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File No. 039610-0003

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

Re: City of Palmdale Hybrid Power Plant Project: Docket No. 08-AFC-9

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 Opening Brief.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the attached 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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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF:) Docket No. 08-AFC-9
)
APPLICATION FOR CERTIFICATION FOR) APPLICANT’S OPENING BRIEF
THE PALMDALE HYBRID POWER PLANT)
PROJECT BY THE CITY OF PALMDALE)
)
)
_____)

On behalf of the City of Palmdale (“Applicant”) for the Palmdale Hybrid Power Plant Project (08-AFC-9) (“Project”), we hereby provide Applicant’s Opening Brief. The Committee did not request briefing on any particular issues. Based on the evidentiary record, Applicant does not believe that the Committee or the Commission will have any difficulty making the findings necessary to certify the Project. In fact, the evidentiary record so clearly supports the ability of the Committee and the Commission to make the necessary findings that there is limited need for any briefing at all. Nevertheless, Applicant takes this opportunity to demonstrate that the various claims asserted by the interveners Center for Biological Diversity (“CBD”) and Desert Citizens Against Pollution (“DCAP”) are contrary to the evidence in the record. Applicant also counters certain claims made by members of the public at the Evidentiary Hearing. Specifically, this Opening Brief addresses the following issues:

1. The Evidence Supports Finding That The Project Road Paving Would Not Result In Significant Environmental Impacts;
2. The Evidence Supports Finding That Project Emissions Will Not Adversely Impact Public Health; and
3. The Evidence Supports Finding That No Additional Rulemaking Is Required By The Antelope Valley Air Quality Management District In Connection With Project Road Paving.
4. Staff Properly Analyzed Project Alternatives

I. THE EVIDENCE SUPPORTS FINDING THAT THE PROJECT ROAD PAVING WOULD NOT RESULT IN SIGNIFICANT ENVIRONMENTAL IMPACTS

A. Analysis Completed By Staff and Applicant Was Adequate In Scope and Timely

In its Application for Certification (“AFC”), Applicant proposed to offset Project emissions of particulate matter less than 10 microns in diameter (“PM10”) by paving roads to create bankable emission reduction credits (“ERCs”) in compliance with the Antelope Valley Air Quality Management District (“AVAQMD”) Rules and Regulations (hereinafter, “Project Road Paving”). (AFC, Air Quality Section, 5.2-80; Exhibit (“Ex.”) 56, at AQ-11; Ex. 76, at A-2 to A-4; Transcript for the Project Evidentiary Hearing on March 2, 2011, Docket 08-AFC-9 (hereinafter, “Evidentiary Hearing”), at page 49, lines 8 through 10 (e.g., “49:8-10”).) Applicant provided additional specific information about the Project Road Paving, including identification of the specific road segments, in its response to a Staff Data Requests. (Ex. 56, at AQ-11; Ex. 76, at A-2 to A-4; Evidentiary Hearing, at 49-59.) The Energy Commission has approved road-paving for PM10 offsets in the past (Evidentiary Hearing, at 49:20-22, 115:9-10) and various air districts have done the same for other projects (Evidentiary Hearing, at 49:23-25, 115:9-10).

Analysis of the Project Road Paving must comply with the Warren-Alquist Act and Energy Commission regulations promulgated pursuant thereto, and the California Environmental Quality Act (“CEQA”). Energy Commission regulations require Staff to evaluate “environmental effects of the applicant’s proposal, the completeness of the applicant’s proposed mitigation measures, and the need for, and feasibility of, additional or alternative mitigation measures.” (Title 20, California Code of Regulations, § 1742.5(a).) Staff must review the Project’s compliance with applicable laws, ordinances, regulations and standards (“LORS”) (*id.*, § 1744(b)) and publish its Final Staff Assessment (“FSA”) at least 14 days prior to the start of evidentiary hearings. (*Id.*, § 1747.) Under CEQA (Public Resources Code § 21000 *et seq.*), a project that may result in a significant environmental impact must prepare an Environmental Impact Report (“EIR”), or equivalent,¹ with sufficient analysis to provide decision-makers with the information needed to intelligently consider the environmental consequences of the action. (Title 14, California Code of Regulations, § 15000 *et seq.*, (CEQA Guidelines) § 15151.) The EIR need not be exhaustive. (*Id.*) Rather, an EIR may rely on informed estimates and reasonable assumptions by the experts who prepared it. (CEQA Guidelines § 15384.) Disagreements between experts do not make an EIR inadequate. (CEQA Guidelines § 15151.) Ultimately, an EIR’s conclusions are upheld if based on substantial evidence. (Public Resources Code § 21168.5; *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990).)

As described more fully herein, Staff’s analysis of the Project Road Paving complies with the Warren-Alquist Act, Energy Commission regulations and CEQA. (Ex. 301; Evidentiary Hearing, at 52:8-13.) Staff published its analysis of the Project Road Paving on January 21, 2011, forty (40) days before the Evidentiary Hearing held on March 2, 2011. (Ex. 301.) The analysis incorporated information and Conditions of Certification (COCs) from the FSA, which was published on December 22, 2010, seventy (70) days before the Evidentiary Hearing. (*See*

¹ The Energy Commission’s AFC process has been certified by the Secretary of Natural Resources as a certified regulatory program under CEQA. (CEQA Guidelines § 15251(j).)

Exs. 300 and 301; Evidentiary Hearing, at 49:23-52:2.) Staff evaluated the Project Road Paving by environmental topic area and determined it would comply with all applicable LORS and would not result in a significant environmental impact. (Ex. 301; Evidentiary Hearing, at 52:8-13.) As discussed in more detail below, Staff’s expert conclusions were based on, and supported by, ample data and facts which are now part of the evidentiary record. (*See, e.g.*, Exs. 1-35, 56, 76, 300, 301 and 307.)

In addition to the analysis completed by the Staff, Applicant conducted its own review of the Project Road Paving. Applicant determined that Staff’s analysis of the Project Road Paving properly concluded that potential impacts would be less than significant for all ten² road segments. (Evidentiary Hearing, at 52:8-13.) Applicant completed additional analysis of road segments No. 2 (17 Avenue S-2), No. 4 (40th Street West), No. 6 (Avenue S-6), No. 8 (Avenue T-10), and No. 9 (West Avenue N-8), as identified by the “Biological Resources Table Rebuttal-1” in Exhibit 301 (collectively, the “preferred road segments”).³ (Ex. 301, at 4; Evidentiary Hearing, at 54:16-19; Ex. 146.) As discussed below, Applicant’s experts concluded that the Project Road Paving would not result in a significant environmental impact.

