

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062

bheeley@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL, SUITE 350
SACRAMENTO, CA 95814-4715

TEL: (916) 444-6201
FAX: (916) 444-6209

DANIEL L. CARDOZO
RICHARD T. DRURY
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
MARC D. JOSEPH
LOULENA A. MILES
SUMA PEESAPATI
GLORIA D. SMITH

FELLOW
RACHAEL E. KOSS

OF COUNSEL
THOMAS R. ADAMS
ANN BROADWELL

March 28, 2008

DOCKET	
07-AFC-1	
DATE	MAR 28 2008
RECD.	MAR 28 2008

California Energy Commission
Attn: Docket No. 07-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: Victorville 2 Hybrid Power Project, 07-AFC-1

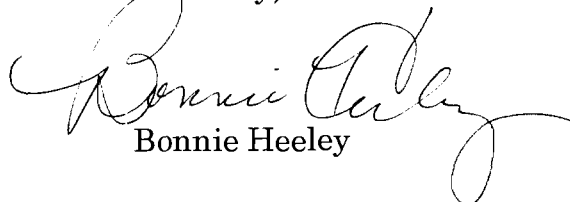
Dear Docket Clerk:

Enclosed are an original and 2 copies of CURE's Prehearing Conference Statement for the Victorville 2 Hybrid Power Project, 07-AFC-1. This document has previously been sent to the Docket Office via email.

Please process and return a copy in the envelope provided.

Thank you for your assistance.

Sincerely,


Bonnie Heeley

:bh
Enclosures

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

The Application for Certification
for the CITY OF VICTORVILLE 2
HYBRID POWER PROJECT

Docket No. 07-AFC-1

**PREHEARING CONFERENCE STATEMENT OF THE
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

March 28, 2008

Marc D. Joseph
Gloria D. Smith
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com

STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

The Application for Certification
for the CITY OF VICTORVILLE 2
HYBRID POWER PROJECT

Docket No. 07-AFC-1

**PREHEARING CONFERENCE STATEMENT OF THE
CALIFORNIA UNIONS FOR RELIABLE ENERGY**

In response to the March 13, 2008, Notice of Prehearing Conference, this statement preliminarily identifies issues intervenor California Unions for Reliable Energy (“CURE”) intends to raise at the public evidentiary hearings for the Victorville 2 Hybrid Power Project (“Project”). CURE submits this statement preliminarily and subject to change because the staff’s environmental review and analysis of the Project is incomplete with respect to biological resources.

Specifically, as discussed in Section II B below, neither the Fish and Wildlife Service nor the Department of Fish and Game have finalized key management plans for legally protected species affected by the Project, in part because the City itself has not timely fulfilled its own obligations to provide the agencies with required data. We reserve the right to supplement and/or amend this statement.

I. Technical Areas That Are Complete and Ready to Proceed to Evidentiary Hearings

As of March 28, 2008, CURE does not object to a finding of completeness and readiness to proceed to evidentiary hearings for any technical area *except* those discussed in Section II below.

II. Technical Areas That Are Not Complete and Not Yet Ready to Proceed To Evidentiary Hearings

There are fundamental unresolved issues in the areas of air quality and biological resources. With respect to air quality, the Staff Assessment recommended offsetting the Project's combustion-related PM10 emissions by allowing the City to pave unpaved roads anywhere within the Mojave Desert Air Quality Management District ("Air District"), thereby reducing road dust. (FSA, pp. 4.1-15, 16.)

However, such a proposal will not comply with federal requirements under the Clean Air Act because the offset plan, based upon the Air District's recently adopted Rule 1406, has not been approved by EPA into the state implementation plan ("SIP").¹ Importantly, EPA is unlikely to act upon Rule 1406 anytime soon because before EPA can approve the rule, the Air District must submit for EPA approval a district-wide non-attainment or maintenance plan for incorporation into

¹ Mojave Desert Air Quality Management District's Rule 1406-Generation of Emission Reduction Credits for Paving Unpaved Public Roads (August 27, 2007).

the SIP.² Only when that process is complete can EPA evaluate Rule 1406 for Clean Air Act compliance and inclusion into the SIP.

As for biological resources, the FSA is admittedly incomplete, and numerous key decision-making documents and/or management plans remain outstanding, or have only recently been submitted to the Fish and Wildlife Service, the Department of Fish and Game and the Commission. In this regard, the analysis and mitigation of the Project's impacts on biological resources is contingent on numerous unresolved issues and, therefore, this topic will not be ready for hearing by April 3, 2008.

