STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:

Application for Certification
For the Avenal Energy Project

Docket No. 08-AFC-1

August 12, 2009

Energy Commission Staff's Opening Brief

On July 7, 2009, the Committee assigned to this proceeding held an evidentiary hearing to receive evidence into the record regarding the Avenal Energy Application for Certification. The Committee directed parties to file opening briefs by August 12, 2009, discussing all matters in contention. Below, Energy Commission staff (staff) addresses the pertinent issues raised by intervenors at evidentiary hearings and in their prehearing conference statements.

I. Avenal Energy Will Not Result in Any Unmitigated Significant Adverse Environmental Impacts.

Intervenors Center on Race, Poverty and the Environment (CRPE), the Tehipite chapter of the Sierra Club, and Rob Simpson (intervenors) have raised questions concerning the adequacy of the environmental review of Avenal Energy's potential for impacts in the areas of Air Quality, Greenhouse Gas Emissions, Public Health, Hazardous Materials Management, and Worker Safety and Fire Protection. As discussed below, staff has thoroughly evaluated the project's potential impacts in these areas and concluded that, with the mitigation measures proposed by staff and accepted by the applicant, the project would not result in any significant adverse impacts to the environment or public health.

A. Avenal Energy Will Not Result in Any Significant Adverse Impacts to Air Quality.

The intervenors make several assertions claiming Avenal Energy's impacts to air quality have not been sufficiently mitigated and staff's analysis of these impacts is flawed. Staff addresses each of these assertions below.

1. Avenal Energy Will Not Result in Any Significant Localized Air Quality Impacts.

Intervenors argue that staff has failed to show how allowing SOx offsets for PM10 emissions will mitigate Avenal Energy's localized air quality impacts. (Joint Prehearing Conference Statement by Sierra Club, Tehipiti Chapter and The Center on Race, Poverty & The Environment (Joint Statement), p. 3[1].) In the Final Staff Assessment (FSA), staff clearly describes the method and threshold used for determining significance and discusses the localized impacts caused by Avenal Energy (Exh. 200, pp. 4.1-20 to 4.1-26.) As shown in the analysis, the localized increases in pollutant concentrations that contribute to existing violations of ambient air quality standards will be mitigated to a less than significant level through a combination of using Best Available Control Technology (BACT) and Emission Reduction Credits (ERCs). (Exh. 200, pp. 4.1-31 to 4.1-32.) Intervenors' main contention is that ERCs do not mitigate for localized impacts, but they fail to provide evidentiary support for this argument.

The dispersion modeling shows Avenal Energy will not result in any significant adverse localized impacts. (RT 7/7/09 p. 256.) The project will use a combination of BACT and ERCs to mitigate for both regional and local impacts. (Exh. 200 4.1-38; RT 7/7/09 p. 256, 258.) Because the region is a shared airshed, reductions in a pollutant in one part of the basin provide a benefit to other parts of the basin. (RT 7/7/09 pp. 260-261.) While this project may be using credits from another part of the air basin, projects located in other areas are using credits obtained from locations near Avenal. (RT 7/7/09 p. 262.) Additionally, credits over 15 miles from the project are given less value by the air district, ensuring a surplus of reductions. (RT 7/7/09 pp. 261-262.)

[1] The document does not contain page numbers. For ease of reference I have identified the page on which the argument can be found, counting from the cover page of the document as page 1.

2. The Emission Reduction Credits Are Provided In Sufficient Ratio to Mitigate the Project's Impact on Regional Air Quality.

Intervenors argue that a one-to-one ratio of SOx to offset PM10 and PM2.5 emissions is insufficient to mitigate for the project's impacts. (Joint Statement, p. 3.) They argue that staff should have instead used a 40-to-1 offset ratio, which they claim is supported by the U.S. Environmental Protection Agency (EPA) in its final rule published on May 18, 2008 titled, "Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5)." (73 Federal Register 28321.) This rulemaking by EPA, however, does not establish a mandatory 40-to-1 ratio. (RT 7/7/09 p. 263.) The rule specifically states: "[u]se of the preferred ratios is recommended by EPA but not mandatory, and we do not intend to preclude the opportunity for a local demonstration of trading ratios on a case-by-case basis and public input into that process." (73 Federal Register 28321, 28339.) The San Joaquin Valley Air Pollution Control District has demonstrated why a 1:1 ratio of SOx offsets for PM10/PM2.5 emissions is justified in this case and staff has accepted SVJAPCD's analysis as reasonable. (Exh. 200, p. 4.1-38.) With these offsets, staff has concluded that Avenal Energy has shown sufficient mitigation to reduce the project's impacts to air quality to less than significant. (Exh. 200, pp. 4.1-29 to 4.1-32; RT 7/7/09 pp. 257-258, 263-264, and 273-275.)

