

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

**APPLICATION FOR CERTIFICATION FOR THE  
AVENAL ENERGY PROJECT**

DOCKET NO. 08-AFC-1  
(AFC filed February 21, 2008)

**DOCKET**

**08-AFC-1**

**AVENAL POWER CENTER, LLC'S  
REPLY BRIEF**

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**I. INTRODUCTION**

On August 12, 2009, the parties to the Avenal Energy Project ("Project") Application for Certification ("AFC") proceeding filed their opening briefs. Avenal Power Center, LLC ("Avenal Power") hereby files its reply brief, which addresses the opening briefs filed by Intervenor Rob Simpson; Intervenor Center for Race, Poverty, and the Environment ("CRPE"); and California Energy Commission Staff ("Staff").

Due to the large number of issues raised by the intervenors in their opening briefs, many of which have already been extensively addressed in Avenal Power's opening brief and at other points in the record, Avenal Power has created a matrix of previously-addressed points indicating where these issues have been addressed (included as Attachment A to this reply brief).

**II. SPECIFIC ISSUES BY TOPIC AREA**

**A. Air Quality and Public Health**

CRPE generally claims the Commission failed to analyze and mitigate the Project's local air quality impacts. (CRPE Opening Brief at 7.) The sections below address CRPE's specific grounds for this claim.

1. The Project's Analysis Properly Correlates Air Quality Impacts to Resulting Public Health Impacts.

CRPE claims the Project's analysis fails to correlate air quality impacts to resulting public health impacts, in violation of the California Environmental Quality Act ("CEQA"). (CRPE Opening Brief at 7.) In support of this contention, CRPE cites *Bakersfield Citizens for*

*Local Control v. City of Bakersfield*, 124 Cal.App.4th 1184 (2004). CRPE is correct that in *Bakersfield Citizens*, the court held the failure to correlate air quality impacts to resulting public health impacts violated CEQA. (*Bakersfield Citizens*, 124 Cal.App.4th at 1219-1220.) *Bakersfield Citizens* concerned an Environmental Impact Report (“EIR”) that identified potential air quality impacts while including “no acknowledgement or analysis of the well-known connection between reduction in air quality and increases in specific respiratory conditions and illnesses.” (*Bakersfield Citizens* at 1220.) However, the environmental analysis in *Bakersfield Citizens* is distinguishable from the analysis conducted for the Project. The FSA contains an entire attachment of background information on criteria pollutants, which describes in detail the various health risks these pollutants can create. (Ex. 200 at 4.7-15 through -20 [Attachment A – Criteria Pollutants].) The ambient air quality standards used to address the Project’s criteria pollutants are designed specifically to protect public health, and they are stringent enough to protect the members of the population who are most susceptible to respiratory distress. (Ex. 1 at 6.2-4; Ex. 200 at 4.1-7; July 7, 2009 Evidentiary Hearing Transcript [“7/7/2009 RT”] 403:22-404:16.)

Avenal Power also conducted a multi-pathway health risk assessment for noncriteria toxic air pollutants. (Ex. 1 at Appendix 6.16-1.) This assessment analyzes the Project’s adverse air emissions and, using extremely conservative assumptions regarding potential exposure to those emissions, calculates the risk of cancer and acute and chronic noncancer health effects throughout a grid containing thousands of receptor points. (See Ex. 200 at 4.7-3.) This assessment revealed no potential for a significant impact to public health. (Ex. 200 at 4.7-12 [Public Health Table 2].)

CRPE also cites *Berkeley Keep Jets Over the Bay Comm. v. Board of Port Commissioners*, 91 Cal.App.4th 1344, 1369-1372 (2001), a case in which the court invalidated an EIR for failing to conduct a health risk assessment (“HRA”) despite finding that the project would have a significant impact on public health. CRPE cites this case for the proposition that a significance finding without analysis “allows the lead agency to travel the impermissible easy road to CEQA compliance.” (CRPE Opening Brief at 7-8.) While this may be true, this case is not relevant here because Staff and Avenal Power have extensively analyzed potential public health impacts from the Project, and have conducted an HRA in this case. (See Ex. 1 at Appendix 6.16-1.) The analysis conducted for the Project is further distinguishable from

*Berkeley Keep Jets Over the Bay* because the Project's impact to both air quality and public health will be less than significant. (Ex. 200 at 4.1-1, 4.7-1.) Therefore, the cases cited by CRPE do not demonstrate any insufficiency in the Project's public health impact analysis.

2. The Project's Analysis Provides Sufficient Evidence to Support a Finding that the Project's Emission Reduction Credits Will Adequately Mitigate the Project's Regional and Local Air Quality Impacts.

CRPE claims Staff failed to demonstrate the ERCs will mitigate the Project's air quality impacts. (CRPE Opening Brief at 8.) First, CRPE claims Staff failed to provide enough information regarding the ERCs to allow decisionmakers and the public to judge their adequacy as mitigation. (CRPE Opening Brief at 8.) CRPE claims that "the FSA provides no information on the type of any of the ERCs being claimed to offset the project's air impacts." (CRPE Opening Brief at 9.) However, the FSA does include separate tables detailing the offset analysis for the Project and offset holdings for NO<sub>x</sub>, VOCs, PM<sub>10</sub>, and SO<sub>x</sub>. (See Ex. 200 at 4.1-27 through -30.) The San Joaquin Valley Air Pollution Control District ("SJVAPCD") and Staff have thoroughly reviewed these offset holdings and found them to satisfy SJVAPCD and Commission rules. (7/7/2009 RT 258:23-260:3, 266:7-19.)

