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July 1, 2010

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
Docket No. 07-AFC-3

Dear Sir or Madam:

Enclosed is the original of California Communities Against Toxics' Opposition to Motion by South Coast Air Quality Management District for an Order Disqualifying Michael Harris as a Witness.

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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California Communities Against Toxics

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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Application for Certification for the **CPV SENTINEL ENERGY PROJECT** By CPV Sentinel, L.L.C.	)	**Docket No. 07-AFC-03**
	)	*California Communities Against Toxics' Opposition to Motion by South Coast Air Quality Management District for an Order Disqualifying Michael Harris as a Witness*

California Communities Against Toxics ("CCAT") opposes the Motion by the South Coast Air Quality Management District ("District") for an Order Disqualifying Professor Michael Harris as a Witness ("Motion") in the Sentinel proceeding before the Energy Resources Conservation and Development Commission ("Commission"). First, and importantly for the Commission's purposes, the District does not have standing to bring this motion. Further, the District is wrong in its analysis of Professor Harris' testimony and how the California Rules of Professional Conduct apply both to Professor Harris and to his testimony.

Professor Harris is clearly qualified to provide expert testimony on the questions upon which he has opined – the impact of what is commonly referred to by air pollution experts as a "SIP gap" on the issuance of pollution offsets to the applicant in this case, CPV Sentinel. A SIP gap occurs from where a local or state air pollution control rule is adopted, but has yet to be approved by the U.S. Environmental Protection Agency ("EPA").[1] During a SIP gap, it is widely known that the local rule is not considered federally enforceable. As evidenced by his CV, Professor Harris has worked, and taught, on matters involving the Clean Air Act, including SIP gaps and federally enforceable permit conditions,

[1] *See, e.g.*, SCAQMD, Draft Title V TGD, Chapter 7: The Permitting Process and Public Participation at p. 62, *available at* http://www.aqmd.gov/titlev/TGD/TGD_CH_7.pdf.

since 1998, so it clear he has the requisite experience to present testimony on this issue in this case.

The District and none of the actual parties dispute the fact that Professor Harris is highly knowledgeable about federal air pollution law. Instead, in its unorthodox Motion, the District asserts that Professor Harris' testimony is substantially related to matters on which he worked as a District lawyer, and will also require disclosure of confidential communications subject to the attorney-client privilege. Tellingly, the District does not, and cannot, point to anything specific in Professor Harris' testimony that makes any such disclosure or that would rely on any privileged information, even though the District had been served with a copy of Professor Harris testimony prior to when it filed this Motion. It seems that the District believes that if it attacks Professor Harris professionally and personally—leveling the very serious charge that he has violated the Rules of Profession Conduct—they can somehow change the facts and analysis presented by Professor Harris. Professor Harris has more than 15 years of dedicated service to the profession and his clients. Indeed, the fact that the District employed Professor Harris on not just one, but two occasions, is acknowledgement that the District believes him to be not only a highly qualified air pollution expert, but also a person of high reputation and sound moral character. For the District now to assert that Professor Harris' testimony in this matter is "highly improper" is, itself, highly improper, especially given the broad, speculative nature of the District's severe accusations.

I. The District Lacks Standing to Challenge Professor Harris' Role as an Expert Witness

The District is not a party to the Sentinel proceeding, and therefore does not have standing to bring this motion under section 1716.5 of the Commission's *Regulations Pertaining to the Rules of Practice and Procedure* (July 2008) ("Commission Rules").

The District argues that because the Commission has ordered it to provide testimony on air quality issues concerning the project, it is a "party" to the proceedings. According to the CEC Rules, however, a "party" includes only "the applicant, the staff of the commission, and any intervenor."[2] In fact, in the context of this very proceeding, the CPV Sentinel Committee ("Committee") has already ruled that the District is not a party to these proceedings. On March 30, 2010, CCAT petitioned the Commission for *An Order to Allow Submission of*

[2] Commission Rules § 1702(j).