Intervenors also argue that there was insufficient information about the Emission Reduction Credits (ERCs) to conclude that they are valid and mitigate the project's impacts (Joint Statement, p. 4.) Staff testified that, with the information provided by the applicant and obtained by the air district, staff was able to verify that the ERCs provided were valid and would mitigate project impacts to less than significant. (RT 7/7/09 pp. 259-260.) The certificate numbers and locations, where known, of the offsets are identified by staff in Air Quality Tables 17-20. (Exh. 200, pp. 4.1-28 to 4.1-30.) Intervenors have not provided any evidence calling into question the validity of these ERCs.

3. Avenal Energy Would Not Result in Any Significant Adverse Air Quality Impacts Resulting From Construction.

Intervenors argue that staff's analysis of construction emission impacts is flawed because it was qualitative rather than quantitative. (Joint Statement, pp. 6-7.) In its analysis, staff has described and quantified the potential for construction emissions and has concluded that, with the applicant's proposed mitigation measures and those proposed by staff in AQ-SC1 through AQ-SC5, construction-phase impacts are reduced to a level less than significant. (Exh. 200, pp. 4.1-13 to 4.1-16, 4.1-20 to 4.1-23; RT 7/7/09 pp. 176, 256-257.) Though not explicit, intervenors seem to be arguing that the applicant must be required to offset all of its construction emissions in order for staff to conclude that construction impacts are less than significant. They fail, however, to cite any controlling legal authority to support this contention or the contention that the precise effects of the applicant's or staff's proposed mitigation measures must be quantified. Based on the short-term nature of the emissions and the stringent controls both staff and applicant have proposed to limit construction emissions to the minimum amount feasible, staff reasonably concluded that construction impacts would be less than significant. (RT 7/7/09 pp. 174-175.)

4. The Ammonia Slip Limit Contained in Condition of Certification AQ-SC10 is Sufficient to Reduce Avenal Energy's Ammonia Impacts to Less Than Significant.

In his non-expert testimony, intervenor Rob Simpson references the Final Determination of Compliance (FDOC) and argues that the project is being allowed a higher ammonia slip limit than other projects recently permitted by the Energy Commission. (Exh. 300, p.2.) In fact, regardless of what the FDOC allows, staff has proposed AQ-SC10, which establishes an ammonia slip limit of 5 ppm over a rolling 24-hour period, consistent with similar projects recently permitted by the Energy Commission. (Exh. 200, p. 4.1-45; RT 7/7/09 p. 256; see also Walnut Creek Energy Center Final Commission Decision, p. 15.) If adopted, this stricter limit would prevail. Thus, staff reasonably concluded that, with the proposed condition of certification, Avenal Energy's ammonia emissions would not result in any significant adverse impacts.

B. Avenal Energy's Greenhouse Gas Emissions Will Not Result in Any Significant Adverse Impacts

Intervenors argue that staff's greenhouse gas analysis is flawed in several respects: 1) staff failed to use an appropriate baseline in determining impacts; and 2) staff inappropriately relied on the displacement of electricity from less efficient power plants in concluding that Avenal Energy would have a less than significant impact; 3) the emission reductions attributed to Avenal Energy could be double-counted when a cap-and-trade system under AB32 is implemented; and 4) certification of Avenal Energy could preclude additional renewable facilities from being built, thus thwarting the goals of AB32. For the reasons discussed below, these concerns are not reasonable and not supported by any evidence in the record.

