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May 27, 2009

**VIA FEDEX**

Mary Dyas  
Compliance Project Manager  
California Energy Commission  
1516 Ninth Street (MS-2000)  
Sacramento, CA 95814

File No. 039610-0001

**DOCKET**  
**07-AFC-1C**

DATE	<u>MAY 27 2009</u>
RECD.	<u>JUN 01 2009</u>

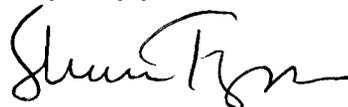
Re: Victorville 2 Hybrid Power Project, Docket No. 07-AFC-1C  
Petition To Amend Condition of Certification BIO-11

Dear Ms. Dyas:

Condition of Certification COM-14, as set forth in the Commission's Final Decision in the above-captioned docket, requires any petition to amend a Condition of Certification under 20 Cal. Code Reg. Section 1769 to be submitted to you for filing with the Dockets Unit in accordance with 20 Cal. Code Reg. Section 1209. Accordingly, enclosed for filing is our petition to amend Condition of Certification BIO-11, including clean and black-lined versions of the proposed language for BIO-11.

Please do not hesitate to contact me with any questions or concerns.

Very truly yours,



Shannon D. Torgerson  
of Latham & Watkins LLP

Enclosures - Noted

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Shannon D. Torgerson  
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**STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:	)	Docket No. 07-AFC-1C
	)	
Application for Certification	)	<b>PETITION TO AMEND CONDITION</b>
for the VICTORVILLE 2 HYBRID	)	<b>OF CERTIFICATION BIO-11</b>
POWER PROJECT	)	
by the City of Victorville	)	

Pursuant to Title 20, Section 1769 of the California Code of Regulations (“Section 1769”) and the siting regulations of the California Energy Commission (“CEC “or the “Commission”), the City of Victorville (“Petitioner”) hereby submits this petition to amend Condition of Certification BIO-11 set forth in the Final Decision issued by the Commission on July 16, 2008, in the above-captioned docket (“Final Decision”).

**A. Description of the Proposed Modifications and New Language for Affected Condition. Section 1769(a)(1)(A).**

Condition of Certification BIO-11 requires the project owner to implement a habitat compensation strategy to compensate for impacts to desert tortoise, Mojave ground squirrel, burrowing owl, and creosote rings. BIO-11 allows the project owner to commence ground-disturbing project activities before completing all of the required mitigation, including acquiring compensation lands, upon providing a letter of credit or other form of security prior to ground disturbance or within 12 months of the issuance of the Final Decision, whichever occurs first. Pursuant to the Verification for BIO-11, the project owner must acquire compensation lands within 12 months of issuance of the Final Decision.

Petitioner respectfully requests to amend BIO-11 to extend the date by which the project may provide the letter of credit or other form of security from “prior to commencing ground-disturbing activities or within 12 months of the issuance of the Final Decision, whichever occurs first” to “prior to ground-disturbing activities.” Petitioner also requests a modification to the Verification for BIO-11 to extend the compliance date for compensation land acquisition from “no later than 12 months following the publication of the Energy Commission Decision” to “no later than 12 months following the commencement of ground disturbance.”

The text of the proposed new language for BIO-11 is included in Attachment A to this petition.

**B. Discussion of the Necessity for the Proposed Modification. Section 1769(a)(1)(B).**

As CEC Staff is aware, the project's construction start-date has been significantly delayed due to the recent instability of the financial markets. Petitioner is uncertain when ground-disturbing project activities will commence or when the project will secure financing for the acquisition of compensation land.

**C. Explanation Supporting Modification (Based on New Information). Sections 1769(a)(1)(C) and (D).**

The proposed modification is based on financial market information that was unknown during the certification proceeding and that, aside from delaying project ground disturbance and construction activities, does not change or undermine any other assumptions, rationale, findings, or other bases of the Final Decision.

**D. Analysis of Impacts on Environment. Section 1769(a)(1)(E).**

The proposed modification is administrative in nature and does not result in any significant adverse impact on the environment.

**E. Analysis of Impacts on the Facility's Ability To Comply with Applicable Laws, Ordinances, Regulations, and Standards ("LORS"). Section 1769(a)(1)(F).**

The proposed modification will have no impact on the facility's ability to comply with applicable LORS. The project will continue to meet all permit conditions.

**F. Discussion of Modification's Effect on the Public. Section 1769(a)(1)(G).**

The proposed modification will not affect the public.

**G. List of Property Owners Potentially Affected by the Modification. Section 1769(a)(1)(H).**

The proposed modification is administrative in nature and, therefore, will not affect property owners.

