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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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APPLICATION FOR CERTIFICATION FOR THE:	
ALAMITOS ENERGY CENTER	**Docket No. 13-AFC-01**

COMMITTEE TENTATIVE RULING RE: STAFF'S MOTION FOR SUMMARY ADJUDICATION

INTRODUCTION AND SUMMARY

On August 31, 2016, Energy Commission staff (Staff) filed a Motion for Summary Adjudication (Motion)[1] seeking an Order excusing Staff from conducting a direct and indirect impact analysis of the demolition of Alamitos Generating Station (AGS) units 1-6, and an Order excluding evidence regarding the demolition of AGS units 1-6 except as relevant to the cumulative impacts analysis (TN 213217).

ISSUE PRESENTED

Whether the demolition of AGS units 1-6 is part of the whole of the AEC project or a potential future project subject to cumulative impacts analysis.

BACKGROUND

On December 27, 2013, AES Southland Development, LLC (Applicant or AES) submitted an Application for Certification (AFC) to the California Energy Commission (Energy Commission) seeking approval to construct the Alamitos Energy Center (AEC). The AFC was deemed "data adequate" on March 12, 2014. The Energy Commission designated a Committee of two Commissioners[2] to conduct proceedings on the AFC. On April 29, 2014, the Committee conducted a public Site Visit, Informational Hearing and Environmental Scoping Meeting in Long Beach, California. At the December 16, 2014 Status Conference, the Applicant stated that it would be filing a supplemental AFC (SAFC) (TN 206427), in the third quarter of 2015 which would reduce the proposed AEC nominal generating capacity from 1,995 MW to 1,040 MW.

On October 26, 2015, the Applicant filed the SAFC, which identified the changes to the design of the proposed AEC project. The revised AEC would be located on an

[1] TN 213217
[2] The Energy Commission designated Karen Douglas, Commissioner as Presiding Member, and Janea A. Scott, Commissioner as Associate Member, to the Committee at its March 12, 2014 Business Meeting.

approximately 21-acre site within the larger 71.1-acre AGS site. The AEC would consist of two gas turbine power blocks. Power Block 1 would consist of two natural-gas-fired combustion turbine generators in a combined-cycle configuration, with two unfired heat recovery steam generators, one steam turbine generator, an air-cooled condenser, an auxiliary boiler, and related ancillary equipment. Power Block 2 would consist of four simple-cycle combustion turbine generators with fin-fan coolers and ancillary facilities.

At the December 17, 2015 Status Conference, there was discussion of how the currently proposed project affects the Energy Commission's responsibility to assess the demolition of existing AGS units 1-6. In its January 14, 2016 Committee Scheduling Order (TN 207316), the Committee said that "Staff's environmental assessment should consider the environmental effects of these activities."

In the March 10, 2016 Notice of Status Conference and Clarification of Committee Order (TN 210673), the Committee clarified its order as follows:

> In its February 16, 2016 Status Report (TN 210341), Energy Commission staff (Staff) sought clarification on the Committee's Scheduling Order which directed Staff to analyze the environmental effects of the demolition of AGS units 1-6 (TN 207316). Staff asserts that the demolition of the AGS units is not a reasonable consequence of the AEC project and therefore seeks to limit its analysis to analyze the demolition as a part of the standard cumulative analysis in each technical area. The Committee does not object to Staff's proposal to analyze demolition of AGS units 1-6 as part of the cumulative analysis in each technical area.

On August 12, 2016, Los Cerritos Wetlands Land Trust (LCWLT), filed comments on Staff's Preliminary Staff Assessment (PSA) (TN 212764-1), asserting, among other things, that CEQA requires Staff to analyze the direct and indirect effects of demolition of AGS as part of the AEC project.

On August 31, 2016, Staff filed the Motion for Summary Adjudication seeking a ruling on where the demolition of units 1 – 6 fits within the scope of the project. (TN 213217). Applicant and Intervenor, LCWLT, filed responses to Staff's Motion on September 19, 2016 (TN 213733, TN 213732-1).

