

## DOCKETED

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**STATE OF CALIFORNIA**

**Energy Resources Conservation and Development Commission**

In the Matter of:

Docket No. 08-AFC-8A

The Application for Certification for the  
Hydrogen Energy California Project

**INTERVENORS' MOTION TO TERMINATE APPLICATION FOR CERTIFICATION  
FOR THE HYDROGEN ENERGY CALIFORNIA PROJECT**

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Sierra Club, HECA Neighbors, and Association of Irrigated Residents respectfully request that the Committee overseeing the proceeding on the Application for Certification for the Hydrogen Energy California (HECA) project terminate the proceeding under Title 20, California Code of Regulations, section 1720.2, because the project applicant has failed to pursue the application with due diligence. Most notably, the applicant cannot obtain a contract to sell its carbon dioxide (CO<sub>2</sub>) to the adjacent Elk Hills oil field. Without a CO<sub>2</sub> contract, the project is financially and legally infeasible. Abundant additional evidence points to the same conclusion that the project cannot proceed, including the lack of an acceptable water supply plan, and the impossibility of qualifying for and spending DOE's full funding allocation by the September 2015 statutory deadline.

For the last 18 months, the applicant and owner, SCS Energy California LLC (SCS), has failed to provide staff with a CO<sub>2</sub> contract between SCS and the Elk Hills oil field owner, and other critical information. SCS has also closed its local information office, failed to update its website, and, in stark contrast to its past media presence, refused to respond to any request for public comment. SCS' last status report, filed over ten months ago, failed to report a single informational update on the project. SCS' actions – more pointedly, lack of actions – demonstrate that it is not pursuing the HECA project with due diligence, and the Commission should therefore terminate the proceeding. In the alternative, the Commission should issue an order to the applicant to show cause why the proceeding should not be terminated.

## **I. Background on the Controversial HECA Project**

For seven years, the Commission, along with other local, state, and federal agencies, has dedicated significant staff time and other valuable resources to reviewing the HECA proposal.<sup>1</sup> The Commission coordinated its review with the Department of Energy (DOE), which awarded HECA a total of \$408 million dollars.<sup>2</sup> After \$75 million dollars of tax payer money was spent

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<sup>1</sup> An application for certification (08-AFC-8) for the HECA project was originally filed on July 31, 2008. SCS Energy California, LLC filed an amended application on May 2, 2012 (08-AFC-8A). See CEC, *General Description of Project*, at [http://www.energy.ca.gov/sitingcases/hydrogen\\_energy](http://www.energy.ca.gov/sitingcases/hydrogen_energy); see also Preliminary Staff Assessment/Draft Environmental Impact Statement, (June 28, 2013), hereinafter ("PSA/DEIS"), at 1-6.

<sup>2</sup> PSA/DEIS at 1-20.

on the original proposal,<sup>3</sup> a new power plant development company headquartered in Concord, Massachusetts, SCS Energy California, LLC, filed an amended application on May 2, 2012.<sup>4</sup>

The proposed HECA facility has been ill-conceived from the start, drawing broad vocal opposition from the local and regional community. HECA has been extremely controversial and unlikely to succeed because the project proposes to ship coal by open-top rail car over 650 miles<sup>5</sup> into the nation's leading clean energy state, draw significant amounts of usable agricultural water away from an over-tapped aquifer during a severe drought, and burn coal in the most polluted air basin in the country, while providing no benefit to California's energy consumers.<sup>6</sup> The project's precarious financial viability is dependent on its ability to pump regional water, sell its carbon dioxide emissions to the adjacent Elk Hills oil field for enhanced oil recovery, and obtain funding from DOE. As explained below, Elk Hills is unwilling to buy HECA's carbon dioxide, HECA's water supply proposal is not approvable under state and Commission policies, and the project cannot meet its deadlines for DOE funding.

## **II. The HECA Proposal Cannot Advance Because Applicant Cannot Overcome Two Significant Unresolved Issues: Carbon Sequestration and Water Supply.**

### **A. SCS is Not in Negotiations with the Owners of the Elk Hills Oil Field to Purchase and Sequester HECA's CO<sub>2</sub>.**

The sale and sequestration of carbon dioxide to the adjacent Elk Hills oil field is central to the project proposal, and both applicant and the Commission have recognized that it is crucial to the financial and legal viability of the HECA project. Indeed, about half of the applicant's claimed project objectives are based on providing "low-carbon electricity," capturing and sequestering

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<sup>3</sup> US Dept. of Energy, Office of Inspector General, Office of Audits and Inspections, Audit Report Hydrogen Energy California Project, OAS-RA-13-22 at 12 (June 2013), hereinafter ("DOE Audit Report"), at <http://energy.gov/sites/prod/files/2013/06/f1/OAS-RA-13-22.pdf>.

