

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

DOCKET

08-AFC-9

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In the Matter of:

APPLICATION FOR CERTIFICATION
FOR THE PALMDALE HYBRID
POWER PROJECT

DOCKET NO. 08-AFC-9

**OPENING TESTIMONY AND REBUTTAL TO APPLICANT'S RESPONSE TO
FINAL STAFF ASSESSMENT
BY CENTER FOR BIOLOGICAL DIVERSITY**

January 19, 2011

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Introduction

Intervenor Center for Biological Diversity (the “Center”) provides this Opening Testimony regarding the application for certification of the proposed Palmdale Hybrid Power Project.

The Center provided detailed comments to the Committee for this project regarding 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. 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. The Center hereby requests that the Commission accept the Center’s comment letter and attachment as Exhibit 400.

Given the very short time provided between issuance of the FSA (of over 1,100 pages), the Applicants Opening Testimony (including over 100 exhibits), and the deadline for Intervenor to submit opening testimony, the Center has not has sufficient time to review all of the issues that may require additional evidentiary development.

Therefore, the Center respectfully reserves the right to provide additional testimony at any time up to and including the close of the evidentiary hearings and to seek additional time to complete evidentiary development.

Because many of the factual issues discussed in FSA involve both legal and factual questions while others are predominately legal issues, the Center also respectfully reserves the right to address all disputed issues identified at the hearings through testimony, rebuttal, cross-examination, or at later stages of this process including in briefing following the evidentiary hearing.

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 Poer Project, dated July 19, 2010, from Phyllis Fox, Ph.D., QEP, PE, BCEE, Consulting Engineer.

Rebuttal to Applicant's Response to the Final Staff Assessment

Intervenor Center for Biological Diversity (the "Center") submits the following rebuttal to the Applicant's Response to the December 22, 2010 Final Staff Assessment ("FSA") in this matter. In this matter, the Center has focused on concerns with the use of emission reduction credits (ERCs) from the paving of existing unpaved public roads to offset the Project's emissions of particulates and the lack of CEQA compliance for the use of any such ERCs. As noted above, the Center submitted comments and detailed information regarding this issue to the Commission that was largely ignored by Staff in the FSA. Against that background, the Center provides the following rebuttal to the Applicant's response to the FSA.

The Applicant disputes the FSA's conclusion that any program to allow road paving ERCs would "have to include a regulation that is approved by EPA and incorporated into the State Implementation Plan (SIP)." FSA at 4.1-33; Applicant's Response at 4. In particular, the Applicant contends that *existing* Antelope Valley AQMD rules provide for the issuance of PM₁₀ ERCs based on road paving activities. Applicant's Response at 4. The Applicant's reasoning is based on the erroneous assumption that the Antelope Valley AQMD can simply adopt the methodology of the recently-invalidated Mojave Desert AQMD road paving rule without additional environmental analysis or EPA approval.

While the Center generally concurs with the FSA's conclusion that any road paving ERC program would need to be approved by EPA and incorporated into the SIP, the Center disagrees with the FSA's characterization of the status of previous road paving ERC programs. The FSA repeatedly states that the Mojave Desert AQMD's road paving rule ("Rule 1406") "is being legally challenged in court." *See, e.g.*, FSA at 4.1-34; 4.1-35. This characterization is inaccurate. While the Center and others *have* challenged Rule 1406, this challenge resulted in the invalidation of Rule 1406. *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (October 30, 2009) 178 Cal.App.4th 1225, 1247. As a result of this binding and final appellate decision, Rule 1406 has been rescinded, and no valid road paving rule is currently in effect.

Faced with an invalid Rule 1406, the Applicant no longer asserts that it will obtain PM₁₀ ERCs through an Antelope Valley AQMD rule modeled on Rule 1406. Instead, the Applicant suggests that existing Antelope Valley AQMD rules provide all the authority needed to obtain road paving ERCs, citing Antelope Valley AQMD Rule 1305(8)(3) [*sic*]. The Applicant cites a July 6, 2009 letter from the Antelope Valley AQMD that appears to endorse this approach:

Rule 1305(8)(3) explicitly addresses the use of area and indirect source actual emission reductions as offsets. No additional rulemaking is

necessary to allow the use of actual emission reductions from paving of an existing unpaved road as offsets.

Applicant's Response at 4, citing Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment C. However, the Applicant omits the last part of the Antelope Valley AQMD's statement:

The District will use the unpaved road paving emission reduction credit methodology adopted by the Mojave Desert Air Quality Management District in conjunction with Rule 1309.

Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment C (emphasis added).

This omission is significant – the Applicant cites a statement from the Antelope Valley AQMD that was issued prior to the *California Unions for Reliable Energy* decision stating that the District intends to use the same methodology of the rule that was subsequently invalidated. Perhaps this is still the District's intent. If the Antelope Valley AQMD does adopt the Mojave Desert AQMD's road paving ERC methodology, however, the Antelope Valley AQMD must comply with the California Environmental Quality Act ("CEQA") consistent with the *California Unions for Reliable Energy* decision in applying this interpretation of Rule 1305(B)(3). If the District does not do so, CEQA compliance will fall to the CEC. Accordingly, the Applicant's suggested approach would place the Antelope Valley AQMD or the CEC, or both, in conflict with the requirements of CEQA.

The Applicant also cites to an EPA letter that appears to endorse the claim that no further federal approval is required. Applicant's Response at 4, citing Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment F. Again, however, the Applicant inexcusably omits the last part of EPA's comment, which expressly states that "[t]his letter does not represent EPA concurrence on whether these credits meet federal offset requirements." Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment F at p. 3. Indeed, EPA has not yet concurred that application of Antelope

Valley AQMD Rule 1305(B)(3) to generate ERCs through road paving would meet federal offset requirements, confirming the FSA's conclusion that "[i]t is unclear whether or not ARB or EPA would approve this approach to generating PM10 ERCs under the existing rules, and whether or not this would occur before constructing the facility." FSA at 4.1-33.

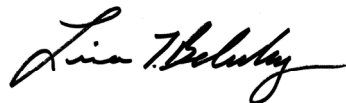
In addition, Antelope Valley AQMD Rule 1305(B)(3)(d) provides that area and indirect source ERCs may be used as offsets if, *inter alia*, the Applicant "demonstrates sufficient control over the Area or Indirect Sources to ensure the claimed reductions are real, enforceable, surplus, permanent and quantifiable." As the FSA states, it has not been demonstrated that the Applicant has sufficient control over these sources, "especially for those roads located outside of the City of Palmdale." FSA at 4.1-32. Nothing in the Applicant's response alters this conclusion.

Contrary to the Applicant's assertions, if the Project is to rely on road paving ERCs, the Antelope Valley AQMD must develop a specific protocol through District rulemaking for such ERCs ensuring that the emissions reductions are "real, permanent, quantifiable, enforceable, and surplus." The rulemaking must further comply with CEQA by evaluating the full range of direct, indirect, and cumulative environmental effects of road paving. Finally, the road paving ERC rule must further be approved by EPA and incorporated into the SIP. To date, none of this has occurred, precluding reliance on road paving ERCs to offset the Project's particulate emissions.

Given the potential impacts and uncertainties with road paving ERCs that remain unaddressed, the Commission cannot rely on them to off-set impacts from the Project.

Dated: January 19, 2011

Respectfully submitted,



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity



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APPLICATION FOR CERTIFICATION
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, Lisa Belenky, declare that on, January 19, 2011, I served and filed copies of the attached Opening Testimony and Rebuttal, dated January 19, 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)

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1516 Ninth Street, MS-4
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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.

