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VIA U. S. Mail and Electronic Service

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

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

Energy,
Air Quality,
and Climate Change
from an
Environmental Justice Perspective

Dear Sir or Madam:

Attached hereto is the Reply to Opposition to Petition for Order to Allow Submission of Data Requests filed by California Communities Against Toxics.

This filing was filed today via electronic mail in accordance with the March 24, 2010 Proof of Service List in addition to being deposited into the U.S. Mail for delivery to the Dockets Unit.

Sincerely,

Angela Johnson Meszaros
Counsel to Intervenor
California Communities Against Toxics

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Application for Certification for the **CPV SENTINEL ENERGY PROJECT** By CPV Sentinel, L.L.C.	))))))))	**Docket No. 07-AFC-03** Reply to Opposition Petition for Order to Allow Submission Of Data Requests

California Communities Against Toxics (hereinafter "CCAT") hereby submits its reply to CPV Sentinel's (hereinafter "Applicant") Objection to Petition for Order to Allow Submission of Data Requests ("Opposition").

Introduction

In its Opposition, the Applicant argues that CCAT's Petition should be denied because "re-opening discovery in this matter as requested in CCAT's petition would serve no practical purpose whatsoever." Opposition at 2. The Applicant further argues that "re-opening discovery" would be unfair and that CCAT has not shown good cause to "re-open discovery."

CCAT has not asked to "re-open discovery." CCAT is seeking to conduct discovery on issues raised by the recently submitted addendum to the Determination of Compliance. The proceedings and the evidentiary record are still open as to Air Quality, specifically because information is needed to evaluate the Emissions Reductions Credits ("ERCs") Sentinel identified to meet the requirements of state and federal law.[1] Good cause, including law, policy, and the facts of this proceeding, all support granting CCAT's Petition.

[1] Since the Applicant has responded to Data Request #1 by identifying CEC Docket Log Numbers 54001 and 54430 as the additional information proved by CPV to AQMD, there is no need to further discuss that Request. Therefore, this Reply will focus only on Request #2.

I. The Data Sought can Properly be Obtained Through the CEC Process

In its Objection, the Applicant argues that:

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.

It is clear that as a matter of law, the Applicant has the burden of "presenting sufficient substantial evidence to support the findings and conclusions required for certification." 20 CCR 1748(d). This includes the finding that the Applicant has offset its emissions as required by state and federal law. Therefore, the Applicant would be responsible for obtaining the evidence that the ERCs it has identified are valid even if that information must come from a third party. Nonetheless, assuming, *arguendo*, that the Applicant is not responsible for obtaining evidence of the validity of its ERCs from the SCAQMD, the CEC has the authority to issue a *subpoena duces tecum* to the SCAQMD for the information sought in Request #2. 20 CCR 1203(b).

II. Applicable Statutes, Policy and Facts all Support the Committee Exercising its Discretion to Allow Discovery

The Applicant argues that under 20 CCR 1716(e) "discovery in this matter has long been closed." Opposition at 2. The very same section of the regulation, however, clearly establishes that data requests may be allowed beyond the 180 day time frame. Indeed, few of the schedules established in the rule for various parts of the Application for Certification proceedings are rigid and unchangeable—as evidenced by the very fact that this Application has been pending before the Commission since June 2007. That the applicant has taken nearly three years to identify emission offset credits for its project should not deprive CCAT of its right to participate fully in these proceedings.

In addition to the clear language of the rule granting discretion to allow relevant discovery to proceed, the Commission describes the timing for Data Requests as follows:[2]

Once the Application for Certification is accepted as data adequate complete, the Energy Commission staff, agencies, and intervenors may request to exchange information with each other in order to thoroughly review each issue in the proceeding. A party may obtain any information from another party that is reasonably available and relevant to the proceedings.

[2] Public Participation in the Siting Process: Practice and Procedure Guide, CEC-700-2006-002 at 39.

- ...
- *During the 12-month process, the Presiding Member of the committee is allowed to set reasonable time limits on the use of, and compliance with data requests. While there is no set timeline, usually, data requests can be sent anytime prior to release of the hearing order. The hearing order is released soon after the pre-hearing conference, held typically around 200 days after initial acceptance of the application.*

Since the pre-hearing conference has not yet occurred, and is likely to be scheduled for mid-May, the use of data requests now would be well within the Commission's articulated timing policy.

