



# South Coast Air Quality Management District

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July 16, 2010

**Via U.S. Mail and Electronic Service**

California Energy Commission  
Attn: Docket No. 07-AFC-03  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512

**DOCKET**

**07-AFC-3**

DATE JUL 16 2010

RECD. JUL 16 2010

Re: *CPV Sentinel Energy Project; Docket No. 07-AFC-03*

Dear Sir or Madam:

Enclosed is the original *South Coast Air Quality Management District's Reply to CCAT's Opposition re Order Disqualifying Michael Harris as a Witness*.

This document was filed today via electronic mail and the original was deposited into the U.S. Mail for delivery to the Dockets Unit. All parties on the service list (last revised on 7/01/10) have also been served electronically and by U.S. Mail.

Very truly yours,

Barbara Baird  
District Counsel

BB:pa

Encl.

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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, LLC

**Docket No. 07-AFC-03**

South Coast Air Quality Management  
District's Reply to CCAT's Opposition re  
Order Disqualifying Michael Harris as a  
Witness

**Introduction**

In order to address an issue raised for the first time in California Communities Against Toxics (CCAT) Opposition to Motion by South Coast Air Quality Management District for an Order Disqualifying Michael Harris as a Witness (Opposition), as well as to address several misstatements of law in the Opposition, the South Coast Air Quality Management District (District) seeks leave to file this Reply to the Opposition. *See* Commission Rules § 1203(c) (“[T]he chairman or presiding member designated pursuant to Section 1204 shall have the power to: ... (c) Regulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests, admitting or excluding evidence, receiving exhibits, designating the order of appearance of persons making oral comments or testimony, and continuing the hearings.”).

**The District Has Standing**

CCAT claims in the Opposition that the District does not have standing to bring its Motion for an Order Disqualifying Michael Harris as a Witness (Motion). Whether the Commission considers

the District a party under Commission Rule 1716.5(a) or an agency participant, *see* Rule 1717(a), under Rule 1203 and the Commission's inherent authority to ensure that it proceeds pursuant to law, the Commission must provide the District with an opportunity to be heard where the nature of the proceedings and/or papers presented to the Commission raise important privilege issues. Mr. Harris' purported testimony has been proffered as part of an evidentiary hearing involving air quality regulatory matters where the District is a cooperating agency in the Commission's proceeding. The District has been asked to testify on air quality permitting matters and has been an active participant in the process of evaluating compliance with air quality laws and regulations associated with this proceeding. As such, the District has more than adequate standing to bring its Motion. More importantly, the nature of the Motion involves attorney-client relationship matters and the potential use of information protected by the attorney-client privilege. As courts have frequently repeated, "[f]ew precepts are more firmly entrenched than that the fiduciary relationship between attorney and client is of the very highest character [citations] and, even though terminated, forbids (1) any act which will injure the former client in matters involving such former representation or (2) use against the former client of any information acquired during such relationship." *People v. Thoi*, 213 Cal.App.3d 689, 699 (1989) (citations omitted). As the *only* entity with standing to assert such privilege, the District must have an opportunity to seek redress at the time an adverse representation takes place and privileged information may be introduced into a public proceeding. Ideally, the District should have had an opportunity to address these issues before Mr. Harris is provided an opportunity to take positions adverse to the District without seeking the written waiver from the District that is required by California Rule of Professional Conduct 3-310(E).

**The District Is Not Required To Affirmatively Demonstrate  
Privileged Information Has Been Revealed**

California Communities Against Toxics (CCAT) suggests that the District must affirmatively demonstrate that privileged information has been or will be revealed by Mr. Harris' testimony. No such showing is required for disqualification. In successive representation situations such as this one, "[i]f a substantial relationship exists, courts will presume that confidences were disclosed during the former representation which may have value in the current relationship. Thus, *actual possession of confidential information need not be proven when seeking an order of disqualification.*" *Truck Ins. Exchange v. Fireman's Fund Ins. Co.*, 6 Cal.App.4th 1050, 1056 (1992) (emphasis supplied). Whether Mr. Harris is considered a witness or an attorney providing

legal argument, he must be disqualified if there is a substantial relationship between his prior representation of the District and his current testimony/argument. *See Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, 124 Cal. App. 4th 594, 599 (2004) (applying the “substantial relationship” test used in attorney disqualification cases to disqualify a former attorney as a witness).