POSITIONS OF THE PARTIES

According to Staff's Motion, the demolition of AGS units 1-6 is not part of the AEC project because it is not a reasonably foreseeable consequence of the AEC project. In other words, "[t]he AEC project is not causing decommissioning or demolition of AGS." Staff argues that, "[i]t is not necessary to stop the operation of, or remove, units 1-6 to construct AEC." Staff further argues that, "[t]he state's once-through-cooling policy is driving decommissioning of AGS, while an agreement, through a Memorandum of Understanding, between the Applicant and the City of Long Beach (City) is the driver for eventual demolition of AGS." (Motion, pp. 2-3.)

The Applicant's reply brief expressly supports the positions in Staff's Motion, and offers additional support. Among other things, the Applicant states that the demolition of the AGS is not a "step" that must be taken for the construction and operation of the AEC. (Applicant's Response, p. 3-4 (TN 213733)).

LCWLT's Reply Brief asserts that the demolition of AGS units 1-6 is a "reasonably foreseeable consequence" of AEC construction and therefore should be considered a part of the whole of the project. In support, LCWLT cites the Memorandum of Understanding (MOU) between the Applicant and the City, dated Nov. 16, 2015 (TN 206920, filed again by LCWLT: TN 213732-2). According to LCWLT, the MOU "identifies a commitment by AES to demolish the existing AGS" and "in exchange for the promise by AES to demolish the existing units, the City committed to assist AES in its endeavors to obtain any permits or approvals required from governmental or quasi-governmental agencies having jurisdiction affecting the development of or provision of services to the Project."

LCWLT contends that the MOU integrates the construction and operation of the AEC with the demolition of the AGS because the demolition of AGS requires "final approvals from CAISO and CPUC – both of which are dependent upon the AEC being approved by [the California Energy] Commission." Further, LCWLT alleges that the Applicant has committed to demolish the AGS *in exchange for the City's assistance in getting the AEC approved from this Commission – a clear integration of the demolition and the "project."* (Los Cerritos Wetlands' Reply Brief, pp. 3-4) (emphasis added).

DISCUSSION AND ANALYSIS

An environmental impact report (EIR) must include analysis of the environmental effects of future expansion or other action if it is a reasonably foreseeable consequence of the initial project and the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Laurel Heights Improvement Assn. v. Regents of University of California[3].

Similarly, if an individual project is a "necessary precedent" for a larger project, or commits the lead agency to a larger project with significant environmental impacts, then the scope of the CEQA document must encompass the larger project. (See CEQA Guidelines § 15165; Lighthouse Field Beach Rescue v. City of Santa Cruz[4]).

It is well settled that CEQA forbids "piecemeal" review of the significant environmental impacts of a project.[5] Thus, the Guidelines define "project" broadly as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...." (CEQA Guidelines, § 15378, subd. (a).)

[3] 47 Cal.3d 376.
[4] 131 Cal.App.4th 1170, 1208.
[5] *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th70, 98.

The key issue that needs to be resolved is whether the demolition of AGS units 1 – 6 is a reasonably foreseeable consequence of AEC. Decisional law provides guidance as to which actions qualify as a reasonably foreseeable consequence. Some courts have concluded a proposed project is part of a larger project for CEQA purposes if the proposed project is a "crucial functional element" of the larger project such that, without it, the larger project could not proceed. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*[6], the court concluded the description of a residential development project in an EIR was inadequate because it failed to include expansion of the sewer system, even though the developer recognized sewer expansion would be necessary for the project to proceed. Because the construction of additional sewer capacity was a "required" or "crucial element" without which the proposed development project could not go forward, the EIR for the project had to consider the environmental impacts of such construction.