1. Staff Used the Appropriate Baseline to Analyze Avenal Energy's Greenhouse Gas Emissions.

In assessing impacts, the CEQA guidelines direct agencies to "**normally** limit [their] examination to changes in the existing physical conditions in the affected area as they exist at the time...environmental analysis is commenced." (Cal. Code Regs., tit. 14, §15126.2 [emphasis added].) In conducting its analysis of Avenal Energy's greenhouse gas emissions, staff compared the emissions that would occur with Avenal Energy connected to the grid to the environment that existed when the analysis was prepared. (RT 7/7/09 p. 144, 161, 163.) In comparing Avenal Energy's greenhouse gas emissions to the existing environment, staff concluded that Avenal Energy would not result in any significant adverse impacts because it would contemporaneously displace electricity from other less efficient power plants, thereby displacing greater greenhouse gas emissions from those other plants than Avenal Energy would emit. (Exh. 200, p. 4.1-87.) Intervenors claim that this approach uses a future baseline to compare project impacts and is disallowed under CEQA. (Joint Statement, p. 6.) Neither of these assertions is correct.

The use of the term "normally" in the CEQA Guidelines indicates that there is some flexibility in an agency's determination of the appropriate point in time to identify as the baseline. Nevertheless, it is simply untrue that accounting for all of the contemporaneous

impacts of a project, either adverse or beneficial, amounts to utilizing a future scenario as the baseline. Staff's analysis involved taking the environmental setting as it exists today and discussing what the anticipated effects, both good and bad, direct and indirect, of plugging Avenal Energy into the electricity system would be. CEQA does not require agencies to ignore the beneficial effects of a proposed project in analyzing whether a project would ultimately create significant adverse impacts.

2. Staff's Greenhouse Gas Emissions Analysis Does Not Assume That Unenforceable Mitigation Would Occur

Intervenors also argue that staff's greenhouse gas emissions analysis is flawed because it relies on future mitigation that is not guaranteed to occur. (Joint Statement, p. 6.) This reflects a misunderstanding of the analysis. Staff did not conclude that, with mitigation, the project's impacts would be less than significant. Staff concluded that the project did not necessitate mitigation in the first place because a direct effect of the project providing electricity is that such operation would replace generation from other, less efficient powerplants. Therefore, emissions from other power plants in the state's electricity system would be avoided entirely, and the net result is fewer greenhouse gas emissions from the system with Avenal Energy operating than without. (RT 7/7/09 p. 148, 150.) This is a direct result of how the electricity system functions and does not necessitate any enforcement to bring it about. Such displacement would only occur with Avenal Energy or another new electricity generator.

Intervenors also argue that staff cannot credit Avenal Energy with displacing less efficient generation because those plants would be shutting down anyway. (Joint Statement, p. 6.) It is import to distinguish staff's analysis that, pursuant to market forces, Avenal Energy would displace less efficient generation and the argument that intervenors falsely attribute to staff that Avenal Energy would cause less efficient generation to shut down. Staff does not argue that the construction of Avenal Energy will cause any particular power plant to shut down, although it is likely that one or more plants will shut down as a result of Avenal's operation. (RT 7/7/09 p. 171.) Staff has simply concluded that, for any hour that Avenal Energy runs, a less efficient plant will not be able to sell its power into the market. Therefore, the net total of greenhouse gas emissions for that hour

is reduced. This does not depend on any particular plant shutting down, nor is the analysis compromised if any of the power plants listed in Greenhouse Gas Tables 5 and 6 shut down prior to construction of Avenal Energy. (Exh. 200, pp. 4.1-83 and 85.) Even if all the coal contracts expire and the facilities that use once-through cooling begin to shut down, there will still be many less efficient power plants remaining and, for the foreseeable future, these less efficient plants will be operating and selling power into the electricity grid. (RT 7/7/09 pp. 188.) Any time Avenal Energy operates, it would be displacing this less efficient electricity.