Data Requests in which CCAT sought information relevant to this proceeding. In denying CCAT's petition, the Committee first noted that:

> Applicant's opposition brief points out that "the information sought in Request #2, to the extent it exists, is within the custody and control of SCAQMD, which is not a party to these proceedings. Therefore, there is no authority within the CEC process for CCAT to obtain the information requested in Request #2 from the SCAQMD even if the Committee were to re-open discovery as requested in the petition."[3]

The Committee then issued its finding on this issue, writing:

> Indeed, the Energy Commission's jurisdiction does not extend to compelling SCAQMD to respond to discovery where, as here, SCAQMD is not a party to these proceedings.[4]

The District is, therefore, not a party to the Sentinel proceedings, and does not have standing under Commission Rules section 1716.5 to bring this, or any, motion.

The District argues, in the alternative, that if it does not have standing as a party under Commission Rules section 1716.5, then it does under Commission Rules section 1717(a). The District's reliance on this provision is completely misplaced. The purpose of section 1717 is to establish how documents are to be distributed. In fact, the title of section 1717 is *Distribution of Pleadings, Comments, and Other Documents* and directs parties and agencies to serve documents in accordance with section 1210. Section 1210, in turn, establishes that "a paper copy of all written material filed by any party in a proceeding shall be served in person or by first class mail, … on every other party to the proceeding." Section 1717 merely extends to agencies the requirement to serve all the participants in the proceedings.[5] The District's

[3] Committee Order Denying CCAT's Petition to Allow Submission of Data Requests, April 22, 2010.
[4] *Id.*
[5] Interestingly, while the District now seeks to rely upon this section 1717 to establish standing, it had not at any point prior to this moment followed the requirements of section 1717. That is, the documents that the District has filed with the Commission, including its FDOC and the various amendments to the FDOC, were not served on all the parties in accordance with section 1210.

curious attempt to invoke section 1717 for the purposes of establishing standing should be rejected by the Committee. [6]

II. Professor Harris' Previous Employment at the District Does not Disqualify Him as an Expert Witness in these Proceedings

The District asserts, based upon its understanding of the law represented in *Brand v. 20th Century Ins. Co.* ("*Brand*"),[7] that application of the "substantial relationship" test necessitates Professor Harris' disqualification as a witness in this administrative proceeding. As stated in *Brand*, the test is as follows:

> An attorney engaged in employment adverse to a former client is subject to disqualification where a "substantial relationship" exists between the lawyer's current employment and the lawyer's representation of the former client. Where an attorney successively represents clients with adverse interests, and where the subjects of the two representations are substantially related, the need to protect the first client's confidential information requires that the attorney be disqualified from the second representation.[8]

The District contends that:

> Mr. Harris personally represented the District on matters substantially related to the proceedings above and was privy to confidential information related to the above matter, including through participation in staff meetings at which these matters were discussed. [9]

Later in the Motion, the District indicates that the "matters" on which Professor Harris "worked" related to litigation brought by CBE, CCAT and NRDC regarding the adoption of Rules 1315 and 1309.1—rules that were invalided by the court because the District failed to comply with the California Environmental Quality Act ("CEQA") when it adopted them. Based upon these "facts" the District asserts that Professor Harris should be disqualified as an

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[6] The Commission's Public Participation Guide further clarifies the District's lack of standing to bring this motion. The Public Participation Guide encourages interested members of the public, groups, or *public agencies* to become formal intervenors, because intervenors (not merely any interested agency) have all the rights of a party, including "filing documents relevant to the siting proceedings, including motions, petitions, objections and briefs." Public Participation Guide, pp. 53 fn 95 and 54.

[7] 124 Cal.App.4th 594 (2004).

[8] *Brand*, 124 Cal.App.4th at 601.

[9] Motion, p. 2.

expert witness in these proceedings. The District's accusation is wrong for two reasons.[10]

First, the District's suggestion that Professor Harris was substantially involved in these cases is incorrect. The District was represented by outside counsel, as well as by Mr. Weise himself, on those matters. During 2007 and 2008, Professor Harris was never an attorney of record in these case, and, in fact, at the time was working full-time as the attorney of record in two other cases that had nothing to do with the District Rules at issue in this matter (*American Association of Railroads v. South Coast AQMD*, 2:2006-CV-01416 (C.D. Cal. 2006) and *Pacific Merchant Shipping Association v. Goldstene*, 06-CIV-2791 (E.D. Cal. 2007)).