CRPE cites *Berkeley Keep Jets Over the Bay v. Board of Port Comm'rs*, 91 Cal. App. 4th 1344, 1381 (2001) in support of the contention that "specific data must be presented when it is necessary for the meaningful analysis of a significant impact and reasonably feasible to do so." (CRPE Opening Brief at 9.) In that case, the court invalidated the EIR partially for using scientifically outdated information in measuring aircraft emissions, and for failing to include a health risk assessment. (*Berkeley Keep Jets Over the Bay*, 91 Cal.App.4<sup>th</sup> at 1367 and 1371.) The decision in *Berkeley Keep Jets Over the Bay* would in no way require any further information pertaining to the Project's offset holdings because the proposed offsets have been described and reviewed by both Staff and SJVAPCD.

CRPE further claims the Project's ERCs "must be spatially, temporally, and qualitatively equivalent to the project's actual emissions...." (CRPE Opening Brief at 9.) CRPE offers no citation for this contention, and indeed this contention has no basis in the law. SJVAPCD's rules require emission reductions to be "real, enforceable, quantifiable, surplus, and permanent." (SJVAPCD Rule 2201, section 3.2.1.) The offsets purchased by the Project satisfy all of these requirements. (See 7/7/2009 RT 258:23-260:7; Ex. 200 at 4.1-33 through -34.)

3. The Commission May Properly Use Information and Proposed Mitigation Measures from the San Joaquin Valley Air Pollution Control District In Its Analysis.

CRPE complains that the Commission improperly relied upon the interpollutant trading ratio established by SJVAPCD, contending the Commission should have developed its own offset ratio. (CRPE Opening Brief at 11.) CRPE claims the Commission “cannot merely rely on another public agency or process as a substitute for its work as lead agency.” (*Id.*)

CRPE misunderstands the relationship between lead and responsible agencies contemplated by CEQA. Section 15204 of the CEQA Guidelines specifically allows a responsible agency such as SJVAPCD to propose mitigation measures to address a project’s impacts. This section provides:

Prior to the close of the public review period for an EIR or mitigated negative declaration, a responsible or trustee agency which has identified significant effects on the environment may submit to the lead agency proposed mitigation measures which would address those significant effects. Any such measures shall be limited to impacts affecting those resources which are subject to the statutory authority of that agency. (14 C.C.R. § 15204[f].)

This is precisely what has occurred in this case. SJVAPCD, the agency responsible for the air quality in eight counties including Kings County, has identified potential significant effects on the environment, and has submitted to the lead agency (the Commission) proposed mitigation measures, including interpollutant trading, which would reduce those impacts to below the level of significance. There is substantial evidence in the record supporting SJVAPCD’s suggested interpollutant trade ratio. (Avenal Power Opening Brief at 36-37; see also Ex. 61.) Therefore, it is entirely proper for the Commission to benefit from the work already done in this area by SJVAPCD.

Furthermore, in many resource areas, the Commission may adopt standards “which may be different from or more stringent than those adopted by local, regional, or other state agencies....” (Cal. Pub. Res. Code § 25216.3[a].) However, the Warren-Alquist Act expressly excludes “air and water quality” standards from this provision. (*Id.*) Therefore, it is entirely consistent with CEQA for the Commission to evaluate the Project for compliance using the measures proposed by SJVAPCD.

The Commission’s regulations also clearly contemplate some degree of reliance upon the

work of local air districts in the site certification process. (See, e.g., 20 C.C.R. § 1744.5 [describing the air district’s role in preparing a Determination of Compliance as part of the site certification process].) The purpose of this coordinated approach to addressing air quality issues is to take advantage of the expertise of the local air districts. SJVAPCD has a great deal of expertise regarding air quality issues in the San Joaquin Valley, and the analysis conducted by SJVAPCD has properly supplemented Staff’s air quality analysis in the FSA.

4. The Project’s Impacts to Air Quality During the Project’s Construction Have Been Adequately Analyzed and Mitigated.

CRPE claims the mitigation measures for air quality impacts during the Project’s construction are not sufficiently well-defined so as to gauge their effectiveness, and that the Commission has failed to calculate the amount of reductions “associated with any of its mitigation of construction emissions.” (CRPE Opening Brief at 13.) However, the AFC extensively quantifies the Project’s construction emissions. (See Ex. 1 at Appendix 6.2-3.) Also, the FSA includes a table detailing the maximum impacts from the Project during the construction phase. (Ex. 200 at 4.1-22.)

Staff also describes in detail its qualitative approach to mitigating construction emissions, which is appropriate given the short-term and variable nature of construction activities. (Ex. 200 at 4.1-23.) This approach uses control measures to mitigate the Project’s construction emissions to below the level of significance. (Ex. 200 at 4.1-23.) The CEQA Guidelines expressly provide that “[mitigation] measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” (14 C.C.R. § 15126.4[a][1][B].) Staff’s qualitative approach to mitigating construction emissions is therefore entirely consistent with the requirements of CEQA.

5. The Project’s Public Health Analysis Is Sufficient, and Further Health Surveys or Research Are Neither Necessary Nor Helpful.

CRPE claims the Commission “failed to conduct any research to determine whether residents have already experienced health effects from the cumulative effects [sic] of multiple polluting sources.” (CRPE Opening Brief at 14.) CRPE further claims the Commission should have performed a “health survey” and should have talked to the community about health concerns or possible disproportionate impacts. (CRPE Opening Brief at 14.) However, CRPE cites no authority whatsoever suggesting that such a survey be conducted, nor is Avenal Power

aware of any requirement to undertake such a survey. The Project's public health analysis is conducted using standards designed to protect the health of all members of the public, under extremely conservative conditions. (Avenal Power Opening Brief at 57-58; Ex. 200 at 4.1-21; 7/7/2009 RT 241:1-23; 403:22-404:16.) Compliance with these standards ensures the health of even the most sensitive populations. (*Id.*) The AFC process is guided by well-established rules intended to measure potential public health impacts as effectively as possible, and the Project's analysis has fully complied with all applicable requirements in conducting its public health analysis.