A. Air Quality

The staff assessment omitted meaningful analysis of whether the City's offset plan complied with federal requirements under the Clean Air Act, vaguely asserting instead that, "staff believes that the project complies with applicable LORS."³ However, under the Warren-Alquist Act, the Commission must make findings showing that all emission offsets are consistent with federal law.⁴ CURE disputes staff's conclusion that the Project's PM10 offset strategy complies with federal law.

CURE submitted comments on the Air District' preliminary determination of compliance and staff's preliminary assessment outlining the specific legal

² Personal communication with Alan Zabel, general counsel's office Environmental Protection Agency, Region 9 (March 18, 2008). Also, the California Air Resources Board must review and transmit the rule to EPA.

³ FSA at p. 4.1-16.

⁴ Pub. Resources Code § 25523(d)(2).

deficiencies precluding the City's use of Rule 1406.⁵ Both the Air District's final determination of compliance and Staff's LORS assessments were fundamentally flawed because the Air District rule under which the offsets would be issued is not federally approvable.

Put simply, for Rule 1406 to comply with the Clean Air Act, it must meet certain legal requirements. For example, the District was required to have an EPA-approved nonattainment plan or maintenance plan before adopting the rule for the nonattainment area in which offsets will be created and used.⁶ The problem is, the District has not submitted to EPA attainment and/or maintenance plans for the previously designated PM10 nonattainment areas in the District. Until EPA receives and approves such plans, and then separately acts upon Rule 1406, the District cannot lawfully permit sources to create 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.

B. Biological Resources

The Project would impact numerous plant and animal species, three of which are legally protected under the state and federal Endangered Species Acts. The

⁵ See Comments on the Preliminary Staff Assessment for the Victorville 2 Hybrid Power Project (January 2, 2008); Comments on the District's Preliminary Determination of Compliance for the Victorville 2 Power Plant Project (October 2, 2007).

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. See Clean Air Act section 172.

City has not proposed adequate protection for the federal and state listed desert tortoise, the state listed Mohave ground squirrel and the burrowing owl, a species of special concern. In addition, the project site contains important native desert vegetation and habitat types, including creosote rings.

Despite the significance of these issues, few are close to resolution. Indeed, the City is still in the process of finalizing key decision-making documents that will determine many aspects of the final impacts and mitigation plans for biological resources; other documents have only recently been made available to the wildlife agencies, the Commission, intervenors and the public for review. For example the following documents were only recently made available or are outstanding:

- The City's required rare plant survey for 2008 remains outstanding;⁷
- The second addendum to the City's biological assessment of endangered species (made available on March 11, 2008);⁸
- The 267-page application to the Department of Fish and Game for the incidental take of both the desert tortoise and Mohave ground squirrel (made available on March 11, 2008);
- The City's translocation plan submitted to both the Department of Fish and Game and the Fish and Wildlife Service (made available on March 3, 2008);

⁷ FSA, p. 4.2-1.

⁸ CURE realizes that the Fish and Wildlife Service has issued a biological opinion; however, given that the tortoise translocation program is still unresolved, and the fact that the City just produced a second addendum to its biological assessment, it is apparent that none of the wildlife issues are complete.

- 1992 California Desert Tortoise Management Policy (made available on March 24, 2008).

Most significantly, the California Department of Fish and Game has not acted upon the City's 276-page CESA section 2081 application for incidental take of listed species because the City did not submit the application until March 11, 2008. Most issues concerning biological resources remain unresolved, especially until Fish and Game has completed its analysis concerning issuance of an incidental take permit under CESA section 2081. Given this uncertainty, the Commission can neither make a LORS determination for either state or federal law, nor can it decide appropriate Conditions of Certification for biological resources. In sum, no evidentiary hearings on biological issues can go forward on April 3, 2008.

CURE cannot take a position on any matters presented, including the dispute concerning habitat compensation ratios. The City proposes to only provide compensatory habitat at a ratio of 1:1 ratio rather than 3:1, as staff recommended. Likewise, staff does not consider the degraded lands the City proposed for compensatory habitat as suitable as compared to the Project site.⁹ The Department of Fish and Game has yet to issue a determination on either of these matters. In this way, CURE will not weigh in until the wildlife agencies have completed their statutorily mandated work.

⁹ See FSA, at p. 1-10.

III. Cross-Examination

CURE requests the opportunity to cross-examine staff and the City witnesses on all topic areas in dispute. Until we see the City's pre-hearing conference statement, we cannot be certain about the nature or extent of cross-examination.

