

DOCKET

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From: Michael Boyd <michaelboyd@sbcglobal.net>
To: <puma@davis.com>
Date: 6/11/2006 2:30:43 PM
Subject: Docket No. 03-AFC-2, Los Esteros Motion to Override City of San Jose

Dr. Smallwood,

I have received no official notice of a hearing yet from the CEC of a hearing on the CEC Staff's Motion to Override the City of San Jose on CEQA mitigation for the impacts of Nitrogen deposition on protected species in serpentine habitat like the Checkerspotted Butterfly. If I could get something by close of business Friday I would appreciate it, but just respond to me and the service list if you need more time.

I need some written testimony to file on the Los Esteros Critical Energy Facility in Alviso, San Jose Ca. The issue being contested is the mitigation being offered up in the form of off-site mitigation (land) for the impact of Nitrogen deposition from NOx emitted by the project on serpentine habitat. For the Los Esteros Final Staff Assessment discusses NOx impacts and mitigation at page 54 and 57. See http://www.energy.ca.gov/sitingcases/losesteros2/documents/2004-11-15_FSA.PDF for the Biological Resources section of the FSA.

The City of San Jose was charged with preparing their own CEQA review to determine if the mitigation was feasible and adequate to mitigate the impacts of the project from NOx deposition. Apparently the CEC Staff and Calpine are not satisfied with the City's progress because on May 30, 2006 Staff counsel filed a Motion to Override the City offering up pre 1985 ERCs for CEQA mitigation instead. See http://www.energy.ca.gov/sitingcases/losesteros2/documents/2006-05-30_MOTION_OVERRIDE.PDF

"Banked ERCs are Recognized as Valid Mitigation for Air Quality Impacts Under Federal Law, State Law, and BAAQMD Rules.

Were the issue merely whether, in fact, "offsets/mitigation" have been identified, the above confusion could easily have been corrected. However, the April 18 letter goes on to state that the "City of San Jose Planning Staff is not supportive of the use of Emission Reduction Credits, from discontinued uses that are outside the project area, to mitigate the project's impact" This statement is indicative of a conceptual misunderstanding of federal and state law requirements for mitigating stationary source emissions with ERCs, and how such ERCs are regarded under CEQA.

1. Under Both State and Federal Law, Offsets are an Integral Mitigation Measure for Large Stationary Sources such as Power Plants.

Offsets were recognized as an important measure for air pollution control in the federal Clean Air Act of 1970, and subsequent amendments of that statute have emphasized their importance. (See generally, Grad, Treatise on Environmental Law, §§ 2.03[13][a] et seq.) Over time they have become a cornerstone of the federal New Source Review rules which are used to regulate stationary sources. (Manaster & Selmi, California Environmental Law and Land

Use Practice, § 41.23[4][d].) Offsets are enforceable emission reduction credits that 1) offset all anticipated emission increases from a new stationary source, and 2) result in a net air quality benefit. (Ibid.) Offsets are likewise a required device of the California Clean Air Act, and are adopted into the rules of the various regional air districts. (Id. at §§ 41.01 et seq.)."

At a recent evidentiary hearing on the San Francisco Energy Reliability Project, 04-afc-1 Bob Sarvey got the BAAQMD witness to admit on the record that ERCs are not CEQA mitigation for NO2 or nitrogen deposition impacts. See page 312 line 4 to 10 for BAAQMD witness SFERP May 22, 2006 evidentiary hearing at

http://www.energy.ca.gov/sitingcases/sanfrancisco/documents/2006-05-22_TRANSCRIPT.PDF

"4 BY MR. SARVEY:

5 Q In your response to my comment number
6 five on the PDOC you state that the District's
7 offset requirements are not intended to mitigate
8 local impacts such as NO2 and nitrogen deposition
9 impacts, is that correct?
10 MR. BATEMAN: Correct."

Your Metcalf Testimony on Nitrogen Deposition is at

http://www.energy.ca.gov/sitingcases/metcalf/documents/intervenors/2000-06-30_BIO_RESPONSE.PDF

Let me know if you need any other docs for preparing your testimony and I will send it to you.

Respectfully,

Michael Boyd President, CARE

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