6. The Analysis of the Project's Construction-Related Impacts From Diesel Particulate Matter Is More Than Adequate.

CRPE claims the FSA "did not adequately model off-site exposure" to construction-related diesel particulate matter ("DPM"). (CRPE Opening Brief at 20.) This is not true. Avenal Power summarized the diesel emissions from the different types of equipment used during the construction phase. (Ex. 1 at Appendix 6.2-3.) Avenal Power then evaluated the cancer risks posed by the potential PM<sub>10</sub> emissions from the Project's construction equipment. (Ex. 1 at 6.2-70.) This analysis found that the small area that would potentially experience a potential cancer risk above one in one million due to construction impacts (which is below Staff's significance criterion of ten in one million) does not encompass any residences. (Ex. 1 at 6.2-70; see also Ex. 200 at 4.7-12.) Staff also addressed PM<sub>10</sub> emissions, both from combustion and fugitive dust, and the other criteria pollutant emissions from the Project's diesel-fueled construction equipment, and found that the proposed conditions of certification will mitigate impacts from these emissions to below the level of significance. (Ex. 200 at 4.7-9, Ex. 1 at 6.2-70.) The analysis of the Project's construction-related impacts from diesel particulate matter is more than adequate, and CRPE has failed to indicate any actual deficiencies therein.

**B. Greenhouse Gases**

1. The Project's Contribution to a Systemwide Reduction in Greenhouse Gas Emissions Is Not Speculative.

In its discussion of the conclusion reached by Staff and Avenal Power that the Project will result in no significant adverse GHG impacts because the Project would displace electricity generated by less efficient resources, CRPE claims Staff improperly failed to identify any "less efficient" or "less competitive" sources that the Project will displace. (CRPE Opening Brief at

17.) CRPE claims this renders the Project’s GHG analysis speculative. (CRPE Opening Brief at 17.) This is not true. In the FSA, Staff included a table summarizing the GHG performance of many projects in the greater Fresno area, measured in metric tons of carbon dioxide (“CO<sub>2</sub>”) equivalent per megawatt hour (“MTCO<sub>2</sub>/MWh”). (Ex. 200 at 4.1-80.) This table reveals the Project is far more efficient from a GHG perspective than most other natural gas-fired projects in the area. (See *id.*)

The CEQA Guidelines recognize that “[d]rafting an EIR ... necessarily involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.” (14 C.C.R. § 15144.) The Project’s analysis fulfills this requirement. The great weight of the evidence in this case demonstrates that electricity produced by more efficient natural gas-fired plants will displace production from less efficient natural gas-fired plants. (See Avenal Power Opening Brief at 11-13; see also Ex. 23 at 14.) CRPE has failed to demonstrate any inaccuracy in this conclusion.

2. A Systemwide Approach to Establishing a Baseline for Greenhouse Gas Emissions Is Necessary to Reflect Real-World Conditions.

CRPE takes issue with the baseline for the Project’s GHG analysis, claiming that the baseline should be viewed on a single-facility level rather than on a systemwide level. (CRPE Opening Brief at 18.) CRPE claims the environmental setting must “reflect the project’s real-world physical setting – ‘real conditions on the ground’ – rather than ‘hypothetical situations.’” (CRPE Opening Brief at 18.) However, the “single-facility” approach advocated by CRPE is itself a “hypothetical situation” that does not accurately reflect the nature of California’s electrical system. Power plants do not operate in isolation, and the electricity they produce is not purely an addition to the system. (Avenal Power Opening Brief at 6-8.)

CRPE cites *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal.App.4<sup>th</sup> 99 (2001) in support of its contention that the analysis for the Project does not accurately reflect the conditions on the ground. In that case, Monterey County (the “County”) issued an EIR for a project. This EIR estimated the project’s water use impacts by using a baseline reflecting average water use for irrigated pastureland. (*Save Our Peninsula Committee*, 87 Cal.App.4<sup>th</sup> 99 at 110.) The court held that because “there was no substantial evidence to show that the property was in fact irrigated,” establishing the baseline estimates upon such a use was improper. (*Id.* at 121.) In this case, there is substantial evidence that the baseline for the

Project was properly established at a systemwide level. (See Avenal Power Opening Brief at 6-8.) CRPE has provided absolutely no evidence that the Project would cause a net increase in systemwide GHG emissions. Therefore, the holding in *Save Our Peninsula Committee* is inapplicable.

CRPE also implies that a “no-project” scenario would result in less GHG emissions. However, the record in this proceeding demonstrates that this is not the case. Avenal Power conducted a comparative analysis of the GHG emissions attributable to the state electric system with and without the Project. (See Ex. 23.) This analysis determined the addition of the Project will in fact result in a net decrease, and in a worst-case scenario would simply result in no net increase in GHG emissions on a systemwide basis. (See Ex. 23 at 14; 7/7/2009 RT 83:22-85:5, 169:3-22.)

3. Systemwide Average Greenhouse Gas Emissions Are Not Determinative of Whether a Project Will Cause a Net Decrease in Greenhouse Gas Emissions.

CRPE claims the Project will displace more efficient generation because the Project’s GHG emissions rate is actually higher than the California systemwide average. (CRPE Opening Brief at 17.) However, simply because a project’s emission rate is higher than the systemwide average in no way means the project will displace more-efficient resources, or that the project will create a net increase in GHG emissions systemwide. In fact, the record in this proceeding demonstrates the Project will reduce GHG emissions systemwide. (Avenal Power Opening Brief at 11-14.) The systemwide average GHG emission rate includes power plants using many different generation technologies, including renewable resources and nuclear power. While such information is informative, it ultimately is not helpful in demonstrating the GHG impacts of a new natural gas-fired plant on a systemwide basis. The relevant comparison is to other natural gas-fired plants that have the potential to be displaced by the Project, not to systemwide averages for all generation technologies, many of which – such as renewables and nuclear generation – do not have the potential to be displaced by the Project. (See Avenal Power Opening Brief at 12.) The analysis for the Project has already demonstrated that the Project will displace generation from less-efficient natural gas-fired plants, and also potentially from coal-fired plants as well. (Avenal Power Opening Brief at 12-14.) The Project will not displace generation from more efficient sources. (*Id.* at 15-16.) There is no evidence in the record suggesting that the Project would displace generation from more-efficient sources.

