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June 13, 2008

File No. 039610-0001

VIA FEDEX

CALIFORNIA ENERGY COMMISSION  
Attn: Docket No. 07-AFC-1  
1516 Ninth Street, MS-4  
Sacramento, California 95814-5512

**DOCKET**  
**07-AFC-1**

DATE	JUN 13 2008
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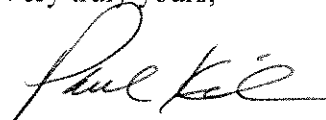
Re: Victorville 2 Hybrid Power Project: Docket No. 07-AFC-1

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 Comments on the Presiding Member's Proposed Decision.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the CEC's current electronic proof of service list.

Very truly yours,



Paul E. Kihm  
Senior Paralegal

Enclosure

cc: CEC 07-AFC-1 Proof of Service List (w/encl. via e-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. 07-AFC-1
	)	
Application for Certification,	)	APPLICANT’S COMMENTS ON THE
for the VICTORVILLE 2 HYBRID POWER	)	PRESIDING MEMBER’S PROPOSED
PROJECT	)	DECISION
by The City of Victorville	)	
	)	

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The City of Victorville (“Applicant”) hereby submits the following comments on the Presiding Member’s Proposed Decision (“PMPD”) issued May 30, 2008. Applicant’s comments are divided into three categories: A) matters that the California Energy Commission (“CEC”) staff and Applicant agreed upon prior to the close of the evidentiary hearing that are not reflected in the PMPD; B) proposed modifications to the due dates for certain compliance submittals; and C) other matters.

Matters identified in Category A are reflected in the Additional Testimony and Addendum to Final Staff Assessment (“FSA”) filed by Energy Commission Staff on March 28, 2008 (“FSA Addendum”), the transcript of the Prehearing Conference held on April 1, 2008, the Additional Testimony of Energy Commission Staff filed April 2, 2008 (“April 2 Staff Filing”), the transcript of the Evidentiary Hearing held on April 3, 2008, and various documents filed and docketed with the Commission after the Evidentiary Hearing. Citations to these documents are provided for each Category A item below.

Applicant’s proposed modifications to the due dates for certain compliance submittals are based on a targeted site mobilization date of September 2, 2008 and a targeted commencement of construction date of November 1, 2008. Based on this schedule, Applicant has identified several areas in which the Applicant foresees difficulty in meeting certain compliance due dates set forth in the PMPD.

## **I. GENERAL CONDITIONS OF CERTIFICATION**

### **A. Matters Previously Agreed Upon**

1. PMPD Page 49, 51-52 and Appendix A: 8, GEN-1: Staff agreed to modify proposed condition GEN-1 to specify that the GE equipment is subject to the 2001 California Building Code. (Prehearing Conference Transcript 13:6-13.)

### **B. Proposed Modifications to Compliance Due Dates**

None.

### **C. Other Matters**

None.

## **II. AIR QUALITY**

### **A. Matters Previously Agreed Upon**

1. PMPD Pages 105-107: After reviewing recent data from 2007 that were not available during the preparation of the FSA, Staff agreed that the ambient PM2.5 levels in the Victorville area and near the project site do not exceed federal and state standards and are level or trending downward. Staff found that that the project's contribution to ambient PM2.5 levels is not likely to cause an exceedance of these standards. Staff agreed that the project's PM2.5 emissions do not have a significant impact on PM2.5 air quality in Victorville and no additional PM2.5 mitigation is needed. (April 2 Staff Filing at AQ p. 1.)

2. PMPD Page 114, AQ-SC3(G): Staff modified AQ-SC3(G) to read as follows: "All construction vehicles shall enter the construction site through the treated entrance roadways, unless an alternative route has been submitted to and approved by the CPM District." (FSA Addendum at AQ p. 3.)

3. PMPD Page 114, AQ-SC3(I): Staff modified AQ-SC3(I) to read as follows: "All paved roads within the construction site shall be swept at least twice daily (or less during periods of precipitation or on other days with the concurrence of the CPM) on days when construction activity occurs to prevent the accumulation of dirt and debris." (FSA Addendum at AQ p. 3; April 2 Staff Filing at AQ p. 3.)

