

DOCKET

08-AFC-9

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STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION
FOR THE PALMDALE HYBRID
POWER PROJECT

DOCKET NO. 08-AFC-9

PREHEARING CONFERENCE STATEMENT
BY CENTER FOR BIOLOGICAL DIVERSITY

February 8, 2011

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Introduction

Pursuant to the Second Revised Notice of Prehearing Conference and Evidentiary Hearing and Order Granting Intervenor’s Motion to Continue Hearing Dates and Other Deadlines filed January 31, 2011 (hereinafter “Second Revised Notice”), Intervenor Center for Biological Diversity (the “Center”) provides this Prehearing Conference Statement regarding the application for certification of the proposed Palmdale Hybrid Power Project.

The Center provided detailed comments to the Committee for this project in connection with the FDOC on July 22, 2010 (Docket # 57740), regarding the generation and use of emission reduction credits (ERCs) from the paving of existing unpaved public roads to offset the project’s PM10 emissions. Exhibit 400. Because wide-spread paving of unpaved roads can have a significant effect on the environment, including on biological resources, CEQA review and analysis is required before ERCs can be used. Unfortunately, the FSA did not adequately address these concerns, the needed CEQA analysis has not been undertaken to date, and is not provided in the FSA. On January 19, 2011, the Center raised these issues again (as well as other issues) in the Center’s Opening Testimony and Rebuttal to Applicant’s Response to the Final Staff Assessment.

Exhibit 401. On January 21, 2011, the Staff provided a “rebuttal” that included new information regarding the potential impacts of road paving – information that had not been included in the FSA. On February 2, 2011, staff provided the parties with suggested changes to the proposed conditions including substantial changes to the proposed conditions regarding the mitigation measure that could allow road paving off-sets in ERCs, and added a new proposed condition that would allow for inter-pollutant trading as follows:

AQ-SC19 The project owner shall provide 137 tons per year of PM10 ERCs (128 tons per year for PM10 emissions and 9 tons per year for PM10-precursor SOx emissions) that are banked consistent with the Rules and Regulations of the AVAQMD. Once the District has adopted one or more rules to bank PM offsets from road paving, Should the project owner pursue road paving as the method to obtain the necessary PM10 ERCs, the project owner shall pave, with asphalt concrete that meets the current county road standards, unpaved local roads to provide emission reductions of 137 tons per year of PM10, prior to start of construction of the project. The project owner shall submit a road paving plan that includes a list and pictures of candidate roads to be paved, their actual daily average traffic count including classifications of vehicles (ADT), and daily vehicle miles travel (DVMT), their actual road dust silt content, and calculations showing the appropriate amount of emissions reductions due to paving of each road segment. Calculations of PM10 emission reduction credits shall be performed in accordance with Sections 13.2.1 and 13.2.2 of the U.S. EPA's AP-42 "Compilation of Air Pollutant Emission Factors, Volume 1: Stationary Point and Area Sources", Fifth Edition.

Should the project owner pursue an alternate method of obtaining PM10 ERCs, such as inter-pollutant trading of NOx and SOx for PM10, the project owner shall provide, at a minimum, NOx and SOx ERCs at ratios of 2.629:1 and 1:1, respectively, per guidance from SJVAPCD rules.

Notably, inter-pollutant trading had not previously been discussed or analyzed in the FSA. Therefore, in proposing these additional changes to the conditions of certification Staff, again, provided new information that had not previously been provided to the

parties in this matter – information that the parties have not yet had a chance to respond to.

In the Second Revised Notice, the Committee provided additional time for testimony to be filed regarding these issues and on February 4, 2011, the Center filed Additional Testimony from Gregory Tholen of Autumn Wind Associates, Inc., regarding road paving offsets. Exhibit 402.

As the Committee is aware, key issues continue to evolve and change as staff and the applicant provide new information and new proposed conditions regarding many issues including the proposed road paving off-sets for ERCs and other potential off sets. The Center does not object to the applicant continuing to assess the environmental impacts of the project and the proposed mitigation measures; however, such a process does make it difficult for all of the parties to evaluate the issues and topic areas as the facts continue to evolve and the Staff's assessment of those topics is revised or supplemented and new conditions are proposed. As a result, the Center reserves the right to respond to any new information submitted by the Staff or the Applicant on all topics including, but not limited to, new information or calculations regarding road paving off-sets used as ERCs or any other ERCs, any identification and analysis of impacts to biological resources, water resources or other resources from those mitigation measures, and/or any other proposed mitigation/avoidance measures or ERCs.