## C. Alternatives

### 1. Applicable Law Requires Analysis of a Reasonable Range of Alternatives Which Avoid or Substantially Lessen Significant Impacts.

The Commission’s regulations require an EIR to discuss “the 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.” (Appendix B to Title 20 of the California Code of Regulations at section [f].) The Commission’s regulations also require “an evaluation of the comparative merits of the alternatives.” (*Id.*) The alternatives analysis requirements in the CEQA Guidelines are almost identical. (See 14 C.C.R. § 15126.6[a].) The CEQA Guidelines include express restrictions to the alternatives analysis:

An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. (14 C.C.R. § 15126.6[a].)

In discussing the alternatives analysis conducted for the Project, it is essential to recognize that the Project as proposed will not result in any significant unmitigated impacts to the environment. (Ex. 200 at 1-4.) The primary goal of an alternatives analysis, which is to identify ways which would “avoid or substantially lessen any of the significant effects of the project,” has already been satisfied in this case. Therefore, the Project’s alternatives analysis need not necessarily be as extensive as for a project with significant environmental impacts.

Furthermore, an alternatives analysis need not address alternatives that are infeasible; such an analysis need only address “potentially feasible” alternatives. (14 C.C.R. § 15126.6[a].) The term “feasible” is defined as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Res. Code § 21061.1.)

### 2. The Alternatives Suggested by Mr. Simpson Are Not Feasible.

Mr. Simpson presents three creative but ultimately unrealistic suggestions for alternatives. First, Mr. Simpson claims the Commission should explore the possibility of developing solar photovoltaic (“PV”) resources over the State Water Project. (Simpson Opening

Brief at 6.) Second, Mr. Simpson suggests the development of solar PV generation on farmland. (*Id.*) Third, Mr. Simpson suggests the installation of PV resources on rooftops. (*Id.*)

- a. A Photovoltaic Solar Generating Facility Over the State Water Project Is Not a Feasible Alternative.

Mr. Simpson claims “development of solar panels over the aqueduct would be a highly superior alternative” yet he does not offer any analysis to support this statement. (Simpson Opening Brief at 6.) Nor does the record contain any such information, except for a brief discussion at the evidentiary hearing which identified the very complex site control issues that such a development would present. (7/7/2009 RT 430:22-431:1.) Mr. Simpson states that development of solar panels over the aqueduct would “eliminate greenhouse gas emissions” as well as saving water by reducing evaporation from the aqueduct. (Simpson Opening Brief at 6.) However, there is no evidence in the record supporting any of these contentions.

Furthermore, water conservation measures and the conversion of irrigated agricultural land to industrial use will more than offset the Project’s water use. (Ex. 1 at 6.5-16 through -17; Ex. 200 at 4.9-8; Avenal Power Opening Brief at 61.) The record clearly demonstrates that the Project will not create a significant impact to water resources. (Ex. 1 at 6.5-11 through 6.5-17; Ex. 200 at 4.9-24 through -25.) Mr. Simpson’s alternative would not substantially reduce the Project’s impact to water resources. Therefore, neither CEQA nor Commission guidance requires further analysis of Mr. Simpson’s suggested alternative of PV along the State Water Project. (See Pub. Res. Code 21002; 14 C.C.R. § 15126.6[a]-[b].)

- b. The Legislation Cited by Mr. Simpson Pertaining to Development of Photovoltaic Resources Over the State Water Project Does Not Address the Basic Feasibility Issues With Such a Project.

Mr. Simpson references legislation from 2005 which would allow the Department of Water Resources (“DWR”) to establish a program allowing private entities to lease space above or adjacent to the State Water Project (“SWP”) for the purpose of installing solar PV panels and generating electricity. (Simpson Opening Brief at 6.) This legislation is now codified at section 141 of the California Water Code, which provides:

The department may establish a program to authorize private entities to lease space above or adjacent to appropriate conveyance facilities of the State Water Project for the purpose of installing solar photovoltaic panels and systems for generating electricity

from those panels and transferring electricity through the related systems. Upon request, the department shall evaluate proposals for installing solar photovoltaic panels and related systems for the generation and transfer of electricity. (Water Code § 141[a].)

The legislation referenced by Mr. Simpson allows for DWR to establish a program for this type of development. However, Mr. Simpson has not provided any indication that DWR has established such a program.

Even if DWR did establish such a program and would agree to permit such a development (which to the best of Avenal Power's knowledge has never occurred as of this date), fundamental feasibility issues remain for such a project. Cost issues aside, the additional environmental impacts alone would likely be enough to render such a project utterly infeasible. Construction of PV along the SWP would require construction on, rather than merely adjacent to, the United States Bureau of Reclamation ("USBR") land along the canal. The evidence shows that these USBR lands are likely to contain biological habitat which is equally or more sensitive than the surrounding lands, as these lands can provide wildlife habitat and important wildlife migration corridors. (Ex. 1 at 6.6-7 through -18, 6.6-21 through -28; Ex. 200 at 4.2-5, 4.2-6, 4.2-9, 4.2-15 through -16, 4.2-18; Ex. 204 at 26-28.) In fact, the Project as originally proposed, with a 300 foot buffer measured from the edge of the canal to the Project facilities, came no closer than 120 feet to the USBR lands adjacent to the SWP. (See Ex. 200 at 4.2-6.) Nevertheless, the Commission, the California Department of Fish and Game ("CDFG"), and the United States Fish and Wildlife Service ("USFWS") agreed upon a 300-foot buffer extending from the outer boundary of the USBR lands to preserve a wildlife corridor and habitat for state and federally listed species. (Ex. 200 at 4.2-15.) The presence of panels and associated infrastructure and routine monitoring and maintenance activities would impact these corridors, as well as the flora and fauna within and adjacent to the corridors. Due to the large area of solar panels required, there could be substantial disruption not only to biological resources, but also to operations access for the SWP and local agriculture. (7/7/2009 RT 415:18-416:12, 427:4-16, 430:22-431:3). There is no evidence that development of solar panels along SWP lands would reduce impacts compared to the proposed Project; in fact, the evidence in the record suggests the opposite.