3. The Construction of Avenal Energy Would Not Preclude the Construction and Operation of Renewable Energy Facilities.

Intervenor Rob Simpson expressed concern that Avenal Energy would displace renewable energy. (RT 7/7/09 p. 194.) As staff testified, because of the state's renewable portfolio standard, most renewable energy facilities have must-take contracts requiring utilities to take all the electricity they can generate. (RT 7/7/09 pp. 149, 194-195.) Additionally, once a renewable facility is built, its operating costs will always be lower than a facility that must purchase fuel; therefore, a renewable facility will always be able to bid into the electricity market at a lower rate than a natural-gas facility and, therefore, is not at risk of being displaced. (RT 7/7/09 pp. 149, 195.) There is no risk that Avenal Energy would prevent any renewable facility from providing electricity to the grid.

C. Avenal Energy Will Not Result in Any Significant Adverse Impacts to Worker Safety or Hazardous Materials.

In previous comments, intervenors raised the concern that pesticides remaining in the soil from past agricultural use of the project site might affect workers during construction. (Letter from CRPE to Commissioners Byron and Rosenfeld, March 11, 2009, pp. 6-7.) As a result of these concerns, staff has proposed condition of certification Waste-1. The condition would require the project owner to sample the soil prior to construction and, if persistent agricultural chemicals are found in amounts exceeding applicable thresholds, develop a plan to remediate. (Exh. 200, pp. 4.13-18 and 19.) With this condition, staff concludes that all potential impacts to workers resulting from past pesticide use will be

mitigated to less than significant. (Exh. 200, pp. 4.13-9 through 11; 4.14-14; RT 7/7/09 pp. 378-379.)

Intervenors also raised the concern that the ammonia used by the project could be intentionally dumped into the nearby California Aqueduct, resulting in contamination. (RT 7/7/09 p. 406.) Staff testified that there are security precautions in place that would prevent the theft of ammonia from the project site or during transportation enroute to the project. (RT 7/7/09 pp. 407-408.) Even in the highly unlikely event someone with illicit intentions could obtain the ammonia used by the project (which is already diluted to a concentration of 19% in water), the large volume and flow of water in the aqueduct would quickly dilute and render harmless any illegally-dumped ammonia. (RT 7/7/09 p. 408.)

II. Staff's Analysis of Cumulative Impacts Complies with CEQA and Concludes that Avenal Energy Will Not Result in any Significant Public Health Impacts.

Intervenors argue that staff's cumulative impacts analysis is deficient because staff failed to include the Chemical Waste Management Hazardous Waste Facility (ChemWaste) in its analysis of cumulative impacts and staff failed to analyze Avenal Energy's impacts on residents of Kettleman Hills. (Joint Statement, p. 5.) These assertions are not supported by the record. Staff discusses the Chem Waste facilty throughout the FSA in those technical areas where the existence of the facility has the potential to result in a cumulative impact. This includes Hazardous Materials Management (Exh. 200, pp. 4.4-19 to 20), Noise and Vibration (Exh. 200, p. 4.6-13), Public Health (Exh. 200, pp. 4.7-12 to 13), and Socioeconomics (Exh. 200, p. 4.8-10). In all other areas, staff was aware of the existence of the facility, but determined either that the facility was already reflected in baseline data, that there was insufficient data available concerning the anticipated expansion of the facility to support inclusion in an analysis, or that, given the nature of the facility and its location, it could not feasibly contribute to a cumulative impact with Avenal Energy in that technical area. (RT 7/7/09 pp. 277-279.)

Additionally, staff did not arbitrarily exclude residents of Kettleman Hills from analysis of Avenal Energy's impacts. In each technical area of the FSA, staff describes the scope

of its analysis and the geographic area of potential effect. If residents of Kettleman Hills were not included in a particular analysis, it was because those residents were outside the area in which Avenal Energy could reasonably be found to result in a significant direct, indirect, or cumulatively considerable impact. Intervenors voiced concern over a birth defect cluster occurring in Kettleman Hills. This issue falls under public health and is also addressed in Hazardous Materials Management, and staff took great pains to ensure that it thoroughly analyzed the potential of Avenal Energy to contribute to such an impact. Staff ultimately concluded that Avenal Energy would not produce the types of chemicals that could contribute to or cause, significantly or otherwise, the birth defect cluster identified by intervenors. (Exh. 200, pp. 4.7-12 to 13 and 4.4-19 to 20; RT 7/7/09 pp. 382-385, 388.)

