

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:)
)
)
Pio Pico Energy Center) Appeal Nos. PSD 12-04, PSD 12-05,
) and PSD 12-06
)
PSD Permit No. SD 11-01)

)

EPA REGION 9'S SUPPLEMENTAL BRIEF

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 requesting to withdraw PSD permit application for Quail Brush Project

INTRODUCTION AND BACKGROUND

Respondent U.S. Environmental Protection Agency (“EPA”) Region 9 (“Region 9”) hereby submits this supplemental brief in response to the EPA Environmental Appeals Board’s (“EAB” or “Board”) April 5, 2013 Order Scheduling Status Conference and Directing Parties to Provide Additional Information (“Order”). See EAB Pio Pico Docket #22.¹

Pio Pico Energy Energy Center, LLC’s (“Pio Pico”) application for a Clean Air Act Prevention of Significant Deterioration (“PSD”) permit for the Pio Pico Energy Center (“PPEC”) is the subject of the instant proceeding before the Board. On March 22, 2013, Pio Pico filed a notice of supplemental information to inform the Board that on March 21, 2013, the California Public Utilities Commission (“CPUC”) disapproved an application by San Diego Gas & Electric Company (“SDG&E”) for authority to enter into a Purchase Power Tolling Agreement (“PPTA”) with Pio Pico. See EAB Pio Pico Docket #18-19. Pio Pico stated that it did not believe that the CPUC decision impacted the issues pending before the Board or that supplemental briefing on the CPUC decision was necessary. Pio Pico Notice of Supp. Info. at 1.

Petitioner Sierra Club thereafter filed a motion and proposed response with the Board arguing that the CPUC’s March 21 decision called into question Region’s PSD permit decision for the PPEC and that, at a minimum, the permit and public comment period should be reopened. See Docket #20-20.01. Region 9 subsequently filed a motion and a brief proposed response asserting that the CPUC decision provided no basis for the remand or reopening of Region 9’s PSD permit decision for the PPEC. See Docket #21-21.01. The Board’s April 5 Order granted Sierra Club's and the Region's motions, stating that the Board would take these responses into consideration. Order at 2.

¹ Docket numbers cited hereinafter refer to items docketed by the EAB in the instant proceeding.

The Board's April 5 Order also scheduled a Status Conference for April 11, 2013, and directed Region 9 to provide further briefing no later than April 15, 2013 concerning topics relating to the March 21 CPUC decision. The Board's Order specifically requested that the Region provide further analysis to support the Region's assertion that the BACT analysis should not be revisited via a remand following the CPUC's recent disapproval action. Order at 5-6. The Order explained that, in doing so, the Region should explain why its BACT analysis would have been the same had the PPTA and SDG&E's Request for Offers ("RFO") not existed at the time it considered the PSD permit application for the PPEC. *Id.* The Order also requested that the Region provide further discussion of the reasonable likelihood that the PSD permit terms would not need to be altered. *Id.* at 6.

The Order stated that the Region may also respond to two issues that it directed to Pio Pico for response, *i.e.*, (1) a request for assurance that there is, in fact, a realistic prospect that construction of the facility will commence within the 18-month time period required by 40 C.F.R. § 52.21(r)(2), and (2) a discussion of whether, if the merchant plant is built, the purpose, nature, and design of the facility will remain as described in the terms of the permit as required by 40 C.F.R. § 52.21(r)(1), which states that a permittee may only construct a facility in accordance with the permit application or the terms of the approval to construct. Order at 5-6.

On April 16, 2013, in response to an oral motion requesting an extension of time made by Region 9 during the Status Conference and a Status Update filed by Region 9 shortly thereafter, Docket #25, the Board issued an Order Rescheduling Filing Deadline extending the due date for submission of Region 9's response until April 22, 2013. Docket #26. The Order Rescheduling Filing Deadline stated that the Region's brief should also contain responses to any other issue identified at the Status Conference.