More recently, in *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*[7], the court held that a proposed Lowe's home improvement center and a planned realignment of the adjacent Old Wards Ferry Road were improperly segmented as two separate projects in light of the dispositive fact that the road realignment was included by the City of Sonora as a condition of approval for the Lowe's project. The court held that this was really one project, not two, because "[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project.[8]"

Other courts have used a similar analysis to reach the opposite result. In *Christward Ministry v. County of San Diego*[9], the court considered an expansion proposal for a landfill site. Petitioners contended that other waste management projects in the area should have been included in the project description and evaluated in the EIR as part of the project. The court disagreed, finding that even though there were a number of separate waste management projects occurring at the same time, there was "no record reflecting a contemplated larger project...." Consequently, treating the landfill project as an independent project in the EIR could not be equated to the "'chopping up' " of a larger project into smaller parts to evade environmental review. Furthermore, the court noted that the other projects were addressed in the cumulative impacts analysis of the EIR in accordance with CEQA requirements.[10]

Similarly, in *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs*[11], the court rejected an argument that the project description in an EIR for an airport development plan (ADP) should have included long-range plans for potential runway expansions. The runway expansion projects were not functionally linked to the ADP; and because the airport's existing runways were expected to continue operating below capacity for several years, the runway projects were unnecessary for completion of the ADP. The

[6] 27 Cal.App.4th 713, 32 Cal.Rptr.2d 704.
[7] 155 Cal. App. 4th 1214 (66 Cal. Rptr. 3d 645).
[8] (*Id.* at 1231, 66 Cal.Rptr.3d 645.).
[9] 13 Cal.App.4th 31, 16 Cal.Rptr.2d 435.
[10] (*Id.* at p. 47, 16 Cal.Rptr.2d 435.)
[11] 91 Cal.App.4th 1344, 1371, 111 Cal.Rptr.2d 598.

court noted, "the ADP does not depend on a new runway and would be built whether or not runway capacity is ever expanded." Because runway expansion was not a crucial element of the ADP or a reasonably foreseeable consequence of the ADP, the court concluded the EIR's project description was adequate and did not violate the policy against piecemealing[12].

Communities for a Better Environment v. City of Richmond[13] presents a similar scenario to that considered in *Christward Ministry and Berkeley Jets*. The Chevron refinery project at issue and a hydrogen pipeline project were found not to be interdependent, because they performed entirely different, unrelated functions. The principal purpose for the project was to allow Chevron to modify and/or replace existing refinery equipment in order to "improve the refinery's ability to process crude oil and other feed stocks from around the world and to direct more of current gasoline production capacity to the California market." The principal purpose of the hydrogen pipeline project was to provide a way to transport excess hydrogen that is not required for Chevron's operations to other hydrogen consumers in the Bay Area. Because Chevron's efforts to process a larger percentage of California fuel at the refinery did not "depend on" construction of the hydrogen pipeline, the City's treatment of the hydrogen pipeline as a separate project did not constitute illegal "piecemealing." The EIR treated the hydrogen pipeline as a separate project; however, the EIR identified the potentially significant cumulative impacts to which the hydrogen pipeline project would contribute.

Based upon the authorities above, in order to ascertain whether the demolition of AGS units 1-6 is a reasonable consequence of the AEC, we must determine whether the AGS demolition is a crucial functional element, a required element, dependent upon, interdependent, or functionally linked to the construction and operation of AEC.

LCWLT asserts that a proper reading of the MOU between the Applicant and the City makes demolition integral to the AEC. We note that the MOU makes no reference whatsoever to the AEC and the only "project" defined in the MOU is the AGS that must obtain all necessary demolition permits after it is decommissioned (MOU p. 1). The Energy Commission would not be involved in the permitting of AGS' demolition. (Cal. Pub. Res. Code § 25501). According to its terms, the MOU obligates the City to assist AES in securing approvals from other governmental agencies solely for the purpose of permitting the demolition of AGS units 1–6. LCWLT incorrectly reads the MOU to say that the City must assist the Applicant in getting the AEC certified by the Energy Commission. It plainly does not.