B. Evidence Presented by Staff and Applicant Supports Finding That Project Road Paving Would Not Cause A Significant Environmental Impact

To illustrate the sufficiency of the evidentiary record, the following is an overview of the evidence in the following topic areas, which were the focus of the road-paving discussion at the Evidentiary Hearing: Biological Resources, Traffic and Transportation, Growth-Inducing Impacts and Air Quality.⁴

1. Biological Resources

a. The Evidence Presented by Staff and Applicant Establishes That Project Road Paving Would Not Significantly Impact Biological Resources

Staff analyzed potential impacts to Biological Resources from Project Road Paving after incorporating applicable COCs from the FSA. (Ex. 301; Evidentiary Hearing, 284:23-285:1; *see* Ex. 300, at 4.2-92 to 4.2-149⁵.) To inform its analysis, Staff evaluated aerial photographs of the

² Applicant originally proposed eleven road segments but eliminated the Barrel Springs Road segment in response to concerns raised by the Antelope Valley Conservancy. (Evidentiary Hearing, at 256:16-21.)

³ To address concerns raised by the Intervenors, Applicant identified preferred road segments Nos. 2, 4, 6, 8 and 9, which provide an adequate quantity of PM10 emission reductions while having the lowest possibility of producing environmental impacts or growth inducing impacts, although both Staff and Applicant determined that paving any of the ten road segments would not result in a significant environmental impact. (Evidentiary Hearing, at 53:14-54:11, 252:18-20; Ex. 146; Ex. 301.)

⁴ The environmental analysis completed by Applicant and Staff covered all aspects of the Project Road Paving. This brief focuses only on those areas that were the focus of discussion at the Evidentiary Hearing.

⁵ Applicable mitigation measures may include: BIO-2, BIO-4, BIO-6, BIO-7, BIO-8, BIO-9, BIO-10, BIO-11, BIO-12, BIO-13, BIO-14, BIO-15, BIO-16, BIO-17, BIO-18, BIO-19, BIO-20, BIO-21, BIO-22, BIO-23, and BIO-24. (Ex. 300, at 4.2-92 to 4.2-149.)

road segments and conducted multiple field surveys to confirm its findings and the appropriateness of the COCs. (Evidentiary Hearing, at 276:17-18, 282:23-25, 284:23-285:1.)

Staff's estimated impact area for construction was based on a worst-case scenario. (Evidentiary Hearing, at 301:7-8.) Under CEQA, when uncertain future events could lead to a range of possible outcomes, an EIR may base its analysis on a reasonable worst-case scenario. (*Planning & Conserv. League, supra*, 180 Cal. App. 4th at 244.) Staff's proposed mitigation was similarly conservative in the sense that Staff applied the COCs to the Project Road Paving that were designed for the relatively undisturbed habitat on the Project site and linears. (Evidentiary Hearing, at 306:14-307:22.) The COCs were specifically designed in consultation with the California Department of Fish & Game to protect rare and sensitive species. (Evidentiary Hearing, at 306:18-21; *see* Ex. 300, at 4.2-44, 4.2-56, 4.2-63.)

In contrast, the road segments are urbanized and lack habitat for most rare or endangered biological resources. (Ex. 301, at 5-7; Evidentiary Hearing, at 307:3-5.) Although a few of the road segments have a limited potential to support rare species (Evidentiary Hearing, at 307:14-16), the potential is low (Ex. 301, at 6-7; Evidentiary Hearing, at 295:20-22) because most of the road shoulders are highly disturbed (Ex. 301, at 6-7; Evidentiary Hearing, at 296:14-15). To the extent that the Project Road Paving should impact sensitive or rare plants, which Staff determined has a low likelihood of occurring, impacts would be similar to those impacts discussed in the FSA and would be reduced to less than significant levels with implementation of the COCs. (Ex. 301, at 7; Evidentiary Hearing, at 295:21-296-3.) Based on its analysis and review of the evidence in the record, Staff determined that impacts to Biological Resources from Project Road Paving would be less than significant with implementation of the proposed COCs. (Evidentiary Hearing, at 307:18-22; Ex. 301, at 3.)

Applicant's expert consultants performed additional surveys to assess potential impacts to Biological Resources, including wetlands and sensitive species. (Evidentiary Hearing, at 220-222.) The subject road segments are highly disturbed and traverse through developed, residential areas with little habitat value. (Evidentiary Hearing, at 221:18-22.) There is low potential for presence or use by listed species. (Evidentiary Hearing, at 221:19-20.) No significant drainage or wetland features were found. (Evidentiary Hearing, at 221:21.)

b. The Scope of the Staff's Analysis Was Sufficient and Appropriate Under the Circumstances

(1) Staff Adequately Analyzed Potential Impacts to Rare and Sensitive Species

CBD expressed concern that full protocol level surveys for rare or listed species were not completed. (*See* Evidentiary Hearing, at 276:11-13; 293:20-23; CBD Prehearing Conference Statement, at 8.) CBD's concerns regarding the scope of Staff's analysis are unfounded. The Energy Commission does not require protocol surveys in every instance to evaluate impacts to sensitive species. (Evidentiary Hearing, at 305:22-23, 306:12.) Staff's conclusions withstand scrutiny if supported by substantial evidence. (Public Resources Code § 21168.5; *Citizens of Goleta Valley, supra* 52 Cal. 3d at 564.) Substantial evidence is defined as "relevant information and reasonable inferences from this information that a fair argument can be made to support a

conclusion, even though other conclusions might also be reached.” (CEQA Guidelines § 15384(a).) Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (CEQA Guidelines § 15384(b).) CEQA does not require that any specific type of analysis be completed, only that the analysis produces substantial evidence in support of the conclusions reached.

CEQA does not mandate that every conceivable study be undertaken. (CEQA Guidelines §§ 15151 and 15204; *Assoc. of Irrigated Residents v. County of Madera*, 107 Cal. App. 4th 1383, 1391 (2003) (“CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project.”).) Evidence supporting the conclusion that further studies would not provide information essential to an adequate impact assessment is sufficient to support reliance on the EIR’s analysis even if there is a difference of expert opinion on the usefulness of further studies. (*See National Parks & Conserv. Ass’n v. County of Riverside*, 71 Cal. App. 4th 1341, 1361-1362 (1999) (finding a suggested study would not add useful information, the county “could reasonably draft conclusions about the significance of these impacts” from the general information and hard data given).) Staff need provide only sufficient information and analysis to allow the public and decision-makers to discern the basis for its conclusions. (*See* CEQA Guidelines § 15151; *City of Fremont v. San Francisco Bay Area Rapid Transit Dist.*, 34 Cal. App. 4th 1780, 1787 (1995) (holding it was possible to discern the basis for the agency’s conclusions from reviewing data tables provided by the agency).)