**H. Discussion of the Potential Effect on Nearby Property Owners, the Public, and Parties in the Application Proceeding. Section 1769(a)(1)(I).**

The proposed modification is administrative in nature and, therefore, will not affect nearby property owners, the public, or other parties.

## **Desert Tortoise, Mohave Ground Squirrel, Burrowing Owl, and Creosote Ring Compensation**

**BIO-11** To compensate for temporary and permanent impacts to desert tortoise, Mohave ground squirrel, burrowing owl, creosote rings, and their habitat, the project owner shall implement a habitat compensation strategy that guarantees the perpetual care of at least 1,315.5 acres of off-site habitat in the region of the proposed project. The selected compensation land must be suitable for all three special-status species and creosote rings as determined by the CPM through consultation with the Mohave ground squirrel technical advisory group, CDFG, other technical advisory groups recommended by CDFG, and USFWS. The project owner shall attempt to acquire parcels that are as contiguous as possible in the same timeframe rather (i.e., avoid significantly separated parcels and "piecemeal" acquisition). This mitigation acreage shall not overlap with other previously planned compensation land requirements set aside for other city projects.

As part of this condition, project owner shall:

1. Transfer fee title for the habitat compensation lands or a conservation easement over the habitat compensation lands to CDFG or to a third party non-profit habitat conservation organization (hereafter referred to as "third party"), such as DTPC, with experience in acquiring and protecting desert tortoise, Mohave ground squirrel, and burrowing owl habitat, approved by the CPM, in consultation with CDFG, under terms approved by the CPM. No third party shall be approved by the CPM until after the CPM has reviewed the third party's management plan. In the alternative, if approved by the CPM, the project owner may provide a check or a letter of credit to CDFG with a copy to the CPM in an amount deemed sufficient by the CPM, in consultation with CDFG, for acquisition of the habitat compensation lands identified in this condition of certification.
2. Provide to the third party or CDFG a check in the amount acceptable to the CPM, in consultation with CDFG, drawn from a banking institution located within California, for use as principal for a permanent, non-wasting capital endowment. The endowment amount shall be determined through a PAR analysis. Interest from this amount shall be available for the operation, management and protection of the habitat compensation lands, including reasonable administrative overhead, biological monitoring, improvements to carrying capacity, law enforcement measures, and any other action designed to protect or improve the habitat values of the habitat compensation lands. The endowment principal shall not be drawn upon unless such withdrawal is deemed necessary by the CPM, in consultation with CDFG, to ensure the continued viability of the species on the habitat compensation lands. The CPM, in consultation with CDFG, will decide how the funds will be spent. Monies received by CDFG pursuant to this provision shall be deposited in a special deposit account established pursuant to Fish and Game Code section 13014.
3. The project owner shall provide to the third party or CDFG funds for the initial protection and enhancement of the habitat compensation lands, if the PAR analysis

indicates that such activities are needed for the specific parcels selected. The amount required for initial protection and enhancement needs to be approved by the CPM, in consultation with CDFG, once the project owner identifies the habitat compensation lands. Alternatively, project owner may fund CDFG's initial protection and enhancement of the lands by providing the funds required for the initial protection and enhancement as determined by the CPM, in consultation with CDFG, to CDFG.

The project owner may proceed with ground-disturbing project activities before completing all of the required mitigation (including acquisition of habitat compensation lands), monitoring, and reporting activities only if the project owner ensures funding to complete those activities by providing to the CPM and CDFG prior to commencing ground-disturbing activities: an irrevocable letter of credit, a pledged savings account, or another form of security ("Security") approved by the Office of the General Counsel at the Energy Commission, in consultation with CDFG, in the amount necessary to ensure that all funds required pursuant to 1 – 3 above are available. The Security shall allow the Energy Commission and CDFG, to draw on the principal sum if the CPM, in consultation with CDFG, determines that project owner has failed to comply with the conditions of certification.

**Verification:** No later than 12 months following the commencement of ground disturbance, the project owner will provide written verification to the CPM that the habitat compensation purchase has been completed. At the same time, the project owner will provide a certified check for the endowment and for initial protection and restoration activities, if required, to the third party or CDFG and written verification to the CPM that the check has been provided. Within six months of the land purchase (as determined by the date on title), the project owner shall provide the CPM a management plan for the habitat compensation lands and associated funds for review and approval in consultation with CDFG.

Within 90 days after completion of project construction, the project owner shall provide the CPM aerial photographs taken after construction and an analysis of the amount of any habitat disturbance additional to that identified in this staff assessment. The CPM will notify the project owner of any additional funds required to compensate for any additional habitat disturbances at the adjusted market value at the time of construction to acquire and manage habitat.