4. PMPD Pages 115-16, AQ-SC4: Staff modified AQ-SC4 Step 3 to read as follows: "The AQCMM or Delegate shall direct a temporary shutdown of the activity causing the emissions if step 2, specified above, fails to ~~result in effective mitigation~~ eliminate visible dust plume at any location 200 feet or more off the project construction fence line within one hour of the original determination. The activity shall not restart until the AQCMM or Delegate is satisfied that appropriate additional mitigation or other site conditions have changed so that visual dust plumes will not result upon restarting the shutdown source. The owner/operator may

appeal to the ~~CPM District~~ any directive from the AQCMM or Delegate to shut down an activity, provided that the shutdown shall go into effect within one hour of the original determination, unless overruled by the ~~CPM District~~ before that time.” (FSA Addendum at AQ p. 3-4; April 2 Staff Filing at AQ p. 3.)

5. PMPD Page 117, AQ-SC6: Staff modified AQ-SC6 to read as follows: “Construction activities shall be limited to the hours between one hour after sunrise and one hour before sunset during July 15 and August 30. At other times, construction activities shall be limited to the hours between one hour after sunrise and thirty (30) minutes before sunset.” (Energy Commission Staff’s Proposed Construction Schedule Restriction for the Victorville 2 Hybrid Power Project, docketed April 15, 2008.)

6. PMPD Page 118, AQ-SC9: After reviewing recent data from 2007 that was not available during the preparation of the FSA, Staff agreed that the ambient PM2.5 levels in the Victorville area and near the project site do not exceed federal and state standards and are level or trending downward. Staff found that that the project’s contribution to ambient PM2.5 levels is not likely to cause an exceedance of these standards. Staff agreed that the project’s PM2.5 emissions do not have a significant impact on PM2.5 air quality in Victorville and no additional PM2.5 mitigation is needed. (April 2 Staff Filing at AQ p. 1.) Accordingly, Staff modified AQ-SC9 to read as follows: “The project owner shall pave, with asphalt concrete that meets the current county road standards, unpaved local roads to provide emission reductions of 132.7 tons per year of ~~PM2.5~~ PM10, prior to start construction of the project. Calculations of ~~PM2.5~~ 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. ~~and PM2.5 portion shall be calculated as being equal to 10% of the total PM10 road dust emission reduction credits.~~”

7. PMPD Page 118, AQ-SC9: Staff modified the verification for AQ-SC9 as follows: “At least 60 days prior to start of construction, the project owner shall submit to the CPM and the District, for approval, 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. All paving of roads shall be complete at least 15 days prior to start of construction of the project.” (April 2 Staff Filing at AQ p. 1-2.) Please see additional requested changes to AQ-SC9 under Category B below.

8. PMPD Page 120, AQT-3: Staff modified AQT-3, Verification, to read as follows: “~~At least 90 days prior to construction of the project, the~~ The project owner shall provide the ~~District, the ARB and the CEC~~ CPM copies of the federal PSD and Acid Rain permits no later than 30 days after their issuance.” (FSA Addendum at AQ p. 4; April 2 Staff Filing at AQ p. 2.)

9. PMPD Page 121, AQT-5: Staff agreed to modify the durations of startups upon concurrence the Mojave Desert Air Quality Management District in the FDOC. These changes are reflected in the FDOC (p. 18, condition 5), and hence, AQT-5 should be revised as

follows: 1. Cold startup – ~~108~~ 110 minutes. 2. Other startup – ~~78~~ 80 minutes. (March 28 FSA Additional Staff Testimony and Addendum at p. 4.)

10. PMPD Page 123, AQT-9: Staff agreed to change the compliance due date in AQT-9, Verification, to 60 days prior to construction of the turbine stacks. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

11. PMPD Page 123, AQT-11: Staff agreed to change the compliance due date in AQT-11, Verification, to 60 days prior to construction of the turbine stacks. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

12. PMPD Page 124, AQT-13: Staff agreed to change the compliance due date in AQT-13 as follows: “The O.O. shall conduct all required compliance/certification tests in accordance with a District-approved test plan. Thirty (30) days prior to the compliance/certification tests the operator shall provide a written test plan for District review and approval. Written notice of the compliance/certification test shall be provided to the District ten (10) days prior to the tests so that an observer may be present. A written report with the results of such compliance/certification tests shall be submitted to the District within ~~forty-five (45)~~ sixty (60) days after testing.” (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 2-3.)

13. PMPD Page 124, AQT-13: Staff agreed to change the compliance due date in the Verification for AQT-13 as follows: “The project owner shall notify the District and the CPM within ~~seven (7)~~ ten (10) working days before the execution of the source tests required in this condition. Source test results shall be submitted to the District and to the CPM within 60 days of the date of the tests.” (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 2-3.)