The evidentiary record is replete with data and facts upon which Staff’s and Applicant’s experts based their opinions that impacts to rare or sensitive species would be less than significant. Staff relied upon information contained in the AFC and data request responses, along with an analysis of aerial photographs and completion of multiple field surveys. (*See* Exs. 7, 30, 39, 44, 56, 57, 76, 300 and 301; Evidentiary Hearing, at 276:17-18, 282:23-25, 284:23-285:1.) This wealth of data and facts, which is included in the evidentiary record, informs and supports Staff’s expert opinion and analysis. (*See id.*) In Staff’s expert opinion, the COCs adequately ensure that impacts to sensitive species would be less than significant even without conducting protocol level surveys because the COCs were already designed to protect rare and sensitive species based on protocol level surveys of a habitat that was superior to the habitat affected by the Project Road Paving. (Evidentiary Hearing, at 307:9-22.) In addition, Staff evaluated aerial photographs depicting the applicable road segments and habitats, and completed multiple-reconnaissance level surveys to confirm its findings and the appropriateness of the COCs. (Evidentiary Hearing, at 276:17-18, 282:23-25, 305:22-23.) Staff determined that the potential for rare plants to occur along the segments is low (Evidentiary Hearing, at 295:20-22) because most of the road shoulders are highly disturbed (Evidentiary Hearing, at 296:14-15). The Applicant’s expert confirmed that Project Road Paving did not warrant protocol surveys, and determined Staff’s analysis and assumptions were reasonable. (Evidentiary Hearing, at 222:6-9; 255:20-25.)

(2) Staff Adequately Analyzed Potential Impacts to Wetlands

CBD also questioned whether Staff properly analyzed and mitigated potential impacts to wetlands from the Project Road Paving. (Evidentiary Hearing, at 274:5-6; CBD Prehearing

Conference Statement, at 6-7.) CBD asserts that Staff is required to complete a wetlands delineation as part of its analysis. (Evidentiary Hearing, at 274:5-6; CBD Prehearing Conference Statement, at 6.) CBD also suggests that COCs requiring impacts to wetlands be defined before construction are not adequate. (Evidentiary Hearing, at 275:25-276:2.)

CBD's arguments fail here for the same reasons described above for sensitive species. Staff's conclusions withstand scrutiny if supported by substantial evidence. (Public Resources Code § 21168.5; *Citizens of Goleta Valley, supra*, 52 Cal. 3d at 564.) Staff needs to provide sufficient information and analysis to allow the public and decision-makers to discern the basis for its conclusions. (See CEQA Guidelines § 15151.) CEQA does not mandate that Staff perform a wetlands delineation as part of its analysis because Staff already has based its conclusions on substantial evidence in the record and determined that no additional studies are needed at this time. (Ex. 301, at 12; Evidentiary Hearing, at 276:14-18.) CEQA does not mandate that every conceivable study be undertaken. (CEQA Guidelines §§ 15151 and 15204; *Assoc. of Irrigated Residents, supra* 107 Cal. App. 4th at 1391 ("CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project.")) As such, Staff was not required to conduct additional recommended studies.

To address uncertainties about the area of impact, Staff relied on worst-case assumptions about the width of road paving construction. (Evidentiary Hearing, at 301:7-8.) Under CEQA, when uncertain future events could lead to a range of possible outcomes, an EIR may base its analysis on a reasonable worst-case scenario. (*Planning & Conserv. League v. Castaic Lake Water Agency*, 180 Cal. App. 4th 210, 244 (2009).) The COCs are also similarly conservative because Staff applied the same conditions to the Project Road Paving as were designed for the relatively undisturbed Project site and linears. (Evidentiary Hearing, at 306:14-307:22.) Staff determined that the proposed COCs adequately address potential impacts to wetlands even though the exact acreages that could be subject to disturbance were not identified with a wetlands delineation. (Ex. 301, at 12; Evidentiary Hearing, at 275:19-22.) The COCs assured that the scope of the impact would be determined and mitigated prior to the start of construction. (*Id.*) Applicant also provided expert testimony that wetland delineations were not required prior to certification to adequately assess and mitigate impacts from Project Road Paving. (Evidentiary Hearing, at 222:13-15; 255:20-25.)

c. The Staff Identified and Recommended Appropriate Mitigation Measures

Similar to its assertion that protocol level surveys are required for Staff's analysis, CBD argues that Staff's proposed COCs are inadequate because they require certain information to be gathered after the Energy Commission certification. (Evidentiary Hearing, at 282:6-14; CBD Prehearing Conference Statement, at 6-7.) CBD repeatedly questions the adequacy of mitigation that does not require the requested surveying before certification. (See Evidentiary Hearing, at 282:6-8, 283:18-19, 293:15-17, 295:11-17.)

It is well recognized under CEQA, however, that mitigation measures may incorporate further studies to define the specific parameters of the mitigation when the results of later field studies are used to tailor mitigation to fit actual environmental conditions. (*National Parks &*

Conserv. Ass'n, supra 71 Cal. App. 4th at 1366 (county appropriately allowed determination about placement of tortoise protection fences along railroad line to be based on further study of migration patterns during operation of project.) Such an approach is particularly appropriate under CEQA when a mitigation measure has been defined but the extent of mitigation that may be required will depend on the results of a later study. (*Riverwatch v. County of San Diego*, 76 Cal. App. 4th 1428, 1447 (1999).)

As discussed above, Staff applied all applicable COCs from the FSA to the Project Road Paving. This approach is conservative because the COCs were designed to protect rare and sensitive species based on protocol surveys of a habitat that is generally superior to the habitat associated with the Project Road Paving (Evidentiary Hearing, at 306:14-307:22). The road segments are primarily urbanized and lack habitat for most rare or endangered biological resources. (Evidentiary Hearing, at 307:3-5.)

The COCs include ample specificity and performance standards to ensure their effectiveness. Where applicable, the COCs require the Applicant to provide specific information about the precise nature of the impact from the Project Road Paving before construction activities commence. (See Ex. 300, at 4.2-89 to 4.2-91.) The COCs require Applicant to conduct sensitive species surveys in natural habitats prior to implementation of any road paving. (Evidentiary Hearing, at 282:1-5.) The Applicant must also develop a biological resource mitigation plan prior to construction and identify specific mitigation obligations associated with the Project Road Paving. (Evidentiary Hearing, at 286:8-11.) The Applicant is required to obtain concurrence from the Energy Commission's Compliance Project Manager that the COCs are being applied appropriately. (Evidentiary Hearing, at 286:11-14.) In the Staff's expert opinion, the COCs are specific enough and include adequate implementation measures to ensure that the appropriate surveys will be completed in a timely manner prior to construction to ensure sensitive species are protected. (Evidentiary Hearing, at 286:25-287:2.)

d. Interveners Did Not Offer Substantial Evidence About Significant Impacts to Biological Resources From the Project Road Paving

Neither CBD nor DCAP offered expert testimony concerning impacts to Biological Resources from the Project Road Paving. CBD included public comment offered by Dr. Phyllis Fox, dated July 22, 2010 ("Fox Comments") as part of its Exhibit No. 400, but the Fox Comments are hearsay and lack foundation. (See Ex. 400; Evidentiary Hearing, at 352:3-13 (Fox Comments are "certainly hearsay" and "not expert testimony".)) The Fox Comments represent unsupported comment offered without expert qualifications. (Evidentiary Hearing, at 23:8-10.) Neither Applicant nor Staff was given the opportunity to cross-examine Dr. Fox despite Applicant's request to do so. (Applicant's Prehearing Conference Statement, p. 6.) Furthermore, Applicant provided expert testimony that the Fox Comments are based on several erroneous assumptions, and are so general in nature that they are not directly relevant to the Project Road Paving. (Evidentiary Hearing, at 237:10-23.) The Fox Comments should be given little weight because the comments are based on unsubstantiated assumptions, and do not constitute expert testimony. (Evidentiary Hearing, at 352:3-13.)