## **Desert Tortoise, Mohave Ground Squirrel, Burrowing Owl, and Creosote Ring Compensation**

**BIO-11** To compensate for temporary and permanent impacts to desert tortoise, Mohave ground squirrel, burrowing owl, creosote rings, and their habitat, the project owner shall implement a habitat compensation strategy that guarantees the perpetual care of at least 1,315.5 acres of off-site habitat in the region of the proposed project. The selected compensation land must be suitable for all three special-status species and creosote rings as determined by the CPM through consultation with the Mohave ground squirrel technical advisory group, CDFG, other technical advisory groups recommended by CDFG, and USFWS. The project owner shall attempt to acquire parcels that are as contiguous as possible in the same timeframe rather (i.e., avoid significantly separated parcels and "piecemeal" acquisition). This mitigation acreage shall not overlap with other previously planned compensation land requirements set aside for other city projects.

As part of this condition, project owner shall:

1. Transfer fee title for the habitat compensation lands or a conservation easement over the habitat compensation lands to CDFG or to a third party non-profit habitat conservation organization (hereafter referred to as "third party"), such as DTPC, with experience in acquiring and protecting desert tortoise, Mohave ground squirrel, and burrowing owl habitat, approved by the CPM, in consultation with CDFG, under terms approved by the CPM. No third party shall be approved by the CPM until after the CPM has reviewed the third party's management plan. In the alternative, if approved by the CPM, the project owner may provide a check or a letter of credit to CDFG with a copy to the CPM in an amount deemed sufficient by the CPM, in consultation with CDFG, for acquisition of the habitat compensation lands identified in this condition of certification.
2. Provide to the third party or CDFG a check in the amount acceptable to the CPM, in consultation with CDFG, drawn from a banking institution located within California, for use as principal for a permanent, non-wasting capital endowment. The endowment amount shall be determined through a PAR analysis. Interest from this amount shall be available for the operation, management and protection of the habitat compensation lands, including reasonable administrative overhead, biological monitoring, improvements to carrying capacity, law enforcement measures, and any other action designed to protect or improve the habitat values of the habitat compensation lands. The endowment principal shall not be drawn upon unless such withdrawal is deemed necessary by the CPM, in consultation with CDFG, to ensure the continued viability of the species on the habitat compensation lands. The CPM, in consultation with CDFG, will decide how the funds will be spent. Monies received by CDFG pursuant to this provision shall be deposited in a special deposit account established pursuant to Fish and Game Code section 13014.
3. The project owner shall provide to the third party or CDFG funds for the initial protection and enhancement of the habitat compensation lands, if the PAR analysis

indicates that such activities are needed for the specific parcels selected. The amount required for initial protection and enhancement needs to be approved by the CPM, in consultation with CDFG, once the project owner identifies the habitat compensation lands. Alternatively, project owner may fund CDFG's initial protection and enhancement of the lands by providing the funds required for the initial protection and enhancement as determined by the CPM, in consultation with CDFG, to CDFG.

The project owner may proceed with ground-disturbing project activities before completing all of the required mitigation (including acquisition of habitat compensation lands), monitoring, and reporting activities only if the project owner ensures funding to complete those activities by providing to the CPM and CDFG prior to commencing ground-disturbing activities ~~or within 12 months of publication of the Energy Commission Decision, whichever occurs first:~~ an irrevocable letter of credit, a pledged savings account, or another form of security ("Security") approved by the Office of the General Counsel at the Energy Commission, in consultation with CDFG, in the amount necessary to ensure that all funds required pursuant to 1 – 3 above are available. The Security shall allow the Energy Commission and CDFG, to draw on the principal sum if the CPM, in consultation with CDFG, determines that project owner has failed to comply with the conditions of certification.

**Verification:** No later than 12 months following the ~~publication of the Energy Commission Decision~~ commencement of ground disturbance, the project owner will provide written verification to the CPM that the habitat compensation purchase has been completed. At the same time, the project owner will provide a certified check for the endowment and for initial protection and restoration activities, if required, to the third party ~~or~~ CDFG and written verification to the CPM that the check has been provided. Within six months of the land purchase (as determined by the date on title), the project owner shall provide the CPM a management plan for the habitat compensation lands and associated funds for review and approval in consultation with CDFG.

Within 90 days after completion of project construction, the project owner shall provide the CPM aerial photographs taken after construction and an analysis of the amount of any habitat disturbance additional to that identified in this staff assessment. The CPM will notify the project owner of any additional funds required to compensate for any additional habitat disturbances at the adjusted market value at the time of construction to acquire and manage habitat.