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

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

Dear Sir or Madam:

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

Attached hereto is the Opening Brief filed jointly by California Communities Against Toxics and Communities for a Better Environment.

This filing was filed today via electronic mail in accordance with the July 1, 2010 Proof of Service List in addition to being deposited into the U.S. Mail for delivery to the Dockets Unit.

Sincerely,

ORIGINAL SIGNED BY

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STATE OF CALIFORNIA

ENERGY RESOURCES

CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	**Docket No. 07-AFC-03**
Application for Certification for the CPV SENTINEL ENERGY PROJECT	OPENING BRIEF

Pursuant to the Commission's July 19, 2010 mandate, California Communities Against Toxics ("CCAT") and Communities for a Better Environment ("CBE") respectfully submit a joint Opening Brief in the above-captioned matter.[1]

I. Introduction

When the Legislature adopted, and the Governor signed, Assembly Bill 1318 (V. Manuel Perez, 2009) the California Energy Commission was given clearly articulated enhanced duties: not only must the Commission undertake its ordinary review of the CPV Sentinel Application for Certification, it must also conduct an independent evaluation of the emission reduction credits that the South Coast Air Quality Management District ("SCAQMD") is providing from its internal account to offset the emission increases from the proposed facility. This legislative direction, crafted by the Applicant to circumvent the established process for SCAQMD rule adoption and EPA approval, imposed on the Commission a heightened responsibility. Presumably, the Commission is intended to act as a mediating agency between the assertions of the Applicant that the ERCs from the SCAQMD are valid and comply with all relevant laws, and the assertions of the several community and environmental organizations that the ERCs are invalid, cannot be used to offset pollution emissions, and that their creation and distribution violate federal law.

AB 1318 requires that, prior to certifying a project that relies on credits from the SCAQMD, the Commission first evaluate whether the credits meet all applicable laws, identifying in particular, the federal Clean Air Act, the law governing the creation of ERCs, and the law

[1] While CCAT and CBE are submitting a joint Opening Brief, each of party retains the right to submit individual rebuttal briefs, in addition to maintaining completely separate status for any and all additional matters heard before this Committee, the Commission, or in any other venue.

governing transfer of ERCs from the SCAQMD to powerplants. If the Commission determines that either ERC creation or transfer would violate state or federal law, the Commission *must* refrain from *certifying* any project that would rely on the credits.[2] The certification must be based upon the law as it exists at the time of the certification, not as the Applicant hopes it will exist at some point in the future.

This new duty is particularly challenging since it, in effect, requires the Commission to guess what the state court, the federal court, and EPA will decide on the range of issues raised by the Applicant's effort to rely upon the ERCs being offered by the SCAQMD. Essentially, the Commission has been directed to interject its judgment on questions of federal and state law that are generally outside of the Commission's direct decision-making arena. Now the Commission must pull out its crystal ball to guess, as best it can, how these processes will unfold. We urge the Commission to consider carefully how to proceed and how best to balance the strong desire of the Applicant to see its project move forward against the need to ensure a stable application decision-making process and follow the mandate of state law.

II. AB1318 doesn't allow transfer until the Commission can determine that ERCs meet all applicable legal requirements

In the Final Staff Assessment, Staff found that "The applicant has secured sufficient offsets to satisfy SCAQMD Rule 1303 (which requires Emission Reduction Credits (ERCs))"[3] The credits on which the Applicant wishes to rely are purportedly being provided through a process created

[2] The State Energy Resources Conservation and Development Commission shall determine whether the emission credits to be credited and transferred *satisfy* all applicable legal requirements…. 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).