2. Traffic and Transportation

a. The Evidence Presented by Staff and Applicant Establishes That the Project Road Paving Would Not Significantly Impact Traffic and Transportation

To evaluate potential traffic and transportation impacts associated with road paving, Staff analyzed each of the proposed road segments. (Ex. 301, at 29-33.) Staff also proposed a new Condition of Certification, TRANS-1. (Ex. 301, at 33.) With the incorporation of TRANS-1, Staff determined that the Project Road Paving would not cause any significant environmental impacts or result in a significant increase in traffic. (Ex. 301, at 33; Evidentiary Hearing, at 115:24-25.)

Applicant's expert analysis concluded that the Project Road Paving would not increase traffic or cause an adverse traffic impact. (Evidentiary Hearing, at 240:4.) In particular, road segments Nos. 2, 6 and 8 are located within subdivided residential areas where alternate streets are already paved. (Evidentiary Hearing, at 240:8-10.) There is no reason to expect drivers to divert from one of the existing paved roads to the newly paved roads because the newly paved road would not establish or facilitate a throughway that would promote traffic. (Evidentiary Hearing, at 240:10-12.) The same analysis is applicable to road segment No. 4 because paving a short distance of the road would not provide a preferable route that would divert existing traffic. (Evidentiary Hearing, at 240:12-15.) Traffic is expected to continue to be local traffic going to adjacent properties. (Evidentiary Hearing, at 240:15-17.) For road segment No. 9, traffic volumes on proximate roads are limited and there is no reason for traffic to divert to a newly paved road. (Evidentiary Hearing, at 240:21-23.)

b. Interveners Did Not Offer Substantial Evidence About Significant Traffic Impacts From the Project Road Paving

Intervenors did not offer expert Traffic and Transportation testimony by declaration or live witness. CBD's expert for Air Quality, Mr. Gregory Tholen, offered an unsupported opinion that road paving activities may cause an increase in traffic on paved roads. (Ex. 402, at 2; Evidentiary Hearing, at 108:5-7.) Mr. Tholen, however, readily acknowledged that he is not a traffic expert and is not qualified to proffer a traffic-related expert opinion. (Evidentiary Hearing, at 109:25.) CBD expressly limited Mr. Tholen's area of expertise to Air Quality. (Evidentiary Hearing, at 106:6-8.) Moreover, Mr. Tholen confirmed that he is not familiar with the road segments in question or local traffic patterns. (Evidentiary Hearing, at 108:11, 109:24.) Accordingly, Mr. Tholen's assertion that the Project Road Paving may increase traffic should be given very little weight as a non-expert comment without a technical basis or a practical familiarity with applicable Project-level facts.

Any reliance by Mr. Tholen on the Fox Comments is hearsay and lacks foundation. (See Ex. 400; Evidentiary Hearing, p. 352:3-13 (Fox Comments are "certainly hearsay" and "not expert testimony").) The Fox Comments are unsupported public comment offered without expert qualifications. (Evidentiary Hearing, at 23:8-10.) Neither Applicant nor Staff was given the opportunity to cross-examine Dr. Fox despite Applicant's request to do so. (Applicant's Prehearing Conference Statement, at 6.) The Fox Comments should be given little weight

regarding specific Project-related issues because the comments are general in nature and do not constitute expert testimony about the applicable facts at hand. (Evidentiary Hearing, at 352:3-13.)

3. Growth Inducing Impacts

a. The Evidence Presented by Staff and Applicant Establishes That the Project Road Paving Would Not Result In Growth-Inducing Impacts

CEQA requires a general discussion about “the ways in which the proposed project” may cause population growth or construction of housing. (*See Napa Citizens for Honest Gov’t v. Napa County Bd. Of Supervisors* (2001) 91 Cal. App. 4th 342, 369 (“Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth.”).) Staff determined that the Project Road Paving would not induce growth. (Evidentiary Hearing, at 268:21-25; 269:1-18; 272:16-17; 273:12-13.) The proposed roads are existing roads that provide access to existing nearby land uses. (Evidentiary Hearing, at 272:20-22.) The road segments are part of an existing roadway grid system and included within the local and regional planning activities of the affected jurisdictions. (Ex. 301, p. 22; Evidentiary Hearing, at 268:22-23; 269:8-9.) Therefore, paving the proposed existing road segments would not expand the road system into previously underserved areas and will not induce growth. (Evidentiary Hearing, at 268:22-25; 269:1; 272:16-17.)

The Applicant determined that the Project Road Paving would not induce growth. (Evidentiary Hearing, at 240:4; 248:10-20.) Project Road Paving would be completed in low-density, previously developed residential areas with little potential for new expansion or growth. (Evidentiary Hearing, at 221:25-222:2, 248:14-15.) The applicable land use development and zoning standards do not support a significant amount of new growth. (Evidentiary Hearing, at 240:4; 248:13-14.) The Project Road Paving would not introduce new urban infrastructure to previously underserved areas that would support or encourage a higher intensity of development. (Evidentiary Hearing, at 248:17-20.)

b. Interveners Did Not Offer Substantial Evidence About Significant Growth-Inducing Impacts From the Project Road Paving

Neither CBD nor DCAP offered expert testimony concerning growth-inducing impacts. Mr. Tholen offered an unsupported opinion that the Project Road Paving may induce growth but did not provide any explanation or analysis to support his opinion. (Ex. 402, at 2-3.) As stated above, CBD only offered Mr. Tholen as an Air Quality expert. (Evidentiary Hearing, at 106:6-8.) Mr. Tholen is not qualified as an expert in land use or demographics. (*Id.*) Moreover, Mr. Tholen acknowledged that he is not familiar with development patterns in the area surrounding the proposed Project Road Paving. (Evidentiary Hearing, at 108:11.) To the extent that Mr. Tholen relied on the Fox Comments, they are hearsay and lack foundation, and should be given very little weight for the reasons described above. (*See Ex. 400; Evidentiary Hearing, at 352:3-13* (Fox Comments are “certainly hearsay” and “not expert testimony”).) Accordingly, Mr. Tholen’s assertion that the Project Road Paving may induce growth should be given very little

weight as a non-expert comment without a technical basis for the assertion or a practical familiarity with applicable Project-level facts.