Further, as a matter of fact, these proceedings were held open as to Air Quality explicitly for the purpose of identifying ERCs for the project and for allowing the opportunity to comment on the ERCs once identified.[3] This fact was clarified during the November 3, 2008 Evidentiary Hearing:

MR. CARROLL:... And our understanding had been, and preference, is for the record to be closed in the other remaining areas so that we are not revisiting all of the topics that have now been put to rest four months from now or five months from now. Our request would be that once the issues that Southern California Edison has raised our (sic) resolved, that the record be closed with the exception of Air Quality.

HEARING OFFICER CELLI: Staff?

MS. HOLMES: Staff doesn't have a position on this issue.

HEARING OFFICER CELLI: Well, since we have no intervenors really and there's just the two parties. I just want to make sure that we have everything in the record and that everything, all of the holes are filled. My inclination then would be to say that we will give you until after December 4, at which time we would close the record. And we would put out a Notice, or an Order rather, that officially closes the record after the December 4 date on all issues with the exception of Air Quality if that is acceptable to both parties. That's applicant's motion. Staff, any comment? Are there any topics that you feel that we need to leave open?

MS. HOLMES: There are no topics that we need to leave open. Staff does not have any objection to your proposal.

Subsequent to the November 2008 Evidentiary Hearing, the Committee issued an Evidentiary Hearing Order in which it stated:

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[3] *See,* Transcript of the Pre Hearing Conference, October 21, 2008, pages 37-43.

Once the Applicant has identified the emissions offsets to be applied to the CPV Sentinel Project pursuant to Public Resources Code § 25523(d)(2), the Committee orders the Applicant to confer with Staff to determine whether the identified emissions offsets raise any dispute between the parties. The Committee recommends that the parties use their best efforts to resolve any such disputes prior to making a request that the Committee set a date to take evidence on Air Quality. After conferring with Staff regarding the emissions offsets, the Applicant is ordered to so inform the Hearing Officer who will issue a Notice of Evidentiary Hearing.

A dispute has been identified between the parties and "best efforts to resolve any such disputes" properly includes conducting discovery. CCAT disputes, among other issues, the validity of the ERCs offered by the Applicant. Therefore, CCAT is entitled to request information from the Applicant to understand the factual basis for its assertion that the ERCs it has identified meet the requirements of state and federal law.

The Applicant has correctly noted that "[t]he 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." Opposition at 3. As evidenced by the Applicant's extensive recital of the litigation regarding the ERCs offered in these proceedings, it should come as no surprise to the Applicant that reliance upon these ERCs (as compared to other options the Applicant might have pursued[4]) would result in questions being raised here. The Applicant lobbied for and secured the adoption of AB 1318 which seeks to move the venue for the determination of the validity of the ERCs from the Court (which prohibited the use of the ERCs the Applicant seeks to rely upon) to the CEC.[5] AB 1318 clearly states:

In the exercise of its regulatory responsibilities under its power facility and site certification authority, the State Energy Resources Conservation and Development Commission shall not certify an eligible electrical generation facility if it determines that the credit and transfer by the south coast district do not satisfy all applicable legal requirements. Health & Safety Code 40440.14(c).

and

This section shall be implemented in a manner consistent with federal law, including the Clean Air Act (42 U.S.C. Sec. 7401 et seq.). Health & Safety Code 40440.14(f).

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[4] See, eg, discussion during the October 21, 2008, Pre Hearing Conference at page 43, lines 9-21:
PRESIDING MEMBER BOYD: I have a question of the applicant. Do you have any estimate of time as to when the emission offset issue for this case might be resolved?

MR. CARROLL: We have a number of options that we are pursuing for replacing the emission offsets that we had intended to obtain from the priority reserve. They range from legislative fixes to completely different credit generation proposals. I would say that the range of time is anywhere from one month to seven months depending on which of those options comes to fruition.