<sup>4</sup> CEC, General Description of Project, *supra*; see also PSA/DEIS at 1-6.

<sup>5</sup> See generally PSA/DEIS 1-7 (rail route from New Mexico to Wasco, California). Approximate distance from New Mexico coal mine to Wasco, California is 700 miles.

<sup>6</sup> This behemoth fertilizer project would be extremely inefficient as a power plant. HECA would provide only 53 MW of added power to the grid during its maximum electricity production, and it would pull 62 MW from the grid during maximum fertilizer production. PSA/DEIS at 1-7.

CO<sub>2</sub> for enhanced oil recovery (EOR), and even more specifically, “sit[ing] the project at a location...which offers reasonable access...[to] geologic formations appropriate for CO<sub>2</sub> EOR and sequestration.”<sup>7</sup> CO<sub>2</sub> sequestration is also essential for DOE funding for the project,<sup>8</sup> which is another claimed objective of the applicant.<sup>9</sup>

HECA’s carbon dioxide must be sequestered for the project to be viable for at least three reasons: 1) to comply with state and federal greenhouse gas regulations;<sup>10</sup> 2) to receive essential federal funding;<sup>11</sup> and 3) CO<sub>2</sub> sales revenue is a necessary component of the project’s financial viability.<sup>12</sup>

The Elk Hills oil field is the only potential purchaser for the facility’s carbon dioxide. In fact, alternative sites for the facility were eliminated from consideration in the alternatives analysis because the applicant was unable to reach agreement with owners and operators of other oil fields for CO<sub>2</sub> injection.<sup>13</sup>

Now, SCS is also unable to reach agreement with the owners of the Elk Hills oil field for sale of the project’s CO<sub>2</sub>. Not only has SCS been unable to secure a contract with the oil field in the seven years since this project was originally proposed, nor in the 18 months since Commission staff insisted on reviewing the contract, but the two parties are no longer even in negotiations regarding a contract. Last year, the oil field ownership changed hands when Occidental California split from Occidental Petroleum Corporation and became a separately traded company known as California Resources Corporation (CRC).<sup>14</sup> Following the split, the new owner CRC

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<sup>7</sup> PSA/DEIS at 6-13.

<sup>8</sup> *E.g.*, DOE Audit Report at 1.

<sup>9</sup> PSA/DEIS at 6-13.

<sup>10</sup> *See generally* PSA/DEIS 4.3 (“Carbon Sequestration and Greenhouse Gas Emissions”).

<sup>11</sup> DOE Audit Report at 1.

<sup>12</sup> *See* DOE Audit Report at 1-3; Applicant’s Status Report No. 8, 08-AFC-08, TN # 200322 at 4 (Aug. 13, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200322\\_20130823T131720\\_Applicant's\\_Status\\_Report\\_No\\_8.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200322_20130823T131720_Applicant's_Status_Report_No_8.pdf) (discussing tax incentives).

<sup>13</sup> PSA/DEIS at 6-14 to 6-15 (“The project applicant considered siting the project on the property of British Petroleum (BP) Carson Refinery in Los Angeles County...However, in 2007, the applicant was unable to reach consensus with the multiple owners and operator of a nearby oil field for a viable off-take agreement for CO<sub>2</sub> injection.”).

<sup>14</sup> *See* CRC, Occidental Petroleum to Separate its California Business, Creating Two Independent, Publicly Traded Energy Companies (Feb. 14, 2014), at <http://news.crc.com/press-release/occidental-petroleum-separate-its-california-business-creating-two-independent-publicl>.

announced that the company is not in negotiations with the applicant for the HECA project. CRC spokeswoman Holly Arnold stated in no uncertain terms in a Kern Golden Empire news report that “[t]he company is not currently in negotiations with the developer of the Hydrogen Energy California project.”<sup>15</sup> Therefore, regardless of the intentions of the previous owner, the current owner of the oil field appears to have no intention of buying carbon dioxide from this controversial project.