The sheer size of a PV project along the SWP would likely lead to other impacts as well. In the Project area, the SWP aqueduct is approximately 200 feet wide. (Ex. 1 at Figure 2.1-3A.)

Using Staff's conservative assessment of 4 acres per MW (Exhibit 200 at 6-20), a 200-foot wide band of solar panels would need to extend along 522,720 feet (99 miles) of the aqueduct in order to produce the 600 MW production capacity of the Project. The FSA indicates that the actual area required to generate such a capacity could be considerably greater due to atmospheric cover. (Ex. 200 at 6-20.) Such an extensive development has strong potential for significant environmental impacts to biology, transportation and other infrastructure. In contrast, the proposed Project will not have any significant unmitigated impacts. (Ex. 200 at 1-4.)

c. A Photovoltaic Project on Nearby Farmland Is Not a Feasible Project Alternative.

In his opening brief, Mr. Simpson states, "California is facing the most severe water crisis in its history. Much of Kings County 'prime farmland' is in cotton, not food crops...If the land is taken out of production in the short or mid-term due to lack of available water supplies, putting the land to use as a PV solar plant benefit [sic] both the farmer...and California's critically short water supplies by eliminating a major user of the water." (Simpson Opening Brief at 6.) However, Mr. Simpson's assertions regarding the local water supply are purely speculative and entirely unsupported by the record.

As described above, the Project's water mitigation measures will reduce any potential impacts to water resources to below the level of significance. (Avenal Power Opening Brief at 60-62.) The Project as proposed will also reduce overall water consumption compared to baseline conditions. (Avenal Power Opening Brief at 61.) Therefore, the mere potential for reduced water consumption under Mr. Simpson's proposed alternative does not make this alternative in any way superior to the Project as proposed.

Finally, even if Mr. Simpson's alternative were feasible on the grounds discussed above, there is no evidence that conversion of potential future fallowed lands would reduce other environmental impacts compared to the Project. At the evidentiary hearing, Staff's expert witness on the topic of alternatives testified that farmland that has been taken out of agricultural use is likely to provide a more desirable habitat for threatened or endangered wildlife than land which is actively used for agricultural purposes. (7/7/2009 RT 423:23-424:8.) Therefore, the conversion of fallowed land into a solar PV farm could actually result in more significant impacts to wildlife than the conversion of a similar amount of actively farmed land. Considering a PV facility with similar generation capacity to the 600 MW proposed project would require at

least 2,400 acres of land (Ex. 200 at 6-20), compared to the 34.8 acres of permanent disturbance that will occur for the Project as proposed (Ex. 21 at Attachment 3), there is no evidence that a solar PV facility developed on potential future fallowed land would offer any significant benefits over the Project as proposed.

d. A Photovoltaic Project on Nearby Rooftops Is Not a Feasible Project Alternative.

Staff did not limit its consideration of solar PV development to facilities occupying prime farmland, as alleged by Mr. Simpson. (Simpson Opening Brief at 6.) In the FSA, Staff expressly considered rooftop solar PV as an alternative, stating that “[p]hotovoltaic arrays mounted on buildings generally require about 4 acres per MW.” (Ex. 200 at 6-20.) However, the record demonstrates this alternative is also infeasible. One of the factors that may be taken into account when addressing the feasibility of alternatives is whether the proponent can reasonably acquire, control, or otherwise have access to the alternative site. (See *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 574 [Cal. 1990].) There is no evidence in the record that Avenal Power can reasonably obtain access to anywhere near the at least 2,400 acres of rooftop area that would be required to generate output similar to that of the proposed Project.

Staff further addressed rooftop solar PV as an alternative at the evidentiary hearing. (7/7/2009 RT 433:4-435:7.) Staff ultimately concluded that alternative generation technologies such as solar PV do not present feasible alternatives for a variety of reasons, including development uncertainties, inability of such resources to follow electricity demand, and the fact such an alternative does not meet the project objectives. (Ex. 200 at 6-20; 7/7/2009 RT 434:21-435:3.) Rooftop solar would not satisfy the basic project objective of constructing and operating a cost-effective facility. (See Ex 1 at 1-1; Ex. 200 at 6-5). The logistics required to assimilate an extensive array of rooftop solar and related infrastructure make such a project infeasible, and such a project would be an inferior alternative to the Project as proposed.

e. The Burden of Demonstrating the Feasibility of the Alternatives Suggested by Mr. Simpson Has Shifted to Mr. Simpson.

As discussed above, Avenal Power has already met its burden of providing sufficient substantial evidence to prove that the Project does not create a significant adverse impact requiring an analysis of alternatives and no feasible project alternatives exist that would reduce

any significant adverse impacts of the Project. If Mr. Simpson wants to challenge this alternatives analysis, the burden of doing so lies upon him. Section 1748 of the Commission's regulations provides:

Except where otherwise provided by law, the applicant shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions required for certification of the site and related facility.  
(20 C.C.R. § 1748[d].)

Once this burden has been met, the Commission's regulations shift the burden of supporting any additional condition, modification, or other provision relating to the design or operation of a project to the person who proposes it:

The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision. The presiding member may direct the applicant and/or staff to examine and present further evidence on the need for and feasibility of such modification or condition.  
(20 C.C.R. § 1748[e].)

As discussed above, Avenal Power has already presented sufficient substantial evidence to support a finding that renewable resources such as solar PV is not a feasible alternative to the Project. Once Avenal Power has satisfied this burden, the burden of proof shifts to the intervenor to demonstrate the feasibility on the suggested project alternatives. (20 C.C.R. § 1748[e].) Because Mr. Simpson has not provided sufficient information to satisfy this burden, no further analysis is required from Avenal Power.