[5] CCAT has challenged the Constitutionality of the adoption of AB 1318 in Los Angeles Superior Court and in making reference to the statute or any of its provisions does not assert or recognize the legality of it.

The Applicant sponsored, wrote, and lobbied extensively to secure adoption of AB 1318, which on its face directs the Commission to determine that ERCs being offered meet "all applicable legal requirements." This Commission has an affirmative duty to gather the information necessary to make a determination of whether the ERCs are valid. Indeed, AB 1318 requires the Commission to gather that information and make that determination. It strains commonsense for the Applicant to now argue that it is improper for a party to these proceedings to seek data central to the Commission's ability to make such a determination and for that request to come subsequent to the SCAQMD's submission of its addendum to the Final Determination of Compliance.

Although the law, policy, and facts as to the timing both for CCATs intervention and for its data requests clearly support granting CCATs Petition, the Applicant argues that CCAT's past participation in other venues prohibits full participation in this venue. Even if CCAT had intervened on June 26, 2007—the day the AFC was filed--that would not change the fact that SCAQMD has just recently filed this supplemental FDOC thus creating the need for requesting data regarding the proffered ERCs.

III. CCAT has Shown Good Cause to Grant its Petition

After arguing that CCAT's request to submit data requests comes too late in the process, the Applicant then argues that CCAT has failed to show good cause to grant the Petition because its request is "at a minimum, premature." Opposition at 5. The Applicant cannot have it both ways.

The Applicant further argues that "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." Opposition at 5. As shown above, while the statute is unlawful, the plain language on its face is clear: it directs the Commission to make a determination, independent to any assertions the SCAQMD may make, whether the ERCs "satisfy all applicable legal requirements." The basis for CCAT's assertion that AB 1318 requires discovery as to the validity of the offered ERCs is very clear and well grounded.

Finally, the Applicant argues that CCAT failed to establish good cause because "all witnesses...[will] identify in advance...evidence to be offered....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." Opposition at 5. This argument seems to be another way of asserting that CCAT's request for data is premature because somehow the information we seek will show up later. Again, the Applicant cannot have it both ways. Now is the proper time to seek information about the Applicants offered ERCs, not when the witness identifies what will be offered, which may or may not be adequate to answer the vital Air Quality questions presented.

Conclusion

CCAT properly seeks reasonably available, relevant information for the determinations of law and fact this Committee must make. As a party, CCAT is entitled to engage in an orderly process for gathering information to allow for the thorough review of this important issue and respectfully requests that the Committee grant its Petition for Order to Allow Submission of Data Requests.

Dated April 15, 2010

Respectfully Submitted,

Angela Johnson Meszaros
Counsel to
California Communities Against Toxics

DECLARATION OF SERVICE

I, Angela Johnson Meszaros, declare that on, April 15, 2010, I served and filed a copy of the attached Rely to Objection to Petition for Order to Allow Submission of Data Requests. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[http://www.energy.ca.gov/sitingcases/sentinel/index.html]**

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

For service to all other parties:

__x__sent electronically to all email addresses on the Proof of Service list;

____by personal delivery or by depositing in the United States mail at with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

__x__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

OR

_____depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-3
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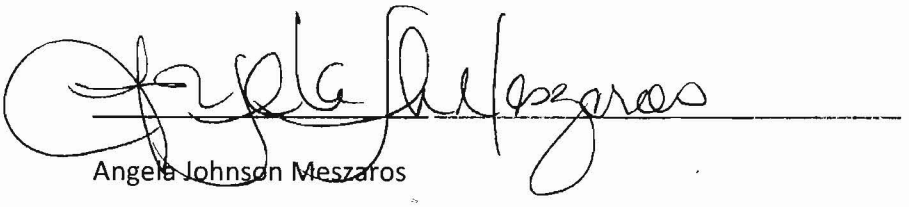
I declare under penalty of perjury that the foregoing is true and correct.



Angela Johnson Meszaros

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APPLICATION FOR CERTIFICATION FOR THE
CPV SENTINEL ENERGY PROJECT
BY THE CPV SENTINEL, L.L.C

DOCKET NO. 07-AFC-3

PROOF OF SERVICE
(Revised 3/24/2010)

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