[3] Exhibit 214, Final Staff Assessment Air QualityAddendum 2.1-36.

by AB 1318. In fact, the Applicant is not much closer to securing the necessary offsets than they were in October 2008 when staff found that the project had not yet secured the necessary ERCs.[4]

In October 2008, the Applicant's position was that they were going to secure ERCs from the SCAQMD's priority reserve. Access to those credits, however, was blocked for two reasons (1) the State Superior Court had enjoined the SCAQMD from creating the credits upon which the Applicant wished to rely and enjoined the SCAQMD from distributing those credits to powerplants; and (2) the SIP-approved rule that allowed the AQMD to transfer Priority Reserve Credits to powerplants had sunset and therefore under federal law, the SCAQMD was barred from transferring the credits to the Applicant. While the Applicant's legislative effort has, temporarily, addressed the State Court injunction, the federal law barriers to the transfer remain.

Clear evidence on this issue has been provided by the SCAQMD itself:

> In order to implement AB 1318, the District has proposed a SIP revision for the CPV Sentinel offsets. *The purpose of the SIP revision is to "provide a mechanism for the transfer of credits to CPV Sentinel, and [to] establish the AB 1318 tracking system used to account for such credits."* (SIP Revision, Attachment A; Preamble, p. I.) The text of the SIP revision includes the following: "Notwithstanding District Rule 1303, this SIP revision provides a federally-enforceable mechanism for transferring offsets from the AQMD's internal accounts to the CPV Sentinel Project." The importance of the language "notwithstanding District Rule 1303" is two-fold.
>
> *First, this language makes clear that the transfer of offsets may occur in spite of language in Rule 1303(b)(2)(A)* which says "Unless exempt from offsets requirements pursuant to Rule 1303, emission increases shall be offset by either Emission Reduction Credits approved pursuant to Rule 1309, or by allocations from the Priority Reserve in accordance with the provisions of Rule 1309.1 ...."

[4] Exhibit 200, Final Staff Assessment at 4.1-1.

Second, Rule 1303 requires that emission offsets be obtained before a Permit to Construct is issued. (District Rule 1303(b) (2)(A).)[5]

This language makes clear, the Applicant has not, and cannot, "secure" ERCs unless and until the U.S. EPA approves the proposed SIP-revision. As discussed below, the Applicant's argument that federal law and policy allows the permit to be issued without meeting the requirements of Rule 1303 are unavailing. Even if the Applicant's claim were correct—which it is not—the Applicant's effort to secure certification absent federal approval would run afoul of state law.

Under AB 1318 the Commission shall not certify a facility's Application if the "credit and transfer by the south coast district do not satisfy *all applicable legal requirements*." The clear language of the statute does not allow the Commission to certify a facility based upon the Applicant's strong hope that the EPA will approve a proposed SIP revision. Indeed, if all that was necessary for securing Commission approval was for the Applicant to assert that "we're just one or two changes in the law away from having the credits," then the Application could have been certified long ago. The plain fact of the matter is, the current federal law does not allow the District to issue a Permit to Construct prior to emission reduction credits being secured, nor does federal law allow the transfer of credits from the SCAQMD to a power plant project. AB 1318 does not allow the Commission to certify the project based upon a finding that if federal law changes, the credit and transfer by the SCAQMD will meet applicable legal

[5] Exhibit 219, Legal Argument of the South Coast Air Quality Management District in Response To Intervenors' Testimony at 5. (emphasis added)

requirements. The Commission must in fact find that the credit and transfer both currently meet all currently-applicable requirements.

III. Approval by the EPA of the Applicant's proposed reliance on the SCAQMD's Priority Reserve is required prior to certification of the project

The Applicant has asserted that emission reduction credits need not be secured by the facility until commencement of operation[6] and provides three pieces of support for this assertion: (1) an excerpt from a 1994 EPA memo; (2) a quote from the Warren-Alquist Act; and (3) the example of the CEC approval of the Victorville 2 Hybrid Power Plant Project. Each is completely unavailing.

