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July 3, 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

<b>DOCKET</b>	
<b>07-AFC-1</b>	
DATE	JUL 03 2008
RECD.	JUL 03 2008


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 a document entitled, "California Unions for Reliable Energy, Center for Biological Diversity, et al. v. Mojave Desert Air Quality Management District."

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.)

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,	)	CALIFORNIA UNIONS FOR RELIABLE
for the VICTORVILLE 2 HYBRID POWER	)	ENERGY, CENTER FOR BIOLOGICAL
PROJECT	)	DIVERSITY ET AL V. MOJAVE DESERT AIR
by The City of Victorville	)	QUALITY MANAGEMENT DISTRICT
	)	

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For the information of the Parties and the Committee, attached are Minutes of the Court issued in connection with California Unions for Reliable Energy, Center for Biological Diversity, et al v. Mojave Desert Air Quality Management District ("MDAQMD"), Case No. INC071192, Superior Court of the State of California, County of Riverside, denying petitioners' request for a writ of mandate, and finding that the MDAQMD complied with the California Environmental Quality Act when it adopted its Rule 1406 providing for the generation of emission reduction credits through the paving of roads.

DATED: July 3, 2008

Respectfully submitted,



Michael J. Carroll  
of LATHAM & WATKINS LLP

**SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE**

<b>TITLE:</b> California Unions for Reliable Energy, Center for Biological Diversity et al	v. Mojave Desert Air Pollution Control District et al	<b>DATE &amp; DEPT.</b> June 30, 2008 2G	<b>NUMBER</b> INC071192
<b>COUNSEL</b> None	None	<b>REPORTER</b> None	
<b>PROCEEDING</b> Order on Submitted Matter—Petition for Writ of Mandate			

Petitioners California Unions for Reliable Energy, Center for Biological Diversity and Frank Leivas seek a writ of mandate directing respondents Mojave Desert Air Pollution Control District and Eldon Heaston, in his capacity as its air pollution control officer, to set aside their approval of Rule 1406, which sets out a method for calculating offsets against particulate matter generated by a new source by the reduction of particulate matter obtained from paving dirt roads. Portions of respondent district are located in a federal non-attainment area for PM10 and respondent district is required by federal law to adopt a site-specific plan to bring the area into attainment with national air pollution standards. The site-specific plan must include a preconstruction review, known as a new source review, of all new or modified stationary sources of non-attainment air pollutants. The new source review program requires new or modified stationary sources that emit or have the potential to emit greater than a specified amount of non-attainment pollutants to offset such new emissions in an amount greater than those emissions.

The district wrote Rule 1406 to provide a method of calculating such offsets from the paving of currently unpaved public roads. It determined that its adoption of Rule 1406 was exempt from review under the California Environmental Quality Act because the rule will not create any adverse impacts on the environment and because there is no potential that the adoption of the rule might cause the release of additional air contaminants or create any adverse impacts, a Class 8 categorical exemption applies. The district also contends that no exception to the Class 8 categorical exemption applies. Petitioners dispute both of these contentions. The essence of petitioners' argument is that the adoption of Rule 1406 will result in the paving of hundreds or thousands of miles of roads, causing significant environmental impacts and therefore CEQA review is required.

A class 8 exemption "consists of actions taken by regulatory agencies . . . to assure the maintenance, restoration, enhancement or protection of the environment where the regulatory process involves procedures for protection of the environment. . . . [R]elaxation of standards allowing environmental degradation are not included in this exception." CEQA Guidelines, § 15308. The Court finds that there is substantial evidence that supports the district's determination that the Class 8 categorical exemption applies. Rule 1406 is component of new source review of any new or modified stationary sources of air pollutants and is intended to assist the district in bringing the non-attainment area into attainment with national air pollution standards. As such, it will enhance or protect the environment. It does not relax standards or allow environmental degradation. Indeed, it does not permit any activity that would harm or degrade the environment. Contrary to petitioners' argument, the rule does not permit the paving of any road or the use of any offset against a new or modified source of air pollution: the rule simply sets forth a protocol for calculating such an offset if one is sought. Whether the use of such offsets in connection with a particular project is appropriate will be part of the environmental analysis of that project. Nothing in the rule entitles a future applicant to use such

offsets.

Even if the Class 8 exemption applies, the adoption of the rule is not exempt from CEQA review if there is a reasonable possibility that it will have a significant effect on the environment due to "unusual circumstances." CEQA Guidelines § 15300.2(c). To determine if there are unusual circumstances, courts use a two-step test. First, whether "the circumstances of a particular project differ from the general circumstances of the projects covered by a particular categorical exemption," and second, whether "those circumstances create an environmental risk that does not exist for the general class of exempt projects." Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster (1997) 52 Cal. App. 4<sup>th</sup> 1165, 1207.

Applying this test to Rule 1407, the Court finds that adopting a rule designed to facilitate attainment of national air quality standards does not differ from general circumstances of projects covered by the Class 8 exemption. Second, for the reasons described above, the Court concludes that the rule does not create an environmental risk that does not exist for the general class of exempt projects. The rule does not create an entitlement, it does not permit the use of any offset in connection with a particular project nor does it authorize the paving of any road.

Therefore, the petition for writ of mandate is DENIED.

Respondents to prepare a proposed order and judgment pursuant to Rule 3.1312.

Clerk to give notice.

Harold W. Hopp, Judge  
P. Vasquez, Clerk

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

In the Matter of: ) Docket No. 07-AFC-1  
)  
Application for Certification, ) **ELECTRONIC PROOF OF SERVICE**  
for the VICTORVILLE 2 ) **LIST**  
HYBRID POWER PROJECT )  
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**

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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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Transmission via U.S. Mail addressed to the following:

INTERESTED AGENCIES

**CA Independent System Operator**  
151 Blue Ravine Road  
Folsom, CA 95630

DECLARATION OF SERVICE

I, Paul Kihm, declare that on July 3, 2008, I deposited a copy of the attached:

**CALIFORNIA UNIONS FOR RELIABLE ENERGY, CENTER FOR BIOLOGICAL  
DIVERSITY, ET AL. V. MOJAVE DESERT AIR QUALITY MANAGEMENT  
DISTRICT**

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 July 3, 2008, at Costa Mesa, California.

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