LCWLT further argues, without citation to authority, that final demolition approval from the California Independent System Operator (ISO) and CPUC depends upon the AEC being approved by the Energy Commission. The only reference to the California ISO and CPUC approvals in the MOU states, "AES will demolish the AGS Units once all necessary permits from the City are received, and if required, the final and unappealable approval of the California Independent System Operator, the California

[12] (*Id*. at p. 1362, 111 Cal.Rptr.2d 598.)
[13] 184 Cal. App. 4th 70.

Public Utilities Commissions, the California Water Resources Control Board and/or any other government agency with jurisdiction over the AGS Units and related demolition activities." (MOU p. 2). Here again, there is neither any acknowledgement of the AEC nor a logical basis to infer that any performance contemplated within the MOU is dependent upon the certification of the AEC. We find that there is nothing in the MOU to support the conclusion that there is an "integral" relationship between the demolition of AGS units 1–6 and the construction and operation of AEC.

The record makes clear that the decommissioning of the AGS units 1–6 is a separate matter from demolition. The decommissioning of the AGS is an option that the Applicant has chosen in response to the State Water Resources Control Board's policy phasing out once-through-cooling by December 31, 2020. The Statewide Water Quality Control Policy on the Coastal and Estuarine Waters for Power Plant Cooling[14] (Policy) became effective October 1, 2010, three years before the AEC application for certification was filed with the Energy Commission. The Implementation Schedule, item 26 on page 14 of Attachment 1 of the Policy, expressly identifies AGS's obligation to comply by December 31, 2020. While the decommissioning of the AGS is a "reasonably foreseeable consequence" of the AEC, the demolition of AGS units 1–6 is not.

Finally, LCWLT relies on *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*[15] (*supra*) to support the argument that demolition of AGS units 1-6 is part of the AEC project.

In *Tuolumne*, the court held that the Lowe's home improvement center and a planned realignment of the adjacent road were really one project, not two, because "[t]heir independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project."[16]

In the present case, there is no actual or proposed condition of certification for the AEC that requires demolition of the AGS. Thus, *Tuolumne* is distinguishable on its facts because the independence of the two projects has not been "brought to an end." It was only after the *Tuolumne* court found a "strong connection between the road realignment and the completion of the proposed home improvement center" that the court turned to general CEQA principles to "test that result."[17] Our record provides no such strong connection between the construction or operation of the AEC and the demolition of the AGS.

Moreover, LCWLT's interpretation of *Tuolumne* does not accurately describe the "general principles" of CEQA that the court set forth in that case.[18] Specifically, LCWLT's arguments sidestep the overarching general principle of CEQA articulated by the *Tuolumne* Court: consideration of "how closely related the acts are to the overall

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[14] http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/policy100110.pdf.
[15] 155 Cal. App. 4th 1214 (66 Cal. Rptr. 3d 645).
[16] *Id.* at 1231; see *Communities for a Better Environment v. City of Richmond Court of Appeal* (2010) 184 Cal.App.4th 70, 99.
[17] *Id.* at 1226.
[18] LCWLT Reply Brief, p. 5.

objective of the project."[19] The *Tuolumne* Court stated, "The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the 'various steps which taken together obtain an objective.'"[20]

In *Tuolumne*, the Court applied these general principles and concluded that the proposed physical act (realignment of a road pursuant to a condition of approval), was "a step that Lowe's must take to achieve its objective" of opening and operating a home improvement center.[21] As a result, the Court concluded that the road alignment and the construction and operation of the home improvement center were part of a single CEQA project.[22]

This is not the case in this application. The demolition of the AGS is not a "step" that must be taken for the AEC to achieve its objective.[23] The AEC can be constructed and operated with or without the demolition of the AGS. The demolition of the AGS is not interdependent with the AEC, nor is it a crucial functional element, a required element, dependent, or functionally linked to the AEC.