Pio Pico filed its Supplemental Brief in response to the Board's Order on April 15, 2013. Docket #23, 23.01, 24. In this filing, Pio Pico confirmed that it intends to proceed with constructing the PPEC beginning in the first quarter of 2014, assuming that Region 9's decision to issue the Pio Pico's PSD permit is upheld by the Board, and that it anticipates that the PPEC would come online and begin producing power between June and September 2015. Pio Pico Supp. Brief at 2-5 and attached Ex. 1. Pio Pico also confirmed that the nature, purpose, and design parameters of the PPEC will remain the same as those reviewed and permitted by EPA Region 9. *Id.* at 2, 5-11 and attached Ex. 1. Pio Pico clarified that it is negotiating with SDG&E to amend the PPTA to show a new delivery date of 2018 for electricity, consistent with the CPUC Decision, which amendment would not impact the Region's BACT analysis, and that prior to 2018, the PPEC will operate and sell peaking power into the California wholesale electricity market and/or enter into short term resource adequacy contracts with SDG&E (which are currently being negotiated) until SDG&E accepts power from the plant under the amended PPTA in 2018. *See id.* at 2-3, 5-11 and attached Exs. 1-2.²

As noted in Region 9's Response Regarding Pio Pico Energy Center, LLC's Notice of Supplemental Information and Sierra Club's Response dated March 28, 2013 (Docket #21.01), the CPUC's final decision concerning the PPA was issued in a separate State law proceeding, under California public utilities law, well after the Region's November 19, 2012 issuance of the final PSD permit decision for the PPEC. Region 9 does not believe that this recent development at the CPUC, which was not anticipated at the time the Region issued its PSD permit decision and therefore was not specifically addressed in the administrative record for the decision, necessitates a remand of the PSD BACT analysis or review of the PSD permit's terms. Region 9 believes that the Board's questions concerning the impact of this recent development at the

² References herein to Pio Pico Supp. Brief Exhibit 2 refer to Corrected Exhibit 2, Docket #24.

CPUC can be adequately addressed through briefing by the parties, and appreciates the opportunity to more fully articulate our views on the matter after having reviewed the Supplemental Brief submitted by Pio Pico.

DISCUSSION

The CPUC's March 21, 2013 decision to disapprove SDG&E's application for authority to enter into the PPTA with Pio Pico for the PPEC does not change the substance of Region 9's analysis for the PPEC, or otherwise require review of the terms of the PPEC PSD permit, and thus does not necessitate the remand of Region 9's PSD permit decision for the PPEC.

A. The CPUC's Decision Does Not Preclude Commencements of Construction of the PPEC Within 18 Months After Receipt of Approval to Construct

The Board's Order stated that in light of the recent change in circumstances associated with the CPUC's March 21 decision, the Board had questions about whether Pio Pico will be able to construct a power plant, and, if so, when Pio Pico would likely begin construction on the plant, as the Board is interested in assurance that the Board would not be issuing an opinion in this proceeding that would be merely advisory. Order at 2, 4. In response, Pio Pico's Supplemental Brief makes clear that the CPUC's decision does not preclude it from building the PPEC; that it intends to proceed with constructing the PPEC beginning in the first quarter of 2014, assuming the Board upholds the Region's PSD permit decision; that the nature, purpose and design of the PPEC will not change as a result of the CPUC's decision; that Pio Pico is actively negotiating with SDG&E to amend the long-term PPTA to provide for a new delivery date of 2018 for electricity pursuant to the PPTA, consistent with the CPUC's decision;³ and that

³ The CPUC's March 21 decision directed SDG&E to procure up to 298 megawatts of local generation capacity beginning in 2018, and denied SDG&E authority to enter into purchase power tolling agreements with Pio Pico Energy Center and/or Quail Brush Power, without prejudice to a renewed application for their approval, if amended to match the timing of the identified need, or upon a different showing of need. See Docket #19 at 2, 27. Pio Pico's

after construction of the PPEC is completed, Pio Pico will operate and sell peaking power into the California wholesale electricity market and/or enter into short term resource adequacy contracts with SDG&E until SDG&E accepts power from the Project under the amended PPTA. Pio Pico Supp. Brief and attached Exs. 1-2. Thus, available information indicates that construction of the PPEC would be commenced within 18 months of approval to construct by Region 9, which would follow shortly after a favorable decision by the EAB in this proceeding, consistent with 40 C.F.R. § 52.21(r)(2). Accordingly, the CPUC decision raises no unusual concerns about construction of the PPEC that would indicate that resolution of this proceeding by the Board at this time is unnecessary or would result in an advisory opinion.

