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August 27, 2010

File No. 030137-0012

VIA FEDEX

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

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

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, sections 1209, 1209.5, and 1210, enclosed herewith for filing please find Applicant's Rebuttal to Intervenor's Opening Brief.

Please note that the enclosed submittal was filed today via electronic mail to your attention and served on all parties to the above-referenced project.

Very truly yours,

Paul E. Kihm
Senior Paralegal

Enclosure

cc: CEC 07-AFC-3 Proof of Service List (via email and U.S. Mail)
Michael J. Carroll, Esq. (w/encl.)

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: APPLICATION FOR CERTIFICATION FOR THE CPV SENTINEL ENERGY PROJECT BY CPV SENTINEL, L.L.C.	)	Docket No. 07-AFC-03 APPLICANT'S REBUTTAL TO INTERVENORS' OPENING BRIEF

On behalf of CPV Sentinel, LLC ("Applicant") for the CPV Sentinel Energy Project (07-AFC-03) ("Project"), we submit this rebuttal to the Opening Brief jointly submitted by Intervenors California Communities Against Toxics and Communities for a Better Environment (collectively, "Intervenors").

Intervenors' Opening Brief proffers a radical interpretation of both the federal Clean Air Act and Assembly Bill 1318 ("AB 1318") that would require the Energy Commission to idle its certification process and not approve the Project until: (1) every other federal, state, and local agency has taken final action; and (2) any judicial challenges to those agency actions have been resolved. In support of an indiscriminate reshuffling of California's power plant siting and permitting procedures, Intervenors regurgitate allegations regarding the timing of the revision to the State Implementation Plan ("SIP") – an issue that already has been fully briefed in this proceeding.

A. Determination Required By Assembly Bill 1318

AB 1318 provides that the Energy Commission "shall determine whether the emission credits to be credited and transferred [from the South Coast Air Quality Management District ("SCAQMD") to the

Project] satisfy all applicable legal requirements."[1] Principles of statutory construction recognized by California courts require that AB 1318 be harmonized with the existing statutory and regulatory scheme governing the Energy Commission's power facility and site certification authority. California courts do not "construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."[2] There is a "judicial duty to construe statutes harmoniously where that can reasonably be done."[3]

1. AB 1318 Did Not Create A Novel Duty For Energy Commission

Contrary to Intervenors' allegations of "articulated enhanced duties,"[4] AB 1318 does not impose unique obligations on the Energy Commission. The Energy Commission's normal siting and certification procedures require substantially similar, if not identical, findings. AB 1318 provides:

> The State Energy Resources Conservation and Development Commission shall determine whether the emission credits to be credited and transferred satisfy all applicable legal requirements. **In the exercise of its regulatory responsibilities under its power facility and site certification authority**, 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.[5]

Regardless of AB 1318, the Energy Commission "may not certify a facility … when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless" the Energy Commission makes specified findings

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[1] Health & Safety Code Section 40440.14(c).

[2] *Waterman Convalescent Hospital v. State Dept. of Health Services*, 101 Cal. App. 4th 1433, 1438 (2002)(internal citations omitted).

[3] *Moran v. Murtaugh, Miller, Meyer & Nelson, LLP*, 126 Cal. App. 4th 323, 336 (2005), as modified on denial of rehearing (3/2/2005) and review granted and opinion superseded on other grounds, 29 Cal. Rptr. 3d 2, and judgment affirmed, 40 Cal. 4th 780 (2007).

[4] Intervenors' Opening Brief at 1.

[5] Health & Safety Code Section 40440.14(c) (emphasis added).

regarding public convenience and necessity.[6] Even when specified findings are made, the Energy Commission "may not make a finding in conflict with applicable federal law or regulation."[7] Accordingly, the determination required by AB 1318 essentially represents a reiteration of the Energy Commission's pre-existing obligations.

Indeed, AB 1318's instruction to the Energy Commission to "not certify" the Project if "the emission credits to be credited and transferred" fail to "satisfy all applicable legal requirements" is subsumed by the Energy Commission's "exercise of its [normal] regulatory responsibilities under its power facility and site certification authority."[8] AB 1318 works in concert with the Energy Commission's regulatory responsibilities; it does not necessitate a sweeping overhaul of California's power plant siting and permitting procedures.

2. Energy Commission Can Rely On Local Air District's Expertise

The Energy Commission is allowed, indeed instructed, to rely on a local air pollution control district's Determination of Compliance ("DOC") when finding that a facility complies with applicable local, regional, state, and federal standards, ordinances, regulations or laws.[9] This reliance is both commonsensical and administratively efficient considering the expertise of local air pollution control districts with air quality laws. Since the local air pollution control districts have been delegated the authority to act as federal Clean Air Act permitting authorities, it is understandable that the California Legislature intends the Energy Commission to leverage the districts' knowledge and permitting efforts

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[6] Public Resources Code § 25525; *see also* 20 CCR § 1752(a).

[7] *Id.*

[8] Health & Safety Code Section 40440.14(c).