Second, and most importantly, even if Professor Harris' presence at staff meetings where these cases were discussed raises an issue under *Brand*, there is simply no "substantial relationship" between those cases and Professor Harris' current testimony. The CEQA cases involved state law issues over the District's adoption of Rules 1315 and 1309.1; in other words, they were *state law challenges* related to how state law related to the District's rules and rulemaking authority. Professor Harris' testimony in the Sentinel proceeding involves the legality of offset credits relied upon by the Applicant *under federal law***.** Professor Harris's testimony is simply unrelated to the District's Rules or state law application to them. His testimony about the relationship between a recently created state statue (a statute that did not exist when Professor Harris worked at the District) as applied to the specific facts of this case and federal law simply has no relationship whatsoever to the litigation in 2008 that the District asserts creates a conflict here today.[11]

The cases the District cited do not change this conclusion. In *H. F. Ahmanson & Co. v. Salomon Bros., Inc.* ("*Ahmanson*"),[12] a case relied upon by the *Brand*

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[10] As an initial matter, the case upon which the District relies concerns an expert witness in a matter in which his former employer was an *adverse party* to the litigation. As already discussed with respect to standing, the matter before the Commission is not an adversarial proceeding, it is an administrative hearing on an application of a project proponent. Professor Harris is not offering testimony adverse to the District's interests as the District is not a party and does not have any legal stake in the grant or denial of the application.

[11] The District also states that while Professor Harris worked at the District, "an agreement was reached with EPA over the offset issue." Notably, the District did not assert that Professor Harris had any direct connection with negotiating such an agreement, because he had none. But in any case, that agreement related to the formula the District would use to determine the offsets to be kept in its Priority Reserve and other internal accounts. It had nothing to do with a "SIP gap" or the federal enforceability requirement at issue in this case.

[12] 229 Cal.App.3d 1445 (1991)

court, the court expounded upon the meaning of "substantially related." The court articulated a "pragmatic approach" to determine whether a substantial relationship exists between current and former representation. This approach "focuses on the nature of the former representation."[13] The Court noted that in analyzing the issue, one should "focus less on the meaning of the words substantial and relationship and look instead at the practical consequences of the attorney's representation of the former client."[14] In so doing, it is appropriate to "focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases…the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy."[15]

The facts in Ahmanson are as follows: a bank having financial problems hired an attorney to provide advice about credit risk protection, including how to eliminate or minimize the risks of variable interest rates. Meanwhile, Ahmanson hired the Salomon Brothers to provide financial advice on Ahmanson's decision to buy the troubled bank, and then acquired that bank. The Salomon Brothers gave Ahmanson bad advice about negotiating the bank's interest rate protection. Anticipating litigation, the Salomon Brothers retained the attorney that had previously advised the troubled bank on its financial issues. Ahmanson moved to disqualify the attorney.

Applying its pragmatic "substantial relationship" test, the court found that there was no conflict of interest, and declined to disqualify the attorney. First, the court found that even though the attorney provided both the subsidiary of the opposing party and his own client with financial advice arising out of the same general transaction, that advice only "fell within the general subject of credit risk protection" and constituted two different types of credit risk protection.[16] Therefore, the two matters were not factually substantially related. Second, the court found that the legal questions in the two matters were not substantially related: the first addressed how the bank could protect itself against fraud or insolvency, and the second addressed whether the Salmon Brothers acted fraudulently, negligently, or in breach of their fiduciary duty to Ahmanson.[17]

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[13] *Ahmanson*, 229 Cal.App.3d at 1455.
[14] *Id.* at 1454.
[15] *Id* at 1455 (internal quotations and citations omitted).
[16] *Id.* at 1456.
[17] *Id.* at 1457.

As in *Ahmanson*, the prior CEQA cases and the Sentinel proceeding are not factually or legally substantially related. Like in *Ahmanson*, where the two matters were both based on the same general transaction and general area of financial law (credit risk protection), but were about different types of risk protection, here, the two matters both arise out of the requirement that new sources of pollution offset their emissions, but are about very, very different aspects of requirement. The legal issues could not be more different. The earlier cases addressed the District's obligation to conduct CEQA on the adoption of rules—the first case looked at whether the Rules were exempt, the second looked at the adequacy of the CEQA document. This matter before the CEC is about whether the actual offsets upon which the Sentinel project seeks to rely in order to meet its obligations under the Clean Air Act, including the FDOC upon which it wishes to rely, meet federal law requirements.

