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STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	DOCKET NO. 08-AFC-9
APPLICATION FOR CERTIFICATION FOR THE PALMDALE HYBRID POWER PROJECT	

REBUTTAL BRIEF OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

April 1, 2011

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Intervenor Center for Biological Diversity (the "Center") submits this memorandum in rebuttal to the opening briefs filed in this matter by Energy Commission staff ("Staff") and by the applicant City of Palmdale (the "Applicant"). The Center's Opening Brief anticipates and responds to the arguments contained in Staff's and the Applicant's opening briefs. This rebuttal, however, responds to several of these arguments in greater detail.

A. The Project's Microparticulate Impacts Have Not Been Adequately Mitigated

Staff's opening brief focuses on the testimony of the Center's air quality witness, Gregory Tholen. Ultimately, Staff fails to refute Mr. Tholen's testimony that the Palmdale Hybrid Power Plant project ("PHPP" or the "Project") will result in significant unmitigated air quality impacts. Indeed, Staff's contentions fail as a matter of law to meet the requirements of the California Environmental Quality Act ("CEQA").

Staff contends that Mr. Tholen's testimony regarding the PHPP's $PM_{2.5}$ impacts is "irrelevant" because "$PM_{2.5}$ offsets are not required by the AVAQMD's rules and, because the area is attainment/unclassified for $PM_{2.5}$ …". (Staff Opening Br. at 2.) Staff concludes that no $PM_{2.5}$ offsets are required because "there are no existing violations of the state or federal $PM_{2.5}$ standard, and the project would not cause a violation of either standard." (*Id*.) This conclusion is fatally flawed as a matter of law. Staff appears to misunderstand the fundamental purpose of CEQA – the analysis required by CEQA is not limited to whether the Project will violate state and federal air quality standards. Rather, CEQA is more broadly intended to disclose, evaluate, minimize, and avoid the Project's significant environmental impacts. (*See, e.g., Sierra Club v. State Bd. of Forestry* [1994] 7 Cal.4th 1215, 1233 ["CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives."]).

Thus, the conclusion that the Project will not violate state and federal $PM_{2.5}$ standards does not end the analysis, and Mr. Tholen's testimony is directly relevant to the Center's contention that the Project will result in significant, unmitigated $PM_{2.5}$ emissions.

Importantly, the significance of an environmental effect, such as the Project's $PM_{2.5}$ emissions, is not determined simply by reference to established state and federal standards. In 2002, the Court of Appeal invalidated an amendment to the CEQA Guidelines that would have allowed precisely that approach, holding that it was inconsistent with CEQA's "fair argument" standard. (*Communities for a Better Environment v. California Resources Agency* [2002] 103 Cal.App.4th 98, 113-14.) Like the invalidated CEQA Guidelines provision, Staff's approach improperly applies "an established regulatory standard in a way that forecloses the consideration of any other substantial evidence showing there may be a significant effect." (*Id*. at 114.) When there is a fair argument that a project will result in a potentially significant environmental effect, that effect must be disclosed, evaluated, and mitigated or avoided. Here, notwithstanding Staff's assertion that the PHPP will not cause a violation of either state or federal $PM_{2.5}$ standards (although the Project's potential to "bust the cap" for $PM_{2.5}$ remains in dispute – *see* the Center's Opening Br. at 5-6), the Center has presented substantial evidence showing that the Project's $PM_{2.5}$ emissions – which constitute a substantial fraction of its PM_{10} emissions – will result in significant adverse health and environmental effects. (*See* Tholen testimony, Ex. 402 at 5-6; Fox comment, Ex. 400 at 10-12.) Moreover, Staff fails to answer to the fundamental concern presented in this testimony – that road paving does not adequately mitigate the adverse health and environmental impacts of the $PM_{2.5}$ fraction, and would likely result in *increased* emissions of $PM_{2.5}$. (*See* Tholen testimony, Ex. 402 at 6-7; Fox comment, Ex. 400 at 10-12.)

Moreover, Staff's approach is inconsistent with CEQA's mandate to evaluate cumulative

impacts. The Center maintains that the PHPP's direct $PM_{2.5}$ emissions are significant and not adequately mitigated by the proposed road-paving ERCs. However, even if the direct $PM_{2.5}$ emissions are less than significant, CEQA requires evaluation of the Project's cumulative contribution to $PM_{2.5}$ impacts. (*Kings County Farm Bureau v. City of Hanford* [1990] 221 Cal.App.3d 692, 721).

> "One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. Perhaps the best example is air pollution, where thousands of relatively small sources of pollution cause a serious environmental health problem."
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> * * *
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> "This judicial concern often is reinforced by the results of cumulative environmental analysis; the outcome may appear startling once the nature of the cumulative impact problem has been grasped."

