650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Tel: +1.714.540.1235 Fax: +1.714.755.8290
www.lw.com

LATHAM&WATKINS LLP

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DOCKET
07-AFC-3
DATE APR 07 2010
RECD. APR 08 2010

April 7, 2010

File No. 030137-0012

VIA FEDEX

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

Re: CPV Sentinel Energy Project: Docket No. 07-AFC-3

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, sections 1209, 1209.5, and 1210, enclosed herewith for filing please find Applicant's Objection to Petition for Order to Allow Submission of Data Requests.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the attached proof of service list.

Very truly yours,

Paul E. Kihm
Senior Paralegal

Enclosure

cc: CEC 07-AFC-3 Proof of Service List (w/encl., via e-mail and U.S. Mail)
Michael J. Carroll, Esq. (w/ encl.)

OC\1058246.1

Michael J. Carroll
Marc T. Campopiano
LATHAM & WATKINS LLP
650 Town Center Drive, Suite 2000
Costa Mesa, CA 92626
(714) 540-1235

STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: APPLICATION FOR CERTIFICATION FOR THE CPV SENTINEL ENERGY PROJECT	))))))))	Docket No. 07-AFC-3 OBJECTION TO PETITION FOR ORDER TO ALLOW SUBMISSION OF DATA REQUESTS

On behalf of CPV Sentinel, LLC ("Applicant") for the CPV Sentinel Energy Project (07-AFC-3) ("Project"), we object to the Petition for Order to Allow Submission of Data Requests by California Communities Against Toxics ("CCAT"), and respectfully request that the petition be denied. As a practical matter, the information requested is either already in the public record of these proceedings, or is not available through data requests pursuant to California Code of Regulations ("CCR"), Title 20, Section 1716. As a matter of equity, to re-open discovery at this advanced stage of the proceedings would result in additional delay and place an undue burden on the Applicant. As a matter of law, CCAT has failed to satisfy its burden of demonstrating good cause as required by CCR, Title 20, Section 1712(a).

For ease of reference, CCAT's information requests, referred to herein as Request #1 and Request #2, respectively, are as follows:

Request #1: The additional information provided by CPV to AQMD related to emissions offsets that formed the basis for AQMDs determination that the CPV Project complies with all applicable requirements of the local, state and federal air quality Rules and Regulations related emissions offsets.

Request #2: Electronic copies of the records that show that the emission offsets provided in the internal emission offset account tracking system pursuant to AB 1318 as described in the Determination of Compliance Appendix N, Attachment I, and Tables 1 and 2 provided to the California Energy Commission for the Sentinel Power Project meet the integrity criteria for qualifying as offsets, meaning that they are all Real, Permanent, Quantifiable, Enforceable and Surplus.

I. As a Practical Matter, the Requested Information is Either Already Available in the Public Record of These Proceedings, or Not Available Pursuant to CEC Data Request Procedures

The information sought in Request #1 is already available in the public record of these proceedings. On November 19, 2008, the Applicant submitted to the California Energy Commission ("CEC") certain Project design refinements that would improve the overall performance of the Project. Since the refinements would result in very minor changes to the Project's emissions sources, the Applicant also filed an amended application with the South Coast Air Quality Management District ("SCAQMD") on October 15, 2009. The amended application to the SCAQMD was filed with the CEC on October 30, 2009 and is available in the CEC Docket as Log #54001. During the processing of the amended application to SCAQMD, several additional minor revisions to the Project were identified. Those revisions, and supporting air quality data and analysis, were filed with the CEC on December 11, 2009 and are available in the CEC Docket as Log #54430. The information contained in Log #54001 and Log #54430 comprises the additional information provided by Applicant to the SCAQMD since issuance of the Final Determination of Compliance on August 29, 2009.