IV. List of Exhibits

Air Quality

A. CURE's exhibit A shows that EPA has warned the Air District that Rule 1406 cannot be approved into the SIP because the District has not submitted, nor has EPA approved, a District-wide PM non-attainment plan. (Email from EPA Region 9 to the Air District's Alan De Salvo notifying the District that EPA would not be able to approve Rule 1406 given the outstanding PM SIP issues. (August 24, 2007).)

B. CURE's exhibit B shows that the Air District has not yet adopted, much less submitted to EPA for approval, a SIP approvable District-wide non-attainment plan. (MDAQMD Rule Development Calendar 2008 listing development of a PM10 attainment and maintenance plan, and listing a "rehash" on Rule 1406 "in conjunction with PM10 plan.")

V. Proposed Schedule

Due to a scheduling conflict, CURE requests that opening briefs not be due for filing before April 25, 2008 and that reply briefs not be filed before May 2, 2008.

Dated: March 28, 2008

Respectfully submitted,



Marc D. Joseph
Gloria D. Smith
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
(650) 589-1660 Voice
(650) 589-5062 Facsimile
mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com

Attorneys for the CALIFORNIA UNIONS FOR
RELIABLE ENERGY

EXHIBIT


A



Laura
Yannayon/R9/USEPA/US
08/24/2007 01:40 PM

To Adesalivo@mdaqmd.ca.gov
cc Kerry Drake/R9/USEPA/US@EPA, Allan
Zabel/R9/USEPA/US@EPA@EPA, Lily
Wong/R9/USEPA/US@EPA
bcc

Subject Additional EPA comments on latest PERC rule draft

History:  This message has been replied to.

Alan,

I left you a voice mail message, but I think today is your every other Friday off, so I thought I should send you an email as well. Please find attached the latest draft of Rule 1406 you provided a few weeks ago with additional track change edits and comments. Many of the changes are minor or provide clarification. For example, in several places the rule refers back to Rule 1402 on how certain actions are to be performed. Because of the different terminology used in Rule 1406, we think it is better to spell these requirements out in this rule, using the terminology of this rule. Please review and accept all of the changes you concur with so we can focus on the remaining issues. I edited the text to accept the 1% moisture content. (Note the rule was not consistent, in one place it stated you had to test to determine, and in another it said you had to use the default.)

The one technical issue remaining is how the traffic counts will be conducted and how this raw collected data will be used to determine annual traffic counts.

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.



LY - Second Draft 1406 8-24-07.doc

Laura Yannayon

US EPA, Region 9 / Air Division, Permits Office (Air-3) / San Francisco, CA 94105-3901
yannayon.laura@epa.gov / (415) 972-3534 / (415) 947-3579 (fax)

EXHIBIT

B

MDAQMD Rule Development Calendar 2008

District	Rule #	Rule Title	Action Considered
MD	307	Asbestos Waste Disposal Site Fees	Amend or Rescind if unnecessary.
MD	308	Stationary Source Monitoring Device Fees	Amend and consolidate with 304 and 310.
MD	309	Stationary Source Monitoring Device Fee	Rescind and consolidate in Rule 304.
MD	310	Source Emission Analysis Fees	Rescind and Consolidate in Rule 304.
MD	310	Source Emission Analysis Fees	Amend and consolidate with 304 and 309.
MD	314	Reinspection Fee	New rule. Could be consolidated in Rule 304.
MD	403.1	Fugitive Dust Control for SVPA	Also required by PM Plans
MD	403.2	Fugitive Dust Control for MDPA	Also required by PM Plans
MD	431	Sulfur content of fuels	Update to conform with CARB Diesel requirements
MD	442	Usage of Solvents	Amend to update language. Check for compliance with additional PM measures, amend if needed.
MD	461	Gasoline Transfer & Dispensing	The efficiency of vapor systems from 95 to 98, for EVR. Daily inspections of vapor recovery systems.
MD	463	Storage of Organic Liquids	Update to conform with current tank requirements from USEPA & CARB
MD	463	Storage of Organic Liquids	Update definitions, update test methods, add the "catch all" test method language
MD	900	Standards of Performance for New Stationary Sources	Update citations & cross references. Request Delegation authority if necessary.
MD	900	Standards of Performance for New Stationary Sources	Update citations & cross references
MD	901	Asbestos sources not covered by Federal Regulation	Potential new rule.
MD	1000	National Emissions Standards for Hazardous Air Pollutants	Update citations & cross references. Request Delegation authority if necessary.
MD	1000	National Emissions Standards for Hazardous Air Pollutants	Update citations & cross references. Request Delegation authority.
MD	1116	Automotive Refinishing Operations	Update rule to reflect SCM.
MD	1117	Graphic Arts	Update to RACT
MD	1118	Aerospace Vehicle Parts and Products Coating Operations	Conform to AV1124 requirements.
MD	1118	Rule 1118 – Aerospace Vehicle Parts and Products Coating Operations	Amend to comply with current MACT/ATCM and CTGs.
MD	1160	Internal Combustion Engines	Analyze PM Measures for cost effectiveness. Update for RACT. Conform to ATCM.
MD	1406	ERC's from Road Paving Operations	Rehash in conjunction with PM10 plan.
MD	1511	Recovery or Recycling of Refrigerants From Motor Vehicle Air Conditioners	Rescind if superceded by USEPA regulations.

