



County of Fresno

Hall of Records, Rm. 301
2281 Tulare Street
Fresno, California
93721-2198

Legislation Text

File #: 17-0100, **Version:** 1

DATE: February 28, 2017

TO: Board of Supervisors

SUBMITTED BY: Steven E. White, Director
Department of Public Works and Planning

SUBJECT: Reclamation Agreement with RE Tranquillity LLC for Approved Photovoltaic Facility

RECOMMENDED ACTION(S):

- 1. Approve and authorize Chairman to execute a Reclamation Agreement with RE Tranquillity LLC, the project applicant (the Applicant), to implement a condition of approval of Unclassified Conditional Use Permit No. 3451 (UCUP No. 3451) for the first phase of a multi-phase solar photovoltaic electricity generating facility (Solar Facility) near the community of Tranquillity.**
- 2. Approve the proposed form of an Irrevocable Standby Letter of Credit initially in the amount of \$1,098,520 (Letter of Credit) to be issued by Coöperatieve Rabobank U.A., New York Branch (Rabobank-New York), as security to the County for the Reclamation Agreement.**
- 3. Authorize the Director of the Department of Public Works and Planning (Director) to accept the Letter of Credit to be issued by Rabobank-New York, and to accept any replacement Letter of Credit in the then-current amount of the Letter of Credit being replaced, to be issued by an eligible financial institution, as security to the County for the Reclamation Agreement, to implement a condition of approval of UCUP No. 3451, all of which shall be subject to approval as to legal form by County Counsel.**
- 4. Accept Grant of Limited Access Easement from RE Tranquillity Landco LLC, the owner of the property upon which the Solar Facility is to be situated.**
- 5. Approve and authorize Chairman to execute a Indemnification Agreement with RE Tranquillity, LLC, to implement a condition of approval as required by Unclassified Conditional Use Permit Application No. 3451.**

The Board's approval of the Recommended Actions would implement conditions of approval placed on UCUP No. 3451 and thereby enable the County to issue a building permit for the first phase of the multi-phase Solar Facility to be constructed. The Recommended actions contractually requires the Applicant to pay for costs associated with reclamation of the Solar Facility through financial assurances (i.e., the Letter of Credit) maintained by the Applicant and issued directly to the County. But the recommended actions do not require the Applicant to pay any fee or similar charge to the County for its approvals related to UCUP No. 3451.

The Board's approval of Recommended Actions, taken together, would (1) authorize the County to enter into a Reclamation Agreement with the Applicant, (2) approve the proposed form of the Letter of Credit that would secure the Applicant's obligations under the Reclamation Agreement, (3) authorize the

Director to accept the Rabobank-New York Letter of Credit (or any replacement Letter of Credit from an eligible financial institution) to be issued following the parties' execution of the Reclamation Agreement, and (4) authorize the County to accept a grant of a limited access easement from the owner of the property upon which the Solar Facility is to be situated; when UCUP No. 3451 expires or the Solar Facility is abandoned, that easement would give the County the legal right needed to access the project facilities to carry out the reclamation of the property to its current use, should the Applicant fail to complete the reclamation of the property, and the County elects to undertake such reclamation. Finally, Recommended Action Number 5 would authorize the County to enter into an Indemnification Agreement with the Applicant, which is a condition of approval of the project.

ALTERNATIVE ACTION(S):

No viable options have been identified.

FISCAL IMPACT:

No fiscal impact is anticipated. The recommended Reclamation Agreement requires the Applicant to pay for costs associated with reclamation of the Solar Facility through financial assurances (i.e., the Letter of Credit) maintained by the Applicant and issued directly to the County.

If the Applicant operates the Solar Facility for the presently expected period of approximately 40 years, stated below (and without any default under the Reclamation Agreement), the required amount of the Letter of Credit, initially \$1,098,520.00, will automatically increase by annual scheduled amounts (i.e., 3% annually) to \$3,479,042.48 by the 40th year. The Planning Commission approved the amount, and escalation rate, of the Letter of Credit as part of its conditional approval related to the Solar Facility.

