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October 27, 2009

File No. 045049-0001

DOCKET	
08-AFC-8	
DATE	<u>OCT 27 2009</u>
RECD	<u>OCT 27 2009</u>

VIA FEDEX

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

Re: Hydrogen Energy California Project: Docket No. 08-AFC-08

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 Objections to Certain Data Requests from the Association of Irrigated Residents (Air) Data Request, Set One.

Please note that the enclosed submittal was filed today via electronic mail to your attention and served on all parties to the above-referenced project.

Very truly yours,



Paul E. Kihm
Senior Paralegal

Enclosure

cc: 08-AFC-08 Proof of Service List (w/encl., via e-mail and U.S. Mail)
Michael J. Carroll, Esq. (w/encl.)
Marc T. Campopiano, Esq. (w/encl.)

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STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:)	Docket No. 08-AFC-8
)	
APPLICATION FOR CERTIFICATION,)	OBJECTIONS TO CERTAIN DATA
FOR THE HYDROGEN ENERGY)	REQUESTS FROM THE ASSOCIATION
CALIFORNIA POWER PLANT PROJECT BY)	OF IRRITATED RESIDENTS (AIR) DATA
HYDROGEN ENERGY INTERNATIONAL,)	REQUEST SET ONE
LLC)	

Pursuant to Title 20, California Code of Regulations, Section 1716(f), Hydrogen Energy International, LLC (“Applicant”), hereby objects to certain of the data requests made by the Association of Irrigated Residents (“AIR”) on October 7, 2009 in its Data Request Set One regarding the Hydrogen Energy California Power Plant Project (08-AFC-8) (“Project”). For the reasons outlined below, the Applicant objects to all or portions of Data Requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14. Despite the objections described below, the Applicant intends to provide timely responses to Data Requests 1, 2, 3, 4, 6, 7, 10, 11, 12, and 13.

A. Objection to Data Request No. 1

Data Request No. 1: Was the concept that there would be less local opposition to the project because of a clear majority of the local population consists of people of color who are low-income and under-educated, a reason for the current site selection in the San Joaquin Valley instead of elsewhere in the state? Was that concept ever discussed at any level by the applicant?

Applicant’s Objection: The Applicant objects to Data Request No. 1 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 1.

B. Objection to Data Request No. 2

Data Request No. 2: Is there any reason not to do the air analysis using the measurements of the nearby monitoring stations (in Kern County) showing the highest numbers for the relevant criteria air emissions?

Applicant's Objection: The Applicant objects to Data Request No. 2 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 2.

C. Objection to Data Request No. 3

Data Request No. 3: Will any SOx ERC's be used to mitigate PM 10/2.5 emissions from the project and, if so, how can this interpollutant trading be justified?

Applicant's Objection: The Applicant objects to Data Request No. 3 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 3.

D. Objection to Data Request No. 4

Data Request No. 4: Without quantifying this significant nearby source of VOCs how can an accurate ambient air quality analysis be done?

Applicant's Objection: The Applicant objects to Data Request No. 4 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 4.

E. Objection to Data Request No. 5

Data Request No. 5: In order to compare the HECA project to other fossil fuel plant alternatives such as the Avenal project we request an analysis to be done from the respective AFC's of the total projected emissions of both plants for NOx, SOx (or SO2), VOC, and PM 10/PM2.5. The figures should be put into a joint table and then calculations per unit of power to the grid should be done for each plant and each pollutant. Projected gross mobile emissions (in the San Joaquin Valley) should also be included in the comparison.

