

William B. Rostov (State Bar No. 184528)
 EARTHJUSTICE
 426 17 St., 5th Floor
 Oakland, California 94612
 Tel: (510) 550-6725; Fax: 510-550-6749
 wrostov@earthjustice.org

DOCKET	
07-AFC-6	
DATE	<u>SEP 23 2011</u>
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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 RESPONSE COMMENTS
)	ON SEPTEMBER 13, 2011 COMMITTEE
)	CONFERENCE DISCUSSION AND ON
)	SCHEDULE
)	
)	
)	

The Center for Biological Diversity (the “Center”) files the following comments on Committee Conference discussion on September 13, 2011 and the future schedule of the proceeding pursuant to the request by the Committee for comments on these topics.

I. NRG’s Request to Rescind Conditions Land-2 and Land-3 Should Be Denied.

As the Committee recognized in its order, NRG raised new issues regarding the schedule and certain permit conditions. Ignoring its own request for delay and the legal reasoning of its motion filed on August 31, 2011, NRG made a new request to eliminate conditions LAND-2 and LAND-3 from the Presiding Member’s Proposed Decision (“PMPD”). The hearing officer summarized NRG’s position in his subsequent email to the parties: “the Applicant said

Conditions LAND-2 and LAND-3 relating to the demolition and removal of the existing Encina power plant would make it difficult, due to financial considerations, to build the Carlsbad Energy Center Project.” NRG is requesting that the Committee allow NRG to backtrack on permit conditions to which NRG has already agreed. At the Conference, NRG provided no legal justification for its request that the Committee remove these certain conditions from the PMPD. Therefore, this request should be rejected.

II. The Committee Should Delay the Proceeding Until Analysis of NRG’s PSD Permit Can Be Included in the PMPD.

In addition to denying NRG’s request, the Committee should delay the proceeding until the U.S. Environmental Protection Agency (“EPA”) issues a statement of basis for NRG’s PSD permit. Although NRG has backed away from its request to delay the proceeding, the legal reasoning in its brief is still correct and that reasoning justifies a delay. In its August 31st motion, NRG states:

As CBD correctly points out, it would be premature to hold further evidentiary hearings in September 2011 because the Presiding Member cannot issue a [Revised] Presiding Member's Proposed Decision (‘RPMPD’) until a full analysis of compliance with air quality laws is made. (20 Cal. Code Regs. § 1752.3(a).) Specifically, the RPMPD ‘shall include findings and conclusions on conformity with all applicable air quality laws.’ (*Id.*)

(*See also* Center’s Response to Staff’s Status Report #11 and City of Carlsbad’s Related Letter [“Center’s Response”], pp 2-3.) NRG’s change of heart does not change the law or its valid point that the RPMPD will not be able contain an analysis of compliance with the PSD permitting until EPA has taken action.

The proceeding should be delayed until EPA issues a statement of basis, a draft permit, on NRG’s PSD permit application. In its motion, NRG explains that it sought “to postpone the CECP licensing process until such time that the Committee will be able to

incorporate accurate findings and conclusions regarding CECP's conformity with applicable federal PSD regulations based on evidence in the record for this proceeding.” The Center agrees with NRG’s written motion that a RPMPD should not be issued until there is sufficient evidence in the record. (*See* Center’s Response, pp. 2-3.) However, NRG’s request to delay the schedule only until an applicability determination is made would not provide sufficient information for the record, because the determination would only state whether PSD applied. If PSD applied, a BACT (“best available control technology”) determination would need to be made. This BACT determination would be included in a statement of basis. Thus, the delay should be based on the issuance of the statement of basis, because this document would provide sufficient information to analyze conformity with the air laws. The length of the delay is unknown because NRG has not filed a PSD permit application or requested an applicability determination.