First, the 1994 EPA memo from John Seitz discusses NOx offsets, not the PM10 and SOx offsets which the facility has not yet secured.[7]

More importantly, the memo is very clear that EPA strongly discourages issuing permits to construct prior to securing necessary offsets. The memo states:

> The EPA's general policy is that emissions offsets for a major new or modified stationary source must be federally enforceable prior to the issuance of a part D new source review (NSR) construction permit. This position is consistent with congressional intent as reflected in the changes made to the Act under the 1990 Amendments.
>
> ***
>
> The requirement that offsets be federally enforceable is based on sound policy, as well. Federal enforceability for the source making the offsetting reductions ensures that the Agency may hold the reducing source responsible in an enforcement action for failure to make the reductions. It further ensures that the criteria for fully-creditable offsets (quantifiable, surplus, permanent) are addressed before construction may commence. After commencement of construction, the

[6] Exhibit 152, Applicant's Rebuttal to Declaration of Michael Harris at 2-3.
[7] The SCAQMD assertion that they happen to know that Region IX applies this idea beyond the context of NOx is entirely unsupported and should not be relied upon by the Commission.

> equity considerations shift in favor of the new or modified source needing offsets. Once constructed, it may become more difficult for EPA or a State to prevent that source from commencing operation even though the offsetting reductions are not yet identified, quantified, and secured with federally-enforceable restrictions.
>
> ***
>
> The EPA is concerned both about the consistency of this approach [allowing issuance of permits] with Act requirements, and the potential abuse of it in practice. As discussed above, once a new or modified major source has completed construction and is ready to operate, it may be very difficult for reasons of equity for EPA or a State indefinitely to prevent the source from operating pending acquisition of sufficient creditable offsets that have been secured with federally-enforceable restrictions. In general, therefore, EPA does not believe it is appropriate to allow a construction permit to be issued until creditable offsets are identified, quantified, and made federally enforceable. [8]

Completely contrary to the Applicant's assertion, the EPA does not generally allow nor does it favor allowing construction to begin before providing offsets.

Second, the Applicant quotes the Warren-Alquist Act for the proposition that credits are not required until commencement of operations. This is incorrect – in the SCAQMD's zone of authority, where the facility would be located, the controlling law is Rule 1303, which clearly states—as even the SCAQMD admits—that the credits must be provided prior to *issuance of the permit* to construct, not prior to construction or operation. The Applicant is free to cite provisions of the federal Clean Air Act, or Warren-Alquist, both are superseded by SIP-approved rules. The Applicant's reliance on either the Warren-Alquist Act or the text of the Clean Air Act is misplaced.

Third, the Applicant provides the Commission approval of the Victorville 2 Hybrid Power Plant project as support for the notion that there is precedent for certifying Applications prior

[8] Exhibit 219, Legal Argument of the South Coast Air Quality Management District in Response to Intervenors' Testimony, Attachment E, pages 3, 4, and 5.

to SIP approval of proposed ERC packages. We remind the Commission that although that project was approved in 2008, the Victorville project cannot move forward because the California Court of Appeal found that the road-paving rule the facility sought to rely upon was improperly adopted, and enjoined its use. Further, in that instance, this Commission was not charged with analyzing the legality of the creation and transfer of credits prior to certifying the project. Perhaps informed by Victorville 2, the Legislature has required this Commission to refrain from certifying CPV Sentinel unless the Commission knows that the credits were legally created and transferred. Providing certifications prior to final decisions from relevant courts or agencies introduces unnecessary uncertainty into the certification process and into the process of ensuring a stable energy system for the state.

IV. Conclusion

The Commission has an independent duty first to determine whether these credits meet all applicable laws, and then whether they may be transferred from the Priority Reserve account for use by Sentinel. Federal law clearly prohibits the transfer, and thus the Commission should conclude that the Applicant has not secured the ERCs required for the CPV Sentinel Project. Upon making this conclusion, AB 1318 provides that the Commission must refrain from certifying the Project, which is what CBE and CCAT request the Commission to do.

Dated: August 13, 2010

Respectfully submitted,

[Original signed]
Angela Johnson Meszaros
Counsel for
California Communities Against Toxics

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Shana Lazerow
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Communities for a Better Environment

DECLARATION OF SERVICE

I, Angela Johnson Meszaros, declare that on, August 13, 2010, I served and filed a copy of the attached *Opening Brief*. 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;

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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:

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

____original signed by_____

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 7/1/2010)

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