III. The District has Asserted a Violation of Rule 3-100 that Did Not Occur

The District's bold accusations that Professor Harris has violated the Rules of Professional Conduct regarding disclosure of confidential information are also wrong. The District charges that Professor Harris' testimony requires disclosure of information subject to the attorney client privilege and, therefore, violated California Rules of Profession Conduct, Rule 3-100. That rule provides:

> A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

It is clear, however, from the face of the testimony offered by Professor Harris that, as a matter of fact, he has not disclosed any confidential information, nor has his testimony relied upon such information. Remarkably, the District's accusations are pure speculation, and it has failed to point to *any* information in Professor Harris' testimony that it claims is confidential or required that he divulge to CCAT privileged information. The testimony submitted by Professor Harris provides a factual analysis based upon federal law, which as discussed above, has nothing legally in common with the matters the District asserts he worked on as an attorney for them in 2007 and 2008. Moreover, by the time the entirely new statute directing the District to transfer offsets to the Applicant and directing the Commission to determine that the offsets meet all

of the requirements of federal law was enacted, Professor Harris was not even employed by the Agency.

Nothing in Professor Harris' testimony discloses the District's confidential information, nor has he shared any confidential information. His testimony is based on his extensive experience and knowledge in the area of environmental law, particularly with respect to clean air laws and regulations. Professor Harris gained this experience and knowledge through his many years of work as an attorney and as a professor of environmental, administrative, and air pollution law. Professor Harris' expert testimony simply does not disclose nor rely upon confidential information gained while working at the District.

IV. The District's Motion Suggests an Impossibility Broad Interpretation of Conflict for Former Government Lawyers

Professor Harris is an expert on the air pollution law, including the Clean Air Act. As such, his expertise to opine on these issues is beyond dispute. The District's arguments suggest that because it once employed Professor Harris, he (and any other former District lawyer) is now conflicted out of ***any matter*** related to rules developed while he worked at District. Professor Harris worked on numerous rule issues during his employment at the District. According to the District's far flung theory of "substantial involvement," future work on any matter related to any of these rules would be off-limits. This interpretation simply does not square with the reality of the kinds of work undertaken by former employees of the District (or other regulatory agencies). The California Rules of Professional Conduct do not say that once a lawyer works for an agency, they are barred from working on issues related to the subject matter of the agency. Former lawyers who have worked for the District have left to work for law firms that represent businesses directly regulated by the District, as well as on in matters in the courts and before the District's hearing boards where the District actually is a party. Former District lawyers advise clients on how to gain approval of their projects from the District and how to avoid or minimize penalties under the District's rules. That behavior is not prohibited by the Rules of Professional Conduct or by state law.[18] In short, Professor

[18] Indeed, Section 87406.1 of the California Government Code provides that: (b) No former member of a district board, and no former officer or employee of a district who held a position which entailed the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, shall, for a period of ***one year*** after leaving that office or employment, act as agent or attorney for, or otherwise represent, for compensation, any other person, by making any formal or informal appearance before, or by making any oral or written communication to, that district board, or any committee, subcommittee, or present

Harris' work on behalf of CCAT to provide expert testimony to the Commission on the question of whether Sentinel's application meets relevant requirements of federal law is entirely proper.

V. CONCLUSION

The District does not have standing to petition the Commission regarding Professor Harris' participation in this administrative proceeding, because the District is not a party to the Sentinel proceeding. Even if the District did have standing to bring this motion, Professor Harris should not be disqualified because his testimony is not adverse to the District's interest, is not substantially related to a matter on which Professor Harris worked while at the District, and does not rely upon or disclose any of the District's confidential information.

Dated: July 1, 2010

Respectfully submitted,

ORIGINAL SIGNED BY

_____

Angela Johnson Meszaros
Counsel for
California Communities Against Toxics

member of that district board, or any officer or employee of the district, if the appearance or communication is made for the purpose of influencing regulatory action. (emphasis added)

DECLARATION OF SERVICE

I, Angela Johnson Meszaros, declare that on, July 1, 2010, I served and filed a copy of the attached *California Communities Against Toxics' Opposition to Motion by South Coast Air Quality Management District for an Order Disqualifying Michael Harris as a Witness*. 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;

____by personal delivery or by depositing in the United States mail at with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

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:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-3
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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 COMMISSION OF THE STATE OF CALIFORNIA
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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