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DOCKET
07-AFC-3

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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
Reply Brief
Docket No. 07-AFC-3

Dear Sir or Madam:

Attached hereto is the Reply 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

Angela Johnson Meszaros
Counsel to
California Communities Against Toxics

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

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CALIFORNIA COMMUNITIES AGAINST TOXICS

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

JOINT REPLY 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 Reply Brief in the above-captioned matter.¹

I. Introduction

Applicant is only one change in the law away from securing emission reduction credits from the internal bank maintained by the South Coast Air Quality Management District. Applicant CPV Sentinel and CEC Staff are urging this Commission to certify the Sentinel project based on a hunch that the law will be changed. Commission precedent, Assembly Bill 1318 (V. Manuel Perez, 2009), and federal law all contradict this outcome.

II. Argument

A. *Commission Precedent Prohibits Certifying a Project Until it has Legally-Enforceable ERCs*

Before a project can be certified, an applicant must offer credits either that it has purchased or to which it "possesses legally enforceable commitments." This requirement is clearly spelled out, for example, in the High Desert Power Project, Presiding Member's Proposed Decision (PMPD), p. 103.

. . . under Public Resources Code section 25523 (d)(2) we are prohibited from finding that a proposed facility complies with applicable air quality standards unless the Applicant obtains sufficient offsets **prior to licensing**. (10/7/99 RT 58, 60-1, 64; see also Staff's 11/5/99 Post-Hearing Brief, pp. 1-2.) In our estimation, this means that Applicant must establish that it has purchased or **possesses legally enforceable commitments** to sufficient quantities of offsets required to mitigate the air impacts of the project before we may recommend project certification. (PMPD, p.101) Applicant must provide verification that it has

¹ While CCAT and CBE are submitting a joint Reply Brief, each of party retains the right to submit individual documents in the future, in addition to maintaining completely separate status for any additional matters heard before this Committee, the Commission, and all other venues.

purchased or **obtained legally enforceable rights to all required offsets** in order to persuade us that air impacts associated with the project will be mitigated to below a level of significance. It has not yet done so. We therefore conclude that we may not now recommend that the Commission certify the High Desert Power Project.

The promise that credits identified in the two subsequent modifications to the FDOC will be available for the CPV Sentinel project later—just not now—is as unavailing to Sentinel as it has been to previous projects.² CPV Sentinel has no legally enforceable right to the offsets required for certification since the entire crediting scheme hinges on EPA concluding its decisionmaking process concerning the SCAQMD SIP submission that would allow the generation and transfer of credits for the Project, and approving that submission in its entirety. Should the EPA not approve the District’s proposed SIP amendment, what recourse will CPV Sentinel have to secure those credits? EPA could approve the generation of credits from the identified sources and still reject their transfer for use by a power plant. It could approve a transfer in theory to a power plant, but reject the use of these particular credits. Or, the EPA could reject some or all of the District’s calculation methodology for the credits in the pool resulting in the balance falling below what is needed for the CPV project. In any of these scenarios, SCAQMD would have carried out its duties under AB 1318, and CPV Sentinel could neither assert nor pursue any legal remedy to secure the credits.

As stated by the SCAQMD itself, the SIP revision that is currently pending before EPA is a required change to allow the “the transfer of offsets” to “occur in spite of language in Rule

² CEC staff also recently quoted the language from the High Desert Power Plant Project in the proceedings for the Palmdale Hybrid Power Project. In the Palmdale proceeding, staff analyzed whether the air district’s promise of PM10 credits generated by road paving would suffice to allow certification. Applicant’s attorney, Michael Carroll, who also represents CPV Sentinel in the above-caption matter, argued that the air district need not adopt a new rule prior to the Commission certification of the project. The Committee rejected this contention.

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’” Thus CPV Sentinel has not, and cannot, “secure” ERCs unless and until the U.S. EPA approves the proposed SIP revision.

B. AB 1318 Requires the Commission to Make an Independent Finding, not Simply Rely on the FDOC

Applicant contends that the Commission’s responsibilities under AB 1318 simply reiterate existing duties, allowing it to rely on the SCAQMD’s FDOC since it is the SCAQMD that possesses expertise in air quality matters. As articulated at length in our Joint Opening Brief, this view is contradicted by AB 1318’s plain language—while the language may be similar to that previously contained in the statute, AB 1318 was adopted in the context of a very specific controversy between the Applicant and the Petitioners in the case that AB 1318 sought to set aside. Even if the language of AB 1318 were not clear, in the context that gave rise to AB 1318, there can be no doubt that the Legislature meant what it said when it directed the Commission to conduct an independent evaluation of the offsets that the SCAQMD is providing for use by the Applicant’s project.

The argument here is not whether the SCAQMD possesses expertise in air quality matters—it does. The argument here is that the plain language of AB 1318 directs the Commission to independently review the SCAQMD’s assertion that the offsets created meet all applicable

requirements of law for their creation and transfer. The Legislature was relying on the Commission as an additional check, on top of the SCAQMD's expertise in air quality matters, regarding this particular transaction.

Clearly, AB1318 does not allow transfer until the Commission can determine that the offsets meet all currently applicable legal requirements. Applicant's Opening Brief describes the amendment to Rule 1309.1 that allowed power plant proponents to access the Priority Reserve, the SIP-approved rule that allowed the AQMD to transfer Priority Reserve Credits to powerplants. This description demonstrates that to be effective, the rule must in fact be amended. The amendment to 1309.1 sunset in 2002, and therefore under federal law, the SCAQMD is currently barred from transferring the credits to the Applicant. The SCAQMD does not dispute this fact.

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.*" Contrary to Applicant's assertion, the statute does not allow the Commission to certify this facility unless it can independently determine that legality of the credit and transfer. Plainly, current federal law does not allow the transfer of these credits from the SCAQMD to CPV Sentinel.

III. Conclusion

Under currently applicable law, CPV Sentinel does not have offset credits required for certification of their project. This Commission should decline to certify the project as meeting all applicable laws, ordinances, and regulations until the Applicant's project meets the LORs as they exist—not as the Applicant *really, really* wishes them to exist.

Dated: August 27, 2010

Respectfully submitted,

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

[Original signed]
Shana Lazarow
Staff Attorney
Communities for a Better Environment

DECLARATION OF SERVICE

I, Angela Johnson Meszaros, declare that on, August 27, 2010, I served and filed a copy of the attached *Reply 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:

[\[http://www.energy.ca.gov/sitingcases/sentinel/index.html\]](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)

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For filing with the Energy Commission:

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

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CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct.

_____ original signed by

Angela Johnson Meszaros



**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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1516 NINTH STREET, SACRAMENTO, CA 95814
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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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