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June 30, 2010

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**DOCKET**  
**07-AFC-3**

DATE	JUN 30 2010
RECD.	JUN 30 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 the Declaration of Michael Harris.

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.)  
Joshua Bledsoe, Esq. (w/encl.)

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STATE OF CALIFORNIA  
ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: ) Docket No. 07-AFC-3  
)  
APPLICATION FOR CERTIFICATION, ) APPLICANT'S REBUTTAL TO  
FOR THE CPV SENTINEL ENERGY ) DECLARATION OF MICHAEL HARRIS  
PROJECT, BY CPV SENTINEL, LLC )  
)  
\_\_\_\_\_ )

On behalf of CPV Sentinel, LLC (Applicant) for the CPV Sentinel Energy Project (07-AFC-03) (Project), we submit this rebuttal to the declaration of Michael Harris submitted by Intervenor California Communities Against Toxics (CCAT).<sup>1</sup>

In his declaration, Mr. Harris argues that the South Coast Air Quality Management District (SCAQMD) Determination of Compliance (DOC)<sup>2</sup> for the Project is invalid because the emission offset strategy provided for in Assembly Bill 1318 (including California Health and Safety Code Section 40440.14) has not been incorporated into the California State Implementation Plan (SIP), and therefore, according to Mr. Harris, the offsets do not comply with federal law.

As a preliminary matter, Mr. Harris's analysis suffers from the failure to distinguish between the federal enforceability of the emission offsets, and the federal approval of the mechanism by which the offsets will be made available to the Project. Furthermore, and most importantly, Mr. Harris's arguments put the cart before the horse. Approval of the proposed SIP amendment is not a prerequisite to SCAQMD's issuance of the DOC or the California Energy Commission's

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<sup>1</sup> While Mr. Harris's declaration is characterized by CCAT as expert testimony, it consists entirely of legal argument that would typically be provided during the briefing stage of the proceedings. Applicant's rebuttal, therefore, consists of legal analysis provided by counsel.

<sup>2</sup> The DOC includes the Final Determination of Compliance dated September 2, 2008 (FDOC), the Addendum to the Determination of Compliance dated March 2, 2010 and the Revision to the Addendum to the Determination of Compliance dated May 12, 2010.

(CEC) certification of the Project. To the extent that the proposed SIP amendment is necessary at all, it need not be approved by the U.S. Environmental Protection Agency (U.S. EPA) until commencement of Project operations. Moreover, even if one took an overly conservative view that the SIP amendment, to the extent required, must be fully approved prior to issuance of the New Source Review (NSR) permit to construct, that permit has not yet been issued by the SCAQMD and need not be issued for CEC approval.

## **I. APPROVAL OF SIP AMENDMENT 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 SCAQMD issuance of the DOC or CEC certification of the Project under state or federal law. Mr. Harris himself quotes Section 173 of the federal Clean Air Act, which 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.”<sup>3</sup> 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.”<sup>4</sup> The CEC Staff Assessment Air Quality Addendum for the Project recognizes this aspect of federal law: “Under federal NSR, offsets are required prior to start of operation.”<sup>5</sup>

Furthermore, U.S. 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 offsets are made federally enforceable by EPA approval of the SIP measure.<sup>6</sup>

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<sup>3</sup> 42 U.S.C. § 7503(a)(1)(A) (emphasis added).

<sup>4</sup> 42 U.S.C. § 7503(c)(1) (emphasis added).

<sup>5</sup> Energy Commission, Final Staff Assessment Air Quality Addendum, CEC-700-2008-005-FSA-AD, 07-AFC-3, at 2.1-46 (4/15/2010).

<sup>6</sup> 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).

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 ... **prior to commencement of the operation** of the proposed facility.”<sup>7</sup>

Finally, there is precedent for CEC approval of projects with virtually identical facts.<sup>8</sup> The CEC 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.”<sup>9</sup> Just as the SCAQMD here has approved of the CPV Sentinel Energy Project’s offset package,<sup>10</sup> the Energy Commission noted that Applicant City of Victorville’s “emissions mitigation plans ... were approved by the District in its Final Determination of Compliance.”<sup>11</sup> The CEC 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.”<sup>12</sup> Accordingly, the CEC denied CURE’s request that the Commission “require the City to identify an alternate source of federally enforceable PM10 offsets prior to the Commission certifying the Project” and approved the Victorville 2 Hybrid Power Project.<sup>13</sup>

## **II. EVEN IF ONE WERE TO INTERPRET APPLICABLE LAW TO REQUIRE APPROVAL OF THE SIP AMENDMENT PRIOR TO ISSUANCE OF A PERMIT TO CONSTRUCT BY THE SCAQMD, HARRIS’S CLAIMS WOULD BE PREMATURE**

Even if one were to adopt the more restrictive view that approval of the SIP amendment is required prior to issuance of a permit to construct for the Project, as opposed to prior to commencement of operation, which we do not, Mr. Harris’s claims would fail. This is because the SCAQMD has not yet issued a permit to construct for the Project and does not intend to do so until after CEC certification of the Project. Under SCAQMD rules, the DOC does not act as

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<sup>7</sup> Public Resources Code § 25523(d)(2) (emphasis added).

<sup>8</sup> 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).

<sup>9</sup> *Id.*

<sup>10</sup> See SCAQMD, Addendum to Determination of Compliance, Appendix N (Emission Offset Evaluation) (3/2/2010, revised 5/12/2010).

<sup>11</sup> 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).

<sup>12</sup> *Id.* (internal citations omitted).

<sup>13</sup> *Id.* (internal quotations omitted).

the permit to construct for the project.<sup>14</sup> Rather, after CEC certification of the Project, the SCAQMD will take the additional step of issuing a permit to construct.

### III. CONCLUSION

Contrary to Mr. Harris's views, neither SCAQMD issuance of the DOC or CEC certification of the Project requires 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 U.S. EPA is commencement of operations of the Project.

### IV. REQUEST FOR OFFICIAL NOTICE

Applicant requests that the Committee take official notice, pursuant to Section 1213 of the CEC regulations,<sup>15</sup> of the documents cited herein; said documents support CEC Staff's finding that the Project's "offsets all meet the integrity criteria for qualifying as offsets, meaning they are all Real, Permanent, Quantifiable, Enforceable and Surplus, as required by federal law."<sup>16</sup>

DATED: June 30, 2010

Respectfully submitted,

 [STB]

Michael J. Carroll  
of LATHAM & WATKINS LLP  
Counsel to Applicant

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<sup>14</sup> California air district rules vary on this point, and in some jurisdictions the DOC does act as a permit to construct, but that is not the case in SCAQMD.

<sup>15</sup> 20 CCR § 1213.

<sup>16</sup> Energy Commission, Final Staff Assessment Air Quality Addendum, CEC-700-2008-005-FSA-AD, 07-AFC-3, at 2.1-39 (4/15/2010).

**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 )  
) (May 21, 2010)  
)  
\_\_\_\_\_ )

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

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

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**DECLARATION OF SERVICE**

I, Paul Kihm, declare that on June 30, 2010, I served and filed copies of the attached:

**APPLICANT'S REBUTTAL TO DECLARATION OF MICHAEL HARRIS**

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

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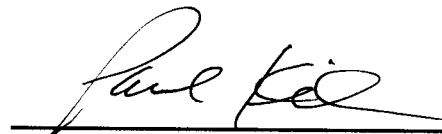
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I further declare that transmission via U.S. Mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 30, 2010, at Costa Mesa, California.

  
Paul Kihm