CCR, Title 20, Section 1716 provides a mechanism for any party, which in this case includes CCAT, to obtain information from any other party, including the Applicant. CCAT does not indicate in its petition which party it intends to serve data requests upon if permitted to do so, but the information sought in Request #2, to the extent it exists, is within the custody and control of the SCAQMD, which is not a party to these proceedings. Therefore, there is no authority within the CEC process for CCAT to obtain the information requested in Request #2 from the SCAQMD even if the Committee were to re-open discovery as requested in the petition.

For the reasons set forth above, re-opening discovery in this matter as requested in CCAT's petition would serve no practical purpose whatsoever. CCAT either has the information it seeks, or cannot obtain it through the CEC process even if permitted by the Committee to attempt to do so.

II. As a Matter of Equity, to Re-Open Discovery at this Stage of the CEC Proceedings Would Result in Additional Delay and Would be Fundamentally Unfair to the Applicant

The Application for Certification ("AFC") in these proceedings was filed on June 26, 2007 and deemed data adequate on August 29, 2007. Pursuant to CCR, Title 20, Section 1716(e), all data requests must be made within 180 days of the AFC being deemed complete. Thus, discovery in this matter has long been closed. CCAT was well aware of this fact when it sought to intervene, and the Committee Order granting intervention, dated December 22, 2009, specifically advised CCAT that discovery was closed. Nor should the SCAQMD's Addendum to its Determination of Compliance come as any surprise to CCAT. As indicated in its Petition to Intervene, CCAT actively participated in the legislative process that culminated in the adoption of AB 1318[1], and was well aware of its requirements and procedures at the time it sought to intervene. Thus, CCAT entered into these proceedings knowing that the SCAQMD would be

[1] Introduced by Assembly Member V. Manual Perez on February 27, 2009. Signed by Governor Schwarzenegger on October 11, 2009 and filed with the Secretary of State on the same day.

submitting a report to the CEC regarding the emission offsets for the Project, and knowing that discovery in the matter was closed. Its attempt to now re-visit those circumstances suggests an effort to incrementally re-open those aspects of these proceedings that are now closed in a manner that is fundamentally unfair to the Applicant.

While CCAT's Petition to Intervene in these proceedings was "timely" in a strict legal sense, it was as a practical matter very late in the proceedings; having come two and one-half years after the AFC was submitted to the CEC. While parties are permitted to intervene at relatively late stages of the proceedings, applicable regulations make it clear that they do so at some disadvantage in terms of their ability to re-open past stages of the proceedings.[2] Such limitations are placed on interveners to protect the right of the Applicant to orderly and timely proceedings, and to conserve the resources of the CEC Staff and other agencies and parties. While it is true that the Committee is granted a certain amount of discretion to re-open past stages of the proceedings upon a specific showing by a requesting party (which, as discussed below, CCAT has failed to satisfy in this case), any exercise of such discretion must take into consideration the equities of the specific situation. For example, an affected party who was either unaware of the proceedings, or unable to intervene for some reason, might be granted special relief when to do so would not impose an unfair burden on the Applicant or other parties.

In this case, the equities weigh strongly in favor of the Applicant. CCAT and its current counsel have known about the Project, and its intention to obtain PM10 and SOx emission offsets from the SCAQMD's internal emission offsets account since at least August 2007, the same month that the Project AFC was deemed data adequate.[3] During this period of time, the Project has undergone only minor modifications, and the source of emission offsets, the SCAQMD's internal emission offset account, has remained unchanged. While the mechanism by which offsets from the SCAQMD's internal emission offset account will be made available to the Project has changed from SCAQMD Rule 1309.1 to AB 1318, the source of the offsets has remained unchanged. The information sought by CCAT goes to the integrity of the offsets in the SCAQMD's internal emission offset account. This is not a new issue. In fact, CCAT has been raising this issue in various contexts for over three years, predating the date of data adequacy of the Project AFC.[4]

CCAT has known about the Project and its proposed source of emission offsets since the filing of the AFC in 2007. It chose not to intervene until very late in the proceedings knowing full well of the limitations on its ability to re-open prior stages of the proceedings, including

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2 CCR, Title 20, Section 1712(a).