14. PMPD Page 125, AQT-16: Staff agreed to change the compliance due date in AQT-16, Verification, to 60 days prior to construction of the turbine stacks. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

15. PMPD Page 136, AQEG-5: Staff agreed to change the compliance due date in AQEG-5, Verification, to 60 days prior to installation. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

16. PMPD Page 137, AQEG-7: Staff agreed to change the compliance due date in AQEG-7, Verification, to 60 days prior to installation. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

17. PMPD Page 138, AQFP-5: Staff agreed to change the compliance due date in AQFP-5, Verification, to 60 days prior to installation. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

18. PMPD Page 138, AQFP-7: Staff agreed to change the compliance due date in AQFP-7, Verification, to 60 days prior to installation. (FSA Addendum at AQ p. 5; April 2 Staff Filing at AQ p. 3.)

**B. Proposed Modifications to Compliance Due Dates**

1. PMPD Page 113, AQ-SC1: The Verification for AQ-SC1 requires Applicant to submit information on the on-site Air Quality Construction Mitigation Manager (AQCMP) no later than 60 days prior to the start of ground disturbance. Applicant requests that this compliance due date be changed to 30 days prior to site mobilization (August 1, 2008 under current schedule).

2. PMPD Page 118, AQ-SC9: The Verification for AQ-SC9 requires that all paving of roads be complete at least 15 days prior to commencement of construction. Applicant requests that the Verification for AQSC-9 be modified to require that paving of roads sufficient to provide 18.1 tons of PM10 emission reductions (amount of construction related PM10 emissions) be complete no later than 15 days prior to the commencement of construction and that the remaining reductions needed be complete no later than six months following commencement of construction.

**C. Additional Matters**

None.

**III. HAZARDOUS MATERIALS MANAGEMENT**

**A. Matters Previously Agreed Upon**

1. PMPD Page 142: Staff agreed to note that Therminol VP-1 or equivalent formula has been proposed for use at the project site. (April 2 Staff Filing at HM p. 2.)

2. PMPD Page 153, HAZ-9: Staff agreed to eliminate the reference to the Vulnerability Assessment in HAZ-9, Verification. The first sentence of the Verification should now read as follows: "At least 30 days prior to the initial receipt of hazardous materials on-site, the project owner shall notify the CPM that a site-specific ~~Vulnerability Assessment and~~ Operations Site Security Plan is ~~are~~ available for review and approval." (April 2 Staff Filing at HM p. 1.)

**B. Proposed Modifications To Compliance Due Dates**

None.

**C. Additional Matters**

None.

#### **IV. BIOLOGICAL RESOURCES**

##### **A. Matters Previously Agreed Upon**

1. PMPD Page 185, BIO-1: Staff agreed to change the compliance due date in BIO-1, Verification, to 60 days prior to the start of any site mobilization. (April 2 Staff Filing at BIO p. 1.)

2. PMPD Page 190, BIO-6: Staff agreed to change the compliance due date for submitting the BRMIMP in BIO-6, Verification, to 45 days prior to the start of any site mobilization. Staff also agreed to change the compliance due date for the CPM's determination of the BRMIMP's acceptability to within 30 days of receipt. (April 2 Staff Filing at BIO p. 4.)

##### **B. Proposed Modifications To Compliance Due Dates**

1. PMPD Page 185, BIO-1: The Verification for BIO-1 requires that information regarding the Designated Biologist be submitted to the CPM 90 days prior to site mobilization. Applicant requests that this compliance due date be changed to 30 days prior to site mobilization (August 1, 2008 under current schedule).

2. PMPD Page 190, BIO-6: As indicated above, staff previously agreed to change the compliance due date for submitting the BRMIMP in BIO-6, Verification, to 45 days prior to the start of any site mobilization. Staff also agreed to change the compliance due date for the CPM's determination of the BRMIMP's acceptability to within 30 days of receipt. (April 2 Staff Filing at BIO p. 4.) Applicant requests that the compliance due date for submission of the BRMIMP be changed to 60 days prior to commencement of construction (September 1, 2008 under the current schedule).

##### **C. Additional Matters**

1. PMPD Page 184: The PMPD states in numerous areas of the BIO Section, including Findings and Conclusions No. 10 on page 184, that the record ensures compliance with applicable laws, ordinances, regulations, and standards. CDFG participated in the CEC certification process and the PMPD includes all requirements that would be imposed by CDFG in an incidental take permit for the desert tortoise and Mohave ground squirrel were CDFG to issue such a permit. To make it clear that the CEC certification provides the necessary take authorization, an additional finding should be added to read as follows: "11. This decision provides incidental take authorization for the desert tortoise and Mohave ground squirrel as required by the California Endangered Species Act."