B. The CPUC's Decision Does Not Impact the Substance of Region 9's BACT Analysis for the PPEC or Require Review of the PSD Permit's Terms

The CPUC's March 21 decision does not impact the substance of Region 9's BACT analysis for the PPEC or require review of the PPEC PSD permit's terms. Sierra Club argues that the CPUC's decision to disapprove the PPTA requires reopening the entire record for the PSD proceeding for additional notice and comment based on the fact that the PSD permit application submitted by Pio Pico and the Region's subsequent BACT analysis reference and rely upon information concerning the Project's purpose and design that originated in the RFO and PPTA. SC Response to Notice of Supp. Info. However, this argument is without merit, as explained below.

Pio Pico, as the PSD permit applicant, made evident through its PSD permit application that the fundamental purpose of the PPEC is to serve as a peaking and load-shaping power plant

Supplemental Brief makes clear that SDG&E is, in fact, pursuing an amended PPTA with Pio Pico with a delivery date of 2018, which Pio Pico expects that SDG&E would submit for approval to the CPUC in May 2013. Pio Pico Supp. Brief at 2-3, 5-11 and Exs. 1-2. We note that Quail Brush recently asked to withdraw its PSD permit application for the Quail Brush Project from Region 9, and notified Region 9 that the California Energy Commission granted its request to suspend review of that project for one year. See Attachment 1 submitted herewith.

designed to provide up to 300 MW of power with the flexibility necessary to integrate electrical generation provided by renewable resources. For example, the application stated that:

PPEC is a proposed simple-cycle power generation project that consists of three General Electric (GE) LMS100 natural gas-fired combustion turbine generators (CTGs). The total net generating capacity would be 300 megawatts (MW), with each CTG capable of generating 100MW. . . .

The GE LMS100 is the first intercooled gas turbine system *developed especially for the peaking electrical needs of the power generation industry*. The LMS100 is designed for cyclic applications with 10-minute starts that provide flexible power generation for *peaking and intermediate solutions vital to support variable demand and variable renewable energy sources* that [SDG&E] is increasingly contracting for. . . .

For these reasons, PPEC will have minimal adverse environmental impacts while providing a valuable *peaking and load shaping needs for the San Diego area*. . . .

PPEC is designed to directly satisfy the San Diego area demand for peaking and load-shaping generation, near and long term.

PSD Permit App. (R9 Response to Pet. for Review Ex. D) at PSD 2.1 (emphasis added); *see also* Fact Sheet (SC Pet. for Review Ex. 2) at 18-19 (PPEC would be operated as a peaking and load-shaping facility). The application and the Region's BACT analysis made clear that in order to serve the Project's fundamental purpose, the PPEC must be able to start up quickly, even under cold-start conditions, provide regulation during the morning and evening ramps, and be repeatedly started and shut down as needed, in order to meet the demand created by the use of renewable energy in the area. *See, e.g.*, PSD Permit App. (R9 Response to Pet. for Review Ex. D) at PSD 3.2–3.3; Fact Sheet (SC Pet. for Review Ex. 2) at 10 n.4, 16-17; *see generally* R9 Response to Pet. for Review at 13-23.

The record makes clear that Pio Pico developed the PPEC in response to the RFO from SDG&E, and that it entered into the PPTA, a long-term power purchase tolling agreement, with SDG&E, for which SDG&E required approval from the CPUC. The RFO and PPTA documents naturally provided details about the nature, purpose, and associated design elements of the

