

## CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET  
SACRAMENTO, CA 95814-5512

April 22, 2011

Marc Campopiano  
Latham & Watkins LLP  
650 Town Center Drive, 20<sup>th</sup> Floor  
Costa Mesa, CA 92626

<b>DOCKET</b> 08-AFC-8
DATE 4-22-11
RECD. 5-2-11

Re: **Application for Confidentiality,  
Report of David H. Merchant, *Geologic Storage Options for CO2  
Sequestration of Carbon Dioxide, Elk Hills Field, June 2006* and  
related responses to Data Requests Nos. 222-224, 227, 229, 231, 234,  
235, 243.  
Hydrogen Energy International, LLC,  
Docket No. 08-AFC-8**

Dear Mr. Campopiano:

On March 4, 2011, Hydrogen Energy International, LLC, filed an application for confidentiality on behalf of the Hydrogen Energy California Power Plant ("Applicant"), in the above-captioned docket. Applicant seeks confidentiality for the report by David H. Merchant titled, *Geologic Storage Options for CO2 Sequestration of Carbon Dioxide, Elk Hills Field, June 2006*, and related responses to Data Requests Nos. 222-224, 227, 229, 231, 234, 235 and 243.

The application states that the report is confidential as a trade secret and as proprietary information. Specifically, the application claims:

. . . the Submitted Record represents a valuable compilation of confidential information related to Oxy's EOR Project. . . Applicant's or Oxy's competitors cannot readily obtain the information on the open market without making a commensurate investment of time and or resources as the Applicant or Oxy. The Applicant or Oxy would also lose their competitive advantage if its competitors could access the information.

A properly filed Application for Confidentiality shall be granted under the California Code of Regulations, title 20, section 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 California Public Records Act allows for the non-disclosure of trade secrets and proprietary information. (Gov. Code, §§ 6254(k), 6254.15 Evid. Code, § 1060.) The California courts have traditionally used the following definition of trade secret:

a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . .

(*Uribe v. Howe* (1971) 19 Cal.App.3d 194, 207-208, from the Restatement of Torts, vol. 4, § 757, comments b, p.5.)

California Code of Regulations, title 20, section 2505(a)(1)(D) states that if the applicant for confidential designation believes that the record should not be disclosed because it contains trade secrets, or its disclosure would otherwise cause loss of a competitive advantage, the application shall state: 1) the specific nature of the advantage; 2) how the advantage would be lost; 3) the value of the information to the applicant; and 4) the ease or difficulty with which the information could be legitimately acquired or duplicated by others.

Government Code section 6254.15 exempts from disclosure the following types of information:

Corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in locating a facility within California.

Applicant has made a reasonable claim that the law allows the California Energy Commission (Energy Commission) to keep the Merchant report and related responses to the above listed data requests confidential on the grounds that it is proprietary and trade secret information. The information has been developed exclusively by Applicant, contains information that is not public, and has the potential for economic advantage.

Applicant requests that the information be designated confidential indefinitely and that the information not be disclosed even if aggregated with other information or redacted to conceal certain information.

For staff to perform an appropriate level of independent analysis of the Hydrogen Energy Project and to provide adequate support for conclusions and mitigation in staff's environmental documents, staff may have to summarize portions of the Merchant report or Data Request responses. Therefore, a restriction that staff could not include some level of summation or aggregation of information in its environmental assessment or that the Energy Commission could not also include such information in a decision is contrary to the Energy Commission's public siting process and is denied. Historically, in the context of confidential cultural resources or economic data, staff has been able to balance the need to summarize confidential information to allow the public to understand the basis of staff's analysis yet ensure adequate aggregation or summation so to protect the sensitive data. In the context of the Merchant report, staff should be able to balance the competing needs with appropriate summarization of the study information if necessary.

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Based on the above discussion, the Applicant's confidentiality application is granted with the exception that staff may disclose summarized or aggregated information, if necessary, as part of staff's environmental documents and assessment. The materials subject to this confidentiality designation will be kept confidential for an indefinite period.

Be advised that persons may petition to inspect or copy 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, section 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", with a large, stylized flourish extending to the left.

Melissa Jones  
Executive Director

cc: Docket Unit  
Energy Commission Project Manager