2. PMPD Page 189, BIO-6: BIO-6 paragraph 4 refers only to state agency requirements and, thus, the reference to the USFWS Biological Opinion should be deleted.

3. PMPD Page 193, BIO-9: BIO-9 paragraph 2 requires daily maintenance monitoring of permanent desert tortoise exclusion fencing but does not state how long this monitoring is required.

4. PMPD Pages 193-94, BIO-9: BIO-9 paragraph 3 makes several references to “any wildlife” but should apply only to sensitive wildlife.

5. PMPD Page 195, BIO-10: BIO-10 , Verification, requires the project owner to provide the CPM with the final BRMIMP, which include nesting bird survey results, 60 days prior to start of any ground disturbance activities. This is inconsistent with condition 2, which requires nesting bird surveys be done no less than 30 days prior to start of initial ground disturbance.

6. PMPD Page 197: The first sentence of BIO-11, Verification, should be modified to read as follows: “No later than 12 months following the publication of the Energy Commission Decision, or commencement of ground disturbing activities . . .”

7. PMPD Page 197, BIO-12: On June 3, 2008, Applicant filed proposed revisions to BIO-12. A copy of that filing is attached.

8. PMPD Page 203, BIO-14: BIO-14 paragraph 4 does not specify for how long fences must be checked on a daily basis.

## **V. SOIL AND WATER RESOURCES**

### **A. Matters Previously Agreed Upon**

None.

### **B. Proposed Modifications To Compliance Due Dates**

1. PMPD Page 220, SOIL & WATER-2: The Verification for SOIL & WATER-2 requires the Applicant to submit a copy of the DESC to San Bernardino County and the Lahontan Regional Water Quality Control Board (“LRWQCB”) no later than 90 days prior to site mobilization, and to submit the DESC with comments from the County and LRWQCB no later than 60 days prior to site mobilization. Applicant requests that these compliance due dates be changed to 60 days prior to commencement of construction (September 2, 2008 under the current schedule) and 30 days prior to commencement of construction (October 1, 2008 under the current schedule), respectively.

2. PMPD Page 222, SOIL & WATER-4: The Verification for SOIL & WATER-4 requires the project owner to submit copies of the Water Quality Management Plan to the CPM and San Bernardino County Public Works 60 days prior to site mobilization (July 1, 2008 under current schedule). The Applicant requests that this compliance due date be changed to 60 days prior to commencement of construction (September 1, 2008 under the current schedule).

3. PMPD Page 222, SOIL & WATER-5: The Verification for SOIL & WATER-5 requires the project owner to submit to the CPM the water supply and distribution system design and engineer’s report prior to beginning any site mobilization activities. The



Applicant requests that this compliance due date be changed to 60 days prior to commencement of construction (September 1, 2008 under the current schedule).

### **C. Additional Matters**

1. PMPD Page 226, SOIL & WATER-9: SOIL & WATER-9 requires the Applicant to obtain a wastewater discharge permit from the Victor Valley Wastewater Reclamation Authority. Because the project will be equipped with a zero liquid discharge system, it will not be necessary to obtain a wastewater discharge permit. SOIL & WATER-9 should be deleted.

## **VI. CULTURAL RESOURCES**

### **A. Matters Previously Agreed Upon**

1. PMPD Page 240; CUL-1: Staff agreed to change the compliance due dates in (1) CUL-1, Verification 1, to 45 days prior to start of ground disturbance; (2) CUL-1, Verification 3, to 20 days prior to start of ground disturbance; and (3) CUL-1, Verification 5, to 10 days prior to start of ground disturbance. (FSA Addendum at CR pp. 1-2.)

2. PMPD Page 241, CUL-2: Staff agreed to change the compliance due date in CUL-2, Verification 1, to 40 days prior to start of ground disturbance. (FSA Addendum at CR p. 2.)

3. PMPD Page 243, CUL-3: Staff agreed to change the compliance due date in CUL-3, Verification 1, to 30 days prior to start of ground disturbance. (FSA Addendum at CR p. 2.)

4. PMPD Page 249, CUL-8: Staff modified CUL-8 to read, in relevant part, as follows: "Prior to the dismantling of the towers of the Kramer-to-Victor 115-kV transmission line, the project owner shall obtain the services of an architectural historian. The project owner shall provide the CPM with the name and resume of the architectural historian. ~~No ground disturbance~~ dismantling of the towers shall occur prior to CPM approval of the architectural historian, unless specifically approved by the CPM." (FSA Addendum at CR p. 5.)