DISCUSSION:

On October 9, 2014 the Planning Commission approved Unclassified Conditional Use Permit (UCUP) Nos. 3451 through 3458 and certified Environmental Impact Report No 6730 (State Clearinghouse No. 2013111056) to construct, operate, maintain, and ultimately decommission eight photovoltaic electricity generating facilities (each a Solar Facility) and their associated infrastructure. The combined projects could generate up to a total of 400-megawatts of electricity on approximately 3,732 acres near the community of Tranquillity.

The Applicant has informed County staff that it intends to construct the project in phases. The first phase of project construction is covered by UCUP No. 3451, which is this item being presented to the Board, and which authorizes an approximately 1,981.11-acre project designed to generate a maximum of 200-megawatts. Depending on the Applicant's phasing of the remainder of its construction, a subsequent item or items will be presented to the Board for its requested approval when the Applicant is prepared to proceed with construction of the improvements authorized by UCUP Nos. 3452 through 3458.

The Planning Commission placed conditions on its approval of UCUP No. 3451. Condition of Approval No. 12, which requires the project owner to adhere to the Reclamation Plan submitted to the County and approved at the Planning Commission. This condition requires the Applicant to provide financial assurances to ensure restoration of the property on which the project is situated when UCUP No. 3451 expires or the Project is abandoned.

The condition as approved reads as follows:

"Financial Assurances: Section No. 9 of each Reclamation Plan for UCUP Nos. 3451 through

3458 shall be modified to state that the Applicant will establish and maintain an Irrevocable Letter of Credit from a state or national financial institution in the amount identified for each individual UCUP prior to the issuance of building permits for each Phase to be maintained throughout the life of the Project.”

On July 23, 2015, the Department of Public Works and Planning (Department) issued a building permit to Applicant, to allow construction of the portion of the Project approved by UCUP No. 3451, subject to a condition that the Department would not issue occupancy to Applicant until the Irrevocable Letter of Credit had been established. In late September 2016, County staff became aware that the Applicant was generating electricity at the facility without receiving occupancy. Approval of the Recommended Actions will allow the Department to issue occupancy to the Applicant.

The Planning Commission also placed a condition on its approval, which requires that the Applicant defend and indemnify County against any legal challenge filed against the County related to the project. Entering into the Indemnification Agreement recommended for approval by this item will satisfy the indemnification condition of approval.

Recommended Action 1:

The primary purposes of a reclamation agreement are to give the County and the Applicant an agreed-upon process and terms for the Applicant to complete the reclamation of the affected property under the Reclamation Plan, for the Applicant to establish and maintain financial assurances to the County for the performance of the Applicant's obligations, and for the County to draw upon the irrevocable standby letter of credit (Letter of Credit) if the Applicant does not perform its obligations.

Therefore, the Board's approval of Recommended Action 1 would authorize the approval and execution of the recommended Reclamation Agreement, which would require the Applicant to comply with the Reclamation Plan for UCUP No. 3451 and to secure this obligation by establishing and maintaining, in favor of the County, a Letter of Credit issued by an eligible state or national financial institution in an initial amount of \$1,098,520; under the terms of the recommended Reclamation Agreement, the financial institution issuing the Letter of Credit shall meet minimum "investment grade" rating for an "issuer long-term rating" from at least two of the following major rating agencies, or their successors: (1) Fitch Ratings Ltd.; (2) Moody's Investors Service, Inc. (Moody's); or (3) Standard & Poor's Ratings Services (S&P).

The recommended Reclamation Agreement's use of these rating agency credit ratings enables the parties to use an agreed-upon readily available, independent measuring tool for the minimum creditworthiness of the financial institution providing the Letter of Credit (and any eligible new financial institution, discussed below, that issues a replacement Letter of Credit to the County).

A rating agency's credit rating, if given, is specific to the particular entity being rated (e.g., the entity's parent, if rated, would have its own rating). Each rating agency may have one or more rating categories that measure various aspects of a rated financial institution's creditworthiness. Therefore, the recommended Reclamation Agreement uses the "issuer long-term rating" category, since it is a rating agency's commonly-available, overall rating category for a rated financial institution's creditworthiness.