3 For example, on August 31, 2007, CCAT joined in a lawsuit in State Superior Court challenging the environmental review process under the California Environmental Quality Act (CEQA) of the SCAQMD's adoption of proposed Rule 1315 and Rule 1309.1. The SCAQMD's CEQA document identified the Project as a possible recipient of offsets from the SCAQMD's internal accounts based on the proposed new rules. *See Natural Resources Defense Council, et al. v. South Coast Air Quality Management District*, Superior Court of Los Angeles County, Case No. BS110792, filed August 31, 2007.

4 *See* CCAT joining challenges in State court: *Natural Resources Defense Council, et al. v. South Coast Air Quality Management District*, Superior Court of Los Angeles County, Case No. BS105728, filed November 20, 2006, and *Natural Resources Defense Council, et al. v. South Coast Air Quality Management District*, Superior Court of Los Angeles County, Case No. BS110792, filed August 31, 2007. *See also* CCAT joining challenges to the SCAQMD in federal court: *Natural Resources Defense Council, et al. v. South Coast Air Quality Management District*, No. CV08-05403, filed Aug. 18, 2008, (C.D. Cal).

discovery. The Applicant has been clear since the filing of the AFC about the anticipated source of emission offsets for the Project, the SCAQMD's internal emission offset account, and has already suffered extensive delays in the permitting process. Under these circumstances, the equities weigh strongly against granting any relief to CCAT.

III. CCAT Has Failed to Satisfy its Burden of Demonstrating Good Cause to Re-Open Discovery in this Matter

CCAT has not demonstrated a good cause basis for reopening discovery. As an initial matter, any evaluation of an assertion of good cause must take into consideration the relative equities, which as discussed above, weigh heavily in favor of not re-opening discovery in this case. Furthermore, as discussed further below, the four bases upon which CCAT asserts good cause are without merit.

> 1. *[B]ecause the information sought by CCAT is reasonably necessary for the committee to make a decision on the application, specifically, without the information sought by CCAT, the committee will be unable to determine if the offsets that the SCAQMD proposes to credit and transfer to Sentinel meet all applicable federal legal requirements;*

CCAT's argument that the evidentiary record will be insufficient to support a decision on the Project is, at a minimum, premature. The evidentiary hearings on air quality have not even commenced yet. As discussed above, the information sought in Request #1 is already part of the public record of these proceedings, and will almost certainly be offered into evidence by the Applicant. What additional evidence may be offered by the parties and agencies remains to be seen. There is no basis at this stage of the proceedings for concluding that the record will necessarily be deficient if CCAT's request to re-open discovery is not granted.

> 2. *[I]n February 2008, 180 days after the determination that the application was complete, neither the document nor the law which allowed for the document's creation or submission existed;*

and

> 3. *[I]t was not possible for this information to have been sought at any time prior to March 2010; and*

As discussed above, CCAT already has the information sought in Request #1. The information sought by CCAT in Request #2 goes to the integrity of the offsets in the SCAQMD's internal emission offset accounts. This is not a new issue. CCAT and its current counsel have known about the Project's intention to obtain PM10 and SOx emission offsets from the SCAQMD's internal emission offsets accounts since at least August 2007, the same month that the Project AFC was deemed data adequate.[5] Since that time, the source of emission offsets for the Project, the SCAQMD's internal emission offset accounts, has remained unchanged. Contrary to its assertion that it could not have sought the requested information prior to March

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[5] See footnote 3, *supra*.

