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October 21, 2009



VIA FEDEX

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-9
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

File No. 039610-0003

DOCKET	
08-AFC-9	
DATE	OCT 21 2009
RECD	OCT 22 2009

Re: City of Palmdale Hybrid Power Plant Project: Docket No. 08-AFC-9
Revised Application for Confidential Designation

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, Sections 1209, 1209.5, 1210, and 2505, enclosed herewith for filing please find a letter from Marc Campopiano to Melissa Jones regarding the revised application for confidential designation of Applicant's Biological Mitigation Map. Per CEC protocols, five (5) copies of the letter are enclosed.

Please note that the enclosed submittal (without the confidential mitigation map) was filed today via electronic mail to your attention and to all parties on the attached electronic proof of service list.

Very truly yours,

Paul E. Kihm
Senior Paralegal

Enclosure

cc: 08-AFC-9 Proof of Service List (w/encl., via e-mail and U.S. Mail)
Michael J. Carroll, Esq. (w/encl.)

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File No. 039610-0003	

October 21, 2009

VIA FEDERAL EXPRESS

Ms. Melissa Jones
Executive Director
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814

Re: **Confidential Submittal** - Palmdale Hybrid Power Plant Project (08-AFC-9)
Revised Application for Confidential Designation – Mitigation Map

Dear Ms. Jones:

On behalf of the City of Palmdale (“Applicant”) for the Palmdale Hybrid Power Project (08-AFC-9), I am submitting a revised application for confidential designation for a map depicting potential compensation mitigation lands (the “Mitigation Map”) that was first submitted to the Energy Commission on July 23, 2009 and subsequently submitted in revised form on August 20, 2009.¹

In a letter dated October 8, 2009, the Applicant’s revised request for confidentiality was denied because the application did not explicitly address the factors in Title 20, California Code of Regulations, § 2505(a)(1)(D). Accordingly, this letter constitutes the Applicant’s revised application to address those issues. We also provide an additional, independent basis for confidentiality pursuant to Government Code § 6254.15.

Confidentiality Request Pursuant to Government Code § 6254(k) (Trade Secrets)

The Applicant requests that the Mitigation Map be designated confidential pursuant to California Government Code § 6254(k), which exempts trade secrets from disclosure under the California Public Records Act. Under controlling law expressed in *Uribe v. Howie* (1971) 19 Cal. App. 3d 194, 207:

A trade secret may consist of any formula, pattern, device or
compilation of information which is used in one’s business and

¹ See PHPP Docket Log # 52590, July 23, 2009. See also PHPP Docket Log # 52960, August 20, 2009.

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which gives him an opportunity to obtain an advantage over competitors who do not know or use it. (Emphasis added.)

The Mitigation Map is a trade secret under California law as a compilation of information that was developed by the Applicant *through a significant expenditure of the Applicant's time, money and resources*. The Mitigation Map provides the Applicant with a pricing advantage over potential competitors who have not developed the information. The information would lose its value (and the Applicant would lose its investment in the information) if it is disclosed to the Applicant's competitors. As a trade secret, the Mitigation Map falls squarely under Gov. Code § 6254(k) and should be exempted from disclosure under the California Public Records Act.

When requesting a trade secret to be deemed confidential, the Applicant must provide: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to the applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others. *See* Title 20, California Code of Regulations, § 2505(a)(1)(D). Accordingly, the Applicant attests to the following:

- ***"The specific nature of the advantage"*** – The specific nature of the advantage is the Applicant's ability to use the Mitigation Map to identify and potentially purchase lands that would be suitable for mitigation at a feasible cost. This information is not readily available on the marketplace and can only be obtained with a significant investment of time and money. Without the confidentiality of this information, the Applicant could be forced to negotiate mitigation land at a much higher cost. When evaluating trade secrets such as the Mitigation Map, one must consider (1) whether the information is valuable because it is unknown to others, and (2) whether the owner has attempted to keep the information secret. *Whyte v. Schlage Lock Co.* (2002) 101 Cal. App. 4th 1443, 1454. In this case, the information is valuable as a trade secret (and thus provides the Applicant with an advantage) precisely because it is unknown to others.
- ***"How the advantage would be lost"*** – The advantage described above would be lost if the information is no longer confidential because the Applicant would be unable to negotiate the potential mitigation lands at a reasonable cost. Owners of the land, or competitors for the land, could increase acquisition costs if the Applicant's interest becomes public. This would force the Applicant to pay an artificially high cost or to go through the additional time and expense to identify new mitigation lands, if such an approach were even feasible in the siting context.
- ***"The value of the information to the applicant"*** – The value of the information to the Applicant is based on (1) the significant investment in time, money and resources that went into developing the Mitigation Map, and (2) the Applicant's ability to evaluate lands that would be suitable for mitigation at a reasonable cost.
- ***"The ease or difficulty with which the information could be legitimately acquired or duplicated by others"*** – This information is not readily available on the marketplace and can only be obtained with a significant investment of time and

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money. Thus, others could not easily acquire or duplicate this information unless they expend similar time and resources as the Applicant.

Confidentiality Request Pursuant to Government Code § 6254.15 (Proprietary Information)

Separately, the Applicant believes Gov. Code § 6254.15 provides another independent basis for deeming the Mitigation Map confidential. Gov. Code § 6254.15 exempts the following type of information from disclosure under the California Public Records Act:

[C]orporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California.
(Emphasis added.)

As stated above, the Mitigation Map is a trade secret under California law as a compilation of information that the Applicant has carefully kept secret to preserve its value. Thus, it falls squarely under Gov. Code § 6254.15 as corporate proprietary information. The Mitigation Map is also information related to the siting of a facility within the state. The Applicant has submitted this information to the Energy Commission for the purpose of locating a facility within California. Thus, the information falls squarely under Gov. Code § 6254.15 and should be exempted from disclosure under the California Public Records Act.

Conclusion

According to the Energy Commission's regulations, an application for confidential designation "shall be granted if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential." Title 14, California Code of Regulations, § 2505(a)(3)(A) (emphasis added). This letter establishes a "reasonable claim" for confidentiality because the Mitigation Map falls squarely under two independent exemptions to the California Public Records Act – Gov. Code § 6254(k) and Gov. Code § 6254.15. The Applicant requests that its application for confidentiality be granted in accordance with the Energy Commission's regulations.

Lastly, the Applicant requests that the entirety of the Mitigation Map be kept confidential indefinitely. The Applicant requests that the Mitigation Map not be disclosed even if aggregated with other information or redacted to conceal certain information. The Applicant has not disclosed any of the subject confidential information to anyone other than its employees, attorneys, consultants, or others working as part of the project application before the Energy Commission. Moreover, this information has not been disclosed by the Applicant except on a "need-to-know" basis. It is our understanding that because our revised application will be filed during the fourteen day appeal period, the Mitigation Map will remain confidential during your review of this revised application.

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I have been authorized to make this application and certification on behalf of the Applicant. With my signature to this letter, I certify under penalty of perjury that the information contained in this application for confidential designation is true, correct, and complete to the best of my knowledge.

Best regards,



Marc T. Campopiano
of LATHAM & WATKINS LLP

cc: Deborah Dyer, California Energy Commission (via Federal Express)