The Center reserves the right to provide additional prehearing testimony and documentary evidence along with written rebuttal up to and including and evidentiary hearings on this matter. Given the extremely short schedule and the additional information being submitted by the Staff last week, the Center also requests that the Committee allow testimony at the hearings to encompass issues that arguably could have been raised on earlier had these issues been properly addressed in the FSA.

a) The topic areas that are complete and ready to proceed to evidentiary hearing:

Although the Center disputes that the FSA and rebuttal together have provided adequate information to proceed to hearing, the Center is prepared to proceed to hearing on the following topics: Project Description, Purpose and Need.

b) The topic areas that are not complete and not yet ready to proceed to evidentiary hearing, and the reasons therefore:

The Center does not believe that the following topic areas are complete or ready to proceed to evidentiary hearing: Air Quality, Biological Resources, Land Use, Cumulative Impacts, Alternatives Analysis, Soil and Water Resources. The Center does not view these topics as complete and ready for evidentiary hearing given the lack of adequate identification and analysis of the impacts of the proposed road paving off-sets as a mitigation measure for the air quality impacts of the project. These impacts include impacts to air quality due to the off-sets, as well as direct and indirect impacts to biological resources, soils and water, and other resources. The Center is particularly concerned with the lack of identification of potential impacts from the proposed road paving off-sets and the Staff's failure to undertake even a bare minimum of investigation into these potential impacts and, as a result, the complete lack of meaningful analysis of impacts. For example, it is unclear what, if anything, the Staff did to assess the potential biological impacts from road paving.

As an initial matter, the testimony fails to even mention that the proposed project and the proposed road paving are within the DRECP planning boundary. While the Center does not believe that a gas-fired power plant that has a small solar component and is therefore termed a "hybrid" project should be covered by the DRECP, the CEC must consider whether the project or the proposed mitigation measures may conflict with or compromise the conservation direction of the DRECP.

As just one example, the letter from the Antelope Valley Conservancy dated February 3, 2011, notes that one of the road segments proposed for paving includes historic wetlands documented in the National Wetlands Inventory and past grading of the

dirt road is the subject of local controversy. The Staff testimony completely failed to identify the wetlands that would be affected by that proposed segment.

It is impossible on the short timeframe provided by the Committee for the Center to assess how many other significant impacts to biological resources, soil and water resources, and others were also overlooked in the areas that would be affected by the proposed road paving. Given the inadequacies in the FSA and rebuttal, it is impossible to evaluate at this time whether the project will fully comply with relevant federal and state laws. Moreover, it is not the burden of the intervenors but of the Commission to identify and analyze the impacts to resources in order to comply with CEQA. The Commission has wholly failed to comply with the most basic requirements of CEQA by identifying and analyzing the impacts of the proposed mitigation measure of road paving on the environment and therefore this matter should not proceed to evidentiary hearing. If the Committee chooses to nonetheless proceed, at minimum, the issues of air quality, biological resources, soil and water, are not complete and should not proceed to hearing at this time.

While the Center is well aware that the Commission proceeds under a certified regulatory program that is intended to be the CEQA equivalent and which provides some flexibility to the Commission (*see* § 21080.5; CEQA Guidelines § 15251(j).), that program does not allow the Commission to shift the Commission's duty to provide for adequate CEQA review, including identification and analysis of environmental impacts and alternatives, onto other parties or members of the public. It is the Commission's duty to comply with CEQA's substantive and procedural mandates. Pub. Res. Code §§ 21000, 21002; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.

c) The topic areas that remain disputed and require adjudication, and the precise nature of the dispute for each topic:

The primary disputes that the Center believes remain are regarding the mitigation measures for air quality in the form of road paving offsets and the recent addition of inter-pollutant trading offsets by staff in its proposed conditions. The Center believes that the information provided by Staff is incomplete and appears to have been prepared in a rush rather than to be the result of adequate analysis and research regarding impacts to the environment from these proposed mitigation measures. It is well settled that under CEQA, the impacts of and efficacy of proposed mitigation measures must be fully explored and this analysis cannot be deferred. *See Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099, 1119-20.