Staff’s review of the project cannot proceed absent this apparently-unattainable contract governing the sequestration of CO<sub>2</sub> from HECA into the Elk Hills oil field. A year and a half has passed since staff first asked applicant to provide the Elk Hills CO<sub>2</sub> contract. In the June 28, 2013 PSA/DEIS, Commission staff flagged that one of the project’s “*significant... unresolved issues*”<sup>16</sup> was the lack of a binding contract with the Elk Hills oil field. “In order to verify permanent and safe sequestration of HECA’s CO<sub>2</sub> emissions, staff must receive from SCS a binding contract between SCS Energy and the owner of Elk Hills oil field that:

- a) Identifies the responsibilities of each party to demonstrate and document permanent sequestration of the supplied CO<sub>2</sub>.
- b) Documents Hydrogen Energy California’s rights to the entire CO<sub>2</sub> sequestration emissions reductions as necessary for SB 1368 EPS and other regulatory compliance.
- c) Clearly states that the CO<sub>2</sub> sequestration emissions reductions shall not be used for any other purpose than providing for the compliance obligation needs for HECA.
- d) This contract shall also require Occidental of Elk Hills, Inc. to provide a Carbon Dioxide Emissions Sequestration Plan to the Energy Commission for review and approval as detailed under the preliminary staff Condition of Certification GHG-3.”<sup>17</sup>

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<sup>15</sup> Kern Golden Empire, 17 News Investigation: \$153 Million of Taxpayer Money Spent on HECA Project (Dec. 29, 2014), (hereinafter “Kern Golden Empire”), at <http://www.kerngoldenempire.com/story/d/story/17-news-investigation-153-million-of-taxpayer-mone/31120/9tu6c8QRkESZZ9vRkxkAvA>

<sup>16</sup> PSA/DEIS at 1-1.

<sup>17</sup> *Id.* at 4.3-96.

SCS's ongoing failure to fulfill staff's request and its inability to obtain a CO<sub>2</sub> sales contract shows its lack of due diligence and the futility of continuing pursuit of this project.

## **B. HECA's Proposed Water Supply Plan is Untenable and Alternatives are Financially Infeasible**

During California's worst drought on record, HECA plans to draw a staggering 7,500 acre-feet per year from an already overtapped water basin in the center of the nation's richest and most productive agricultural region.<sup>18</sup> Governor Brown declared a State of Emergency on January 17, 2014, and most of the Central Valley, including Kern County, remains designated as experiencing exceptional drought (D4) conditions.<sup>19</sup> Possible impacts associated with D4 drought classification include exceptional and widespread crop/pasture losses and shortages of water in reservoirs, streams, and wells, leading to water emergencies. Contrary to the applicant's claim that its proposed water source is degraded, local farmers have provided information, including peer-reviewed studies, demonstrating that the proposed water supply is in fact currently being used to irrigate salt-intolerant crops like alfalfa.<sup>20</sup>

Given that "a fundamental requirement for a power plant licensed by the Energy Commission is to demonstrate... that its [water] use constitutes the least amount of the most degraded source available," staff concluded in the PSA/DEIS that the project's massive water consumption "may not be consistent with Energy Commission and other state water policies."<sup>21</sup> Among other problems, the pumping could "exacerbate overdraft in the Kern County subbasin..., induce a significant proportion of degraded water to move into the local water-supply aquifer..., [and] increase the threat to the California Aqueduct from subsidence."<sup>22</sup>

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<sup>18</sup> PSA/DEIS at 1-8, 4.15-3.

<sup>19</sup> See generally Articles re California Drought and U.S. Drought Monitor, 08-AFC-08A, TN # 201762 (Feb. 9, 2014), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201762\\_20140219T150352\\_CEC\\_Docket\\_No\\_08AFC8A\\_Articles\\_re\\_CA\\_Drought\\_USDM\\_21914.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201762_20140219T150352_CEC_Docket_No_08AFC8A_Articles_re_CA_Drought_USDM_21914.pdf); see also U.S. Drought Monitor, *U.S. Drought Monitor California* (Feb. 19, 2015), at <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>.

<sup>20</sup> See generally Beau Antongiovanni Comments: Comment and Salinity Field Trial Report, TN # 200819 (Oct. 10, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200819\\_20131010T135851\\_Beau\\_Antongiovanni\\_Comments\\_Comment\\_and\\_Salinity\\_Field\\_Trial\\_Re.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200819_20131010T135851_Beau_Antongiovanni_Comments_Comment_and_Salinity_Field_Trial_Re.pdf).

<sup>21</sup> PSA/DEIS at 4.15-3, 4.

<sup>22</sup> *Id.*

One of the proposal's greatest problems, as staff identified, is that the applicant "neglected to adequately consider a dry-cooled project alternative."<sup>23</sup> Dry cooling would significantly reduce the project's water consumption as well as reduce particulate matter emissions from the cooling towers. As Sierra Club demonstrated in comments, several combined-cycle plants in California operate with dry-cooling as do other gasification plants around the world.<sup>24</sup>

To comply with state and Commission water policies, HECA must demonstrate that its proposed use is the "most degraded source available." To date, the applicant has failed to make that demonstration, despite repeated requests for information.<sup>25</sup> Further, staff would likely require the project to use dry cooling, and the applicant stated in workshops that the costs of dry cooling would render the project financially infeasible. Thus, the project's inability to secure an acceptable water supply, or to economically incorporate dry cooling, are additional facts showing the applicant has not pursued this project with due diligence. California's continued drought further underscores HECA's proposed water use as impracticable.