**Mr. Harris Represented The District And Has Confidential Information That Is Substantially Related To The Matters Addressed In His Purported Testimony**

CCAT’s contention that Mr. Harris was not “substantially involved” in litigation concerning priority reserve offsets and pollution credit accounting is simply a red herring.<sup>1</sup> As a Senior Deputy District Counsel, Mr. Harris was privy to confidential information that is substantially related to the matters about which he now seeks to testify. Mr. Harris was employed by the District and present at meetings during the time in which the District was interacting with EPA regarding Rule 1315. Privileged issues were addressed at these meetings. Absurdly, CCAT argues that Mr. Harris’ testimony is not substantially related to the previous litigation concerning Rules 1315 and 1309.1 *even as Mr. Harris’ Declaration includes testimony about this litigation.* Harris Declaration, p. 7. Mr. Harris testifies about the environmental consequences of the District’s internal offsets accounts, which was also a topic squarely at issue in the previous CEQA litigation. Moreover, Mr. Harris acknowledges that AB 1318 arose out of the prior litigation, although CCAT seems to ignore that point. CCAT’s argument that legal issues concerning offsets are not substantially related to legal issues concerning the same offsets defies common sense, particularly in the context of the Clean Air Act where District rules exist to implement federal requirements.

**The Law Does Not Support CCAT’s Argument Regarding Mr. Harris’ Involvement In This Proceeding**

Notwithstanding CCAT’s lengthy summation of *H. F. Ahmanson & Co. v. Salomon Brothers, Inc.*, 229 Cal.App.3d 1445 (1991), the case provides absolutely no support for CCAT’s

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<sup>1</sup> CCAT also misrepresents the District’s position. The District has not presented a “far flung theory of ‘substantial involvement.’” CCAT Opp. at 8. The District need not and has not argued on the basis of a “substantial involvement” test, or otherwise used the words “substantial involvement.”

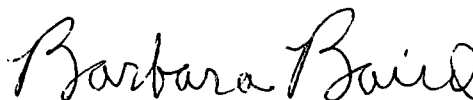
argument. *Ahmanson* involved an *outside counsel*, retained by two financial institutions for narrow purposes that the court found were not substantially related. The representations in *Ahmanson* were not substantially related because the only thing they had in common was the “general subject of credit risk protection.” 229 Cal.App.3d at 1456. Here, by contrast, Mr. Harris was a Senior Deputy District Counsel who was involved with the District’s legal matters on an ongoing basis. He was present for staff meetings concerning litigation regarding the very same rules about which Mr. Harris is currently testifying, and in any case, his access to confidential information must be presumed as a matter of law. See *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324, 1331 (2001) (“when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney’s knowledge of confidential information is presumed”) (citation and internal quotations omitted); *Global Van Lines, Inc. v. Superior Court*, 144 Cal.App.3d 483, 489 (1983) (general counsel is presumed to have confidential knowledge of management policies).

#### Conclusion

Finally, the District respectfully submits that the Staff Proposal to treat Mr. Harris’ testimony as legal argument addresses Mr. Harris’ status as a witness, but does not remedy the conflict of interest. Accordingly, if the Commission allows Mr. Harris’ purported testimony as legal argument on the grounds that CCAT would likely raise the same issues, the District respectfully requests an explicit ruling that the argument must be resubmitted as such under a different caption. In the alternative, the District would request a determination that Mr. Harris may not participate in this proceedings on behalf of CCAT, or that treatment of his purported testimony as legal argument shall not be construed as a finding or decision that Mr. Harris may participate in these proceedings either as a witness or as an attorney for CCAT.

DATED: July 16, 2010

Respectfully Submitted,



Kurt R. Wiese, General Counsel  
Barbara Baird, District Counsel  
South Coast Air Quality Management District

**Declaration of Service**

I, Patricia M. Anderson, declare that on July 16, 2010, I served and filed a copy of the attached *South Coast Air Quality Management District's Reply to CCAT's Opposition re 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/documents/index.html>].

The document has been sent to both the other parties in the 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:**

- sent electronically to all email addressed on the Proof of Service list;
- by personal delivery;
- by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

**AND**

**For filing with the Energy Commission:**

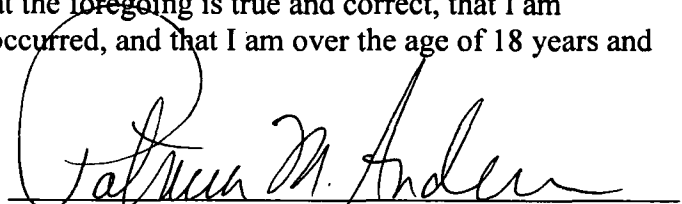
- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (preferred method);

**OR**

- depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**  
Attn: Docket No. 07-AFC-03  
1516 Ninth Street, MS-4  
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[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

  
\_\_\_\_\_  
Patricia M. Anderson



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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