The minimum "investment grade" rating for an "issuer long-term rating" generally means the present estimate of a financial institution's ability to pay long-term financial obligations is viewed by a rating agency as a relatively low-to-moderate long-term credit risk. The rating category below "investment grade" is "speculative" which either signals a higher level of a long-term credit risk or that a default has already occurred. But a rating only reflects a rating agency's subjective judgment of the business and management of the rated entity; a rating is only a prediction of creditworthiness, not a guarantee that a financial obligation will be paid.

The recommended Reclamation Agreement's use of at least two of these three rating agencies' minimum "investment grade" ratings would set a minimum level of creditworthiness of the financial institution (and any eligible new financial institution, discussed below, that issues a replacement Letter of Credit to the County). The rating agency's rating of the financial institution or the financial institution's actual credit risk may change without notice from the financial institution or the Applicant. Therefore, Staff will periodically monitor the relevant rating agencies' "issuer long-term rating" of the financial institution (or any eligible new financial institution) for its compliance with the recommended Reclamation Agreement.

The recommended Reclamation Agreement states that the Applicant intends the financial institution issuing the Letter of Credit to be Coöperatieve Rabobank U.A., New York Branch (Rabobank-New York).

As of the time that this item was prepared, Rabobank-New York received an "issuer long-term rating" of Aa2 from Moody's (compared to Moody's present "investment grade" minimum of Baa3) and A+ Foreign Currency and A+ for Domestic Currency from S&P (compared to S&P's present "investment grade" minimum of BBB-), both of which exceed the minimum "investment grade" rating for an "issuer long-term rating." But, as discussed below, the recommended Reclamation Agreement allows the Applicant to cause any new eligible financial institution to issue a replacement Letter of Credit to the County; the creditworthiness of that new financial institution would be based on the Reclamation Agreement's minimum "investment grade" rating for an "issuer long term rating ."

The recommended Reclamation Agreement provides that the term of the Letter of Credit will be automatically extended each year, unless it is terminated according to the procedure below. If that automatic extension occurs, the Reclamation Agreement also provides that the amount of the Letter of Credit will be automatically increased by annual scheduled amounts (i.e., 3% annually) upon each such automatic extension.

If the Applicant operates the Solar Facility for the presently expected period of approximately 40 years, stated below (and without any default under the Reclamation Agreement), the required amount of the Letter of Credit, initially \$1,098,520.00 will increase to \$3,479,042.48 by the 40th year. The amount of the Letter of Credit, including any increases in its amount, is not a limitation on the Applicant's obligations under the recommended Reclamation Agreement or the Reclamation Plan.

The recommended Reclamation Agreement provides that the Applicant shall cause the Letter of Credit to be maintained by an eligible financial institution, or any replacement Letter of Credit to be maintained by a new eligible financial institution, without interruption in coverage, so that the Applicant's performance of its obligations under the Reclamation Agreement is continuously secured either by a Letter of Credit or a replacement Letter of Credit during the term of the Reclamation Agreement. Specifically, if the eligible financial institution that issued the Letter of Credit gives written notice to the County of non-renewal of its Letter of Credit (which must be given at least 90 calendar days prior to its expiration), the recommended Reclamation Agreement requires the Applicant to cause a new eligible financial institution to issue and deliver to the County a replacement Letter of Credit at least 30 calendar days prior to the date of expiration of the then-current Letter of Credit.

Under the recommended Reclamation Agreement, the Letter of Credit (including the form and substance of the Letter of Credit) shall be subject to the County's satisfaction. Should the new financial institution meet the financial institution requirements under the recommended Reclamation Agreement, the County's review and acceptance of the Letter of Credit shall be limited solely to determining whether the proposed replacement Letter of Credit substantially complies with the requirements of the recommended Reclamation Agreement. In determining whether a proposed replacement Letter of Credit is satisfactory to the County, the County may consider whether the proposed replacement Letter of Credit complies substantially with the form and substance of the then-current Letter of Credit issued to the County.