This calendar is produced to satisfy their requirements of Health Safety Code 40923(a). Inclusion on this list does not necessarily indicate that a particular action or any action at all will be taken on the item. 2/12/2008

MDAQMD Rule Development Calendar 2008

District	Rule #	Rule Title	Action Considered
MD	Plan	8 hour Ozone Plan	Requires SCAQMD regional modeling, CARB Mobile Inventory and latest planning assumptions (local facility data, regional transportation data & statewide growth data)
MD	Plan	PM10 Attainment & Maintenance Plan	USEPA request to allow use of offsets.
MD	Plan	ROP Milestone Update	Requires latest planning assumptions (Local facility data, regional transportation data & statewide growth data)
MD	Plan	State Triennial Update	Requires latest planning assumptions (Local facility data, regional transportation data & statewide growth data)
MD	Reg 11	Regulation XI - Source Specific Standards	Rescission of old SCAQMD rules in SIP for Riverside County and replacement by 8hr O3 adopted Fed Negative Declarations (Clean Up)
MD	Reg 4	Regulation IV - Prohibitions	Rescission of old SCAQMD rules in SIP for Riverside County and replacement by 8hr O3 adopted Fed Negative Declarations (Clean Up)
MD	Reg 7	Air Pollution Emergency Contingency Actions	Combine into 1 rule
MD	Reg 7	Emergencies	Consolidate regulation into single rule.
MD	Report	1104 Solvent Cleaning & Degreasing	Analyze PM Measures for cost effectiveness
MD	Report	1157 Boilers & Process Heaters	Analyze PM Measures for cost effectiveness.
MD	Report	1158 Electric Utility Operations	Analyze PM Measures for cost effectiveness.
MD	Report	1159 Stationary Gas Turbines	Analyze PM Measures for cost effectiveness.
MD	Report	Ag Ops Fugitive Dust (Potential 403.?)	Determine Status of SJUAPCD rule(s). Consolidate with Ag Confined Animal Facilities, Ag Fugitive Dust, Ag Best Management Practices, Ag IC Engines, 219 update for Ag sources.
MD	Report	Composting Operations (Potential 1133)	Analyze PM Measures for cost effectiveness. Also need results of San Joaquin APCD's agriculture regulations.
MD	Report	Residential Water Heaters	Analyze PM Measures for cost effectiveness.
MD	Report	Wood Burning Fireplaces	Analyze PM Measures for cost effectiveness. New rule if necessary

This calendar is produced to satisfy their requirements of Health Safety Code 40923(a). Inclusion on this list does not necessarily indicate that a particular action or any action at all will be taken on the item. 2/12/2008

MDAQMD Rule Development Calendar 2008

District	Rule #	Rule Title	Action Considered
MD	2001	2001 - Transportation Conformity	Amend.
MD	2001	Transportation Conformity	Update
MD	2003	2003 - Consultation procedures	Rescind if appropriate MOU is signed and approved into the SIP.
MD	2003	Consultation procedures	Rescind if MOU signed and approved into SIP.
MD	New	114 Small Ag ICE Registration Program	Pending CARB adoption of Ag engine ATCM requirements. Rule setting up program will need to go in Reg. I. May also need a Reg III fee rule.
MD	New	1160.2 RACT for Agricultural ICE	Tie into Best Management Practices for Ag. RACT for AG engines. Conform to ATCM.
MD	New	1179 Publically Owned Waste Treatment	Determine Status of SJUAPCD rule(s). Consolidate with Ag Confined Animal Facilities, Ag Fugitive Dust, Ag Best Management Practices, Ag IC Engines, 219 update for Ag sources.
MD	New	1186 Agriculture Best Mgmt Practices	New rule for RACT
MD	New	1186.1 Agriculture Large Confined Animal Facility	Determine Status of SJUAPCD rule(s). Consolidate with Ag Confined Animal Facilities, Ag Fugitive Dust, Ag Best Management Practices, Ag IC Engines, 219 update for Ag sources.
MD	New	Large Spray Booths	Analyze PM Measures for cost effectiveness.
MD	New	Reinspection Fee	Adopt new rule 314. (Could use #309 or 310 of previously rescinded/consolidated with 304)
MD	New	Space Heaters	New rule for RACT
MD	Notice	Notification ATCM's and MACT Standards	Update rulebook notifications