4. Air Quality

a. The Evidence Presented by Staff and Applicant Establishes That the Project Road Paving Would Not Result Air Quality Impacts

Staff determined that Project Road Paving would not cause adverse Air Quality impacts. (Evidentiary Hearing, at 116.) Staff determined that construction emissions for the Project as a whole, including all linear emissions, would be less than significant with incorporation of the COCs. (Ex. 300, at 4.1-24.) The FSA included COCs that Staff determined mitigated construction emissions from the Project Road Paving to less than significant levels. (Evidentiary Hearing, at 116:4-9; Ex. 300, at 4.1-23 to 4.1-24; Ex. 300, at 4.1-53 to 4.1-58.)

Applicant also performed an analysis of air emissions from road paving activities. Construction emissions were estimated using the Sacramento Metropolitan Air Quality Management District's roadway construction emissions model, which is called Road Mod, version 6.3.2, from July 2009. (Evidentiary Hearing, at 55:20-56:1.) Road Mod quantifies emissions including fugitive PM10 and PM2.5 road dust, vehicle exhaust and off-gas emissions from grubbing and land clearing, grading and excavation, drainage, utility subgrade, preparation, and asphalt paving. (Evidentiary Hearing, at 56:1-6.) The estimated emissions were low and temporary in nature. (Evidentiary Hearing, at 57:13-14.)

The relatively minor construction emissions from road paving activities would be comparable to less-than-significant emissions associated with constructing the Project's water or wastewater pipelines. (See Ex. 300, at 4.1-16; Evidentiary Hearing, at 58:16-18.) Construction emissions from road paving would only represent a small fraction of the total Project construction emissions. (Evidentiary Hearing, at 59:11-13.) With the implementation of the COCs, construction emissions from road paving would be less than significant. (Evidentiary Hearing, at 59:8-10.)

b. Interveners Did Not Offer Substantial Evidence About Significant Air Quality Impacts From the Project Road Paving

In written testimony, Mr. Tholen asserted that construction emissions from the Project Road Paving may be significant but no evidence was produced. (Ex. 402, at 4.) No evidence was presented to challenge Staff's determination that the Project Road Paving would not cause a significant Air Quality impact. Mr. Tholen recognized that Staff's proposed COCs adequately mitigate construction-related emissions to less than significant levels. (Evidentiary Hearing, at 107:25.) Mr. Tholen acknowledged that Applicant's analysis of construction emissions was performed with the correct model. (Evidentiary Hearing, at 107:12-13.) Moreover, Mr. Tholen acknowledged that he did not conduct any independent analysis to quantify emissions from the Project Road Paving. (Evidentiary Hearing, at 107:17.)

In written testimony, Mr. Tholen suggested that the Project Road Paving may increase air emissions associated with increased traffic. (Ex. 402, at 2-3.) As discussed above, however,

Mr. Tholen acknowledged that he had no expert basis to opine that the Project Road Paving may increase emissions by increasing traffic. (Evidentiary Hearing, at 109:25.) CBD expressly limited Mr. Tholen’s area of expertise to Air Quality. (Evidentiary Hearing, at 106:6-8.) To the contrary, Staff and Applicant determined, as described above, that the Project Road Paving would not increase traffic or induce growth and would therefore not result in related increases in emissions.

To the extent that Mr. Tholen relied on the Fox Comments, they are hearsay and lack foundation, and should be given very little weight for the reasons described above. Moreover, Mr. Tholen confirmed that he is not familiar with the road segments in question or local traffic patterns. (Evidentiary Hearing, at 108:11, 109:24.) Accordingly, Mr. Tholen’s assertion that the Project Road Paving may increase emissions by increasing traffic or inducing growth should be given very little weight as a non-expert comment without a technical basis for the assertion or a practical familiarity with applicable Project-level facts.

II. PROJECT EMISSIONS WILL NOT CAUSE SIGNIFICANT HEALTH RISKS

A. Staff and Applicant Provide Substantial Evidence That Project Will Not Result In Significant Health Risks From Toxic Air Contaminants or PM2.5 Emissions

1. Project Toxic Air Contaminants Will Not Cause Significant Health Risks

In its AFC, Applicant analyzed potential health risks associated with the Project’s emissions of toxic air contaminants (“TACs”) and/or Hazardous Air Pollutants (“HAPs”). (Exs. 14 and 35.) Applicant’s Health Risk Assessment (“HRA”) demonstrates that the Project would not cause significant health risks to sensitive receptors from TACs or HAPs because potential risks are very far below the applicable significance thresholds. (Ex. 14, at 5.10-20 to 5.10-24.) The HRA considered impacts to local sensitive receptors – such as schools, hospitals, and residences – within three miles of the Project and determined that health risk impacts to sensitive receptors were very low and substantially below applicable significance thresholds. (Ex. 14, at 5.10-22 to 5.10-23, Figure 5-10.2; Evidentiary Hearing, at 91:20-24.) Based on data in the HRA, Applicant’s expert determined that health risk impacts to sensitive receptors beyond the analyzed 3-mile radius would be extremely low and far below applicable levels of significance. (Evidentiary Hearing, at 91:20-92-5.)

Staff completed an independent analysis of health risks in the FSA and determined that impacts would be less than significant and far below applicable significance thresholds. (Ex. 300, at 4.7-27.) Staff’s analysis specifically considered impacts to low-income and minority populations, as well as the most sensitive individuals in the population, such as newborns and the elderly. (*Id.*) At the Evidentiary Hearing, Staff clarified that its analysis in the FSA of the maximum potential health risk for operations was a “gross overestimation of cumulative risk.” (Evidentiary Hearing, at 120:15-16.) Based on a more reasonable analysis, cumulative Project health risk estimates were actually almost an order of magnitude lower than the already insignificant levels identified in the FSA. (Evidentiary Hearing, at 120:15-22.) Substantial evidence supports a finding that health risk impacts from TACs would be insignificant.

2. Project PM2.5 Emissions Will Not Cause Significant Health Risks

In its AFC, Applicant considered the health risks associated with PM2.5 emissions by conservatively modeling Project emissions and comparing the estimates to applicable California and federal Ambient Air Quality Standards. (Ex. 6 at 5.2-57, 5.2-63, and 5.2-75.) The AFC modeling was very conservative because it assumed that worst-case meteorological conditions would occur at the same time as worst-case emissions, which has a low probability of occurring. (Evidentiary Hearing, at 39:21-25.)