Applicant's Objection: The Applicant objects to Data Request No. 5 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the

data request and the background thereto that may not be true. The Applicant also objects to Data Request No. 5 because the information and analysis requested is not reasonably related to a potential environmental impact associated with the Project. CEQA does not require an extensive comparison to other proposed projects. See 14 Cal. Code of Regs. § 15130(b) (cumulative discussion “need not provide as great detail as is provided for the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness”); see *Cadiz Land Co. v. Rail Cycle*, 83 Cal. App. 4th 74, 102 (2000); *East Bay Mun. Util. Dist. v. Dept. of Forestry & Fire Protection*, 43 Cal. App. 4th 1113, 1127 (1996). Data Request No. 5 calls for information that is speculative in nature because it does not provide a specific rationale for why additional information about an independent, unrelated project (Avenal) would be relevant to the Project’s environmental review process. See *El Dorado Union High School Dist. v. City of Placerville*, 144 Cal. App. 3d 123 (1983) (CEQA only requires the analysis of impacts that are a reasonably foreseeable consequence of the project). A cumulative impacts analysis will be completed in conformance with CEQA, CEC regulations, and the requirements of the San Joaquin Valley Air Pollution Control District (“SJVAPCD”). The information requested in Data Request No. 5 is not necessary for the preparation of the cumulative impacts analysis. The requested analysis would also be expensive and time consuming for the Applicant, with limited to no benefit. Thus, the burden that would be imposed on the Applicant in providing the requested information is not warranted in light of the limited informative value it would provide.

F. Objection to Data Request No. 6

Data Request No. 6: Please compare total green house gas emission estimates for Avenal and HECA and be sure to include all mobile emissions from all transportation related to each project. On a separate line please show all GHG emissions that Occidental will emit as they receive, inject, recover, clean, separate, repressurize, and reinject all CO2 produced by HECA and sent to them for Enhanced Oil Recovery operations.

Applicant’s Objection: The Applicant objects to Data Request No. 6 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 6.

G. Objection to Data Request No. 7

Data Request No. 7: Please compare total green house gas emission estimates for Avenal and HECA and be sure to include all mobile emissions from all transportation related to each project. On a separate line please show all GHG emissions that Occidental will emit as they receive, inject, recover, clean, separate, repressurize, and reinject all CO2 produced by HECA and sent to them for Enhanced Oil Recovery operations.

Applicant’s Objection: The Applicant objects to Data Request No. 7 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. The Applicant further objects to

those portions of Data Request No. 7 that relate to the Avenal project for the reasons described in its objection to Data Request No. 5 and will not respond to those portions of Data Request No. 7. Without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to the remainder of Data Request No. 7.

H. **Objection to Data Request No. 8**

Data Request No. 8: Please estimate the amount of oil to be recovered using the CO₂ from HECA and then calculate how much additional CO₂ the consumption of this oil will produce.

Applicant's Objection: The Applicant objects to Data Request No. 8 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. The Applicant further objects to Data Request No. 8 because it calls for information that is highly speculative and outside the scope of the environmental review of the Project. CEQA does not require an analysis of speculative impacts or impacts outside the scope of a project. See 14 Cal. Code of Regs. § 15144-14145; *Anderson First Coalition v. City of Anderson*, 130 Cal. App. 4th 1173, 1182 (2005); *Towards Responsibility in Planning v. City Council*, 200 Cal. App. 3d 671, 681 (1988). Potential emissions that may result from the use of oil produced by Occidental's Enhanced Oil Recovery ("EOR") activities are outside the scope of the project and highly speculative, and thus need not be analyzed under CEQA. The Applicant further objects to Data Request No. 8 on the basis that to the extent responsive information does exist, it is confidential business information of Occidental Petroleum that is not within the possession, custody or control of the Applicant.

I. **Objection to Data Request No. 9**

Data Request No. 9: Please estimate the total cost to this project of each ton of projected CO₂ captured and compare that to the current cost of photovoltaic energy on an equivalent energy produced scale. If this data request is not understood, the point is to see if producing energy from photovoltaic is comparable to the cost of capturing CO₂ including all subsidies, when the amount of energy produced is the key comparison factor.