### **III. SCS Cannot Meet Its Deadlines to Secure Essential DOE Funding**

The Department of Energy (DOE) awarded HECA a total of \$408 million in tax payer funds,<sup>26</sup> with \$275 million allocated from the American Recovery and Reinvestment Act (ARRA).<sup>27</sup> Though a good portion of these funds have been spent paying consultants and lawyers in the

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<sup>23</sup> *Id.* at 4.15-5.

<sup>24</sup> Sierra Club's Comments on Air Quality, Water Supply, Alternatives, Public Health and Nuisance, 08-AFC-08A, TN# 200719 at 8-9 (Oct. 2, 2013), *at* [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200719\\_20131002T102420\\_Sierra\\_Club's\\_Comments\\_on\\_Air\\_Quality\\_Water\\_Supply\\_Alternatives.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200719_20131002T102420_Sierra_Club's_Comments_on_Air_Quality_Water_Supply_Alternatives.pdf).

<sup>25</sup> One of the last updates from staff in the HECA docket noted that their continued concerns about water use and that "staff is still waiting for a significant amount of this information." *See* Response Letter to Honorable Rudy Salas, Jr., 08-AFC-08A, TN #203049 at 1 (Sept. 11, 2014), *at* [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN203049\\_20140911T093402\\_Response\\_Letter\\_to\\_Honorable\\_Rudy\\_Salas\\_Jr\\_dated\\_September\\_10\\_2.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN203049_20140911T093402_Response_Letter_to_Honorable_Rudy_Salas_Jr_dated_September_10_2.pdf); and Response Letter to Honorable Shannon Grove, 08-AFC-08A, TN #203050 at 1 (Sept. 11, 2014), *at* [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN203050\\_20140911T093401\\_Response\\_Letter\\_to\\_Honorable\\_Shannon\\_Grove\\_dated\\_September\\_10\\_2.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN203050_20140911T093401_Response_Letter_to_Honorable_Shannon_Grove_dated_September_10_2.pdf).

<sup>26</sup> PSA/DEIS at 1-20.

<sup>27</sup> Recovery.gov, Clean Coal Power Initiative Oct. 1-Dec. 31, 2013 Grants – Award Summary, *at* <http://www.recovery.gov/arra/Transparency/RecoveryData/pages/RecipientProjectSummary508.aspx?AwardIdSur=34509&AwardType=Grants>, (showing HECA's total award amount as \$275,000,000).



permitting phase,<sup>28</sup> DOE must prepare a final EIS before it determines whether to fully fund HECA's construction and operation.<sup>29</sup> DOE allocated \$133 million of the total \$408 million for the initial "Phase I" permitting and design work.<sup>30</sup> The remaining \$275 million would be available for the construction and operation phases of the project only if the project were able to obtain a set of defined "Decision Points."<sup>31</sup> Those Decision Points include final certification from the Commission, California Public Utilities Commission (CPUC) approval of a power sales contract, and a Record of Decision from DOE.<sup>32</sup> All ARRA funds "must be spent or returned to the Treasury by September 30, 2015."<sup>33</sup>

In other words, as of today, SCS has seven months left to obtain full certification from the Commission, a Final EIS, CPUC approval of a power purchase agreement, and utilize the remaining funds for construction. As shown below, fulfilling all of these requirements is functionally impossible.

First, according to SCS, to meet the timing constraints for DOE funding, "the Project requires approvals from the CEC and DOE by the second quarter of 2014 to allow investors adequate time to complete their diligence of the Project and for the financing to close and construction to begin. We emphasize that the financial diligence for this Project will be compressed even assuming the Applicant's proposed schedule."<sup>34</sup> SCS' proposed schedule at that time was for an FSA by December 2, 2013 and Evidentiary Hearing in January.<sup>35</sup> As discussed, staff cannot proceed with an FSA until SCS provides additional information—information that SCS simply cannot provide because it cannot obtain a CO<sub>2</sub> contract, or economically incorporate dry cooling.