Many of the disputed issues identified below involve both legal and factual disputes while others are predominantly legal issues. The Center therefore respectfully reserves the right to address each disputed issue, and any other disputed issues identified at the prehearing conference at later stages of this process including in briefing following the evidentiary hearing.

The nature of the dispute in each topic area are discussed below:

Purpose and Need: The FSA failed to explain why the project is needed, if at all, and in particular why a new gas-fired plant of over 500 MW is needed in light of the recent approval of over 4,000 MW of solar energy by the commission in the Mojave desert region.

Air Quality: As discussed above and in the Center's earlier filings, impacts of the proposed road paving offsets on air quality are significant because the offsets will result in a net increase in smaller PM fractions. Because these impacts to air quality from the proposed mitigation measures are not adequately described or analyzed the FSA is incomplete. Only after adequate identification of potential impacts is undertaken, can impacts to air quality (and human health) be fully analyzed and evidentiary hearings

scheduled. To move forward with evidentiary hearings without adequate information would violate the substantive provisions of CEQA.

Biological Resources: As discussed above and in the Center's earlier filings, impacts of the proposed road paving offsets on biological resources are not adequately described or analyzed. Only after adequate identification of potential impacts is undertaken, can impacts to biological resources be fully analyzed and evidentiary hearings scheduled. To move forward with evidentiary hearings without adequate information would violate the substantive provisions of CEQA.

Cultural Resources and Native American Values: The Staff admits that it had no data and provided only preliminary information on the likely impacts to cultural resources from the road paving proposed as a mitigation measure. Therefore, this issue as well cannot move forward.

Soil and Water Resources:

Water Resources: Impacts of the proposed road paving offsets on water resources are not adequately described or analyzed. Until adequate identification and analysis is undertaken, evidentiary hearings should not be scheduled. To move forward with evidentiary hearings without adequate information would violate the substantive provisions of CEQA.

Soils: Impacts of the proposed road paving offsets on soils are not adequately described or analyzed. Until adequate identification and analysis is undertaken, evidentiary hearings should not be scheduled. To move forward with evidentiary hearings without adequate information would violate the substantive provisions of CEQA.

Cumulative Impacts and Growth Inducing Impacts: The potential growth inducing impacts of the proposed road paving offsets and cumulative impacts are not

adequately described or analyzed. Only once adequate identification and analysis is undertaken, can these issues be addressed at evidentiary hearing.

Alternatives Analysis: The FSA fails to address alternatives to the project proposal that would avoid significant impacts of the project to air quality and the related impacts from the proposed use of road paving offsets. The FSA failed to look at the feasibility of other energy sources such as an all-solar alternative or conservation and efficiency that would decrease the demand for energy in this area. The FSA also failed to explain why this gas-fired plant is needed in light of the recent approval of over 4,000 MW of solar energy by the commission in the Mojave desert region. The FSA also failed to look at distributed solar energy as an alternative that would provide renewable energy near the load centers and existing transmission and could come on line relatively quickly. Any of these alternatives could result in avoidance, minimization and mitigation of the significant impact to the environment from the proposal particularly the air quality impacts and the impacts of the mitigation measures proposed through road paving for offsets. The FSA further failed to evaluate the use of non-asphalt materials for road paving, which could reduce some of the significant effects of road paving. Until adequate identification and analysis is undertaken for each of the affected resources, alternatives cannot be fully evaluated and evidentiary hearings should not be scheduled. To move forward with evidentiary hearings without adequate information would violate the substantive provisions of CEQA.

d) The identity of each witness sponsored by each party (note: expert witnesses must have professional expertise in the scope of their testimony); the topic area(s) which each witness will present; a brief summary of the testimony to be offered by each witness; qualifications of each witness; and the time required to present direct testimony by each witness:

The Center intends to present or rely on one expert witness on air quality.

