STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

The Application for Certification for the VICTORVILLE 2 HYBRID POWER PROJECT

Docket No. 07-AFC-1

OPENING BRIEF OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY

April 21, 2007

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I. INTRODUCTION

California Unions for Reliable Energy ("CURE") submit this opening brief in accordance with Hearing Officer Raoul Renaud's instructions at the evidentiary hearing held April 3, 2008. The only issue addressed in this brief is whether the Commission may lawfully certify the Victorville 2 Hybrid Power Project ("Project") absent federally enforceable PM10 offsets under the Clean Air Act. As shown below, it may not.

II. FACTUAL BACKGROUND

According to Staff and the Mojave Desert Air Quality Management District ("District"), in order for the Project to comply with the Clean Air Act, it must offset its operational emissions of particulate matter in the amount of 132.7 tons per year.[1] The applicant City of Victorville's ("City") AFC proposed, and staff concurred, that these combustion-related emissions can be offset by paving unpaved roads within the Mojave Desert Air Basin pursuant to the District's recently adopted Rule 1406.[2]

However, the City may not lawfully rely on Rule 1406 to generate emission reduction credits ("ERCs") to offset the Project's PM emissions. As CURE has pointed out in comments to the Staff and the District, Rule 1406 does not comply with federal requirements for ERCs and the Clean Air Act's

[1] FSA, at 4.1-16; Mojave Desert Air Quality Management District's Final Determination of Compliance (January 10, 2008).

[2] "Generation of Emission Reduction Credits for Paving Unpaved Public Roads" (adopted August 27, 2007).

new source review ("NSR").[3] Because neither Staff nor the District took into consideration CURE's comments, Staff's LORS assessment and the final determination of compliance remain legally deficient. Thus, the Commission cannot at this time comply with the requirements of the Warren-Alquist Act to find that the Project complies with federal law.

III. LEGAL ARGUMENT

A. Warren-Alquist Act

Under the Warren-Alquist Act, the Commission's written decision to certify the Project must include findings showing that the Project conforms with, among other things, federal law. (Pub. Res. § 25523(d)(1).) Specifically, the Commission "shall require as a condition of certification that the applicant obtain any required emission offsets ...consistent with any applicable federal ...laws... and must make a finding that a project's offsets have been identified and will be obtained in accordance with the local air District's rules." (*Id.* § 25523(d)(2).)

Here, the District's Rule 1302 specifies the permitting procedures for all new or modified emission sources, including power plants. Specific to offsets, Rule 1302 requires that any authority to construct ("ATC") permit the District issues must ensure that all offsets be secured prior to commencement of project construction. Importantly, Rule 1302 is part of California's state

[3] CURE provided extensive comments on this issue to the Air District on October 2, 2007 in response to preliminary determination of compliance and to staff for its preliminary assessment on January 2, 2008.

implementation plan ("SIP"),[4] and is therefore the applicable federal law. In contrast, Rule 1406 is not SIP-approved. This distinction matters because the Commission cannot certify that a project complies with federal law unless it complies with all SIP-approved rules. Thus, under Rule 1302 (a federally enforceable SIP rule), the City must obtain and surrender to the District all 132.7 tons of PM10 offsets before it can commence Project construction, but the City may not generate those offsets under Rule 1406 unless and until EPA approves the Rule 1406 as part of the SIP.

B. Under the Clean Air Act, Rule 1406 Must Be SIP-Approved To Be Federally Enforceable

As it currently stands, Rule 1406 is not a federally enforceable rule under the Clean Air Act because it is simply a proposed SIP revision and will remain so until it receives EPA approval, and is adopted as part of the SIP. (*General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1096-1097 (9th Cir. 2007).) This is so because the portion of the California SIP applicable in the District already establishes the specific standards and rules with respect to offsets. Rule 1406 simply provides a new method for generating "non-traditional" offsets by paving unpaved dirt roads. Significantly, an air district may not unilaterally alter the legal requirements of a SIP once EPA has already approved it, "the SIP becomes federal law, not state law, once EPA approved it, and cannot be

[4] *See* http://yosemite.epa.gov/R9.

changed unless and until EPA approves any change." (*SAFE*, 488 F.3d at pp. 1096-1097.)

The City acknowledged that any PM10 offsets generated pursuant to Rule 1406 would not be legal until EPA approves the rule into the SIP. (Evid. Hearing Transcript, at p. 70, lines 18-22.) The District is also well aware of this fact. EPA warned the District that it could not consider Rule 1406 for SIP approval until the District first completes other SIP-required plans (CURE Exhibit 300).[5]

However, the City was mistaken in its position that it need ***not*** follow the District's existing, SIP-approved rule requiring the Project to offset its PM10 emissions "prior to Beginning Actual Construction." (District Rule 1302(D)(5)(b)(ii).) Instead, the City ignores this rule, and jumps to the less specific requirements in the Clean Air Act, which simply requires that offsets be federally enforceable prior to project operations. (*Id.*) It is indisputable that the rules in an EPA-approved SIP control here. (*SAFE*, at pp. 1092-1093 (states hold the primary responsibility for assuring air quality standards by promulgating SIPs that provide for the CAA's implementation, maintenance and enforcement within the state).) Thus, according to the evidence in the record, the Commission cannot at this time make the finding required by section 25523(d), and therefore cannot grant site certification for the Project.

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[5] According to EPA, "While I am hopeful we can work out the few remaining technical and rule language issues, EPA would like to reiterate that **there are still outstanding issues related to the PM SIP that must also be resolved before the rule can be considered for SIP approval**." (Emphasis added.)