peaking and load-shaping Project that Pio Pico intended to build, and these documents were therefore referenced heavily in both Pio Pico's PSD permit application and Region 9's BACT analysis, which relied on that PSD permit application. *See, e.g.*, PSD Permit App. (R9 Response to Pet. for Review Ex. D) at PSD 2.1, 3.2-3.3, 3.9; Fact Sheet (SC Pet. for Review Ex. 2) at 16-17. The RFO and PPTA were also referenced in Region 9's Response to Comments. *See, e.g.*, RTC (SC Pet. for Review Ex. 3) at 28. However, it is clear that Region 9 did not directly rely on the PPTA, as the PPTA was not submitted to Region 9 by the applicant or by any public commenter, nor was it included in the administrative record index in this matter. Rather, Region 9 relied on the references to the PPTA (and RFO) in the PSD permit application, which contained additional statements regarding the fundamental purpose of the facility. The CPUC's disapproval of the particular PPTA referenced in the PSD permit application does not change the fact that the totality of the record makes clear that the applicant defined the fundamental purpose of the project as a peaking and load-shaping power plant designed to provide up to 300 MW of power with the flexibility necessary to integrate electrical generation provided by renewable resources including the ability to start up quickly, even under cold-start conditions, provide regulation during the morning and evening ramps, and be repeatedly started and shut down as needed. In this case, Region 9 deferred to the applicant's definition of the Project's fundamental purpose and associated design elements necessary to serve that purpose, as is typical. *See* R9 Response to Pet. for Review at 17-21; *In re Prairie State Generating Co.*, 13 E.A.D. 1, 23-24, 26-28 and n. 23 (EAB 2006). The record does not indicate anywhere that Region 9 considered approval of this particular PPTA by the CPUC as an event that was necessary for the applicant to sustain the definition of the Project purpose and design reflected in the permit application.

The record shows that this applicant-defined purpose, and the associated design elements necessary to meet this purpose, rather than the form or CPUC approval of the referenced PPTA, provided the basis for the Region's BACT determination concerning the PPEC, specifically including its determination that a combined-cycle gas turbine ("CCGT") was not technically feasible to meet the Project's purpose and design parameters as outlined in the PSD permit application. *See* Fact Sheet (SC Pet. for Review Ex. 2) at 16-17; RTC (SC Pet. for Review Ex. 3) at 27-30; *see generally* R9 Response to Pet. for Review at 13-23.

Sierra Club asserted in its comments on the Proposed Permit for the PPEC that a CCGT would be technically feasible, but provided little reasoning to support that assertion in this context given the applicant's purpose and associated design elements for the PPEC. *See* RTC (SC Pet. for Review Ex. 3) at 27-30. The Region's response appropriately explained why these comments did not demonstrate the technical feasibility of a CCGT for the PPEC. *Id.* In its Petition for Review, Sierra Club attempted to raise for the first time new arguments about the suitability of a CCGT, including suggesting that the objectives of the Project such as need to be highly flexible, to come on-line quickly, even under cold-start conditions, to provide regulation during the morning and evening ramps, and to be repeatedly started and shut down as needed, were somehow unnecessary, unsupported or overly prescriptive, which the Region pointed out was improper as these issues had not been raised during the public comment period. SC Pet. for Review at 13-18; R9 Response to Pet. for Review at 15-16. The Region nevertheless explained in detail why Sierra Club's arguments were not valid, noting among other things that these objectives are consistent with the purpose and design of peaking and load-shaping power plants in general as well as the purpose and design of the PPEC. *See* R9 Response to Pet. for Review at 13-23.

Sierra Club is now belatedly attempting to get another bite at the apple on this issue by suggesting that the entire nature of the Project necessarily has changed given the CPUC's post-PSD permit disapproval of SDG&E's application for authority to enter into the PPTA. However, the fact that the PPTA and RFO provided illustrative details of the nature and purpose of the PPEC described in the permit application that were liberally referenced in the Region's permit record does not mean that the fundamental purpose and associated design elements of the Project, as evidenced by the totality of the record in this case, would change in the absence of CPUC approval of this specific PPTA.⁴ As noted earlier, the administrative record for Region 9's PSD permit decision for the PPEC did not even include the PPTA. Indeed, had there been no RFO or PPTA at the time the Region reviewed the PSD application for the PPEC, so long as the fundamental purpose and associated design elements of the PPEC as a peaking and load-shaping power plant design to provide intermittent and flexible power to support renewable generation were communicated as they were in the permit application in this case, the Region's BACT analysis, which was based on that fundamental purpose and those associated design elements, would have been the same.

