



South Coast Air Quality Management District

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June 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	JUN 16 2010
RECD.	JUN 16 2010

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

Dear Sir or Madam:

Enclosed is the original Motion by South Coast Air Quality Management District for an 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 5/21/10) have also been served electronically and by U.S. Mail.

Very truly yours,

Kurt R. Wiese
General Counsel

KRW:vmr

Encl.

e:/share/kurt/cec/sentinel61610.doc

Submitting via e-mail that we have...

Kurt R. Wiese
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Management District
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**STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

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Application for Certification for the)	Docket No. 07-AFC-03
CPV SENTINEL ENERGY PROJECT)	Motion by South Coast Air Quality
By CPV Sentinel, LLC)	Management District for an Order
)	Disqualifying Michael Harris as a
)	Witness
)	
)	
)	

The South Coast Air Quality Management District (“District”) petitions the Commission for an order disqualifying Michael Harris as a witness because his participation violates the California Rules of Professional Conduct for attorneys.

Standing to Bring This Motion

The District is the air pollution control agency with jurisdiction over the CPV Sentinel project. The Commission has directed the District to participate in the Sentinel proceeding by providing testimony on air quality issues concerning the project. Under these circumstances, the District is a party within the meaning of the Commission’s Rules of Practice and Procedure. Section 1716.5(a) of the Commission’s Rules provides that “[a]ny party may file a motion with the presiding member regarding any aspect of the notice or application proceeding.” As a party, the District is entitled to file this motion under section 1716.5(a). Should the Commission decide that the District is not a party within the meaning of section 1716.5(a), the District has standing to submit this motion under section

1717(a) of the Commission's Rules of Practice and Procedure. Section 1717(a) contemplates that nonparty agencies may submit papers to the Commission, including motions: "Any party *or agency* who submits petitions (except petitions to intervene), motions, briefs, comments, written testimony, or exhibits, shall file its documents in accordance with section 1210." (Emphasis added.) If the Commission decides that the District cannot submit this motion under section 1716.5(a), the District has standing as a non-party agency under section 1717(a).

Background

On June 1, 2010, intervenor California Communities Against Toxics ("CCAT") submitted a Supplemental Prehearing Conference Statement ("Supplemental Statement") in this proceeding identifying Mr. Michael Harris as a witness it intended to sponsor before the Commission. Between 2002 and 2003, and again between 2005 and 2007, Mr. Harris served as Senior Deputy District Counsel for the District and thus had an attorney-client relationship with the District. In his capacity as Senior Deputy District Counsel, 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. As discussed below, Mr. Harris's proposed testimony raises serious issues under California law and ethical rules protecting confidential communications between attorneys and their clients because of his former attorney-client relationship with the District.

According to the Supplemental Statement, Mr. Harris intends to "opine on the legal standards that apply to offsets and whether or not, based on the documentation provided, the proposed offsets meet applicable legal standards." During his tenure with the District, Mr. Harris was privy to confidential communications about District legal activities and opinions regarding offsets, as well as the District's work product regarding litigation about the District's treatment of offsets. Mr. Harris acted as the District's attorney from April 2, 2002, to November 21, 2003, and again from September 13, 2005, to December 21, 2007. On October 20, 2006, and again on August 31, 2007, Communities for a Better Environment ("CBE") and the Natural Resources Defense Council ("NRDC") filed a lawsuit against the District challenging District rules governing the District's priority reserve offset distribution and establishing pollution credit accounting rules. See Rules 1315, 1309.1. During his tenure at the District, Mr. Harris participated in internal legal meetings that addressed this lawsuit. He also

worked on aspects of the lawsuit. While Mr. Harris was legal counsel for the District, an agreement was reached with EPA over the offsets at issue, two lawsuits were filed and defended regarding these offsets, and a demurrer to one of the suits was filed.

Argument

Mr. Harris's former representation of the District disqualifies him as a witness in this proceeding. In *Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, 124 Cal. App. 4th 594 (2004), the California Court of Appeal applied the "substantial relationship" test used in attorney disqualification cases to disqualify a party's former attorney as a witness. See, also, *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems*, 20 Cal. 4th 1135, 1146 (1999). In *Brand*, the court disqualified plaintiff's proposed witness because he previously represented the defendant insurance company during the processing of the plaintiff's claim, and thus had represented defendant in a substantially related matter resulting in access to confidential information. Mr. Harris's prior representation bears a substantial relationship with the current proceeding because he participated in the representation of the District with regards to the same policies that he intends to testify to in this proceeding. Furthermore, Mr. Harris's participation in the litigation and/or regular staff meetings provided him with confidential information related to the District's consideration of offsets.

Mr. Harris's testimony will also require disclosure of confidential communications subject to the attorney-client privilege. Cal. Evid. Code §§ 952, 954. The attorney-client privilege covers legal opinions formed in the course of Mr. Harris's attorney-client relationship with the District. See Cal. Evid. Code §§ 952, 954. Mr. Harris intends to opine on whether the proposed offsets meet legal standards that were at issue and/or developed while Mr. Harris was the District's attorney. Mr. Harris is not in a position to separate the legal opinions he formed at the District regarding offsets from the legal conclusions about which he intends to testify.

Mr. Harris's testimony is also improper as expert opinion on a legal question. It is well-settled California law that "the manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." *Ferreira v. Workmen's Comp. Appeals Bd.*, 38 Cal. App. 3d 120, 125. The question of "whether or not, based on the documentation provided, the proposed offsets

meet applicable legal standards” is precisely the legal question which the Commission intends to determine in the course of this proceeding.

By testifying, Mr. Harris puts himself at grave risk of violating his duty not to disclose the District’s confidential information. As a member of the California bar during his representation of the District, Mr. Harris has the affirmative duty to maintain inviolate the District’s confidences. See Cal. Bus. & Prof. Code § 6068, subd. (e)(1). Rule 3-100 of Professional Conduct of the State Bar of California forbids disclosure of information protected by section 6068, subdivision (e) without the informed consent of the client. As discussed above, Mr. Harris has been privy to a wide range of confidential communications and information specifically related to the offsets being addressed in this proceeding.


Finally, an attorney may not assist in, solicit, or induce any violation of the California Rules of Professional Conduct. Cal. Rules Prof. Cond. Rule 1-120. Therefore, CCAT’s attorneys may violate Rule 1-120 by soliciting testimony that violates Mr. Harris’s established duty to his client.

Conclusion

Mr. Harris’s prior representation of the District makes it entirely improper for him to appear as a witness in this proceeding. The District does not waive the attorney-client privilege that governs that prior relationship, and thus Mr. Harris should be disqualified as a witness in this proceeding.

June 16, 2010

Respectfully submitted,



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

Declaration of Service

I, Vanessa M. Rodriguez, declare that on June 16, 2010, I served and filed a copy of the attached 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/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

Sacramento, CA 95814-5512

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.



Vanessa M. Rodriguez



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 5/21/2010)

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