3. The Commission's Decision Regarding the Chula Vista Energy Upgrade Project Does Not Render the Project's Alternatives Analysis Inadequate.

Mr. Simpson contends the alternatives analysis regarding solar PV technology is inadequate in light of the Commission's decision regarding the Chula Vista Energy Upgrade Project ("CVEUP"). (Simpson Opening Brief at 7.) In the CVEUP proceeding, the Commission denied the project's application primarily based on land use inconsistencies. (7/7/2009 RT 429:16-430:7.) In that case, because CVEUP's inconsistency with the applicable zoning was

considered to be a significant land use impact, the Commission found the CVEUP's alternatives analysis deficient. (Chula Vista Energy Upgrade Project, Final Commission Decision at 298.<sup>1</sup>) Staff made clear at the evidentiary hearing that these land use issues are not present in this case, as the Project site is zoned for heavy manufacturing (M-2). (Ex. 200 at 3-2.) The M-2 zone expressly allows "electrical power generating plants" and electrical distribution substations within this zone. (See City of Avenal Zoning Ordinance, Table 9-1 [Permitted and Conditional Uses – Nonresidential Zones].)

**D. Socioeconomics**

1. The Analysis of the Project's Growth-Inducing Impacts Is More Than Sufficient.

CRPE alleges the Commission failed to analyze the growth-inducing impacts of the Project. (CRPE Opening Brief at 15.) CRPE correctly notes the CEQA provisions requiring analysis of whether a project will lead to economic or population growth or encourage development or other activities that could affect the environment. Section 15126.2[d] of the CEQA Guidelines lays out the requirements for the analysis of a project's growth-inducing impacts. This section reads in full:

Growth Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment. (14 C.C.R. § 15126.2[d].)

Courts have made clear that this guideline does not require the extensive analysis of growth-inducing impacts demanded by CRPE. The court in *Napa Citizens for Honest*

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<sup>1</sup> Available at <http://www.energy.ca.gov/2009publications/CEC-800-2009-001/CEC-800-2009-001-CMF.PDF> (last visited August 18, 2009).

*Government v. Napa County Board of Supervisors*, 91 Cal.App.4<sup>th</sup> 342, 369 (1st Dist. 2001) held:

It follows that an agency cannot avoid the EIR process simply because a project does not itself call for the construction of housing or other facilities that will be needed to support the growth contemplated by the project. *It does not follow, however, that an EIR is required to make a detailed analysis of the impacts of a project on housing and growth.* Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth. (Italics added.)

In this case, all of section 15126.2(d)'s requirements have been fully satisfied. Both Staff and Avenal Power addressed the Project's potential impacts on economic or population growth. In fact, both Staff and Avenal Power noted the substantial benefits the Project would confer on the local economy. (See Avenal Power Opening Brief at 45-46.) Avenal Power and Staff both concluded the Project does not have the potential to cause significant population growth. (See Ex. 1 at 6.10-19 and -24; Ex. 200 at 4.8-4 through -6.) As CRPE correctly notes, agencies should be mindful of projects which would remove obstacles to population growth. (CRPE Opening Brief at 15.) However, in considering growth-inducing impacts of a new power plant, it is important to understand that power plants do not create demand for electricity. Instead, power plants respond to existing changes in demand. (See Avenal Power Opening Brief at 17.)

Section 15126.2(d) is also concerned with projects which would "tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects." Staff notes in the FSA that the City originally zoned the Project site for industrial development because of the proximity of the area to the natural gas supply pipeline, transmission line, the Gates substation, and Interstate 5. (Ex. 200 at 4.2-5, 4.5-3.) The limited additional infrastructure and services needed to accommodate the Project is a major benefit of the Project as proposed. The extensive water analysis conducted for this project reveals that the Project will actually use less water than in the no-project scenario where the Project site remains in agricultural use. (Avenal Power Opening Brief at 60-61.) There is a sufficient supply of natural gas for the project that will not require expansion of the existing natural gas system. (Ex. 1 at 2-32 through -34; Ex. 200 at 5.4-4.) The Project will not have a significant impact on other services either, such as fire and medical services. (Ex. 200 at 4.8-8 through -10, 4.14-13.)

Finally, CRPE claims the Commission only analyzed the Project’s growth-inducing impacts in the “immediately surrounding areas.” However, the applicable CEQA guideline specifically requires analysis of a project’s growth-inducing impacts “in the surrounding environment.” (14 C.C.R. § 15126.2[d].) In sum, the Project’s analysis of growth-inducing impacts fully complies with CEQA, and the Project will not create any significant growth-inducing impacts.

## **E. Procedural and Noticing Issues**

### **1. All Agencies Have Complied With Their Noticing Requirements.**

Mr. Simpson complains that the United States Environmental Protection Agency (“US EPA”) “is now processing the [Prevention of Significant Deterioration (“PSD”)] permit without the Commission providing notice of it.” (Simpson Opening Brief at 1.) Mr. Simpson fails to recognize that each agency is required to comply with the noticing provisions applicable to that agency. In this case, the Commission complied with the noticing provisions required of it. (Avenal Power Opening Brief at 63-67.) In addition, Jim Swaney of SJVAPCD testified that all of the alleged deficiencies cited by Mr. Simpson were related to rules that are not applicable to the Project, and that the notice provided by SJVAPCD met the requirements of the applicable rules. (Avenal Power Opening Brief at 66-67.) To the best of Avenal Power’s knowledge, the US EPA also has complied with, and continues to comply with, all applicable notice requirements.

### **2. Mr. Simpson Has Received Due Process During the Project Proceedings.**

In his opening brief, Mr. Simpson complains about three alleged deficiencies in the procedure for the Project: (1) the briefing schedule was not set around his vacation schedule; (2) his witnesses were “rejected” at the hearing, and (3) his request for remedial action was heard and rejected at a regular business meeting without the Commission notifying him that it would be heard. (Simpson Opening Brief at 1.)