III. There is No Requirement That Agencies Adopt Quantitative Thresholds of Significance.

Intervenors argue that staff has failed to comply with CEQA for those areas where a quantitative threshold of significance has not been adopted. (Joint Statement, p. 7.) The CEQA Guidelines provides that

> [e]ach public agency is **encouraged** to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, **qualitative or performance level** of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.

(Cal. Code Regs., tit. 14, §15064.7(a) [emphasis added].)

Thus, there is no requirement that an agency establish any thresholds of significance for its review of environmental impacts, and, even if an agency wanted to so establish thresholds of significance, there is no requirement that they be quantitative in nature. Agencies are given leave to analyze environmental impacts on a case-by-case basis, taking into consideration the individual characteristics of each particular project without being required to adhere to an overarching standard. Staff's reliance on informal qualitative thresholds of significance in areas such as construction impacts and on

analyzing some technical areas solely on a case-by-case basis is reasonable and acceptable under CEQA.

IV. Staff's Alternatives Analysis Complies with CEQA

Intervenors argue that staff's alternatives analysis does not comply with CEQA for several reasons: 1) it does not identify a reasonable range of alternatives because none of the alternatives identified ultimately resulted in fewer impacts; 2) it excludes consideration of solar or other alternative energy projects; 3) there was insufficient basis for excluding the identified Morro Creek Alternative; and 4) staff improperly concludes that the proposed project is environmentally superior to the no project alternative. (Joint Statement, p. 5.) Staff addresses each of these arguments below.

A. Staff's Analysis Identifies a Reasonable Range of Alternatives Consistent With Requirements of CEQA

Intervenors argue that staff's alternatives analysis is deficient because no environmentally superior alternatives were identified. (Joint Statement, p. 5.) CEQA requires an agency's environmental review of a project to discuss

> a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.

(Cal. Code Regs., tit. 14, §15126.6.)

Staff identified several technology and site alternatives for evaluation, including: two alternative sites near the proposed project area, two alternative sites outside of the San Joaquin Air Pollution Control District, a smaller facility, and several alternative technologies involving renewable resources (solar, wind, geothermal, hydroelectric, biomass, etc.). (Exh. 200, pp. 6-9 through 6-21.) Staff ultimately concluded that, because all of Avenal Energy's impacts had been mitigated to less than significant and because the identified alternatives either had issues with regard to feasibility or additional environmental impacts not presented by the proposed project, none of the identified alternatives was environmentally superior. (Exh. 200, pp. 6-24 to 6-25.) CEQA does not require an agency to always identify preferable alternatives, especially where the

proposed project does not present any unmitigated significant adverse impacts. It simply requires a reasoned, detailed discussion of the comparative merits of the alternatives identified. (Cal. Code Regs., tit. 14, §15126.6(a).) Staff's alternatives analysis provides this reasoned discussion.

B. Staff's Alternatives Analysis Includes a Discussion of Renewable Resource Technologies.

Intervenors argue that staff's alternatives analysis is deficient because it fails to consider renewable resources "such as solar or other alternative energy project." (Joint Statement, p. 6.) On the contrary, staff's alternatives analysis discusses the feasibility of solar and other renewable facilities meeting the project objectives, as well as other options such as increased conservation and demand side management. (Exh. 200, pp. 6-18 to 6-21.) Intervenors may disagree with staff's conclusions, but there can be no argument that these alternative technologies were not considered and discussed. Intervenors provided no evidence supporting the contention that a renewable facility would satisfy the objectives of this project and be environmentally preferable.

C. Staff's Conclusion That the Morro Creek Alternative Site Was Not Feasible Is Reasonable and Supported by Substantial Evidence

Intervenors argue that it was unreasonable for staff to conclude that the Morro Creek alternative was infeasible. (Joint Statement, p. 6.) Staff excluded further consideration of this site based on several factors, including improper zoning for a power plant, potential for geological impacts, including flooding and potentially unsuitable soils, and the nearness of sensitive receptors. (Exh. 200, pp. 6-10 to 6-11.) Intervenors do not explain why they believe this site presents a viable alternative, nor did they provide any evidence to support this belief.