(*Id*., quoting Selmi, *The Judicial Development of the California Environmental Quality Act* [1984] 18 U.C. Davis L. Rev. 197, 244, fn. omitted.) By relying on established state and federal $PM_{2.5}$ standards as a significance threshold, Staff dodges CEQA's requirement to consider $PM_{2.5}$ impacts that may be individually insignificant but cumulatively significant. While Staff contends that it *has* conducted an analysis of the Project's $PM_{2.5}$ impacts (Staff Opening Br. at 3), this contention is incorrect; on the contrary, Staff has improperly used the state and federal $PM_{2.5}$ standards to avoid this analysis.

B. <u>The Biological Impacts of Road Paving Have Not Been Adequately Evaluated</u>

The Applicant contends that Staff adequately disclosed and evaluated the biological consequences of road paving. (Applicant Opening Br. at 3-5.) The Applicant suggests that full protocol level surveys for rare or listed species are not required and that the surveys that were performed were adequate "under the circumstances." (*Id*. at 4.) It

is not simply a question, however, of the failure to perform protocol level surveys. Rather, the Applicant's analysis obscures the wholesale failure to perform adequate biological surveys capable of disclosing the full range of biological impacts associated with the proposed road paving. CEQA requires that these surveys, whether or not they are "protocol level" surveys, must at least be capable of contributing to a meaningful understanding of the Project's environmental effects. Moreover, the Applicant fails to explain the precise circumstances that precluded legally adequate surveys of affected biological resources.

Testimony at the March 2, 2011 evidentiary hearing makes clear that the surveys that were conducted were cursory at best. Staff conducted two "reconnaissance level surveys" of road segments proposed to be paved in February and March 2011. (Evidentiary Hearing Tr. at 276:8-19.) These surveys consisted of brief, drive-by visits of the road segments conducted by Staff's biologist, who "stopped periodically along all segments to look at such things as -- as habitat, drainages, connectively, adjacent land uses, things of that nature." (Evidentiary Hearing Tr. at 276:22-25.) The March survey was conducted on the day before the March 2, 2011 evidentiary hearing. (*Id*. at 276:23.) These are the surveys that the Applicant characterizes as "multiple field surveys to confirm [Staff's] findings and the appropriateness of the COCs." (Applicant Opening Br. at 4.) The Applicant states that its consultants conducted additional surveys (Applicant Opening Br. at 4), but the Applicant's own witness describes these surveys as "fairly cursory" surveys intended "to confirm the nature and location of the road segments." (Evidentiary Hearing Tr. at 221:6-17.) There is no indication that these surveys were more rigorous in any way than Staff's "reconnaissance level surveys."

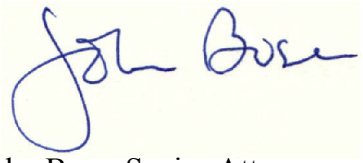
The "reconnaissance level surveys," however, are insufficient to disclose and analyze the potentially significant biological impacts associated with paving the target road segments. There have been no multi-season surveys designed to recognize species in the seasons where they are most likely present. For example, Staff acknowledged that surveys were not conducted during the active seasons for desert tortoise and neotropical migrant birds. (Evidentiary Hearing Tr. at 281-82.) In other words, the surveys that were performed were *incapable* of adequately assessing the impacts of road paving on the sensitive species most likely to be affected by the paving. This is not simply a matter of not conducting "every conceivable study" that the Center or anyone else can imagine, or not requiring a suggested study that would "not add useful information" as the Applicant suggests. (Applicant Opening Br. at 5.) Rather, the failure to conduct seasonal surveys for the desert tortoise, for example, reflects the manifest failure to conduct even the minimal surveys necessary to convey the most basic understanding of the Project's impacts to the public and to the decisionmakers. It is no help that surveys for desert tortoise and other species *may* be conducted prior to the actual road paving work – CEQA demands that surveys aimed at determining whether the Project will have a significant environmental impact may not be deferred until after Project approval. (*Sundstrom v. County of Mendocino* [1988] 202 Cal.App.3d 296, 307-09.)

In addition, the Applicant utterly fails to explain the circumstances that justify the failure to require adequate surveys prior to Project approval. Staff's testimony at the March 2, 2011 evidentiary hearing indicates that although Staff was aware of the road segments proposed for paving in July 2009, its biologist was not asked to survey the segments prior to January 2011. The Staff testimony provides no explanation of why

more rigorous multi-season surveys capable of actually revealing the potentially significant effects of road paving were not undertaken between July 2009 and March 2011.

Dated: April 1, 2011

Respectfully submitted,



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For the *PALMDALE HYBRID POWER PROJECT*

Docket No. 08-AFC-9

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DECLARATION OF SERVICE

I, Lisa Belenky, declare that on, April 1, 2011, I served and filed copies of the attached *Rebuttal Brief of Intervenor Center for Biological Diversity* dated April 1, 2011. 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/palmdale/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:

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