The Ambient Air Quality Standards are health-based standards carefully designed to protect even the most sensitive individuals, including children, people with asthma, and the elderly. (Ex. 300, at 4.1-21; Ex. 6, at 5.3-1; Evidentiary Hearing, at 43:6-8.) An Ambient Air Quality Standard establishes the maximum amount of a pollutant that can be present in outdoor air without harm to the public's health while providing an adequate margin of safety. (See Evidentiary Hearing, at 65:21; Ex. 300, at 4.1-21.) The federal Clean Air Act requires the U.S. Environmental Protection Agency to set National Ambient Air Quality Standards and it also permits states to adopt more protective standards, which the California Air Resources Board has done. (Evidentiary Hearing, at 65:7-18.)

Even assuming worst case-conditions, the AFC modeling demonstrated that the Project would not cause an exceedance of the PM2.5 Ambient Air Quality Standards. (Ex. 6 at 5.2-57, 5.2-63, and 5.2-75; Evidentiary Hearing, at 40:15.) Accordingly, Project PM2.5 emissions are not significant and no further PM2.5 mitigation is required to reduce PM2.5 emissions. (Ex. 6, at 5.2-82 to 5.2-83; Evidentiary Hearing, at 40:15-41:15.) The Project PM2.5 emissions would not cause a significant health impact because the Project would not cause an exceedance of the Ambient Air Quality Standards. (Evidentiary Hearing, at 45:2-11.)

Ambient Air Quality Standards are conservatively designed to protect the most sensitive populations, including infants, the elderly, and people with asthma, so the analysis need not incorporate specific demographics associated with affected populations. (Ex. 300, at 4.1-21; Evidentiary Hearing, at 93:9-18.) This same approach is commonly applied by lead agencies under CEQA and by the Energy Commission during the AFC process. (Evidentiary Hearing, at 38:4-7, 38:17-18.) Because impacts are less than significant, no additional mitigation is required. (Ex. 6 at 5.2-82 to 5.2-83; Evidentiary Hearing, at 38:22.) Staff prepared an independent analysis of PM2.5 emissions and reached the same conclusion as the AFC analysis, that the Project would not cause an exceedance of PM2.5 standards. (Ex. 301, at 4.1-22, 4.1-26, and 4.1-40; Ex. 307, at 19-20; Evidentiary Hearing, at 115:2.) Substantial evidence in the record supports a finding that health risk impacts are insignificant.

B. Intervenor Did Not Identify Significant Health Risk Impacts

Neither CBD nor DCAP presented expert testimony concerning health risks. Mr. Tholen's testimony was specifically limited to Air Quality, not Public Health. (Evidentiary Hearing, at 107:7-8 ("Mr. Tholen is being offered as an...expert on air quality, not on health.").) Nonetheless, Mr. Tholen's rebuttal testimony raised several issues related to public health, which we address below.

1. Toxic Air Contaminants

DCAP made a number of assertions at the Evidentiary Hearing about Staff's health risk analysis, specifically related to its analysis of TACs. (Evidentiary Hearing, at 128-154.) Although it is difficult to summarize DCAP's specific concerns because DCAP did not provide a Pre-Hearing Conference Statement or expert testimony, the general assertion was that Staff did not analyze impacts with sufficient specificity or conservatism.

This argument lacks merit. Staff's analysis incorporates multiple levels of conservatism. (See Ex. 300, at 4.7-7 to 4.7-8.) As an initial matter, the air quality modeling, which forms the basis of the HRA, assumes that worst-case meteorological conditions would occur at the same time as worst case emissions, which has a low probability of occurring. (Ex. 300, at 4.7-7 to 4.7-8; Evidentiary Hearing, at 39:21-25; see *Planning & Conserv. League, supra*, 180 Cal. App. 4th at 244.) In addition, toxicological endpoints are based on the most sensitive standard determined by the Office of Environmental Health Hazard Assessment given the reference exposure level. (Ex. 300, at 4.7-9; Evidentiary Hearing, at 147:6-13.) Reference exposure levels are based on the most sensitive adverse health effect reported in the medical and toxicological literature and include margins of safety. (Ex. 300, at 4.7-9) The margin of safety addresses uncertainties associated with inconclusive scientific and technical information available at the time of standard setting and is meant to provide a reasonable degree of protection against hazards that research has not yet identified. (*Id.*) The margin of safety is designed to prevent pollution levels that have been demonstrated to be harmful, as well as to prevent lower pollutant levels that may pose an unacceptable risk of harm, even if the risk is not precisely identified as to nature or degree. (*Id.*) Health protection is achieved if the estimated worst-case exposure is below the relevant reference exposure level. (*Id.*; Evidentiary Hearing, at 147:17-19.)

Even with these layers of conservatism built in, both Staff and Applicant determined that health risks from the Project are far below significance thresholds. (Ex. 300, at 4.7-27; Evidentiary Hearing, at 120:15-22; Ex. 14, at 5.10-22 to 5.10-23, Figure 5-10.2; Evidentiary Hearing, at 91:20-24.) Staff's analysis constitutes substantial evidence upon which it rests its expert opinion. (CEQA Guidelines § 15151.) Even assuming that DCAP identified an element of Staff's review that could be enhanced with additional data or study, CEQA does not mandate an exhaustive analysis because Staff's conclusions are already based on substantial evidence. (See CEQA Guidelines § 15151; *Assoc. of Irrigated Residents, supra*, 107 Cal. App. 4th at 1390-1391. ("Analysis of environmental effects need not be exhaustive.")) Disagreement by DCAP about the need for additional analysis does not render Staff's analysis inadequate. (See *Eureka Citizens for Responsible Gov't v. City of Eureka*, 147 Cal. App. 4th 357, 371 (2007) ("Disagreements among experts do not make an EIR inadequate."))

DCAP rested many of its assertions at the Evidentiary Hearing on the applicability of a draft document prepared by the Office of Environmental Health Hazard Assessment and submitted into evidence by DCAP as Exhibit 501. Staff acknowledged Exhibit 501 but determined, in its expert opinion, that Exhibit 501 is not relevant to the analysis. (Evidentiary Hearing, 163:14-23.) Staff also determined Exhibit 501 is not an authoritative source for evaluating emissions from a stationary facility because the document was in draft form and primarily pertained to consumer products. (Evidentiary Hearing, at 163:21-164:2.) Given

Staff's expertise in the arena of Public Health, and the lack of an expert opinion from DCAP, Staff's analysis withstands scrutiny despite DCAP's assertions related to Exhibit 501.

2. PM2.5 Emissions

In his written rebuttal testimony, Mr. Tholen for CBD suggested that Project PM2.5 emissions may cause an exceedance of applicable air quality standards. (*See* Ex. 402, at 6.) At the Evidentiary Hearing, however, Mr. Tholen acknowledged that he did not disagree with the conclusions reached by Staff or Applicant concerning PM2.5 emissions. (Evidentiary Hearing, at 105:17.) As stated above, Staff and Applicant determined that the Project would not cause a PM2.5 exceedance. (Evidentiary Hearing, at 115:2, 40:15.) Mr. Tholen further testified that he did not conduct any independent modeling of the Project emissions or review the modeling files. (Evidentiary Hearing, at 105:9-20.) Thus, Staff, Applicant, and Mr. Tholen agree with the conclusion that the Project would not cause an exceedance of applicable PM2.5 Ambient Air Quality Standards. (Evidentiary Hearing, at 40:15, 105:17, 115:2.)