Finally, LCWLT states under the heading "*Timing of Demolition Argues for Revised PSA*," that, "the Staff Motion properly states that, 'there is no concrete date in which demolition may occur except sometime after 2020.' (Motion at p.4, para. 3) But this ambiguity, or lack of a "concrete date", is no excuse for avoiding a thorough analysis of impacts related to demolition – it simply underscores the need for a revised PSA."[24]

First, we note that the PSA is not a decisional document. It is Staff's preliminary expert testimony analyzing the SAFC and is subject to a 30-day comment period. The PSA is revised when Staff files its Final Staff Assessment (FSA) which they docketed on September 23, 2016[25]. LCWLT will be able to cross examine Staff's experts at the evidentiary hearing, but the Committee will not order a revised PSA.

Secondly, there are only two facts which address the question of the timing in the record before us. One is the December 31, 2020 date by which the AGS must cease once-through-cooling according to the Statewide Water Resources Quality Control Policy (*supra*). The other is the paragraph entitled "Timeline" in the MOU. The December 31, 2020 date mandates neither decommissioning nor demolition of the AGS. It is merely the deadline by which AGS must cease once-through-cooling. We can infer from the record that the Applicant will eventually decommission the AGS rather than find an alternative source of water, but we do not know when the decommissioning will occur.

The "timeline" referenced in the MOU states in its entirety:

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[19] 155 Cal. App. 4th 1214; 1226.
[20] *Id.* at 1226 (citing to Robie et al., Cal. Civil Practice- Environmental Litigation (2005) § 8.7).
[21] *Id.* at 1227.
[22] *Id.* at 1226.
[23] See, SAFC, p. 202, TN #206427-1.
Also see, *Preliminary Staff Assessment for Alamitos Energy Center* ("PSA"), p. 4.1-22 (July 2016), TN #212284.
[24] LCWLT Reply Brief, p. 5.
[25] TN 213768

> AES will apply for demolition permits from the City on or before the AGS Units cease operating permanently. The determination of when the AGS Units have ceased operating permanently is within the sole discretion of AES. However, should all of the units be out of operation for one year, AES will meet and confer with the City to determine the date on which the units will be deemed to have permanently ceased operating. The Parties will use their best efforts to ensure that the demolition permits and any other required City permits, approvals or licenses necessary for demolition of the AGS Units are issued within three months of the date the City deems the application complete.[26]

It is noteworthy that the MOU expires by its own terms a month and a half before the deadline to curtail once-through-cooling set by the State Water Resources Quality Control Policy. Nevertheless, there is nothing in the record that compels us to conclude anything more specific than that the demolition of the AGS units 1-6 will occur, if at all, sometime in the unspecified future. We are persuaded that the construction and operation of the AEC has no bearing on the timing of the demolition of the AGS.

We agree with LCWLT's statement that "lack of a "concrete date" is no excuse for avoiding a thorough analysis of impacts related to demolition." Because the demolition of AGS units 1-6 is reasonably foreseeable, it will be analyzed as a future project in the AEC's cumulative impacts analysis.

This ruling on the scope of the project as requested in Staff's Motion for Summary Adjudication is necessary to clarify the parties' understanding of the scope of the project to prepare for the upcoming evidentiary hearing. All other requests for orders or findings by the parties are **DENIED** without prejudice.

CONCLUSION

Based upon the foregoing, we find that the demolition of AGS units 1-6 is not a reasonably foreseeable *consequence* of the AEC. Therefore, the demolition of AGS units 1-6 is not a part of the whole of the AEC project. However, the demolition of the AGS units is reasonably foreseeable and therefore, must be analyzed as a future project in the cumulative analyses of the Energy Commission's environmental analysis documents.

[26] MOU pp. 2-3.

SO ORDERED.

Dated: September 28, 2016 at Sacramento, California.

Original signed by

KAREN DOUGLAS
Commissioner and Presiding Member
Alamitos Energy Center AFC Committee

Original signed by

JANEA A. SCOTT
Commissioner and Associate Member
Alamitos Energy Center AFC Committee