[9] 20 CCR § 1752.3(a)("The … proposed decision shall include findings and conclusions on conformity with all applicable air quality laws, including required conditions, based upon the determination of compliance submitted by the local air pollution control district.")(emphasis added); 20 CCR § 1744.5 ("The local air pollution control officer shall conduct, for the commission's certification process, a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations.")(emphasis added).

when making its findings.[10]

The California Legislature's instructions to rely on the expertise of local air pollution control districts is especially explicit regarding emission offsets: "The commission may not find that the proposed facility conforms with applicable air quality standards … unless the applicable air pollution control district or air quality management district certifies … that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant…."[11] Here, the Energy Commission is permitted to rely on the SCAQMD's expert determination on the legality of the emission credits proposed to be utilized by the Project. The SCAQMD has prepared, and submitted to the Energy Commission, an Addendum to the DOC and a Revision to the Addendum to the DOC for the Project. Therein, the SCAQMD "identified a series of emission offsets for PM10 and SOx which have been created as a result of reductions from permitted equipment that permanently ceased operation in AQMD."[12] These emission credits "meet the integrity criteria for qualifying as offsets, meaning they are all Real, Permanent, Quantifiable, Enforceable and Surplus."[13] This conclusion was further buttressed by testimony from Mohsen Nazemi, SCAQMD Deputy Executive Officer, at the evidentiary hearing on July 19, 2010.

Intervenors' radical interpretation of AB 1318 would have the Energy Commission wholly ignore the SCAQMD's expertise. Their Opening Brief concludes that "the [Energy] Commission has been directed [by AB 1318] to interject its judgment on questions of federal and state law that are generally outside of the Commission's direct decision-making arena."[14] Indeed, Intervenors assert that "the [Energy] Commission must **pull out its crystal ball to guess**, as best it can, how these [federal and state

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[10] *See* Public Resources Code § 25216.3 (acknowledging the special status of air quality standards).

[11] Public Resources Code § 25523(d)(2).

[12] Addendum to Determination of Compliance, Appendix N (Emission Offset Evaluation), 6 (March 2, 2010; Docket Log No. 55739)(revised May 12, 2010; Docket Log Nos. 56650, 56737).

[13] *Id.* (referencing the necessary integrity criteria for federal Clean Air Act emission offsets).

[14] Intervenors' Opening Brief at 2.

law] processes will unfold."[15] While AB 1318 imposes a duty on the Energy Commission to make an explicit determination, surely the California Legislature did not intend for the Commission to abandon its normal siting and certification procedures for soothsaying.

B. Timing of Source-Specific SIP Revision

Intervenors' expansive reading of AB 1318 would require the Energy Commission to drastically reorder the normal sequence of events for siting and permitting an electrical generating facility. Intervenors' Opening Brief concludes that "the [California] Legislature has required this Commission to refrain from certifying CPV Sentinel unless the Commission knows that the credits were legally created and transferred."[16] In other words, according to the Intervenors, the Energy Commission must abort this proceeding and remain idle until the United States Environmental Protection Agency ("EPA") approves the SIP revision, and even must wait until "final decisions from relevant courts [and/]or agencies" are issued.[17]

Intervenors' flawed interpretation of AB 1318 fails to acknowledge that the federal Clean Air Act already allows the Energy Commission to make a determination that the "emission credits to be credited and transferred" satisfy "all applicable legal requirements" that are required to be satisfied by this step in the normal sequence of events for siting and permitting an electrical generating facility. All of the legal requirements "applicable" at this stage of California's power plant siting and permitting procedures have been satisfied. EPA's approval of the SIP revision is not necessary at this step of the siting and permitting process – it can trail the Energy Commission's certification of the Project.

As previously explained in Applicant's Rebuttal to the Testimony of Michael Harris filed on June 30, 2010 (Exhibit No. 152), approval of the SIP revision is not a prerequisite to the Energy Commission's certification of the Project. To the extent that the SIP revision is necessary at all, it need not be effective

[15] *Id.* (emphasis added).

[16] Intervenors' Opening Brief at 7.

[17] *Id.*

until commencement of Project operations. Moreover, even if one took the overly conservative view that the SIP revision must be fully approved prior to issuance of the permit to construct, that permit has not yet been issued by the SCAQMD and need not be issued for Energy Commission certification of the Project.

1. Approval Of SIP Revision Is Not Required Until Commencement Of Operations

The fact that the PM10 and SOx emission offset strategy for the Project has not yet been approved into the SIP does not constitute a roadblock for Energy Commission certification of the Project under state or federal law. Section 173 of the federal Clean Air Act provides that offsets need not be obtained until a source is to commence operation: "permits to construct and operate may be issued if … by the time the source is to **commence operation**, sufficient offsetting emissions reductions have been obtained."[18] The same section of the federal Clean Air Act goes on to say that "[s]uch emission reductions shall be, by the time a new or modified source **commences operation**, in effect and enforceable."[19]

Furthermore, EPA has provided focused guidance regarding this very issue:

> In such circumstances, creditable offsets have been identified, quantified, adopted as a matter of State law, and submitted to EPA, but the EPA administrative process to approve the measure may not be completed by the time the source seeks to commence construction. … In such cases, it may not be feasible for EPA's administrative process needed to make the offsets federally enforceable to be completed within the ordinary timeframe for issuing a construction permit. Thus, EPA believes it is appropriate in these cases to retain the policy announced … that a construction permit may be issued on the basis of a federally-enforceable commitment that the source may not commence operation until the

[18] 42 U.S.C. § 7503(a)(1)(A) (emphasis added).