And to the extent that the CPUC's disapproval action raises a question about whether the project's nature, fundamental purpose and design elements will, in fact, change as a result of the CPUC's action, Pio Pico has confirmed that the answer to that question is no. Pio Pico Supp. Brief and attached Ex. 1-2. Region 9 understands that nothing about the CPUC decision itself inherently changes the project's fundamental purpose and critical design elements. *See* Pio Pico Supp. Brief at 3-5, 7 (citing CPUC's March 21, 2013 decision). Moreover, the information provided by Pio Pico in its Supplemental Brief confirms that Pio Pico has no plans to change the

⁴ We note that most applicants for PSD permits from Region 9 do not have a signed contract in hand to which they can refer in their permit applications to describe the fundamental purpose and design parameters of their projects.

nature and fundamental purpose and associated design elements of the PPEC that were considered in the Region's PSD permit decision. *See id.* at 2, 5-10 and attached Ex. 1. SDG&E confirmed that it does anticipate the need for local capacity and peaking generation to support its growing reliance on renewable generation resources. *Id.* at 6-7 and attached Ex. 2. Pio Pico and SDG&E are negotiating an amendment to the timeframe in SDG&E's long-term PPTA agreement for its accepting electricity from the Project, and Pio Pico intends to sell electricity from the PPEC in the short interim period starting in later 2015 on the wholesale market or to SDG&E through short-term contracts which are being negotiated. *Id.* at 2-3, 5-9 and attached Exs. 1-2. In this case, the precise timing of Pio Pico's sale of electricity to SDG&E under the long-term PPTA was not material to the Region's BACT determination. Accordingly, the Region's BACT analysis for the PPEC that focused on the above-described purpose and associated design elements would not change as a result of the CPUC's disapproval action, nor would the PSD permit's terms be affected. In particular, the substantive basis for Region 9's decision that a CCGT was incompatible with the purpose and associated design elements of the peaking and load-shaping PPEC, and therefore technically infeasible for the Project, remains fully supported in the record following the CPUC's decision. For all of these reasons, a remand is unnecessary and would not ultimately result in a substantively different BACT analysis or different PSD permit for the PPEC.

During the April 11, 2013 Status Conference, Sierra Club indicated that if Region 9's record had not focused on the PPTA⁵ and RFO and had instead described the PPEC more generally as a peaking and intermediate-load project, its comments on the Proposed Permit for the PPEC would have been different. This argument fails for the same reasons articulated above.

⁵ As noted previously, the administrative record for Region 9's PSD permit decision for the PPEC did not include the PPTA itself.

First, as discussed in Section B above, the PSD permit application and Fact Sheet accompanying the Proposed Permit make clear that the PPEC is intended to serve as a peaking and load-shaping unit to support renewable resources with associated design elements, and that the Region relied on that purpose and associated design elements in conducting its BACT analysis. Petitioners therefore had ample opportunity to comment based on the Project's purpose as a peaking and load-shaping unit during the public comment period and, in fact, did comment on the technical feasibility of a CCGT for the Project. See Section B, *supra*. Moreover, as discussed above, in its Supplemental Brief, Pio Pico shows that this fundamental purpose and design will not change as a result of the CPUC's disapproval of the PPTA, and clarifies that it is taking action along with SDG&E to put in place a revised PPTA with an energy delivery date of 2018, and can sell electricity on the market or through short-term contracts with SDG&E in the short interim period starting later in 2015. The CPUC's decision does not call into question the nature, fundamental purpose or design of the Project or otherwise provide a basis for reopening Region 9's PSD permit decision. Sierra Club's attempt to get another bite at the apple to submit additional comments that it clearly could have submitted during the public comment period should therefore be rejected.

C. The CPUC's Decision Does Not Call into Question Region 9's Determination Not to Conduct a Comprehensive Needs Analysis for the PPEC

Next, to the extent Petitioners may suggest that the CPUC's March 21 decision calls into question the Region's determination concerning the question of need for the Project, this issue does not warrant Board review or remand of the PSD permit decision. As discussed in detail in Region 9's Response to Petitions for Review, Region 9 reasonably determined that it would not conduct a comprehensive and detailed, resource-intensive needs analysis in this case. See Region 9's Response to Petitions for Review at 31-34. The CPUC's disapproval of SDG&E's

application for authority to enter into the PPTA does not call into question the Region's reasonable determination in this regard. *See* Region 9's Response to Petitions for Review at 31-34. During the Status Conference, one or more Petitioners stated that Region 9 had relied on the CPUC's need determination to support its approval of the Project. The record is clear, however, that the Region expressly stated that in this case, it did not believe that it was appropriate to conduct the type of rigorous and robust analysis that would be required to definitively determine the need for the Project, and that it was not deferring in this case to any agency's specific determination of need for the PPEC. *Id.*; RTC at 73. The CPUC's decision in no way demonstrates that that the Region erred in declining to conduct a comprehensive needs analysis for the Project.