Mr. Tholen's written rebuttal testimony also suggests that Applicant and Staff failed to analyze potential public health impacts associated with the project's PM2.5 emissions. (Ex. 402, at 2-3.) The comment lacks merit because evidence in the record supports a finding that Project PM2.5 emissions will not adversely impact public health because the Project will not cause an exceedance of health-based Ambient Air Quality Standards. (Evidentiary Hearing, at 115:2, 40:15.) At the Evidentiary Hearing, Mr. Tholen acknowledged that he did not conduct any analysis of the Project's TACs or PM2.5 emissions. (Evidentiary Hearing, at 107:2.) Even assuming there is a dispute between the parties, a disagreement between experts does not undermine Staff's analysis because it is already based on substantial evidence. (*See Eureka Citizens for Responsible Gov't, supra*, 147 Cal. App. 4th at 371-372.)

To the extent that Mr. Tholen relied on the Fox Comments, they are hearsay and lack foundation, and should be given very little weight. (*See* Ex. 400; Evidentiary Hearing, at 352:3-13 (Fox Comments are "certainly hearsay" and "not expert testimony").) The Fox Comments represent unsupported public comment offered without expert qualifications. (Evidentiary Hearing, at 23:8-10.) Neither Applicant nor Staff was given the opportunity to cross-examine Dr. Fox despite Applicant's request to do so. (Applicant's Prehearing Conference Statement, p. 6.) Applicant's expert identified significant problems with the assumptions made by the Fox Comments and the accuracy of the conclusions related to Public Health. (*See* Evidentiary Hearing, at 47:3-6.)

III. RULEMAKING IS NOT REQUIRED BY THE AVAQMD FOR PROJECT ROAD PAVING

A. Overwhelming And Uncontroverted Evidence Supports A Finding That No Additional Rulemaking Is Required

During the public comment period of the Evidentiary Hearing, Mr. Marvin Crist, a member of the City Council for the City of Lancaster and one of the seven Board Members for the Antelope Valley Air Quality Management District (AVAQMD), commented on the Project Road Paving. In particular, Mr. Crist suggested it was unclear whether additional rulemaking

was required before the AVAQMD could consider issuing PM10 emission reduction credits (ERCs) for the Project Road Paving. (Evidentiary Hearing, at 188:21-189:3.) Mr. Crist acknowledged, however, that he was not speaking on behalf of the AVAQMD Board. (Evidentiary Hearing, 188:22-23.) Also during the public comment period, Mr. Jim Ledford, Mayor of the City of Palmdale, and also an AVAQMD Board Member, contradicted Mr. Crist's statements and characterized Mr. Crist's views as a minority position of the AVAQMD Board. (Evidentiary Hearing, at 194:6-17.)

Turning from public comments to the evidence in the record upon which the Committee and Commission must base its decisions, the record is clear that no additional rulemaking is required to implement the Project Road Paving.

The AVAQMD issued a Final Determination of Compliance (FDOC) for the Project on May 13, 2010. (Ex. 302.) The FDOC determined that the Project will comply with all applicable AVAQMD Rules and Regulations. (Ex. 302, at 20.) With respect to the issue of road paving, the AVAQMD stated that it was prepared to develop a rule if required by the U.S. Environmental Protection Agency (U.S. EPA), but also pointed out that the situation in the AVAQMD was materially different from other situations in which U.S. EPA had required federally approved rules – specifically, the AVAQMD is not a federal non-attainment area for PM10:

If required by USEPA, the Project Applicant plans to work closely with the AVAQMD to develop a rule to allow for the banking of PM10 ERCs from the paving of unpaved roads. MDAQMD has developed Rule 1406, which was patterned after a similar rule that was developed by Maricopa County, Arizona Air Quality Department (MCAQD) which has been approved by USEPA. USEPA required a specific rule in these instances because the areas are classified as non-attainment of the Federal PM10 standards. Because AVAQMD has not been designated as Federal non-attainment for PM10, [the Project] does not require any PM10 ERCs under the Federal NSR Program. (Ex. 302, at 16.)

Acknowledging that the AVAQMD is in attainment for federal PM10 standards, EPA has unequivocally stated it does not require a PM10 rule for the Project Road Paving:

With respect to PM10 ERCs, we acknowledge that the proposed reductions are to meet the State offset requirements. [The Project] is located in an area of the District that is designated attainment for all federal National Ambient Air Quality Standards. We understand that there is no federally required District maintenance plan or other requirement that relies on offsets. Therefore, EPA Region 9 has determined that we will defer to the District and the State to review individual offsets in attainment areas that are required under Antelope Valley AQMD Rule 1305. This letter does not represent EPA concurrence on whether these credits meet

federal offset requirements. (Ex. 110, at Attachment F, p. 3 [emphasis added].)

In light of U.S. EPA's concurrence that it does not require a rule, and its deference to the AVAQMD on the issue, District Counsel for the AVAQMD has made it very clear that its existing rules provide for the issuance of ERCs generated by road-paving, concluding that "the AVAQMD does not plan to adopt a specific rule regarding the creation of PM10 offsets from road paving at this time but rather to use the existing applicable provisions of Regulation XIII to quantify, verify and allow use of such ERCs." (Ex. 110, at Attachment E, p. 3); Ex. 72, at 1 [AVAQMD staff determined: "Rule 1305(B)(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."]; Ex. 115, at 3.)

CEC Staff determined that ERCs from the Project Road Paving will be satisfactory if the AVAQMD issues and banks the ERCs in accordance with AVAQMD Rules and Regulations. (Evidentiary Hearing, at 123:17-19; 124:2-5.) Staff concluded it is within the AVAQMD's purview to apply its Rules and Regulations to the Project Road Paving and to make any determination as to whether or not any new rules are required. (Evidentiary Hearing, at 123:17-19; 124:2-5.) As stated by CEC's expert witness, Mr. Radis: "And ultimately all we're looking for are 137 tons per year of PM10 offsets. If . . . the district will bank those emissions without any rule then we would accept that." (Evidentiary Hearing, at 123:15-19.) Staff Counsel further characterized the Staff position during the Evidentiary Hearings, stating: "We discussed it amongst ourselves, and as Mr. Raids testified determined that it really wasn't our - - our purview to determine whether or not a rule making was required, and that ultimately all that we wanted to see was the banked ERCs." (Evidentiary Hearing, at 124:1-5.)

Thus, uncontroverted evidence setting forth the positions of the AVAQMD, U.S. EPA and CEC, supports a finding that no additional rulemaking is required on the part of the AVAQMD in connection with the Project Road Paving.