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<sup>28</sup> DOE's last online update on HECA's invoices is December 2013. *See Id.*

<sup>29</sup> Letter from R. Paul Detwiler, NETL to Karen Douglas et al, 08-AFC-08A, TN # 69749 at 1 (Mar. 1, 2013), at [http://www.energy.ca.gov/sitingcases/hydrogen\\_energy/documents/others/2013-03-01\\_Department\\_of\\_Energy\\_Letter\\_Regarding\\_Schedule\\_for\\_the\\_Proposed\\_Project\\_TN-69749.pdf](http://www.energy.ca.gov/sitingcases/hydrogen_energy/documents/others/2013-03-01_Department_of_Energy_Letter_Regarding_Schedule_for_the_Proposed_Project_TN-69749.pdf).

<sup>30</sup> Exhibit A, DOE HECA Assistance Agreement (Excerpts) at 3. Due to file size restrictions, the Agreement is not attached in full, but it is available upon request.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> Letter from R. Paul Detwiler, NETL to Karen Douglas et al., *supra* at 1.

<sup>34</sup> Applicant's Status Report No. 8, 08-AFC-08A, TN # 200322 at 3 (Aug. 23, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200322\\_20130823T131720\\_Applicant's\\_Status\\_Report\\_No.8.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200322_20130823T131720_Applicant's_Status_Report_No.8.pdf) (emphasis added).

<sup>35</sup> *Id.* at 2.

Second, although the Commission and DOE originally intended to coordinate environmental review of the project, and they jointly published a PSA/DEIS, DOE subsequently determined that information gaps were so vast that it would need to issue a Revised Draft Environmental Impact Statement (RDEIS) once further information was received from the applicant.<sup>36</sup> DOE is still awaiting significant information from SCS. Even supposing SCS could timely provide this information, DOE would still need to draft an RDEIS, hold a public comment period, then issue an FEIS and an ROD before SCS could spend additional funds.

Finally, given recent exposés of the highly improper (and possibly criminal) backroom dealings between the CPUC and PG&E representatives regarding HECA, it is highly unlikely that HECA could ever obtain a power purchase agreement, let alone CPUC approval. As reported in the San Francisco Chronicle, which conducted a review of 65,000 emails, PG&E Vice President Brian Cherry wrote to former CPUC President Micheal Peevey that “‘you owe’ another PG&E executive for keeping alive the struggling \$4 billion project near Bakersfield.”<sup>37</sup> A month later, Cherry called on Peevey’s top aide to repay the debt by intervening to appoint an administrative law judge he wanted to oversee a \$1.3 billion rate case [regarding the San Bruno pipeline explosion.]”<sup>38</sup> Putting aside the questions regarding these improprieties, and whether SCS had any involvement, public perception alone should forestall any chance that a utility would associate with this tainted project or that the CPUC could ever approve such a deal.<sup>39</sup>

DOE’s own internal auditors predicted that HECA would be unable to secure the necessary private investment to proceed. A June 2013 internal audit report on HECA’s funding flagged “the Department is managing HECA at an increased risk level” and warned that “the Department

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<sup>36</sup> See CEC Staff Status Report No. 11, 08-AFC-08A, TN # 201260 at 1 (Nov. 19, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201260\\_20131119T144340\\_CEC\\_Staff\\_Status\\_Report\\_No\\_11.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201260_20131119T144340_CEC_Staff_Status_Report_No_11.pdf) (DOE is considering issuing a RDEIS with the FSA); see also Revised Committee Scheduling Order, 08-AFC-08A, TN # 201601 at 4 (Jan. 27, 2014), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201601\\_20140127T094429\\_Revised\\_Committee\\_Scheduling\\_Order.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201601_20140127T094429_Revised_Committee_Scheduling_Order.pdf) (providing a proposed date for the filing of the RDEIS/FSA).

<sup>37</sup> Jaxon Van Derbeken, PG&E e-mails may prove pivotal in probe of regulator, SFGate (Feb. 16, 2015) <http://www.sfgate.com/news/article/PG-E-e-mails-may-prove-pivotal-in-building-case-6082926.php>.

<sup>38</sup> *Id.*

<sup>39</sup> See also Exhibit B, Sarah Smith, Dinner, drinks, lobbying advice: Vast email trove lays bare PG&E-CPUC coziness, SNL Energy (Feb. 17, 2015) (used with permission); Exhibit C, Sarah Smith, 'God knows what is underground': A timeline of PG&E-CPUC interactions, SNL Energy (Feb. 17, 2015) (used with permission).

is at risk of expending \$133 million for its share of project costs in the first phase without it being completed if the recipient is unable to obtain funding for the next project phase.”<sup>40</sup> DOE has now spent at least \$150 million dollars of taxpayer money on a bad idea that should have never received federal funds in the first place.<sup>41</sup>