CONCLUSION

In sum, the record that serves as the foundation for Region 9's decision to issue the PSD permit for the PPEC, including its BACT analysis, remains sound following the CPUC's March 21, 2013 decision to disapprove SDG&E's application to enter into a PPTA with Pio Pico for the PPEC, and the CPUC decision does not necessitate alteration of the permit's terms. Thus remand of the Region's PSD permit decision is unnecessary as a result of the CPUC's decision.

Date: April 22, 2013

Respectfully submitted,

/S/ Julie Walters

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STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify that this Supplemental Brief submitted by EPA Region 9, exclusive of the Table of Contents, Table of Authorities, Table of Attachments, this Statement of Compliance, the attached Certificate of Service, and Attachment 1, contains 4,122 words, as calculated using Microsoft Word word-processing software.

/S/ Julie Walters

Julie Walters

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **EPA REGION 9'S SUPPLEMENTAL BRIEF AND ATTACHMENT 1** in the matter of Pio Pico Energy Center, EAB Appeal Nos. PSD 12-04, PSD 12-05, and PSD 12-06, to be served by electronic mail upon the persons listed below.

Dated: April 22, 2013

/S/ Julie Walters

Julie Walters

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ATTACHMENT 1

From: Neff, Rick [RickNeff@cogentrix.com]
Sent: Wednesday, April 17, 2013 12:09 PM
To: GLASS, GEOFFREY
Cc: Richard Booth; Collins, John; Gregory Darwin; Ella Gannon; Rick Rothman; Solorio, Eric@Energy; Ziebart, Lori
Subject: Quail Brush Genco, LLC
Attachments: Letter to EPA Withdrawing Quail Brush Application (17.April.2013).pdf

Geoffrey,

Quail Brush has requested that it's proposed project in San Diego County be suspended; CEC approved that request yesterday. Attached please find Quail Brush's request to the EPA to withdraw it's pending applications with EPA.

Please contact me with any comments regarding this matter.

Rick.

C. Richard Neff
Vice President – Environment, Health & Safety
Cogentrix Energy Power Management, LLC
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Quail Brush Genco, LLC

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(704) 525-3800
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April 17, 2013

Mr. Geoffrey Glass
Environmental Engineer
EPA Region IX; Air Permits Office
75 Hawthorne Street
San Francisco, CA 94105

Re: Quail Brush Project – Withdrawal of Application

Dear Mr. Carbonell:

Quail Brush recently requested and, on April 16, 2013, the California Energy Commission granted the Project's request to suspend their review of the project for one year; see attached. With this letter, Quail Brush withdraws its pending air permit application to the EPA Region IX Air Permits Office.

Thank you for your attention in this matter. Please contact me with any questions or comments you may have.

Sincerely,

C. Richard Neff
Vice President – Environment, Health & Safety



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
QUAIL BRUSH GENERATION PROJECT***

Docket No. 11-AFC-03

ORDER SUSPENDING PROCEEDINGS

PLEASE TAKE NOTICE that all proceedings in the above-captioned matter are hereby ordered suspended pursuant to the Applicant's *Request for Project Suspension*, filed April 8, 2013.

During the suspension of the proceedings, Staff and all responsible agencies shall cease work on the Application and any pending motions are stayed.

The suspension shall expire April 15, 2014.

Dated: April 16, 2013, at Sacramento, California.

Original Signed By:

KAREN DOUGLAS
Commissioner and Presiding Member
Quail Brush Generation Project
AFC Committee

Original Signed By:

ANDREW McALLISTER
Commissioner and Associate Member
Quail Brush Generation Project
AFC Committee