Gregory Tholen, Autumn Wind Associates, Inc., has already submitted testimony

regarding the road paving offsets and his qualifications. We anticipate that direct testimony would take no more than 30 minutes.

The Center requests that Mr. Tholen be allowed to testify by telephone. While in-person testimony is preferred, given the schedule and the meeting location Mr. Tholen may not be available to travel and testify in person. The Center respectfully requests that the Committee provide a scheduled time for testimony (with a “window” of 2 hours or less) and that the Center’s witness not be asked to testify after 5:30 p.m. in the evening.

The Center reserves the right to submit additional testimony by way of rebuttal or initial testimony on any late-filed information before the evidentiary hearings.

e) Topic areas upon which a party desires to cross-examine witnesses, a summary of the scope of such cross-examination, and the time desired for such cross-examination:

The Center requests the opportunity to cross-examine Staff and Applicant witnesses on all topic areas in dispute and to cross-examine witnesses presented by other Intervenors. The Center anticipates that cross-examination will require no more than 30 minutes per witness and in most cases far less.

As an initial matter, the Center anticipates that the scope of cross-examination will include at least the following:

Air Quality: CEC Staff, Applicant witnesses, and any witnesses presented by other Intervenors regarding assessment of impacts to air quality and the use of road paving off-sets or inter-pollutant trading.

Biological Resources: CEC Staff, Applicant witnesses, and witnesses presented by other Intervenors regarding assessment of impacts to biological resources and appropriate avoidance, minimization, and mitigation strategies.

Water Resources, Soils: CEC Staff, Applicant witnesses regarding the basis for Staff’s conclusions on the impacts to water resources and soils from the proposed mitigation measures of road paving for off-sets.

Purpose and Need: CEC Staff regarding the basis for the Purpose and Need statements in FSA.

Alternatives: CEC Staff, Applicant witnesses, and witnesses presented by other Intervenors regarding identification and selection of alternatives for review; the analysis of those alternatives; and the analysis of the feasibility of alternative technologies or conservation and efficiency to meet the stated purpose and need for the project while avoiding the significant impacts.

Cumulative Impacts/Growth Inducing Impacts: CEC Staff regarding the basis for the Cumulative Impacts analysis in the FSA particularly with regards to Air Quality, biological resources, and soil and water resources and the potential for growth inducing impacts from the proposed mitigation measure of road paving.

f) A list identifying exhibits and declarations that each party intends to offer into evidence and the technical topics to which they apply:

The Center reserves the right to provide additional exhibits and declarations as by way of rebuttal, and if necessary at hearing. A complete list of exhibits submitted to date is as follows:

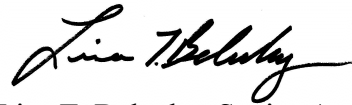
EXHIBIT LIST

Intervenor Center for Biological Diversity's Exhibits No. 400-499.

Doc. No.	Author and title
400	Letter from Center for Biological Diversity Re: FDOC for the Palmdale Hybrid Power Project (08-AFC-9) dated July 22, 2010, and attachment letter re: Proposed Paving Emission Reduction Credits for Palmdale Hybrid Power Project, dated July 19, 2010, from Phyllis Fox, Ph.D., QEP, PE, BCEE, Consulting Engineer. (July 22, 2010 (Docket # 57740)
401	Center Opening Testimony and Rebuttal to Applicant's Response to the Final Staff Assessment (Filed January 19, 2011)
402	Additional Testimony (Filed February 4, 2011)

Dated: February 8, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lisa T. Belenky". The signature is written in a cursive style with a long, sweeping underline.

Lisa T. Belenky, Senior Attorney
Center for Biological Diversity



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For the *PALMDALE HYBRID*
POWER PROJECT

Docket No. 08-AFC-9

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(Revised 1/14/2011)

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DECLARATION OF SERVICE

I, John Buse, declare that on, February 8, 2011, I served and filed copies of the attached **PREHARING CONFERENCE STATEMENT OF CENTER FOR BIOLOGICAL DIVERSITY**, dated February 8, 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:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

- sent electronically to all email addresses 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, delivered by overnight service 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. 08-AFC-9
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.