### **B. Proposed Modifications To Compliance Due Dates**

1. PMPD Page 240, CUL-1: As indicated above, staff previously agreed to change the compliance due date in (1) CUL-1, Verification 1, to 45 days prior to start of ground disturbance. Applicant request that this compliance due date be changed to 30 days prior to ground disturbance.

2. PMPD Page 251, CUL-10: The verification to CUL-10 requires Applicant to submit a Cultural Resources Treatment Plan ("CRTP") at least 60 days prior to the start of construction related ground disturbance within 100 feet around, and inclusive of, those areas not previously surveyed for cultural resources. Due to anticipated delays in gaining access to one parcel, Applicant requests that this compliance submittal due date be changed to 30 days.

**C. Additional Matters**

1. PMPD Page 231, paragraph 1, last sentence states: "Approximately 10 miles of this line would be used as Segment 3 of the project transmission line." Please note that this is incorrect. Approximately 6.6 miles of historic transmission line in Segment 3 will be relocated elsewhere in the same existing SCE ROW, but the project will not use the historic line.

**VII. GEOLOGICAL AND PALEONTOLOGICAL RESOURCES**

**A. Matters Previously Agreed Upon**

None.

**B. Proposed Modifications To Compliance Due Dates**

1. PMPD Page 261, PAL-1: The Verification for PAL-1 requires that the resume of the designated PRS be submitted to the CPM 60 days prior to the start of ground disturbance. Applicant requests that this compliance due date be changed to 30 days prior to site mobilization (August 1, 2008 under current schedule).

**C. Additional Matters**

None.

**VIII. LAND USE**

**A. Matters Previously Agreed Upon**

None.

**B. Proposed Modifications To Compliance Due Dates**

None.

**C. Additional Matters**

1. PMPD Page 288, LAND-2: Applicant requests that LAND-2, as set forth in the FSA, be modified to read as follows: "The project owner shall adjust the boundaries of all parcels or portions of parcels that constitute the Victorville 2 project sites as necessary to effectuate all properties becoming a single parcel, under single ownership, within the City of Victorville jurisdiction, in accordance with provisions and procedures set forth in the City of Victorville's Municipal Code, Title 17 (Subdivision Ordinance).

2. PMPD Page 288, LAND-2: Applicant request that the Verification for LAND-2, as set forth in the FSA, be modified to read as follows: "At least 30 days prior to construction of the Victorville 2 project, the project owner shall submit evidence to the CPM,

indicating either fee ownership or legal possession for all parcels that comprise the Victorville 2 project site. Within 30 days of obtaining fee ownership of all parcels that comprise the Victorville 2 project site, the project owner shall commence an action to create a single parcel of all parcels that comprise the Victorville 2 project site. Within 10 days of the completion of the creation of a single parcel of all parcels that comprise the Victorville 2 project site, the project owner shall provide evidence of the creation of a single parcel to the CPM.”

## **IX. NOISE AND VIBRATION**

### **A. Matters Previously Agreed Upon**

1. PMPD Page 302, NOISE-4: Staff modified NOISE-4 to read, in relevant part, as follows: The project design and implementation shall include noise mitigation measures adequate to ensure that operation of the project will not cause noise levels due solely to plant operation to exceed an average of 39 dBA Leq measured at monitoring location ML2, the residence one mile west of the project site. No new pure tone components may be caused by the project. No single piece of equipment shall be allowed to stand out as a source of noise that draws legitimate complaints. (FSA Addendum at Noise p. 1.)

### **B. Proposed Modifications To Compliance Due Dates**

None.

### **C. Additional Matters**

None.

## **X. TRAFFIC AND TRANSPORTATION**

### **A. Matters Previously Agreed Upon**

1. PMPD Page 325: In the FSA Addendum, Staff proposed additional Condition of Certification TRANS-5. Staff further modified TRANS-5 in the April 2 filing pursuant to discussions following Prehearing Conference. (Prehearing Conference Transcript 14:14-25; 15:1-23.)

### **B. Proposed Modifications To Compliance Due Dates**

1. PMPD Page 324, TRANS-2: The Verification for TRANS-2 requires submission of a post-construction roadway mitigation plan 90 days prior to site mobilization. Applicant requests that this compliance due date be modified to 60 days prior to site mobilization (July 3, 2008 under current schedule).

### **C. Additional Matters**

None.

**XI. VISUAL RESOURCES**

**A. Matters Previously Agreed Upon**

1. PMPD Page 352: Staff modified VIS-1 by deleting condition D in its entirety (“One set of 11” x 17” color photo simulations at life size scale of the proposed treatment for project structures, including structures treated during manufacture, from the Key Observation Points”). (FSA Addendum at VR p. 1; Prehearing Conference Transcript 15:24-25; 16:1-8.)