This calendar is produced to satisfy their requirements of Health Safety Code 40923(a). Inclusion on this list does not necessarily indicate that a particular action or any action at all will be taken on the item. 2/12/2008

MDAQMD Rule Development Calendar 2008

District	Rule #	Rule Title	Action Considered
MD	102	Definitions	Update definitions.
MD	203.1	Special Permit Provisions	Rescind. Rule superceded by terms of Regulation XIII.
MD	203.1	Special Permit Provisions	Rescind. Rule superceded by terms of Regulation XIII.
MD	203.2	Eligibility of Compensatory Emissions Reductions	Rescind. Rule superceded by terms of Regulation XIII.
MD	203.2	Eligibility of Compensatory Emissions Reductions	Rescind. Rule superceded by terms of Regulation XIII.
MD	213	Standard for Permits to Construct: Air Quality Impact	Rescind. Rule superceded by terms of Regulation XIII.
MD	213	Standards for Permits to Construct: Air Quality Impact	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.1	Standard for Permits to Operate: Air Quality Impact	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.1	Standards for Permits to Operate: Air Quality Impact	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.2	Definitions for Rules 213 and 213.1, 213.3	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.2	Definitions for Rules 213 and 213.1, 213.3	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.3	Additional Standards for Permits to Construct and Operate	Rescind. Rule superceded by terms of Regulation XIII.
MD	213.3	Additional Standards for Permits to Construct and Operate	Rescind. Rule superceded by terms of Regulation XIII.
MD	218	Stack Monitoring	Amend to standardize breakdown reporting.
MD	218	Stack Monitoring	Amend. Standardize breakdown reporting
MD	219	Equipment Not Requiring A Permit	Clean up 219 to conform with 1160, 1160.1 and 1160.2 issues. Exempt Ag engines at Facilities >half Title V threshold. Set up for "small ag" registration program. Consolidate with Ag Confined Animal Facilities, Ag Fugitive Dust, Ag Best Management Practices, Ag IC Engines, 219 update for Ag sources.
MD	301	Permit Fees	CPI Adjustment
MD	303	Hearing Board Fees	Amend to reformat, reorganize and update.
MD	303	Hearing Board Fees	Amend to reformat, reorganize and update.
MD	304	Analysis Fee	Amend and consolidate with 309 and 310.
MD	304	Analysis Fees	Amend and consolidate with 309 and 310
MD	305	State Mandated Fees	Amend and update
MD	305	State Mandated Fees	Amend.
MD	306	Demolition and Renovation Project Fees	Amend.
MD	306	Demolition and Reonvation Project Fees	Amend to reflect program costs.
MD	307	Asbestos Waste Disposal Site Fees	Amend or Rescind if rule unnecessary.

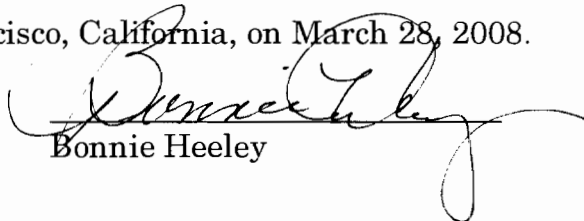
This calendar is produced to satisfy their requirements of Health Safety Code 40923(a). Inclusion on this list does not necessarily indicate that a particular action or any action at all will be taken on the item. 2/12/2008

PROOF OF SERVICE

Transmission via electronic mail was consistent with 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.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at South San Francisco, California, on March 28, 2008.


Bonnie Heeley

Via Mail to:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Via Email to:

docket@energy.state.ca.us
Jroberts@ci.victorville.ca.us
Tbarnett@inlanenergy.com
Shead@ensr.aecom.com
Michael.Carroll@lw.com
esaltmarsh@eob.ca.gov
gsmith@adamsbroadwell.com
amoreau@klinedinstlaw.com
jboyd@energystate.ca.us
jpfannen@energy.state.ca.us
rrenaud@energy.state.ca.us
jkessler@energy.state.ca.us
cholmes@energy.state.ca.us
pao@energy.state.ca.us