[19] 42 U.S.C. § 7503(c)(1) (emphasis added).

> offsets are made federally enforceable by EPA approval of the SIP measure.[20]

In the Warren-Alquist Act, the California Legislature adopted similar timing requirements for acquisition of emission offsets by project applicants: "The commission may not find that the proposed facility conforms with applicable air quality standards … unless the applicable air pollution control district or air quality management district certifies … that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district's rules or … **prior to commencement of the operation** of the proposed facility."[21]

Finally, there is precedent for Energy Commission approval of projects with virtually identical facts.[22] The Energy Commission approved the Victorville 2 Hybrid Power Project over objections from Intervenor CURE that "road paving ERC's may not legally be used by the Applicant because District Rule 1406 (Rule), allowing the use of such credits, has not yet been approved [into the SIP] by the USEPA."[23] Just as the SCAQMD here has approved of the Project's offset package,[24] the Energy Commission noted that Applicant City of Victorville's "emissions mitigation plans … were approved by the District in its Final Determination of Compliance."[25] The Energy Commission then pointed out that "EPA itself allows issuance of permits to construct and operate as long as, by the time the source of emissions is to commence operations, sufficient offsetting emissions reductions have been obtained."[26] Accordingly, the Energy Commission denied CURE's request that the Commission "require the City to identify an alternate source

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[20] EPA, Memorandum from John Seitz, Director, Office of Air Quality Planning and Standards to Regional Directors, Offsets Required Prior to Permit Issuance, at 5-6 (6/14/1994).

[21] Public Resources Code § 25523(d)(2) (emphasis added).

[22] *See* Energy Commission, Final Commission Decision, Victorville 2 Hybrid Power Project, CEC 800-2008-003-CMF, 07-AFC-01, at 108-111 (7/16/2008).

[23] *Id*.

[24] *See* SCAQMD, Addendum to Determination of Compliance, Appendix N (Emission Offset Evaluation (3/2/2010, revised 5/12/2010).

[25] *See* Energy Commission, Final Commission Decision, Victorville 2 Hybrid Power Project, CEC 800-2008-003-CMF, 07-AFC-01, at 108-111 (7/16/2008).

[26] *Id.* (internal citations omitted).

of federally enforceable PM10 offsets prior to the Commission certifying the Project" and approved the Victorville 2 Hybrid Power Project.[27]

2. Even If One Were To Interpret Applicable Law To Require Approval Of The SIP Revision Prior To Issuance Of A Permit To Construct By The SCAQMD, Intervenors' Claims Are Premature

Even if one were to adopt the view that approval of the SIP revision is required prior to issuance of a permit to construct for the Project, as opposed to prior to commencement of operation, which Applicant does not, the Energy Commission's procedures would not be affected. Since the SCAQMD has not yet issued a permit to construct for the Project and does not intend to do so until after Energy Commission certification of the Project, Intervenors' allegations regarding issuance of a permit to construct are both premature and made in the wrong forum. Under SCAQMD rules, the DOC does not act as the permit to construct for the Project.[28] Rather, after Energy Commission certification of the Project, the SCAQMD will take the additional step of issuing a permit to construct.

C. Conclusion

Contrary to the allegations in Intervenors' Opening Brief, Energy Commission certification of the Project does not require prior revision of the SIP in order to be fully compliant with state and federal law. To the extent that the SIP revision is required at all, the deadline for its approval by EPA is commencement of operations of the Project.

DATED: August 27, 2010

Respectfully submitted,

/S/ MICHAEL CARROLL

Michael Carroll
LATHAM & WATKINS LLP
Counsel to Applicant

[27] *Id.* (internal quotations omitted).

[28] California air district rules vary on this point, and in some jurisdictions the DOC and Energy Commission certification may act as a permit to construct, but that is not the case in SCAQMD.

STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 07-AFC-3
	)	
Application for Certification,	)	**PROOF OF SERVICE**
for the CPV SENTINEL ENERGY PROJECT	)	
	)	(July 1, 2010]
	)	
	)	

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CPV SENTINEL ENERGY PROJECT
CEC Docket No. 07-AFC-3

DECLARATION OF SERVICE

I, Paul Kihm, declare that on August 27, 2010, I served and filed copies of the attached:

Applicant's Rebuttal to Intervenor's Opening Brief

to all parties identified on the Proof of Service List above in the following manner:

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☒ Transmission by depositing one original paper copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

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I further declare that transmission via U.S. Mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 27, 2010, at Costa Mesa, California.

Paul Kihm