**B. Proposed Modifications To Compliance Due Dates**

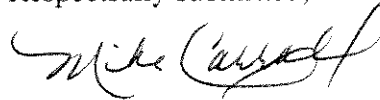
None.

**C. Additional Matters**

None.

DATED: June 13, 2008

Respectfully submitted,



Michael J. Carroll  
of LATHAM & WATKINS LLP

Michael J. Carroll  
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STATE OF CALIFORNIA  
ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of: ) Docket No. 07-AFC-1  
)  
Application for Certification, ) PROPOSED CONDITIONS OF  
for the VICTORVILLE 2 HYBRID POWER ) CERTIFICATION BIO-12 AND BIO-18  
PROJECT )  
by The City of Victorville )  
)

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At the evidentiary hearing on April 3, 2008, the Committee kept open the evidentiary record to allow continued discussion amongst the parties and other agencies regarding proposed Conditions of Certification BIO-12 and BIO-18. A workshop on the proposed conditions was held in the City of Victorville on April 28 and April 29, 2008 and continued by teleconference on May 5, 2008 and May 9, 2008. On May 15, 2008, CEC staff filed supplemental testimony including revised proposed conditions BIO-12 and BIO-18. The revised proposed conditions filed on May 15 are included in the Presiding Member's Proposed Decision (PMPD) issued on May 30, 2008.

Applicant has reviewed revised proposed conditions BIO-12 and BIO-18, as set forth in the PMPD. Applicant proposes certain modifications to proposed condition BIO-12, as set forth in the attached document, which also provides an explanation for each of the proposed changes. Applicant requests that CEC and other agency staff review the proposed modifications and consider a joint request to the Committee to modify condition BIO-12. Applicant concurs with condition BIO-18, as set forth in the PMPD.

Applicant is reviewing the PMPD in its entirety, and may have additional comments, which will be submitted prior to the deadline established by the Committee.

DATED: June 3, 2008

Respectfully submitted,



Michael J. Carroll  
of LATHAM & WATKINS LLP

## PROPOSED CONDITIONS OF CERTIFICATION

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### DESERT TORTOISE IMPACT AVOIDANCE AND MINIMIZATION MEASURES

**BIO-12** The project owner shall incorporate all terms and conditions from the USFWS (2008a) Biological Opinion and the requirements identified in the final desert tortoise translocation plan submitted May 8, 2008, with the exceptions noted below in the Handling and Monitoring and Reporting sections, into the project's final BRMIMP. The BRMIMP will also include the mitigation measures identified in Biological Resources section 6.4 and Appendix H of the AFC (Victorville 2007a), responses to data requests (ENSR 2007d), and the Draft Biological Assessment (ENSR 2007b) unless they conflict with terms and conditions required in the Biological Opinion, final desert tortoise translocation plan, below, or elsewhere in the conditions of certification. In the case of an apparent conflict in mitigation measures, the project owner shall prior to completion of the final BRMIMP notify the CPM, who will confer with USFWS and CDFG, and then clarify and resolve the differences.

The revised final desert tortoise translocation plan shall be resubmitted after the BRMIMP is approved by the CPM, and shall be consistent with the requirements of the approved BRMIMP and of this condition of certification. If there are additional changes to the BRMIMP affecting the desert tortoise translocation plan, the CPM may require modification and resubmittal of the desert tortoise translocation plan to reflect those changes.

The project owner shall ensure the following measures are implemented:

#### FENCING

1. Fence the construction areas and permanent facilities with desert-tortoise-proof fencing prior to mobilization in undeveloped areas. Gate(s) shall be desert tortoise proof as well. Gate(s) shall remain closed except for the immediate passage of vehicles. High use gate(s) will be maintained and have monthly examinations.
2. The fences will be maintained and checked on a daily basis to ensure the integrity of the fence is maintained. The Designated Biologist shall be present onsite to monitor construction and determine fence placement during fence installation.
3. Following fencing, a trained tortoise biologist shall search the interior and exterior of the fenced area areas for tortoises.
4. Temporary fencing during construction along roads shall be installed at the direction of the Designated Biologist, and a biological monitor shall be

on call for wildlife issues. Limit fence encroachment into relatively undisturbed desert tortoise, Mohave ground squirrel, and burrowing owl habitat while minimizing the potential for animals becoming trapped on the road side of the fence. The applicant shall account for the fence encroachment acreage in the final habitat disturbance calculations and provide any resulting, additional compensation habitat that would be required. At road intersections, extend the main fence at right angles along the edge of the intersecting road for 30 feet to discourage desert tortoises from following the main fence line from directly crossing the intersecting road.

