

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512

September 3, 2009

DOCKET**09-AFC-3**DATE SEP 03 2009RECD SEP 08 2009

Andrew Brown
Ellison, Schneider & Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816

**RE: Application for Confidentiality, Emission Reduction Credits
Mariposa Energy Project
Docket No. 09-AFC-3**

Dear Mr. Brown:

On August 3, 2009, Mariposa Energy, LLC ("Applicant") filed an application for confidentiality in the above-captioned Docket. Applicant seeks confidentiality for information regarding sources and quantities of Emission Reduction Credits ("ERCs"). Specifically, Applicant requests that Attachment DA 5.1-2 be kept confidential until "facility operation."

Applicant bases the request upon the Public Records Act, Govt. Code § 6254.7(f), which provides for the confidentiality of data used to calculate the costs of obtaining emissions offsets, and upon section 6254.11, which provides for the confidentiality of records relating to volatile organic compounds information received by an air pollution control officer. The application states, in part:

Applicant has initiated discussions with brokers for the emission reduction credits necessary for the project. The sources and quantities of Applicant's potential emission reduction credits should remain confidential until Applicant has completed its negotiations and executed final, binding contracts for all the emission reduction credits necessary for the project. . . . The market for offsets in the Bay area is highly competitive, as the supply of offsets available for purchase in the area in which the proposed project is to be constructed is limited and there are other applicants competing for these offsets. As Applicant has devoted a great deal of time and energy to developing these potential offset sources, and because Applicant requires these offsets to successfully license its project, disclosure of this information would be very damaging to the project[']s *{sic}* licensing effort.

A properly filed application for confidentiality shall be granted under the California Code of Regulations, title 20, § 2505(a)(3)(A), "if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the [Energy] Commission to keep the record confidential."

The Public Records Act allows for data used to calculate the costs of obtaining

emissions offsets to be confidential for a limited period of time. Gov. Code, § 6254.7(f). Pursuant to the Public Records Act, at the time that an air pollution control district issues a permit to construct to an applicant, data obtained from the applicant regarding offsets purchases becomes a public record.

The application makes a reasonable argument under the California Energy Commission's regulations for classifying the data used to calculate the costs of obtaining emissions offsets as confidential, in accordance with the above standards. Cal. Code Regs., tit. 20, § 2505. It is in the public interest that data used to calculate emissions offsets be given confidentiality, so as not to interfere with offset negotiations.

Applicant requests that the information be kept confidential "prior to facility operation." The Public Records Act does not allow for such information to be kept confidential indefinitely, as stated above. The term of confidentiality needs to be carefully specified to ensure conformance with the policies of both the Environmental Protection Agency (EPA) and the Energy Commission. The identification and evaluation of offset sources is a critical component of the Energy Commission's licensing process, including our review of environmental impacts as the lead agency pursuant to the California Environmental Quality Act (CEQA). The confidentiality of potential offset sources can only be maintained until that point when public participation in review of the project's proposed offsets becomes necessary. This will likely occur when the air district issues its Preliminary Determination of Compliance (PDOC).

As interpreted by the EPA, the Clean Air Act requires "federally enforceable" emission reduction credit banking actions to be completed before the air district's PDOC is issued. 42 U.S.C. § 7503(a)(1). EPA's policy is that an air district's PDOC should satisfy all the requirements of a Determination of Compliance so it can be the subject of meaningful public review. 40 C.F.R. § 51.161.

Moreover, Public Resources Code § 25523, subdivision (d)(2), requires that complete emissions offsets for a proposed facility be identified before the Energy Commission licenses that facility. Staff's first use of an applicant's proposed offset sources is normally in the Preliminary Staff Assessment, which reviews the air district's PDOC. Following issuance of the PDOC, public workshops involving the Energy Commission staff, the air district, other interested agencies, intervenors, and members of the public will be held. At that time, certain aspects of your ERCs will be discussed.

Thus, detailed information on the source, ownership, and characteristics of the offsets proposed for your project needs to become public as part of a properly issued PDOC. I therefore grant **temporary confidentiality** to Applicant's ERC information, only until such time as the air district issues the PDOC. Accordingly, it is in your best interests that negotiations for offset sources be completed by that time.

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Any subsequent submittals related to ERC offsets can be deemed confidential for the temporary term specified in this letter without the need for a new application, provided that you file a certification under penalty of perjury that the new information is substantially similar to that which is granted confidential status by this determination. California Code of Regulations, title 20, § 2505, subdivisions (a)(1)(G) and (a)(4).

Persons may petition to inspect or copy the records that I have designated as confidential. The procedures and criteria for filing, reviewing, and acting upon such petitions are set forth in the California Code of Regulations, title 20, § 2506. If you have any questions concerning this matter, please contact Deborah Dyer, Senior Staff Counsel, at (916) 654-3870.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Jones', written in a cursive style.

MELISSA JONES
Executive Director

cc: Docket Unit
Commission Project Manager