Staff’s argument at the Committee Conference that the proceeding should continue without the PMPD analyzing conformity with PSD, federal air law, is inconsistent with section 1752.3(a), a Commission regulation describing the contents of a PMPD. That section requires the PMPD to “include findings and conclusions on conformity with *all* applicable air quality laws. . . .” (Cal. Code Regs., tit. 20, § 1752.3(a) [emphasis added].) Staff’s argument is contrary to the plain language of section 1752.3(a) which applies to “all applicable air quality laws.” In addition, it also conflicts with the Warren-Alquist Act, which requires the Commission’s written decisions to include “[f]indings regarding the conformity . . . with other applicable . . . federal standards, ordinances, or laws.” (Pub. Resources Codes §25523(d)(1).) Staff also argued that Commission practice is to issue permits without waiting for a project’s PSD

permit. Even if it is Commission practice to provide no analysis of the PSD permit in the PMPD, this practice does not justify violating the Commission's regulation or the Warren-Alquist Act in this case or any other case. The federal clean air act is an air quality law and as such should be included in the PMPD's analysis.

Furthermore, NRG should not be rewarded for its shift in position. If the Committee were to remove Conditions LAND-2 and LAND-3 and change the schedule per NRG's new request, this would only further encourage NRG to continue playing the bait and switch game, *i.e.* taking one position at one time and then taking an inconsistent position at a later time when that suited its objective.

III. The Center Requests that the Schedule Accommodate the Unavailability of the Center's Counsel.

Counsel for the Center has a trip scheduled to China from October 28th – November 20th, 2011. Counsel will be participating in a fifteen-day trip sponsored by the National Committee on US – China Relations in which eight environmental lawyers from the United States will travel to China to meet environmental law professionals in three cities in China. (*See* Exhibit A, invitation letter.) The trip is funded by a United States State Department grant. (*Id.*) Although the official trip is from November 4th – November 18th, Counsel has also planned a related vacation and is flying to China a week earlier than the official trip commences. Plane tickets have already been purchased and counsel has obtained a visa to visit China. (Exhibit B is a copy of the flight information.) Counsel will be unavailable for the whole length of the trip and will not be able to work on issues related to the proceeding. The Center currently plans on cross-examining witnesses at the evidentiary hearings and participating in any related pre-hearing conference. Given the length and distance of the trip, Counsel would also be unable to attend an evidentiary hearing and any related pre-hearing conference the day before the trip or day after

the trip.¹ As the Committee is aware, Counsel is the only attorney representing the Center in this matter, therefore, the Center respectfully requests that the Committee not schedule hearings or pre-hearing conferences from October 27th – November 21st. The Center also requests that the schedule include sufficient time, at least an additional week exclusive of October 27th – November 21st, for the Center’s counsel to review testimony and prepare for the evidentiary hearings.²

DATED: September 23, 2011



William B. Rostov
Earthjustice
Attorney for Center for Biological Diversity

¹ Counsel has been considering taking October 27th as a vacation day, but that has not been scheduled yet.

² The Center notes that the recent delay in the proceeding was triggered after NRG requested a delay of the evidentiary hearings. Already, the result of NRG’s motion is a delay of at least a month. Therefore, accommodating the Center should not have an appreciable effect on the proceeding.

EXHIBIT A



NATIONAL COMMITTEE ON UNITED STATES-CHINA RELATIONS

71 West 23rd Street, 19th Floor, New York, NY 10010-4102 (212) 645-9677 Fax: (212) 645-1695 info@ncuscr.org

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Director of Communications

JOSEPH J. WEED

Program Officers

HAINI GUO

DANIEL MURPHY

Mr. Will Rostov
Staff Attorney
Earthjustice
426 17th Street, 6th Floor
Oakland, CA 94612

August 5, 2011

Dear Will:

We are delighted to extend an invitation to you to participate in the second phase of our program on Legal Advocacy in Support of Environmental Protection. I know that the Chinese delegation members who came to the United States earlier this year as part of the first component of the program and the other experts we will meet in China will be very interested to learn more about your work.

As you know from our earlier communications, this next phase of the project will take place November 4-18. We plan for you and seven other professionals to visit Beijing, Guizhou, and Wuhan to engage in discussions with Chinese environmental law practitioners. I will escort the group, along with two State Department-approved interpreters and a scholar-escort.

Thanks to a grant from Department of State's Bureau of Educational and Cultural Affairs, the costs related to your travel to China (economy airfare, other transportation, meals, lodging, etc.) will be fully covered, except for personal expenses (long distance phone calls, laundry, etc.). The National Committee will make logistical arrangements and put together a substantive agenda with the assistance of our partners and host organizations in China.