D. Staff Properly Concluded that Avenal Energy is Superior to the No-Project Alternative

Intervenors argue that staff's conclusion that Avenal Energy is environmentally superior to the no-project alternative reflects a failure of staff to recognize the local air impacts of the proposed project. (Joint Statement, p. 6.) As discussed above and in staff's Air Quality testimony, all of Avenal Energy's impacts to air quality, both local and regional,

have been mitigated to less than significant. Additionally, staff has concluded that Avenal Energy would displace and facilitate the replacement of some older, less-efficient power plants, thus providing a reduction in overall greenhouse gas emissions. For these reasons, staff's conclusion that the no-project alternative is not environmentally superior to Avenal Energy is supported by substantial evidence.

V. Avenal Energy Will Not Result in Any Disproportionate Impacts to Low-Income or Minority Populations.

Intervenors argue that staff's analysis fails to comply with Executive Order 12898, which requires affected agencies to identify and address "disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations...." First of all, the Executive Order applies only to federal agencies. Nevertheless, staff analyzed the project's potential to result in disproportionate impacts in the following technical areas: Air Quality, Hazardous Materials Management, Land Use, Noise, Public Health, Socioeconomics, Soils and Water Resources, Traffic and Transportation, Transmission Line Safety and Nuisance, Visual Resources, and Waste Management and concluded that the project would not result in any significant adverse impacts and, therefore, would not result in any disproportionate impacts to minority or low-income populations. (Exh. 200, pp. 1-3 to 4; RT 7/7/09 pp. 31-32 [correcting typographical errors in the Environmental Justice discussion of the FSA].)

Intervenors argue that this conclusion fails to take into consideration the localized air quality impacts of the project or the cumulative impacts of this project coupled with existing or proposed projects in the vicinity. As discussed above and in staff's Air Quality analysis, Avenal Energy will not result in any local impact to air quality. (RT 7/7/09 pp. 256-258.) Similarly, staff analyzed the project's potential to considerably contribute to a cumulative impact and concluded that Avenal Energy would not have such an effect. (RT 7/7/09 pp. 256-258.) Intervenors do not provide any evidence to support their contention that, in light of staff's analysis and proposed mitigation measures, Avenal Energy would still result in a significant impact and, thus, a disproportionate impact to minority or low-income populations.

VI. Avenal Energy Will Comply With All Laws, Ordinances, Regulations, and Standards

During cross examination of staff, intervenor CRPE asked whether staff had analyzed Avenal Energy pursuant to Water Code section 10910. This section requires a city or county reviewing a project, as defined by Water Code section 10910, to perform a water supply and demand assessment. Since the Energy Commission's permit is in lieu of local agency permits, an argument can be made that the requirement also applies to the Energy Commission's review of power plant facilities, if the facility under review meets the definition of project in section 10910. Avenal Energy, however, does not meet this definition and, therefore, a water supply and demand assessment is not required. Water Code section 10912 defines project as:

> [a] proposed industrial, manufacturing, or processing plant, or industrial park planned to house more than 1,000 persons, occupying more than 40 acres of land, or having more than 650,000 square feet of floor area.

(Water Code §10912(a)(5).)

Avenal Energy does not meet any of these parameters. The project would have only 25 full-time employees, would occupy only 34 acres, and would have only 98,400 square feet of floor space. (Exh. 200, p. 4.8-2, 3-2; Exh. 1, Figure 2.3-3 and Appendix 2-2, Figure B-13.)

Under the statute a project also includes any:

> project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project.

(Water Code §10912(a)(7).)

The guidelines developed by the Department of Water Resources to aid agencies in interpreting the requirements of this Water Code provision state that "one dwelling unit typically consumes .3 to .5 acre-feet of water per year." (Guidebook for Implementation of Senate Bill 610 and Senate Bill 221 of 2001 to assist water suppliers, cities, and counties in integrating water and land use planning, Department of Water Resources, October 8, 2003, p. 3.) Taking the smallest predicted use of 0.3 acre feet per dwelling, a

water use equivalent to a 500 unit dwelling would be 150 acre feet of water per year. As staff testified, Avenal Energy would only use 104 acre feet of water per year at maximum. (Exh. 200, p. 4.9-7.) This is not enough to trigger the 150 acre-feet per year threshold to require analysis under 10910.