## HANDLING

5. Collection, holding, and translocation of tortoises shall comply with the Desert Tortoise Council (1994, revised 1999) handling protocol (i.e., guidelines for Handling Desert Tortoises during Construction Projects prepared for the USFWS) that ensures their health and safety.
6. Tortoises shall be kept upright at all times except during brief periods during processing and handled in a secure but gentle manner to minimize stress including the possibility of voiding the bladder.
7. Tortoise burrows shall be excavated using hand tools under the supervision of the Designated Biologist. Excavations are permitted only ~~prior to 12:00 noon and within the temperature guidelines established in the Biological Opinion.~~ To prevent re-entry by a tortoise, all burrows in the construction zone that do not contain tortoises shall be collapsed.
8. Instruct all employees and contractors to look under vehicles and equipment for the presence of protected species prior to movement. No equipment will be moved until the animal has left voluntarily or it is removed by a biologist authorized to do so. Any time a vehicle is parked in unfenced native habitat, the ground around and under the vehicle will be inspected for desert tortoises and other wildlife before the vehicle is moved.
9. The Designated Biologist shall follow the Desert Tortoise Council guidelines for proper handling of desert tortoise. If a desert tortoise is observed in an active work area on the project site, whether above ground or in a burrow, ~~or in an open trench~~, it will be left to move on its own. If this does not occur within 15 minutes, the Designated Biologist can remove and relocate the tortoise into undisturbed habitat (i.e., at least 1,000 feet outside of the transmission line right-of-way, in a temporary holding area, or permanent translocation site). Desert tortoises that are found above ground, including in a trench, and need to be moved from harm's way, shall be placed in the shade of a large, marked shrub and

**Comment [AK1]:** Tortoises can be turned upside down for brief periods without causing apparent stress or physical harm. Examining the underside of a tortoise permits the identification of individual morphological features, shell condition and injuries.

**Comment [AK2]:** The BO identifies temperatures within which tortoises can be handled. Further, closing traps prior to noon may preclude an active tortoise from entering its burrow to escape the heat. When temperatures exceed lethal thresholds during the day, and once a burrow has been identified as vacant, it would be better to close it then.

**Comment [AK3]:** All fenced habitat will have been cleared of tortoises.

**Comment [AK4]:** All tortoises should be removed from trenches.

**Comment [AK5]:** All moved tortoises will be continually monitored to ensure their safety. It is not necessary to mark shrubs under which a tortoise is placed, as the tortoise is likely to move and will be watched.

monitored to ensure their continued safety. All desert tortoises removed from burrows will be placed in an unoccupied burrow of approximately the same size as the one from which it was removed. If an existing burrow is unavailable, the Designated Biologist will construct or direct the construction of a burrow of similar shape, size, depth, and orientation as the original burrow. The exception to this is during work on the linear facilities during fall and early spring, and only when daily temperatures do not exceed lethal thresholds. In this situation, a tortoise removed from a burrow will be placed in the shade of a bush and monitored to ensure that it locates another of its burrows and is safe. The project owner shall monitor desert tortoises moved during inactive periods for at least two days after placement in the new burrows to ensure their safety. The Designated Biologist will be allowed some judgment and discretion to ensure that survival of the desert tortoise is likely.

**Comment [AK6]:** When temperatures during the day are sufficiently cool, there is no need to place a tortoise in a burrow. In fact, it will likely leave the burrow immediately. We agree that the construction of a replacement burrow is appropriate, but because finding a tortoise in a burrow is likely to be unexpected and the construction of a burrow could delay moving the tortoise, we suggest that the tortoise be moved first. Following that, an artificial replacement burrow can be constructed as time allows. This would meet the practicality of removing the tortoise from the construction area as well as providing a replacement burrow.

Notwithstanding the ~~The~~ final desert tortoise translocation plan, submitted May 8, 2008, shall include the following item shall be completed and reflected in the revised plan:

10. No desert tortoises shall be handled or moved prior to Energy Commission licensing of the project. ~~Change the schedule on page 27 of the plan (i.e., delete May and June) and other references throughout to reflect this transition.~~

**Comment [L&W7]:** Modification for clarification only.

**Comment [L&W8]:** This language is unnecessary, and because the pagination of the plan will change, it presents a cross-referencing problem.