In considering Mr. Simpson’s contentions, it is important to note that Mr. Simpson has held himself out to be quite familiar with the Commission’s procedures. (See, e.g., Rob Simpson Petition for Intervention at 2 [claiming Mr. Simpson has participated in at least six licensing proceedings before the Commission and that he “brings a perspective to licensing cases otherwise unavailable to persons involved in their first siting”].) Therefore, Mr. Simpson cannot

claim ignorance of the AFC process. Participation as a party in the Commission's proceedings confers both rights and responsibilities upon an intervenor. (20 C.C.R. § 1207[c].) Indeed, Mr. Simpson's petition for intervention recognizes this by stating that "Petitioner Rob Simpson desires to participate fully with the rights and obligations of a party." (Rob Simpson Petition for Intervention at 1.)

With regard to Mr. Simpson's first claim, Mr. Simpson had almost four full weeks in July in which to draft his brief. Many parties had scheduled vacations during the briefing period. Indeed, the briefing schedule was extended to ensure all parties had some time for drafting their briefs within the six weeks between the evidentiary hearing and the due date for the opening briefs. (7/7/2009 RT 449:3-15.)

Next, with regard to Mr. Simpson's second claim, Mr. Simpson's witnesses were initially "rejected" because he attempted to have them offer testimony related to a different AFC proceeding for a project located in a different part of the state - a proceeding which was entirely unrelated to the Project's proceedings. (June 30, 2009 Prehearing Conference Record of Testimony at 51:7-52:23.) In the end, the Committee agreed to accept one exhibit found to be relevant to the Project, allowing Mr. Simpson to sponsor that exhibit as his testimony. (7/7/2009 RT 289:8-22.)

Finally, with regard to Mr. Simpson's third claim, each of the Commission's regular business meetings is noticed in accordance with the Brown Act (Govt. Code §§ 54950-54963). This includes the July 29, 2009 business meeting at which his issue was heard. Therefore, Mr. Simpson should have been aware of the hearing on his request for remedial action.

### **III. CONCLUSION**

Many of the concerns raised by the intervenors in this case have already been addressed in Avenal Power's opening brief and elsewhere in the record. This reply brief demonstrates the remaining concerns raised by the intervenors are unfounded, and the analysis conducted for the



## ATTACHMENT A

### MATRIX OF BRIEFING ISSUES ALREADY ADDRESSED

#### Part 1: Issues from Intervenor Rob Simpson's Opening Brief

<b>Topic</b>	<b>Contention</b>	<b>Previously Addressed<sup>2</sup> at:</b>	<b>Comments</b>
Notice	The notices from the Commission and SJVAPCD failed to incorporate the address of the facility, and failed to include "any reference to the effect on air quality." (p. 1.)	p. 66	At the time the notices were mailed, the Project did not yet have a physical address. The notices need not contain information describing the Project's specific impacts to air quality. The purpose of notice is to direct its recipient to other sources containing the Project's analysis.
Notice	SJVAPCD did not comply with the requirements of 40 C.F.R. part 70 in noticing the Project. (p. 2.)	p. 66; see also 7/7/2009 RT 285:1-286:25.	40 C.F.R. part 70 is not relevant to the site certification process.
Notice	SJVAPCD did not comply with District Rule 2201, sections 5.4, 5.5, 5.9, and 6.1. (pp. 2-4.)	p. 66	Mr. Simpson cites only one section containing noticing requirements, which is section 5.5. The other sections are not relevant to noticing at this point in the process.
Notice	SJVAPCD did not comply with District Rule 2520, section 11. (pp. 4-5.)	7/7/2009 RT 285:8-286:10.	This section pertains to federally mandated operating permits. The operating permit will not issue until a future date. Therefore, the noticing provisions for such a permit are not relevant to this proceeding.

<sup>2</sup> Unless otherwise indicated, all page numbers are references to Avenal Power's opening brief.

<b>Topic</b>	<b>Contention</b>	<b>Previously Addressed<sup>2</sup> at:</b>	<b>Comments</b>
Soil and Water Resources	The Project violates State Water Resources Control Board Resolutions 75-58 and 88-63, and the Commission's policy on the use of fresh water for cooling purposes. (p. 5.)	p. 61	The Project's use of dry cooling and zero liquid discharge (ZLD) technologies fully complies with the policies cited by Mr. Simpson. Mr. Simpson has not stated the basis for his belief that the Project would violate these policies.
Public Health	There is no public health analysis in Staff's report. (p. 7.)	pp. 39-42; Ex. 200 at pp. 4.7-1 through 4.7-20	The FSA includes an entire section on the public health analysis for the Project, demonstrating that the Project will not create any significant impacts to public health.
Public Health	There is no disclosure of toxic air contaminants. (p. 7.)	pp. 39-41	Avenal Power conducted a comprehensive multi-pathway health risk assessment, which includes a complete inventory of the Project's toxic air contaminant emissions.
Public Health	Staff did not identify sensitive receptors potentially present in the nearby homes or fields. (p. 7.)	pp. 57-59	The analysis for the Project reveals that there are no sensitive receptor locations within six miles of the site. (Ex. 200 at 4.7-6.) However, the standards used to determine the significance of the Project's air quality and public health impacts are established to protect the health of all members of the public, including the most sensitive members.

<b>Topic</b>	<b>Contention</b>	<b>Previously Addressed<sup>2</sup> at:</b>	<b>Comments</b>
Socioeconomics	No consideration was given to the obvious environmental justice community working and living adjacent to the facility. (p. 7.)	pp. 40, 51-59	Both Staff and Avenal Power noted the existence of an environmental justice population, and confirmed the Project will not cause any significant impacts to this population.