DOE recently cancelled funding for FutureGen, another so-called “clean coal” project, and reports indicated that FutureGen’s demise means certain death for HECA as well. According to Christopher Smith, assistant secretary of energy for fossil fuels, FutureGen “struggled to attract sufficient commercial interest...[and therefore] The Energy Department determined that FutureGen’s sponsors couldn’t meet the September deadline to get the project’s plans finalized.”<sup>42</sup> Assistant Secretary Smith remarked that since HECA is under the same statutory deadline as FutureGen, and “Congress was not going to act to extend the deadline... The challenges that we see with FutureGen are also going to largely apply to HECA.”<sup>43</sup> Jim Wood, who served as deputy assistant secretary of Energy from 2009 to 2012 and now heads the U.S.-China Clean Energy Research Center at West Virginia University, commented that because DOE has pulled support for FutureGen, “I think both of those projects [FutureGen and HECA] are likely dead.”<sup>44</sup> The MIT CCS Project website also reported: “September 2014. Contracts to sell the CO<sub>2</sub> to Oxy for CO<sub>2</sub>-EOR in the Elk Hills have still not been finalized. The project looks like it could be cancelled if it is not finalized by spring 2015 when it goes before the California Commission for the final vote.”<sup>45</sup> And as has become the new norm, HECA representatives failed to respond to reporters.<sup>46</sup>

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<sup>40</sup> DOE Audit Report at 5.

<sup>41</sup> It is not clear how much of the total \$408 has been spent. As of June 2013, \$150 million has been invoiced. *See* Recovery.gov, *supra*.

<sup>42</sup> Jim Snyder & Mark Dragem, FutureGen’s Demise Shows Carbon Capture for Coal Faces Woes, Bloomberg (Feb. 25, 2015), <http://www.bloomberg.com/news/articles/2015-02-05/futuregen-s-demise-shows-carbon-capture-for-coal-faces-long-road>.

<sup>43</sup> Exhibit D, Annalee Grant, DOE says hands were tied on canceling FutureGen funding; HECA also at risk, SNL Energy (Feb. 5, 2015) (used with permission).

<sup>44</sup> Mathew Phillips, et al., The White House Walks Away From Clean Coal, McClatchyDC (Feb. 25, 2015), <http://www.mcclatchydc.com/2015/02/17/256840/the-white-housewalks-away-from.html>; *see also* Exhibit D.

<sup>45</sup> Carbon Capture & Sequestration Technologies @ MIT, Hydrogen Energy California Project (HECA) Fact Sheet, <https://sequestration.mit.edu/tools/projects/heca.html>

<sup>46</sup> Phillips *supra*; *see also* Exhibit D.

The financial viability of the HECA project is dependent on the DOE funding, yet SCS cannot meet the timing requirements necessary to obtain further project funding from DOE. SCS' failure to obtain the information and certifications necessary for DOE funding demonstrates its lack of due diligence.

#### **IV. SCS has Failed to Diligently Pursue the HECA Project For At Least the Last 18 Months**

Since the publication of the PSA/DEIS on June 28, 2013, staff has consistently and repeatedly requested the same outstanding information from the applicant, as detailed below. We also provide additional important details in the following timeline that demonstrate SCS' failure to diligently pursue or proceed with this project.

- September 9, 2013: The applicant's last update to the "Project News" section of its website.<sup>47</sup>
- October 8, 2013: Staff reported that "significant pieces of information remain outstanding,"<sup>48</sup> including the need for "significantly more detail" on Elk Hill's monitoring, reporting and verification plan, jurisdictional and permitting requirements for CO<sub>2</sub> sequestration, surveys on cultural and biological resources in the Elk Hills oil field, further evaluation of impacts from increased use of the Coal Transfer Facility in Wasco, and further evaluation of impacts of additional truck traffic on school bus routes.<sup>49</sup>
- November 19, 2013: Staff remarked that "a lot of the information identified as outstanding in the PSA/DEIS . . . remains outstanding."<sup>50</sup> Specifically, "staff needs the applicant to provide, at the very least, the contractual terms it intends to enter into with [Elk Hills] to ensure [Elk Hills] will abide by the Energy Commission's conditions of

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<sup>47</sup> HECA, Project News, at <http://hydrogenenergycalifornia.com/project-news>.

<sup>48</sup> CEC Staff Status Report No. 10, 08-AFC-08A, TN #200784 at 1-2 (Oct. 8, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200784\\_20131008T114627\\_CEC\\_Staff\\_Status\\_Report\\_No\\_10.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN200784_20131008T114627_CEC_Staff_Status_Report_No_10.pdf).

<sup>49</sup> *Id.* at 2-3.