VII. All Noticing Requirements Were Complied With

Intervenors argue that noticing with regard to Avenal Energy was deficient because the Energy Commission failed to ensure that notice was provided to all potentially interested or affected persons, including residents of Kettleman Hills, and documents should have been provided in Spanish. (Joint Statement, pp. 7-8.) Several entities within the Energy Commission provide various notices concerning siting cases. Staff provides notices of staff workshops and the release of the preliminary and final staff assessments. The Hearing Office notices Committee-led events such as the informational hearing and site visit, status conferences, the prehearing conference, and evidentiary hearings. The Public Adviser's Office provides additional outreach for critical events as well as provides information to interested persons wishing to become more actively involved. (RT 7/7/09 pp. 55-59.) And the Media Office provides notice of events to local and regional press through press releases. Through the activities of these entities, the Energy Commission has gone above and beyond the standard CEQA noticing requirements to ensure that interested persons are notified of activities in this proceeding. (Exh. 200, pp. 1-2 to 3; RT 7/7/09 pp. 53-60.) Along with noticing residents and entities in Avenal, the noticing efforts included sending notices to entities and residents in Kettleman City and Huron as well as including notices of key hearings in the local newspapers in both English and Spanish. (RT 7/7/09 pp. 47, 57-58.) Additionally, an informational sheet describing the proposed project was provided in Spanish and a Spanish interpreter was present at most staff workshops and at the evidentiary hearing to provide interpretation for monolingual Spanish speakers.

Intervenors argue that the case *El Pueblo Para El Aire y Agua Limpio v. Kings County Board of Supervisors* (December 31, 1991, Sacramento Superior Ct. No. 366045 [nonpub. opn.) supports their contention that the Energy Commission's efforts to

accommodate the participation of monolingual Spanish speakers was insufficient. This is an old superior court case that does not appear to be published and, therefore, cannot be relied upon. (California Style Manual, §1.25.) Nevertheless, even if it did serve as controlling authority, it cannot be found to hold that the measures taken by the Energy Commission are inadequate under CEQA.

In the case, the court set aside a Final Subsequent Environmental Impact Report (FSEIR) for a hazardous waste incinerator because the court found the analysis of air quality impacts misleading and inaccurate and the analysis of agricultural and cumulative air quality impacts inadequate. (Ruling on submitted matter, pp. 3, 5, & 8.) As an apparent aside, the court states that CEQA "would have justified the Spanish translation" of a summary of the FSEIR, public notices, and testimony and that without any of these their meaningful involvement was precluded. (Ruling on submitted matter, p. 10.) It is not clear, however, that absent the other inadequacies the court would have struck down the FSEIR for solely this purpose and the decision implies that the County did not attempt any Spanish translation or interpretation, in contrast to this proceeding. Notice of the Informational Hearing, FSA, FSA workshop, and evidentiary hearing were all provided in Spanish and a Spanish interpreter was provided at the PSA and FSA workshop and at the evidentiary hearing. (RT 7/7/09 pp. 57-58.) Additionally, an informational sheet describing the project was provided in Spanish and the Public Adviser, who speaks Spanish, on several occasions offered to help members of the public to participate more actively in the proceeding. (RT 7/7/09 pp. 58-59.) The Energy Commission's outreach to monolingual Spanish speakers and other interested persons in the communities surrounding the proposed project site ensured that no one who was interested was precluded from participating in this proceeding.

VIII. Conclusion

Staff's conclusions that Avenal Energy will not result in any unmitigated significant adverse impacts and would comply with all applicable laws, ordinances, regulations, and standards are supported by substantial evidence in the record, and the analysis and

proceeding were conducted according to proper procedure. Intervenors have failed to provide any evidence to the contrary.

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Respectfully submitted,

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APPLICATION FOR CERTIFICATION
For the AVENAL ENERGY PROJECT

Docket No. 08-AFC-1
PROOF OF SERVICE
(Revised 6/17/2009)

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DECLARATION OF SERVICE

I, **Chester Hong**, declare that on **August 12, 2009**, I served and filed copies of the attached **"Energy Commission Staff's Opening Brief"**, dated **August 12, 2009**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/avenal]**.

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

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AND

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__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.