**Part 2: Issues From Intervenor CRPE's Opening Brief**

<b>Topic</b>	<b>Contention</b>	<b>Previously Addressed at:</b>	<b>Comments</b>
Air Quality	The Commission does not analyze the local impacts of any criteria pollutants on public health or the environment. The Commission's focus on district-wide impacts ignores the local impacts of these emissions. (p. 7.)	pp. 25-29	The local impacts of criteria pollutants are included in SJVAPCD's BACT requirements (see Avenal Power Opening Brief at 26-27), and were calculated in the Project's impact analysis (Ex. 200 at 4.1-24.) By ensuring the Project is safe for the local area, assuming all worst-case scenarios, the analysis also ensures the Project will not significantly affect more distant areas.
Air Quality	The Commission only mitigates emissions that contribute to nonattainment of district-wide standards. (p. 7.)	Ex. 200 at 4.1-27	The Project's BACT measures mitigate many types of emissions, not limited to those contributing to nonattainment of district-wide standards.
Air Quality	Staff has not demonstrated that the basin-wide benefit from the Project's ERCs is sufficient to offset local air quality impacts from the increase in emissions at the Project site. (p. 8.)	pp. 26-27, 31-32	Staff has provided sufficient substantial evidence to demonstrate the Project's ERCs will provide benefits to local air quality, and along with the Project's Best Available Control Technology requirements, the Project will mitigate impacts to local air quality to below the level of significance.

<b>Topic</b>	<b>Contention</b>	<b>Previously Addressed at:</b>	<b>Comments</b>
Air Quality	The Commission's failure to assess and mitigate the local impact of increased air emissions in the nearby communities of Avenal, Kettleman City and Huron is a violation of CEQA. (p. 8.)	pp. 28-29; see also Ex. 200 at 4.1-37 through 38	These communities are beyond the six mile radius of concern. However, Avenal Power analyzed impacts to the City of Avenal and Kettleman City. (See Ex. 21[a].)
Air Quality	The interpollutant trading ratios for the Project are not supported by evidence in the record. (p. 10.)	pp. 36-37; see also Ex. 200 at 4.1-38	The SJVAPD has provided a detailed explanation for the interpollutant trade ration (See Ex. 61.)
Air Quality	In adopting the SJVAPCD's method for determining offset requirements, the Commission must explain its basis for rejecting the ratios used by the EPA and the applicant and support its decision with relevant data. (p. 11.)	pp. 36-37	Both Avenal Power and Staff's witnesses explained and provided support for the SJVAPCD's interpollutant trade ratio.
Air Quality	The Commission failed to properly analyze the Project's cumulative impacts because it ignored other large scale projects in the vicinity, including the Kettleman Hills Facility and the "sludge farm" two miles west of Kettleman City. (p. 13.)	pp. 29-31 and 33-34	Projects are not "reasonably foreseeable" if they are not either currently under construction or in the process of being approved by a local air district or municipality. (Ex. 200 at 4.1-35.) Avenal Power requested information from the SJVAPCD about any other projects that are reasonably foreseeable, but have not already been operating for at least one year. (Ex. 1 at Appendix 6.2-6.) (The emissions impact of projects already operating for a year or more would be present in background air quality monitoring.) The distance

Topic	Contention	Previously Addressed at:	Comments
			of 6 miles used in the request for information is based on the experience of Staff and air quality science community that cumulative impacts from other sources are less than significant at greater distances. The two other projects noted by CRPE are approximately 10 miles distant from the Project.
Greenhouse Gas	The Commission failed to support its assumption that the Project will displace less-efficient energy production. (p. 16.)	pp. 11-15, 191-23	Avenal Power’s opening brief provides extensive support for the conclusion that the Project will displace less-efficient energy production.
Greenhouse Gas	The FSA never identifies the baseline against which the significance of greenhouse gas emissions is measured, let alone identify its basis. (p. 18.)	pp. 6-10	The baseline, the emissions of the existing system, for the Project’s analysis has been extensively discussed, and was based on the results of several different reports produced by the Commission and Avenal Power.
Greenhouse Gas	The Commission failed to adopt enforceable mitigation. (p. 19.)	pp. 21-22	Mitigation is not required because the Project’s greenhouse gas emissions will not cause a significant adverse impact.
Socioeconomics	The Commission’s environmental justice assessment violates Executive Order 12898, by:  (1) relying on CEQA	(1) pp. 50-51  (2) p. 40  (3) pp. 29-31,	(1) CEQA significance thresholds are sufficient to identify any “high and adverse” impacts to an environmental justice

Topic	Contention	Previously Addressed at:	Comments
	<p>significance thresholds,</p> <p>(2) excluding potential health impacts in the environmental justice assessment, and</p> <p>(3) failing to consider the cumulative impacts from existing and proposed projects. (p. 26.)</p>	33-34	<p>population.</p> <p>(2) The analysis for the Project demonstrates that the Project will not create a significant health risk at any location, at any time, under any operating conditions. Therefore, there cannot be a potentially significant health impact to an environmental justice population.</p> <p>(3) The two cumulative air quality impact analyses conducted for the Project show the Project will not result in any significant unmitigated impacts on regional air quality. The projects cited by CRPE are all at a much greater distance from the Project than would be expected to result in the potential for any significant public health impacts.</p>

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

**APPLICATION FOR CERTIFICATION FOR  
THE AVENAL ENERGY PROJECT**

DOCKET NO. 08-AFC-1

**PROOF OF SERVICE**  
(Revised 6/17/09)

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**Declaration of Service**

I, Lois Navarrot, declare that on August 24, 2009, I served and filed copies of the attached **Avenal Power Center, LLC's Reply Brief**. 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](http://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;

  X   by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service List above to those addresses **NOT** marked "email preferred."

**AND**

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  X   sending an original paper copy and one disk copy by hand delivery to the address below;

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\_\_\_\_\_ depositing in the mail an original and 12 paper copies as follow:

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1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512

[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

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

\_\_\_\_\_  
/s/  
Lois Navarrot