

DOCKETED

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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**AMENDED APPLICATION FOR CERTIFICATION FOR THE
HYDROGEN ENERGY CALIFORNIA PROJECT**

Docket No. 08-AFC-08A

**COMMITTEE ORDER
DENYING MOTION TO TERMINATE THE APPLICATION FOR CERTIFICATION
AND
GRANTING REQUEST FOR SUSPENSION WITH CONDITIONS**

Upon consideration of the Motion to Terminate the Application for Certification (AFC) for the Hydrogen Energy California (HECA) Project filed by Intervenor Sierra Club, HECA Neighbors, and Association of Irrigated Residents (Petitioners), and the Request for Suspension filed by Applicant Hydrogen Energy California LLC (Applicant), the Energy Commission Committee (the Committee) assigned to conduct proceedings on HECA makes the following findings:

1. On March 3, 2015, Petitioners filed a Motion to Terminate the AFC, pursuant to California Code of Regulations, Title 20, section 1720.2. Section 1720.2 allows the committee or any party to bring a motion to terminate the AFC based upon Applicant's alleged failure to pursue the AFC with due diligence.
2. On March 18, 2015, Applicant filed its response to the Motion to Terminate, setting forth facts upon which it based its claim that it had pursued the AFC with due diligence.
3. On May 5, 2015, Applicant filed a request for a six-month suspension of the AFC pursuant to California Code of Regulations, Title 20, section 1716.5. According to the document filed by Applicant, a CO₂ off-take agreement¹ was not imminent and thus a suspension was warranted.
4. On May 6, 2015, the Committee held a hearing on the Motion to Terminate the AFC. At the hearing, the Committee requested that Applicant file a sworn declaration attesting to the facts set forth in its response to the Motion to Terminate.
5. On May 20, 2015, Petitioners filed their response objecting to the Request for Suspension.

¹ The term "off-take agreement" is not defined in the Request for Suspension. For purposes of this Order, the Committee will define it as an agreement to provide CO₂ between the producer of the CO₂ and an entity wanting to secure a supply of CO₂.

6. On May 26, 2015, Applicant filed the Declaration of James L. Croyle attesting to the facts set forth in Applicant's opposition to the Motion to Terminate.
7. On June 2, 2015, Applicant filed a brief in reply to Petitioners' response objecting to suspension.

The Motion to Terminate the AFC

The sole basis for termination of an AFC pursuant to California Code of Regulations, Title 20, section 1720.2 (section 1720.2) is the applicant's failure to pursue the AFC with diligence. In opposing the motion, Applicant has set forth, in a sworn declaration offered by Mr. Croyle, details of its activities during the period from November 2013 to March 2015. There is no reason for the Committee to disbelieve the sworn declaration. The sworn declaration establishes that Occidental of Elk Hills decided to change the terms of its CO₂ off-take agreement through no fault of Applicant, and that since then Applicant has been unable to secure a revised agreement with Occidental of Elk Hills.

The sworn declaration further establishes that Applicant has sought alternative sites for carbon sequestration while continuing to try to work out an agreement with Occidental of Elk Hills and its successor, California Resources Corporation.

The term "diligence" as used in section 1720.2, is not defined in Title 20. The definition set forth in the Merriam-Webster online dictionary is: "the attention and care legally expected of a person (as a party to a contract)." The Committee will use that definition in ruling upon the Motion to Terminate.

The Committee finds that the facts set forth in Applicant's declaration demonstrate that Applicant has acted with diligence in this case. Upon learning of potential changes in its agreement with Occidental of Elk Hills, Applicant proceeded to work with Occidental of Elk Hills to develop a revised agreement, and to work to secure an alternative CO₂ off-take agreement and carbon sequestration site. These facts establish that Applicant acted with the attention and care legally expected under the circumstances.

The Request for a Six-Month Suspension

California Code of Regulations, Title 20, does not contain a specific provision for suspending an AFC proceeding on the request of a party. This Request for Suspension is brought pursuant to section 1716.5, which allows any party to bring any sort of motion, which will be considered and ruled upon by the Presiding Member. Requests for Suspension have been brought on numerous occasions in other AFC proceedings. The usual basis for such requests, including the one before us, is that the applicant has run into an obstacle that it needs time to resolve, and the suspension provides an opportunity both for the applicant to address the obstacle and for the Commission to turn its efforts and resources to other matters.

Petitioners strongly object to any suspension, stating both in their briefs and at Committee hearings that the HECA AFC proceeding is already several years old and that it is unfair to have the uncertainty of a pending AFC hanging over the heads of the landowners and

residents in the vicinity of the proposed site. Numerous additional concerns about the project are set forth in Petitioners' opposition and have been expressed at committee hearings.

Those concerns are understandable. This AFC proceeding has been pending since May 2009 (the Revised AFC) and the current Amended AFC has been pending since May 2012. What is of greatest concern to the Committee, however, is the apparent loss of the CO₂ off-take agreement and the carbon sequestration site. The proposed project is, according to the Amended AFC, intended to demonstrate the commercial viability of carbon capture and sequestration by injecting the CO₂ into older oil field wells, facilitating enhanced oil recovery². The fact that the location for carbon capture and sequestration is now unknown is a major setback to the Applicant. If a new location is to be used, full environmental analysis of that site will have to be performed. Such analysis will likely add significant amounts of time to the already unusually long review process in this case.

In order to ensure that the duration of the HECA AFC proceeding is not indefinite, the Committee finds it necessary to require certain milestones be achieved by Applicant during any suspension period. Failure to achieve those milestones may be deemed evidence of a lack of diligence on the part of Applicant. Accordingly, the Committee **orders** as follows:

1. The request for a six-month suspension is granted, subject to the conditions set forth below. The six month period shall commence on July 6, 2015, and end on January 6, 2016.
2. No later than the end of the suspension period, Applicant shall docket a report to the Committee providing the information and documentation requested in items a, b and c below.
 - a. Documentation of an executed CO₂ off-take and carbon sequestration agreement, for a site that is both feasible and available for such use;
 - b. A letter dated June 18, 2015 (CEC Docket TN 205090) from Lorelei Oviatt, Director, Kern County Planning and Community Development Department, sets forth the County's position that the project is not authorized under current land use designations to operate a chemical production facility at the proposed site. Applicant shall provide an up-to-date listing of any and all commercial products proposed to be produced by the project. In addition, Applicant shall provide a written discussion of whether or not, and why, the production of each such commercial product is or is not in compliance with Kern County's General Plan and zoning ordinance;
 - c. Completed docketed responses to all presently outstanding data requests from the parties. To the extent that any such outstanding data requests are no longer applicable due to changes in the HECA project since issuance of the data requests, Applicant shall provide a discussion of what changes to the project render the data requests inapplicable. To the extent possible,

² Amended Application for Certification, p. 1-2.

Applicant shall modify the inapplicable data requests so that they apply to the changes in the project and respond to those modified data requests.

3. In the event of non-compliance with any portion of item 2, above, the Committee may move to terminate the AFC pursuant to section 1720.2.
4. During the suspension period, Applicant shall file monthly status reports, starting on July 31, 2015, describing its activities during the preceding month.
5. The Motion to Terminate the AFC is **denied**.

Dated: July 3, 2015 at Sacramento, California.

ORIGINAL SIGNED BY:

KAREN DOUGLAS
Commissioner and Presiding Member
Hydrogen Energy California Project
AFC Committee

ORIGINAL SIGNED BY:

ANDREW McALLISTER
Commissioner and Associate Member
Hydrogen Energy California Project
AFC Committee