C. Rule 1406's Specific Legal Deficiencies Currently Preclude it From SIP Inclusion

Before EPA can even consider Rule 1406 for inclusion as part of the SIP, the District must submit to EPA for approval a PM10 maintenance plan, which is a condition precedent to EPA approval of Rule 1406.[6] The Clean Air Act requires air districts to prepare nonattainment plans for EPA approval, which provide for attainment of the national ambient air quality standards for areas designated as not attaining these standards. (Clean Air Act section 172.) CURE's exhibit 301 shows that the District's governing board has not yet been presented with, much less adopted, a PM maintenance plan.[7] Once, the governing board adopts a final maintenance plan, that document must be sent to the California Air Resources Board and from there transmitted to EPA. Then, and only then, may EPA consider Rule 1406 for inclusion as part of the SIP.

Below are examples of Clean Air Act requirements the District must meet prior to SIP approval. Given the enormity of these tasks, under the most ambitious schedule, it is extremely unlikely Rule 1406 will be SIP-approved before the City commences Project construction this summer, if ever.

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[6] Personal communication with Alan Zabel, general counsel's office Environmental Protection Agency, Region 9 (March 18, 2008).

[7] Verified on April 21, 2008, *see* http://www.mdaqmd.ca.gov/.

First, the Clean Air Act requires that Districts prepare nonattainment plans for EPA approval that provide for attainment of the national ambient air quality standards ("NAAQS") for areas that have been designated as not attaining these standards.[8] That plan must be based on an inventory of all emissions[9] and a plan to reduce specific portions of that inventory. Without such an inventory and plan, it is impossible to know if any source of ERCs is otherwise needed to reach attainment.

CURE's exhibit 300 shows that the District is well aware that EPA cannot approve the Rule absent a proper maintenance plan. On August 24, 2007, EPA warned the District of this problem, stating: "...EPA would like to reiterate that there are still outstanding issues related to the PM SIP that must also be resolved before the rule can be considered for SIP approval."[10]

EPA has also made this clear to other districts. For example, in 2002, the Sacramento Metropolitan Air Quality Management District ("SMAQMD") proposed using road-paving ERCs for the Cosumnes Power Plant project. In a letter to SMAQMD, EPA stated: "The PM10 ERCs, primarily road pavement credits, are not valid because SMAQMD does not have an approved PM10 State Implementation Plan."[11] Absent an approved attainment plan,

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[8] Section 172 of the CAA.

[9] CAA Section 172(c)(3).

[10] CURE's Exhibit 300, Email from Laura Yannayon, EPA Region 9 to Alan De Salvio, Mojave Desert Air Quality Management District (August 24, 2007).

[11] Gerardo C. Rios, Chief, Permits Office, Region 9, USEPA, September 30, 2002 letter to Jorge DeGuzman, Permitting Program Supervisor, Sacramento Metropolitan Air Quality Management District.

the District cannot implement the Rule to create PM10 ERCs until EPA has approved the District's PM10 plan.

A federally-approved PM10 plan is central to proper creation and use of ERCs because it provides the overall legal and regulatory framework for an NSR program, especially the provision of an emission inventory that identifies in detail the emissions from, as well as control requirements for, each source category including unpaved roads if they contribute to the nonattainment problem.[12]

Second, in order to create and use non-traditional ERCs, the District was required to develop an economic incentive program consistent with EPA 2001 policy, *Improving Air Quality with Economic Incentive Programs* ("EIP").[13] EPA established the EIP policy in order to provide state and local agencies with guidance on developing revisions to their plans and rules that would provide sources with compliance flexibility. This policy includes EPA approval criteria, which must be met if such agencies adopt rules or plans that provide for the creation and use of non-traditional ERCs such as road paving offsets. Compliance with the EIP is not optional.[14] Thus, the District must comply with EIP before EPA will consider adding Rule 1406 to the SIP.

Until EPA receives and approves these plans, and then separately acts upon Rule 1406, the District cannot lawfully permit sources to create

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[12] Section 172(c)(3)).

[13] See http://www.epa.gov/ttn/caaa/t1/memoranda/eipfin.pdf.

[14] See CURE's PSA comments, at p. 6.

nontraditional offsets pursuant to the rule. Until this and other legal deficiencies are resolved, neither the Air District nor the Commission can lawfully approve the Project's proposed offset plan. CURE cannot fathom how all of this could be accomplished within the next several months, nor is there any certainty that EPA will ever make Rule 1406 a part of the SIP.

The District and Staff appear to be of the opinion that EPA's approval of Rule 1406 is a foregone conclusion, and the District will miraculously obtain all of these outstanding EPA approvals by July 2008. Therefore, the City and Staff are only proposing to generate the necessary PM10 offsets pursuant to Rule 1406. However, under the Warren-Alquist Act, the Commission cannot make its required finding at certification that the Project conforms with the federally enforceable Rule 1302 because the evidence shows that the only method to comply with that is a rule that has not even been proposed for the SIP; thus, EPA has not taken any of the prerequisite steps, and may or may not ever find that Rule 1406 can be included in the SIP.

It appears that the only legal option is for the Commission to require the City to identify an alternate source of federally enforceable PM10 offsets prior to commencement of construction.

IV. CONCLUSION

For the foregoing reasons, CURE respectfully requests that the Commission not certify the Victorville 2 Hybrid Power Project until the Commission can make full and proper findings pursuant to the Warren-Alquist Act that the Project will obtain federally enforceable PM10 offsets prior to commencement of Project construction.

Dated: April 21, 2008

Respectfully submitted,

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on April 21, 2008, transmission of the attached OPENING BRIEF OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, California, on April 21, 2008.

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