I will be in regular contact with you and the other delegation members in the time leading up to our departure to provide further information on the study visit and will be sending you an email with information about visas, plane tickets, and other logistical matters soon. Throughout this process, if you have any questions, please don't hesitate to contact me via phone (212-645-9677 ext 36) or email (dmurphy@ncuscr.org).

Again, let me say how delighted we are to invite you to join this group.

Sincerely,

Dan Murphy

Program Officer

EXHIBIT B

CHINASMITH INC
326 WEST 43RD STREET
NEW YORK NY

CLIENT: ROSTOV/WILLIAM BRIAN

PAGE: 01

28 OCT FR UNITED SAN FRANCISCO SHANGHAI/PUDDON
FLIGHT: 857 CLASS: K SEAT: 34A
DEPART: 11:59P ARRIVE: 5:25P 29OCT

SURFACE TRANSPORTATION

20 NOV SU UNITED BEIJING SAN FRANCISCO
FLIGHT: 888 CLASS: L SEAT: 42K
DEPART: 11:59P ARRIVE: 8:29A



**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 9/19/2011)**

APPLICANT

Jennifer Hein
George Piantka, PE.
NRG Energy, Inc., West Region
5790 Fleet Street, Ste. 200
Carlsbad, CA 92008
jennifer.hein@nrgenergy.com
george.piantka@nrgenergy.com

APPLICANT'S CONSULTANTS

Robert Mason, Project Manager
CH2M Hill, Inc.
6 Hutton Centre Drive, Ste. 700
Santa Ana, CA 92707
Robert.Mason@ch2m.com

Megan Sebra
CH2M Hill, Inc.
2485 Natomas Park Drive, Ste. 600
Sacramento, CA 95833
Megan.Sebra@ch2m.com

COUNSEL FOR APPLICANT

John A. McKinsey
Stoel Rives, LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
jamckinsey@stoel.com

INTERESTED AGENCIES

California ISO
e-mail service preferred
e-recipient@caiso.com

Terramar Association
Kerry Siekmann & Catherine Miller
5239 El Arbol
Carlsbad, CA 92008
e-mail service preferred
siekmann1@att.net

INTERVENORS

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Allan J. Thompson
21 "C" Orinda Way #314
Orinda, CA 94563
e-mail service preferred
allanori@comcast.net

City of Carlsbad
South Carlsbad Coastal
Redevelopment Agency
Joseph Garuba,
Municipals Project Manager
Ronald R. Ball, Esq., City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008
e-mail service preferred
Joe.Garuba@carlsbadca.gov
e-mail service preferred
ron.ball@carlsbadca.gov

California Unions for Reliable Energy
(CURE)
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
gsmith@adamsbroadwell.com
mdjoseph@adamsbroadwell.com

Center for Biological Diversity
c/o William B. Rostov
EARTH JUSTICE
426 17th Street, 5th Floor
Oakland, CA 94612
e-mail service preferred
wrostov@earthjustice.org

Power of Vision
Julie Baker & Arnold Roe, Ph.D.
4213 Sunnyhill Drive
Carlsbad, California 92013
e-mail service preferred
powerofvision@roadrunner.com

Rob Simpson
Environmental Consultant
27126 Grandview Avenue
Hayward, CA 94542
e-mail service preferred
rob@redwoodrob.com

April Rose Sommer
Attorney for Rob Simpson
P.O. Box 6937
Moraga, CA 94570
e-mail service preferred
aprilsommerlaw@yahoo.com

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jboyd@energy.state.ca.us

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Adviser to Commissioner
Douglas
e-mail service preferred
glemei@energy.state.ca.us

Tim Olson
Adviser to Vice Chair Boyd
tolson@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

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Siting Project Manager
mmonasmi@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

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e-mail service preferred
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Jessie Baird, declare that on, September 23, 2011, I served and filed copies of the attached CENTER FOR BIOLOGICAL DIVERSITY'S RESPONSE COMMENTS ON SEPTEMBER 13, 2011 COMMITTEE CONFERENCE DISCUSSION AND ON SCHEDULE, dated September 23, 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].

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California Energy Commission
Michael J. Levy, Chief Counsel
1516 Ninth Street MS-14
Sacramento, CA 95814
mlevy@energy.state.ca.us

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