The Reclamation Agreement allows the Applicant, without the County's consent, to transfer the Reclamation

Agreement, but only in its entirety, to any entity or person that becomes the sole permittee under UCUP No. 3451, provided that certain conditions are met, such as the Applicant giving the County at least 30 days' prior notice of the transfer, and the transferee executes an assignment and assumption agreement in a form and substance reasonably satisfactory to the County.

In the event of the Applicant's default under the Reclamation Agreement, the County may, if it elects, draw on the Letter of Credit and undertake the reclamation of the Property in substantial conformity with the Reclamation Plan. Drawing on the Letter of Credit, however, will not obligate the County to continue or complete the Reclamation Plan beyond the amount of such funds so drawn. The County may also use a portion of such proceeds for the County's reasonable administrative and overhead costs in connection with such reclamation of the property pursuant to the Reclamation Plan.

The term of the recommended Reclamation Agreement is based on the operational period of the Solar Facility; as stated below, that is presently expected to be approximately 40 years.

Recommended Action 2:

If Recommended Action 1 is approved, the Applicant would be required to cause its proposed eligible financial institution to issue the Letter of Credit to the County under the terms of the Reclamation Agreement.

Therefore, the Board's approval of Recommended Action 2 would approve the form of the Letter of Credit proposed by the Applicant's intended financial institution, Rabobank-New York.

The Rabobank-New York Letter of Credit will have an initial term of one year, which term may automatically extend annually, subject to Rabobank-New York's right not to extend the term of its Letter of Credit, as discussed above, and subject to a maximum term of July 15, 2023.

If the term of the Rabobank-New York Letter of Credit is automatically extended, the amount of the Letter of Credit will be automatically increased by annual scheduled amounts (i.e., 3% annually) upon each such automatic extension.

Recommended Action 3:

The Board's approval of Recommended Action 3 would authorize the Director of the Department of Public Works and Planning (Director) to accept the Letter of Credit to be issued by Rabobank-New York with certain final necessary information to be set forth in the Letter of Credit, such as the Letter of Credit date of issuance and expiration (and if automatically extended) the annual dates for the automatic 3% increases in the amount of the Letter of Credit amount, the Letter of Credit number, and the officers signing and certifying such signing of the Letter of Credit.

The recommended Reclamation Agreement states that the Letter of Credit shall be issued and delivered to the County not later than five business days after the parties' final execution of the Reclamation Agreement.

Furthermore, the Board's approval of Recommended Action 3 would authorize the Director to accept any replacement Letter of Credit in the then-current amount of the Letter of Credit being replaced, to be issued by an eligible financial institution, to the County, as security for the Reclamation Agreement. The Director's approval of any replacement Letter of Credit would be subject to approval as to legal form by County Counsel.

Recommended Action 4:

The Board's approval of Recommended Action 4 would accept the Grant of Limited Access Easement from the

owner of the real property on which the Solar Facility is being constructed and operated, RE Tranquillity Landco LLC. The Easement will allow the County, including its contractors and representatives, a nonexclusive access easement over, under, on, and across the property for the purpose of carrying out the reclamation of the property in substantial conformity with the Reclamation Plan, should the Applicant fail to complete reclamation of the property to its current use (grazing land), and the County elects to undertake such reclamation.

Recommended Action 5:

Finally, the Board's approval of Recommended Action 5 would authorize the Chairman to execute the Indemnification Agreement, which follows the standard form used by the County for such agreements.

Project Completion:

The Solar Facility is expected to be operational for a period of approximately 40 years. Upon complete restoration of the property by the property owner, the County will return the Letter of Credit, or any unused portion thereof, to the Applicant.

Future Projects:

It is important to note that, although this is the first of such requests for these projects by the Applicant, each of the eight land use permits for these solar projects have different reclamation amounts, and are expected to be based on separate Reclamation Agreements, which will have their own separate security.

ATTACHMENTS INCLUDED AND/OR ON FILE:

Location Maps

On file with Clerk - Reclamation Agreement with RE Tranquillity LLC

On file with Clerk - Form of Rabobank-New York Letter of Credit

On file with Clerk - Grant of Limited Access Easement

On file with Clerk - Indemnification Agreement

CAO ANALYST:

John Hays