2010, CCAT has been raising this issue, and seeking and obtaining information relevant to this issue, in various contexts for over three years.[6]

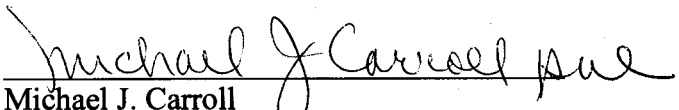
CCAT suggests that somehow the passage of AB 1318 creates a justification to re-open discovery related to the emission offsets in the SCAQMD's internal offset account. There is no basis for this suggestion. As discussed above, AB 1318 changes the mechanism by which the Applicant may obtain emission offsets from the SCAQMD's internal account, but the source of the offsets remains the same as it always has been, and the passage of AB 1318 does not justify re-opening issues that could have been raised during the regular discovery process had CCAT intervened earlier in the proceedings.

4. *[T]he District will present a witness at the Evidentiary Hearing to explain its Determination of Compliance and, as a party, CCAT has a right to cross-examine the witness. 20 CCR 1744.5(c), 1207(c), and 1212(c). Effective cross-examination depends on having access to information related to the District's testimony prior to the Hearing.*

As is typical, the Committee will require all witnesses at the evidentiary hearings to identify in advance of the hearings the evidence to be offered. All parties, including CCAT, will have an opportunity to review the evidence in advance of the hearing, and to cross-examine the sponsors of such evidence at the hearings. Thus, the ability of CCAT to review evidence and cross-examine witnesses will in no way be impaired by the failure of the Committee to re-open discovery.

DATED: April 7, 2010

Respectfully submitted,



Michael J. Carroll
LATHAM & WATKINS LLP
Counsel to Applicant

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[6] See footnote 4, *supra*.

STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 07-AFC-3
	)	
Application for Certification,	)	**PROOF OF SERVICE**
for the CPV SENTINEL ENERGY PROJECT	)	
	)	(February 16, 2010]
	)	
	)	

APPLICANT

Mark Turner
Project Manager
CPV Sentinel, LLC
55 Second Street, Suite 525
San Francisco, California 94105
mturner@cpv.com

Dale Shileikis
Vice President
URS Corporation
221 Main Street, Suite 600
San Francisco, CA 94105-1917
dale_shileikis@urscorp.com

INTERESTED AGENCIES

California ISO
P.O. Box 639014
Folsom, CA 95763-9014
e-recipient@caiso.com

Mohsen Nazemi
South Coast Air Quality Management District
21865 E. Copley Drive
Diamond Bar, California 91765-4178
mnazemi@aqmd.gov

INTERVENORS

Angela Johnson Meszaros
CA Communities Against Toxics
1107 Fair Oaks Avenue, #246
South Pasadena, CA 91030
Angela@CleanAirMatters.net

ENERGY COMMISSION

James D. Boyd
Vice Chair and Presiding Member
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814-5512
jboyd@energy.state.ca.us

Kenneth Celli
Hearing Officer
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814-5512
kcelli@energy.state.ca.us

John Kessler
Project Manager
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814-5512
jkessler@energy.state.ca.us

Caryn Holmes
Staff Counsel
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814-5512
cholmes@energy.state.ca.us

Jennifer Jennings
Public Adviser
CALIFORNIA ENERGY COMMISSION
1516 Ninth Street
Sacramento, California 95814-5512
Publicadviser@energy.state.ca.us

CPV SENTINEL ENERGY PROJECT
CEC Docket No. 07-AFC-3

DECLARATION OF SERVICE

I, Paul Kihm, declare that on April 7, 2010, I served and filed copies of the attached:

OBJECTION TO PETITION FOR ORDER TO ALLOW SUBMISSION OF DATA REQUESTS

to all parties identified on the Proof of Service List above in the following manner:

California Energy Commission Docket Unit

☒ Transmission by depositing one original paper copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

CALIFORNIA ENERGY COMMISSION
Attn: DOCKET NO. 07-AFC-3
1516 Ninth Street, MS-4
Sacramento, California 95814-5512
docket@energy.state.ca.us

For Service to All Other Parties

☒ Transmission via electronic mail to all email addresses on the Proof of Service list; and

☒ by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked "email preferred."

I further declare that transmission via U.S. Mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 7, 2010, at Costa Mesa, California.

Paul Kihm