**MONITORING AND REPORTING**

11. Report all encounters with federally-or state-listed species to the Designated Biologist, who will record the following information for the monthly compliance report: (1) species name; (2) location (global positioning system coordinates, narrative and maps) and dates of observations; (3) general condition and health, including injuries and state of healing; (4) diagnostic markings, including identification numbers or markers; and (5) locations moved from and to.

Notwithstanding the ~~The~~ final desert tortoise translocation plan, submitted May 8, 2008, shall include the following items shall be completed and reflected in the revised plan:

**Comment [L&W9]:** Same as above.

12. Monitor survivorship of translocated tortoises for at least 18 months, and report the results in consultation with the CPM, CDFG, and USFWS. This work shall encompass monitoring in all four seasons and be timed to include two spring both major activity seasons, fall and spring. This will allow a meaningful assessment of spring emergence from burrows in consideration of the atypical fall translocation time. References to the

**Comment [AK10]:** Two spring seasons, in addition to the fall season. When tortoises are initially moved, would equal 20 months, not 18.



previous 12-month monitoring period shall be changed to 18 months throughout the plan.

13. Tortoises fitted with transmitters shall be monitored at least every other week because most movement will likely occur shortly during the active seasons, and more frequently, as needed, following release and following hibernation after release due to unfamiliarity with the new location. Once tortoises become more established the frequency of or are moving shorter distances such that they are less likely to be lost, monitoring can be changed change to monthly. Approval of any change in monitoring frequency will be acquired from appropriate agencies monthly. Following translocation and a planned telemetry monitoring period of at least 18 months, transmitters shall be removed (page 25 of plan).
14. All other desert tortoises observed encountered while tracking translocated tortoises will be marked with identifying numbers and processed for recorded, but not handled, and general health parameters and identifying features will be noted. Their location using GPS will also be recorded. All translocated animals found during a dawn to dusk search will be monitored between September 2008 and April 2010, for 18 months, after which transmitters will be removed. If animals translocated tortoises are not located in the one-day monitoring, continue searching until they are located. This might require multiple days depending on the ease or difficulty in locating the animals (page 48 of plan).

**Comment [AK11]:** Every other week is probably inadequate for newly released, translocated tortoises. There is a high probability of losing them if they are not followed much more frequently, given their anticipated movements and the transmitting range. The same is true following hibernation, assuming that they are translocated in Fall 2008.

**Comment [L&W12]:** Recommend deleting cross-references to specific pages in the plan, as they are likely to change.

**Comment [AK13]:** Information on gender, size, and clinical signs will be gathered on tortoises at the translocation site, but they will not be handled. The latter would require a change in the BO and is unnecessary especially in the context of the information from the translocation effort that is anticipated from translocating so few tortoises.

**Comment [AK14]:** CEC agreed to 12 months in the workshop. CEC then determined that the time would be 18 months. Through April 2010, would be 20 months.

#### TRANSLOCATION SITE

15. The translocation site selected shall support suitable desert tortoise habitat, including appropriate cover and forage.
16. No sensitive biological resources, including other special-status species sensitive habitats or unique vegetation assemblages, shall be disturbed during translocation activities and site preparation, such as artificial/nest burrow installation and juvenile desert tortoise release pen construction.
17. Existing roads or pedestrian access where roads are lacking shall be used to transport desert tortoises to the translocation site and monitor translocation success.

**Verification:** At least 30 days prior to the start of any site or related facilities mobilization activities, the project owner shall incorporate the associated terms and conditions of this condition of certification into the project's BRMIMP, and implement them.

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

In the Matter of: ) Docket No. 07-AFC-1  
)  
Application for Certification, )  
for the VICTORVILLE 2 ) **ELECTRONIC PROOF OF SERVICE**  
HYBRID POWER PROJECT ) **LIST**  
by the City of Victorville ) **(revised May 30, 2008)**  
)  
\_\_\_\_\_ )

Transmission via electronic mail and by depositing one original signed document with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

DOCKET UNIT

**CALIFORNIA ENERGY COMMISSION**

Attn: DOCKET NO. 07-AFC-1  
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VICTORVILLE II HYBRID POWER PROJECT  
CEC Docket No. 07-AFC-1

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VICTORVILLE II HYBRID POWER PROJECT  
CEC Docket No. 07-AFC-1

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**DECLARATION OF SERVICE**

I, Paul Kihm, declare that on June 13, 2008, I deposited a copy of the attached:

**APPLICANT'S COMMENTS ON THE PRESIDING MEMBER'S PROPOSED  
DECISION**

with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the California Energy Commission. I further declare that transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service List above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 13, 2008, at Costa Mesa, California.

  
\_\_\_\_\_  
Paul Kihm