Applicant's Objection: The Applicant objects to Data Request No. 9 as unrelated to the analysis of potential environmental impacts associated with the Project. CEQA requires a good faith analysis of potential environmental impacts from a project. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 392 (1988). It does not require an evaluation of issues outside the scope of the Project. See *Anderson First Coalition, supra*, 130 Cal. App. 4th at 1182. The Project does not involve the installation of photovoltaic panels. Alternative forms of energy generation are already evaluated in the AFC and by Staff as part of the environmental review process. The information in Data Request No. 9 would be expensive and time consuming for the Applicant to provide. The requested information would provide little to no value associated with analyzing potential Project impacts. Thus, the burden that would be imposed on the Applicant in providing the requested information is not warranted in light of the limited informative value that it would provide.

J. Objection to Data Request No. 10

Data Request No. 10: What is the total amount of farmland that will be preserved to mitigate the farmland loss from this project? Where is it located?

Applicant's Objection: The Applicant objects to Data Request No. 10 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 10.

K. Objection to Data Request No. 11

Data Request No. 11: What are the impediments to the project using produced water from the nearby oil fields instead of the relatively fresh groundwater?

Applicant's Objection: The Applicant objects to Data Request No. 11 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 11.

L. Objection to Data Request No. 12

Data Request No. 12: Where does the water migrate from currently to keep this underground aquifer brackish while farmers have been pumping in the area for decades already?

Applicant's Objection: The Applicant objects to Data Request No. 12 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 12.

M. Objection to Data Request No. 13

Data Request No. 13: What, if anything, is being done to mitigate the direct air pollution impacts of this project on the Tule Elk Reserve?

Applicant's Objection: The Applicant objects to Data Request No. 13 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 13.

N. Objection to Data Request No. 14

Data Request No. 14: Given all the environmental problems already in the immediate neighborhood of this project, and given that this project will add significantly to these problems, what can morally justify locating this project in this area at this time?

Applicant's Objection: The Applicant objects to Data Request No. 14 on the basis that it is argumentative, and requires the adoption of certain assertions and assumptions provided in the data request and the background thereto that may not be true. Nevertheless, without waiving its objection, or conceding to the truth of the assertions and assumptions provided in the data request or the background thereto, the Applicant intends to provide a timely response to Data Request No. 14.

DATED: October 27, 2009

Respectfully submitted,



Michael J. Carroll
LATHAM & WATKINS LLP
Counsel to Applicant

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

In the Matter of:) Docket No. 08-AFC-08
)
REVISED APPLICATION FOR)
CERTIFICATION FOR THE HYDROGEN) **PROOF OF SERVICE**
ENERGY CALIFORNIA PROJECT)
) (September 3, 2009)
)
_____)

APPLICANT

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HYDROGEN ENERGY CALIFORNIA PROJECT
CEC Docket No. 08-AFC-08

INTERESTED AGENCIES

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HYDROGEN ENERGY CALIFORNIA PROJECT
CEC Docket No. 08-AFC-08

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on October 27, 2009, I served and filed copies of the attached:

**OBJECTIONS TO CERTAIN DATA REQUESTS FROM THE ASSOCIATION OF
IRRITATED RESIDENTS (AIR) DATA REQUEST SET ONE**

to all parties identified on the Proof of Service List above in the following manner:

California Energy Commission Docket Unit

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

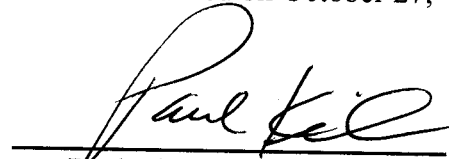
CALIFORNIA ENERGY COMMISSION
Attn: DOCKET NO. 08-AFC-11
1516 Ninth Street, MS-4
Sacramento, California 95814-5512
docket@energy.state.ca.us

For Service to All Other Parties

- Transmission via electronic mail to all email addresses on the Proof of Service list; and
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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 October 27, 2009, at Costa Mesa, California.



Paul Kihm