B. Decision In *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District* Is Irrelevant

In CBD's Opening Testimony and Rebuttal to Applicant's Response to Final Staff Assessment, dated January 19, 2011, CBD suggests that the decision in *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District*, (October 30, 2009) 178 Cal. App. 4th 1225 (2009), and the subsequent rescission of MDAQMD Rule 1406 is relevant to the Project Road Paving. This is not true. Neither the AVAQMD nor the Applicant is relying on MDAQMD Rule 1406 as the authority for generating or using road paving offsets in connection with the Project. (Ex. 110, at Attachment E, p. 3; Ex. 115, at 3.) What the AVAQMD has repeatedly stated is that in implementing its existing AVAQMD Rule 1305(B)(3), which applies to the generation and use of road paving offsets for the Project, it intends to rely on the credit generation methodology that was also utilized in MDAQMD Rule 1406. (Ex. 110, at Attachment E, p. 3; Ex. 115, at 3.)

Contrary to the suggestions of CBD, the court decision and rescission of MDAQMD Rule 1406 has nothing to do with the validity of the methodology for calculating emission offsets from road paving. (*See* Ex. 144, at 4.) The issue before the court was whether or not the adoption of MDAQMD Rule 1406 was exempt from environmental review under CEQA because the action qualified for a Class 8 categorical exemption. (*California Unions for Reliable Energy, supra*, 178 Cal. App. 4th at 1247; Ex. 144, at 4.) The court held that there was insufficient evidence to support the MDAQMD's finding that the action qualified for the exemption. (*California Unions for Reliable Energy, supra*, 178 Cal. App. 4th at 1247; Ex. 144, at 4.) The decision in no way invalidated, or even criticized, the emission calculation methodology. (Ex. 144, at 4.) Notwithstanding MDAQMD Rule 1406 or any action related to it, AVAQMD would have been, and is, free to adopt the same calculation methodology used in Rule 1406, which is the generally accepted methodology for calculating offsets from road paving. (Ex. 144, at 4; Evidentiary Hearing, at 50:4-51:17.)

Applicant's expert provided testimony that the same AP-42 methodology is widely accepted for determining credit generation from road paving. (Evidentiary Hearing, at 51:1-4.) The methodology has been used for several projects approved by the Energy Commission, including the Victorville II Hybrid, the Blythe Energy and High Desert Power projects, is the methodology used in the EPA-approved Maricopa County (Arizona) road paving credit rule, and has been applied for credit generation for several EPA power projects and one cement plant in Arizona. (Evidentiary Hearing, at 51:5-14.)

IV. STAFF PROPERLY ANALYZED PROJECT ALTERNATIVES

Neither CBD nor DCAP supplied expert testimony concerning Project Alternatives, but instead questioned the adequacy of Staff's Alternatives analysis. (*See* Evidentiary Hearing, at 323-347.) The questioning is unfounded. Staff's Alternatives analysis clearly passes muster under CEQA and is supported by substantial evidence in the evidentiary record.

CEQA requires an EIR to analyze "a reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." (CEQA Guidelines § 15126.6(a); *see Citizens of Goleta Valley v Board of Supervisors* 52 Cal. 3d 553 (1990).) The EIR is to "briefly describe the rationale for selecting the alternatives to be discussed." (CEQA Guidelines § 15126.6(c).) The "no project" alternative is also required to be analyzed. (*Id.* at § 15126.6(e).)

"Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." (*Residents Ad Hoc Stadium Com. v. Board of Trustees*, 89 Cal. App. 3d 274, 287 (1979).) This means that the discussion of alternatives "need not be exhaustive," does not require a "crystal ball inquiry," and is limited to what is "realistically possible given the limitation of time, energy, and funds." (*Id.* at 286.) "When the alternatives have been set forth in this manner, an EIR does not become vulnerable because it fails to consider in detail each and every conceivable variation of the alternatives stated." (*Id.* at 287-288.)

In its Alternatives analysis, Staff evaluated three alternative project sites, five alternative transmission routes, and several alternative energy producing technologies. (Ex. 300, at 6-1, 6-

32, and A-1 to A-2.) For each permutation of the analysis, Staff completed a detailed study and review based on the AFC, data responses, and technical analysis from Staff for other environmental topic areas. (See Ex. 300, at 6-1, 6-32, A-1 to A-2.) Staff also considered whether the various alternatives would meet the project objectives. (Ex. 300, at 6-8 to 6-9.)

Staff determined that the Project site was environmentally superior to the alternative sites and generation alternatives. (*Id.* at 6-1; Evidentiary Hearing, at 330:15-331:5.) The alternative transmission routes were found to have additional environmental impacts and thus were not environmentally superior alternatives. (Ex. 300, at 6-2; A-1 to A-2.) Staff found that none of the eight alternative energy producing technologies considered were adequate to meet the project objectives. (Ex. 300, at 6-6; Evidentiary Hearing, at 328:4-10, 331:6-14) The “no project alternative” was also considered by Staff and found to be inferior to the proposed project because it would delay development of electrical resources required in the region, impact statewide electricity supplies, and otherwise not meet project objectives. (Ex. 300, at 6-6 to 6-7; Evidentiary Hearing, at 331:15-21.)

Substantial evidence supports that Staff analyzed a reasonable range of potentially feasible alternatives in manner that informed decision-makers and the public. (CEQA Guidelines § 15126.6(a).) Staff was not obligated to analyze every conceivable alternative to the Project or every potential variation to the alternatives that were evaluated. (*Residents Ad Hoc Stadium Com.*, *supra*, 89 Cal. App. 3d 274 at 287-288.) No additional analysis is required.

DATED: March 25, 2011

Respectfully submitted,

/s/ Michael Carroll

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Counsel for Applicant

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 08-AFC-9
)	
Application for Certification,)	PROOF OF SERVICE
for the CITY OF PALMDALE HYBRID)	
POWER PLANT PROJECT)	(Revised March 22, 2011)
)	
_____)	

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PALMDALE HYBRID POWER PROJECT
CEC Docket No. 08-AFC-09

DECLARATION OF SERVICE

I, Paul Kihm, declare that on March 25, 2011, I served and filed copies of the attached document to all parties identified on the Proof of Service List above in the following manner:

APPLICANT'S OPENING BRIEF

California Energy Commission

- Transmission via electronic mail and by depositing a copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

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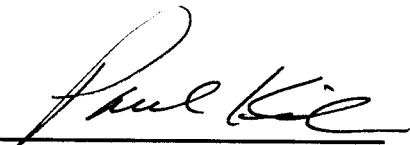
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For Service to All Other Parties

- Transmission via electronic mail to all email addresses on the Proof of Service list; and
- by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked "email preferred."

I further declare that transmission via electronic mail and 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 March 25, 2011, at Costa Mesa, California.



Paul Kihm