<sup>50</sup> CEC Staff Report No. 11, *supra* at 1. .

certification...” as well as a more detailed monitoring, reporting and verification plan. Staff also listed additional information needed on biological resources, cultural resources, noise and vibration, traffic and transportation, waste management, water resources, and transmission system engineering.<sup>51</sup>

- November 20, 2013: The Commission questioned HECA representatives about the missing carbon sequestration contract at a conference in Buttonwillow, emphasizing that “staff needs the applicant to provide the contractual terms Oxy [Elk Hill oil field then-owner] will enter into.”<sup>52</sup> HECA claimed that negotiations for the contract were ongoing, and they were working “diligently” with Oxy.<sup>53</sup> HECA’s counsel promised: “[w]e can assure the contract [will be] finalized before the [Final Staff Assessment].” At the time, the Final Staff Assessment was planned to be released in the first quarter of 2014.<sup>54</sup>
- February 28, 2014: Commission staff report repeated that “[a]ll other informational needs identified in staff’s previous status report remain outstanding.”<sup>55</sup> This included “responses to staff’s data requests concerning potential impacts in the Elk Hills Oil Field and specific, detailed information related to the carbon sequestration proposal, including a revised Monitoring, Reporting, and Verification Plan.”<sup>56</sup> Additionally, “[a] final agreement between HECA/SCS and Occidental of Elk Hills, Inc., to sequester CO<sub>2</sub> from the project is also required for staff to proceed.”<sup>57</sup>

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<sup>51</sup> *Id.* at 2-4.

<sup>52</sup> See generally 11.20.13 Transcript on Committee Conference re Preliminary Staff Assessment and Draft Environmental Impact Statement, 08-AFC-08A, TN #201515 at 50 (Jan. 7, 2014), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201515\\_20140107T123132\\_112013\\_Transcript.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201515_20140107T123132_112013_Transcript.pdf).

<sup>53</sup> *Id.* at 51

<sup>54</sup> *Id.* (replaced “been” with “will be”).

<sup>55</sup> CEC Staff Status Report No. 12, 08-AFC-08A, TN # 201806 at 1 (Feb. 28, 2013), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201806\\_20140228T085912\\_CEC\\_Staff\\_Status\\_Report\\_Number\\_12.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201806_20140228T085912_CEC_Staff_Status_Report_Number_12.pdf).

<sup>56</sup> *Id.* at 1-2.

<sup>57</sup> *Id.* at 2.

- April 7, 2014: The last staff status report once again noted that “[n]o significant documents have been filed by the applicant since staff’s last status report.”<sup>58</sup> Staff reported that “applicant discussions continue with Occidental of Elk Hills regarding the latter’s continued participation in the project,”<sup>59</sup> however, it reported that Occidental California’s split from its parent company could impact the project schedule.<sup>60</sup>
- April 7, 2014: Applicant’s last status report did not include any updates on outstanding information.<sup>61</sup>
- May 2014: HECA’s Buttonwillow information office closed.<sup>62</sup>
- September 5, 2014: A Commission spokesperson stated that the project is “pretty much at a standstill,” because talks between the applicant and Occidental have stalled due to the ongoing spinoff of Occidental’s California operations.<sup>63</sup>
- September 11, 2014: The last updates in the HECA docket regarding the applicant’s outstanding information from Commission staff to State Assembly members Rudy Salas, Jr. and Shannon Grove. Staff stated that “Energy Commission staff’s Preliminary Staff Assessment (PSA) was published over a year ago” and that “staff identified a number of potential concerns with the project as proposed and requested additional information from the project applicant and from Occidental of Elk Hills, the prospective purchaser of the project’s CO<sub>2</sub> emissions. Staff is still waiting for a significant amount of this information.”<sup>64</sup>

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<sup>58</sup> CEC Staff Status Report No. 13, 08-AFC-08A, TN #201979 at 1 (Apr. 7, 2014), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201979\\_20140407T164943\\_Commission\\_Staff\\_Status\\_Report\\_13.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201979_20140407T164943_Commission_Staff_Status_Report_13.pdf).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Applicant’s Status Report No. 11, 08-AFC-08A, TN #201967 (Apr. 7, 2014), at [http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201967\\_20140407T111746\\_Status\\_Report\\_No\\_11.pdf](http://docketpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201967_20140407T111746_Status_Report_No_11.pdf).

<sup>62</sup> Approximate date according to local community members.

<sup>63</sup> John Cox, Oxy Spinoff Delays Proposed Energy Plant, The Bakersfield Californian (Feb. 25, 2015) <http://www.bakersfieldcalifornian.com/business/kern-gusher/x552954144/Oxy-spinoff-delays-proposed-energy-plant>.

<sup>64</sup> See Response Letter to Honorable Rudy Salas, Jr., *supra* at 1; and Response Letter to Honorable Shannon Grove, *supra* at 1.

