appropriate level of environmental review for the City, acting as lead agency pursuant to CEQA, to consider the pending rezoning (PDC05-001) to incorporate Phase 2 of the LECEF project. This course of action was done at the suggestion of the CEC as an alternative to the City functioning as a responsible agency and awaiting approval of the CEC licensing process in order to make a determination of CEQA compliance.

The City has previously certified an EIR related to the U.S. Dataport Project (File No. PDCSH00-06-048), and in connection with approving the U.S. Dataport Project, adopted Resolution No. 70259, which among other findings found the project would result in significant unavoidable impacts to air quality with respect to NOx emissions.

The City has also previously, pursuant to Governor Gray Davis' Executive Order D-26-01 issued February 8, 2001, used the CEC Staff Assessment for the LECEF I project (PDCSH01-09-088) in the same manner as it would use an EIR, and in connection with approving the LECEF I project, adopted Resolution No. 70844, which among other findings found the project would result in significant unavoidable impacts to air quality with respect to NOx, POC, and PM10 emissions.

We have reviewed the Initial Study and related supplemental air quality material provided by Calpine to determine whether the preparation of an addendum to the original Dataport EIR or CEC Staff Assessment for the LECEF I project would be appropriate for the purposes of satisfying the requirements of CEQA for the LECEF II project. According to the CEQA guidelines an addendum in lieu of a subsequent EIR or Negative Declaration can be prepared in cases in which the lead agency concludes that the proposed changes do not involve new significant effects or a substantial increase in the severity of previously identified significant effects.

According to the information provided and confirmed by the CEC's Presiding Members Proposed Decision (PMPD), LECEF II project would not involve a new significant effect. However, it will result in NOx, POC, and PM10 emissions in excess of BAAQMD thresholds for which the CEC has determined that mitigation is required to reduce impacts to a less than significant level. Therefore, in the absence of identified offsets/mitigation, these increased emissions constitute what the City of San Jose Planning staff considers to be a substantial increase in the severity of a previously identified significant impact.

Therefore, the City of San Jose Planning staff concludes that the LECEF II project triggers the need for additional environmental review to disclose and provide public comment regarding a) the substantial

increased emissions associated with LECEF II project and b) the measures identified to reduce those emissions to less than significant levels. Additionally, the adequacy of mitigation for these substantially increased environmental impacts is an issue for further discussion. The City of San Jose Planning staff is not supportive of the use of Emission Reduction Credits, from discontinued uses that are outside of the area, to mitigate the project's impact on local air quality. The City of San Jose Planning will likely be requiring additional mitigation that will clearly address the local air quality impacts of the project.

Should you have questions, please contact Rich Buikema, Senior Planner at (408) 535-7835 or Akoni Danielsen, Principal Planner at (408) 535- 7823.

Sincerely,

Joseph Horwedel, Acting Director
Planning, Building and Code Enforcement

cc: Terrence O'Brien
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and Development Commission

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PROOF OF SERVICE

I, Ron O'Connor, declare that on May 16, 2006, I deposited copies of the attached *Applicant's Status Report #6* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

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

Ron O'Connor

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03-AFC-2

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