- September 15, 2014: PG&E Notice of Improper Communications filed at the California PUC includes emails referencing HECA.<sup>65</sup>
- December 26, 2014: Kern Golden Empire 17 News quoted CRC spokeswoman Holly Arnold as stating that “[t]he company [CRC] is not currently in negotiations with the developer of the Hydrogen Energy California project. Therefore, we have nothing to add to this story.”<sup>66</sup> This news story also reported that “17 News placed more than a half dozen calls over the last four months trying to get an update from parent company SCS Energy about HECA,” and received only an email stating that “the HECA team is tied up and it was not a convenient time for an on-camera interview.”<sup>67</sup>
- February 3, 2015: DOE cancels funding for FutureGen Project, indicates HECA faces risk.
- September 2015: American Recovery and Reinvestment Act funds from DOE must be spent or returned to Treasury.

## **V. The Commission Should Terminate the HECA Proceeding Because SCS has Failed to Pursue the Project with Due Diligence**

California Code of Regulations Title 20, section 1720.2 provides that any party can file a motion to terminate an application proceeding “based upon the applicant’s failure to pursue an application . . . with due diligence.” Title 20 does not define due diligence, however a general definition from Black’s Law Dictionary describes diligence as “[a] continual effort to accomplish something,” while due diligence is defined as “[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.”<sup>68</sup> Abundant evidence shows that the applicant has failed to meet this standard.

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<sup>65</sup> California Public Utilities Commission, Re Pacific Gas and Electric Company’s Notice of Improper Ex Parte Communications, Application 13-12-012, Investigation 14-06-016 (Sept. 15, 2014), *at* <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M107/K149/107149817.PDF>.

<sup>66</sup> Kern Golden Empire.

<sup>67</sup> *Id.*

<sup>68</sup> Diligence, Black’s Law Dictionary (9th ed. 2009).

Since 2008,<sup>69</sup> the schedule and estimated date to complete this proceeding have repeatedly been delayed,<sup>70</sup> and today, all signs point to the inevitable conclusion that SCS is no longer pursuing the HECA project. SCS has failed to provide outstanding information that is necessary for staff to complete review. Staff first requested the “significant outstanding information” in June 2013, and staff has since reiterated in four subsequent status reports that the same items remain outstanding.<sup>71</sup> SCS has persistently failed to comply with staff’s requests for over a year and a half.<sup>72</sup>

Most significantly, the facts show that SCS will never be able to provide a key piece of the missing information. SCS cannot obtain a contract with the owners of the Elk Hills oil field because negotiations have ended. Selling HECA’s carbon dioxide is central to the economic and legal feasibility of the project, so the lack of contract negotiations also means the project is not viable.

The applicant’s inability to secure a water supply that is consistent with state and Commission policies, or to economically utilize dry cooling, also demonstrates its failure to diligently pursue this project. California’s continued drought emphasizes that HECA’s proposed water use is out of touch with the state.

In addition, SCS cannot certify it will have utilized the DOE award funds by the statutory deadline of September 2015. HECA is not financially feasible without the DOE funds. HECA will not obtain full certification from the Commission, a Final EIS, CPUC approval of a power purchase agreement, and utilize the funds for construction in the next seven months.

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<sup>69</sup> CEC, General Description of Project, *supra*; see also PSA/DEIS at 1-6.

<sup>70</sup> Applicant’s Status Report No. 9, *supra* at 8; Revised Committee Scheduling Order, 08-AFC-08A, TN # 201601 (Jan. 27, 2014) at 4; at [http://doCKETpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201601\\_20140127T094429\\_Revised\\_Committee\\_Scheduling\\_Order.pdf](http://doCKETpublic.energy.ca.gov/PublicDocuments/08-AFC-08A/TN201601_20140127T094429_Revised_Committee_Scheduling_Order.pdf)

<sup>71</sup> See generally CEC Staff Status Reports No. 10-13, *supra*.

<sup>72</sup> See CEC Staff Status Report No. 12, *supra* at 1-2.



Finally, the applicant has abandoned its community information office, failed to update its website regarding HECA, and has failed to respond to media's requests for comments. The prolonged absence from the public eye demonstrates a lack of due diligence.

As shown above, the applicant has not pursued the HECA application with due diligence. Thus, under Title 20, section 1720.2 of the California Code of Regulations, Intervenor Sierra Club, HECA Neighbors, and Association of Irrigated Residents respectfully request that the Commission cease expending valuable staff time and other resources and put the local community at ease by terminating the proceeding for this ill-conceived project. In the alternative, the Commission should issue an order to show cause, putting the burden on the applicant to show why the proceeding should not be terminated.

Respectfully Submitted,



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